



Department of Law

**PRINCIPLES AND PERSPECTIVES
OF
EUROPEAN CRIMINAL PROCEDURE**

Suzan Denise Hüttemann

Thesis submitted for assessment with a view to obtaining the degree of
Doctor of Laws of the European University Institute

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EUROPEAN UNIVERSITY INSTITUTE

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Abstract

This thesis shall contribute to European Criminal Procedure, a rapidly evolving area of EU policy that has attracted much attention, but has also been subject to criticism. The research will first identify and analyse the main rationales of this area. Since the Tampere European Council of 1999, mutual recognition has become the most fundamental concept of judicial cooperation in criminal matters and has experienced a steep career, having been adopted by Art. 82 TFEU. When the principle of mutual recognition was introduced, it was based on an analogy to the free movement of goods. This analogy has often been regarded as flawed. Moreover, there has always been a notion of mutual recognition in judicial cooperation as well. The study will show how these two factors have influenced the development of the area, and how policy concepts, such as the principle of mutual trust, have had a greater influence on the development of the law than any legal doctrine.

The lack of a coherent approach to the area of judicial cooperation and the unsystematic combination of different legal orders have caused unforeseen frictions for the individual. These will be illustrated by an analysis of the law of transnational evidence-gathering according to the European Evidence Warrant and the proposed European Investigation Order.

It will be shown that most of the problems result from the lack of a uniform allocation of jurisdiction and from an overly confined understanding of fundamental rights in the context of judicial cooperation. By analysing the nature and purpose of jurisdictional rules in a national and a European context, the thesis aims at uncovering the theoretic foundations on which a uniform allocation of jurisdiction could be built.

Finally, the thesis analyses the role of fundamental rights in judicial cooperation. It will uncover the ineptness of a nation-state oriented interpretation of fundamental rights to adequately address the problems of mutual recognition and argue for a European understanding of transnational judicial rights.

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Table of Contents

Chapter 1	Introduction.	1
1.1	European Criminal Procedure: The Preliminaries	1
1.2	The genesis and current framework of European Criminal Procedure	4
1.2.1	Rudiments of substantive criminal law.	6
1.2.2	A system of administrative sanctioning as an alternative. . . .	7
1.2.3	The protection of the Union's financial interests as a trigger for criminal law.	9
1.2.4	The development of European judicial cooperation.	11
1.2.5	Substantive Criminal Law in the Post-Amsterdam era.	13
1.2.6	The Lisbon Treaty.	15
1.3	Outlook.	18
Chapter 2	Models of judicial cooperation.	21
2.1	Horizontal model of cooperation.	23
2.2	Vertical model of cooperation	27
2.2.1	Administrative Procedures.	29
2.2.2	Criminal procedures.	33

Chapter 3	Main paradigm: Principle of mutual recognition.	37
3.1	History of mutual recognition in classical judicial cooperation and modes of recognition	40
3.1.1	Earlier times.	41
3.1.2	19 th century academic debate.. . . .	42
3.1.2.1	State-interests.. . . .	42
3.1.2.2	Individual's interests: Reduction of the sentence	44
3.1.2.3	Individual's interest: Ne bis in idem.. . . .	45
3.1.2.4	Execution of foreign sentences.. . . .	46
3.1.3	Recent developments.. . . .	47
3.1.4	Conclusion.	49
3.2	The spillover of the principle of mutual recognition from the internal market logic.. . . .	52
3.3	A "Copernican Revolution"?	61
3.4	The functions of the principle of mutual recognition.	68
3.5	The role of concepts and forms in European criminal policy.. . . .	70
3.6	Extradition and surrender.	72
Chapter 4	Mutual trust and mutual recognition.	77
4.1	Trust in society.	79
4.2	Trust in the law.	82
4.3	Trust as a legal principle in civil procedure.	84

4.4	Trust as a legal principle in criminal procedure.....	94
4.5	Outlook	98
4.6	Criticism and Consequences.....	100
Chapter 5	Mutual recognition in the law of evidence-gathering.....	113
5.1	Development of evidence-gathering.....	114
5.2	Prospects on EU-level: the European Evidence Warrant and its successors.	116
5.3	Scope of the proposed legislation.....	118
5.4	Functioning of the proposed legislation.....	119
5.4.1	The order.	119
5.4.2	The execution.....	120
5.5	Dual criminality.	121
5.6	Further safeguards and grounds for refusal.	126
5.6.1	Issuing of the order.....	126
5.6.2	Execution of the order.	127
5.6.3	Grounds for refusal.....	128
5.7	Legal remedies.	129
5.8	Admissibility of evidence.....	130
5.9	Conclusion.	133

Chapter 6	Jurisdiction in European Criminal Procedure.	137
6.1	Conflicts of jurisdiction.	138
6.2	Nature of jurisdiction rules.. . . .	139
6.3	Jurisdiction rules and international law.	142
6.4	Bases for jurisdiction.. . . .	143
6.4.1	Territoriality.. . . .	143
6.4.2	Flag Principle.	151
6.4.3	Active Personality Principle.	152
6.4.4	Passive Personality Principle.	154
6.4.5	Protective Principle.. . . .	155
6.4.6	Universality Principle.	156
6.4.7	Vicarious Administration of Justice.. . . .	156
6.4.8	Protection of EU interests.. . . .	157
6.4.9	Other.	157
6.5	Analysis of existing approaches to jurisdiction.	158
6.5.1	Jurisdiction in current EU legislation.. . . .	158
6.5.1.1	Framework decision on counterfeiting of the Euro	158
6.5.1.2	Framework decision on combating racism and xenophobia.	160
6.5.1.3	Framework decision on non-cash means of payment.	161
6.5.1.4	Framework decision on combating terrorism.	162

6.5.1.5	Framework decision on corruption in the private sector.	165
6.5.1.6	Framework decisions on child pornography, on trafficking in human beings and on drug trafficking	165
6.5.1.7	Framework decision on attacks against information systems.	166
6.5.2	Impacts of the framework decisions.	167
6.5.2.1	Priority of the territoriality principle.	167
6.5.2.2	Interpretation of the territoriality principle. . .	167
6.5.2.3	Development of the personality principle. . .	168
6.5.2.4	Protective principle.	169
6.5.2.5	Exorbitant jurisdictions.	169
6.6	Jurisdiction and ne bis in idem.	171
6.7	Suggestions for jurisdiction in EU criminal procedure.	174
6.7.1	Cooperation model	175
6.7.2	Model specifying soft criteria.	177
6.7.3	Model specifying strict criteria.	178
Chapter 7	Procedural rights and safeguards in the context of multi-layered judicial cooperation.	183
7.1	Introduction.	183
7.2	Efficiency approach	187

7.3	Rights-based approach.....	192
7.4	Transnational approach.	195
7.5	Conclusions..	211
Chapter 8	Concluding remarks.	215
	Bibliography.	217

Chapter 1 Introduction

1.1 European Criminal Procedure: The Preliminaries

European Criminal Procedure is one of the most rapidly evolving areas of European law and subject to ever-increasing attention. However, it is also a relatively late addition to the core of European law, and the pace at which new measures are adopted owing to a perceived practical need has resulted in a very fragmented state of law.

The completion of the internal market is regarded as being responsible for a rise in transnational crime. While criminals are better able to act across frontiers, national criminal prosecutions are still confined by their national territories. Collective action in the realm of criminal law seems to be the only response. Because the gap between the practical opportunities of organised crime and those of the national criminal law systems is perceived to be so great, there has been a virtual rush to counterbalance the effects through new forms of criminal law cooperation. This rush has resulted in the lack of any clear legal coherence or structural underpinning of this area. While in practice numerous legal acts have to be dealt with, there seems to be no idea where these lead to, or what kind of a system is aimed at in the long run.¹ There has hardly been time for more visionary and common approaches, and theories on European Criminal Procedure are quite often nationally confined. Moreover, they are contained within the frame of domestic criminal law theory.²

There are some principles that dominate the legal rhetoric, such as the principle of mutual recognition, the free movement of evidence etc., but their meaning and value are far from clear. I wish to show that many of the principles discussed in this area and readily taken up by legal doctrine do not always have any legal significance.

¹ *Nuotio*, Significance, p. 175, speaks of the “experimental character” of the area.

² Cf. to this phenomenon in general *Walker*, 25 OJLS (2005), p. 582s.; to the divide between domestic public and domestic criminal law doctrine cf. *Meyer*, Demokratieprinzip, p. 13

Instead of being legal principles, they are mainly policy concepts. However, a criminal policy cannot guide the drafting or the interpretation of legal acts on its own. For a coherent area of European Criminal Procedure it is important that it should rely on legal principles that are adapted specifically to this area and contribute to its proper and balanced functioning.

The opposition against the development of European Criminal Procedure has very quickly focussed on a few points: sovereignty, democracy and human rights. States fear that EU action in the area of criminal law undermines their sovereignty in one of its core areas. Critics in general remark on the democratic deficit of this area and the insufficient protection of human rights.³ Much of this is certainly right, and the question of human rights or procedural safeguards in general will receive close attention. Most of the criticism, however, is either very general or it stays too closely within the current framework. Thereby, any attempts to promote fundamental rights in EU criminal law activities do not help to make this area less incoherent. On the contrary, the strange compromises that are reached in negotiating human rights lead to further fragmentation and often ensue contradictory legislative judgments on related issues.

Of course it is very difficult to develop coherent principles for a relatively new area of law. The traditions of the Member States are vastly different. What is more, European Criminal Procedure will always be hybrid to a certain extent: it operates in a multi-layered legal system where different legal orders must interact in complex situations.

However, just as much as this is a problem, it also holds a chance: nation states are often not able to address adequately situations that are essentially transnational on their own or through traditional cooperation. In a multi-layered legal system, not only can the prosecution be made more effective. It is also possible to establish new transnational procedural rights that did not exist before. This becomes particularly evident if one takes into consideration that the European level does not only create

³ For an outline of these theories cf. *Meyer*, *Demokratieprinzip*, p. 42ss.; *Apap/Carrera*, *European Arrest Warrant*, p. 2; *De Capitani*, in: *Guild et al.* (eds.), *The Area of Freedom, Security and Justice ten years on*, p. 23ss .

a new level of competence, but also a new level of responsibility and accountability. Where, in traditional judicial cooperation, responsibilities could be shifted from one state to the other and vice versa, there is now a system where these can be placed.

In my thesis, I will analyse the current system of cooperation in the EU with regard to leading principles. I will mainly focus on horizontal cooperation and the principle of mutual recognition. After exploring the evolution of this principle, I will outline its functioning in selected legal acts and then show the main systematic frictions of horizontal cooperation. I will pay special attention to problems with procedural safeguards of the individual and demonstrate this with regard to jurisdictional rules. The aim is to develop a theory of transnational fundamental rights. To that end, I will also briefly look at vertical cooperation and concentrate on some particularities of this area. The procedural rights in vertical cooperation will probably be established in a more specific manner, because states are less reluctant to accept detailed standards for European bodies.

Before going into detail, however, it is important to establish a common ground of understanding. There is no universally accepted terminology in the area of European Criminal Law and the same terms are used with very different meanings. Therefore, I will at first explain the sense in which these terms can be used and what I mean by them. Following that, I will explore the genesis and development of EU criminal law and the Area of Freedom, Security and Justice in general and explore the function of European Criminal Procedure in this context.

There is no system of European Criminal Law at all comparable with a national system. When speaking of European Criminal Law, one means something entirely different from substantive criminal law. European Criminal Law is a very general term that refers more to a field of research than a specific system of law.⁴ In its broadest sense it refers to a dynamic system that consists of EU law, public international law and national legal systems and comprises those norms that have both a criminal law dimension and a European dimension in any way. It can refer to measures that relate somehow to substantive criminal law, for example some common standards within

⁴ Cf. *Hecker*, *Europäisches Strafrecht*, p. 5.

the ECHR, or the approximation or harmonisation of substantive criminal laws or the protection of the Union's interests through criminal law. In a negative sense, it can also refer to the prohibition to penalize acts that are protected by a market freedom. It can include procedural aspects, such as procedural guarantees found in the ECHR or the approximation of national criminal procedures.⁵ Finally, there are procedures of European institutions in related areas, e.g. those regulating the activities of OLAF. Furthermore, it encompasses the important area of judicial cooperation and legal assistance.⁶

As part of European Criminal Law, European Criminal Procedure as a general term encompasses all European measures that influence national criminal procedures, as well as all genuinely European procedures and forms of judicial cooperation.⁷ Judicial Cooperation means the assistance that states give each other in connection with criminal proceedings.⁸ All terms are used in different ways according to their context.⁹

This terminological vagueness of European Criminal Law is a reflection of the structural and substantive hybridity that is built deeply into the dynamic of EU Criminal Law integration.

1.2 The genesis and current framework of European Criminal Procedure

European Criminal Law has always been an issue under discussion, but it emerged only very gradually. When the European Communities were founded, there was

⁵ For example in the Council framework decision of 15 March 2001 on the standing of victims in criminal proceedings, 2001/220/JHA (OJ L 82/1 of 22.03.2001).

⁶ In a narrow and more specific sense, it refers to European substantive criminal law. It is generally used in this sense when contrasted with other areas of European Criminal Law (in its general sense).

⁷ In a narrow sense, judicial cooperation is excluded from it, leaving only a limited scope. I will look at European Criminal Procedure in its broad sense, but include only those aspects of harmonisation of national laws that affect transnational cases.

⁸ In Europe, it also includes the EU as an actor. There is a number of ways how this area can be subdivided. I will speak of horizontal and vertical cooperation and explain this more fully later. One could also differentiate between bi-lateral and multi-lateral cooperation of nation states and direct enforcement by the EU.

⁹ If one uses these terms in a general way, then European Criminal Law refers to the entire field of study. European Criminal Procedure is one part of it and consists mainly of European Judicial Cooperation.

certainly no idea that criminal law or judicial cooperation would play any important part within this framework. While for decades, EC integration was mainly economic, most collective matters pertaining to international aspects of criminal law were dealt with through the Council of Europe.

However, relatively early on it became apparent that for various reasons, mainly to protect common interests and to react more efficiently to perceived transnational threats, certain common action in the realm of criminal law would be needed. From the beginning, all action in this area was caught in a dilemma. Member States were very unwilling to confer competences in the area of criminal law, because criminal law is generally regarded as being at the core of state sovereignty.¹⁰

As a result, other existing competences have been used creatively to cover areas that would normally fall under criminal law. In order to evade competence issues, administrative powers have had to compensate for the reluctance to address criminal law issues openly. This has led to a general shift in European Criminal Law towards administrative sanctioning and administrative procedures.

Concerns with sovereignty have also led to a greater focus on criminal law cooperation as opposed to substantive measures of criminal law legislation. Even though judicial cooperation has now developed its own powerful dynamic, initially it seemed easier to present cooperation in sovereigntist terms.

Finally, a certain hesitation on the side of Member States to admit the degree of integration that has been achieved and to accept shared responsibility has led to a lack of long-term planning and fundamental visions for the many fragmented practical measures. This is above all a missed opportunity to actively and collectively shape a newly emerging area of law, but it also creates problems for all individuals confronted with these measures.

¹⁰ Cf. *Sugmann Stubbs/Jager*, KritV 2008, p. 66; for the monopoly of force in police cooperation see *Fijnaut*, Police Co-operation, p. 244; *Brants*, in: *Vervaele* (ed.), European Evidence Warrant, p. 103.

1.2.1 Rudiments of substantive criminal law

Therefore, genuine penal measures were only ever adopted in outstanding and exceptional instances:

The first instance of criminal sanctioning was the introduction of what is now Art. 30 of the statute of the ECJ: "A Member State shall treat any violation of an oath by a witness or expert in the same manner as if the offence had been committed before one of its courts with jurisdiction in civil proceedings. At the instance of the Court of Justice, the Member State concerned shall prosecute the offender before its competent court." A corresponding norm was already found in the first version of Art. 27 of the statute of the Court of Justice of the European Economic Community and Art. 28 of the statute of the Court of Justice of the European Atomic Energy Community (1957). Somewhat more vaguely, this idea was also expressed in Art. 28(4) of the code of the Court of Justice of 1952.¹¹ Another such provision which concerns the violation of standards of secrecy is found in Art. 194(1)(2) of the Euratom Treaty.¹²

Although it is contested,¹³ these provisions are generally regarded as self-executing supranational criminal norms.¹⁴ This means that they contain more than just a rule of interpretation for national legislation, or an obligation to legislate. Instead, the criminality of an act follows directly from these articles. They modify national laws and together with the national provisions they define the offence and its consequences. In the present context, the academic debate on whether this

¹¹ "When it is established that a witness or an expert has concealed or falsified the truth as to the facts on which he has testified or has been examined by the Court, the Court shall be empowered to refer such misfeasance to the Minister of Justice of the State of such witness or expert, for the application of the appropriate sanctions provided by the national law."

¹² "Each Member State shall treat any infringement of this obligation as an act prejudicial to its rules on secrecy and as one falling, both as to merits and jurisdiction, within the scope of its laws relating to acts prejudicial to the security of the State or to disclosure of professional secrets. Such Member State shall, at the request of any Member State concerned or of the Commission, prosecute anyone within its jurisdiction who commits such an infringement."

¹³ *Satzger*, Int. u. Europ. Strafrecht, p. 87 s.; *Böse*, Strafen und Sanktionen, p. 108.

¹⁴ *Pabsch*, NJW 1959, p. 2003 s.

understanding is really convincing is not so important. What is significant, however, is that they were the first and, until today, the only provisions that were ever seriously labelled supranational criminal law.

It is obvious that these provisions are of marginal importance for the practice of criminal law and that they were dealing with a public good that due to its nature was not yet protected by national laws. The acceptance of these norms therefore posed no problem.

1.2.2 A system of administrative sanctioning as an alternative

However, right from the beginning it surfaced that certain newly emerging European interests could only be protected through the threat of sanctions. The envisaged goal of developing a Common Market with its respective market freedoms and competition order needed to be put through effectively. While sanctions seemed adequate, it was doubtful whether the Member States themselves could provide for these. Firstly, because many cases concerned were of an international nature. Secondly, common action seemed more reasonable as all cases should be treated similarly to avoid distortions of competition. Thirdly, the willingness of nation states to enforce proper sanctions in all cases was doubtful. Thus, a basis for common measures was inevitable. But a European criminal law was not just unthinkable at the time, it was unthought of.

The lack of competence in the area of criminal law has led to a major shift that is still of great impact. The functions and objects of criminal law were tried to be accomplished through a system of administrative sanctioning.¹⁵ There was a provision in competition law as early as the EEC was founded allowing for the institution of “fines or penalties”.¹⁶ Now the basis for repressive measures is Art. 103(2)(a) TFEU (ex-Art. 83(2)(a) TEC), which will be dealt with in greater detail below. Suffice it to say here that the punitive measures of competition law were of

¹⁵ *Ligeti*, Strafrecht und strafrechtliche Zusammenarbeit, p. 239 s.

¹⁶ Art. 87 (2)(a) of the EEC treaty.

the first to arouse criminal lawyers and draw their attention to European law. While the regulations adopted to implement this provision (particularly of 1962, 1995 and 2003) all explicitly stated that the measures are not of a criminal law nature,¹⁷ it is clear that this labelling cannot influence the legal nature of the acts. This “disclaimer” mainly served to appease Member States’ sensitivities about infringements of their sovereignty. Additionally, it left a scope for national legislators and prosecutions to further sanction the acts in question.

With deepening integration, this system of sanctioning was refined and expanded. In the wake of this development, a discussion set in that was concerned with the true nature of these activities. Even though the sanctions are called administrative, they might have the same function as a criminal sanction. By thus renaming sanctions, the high standards and safeguards of criminal law could be circumvented and individuals’ freedoms be violated. According to the case law of the ECHR, a measure is subject to the safeguards of provisions concerning a “criminal charge” (Art. 6(1) ECHR) if¹⁸ either its goal is to repress or if the measure is of a certain severity or kind.¹⁹ The ECJ has recognised the applicability of certain rights in this context, but the extent is still lesser than in the context of national criminal laws. What is most troubling, however, is the intended parallel existence of competition law measures and national criminal measures.

Thus the first system of sanctioning in the EU was created to protect a new common interest, and, although this sanctioning is the first emergence of anything resembling criminal law, it was really a step away from principles of criminal law. Instead, a system of administrative sanctioning to protect the competition order had been created. This understanding and functioning is still very influential on ideas about how a genuine European criminal law might function.²⁰

¹⁷ E.g. Art. 23(5) of Council Regulation 1/2003.

¹⁸ Beside certain other cases,

¹⁹ *Satzger*, Int. u. Europ. Strafrecht, p. 85; ECtHR of 8 June 1976, Series A No. 22, p. 34-36 - *Engel v. Netherlands*.

²⁰ See below 2.2.1.

1.2.3 The protection of the Union's financial interests as a trigger for criminal law

The second parameter of European criminal law is again aimed at the protection of a common public good: it is concerned with fraud against the financial interests of the EU. Increasing financial activity and the subsequent enormous potential for fraudulent activities have fuelled the development of European criminal law like nothing else. The Commission estimates the total volume of fraud and other irregularities to be 1.8 billion euros in 2010.²¹ Most of the legislative activity set in after the financial reform of 1970 that introduced the system of own-resources.²²

Since there was still no specific competence in criminal matters, and no willingness to create one on the side of the Member States, the solution was found by the ECJ through the national criminal law systems. It established that, although no competence of the Community existed in the area of criminal law, Member States could be obliged to use their national criminal laws for the effective implementation of Community law in other areas. A groundbreaking decision in this respect is the notorious "Greek maize" case of 1989.²³ The court derived two basic concepts of European Criminal Law from the duty of community loyalty under ex-Art. 5 ETC.

The main idea is assimilation, which means that offences against European goods should be assimilated to offences committed against national interests and must be treated in the same way (*in concreto*: with disciplinary or criminal proceedings). As a consequence of this concept, the same degree of protection is reached within each Member State. On the other hand, between Member States the level of protection may still vary. This differentiates assimilation from harmonisation. Additionally, the sanctions chosen must be effective, proportionate and dissuasive.

This concept has been very successful and was adopted in Art. 209a and later

²¹ See the Commission's Annual Report on Fight against Fraud of 29 September 2011, COM/2011/595fin.

²² Council Decision of 21 April 1970 on the replacement of financial contributions from Member States by the Communities' own resources, 70/243/ECSC, EEC, Euratom; cf. *Hecker*, *Europäisches Strafrecht*, p. 522.

²³ ECJ judgment of 21 September 1989, C-68/88 - *Commission v Greece*, ECR 2695.

Art. 280(1) and (2) TEC, now Art. 325(1) and (2) TFEU. It is also found in many framework decisions dealing with criminal law.

This approach to criminal law must be regarded as an unusually functionalist concept. It regards criminal law as a means towards making a community policy effective, rather than as an independent area of law. The functionalist approach has swept into many other areas of criminal law. Of course, it is rather lenient towards Member States' legal systems. It leaves the choice of the type and form of sanction to them. However, this same line of argumentation recurred in a rather less lenient way in questions of harmonisation, namely questions of competences of the EC under the first pillar versus competences of the EU under the third pillar.²⁴

In the subsequent development, the measures for the protection of the financial interests of the Communities have been more and more expanded. The Maastricht treaty brought about substantial improvements to the functioning of this area. It introduced the first competence to cooperate in combating eurofraud in Art. 209 a TEC. In 1999, OLAF was founded as an independent unit of the Commission.

Still, the discussion was centred around assimilation (Art. 209a(1) TEC). Harmonisation concerning eurofraud became an issue only when the Amsterdam treaty introduced Art. 280(4) TEC.²⁵ While this was seen by some as an opportunity for European criminal law measures, others claimed the exact opposite. In the end, it was mostly believed as not conferring a competence, particularly because of its second clause excluding "the application of national criminal law or the national administration of justice". Also, it was considered necessary for such an important competence to be conferred in explicit terms, rather than through an implied power.²⁶

²⁴ See below 1.2.5.

²⁵ The Council, acting in accordance with the procedure referred to in Article 251, after consulting the Court of Auditors, shall adopt the necessary measures in the fields of the prevention of and fight against fraud affecting the financial interests of the Community with a view to affording effective and equivalent protection in the Member States. These measures shall not concern the application of national criminal law or the national administration of justice.

²⁶ Cf. for this debate *Wasmeier / Thwaites*, 29 ELRev. (2004), p. 613 ss.; *Mitsilegas*, 8 EurJLReform (2006), p. 301 ss.

The Lisbon treaty has widened these competences considerably. Among other things, the reservation of Art. 280(4) TEC is not upheld, so that there is now even the possibility of directly applicable European offences under Art. 325(4) TFEU.²⁷ This is a major change, because for the first time it gives the European Union an original competence to create provisions of substantive criminal law concerning fraud against the EU.²⁸

To sum up, the legislation concerning the protection of the financial interests of the EU has been a major factor in establishing a European Criminal Law and encouraging an academic debate on the role of criminal law on the European level.

1.2.4 The development of European judicial cooperation

The lack of clear competences is also the reason for the importance of legal assistance and judicial cooperation. While further advances in substantive criminal law were not possible, there was always a lot of activity in this area. As early as in the 1950s, the two so-called mother conventions of legal aid had been adopted within the Council of Europe framework.²⁹ These conventions were still of the classical type, and proceedings took a very long time; additionally, in the beginning states were reluctant to give up too much sovereignty through intensified judicial cooperation.

On an operational level, however, much cooperation had been achieved. In the 1960s, customs cooperation was the most important area, while in the 1970s police and judicial cooperation came to the fore, mainly in relation with terrorism. Although no fixed institutions and no elaborate legal framework existed, European states instituted several informal intergovernmental working groups (for example, the different TREVI groups from 1975 onward). This form of cooperation was continued by other working groups that prepared the introduction of Europol and the

²⁷ See *Walter*, 117 ZStW (2005), p. 917 s.; *Rosenau*, ZIS 2008, p. 16; *Hecker*, Europäisches Strafrecht, § 14 para. 45 s.; *Satzger*, Int. u. Europ. Strafrecht, § 7 para. 41 s.; see also below.

²⁸ See *Hecker*, Europäisches Strafrecht, § 4 para. 80 s.; *Meyer*, NStZ 2009, p. 658.

²⁹ ETS No. 30; cf. *Schomburg*, in: Sieber et al. (eds.), Europäisches Strafrecht, § 3 para. 12 ss., see below for further details.

cooperation in the Schengen framework.

It can be observed, thus, that due to the lack of competence in other areas of criminal law, legal assistance was regarded as essential. It was also destined to take on more and more functions that would normally be fulfilled by other areas of law. Methods of judicial cooperation were thus seen as a real alternative to harmonisation of criminal law. This line of reasoning would be perfected with the principle of mutual recognition as we will see later on.

Yet states were very slow in cooperating through traditional international legal assistance. Therefore, common action and new competences were promoted on the European level. The European political cooperation as it was codified in the Single European Act 1986 paved the way for several international conventions in the area of cooperation in criminal matters, but they were mostly not ratified.³⁰ The Schengen cooperation was a more successful measure of this form of cooperation.

The Treaty of Maastricht was a first turning point in that it strove to give European criminal law activities a better framework. With the introduction of the pillar structure, these activities got their place in the ambit of justice and home affairs. Among other areas of criminal law, judicial cooperation in criminal matters became a matter of common interest, Art. K.1 (7) and operated through joint positions, joint action and conventions (Art. K.3 para. 2).

The means of legislation however did not prove to be sufficiently effective. Joint positions and joint actions had an uncertain legal impact. A few conventions were adopted, most notably the Europol Convention of 1995 or the Convention on the protection of the European Communities' financial interests. But conventions under the EU framework proved to be just as problematic as any type of international convention. The last-mentioned convention, for example, was done in 1995 and entered into force only in 2002. The main problem was that there was no clear framework into which all measures of judicial cooperation belonged. Since the area was still completely intergovernmental, it created no significant acceleration as

³⁰ *Jour-Schröder/Wasmeier*, in: *von der Groeben/Schwarze* (eds.), *Kommentar zum EU-/EG-Vertrag*, vor § 29 EU para.15.

compared to classical modes of cooperation.

The Amsterdam treaty brought about really substantial changes.³¹ Although formally the third pillar still remained intergovernmental,³² the perception changed, and many aspects made it easier to cooperate than before. The introduction of the Area of Freedom, Security and Justice was not just a visionary approach, it brought some degree of systematisation to an otherwise confusing area. Art. 29-42 TEU sought to “provide citizens with a high level of safety within an area of freedom, security and justice”.³³ The most notable effect came from the introduction of framework decisions as legislative instruments, Art. 34(2)(b).³⁴ Since common positions in the pre-Amsterdam era were not legally binding and decisions could not be used for the approximation of laws – which is almost always necessary – framework decisions and conventions were of the greatest impact. Of these two, framework decisions were more frequently used because they avoided the lengthy and uncertain ratification procedure. They gave the area of judicial cooperation a totally new dynamic and speed that could never have been achieved with international conventions.

The culmination of the system of judicial cooperation is the introduction of the mutual recognition regime. How this came about and how it operates will be shown later.

1.2.5 Substantive Criminal Law in the Post-Amsterdam era

The Amsterdam treaty once more did not bring about an EU competence for substantive criminal law. Art. 29 made it clear that only approximation of national criminal laws was possible, to the extent necessary. Such measure could contain minimum rules as described in Art. 31(1)(e). This latter provision was usually not

³¹ *Weyembergh*, in: *Kerchove/ead.* (eds.), *La reconnaissance mutuelle*, p. 38ss.

³² To the ambivalence of the intergovernmental/supranational division cf. *Walker*, *Odyssey*, p. 16ss.

³³ There have been many discussions on the differentiation of safety and security. However, in other language versions, e.g. German, the same expression is used. The Lisbon treaty only uses “security”, cf. Art. 67(3) TFEU.

³⁴ *Apap/Carrera*, *European Arrest Warrant*, p. 2.

taken literally (as it is confined to organised crime, terrorism and illicit drug trafficking), but interpreted as including all areas of criminal law where cooperation under the EU treaty is possible. Many framework decisions have been enacted accordingly. I will mention them only when they concern aspects of European Criminal Procedure. Since this was still no very extensive competence in criminal law, and the third pillar was still intergovernmental - at least up to a certain point³⁵ - this competence was not so very controversial. But this has been the reason for another very important development: the discussion and final acceptance of an EC competence to instruct Member States to introduce criminal sanctions in a specific area. In generalizing and simplifying the essentials of the ECJ's judgments on environmental law³⁶ and ship-source pollution,³⁷ the EC had the competence to instruct Member States to introduce criminal sanctions if this was necessary for the full effectivity of a policy in this area.³⁸ At first glance, it seems that this could have been decided even before the Amsterdam treaty, because it does not rely at all on competences of the EU treaty. On the other hand, it was precisely the possibility to approximate national laws provided for by the third pillar that made this view of things possible. Before, it had to be argued that such a competence of instruction in criminal matters could at all exist on a European level, rather than being reserved for the Member States. Now, it was clear that at least under the third pillar, such a competence existed at a European level. It was therefore sufficient to pose the question as one of the distribution of competences between two different pillars, which seemed less consequential.

The decision however was more than just a re-allocation of competences. It is also a very basic one about the nature of criminal law in Europe. It shows that criminal law is regarded not as an area of law in its own right, but as an instrument for the

³⁵ Cf. the *Pupino* case, ECJ judgment of 16 June 2005, C-105/03; for a discussion see *Peers*, 44 CMLRev. (2007), p. 883ss.

³⁶ ECJ judgment of 13 September 2005, C-176/03; see also the Commission Communication of 24 November 2005 on the implications of the Court's judgment of September 13, 2005 (Case C-176/03 Commission of the European Communities v Council of the European Union), COM(2005) 583 fin./2.

³⁷ ECJ judgment of 23 October 2007, C-440/05.

³⁸ For an analysis of the judgments see *Peers*, 33 ELRev (2008), p. 399; *Sugmann Stubbs/Jager*, KritV 2008, p. 57.

implementation of policies in other areas of law.³⁹ As such, it is regarded in a functionalist way as an annex to other policies. Although it is certainly true that criminal law is not independent of other areas of law, that these other areas in fact form the basis for the interests that are protected by criminal law, nonetheless this extreme functionalist view is quite distinct from the traditional understanding of a principled criminal law as an *ultima ratio*.⁴⁰

So this development in itself lead away from a real competence in certain areas of criminal law. It made criminal law an ancillary competence to other Community policies which again increases the importance of judicial cooperation.

Because of this, it is still the area of judicial cooperation that is the most important factor in the Europeanization of criminal law and that is meant to achieve all those goals that are usually aimed at by substantive criminal law.

1.2.6 The Lisbon Treaty

Most of the above-mentioned issues have been addressed, even if not resolved, by the Lisbon treaty. The Lisbon treaty reflects the developments in the area of judicial cooperation in criminal matters by setting down the stage that was reached through the activity of legislation and court rulings in the area, but that was still contested. In doing so it adopts a slightly more progressive, coherent and visionary approach.

Through overcoming the pillar structure, it resolves the ambiguities concerning the legal status of measures in judicial cooperation and tries to provide more democratic legitimacy for this area through the - albeit limited - application of the ordinary legislative procedure.

Mutual recognition of judgments and judicial decisions is declared to be the basis for judicial cooperation in Art. 82(1) and Art. 67(3) TFEU. Mutual recognition is also one of the standards that influence harmonisation, cf. Art. 82(2) TFEU: to the extent

³⁹ Cf. *Satzger*, Int. u. Europ. Strafrecht, p. 113: "Durchsetzungsmechanismus".

⁴⁰ Cf. *Sugmann Stubbs/Jäger*, KritV 2008, p. 65s.

necessary for facilitating its functioning, directives shall be adopted to approximate national laws. This is confined however to specifically defined areas of national *procedural* laws and does not extend to substantive law.

As concerns substantive criminal laws, the treaty tries to be more explicit and it seems that substantive law will play a greater role. It defines the areas for which approximation through minimum rules is possible in Art. 83(1) TFEU as areas of particularly serious crime with a cross-border dimension. This is an advantage, but the definition used for this area is rather wide and consists of terrorism, trafficking in human beings and 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. Moreover, it can be extended through a Council decision.

Additionally, the treaty explicitly sets down the standards introduced by the case law discussed above concerning the EC competence for the approximation of criminal law. Only, since here it is not a question of competence anymore, it now becomes clear that criminal law is seen in the pure functionalist view indicated above. Art. 83(2) TFEU states that: „If the approximation of criminal laws and regulations of the Member States proves essential to ensure the effective implementation of a Union policy in an area which has been subject to harmonisation measures, directives may establish minimum rules with regard to the definition of criminal offences and sanctions in the area concerned.“

It seems that this is a competence that will be made use of in the future. The Stockholm Programme⁴¹ promotes activity in the area of substantive criminal law. It displays the same functionalist attitude towards criminal law as a tool to make harmonised community policies more effective. What is more important is that it takes this functionalist approach one step further. It also recommends the approximation of national substantive criminal laws when this serves the functioning

⁴¹ Council Doc. 17024/09, adopted by the European Council on 11 December 2009, EUCO 6/09; see also the Commission's action plan COM/2010/171.

of the principle of mutual recognition.⁴² An area that is explicitly mentioned are those crimes for which the dual criminality requirement is abandoned. Interestingly, such an approach has no basis in the Lisbon treaty. It is quite clear from the functioning of Art. 82 and 83 that the process of mutual recognition can only lead to approximation of national procedural laws, while the approximation of national substantive criminal laws is only possible in areas of particularly serious crime with a cross-border dimension. On the other hand, the *ultima ratio* quality of criminal law is referred to for the first time in the Stockholm Programme.⁴³

In vertical cooperation, the most important provision is that Eurojust is regarded as the root of measures against eurofraud through the establishment of a European Public Prosecutor, Art. 86 TFEU.

For both horizontal and vertical cooperation the competences of the ECJ have been widened. In horizontal cooperation actions are now subject to judicial control according to the general rules (Art. 19 TEU, Art. 251ss. TFEU), with the duty to expedite custody cases (Art. 267(4) TFEU). As concerns vertical cooperation, Europol and Eurojust may be subjected to judicial control of the European courts, cf. Art. 263(5) TFEU.

Although the Lisbon treaty is certainly clearer in this area than the previous framework, there are still many problems. In particular, it sounds more far-reaching than it is. Through the introduction of an “emergency-brake procedure” in Art. 83(3) TFEU which allows a Member State to halt the legislative process because the fundamentals of its criminal law system are concerned,⁴⁴ and a system of enhanced cooperation in the same provision, which enables a group of at least nine EU countries to nevertheless go ahead with the measure, it may well be that the fragmentation of this area of law will continue. Additionally, the limitation of ex-Art. 33 EU (internal security) has been taken on by Art. 72 TFEU.

⁴² Cf. p. 29

⁴³ P. 29.

⁴⁴ For details of this procedure see *Peers*, 33 *ELRev* (2008), p. 507, 522-529; *id.*, *EU Justice and Home Affairs Law*, p. 65-70.

This, then, is the framework in which judicial cooperation has emerged and in which it operates. It has to work more quickly than before, and it has to fulfill more functions. In fact, it often has to compensate for a lack of competence in other areas. Only insofar does it really act as an alternative to harmonisation.

1.3 Outlook

After this overview of European Criminal Law and Procedure, I would like to give the analysis a more ample starting point. Chapter 2 offers an overview of theoretical frameworks for judicial cooperation between states and tries to analyse how EU cooperation is positioned within this structure. Traditionally, legal assistance evolved in a horizontal structure in which two nation states cooperate as equal sovereigns without the interference of third parties. The decisions of one state are accorded a certain effect in the other state based on a request procedure. The system of mutual recognition is, in essence, still such a horizontal cooperation system. Horizontal systems can range from very loose political procedures to deeply integrated juridified mechanisms, such as the model of direct effect within some federal states. A vertical model, on the other hand is one where specific procedural measures are based on the (executive or legislative) decisions of a supranational entity. As there is no strict division, cooperation on a European level always operates in a mixed system. The current dynamic of criminal law integration has, however, led to a very hybrid system in which strong vertical institutions are limited to fulfilling functions that are, in substance, horizontal. The European institutions are there to resolve the tension between cooperation and harmonisation, and between trust and uncertainty. Because cooperation requires some degree of harmonisation, a lack of harmonisation is, paradoxically, compensated for by strong vertical bodies.

Chapter 3 is a study of the most important paradigm in the area of judicial cooperation, namely the principle of mutual recognition. It starts with a brief account of the history of mutual recognition in classical judicial cooperation and explores the reasons why the new regime of mutual recognition is not presented as linked to mutual recognition in legal assistance, but as a spillover of the internal market

principle of mutual recognition. Mutual recognition is generally presented as a necessary reaction to the abolishment of internal borders by enabling judicial decisions to profit by free movement, while at the same time conserving national legal systems and respecting national sovereignty in a sensitive area. After exploring the validity and the limits of this analogy, the chapter will demonstrate that the new principle of mutual recognition was not introduced into judicial cooperation because of the novel legal content of the principle, but because of the integrative dynamic of this policy concept that was expected to benefit an otherwise stagnating area of law. That mutual recognition is not free of its traditional implications will be shown by tendencies of Member States to link mutuality to the classical principle of reciprocity. A short look at the terms “extradition” and “surrender” will show how a new vocabulary can trigger legal developments.

The fourth chapter will turn to the concept of mutual trust as the underlying rationale of mutual recognition. The notion of trust is used for various ends in the debate on European Criminal Procedure, but ideas as to its meaning are varied and often unclear. I will start by outlining both legal and sociological concepts of trust and cooperation. I will then explain how the ECJ tends to develop mutual trust into a true legal principle by looking at its case law in both civil, criminal and asylum matters. A particular focus will be on the relation of trust and harmonisation, since trust is essentially a mechanism to deal with diversity. The chapter concludes with a critique of current notions of trust and tries to give a prospect of what a well-founded concept of trust can and what it cannot achieve.

Chapter five illustrates some of these general issues with the example of the framework decision on the European Evidence Warrant and the proposed directive on the European Investigation Order for the area of transnational evidence-gathering. The area of evidence-gathering is particularly helpful in understanding problems with the principle of mutual recognition, as evidence is by its nature inextricably linked with a particular legal order and is only collected with regard to a trial. Friction that occurs when combining different legal orders will be demonstrated. It will be shown that many of the problems attributed to mutual recognition are in fact based on the lack of a uniform allocation of jurisdiction and of a coherent policy for transnational

fundamental rights.

Chapter 6 addresses the issue of jurisdiction in greater detail. After discussing the nature of jurisdictional rules it gives an overview of the bases for attributing jurisdiction. The analysis will show that positive conflicts of jurisdiction do not just emerge through the assumption of extraterritorial jurisdiction, but increasingly also through a differing understanding of territorial links. The focus will then shift to the wavering EU approach to jurisdiction in existing legislation. I will demonstrate how the lack of a coherent approach to jurisdiction is another symptom of the reluctance to assume collective authorship in areas that are, in any case, already subject to EU law. The advantages of consciously shaping and directing a new area are sacrificed to a hesitant and experimental approach that leaves individuals faced with arbitrary results. I will then discuss possible solutions for a more coherent and rights-based development of jurisdictional rules.

The purpose of chapter 7 is to focus on the individual and provide a framework for procedural rights in the context of multi-layered judicial cooperation. Current debate on fundamental rights in the area of freedom, security and justice is too much centred on a general balance of freedom and security. The chapter argues for a concept of fundamental rights that is specifically adapted to judicial cooperation and that is transnational in its perspective. An analysis of existing legal sources for fundamental rights in judicial cooperation will show that these rights all have their basis in national laws, a fact that is also reflected in the case law of the ECtHR and the ECJ. Since the national perspective suffers from a blind spot when the actions of another sovereign are concerned, these rights cannot adequately address situations that are essentially transnational. The involvement of the EU offers the chance to overcome this limitation as it introduces a new level of responsibility and accountability. The chapter explores in what cases existing rights must be interpreted transnationally by giving them a functionally equivalent meaning and how new transnational rights can be created.

Chapter 2 Models of judicial cooperation

In order to describe and evaluate existing principles of European Criminal Procedure, and in order to establish a framework for new principles, it is important to have a well-defined starting point. Much of the confusion in the present debate on these forms of cooperation in criminal matters is due to uncertainty about the meaning of certain concepts and ideas. Scholars often write on similar issues, but with completely different terminology, and, what is more important, with different views on the framing of the questions. According to their national background, authors locate what I call “Principles of European Criminal Procedure” in totally different legal frameworks. This not only impairs effective academic collaboration in this area, it also prevents an understanding of the actual functioning of European procedural law. I will therefore outline the basic forms of judicial cooperation. By that I do not refer only to the models that are currently put into practice, but rather to a system of possible models that could be adopted. These will give us a framework in which evaluate the principles of current EU legislation in criminal procedure.

What distinguishes the mechanisms on the EU level from solely national procedures is that several independent actors are working together on a criminal proceeding: two or more Member States and in some cases also EU institutions. This multi-layered system creates challenges for the modes of cooperation. Depending on the form of collaboration between these actors we need to distinguish vertical and horizontal cooperation. When the responsibility for initiating and continuing the procedure lies with the Member States, I will speak of horizontal cooperation. The implications of horizontal cooperation for the position of the individual and the effectiveness of prosecution are different from those of vertical cooperation. Vertical cooperation means the involvement of genuine European powers and institutions in the process of prosecuting a crime. In vertical cooperation, one needs to consider the position of a third actor on a different level. This brings about a new level of accountability and has further-reaching effects on the position of the individual concerned and the

outcome of the procedure.⁴⁵

The combination of horizontal and vertical elements that we find in practice now is also indicative of a general tension in the area of judicial cooperation. The Europeanisation of judicial cooperation is not just the result of supranationalist visions and interests.⁴⁶ To a greater extent, it has been shaped by actors with distinctly sovereigntist interests. Member States have a great desire to enhance their law enforcement within the European Union through cooperation mechanisms. At the same time, they jealously guard their sovereignty in criminal matters which they regard as essential.⁴⁷ Sometimes, this is done more by framing the debate through a certain rhetoric rather than by refraining from closer integration. This is one of the reasons why so-called Eurosceptic states were very much in favour of closer judicial cooperation.⁴⁸ For these reasons, European bodies are created, but often relegated to horizontal rather than vertical functions. At the same time, sovereigntist concerns with European bodies often only set in at a second stage, namely on the accountability level. It is then that Member States realise the extent of the integration and seem to shrink from true collective authorship.⁴⁹ Often, the most effective checks are not introduced because they would have to be based on a supranational level, leading to unclear responsibilities and a very hybrid overall structure.⁵⁰

The paradoxical fact that European bodies largely fulfill horizontal functions is also due to the fact that they are sometimes instituted to overcome inherent limitations of horizontal cooperation. After all, European criminal law is largely about the specific relation of harmonisation and judicial cooperation. European institutions are therefore particularly necessary to enhance cooperation between states when harmonisation

⁴⁵ There are different approaches in describing the current state of EU criminal procedure. *Sieber*, 121 ZStW (2009), p. 17ss. differentiates between “cooperation models” and “supranational models”. He focuses on the legal systems and the interaction of their respective norms, whereas my starting point is the distribution of powers between the actors.

⁴⁶ Cf. also *Walker*, *Odyssey*, p. 16ss.

⁴⁷ See *Mitsilegas*, *EU Criminal Law*, p. 322s.

⁴⁸ *Walker*, *Odyssey*, p. 16.

⁴⁹ Aided, ironically, by public opinion, cf. *Mitsilegas*, *Trust-building measures*, p. 289.

⁵⁰ See also *Mitsilegas*, *EU Criminal law*, p. 322s.; *Walker*, *Odyssey*, p. 29, who also detects a similar danger from federalist tendencies of “empire-building”.

cannot be successfully introduced. Thereby, these institutions become an expression of the conceptual tensions of trust.⁵¹

2.1 Horizontal model of cooperation

The horizontal model of cooperation is so far the only one that has been developed on a large scale in an international environment. The vertical cooperation model, instead, is today mainly found within one nation state's legal system. Interestingly, the EU model is currently based on a horizontal model with increasing vertical elements.

The horizontal forms of cooperation have a long tradition in the history of classical legal assistance. The procedures of classical legal assistance are as old as the idea of nation states.⁵² With the increasing importance of public international law, judicial cooperation received its place in international treaties and a "legal" form in the literal sense. From a purely conventional relationship between sovereigns, it became a type of legal process. This juridification is still in progress and it was not until very recent times that a right of the individual in the legality of the procedure has been identified and recognised by law. Classical legal assistance can be seen as a role model of horizontal cooperation between sovereign states, without the interference of third actors.

Classical legal assistance has played and still plays an important role in the ambit of criminal law in Europe. Many bilateral and multilateral treaties, brought forward by the Council of Europe, have contributed to a more efficient prosecution of crimes which involve more than one European state. But notwithstanding this undoubted success, legal aid has not overcome one structural problem that lies in its nature: Being a form of horizontal cooperation between sovereign states, legal aid has always been totally dependent on these sovereign actors. It has been considered as a threat to national sovereignty and therefore made subject to many restrictions. For example, a state

⁵¹ Cf. chapter 4 for an in-depth analysis of the concept of trust.

⁵² See below for their specific relevance in the history of mutual recognition.

normally only grants legal aid if the matter concerned is punishable under its own law, too.⁵³ The prosecution of offences that are a crime in one state only can therefore not be extended over its national borders. And, even more importantly, granting legal assistance has always been considered as a political process, which is subject to governmental control and may be refused for *raisons d'état*. Therefore, we always find exceptions of public policy in the treaties establishing the modes of legal assistance. The step of political control is a major hindrance not only to the granting of legal assistance as such, but also to the speediness of the process. Due to the lengthy proceeding, states often abstain from trying to solve the problem by a request of legal assistance. The duration of the process of legal assistance thus affects the state's interest in prosecution, but also the individual's interest in the matter being resolved within reasonable time limits.

At large, we can see that the obstacles of classical legal aid, which EU criminal procedure seeks to overcome, are inherent in a purely horizontal model of cooperation. Without external, harmonising factors, the relationship between two or more sovereign states will only be compatible up to a certain extent. In examining the „new“ modes of cooperation in the EU system of criminal procedure we therefore have to keep in mind the question of whether these are suitable to disentangle the process from its restrictions of horizontal cooperation.

Notwithstanding the experiences with the cooperation process of classical legal aid, the European legislator has not attempted to create a new system of cooperation, but instead took horizontal cooperation as the starting point of European criminal justice. This has obvious political reasons. But if it is judged from a structural point of view, it must face the same objections as the system of classical legal aid. If one leaves the responsibility with the Member States, there will still be a process of national control and an assessment of the validity of the action from the point of view of the granting state's national legal system. This can be demonstrated simply by the structure of the process of cooperation according to the new European modes of cooperation. The basic steps remain intact: One Member State has to make a

⁵³ Cf. also the following chapters for the meaning and influence of the double criminality requirement.

request, and another Member State has to grant this request. Admittedly, one has tried to change terminology. Moreover, there have been numerous attempts to solve some of the problems of classical legal aid. One measure is to set exact time limits in which a request must be processed. Another means is to reduce the grounds for refusal. The adoption of such measures has certainly increased the effectiveness of cooperation.

However, the basic idea of this attempt is not to alter the structure, but to change the details of the procedure. This idea has been favourably adopted by the Nordic countries who have signed a treaty on the so-called “Nordic Arrest Warrant” on 15 December 2005, creating a procedure of surrender of suspects and convicted criminals. This attempt of the Nordic countries is in compliance with the European Arrest Warrant, but carries the ideas of shortening the procedure and diminishing the grounds for refusal further. The Nordic Arrest Warrant totally abandons the requirement of dual criminality and sets shorter time limits for the surrender of the person.⁵⁴ Also, it does not require a minimum length of the custodial sentence.⁵⁵

Still, the structural process of horizontal cooperation remains basically untouched by these new measures. The EU legislation, which seeks to implement the „principle of mutual recognition“, as well as the multilateral agreement between the Nordic states, which goes further in the effects, does not alter the requirement of a special, two-step procedure of request and the granting of the request, despite the terminological changes. Therefore we need to consider at least very briefly the other possibilities of cooperation in a multi-actor system of criminal prosecution.

A further step in achieving a more efficient and harmonic cooperation would be to totally abandon the two-step procedure. One would merely have to consider foreign procedural measures as equivalent to domestic ones. Thus, the validity of a foreign decision would be extended to all other Member States. The implementation of such a model would be very easy in theory: The EU would need to set down by law that all decisions of Member States' courts and prosecution authorities have to be treated as

⁵⁴ See also Council Doc. 5573/06.

⁵⁵ As set in Art. 2 of the framework decision on the European Arrest Warrant (2002/584/JHA).

domestic decisions without any differentiation. Such a far-reaching measure, however, is politically and practically unfeasible in a heterogeneous complex, as is the case with the European Union.⁵⁶ Therefore, it is not considered to be of practical importance in the future. But nevertheless it can serve as a point of comparison. We can observe that the principle of immediate validity of every judicial decision is attained within nation states, but not on an international level.

In nation states that have a non-unitary legal system, the model of direct validity is often applied. Switzerland, for example, has a unitary substantive criminal law, but different laws of criminal procedure in the several cantons. The 26 cantons set rules as to the organisation of criminal justice, they establish the competent authorities and they set the laws of court procedure.⁵⁷ To facilitate criminal procedure, the cantons have agreed on inter-cantonal treaties (so-called *Konkordate*, cf. esp. the *Konkordat über die Rechtshilfe und die interkantonale Zusammenarbeit in Strafsachen* of 5.11.1992) that give one canton's police the power to conduct investigations in other cantons under the requirement that these measures are legal according to its own procedural law. This means that investigators do not have to take into consideration the law of the canton where they are operating, but only the law of the canton that they belong to. This is a very far-reaching measure which was only possible because in Switzerland the laws of criminal procedure are already harmonised to a high degree. It cannot serve as a model for Europe, which is a far too heterogeneous legal space. But it shows the structural possibilities of horizontal cooperation: Taken seriously, horizontal cooperation can be as far-reaching as the Swiss model, giving the procedural measures of different states exactly the same consequence. What is needed, though, is a sufficient common basis in the law of criminal procedure, so that no major frictions will occur.

A similar development can be seen in the United Kingdom, where the Criminal

⁵⁶ Since this has clearly not been achieved through the European Arrest Warrant, it is contradictory when the Commission calls the implementation of mutual recognition through the European Arrest Warrant an "*ipso facto*" recognition that leads to execution "automatically", cf. Explanatory Memorandum to the proposal COM(2001) 522 fin./2 points 2 and 4.5.

⁵⁷ Since 01 January 2011 a uniform Code of Criminal Procedure – *Eidgenössische StPO* – has come into force.

Justice and Public Order Act 1994 abolished the requirement of an endorsement of an arrest warrant. Under its section 136, arrest warrants issued in England and Wales are executable in Scotland and Northern Ireland, and vice versa. The judicial decision of one country is thus directly applicable in another country. This development may be described as changing a traditional model of recognising a foreign decision ("endorsement") to a model of treating a foreign decision like a domestic one. Admittedly an „endorsement“ is not a procedure of equal weight and political importance as a recognition of a foreign decision in the process of classical legal aid between the Member States of the EU. However, it shows the necessity of transforming a foreign decision into a domestic one, and by abolishing the endorsement, a structural shift occurred from a restricted horizontal system to a more developed horizontal system.

The different possibilities in horizontal cooperation have shown that this way of organising criminal justice offers a lot of potential. From the lengthy procedures of classical legal aid to the direct applicability of foreign decisions, from political review to direct enforcement without further control, there are ample opportunities in models of horizontal cooperation. The comparison of different models of horizontal cooperation shows us the current position of cooperation in EU law. Cooperation on the European level has neither exhausted the full potential of horizontal cooperation, nor remained in the narrow framework of classical legal aid. But what can be seen through the analysis of horizontal cooperation is another point that is vital for any further development in this area: Without a substantive basis of common legal principles, common rules and structures, an extensive horizontal cooperation is not feasible. It is therefore not surprising that horizontal cooperation has not reached its final extent in EU criminal law. The European legislator has instead begun to introduce some forms of vertical cooperation as well, whose particularities I will now briefly examine before returning to horizontal cooperation.

2.2 Vertical model of cooperation

To describe vertical cooperation with a precise term is not an easy task. It would be

an oversimplification to say that the difference is that „the EU“ is the acting part. The various bodies of the European Union play a role in horizontal cooperation as well. This is most notable in the third pillar framework decisions, where the Council set more or less the exact content of the legislation and will be so for directives in this area, although the implementation gives some scope to the Member States. Because of these often inherent vertical elements in horizontal cooperation, one cannot simply distinguish the horizontal and the vertical form of cooperation by differentiating between the actors. One must rather pay attention to the question of who has the main responsibility for the decision. If the concrete procedural measure, e.g. the arrest of a person, the search of a dwelling, or the recognition of a foreign sentence, is substantially determined by the legislative acts of the EU, I will consider it as a form of vertical cooperation, even if the Member States apply the measure. On the other hand, if EU legislation gives leeway to the Member States and the concrete measure mainly depends on prerequisites set by the Member States, the responsibility lies with them and I define it as a form of horizontal cooperation. Obviously, there is no clear dividing line. We can observe already at this stage that the EU system is a mixed system of cooperation. It is principally based on an enhanced system of horizontal cooperation: The mechanisms of classical legal aid have been taken as a starting point but were then remodelled to make them more efficient. At the same time, some forms of vertical cooperation have been adopted. Even if one does not regard the sanctioning of cartels as part of criminal law, there still need to be mentioned the Commission's anti-fraud office (OLAF) and the Union bodies for the cooperation between national prosecution authorities (Europol and Eurojust). Especially the latter ones will surely get more responsibilities in future and therefore assume much importance in a vertically functioning system of criminal law enforcement.

From a theoretical point of view, the main feature of vertical cooperation is a change in perspective. The legal space in which the procedural measures take place is no longer considered a fragmented one, with several national systems that interact, but as a unitary legal space, where only the EU-wide perspective is taken into consideration. The acts of the prosecuting authorities are no longer seen as products

of a cooperation between several actors that are working together as equal partners, but rather as occurrences of a unitary and harmonic European legal space. This newly created territoriality, which might be described as a European territoriality, is the main feature of vertical cooperation. If the responsibility for a procedural act lies with the EU, the perspective changes and a Union-wide standard may be applied. At the present moment, there is hardly any purely vertical procedure. The institutions that are usually named in this context, such as Europol and Eurojust, do not in any way lead vertical criminal cooperations. They are, on the contrary, a vertical element in a strictly horizontal form of cooperation between different Member States. The only procedures for which this definition is at least partly true are procedures in competition law and, to a much lesser extent, the investigations of OLAF.

2.2.1 Administrative Procedures

Competition Law

As for the practical side, there is one pertinent example for the application of vertical cooperation already in force: the sanctioning of companies that infringe competition rules. In this sector, we have, or at least had until recently, a unitary European-wide system of law enforcement. The Commission has extensive investigative powers to discover violations of competition rules and ensure the enforcement of Art. 101 and 102 TFEU (ex-Art. 81 and 82 TEC). If a cartel or monopoly is detected, the sanctioning again lies with the Commission. Judicial review is ensured by the Court of Justice. This system, as created by the old Council Regulation 17/62, was a purely vertical one: Investigation, sanctioning and judicial review were conducted under the sole responsibility of Community bodies. The new Regulation 1/2003 further develops this system and does not change its basic functioning, but introduces some horizontal elements by giving competences to the national competition authorities.

One concession must be made, however, as to the context of this sanctioning system. According to the legislation itself (Art. 23(5) of the Regulation 1/2003), the decisions of the Commission are not of a criminal law nature. What relevance has the structure of the enforcement of competition law in our ambit of study then? The

first answer is that irrespective of whether it forms part of criminal law or of an administrative law system, the structural importance of this truly vertical system of law enforcement remains pertinent. It shows how a harmonic Europe-wide system may work and what alternatives are possible for the current functioning of European Criminal Procedure. And the second answer is that it is highly dubitable whether the wording of Art. 23(5) can change the nature of the Commission's decisions in substance. Apart from competence issues, this framing of the issue makes it easy on sovereigntist Member States to accommodate these activities within their conceptual outlook on the EU. If we consider the actual effects of such a decision, it gets very close to decisions in criminal matters. According to Art. 23(1) of Regulation 1/2003, the Commission may impose on undertakings fines of up to 1 % of their turnover for obstructing the investigations. If an infringement of Art. 101 and 102 TFEU (ex-Art. 81 and 82 TEC) is proven, the fine may be as high as 10 % of the turnover, according to Art. 23(2) of Regulation 1/2003. Revealingly, these fines are only imposed if intentional or negligent misconduct can be proven, which is an essential element of criminal law sanctions. And the fines are as high as 10 % of the turnover in order to deter the company from infringements – deterrence being a typical aim of criminal law sanctions. It can therefore hardly be denied that the Commission's decisions according to Art. 23(2) of the Regulation 1/2003 have a criminal law nature. And in consequence even the Court of Justice considers it as a sanction similar to a criminal sentence. In the *Degussa* case, it is discussed whether the rather vague determination of the exact amount of the financial sanction is in conformity with the principle of legality of penalties.⁵⁸ This principle, which has been developed in the ambit of criminal law,⁵⁹ is at issue in the present context, too, which clearly shows the criminal nature of the financial sanctions under Art. 23(2). For our purposes, the mechanism of direct vertical enforcement gives a valuable example of a vertical cooperation system and may even serve as a model for future cooperation in criminal matters in general.

⁵⁸ See the judgment of the Court of First Instance of 5 April 2006, T-279/02, *Degussa v Commission*, [2006] ECR II-879 para. 66-98, and the judgment of the Court of Justice C-266/06 of 22 May 2008, para. 36-63.

⁵⁹ For a comparative overview of the various European jurisdictions see *Bassiouni*, in: *id.* (ed.), *Int. Criminal Law Vol. I*, p. 73ss.; *Bernardi*, in: *Bassiouni et al.* (eds.), p. 94ss.

The purely vertical system of Regulation 17/62, however, has partly been abrogated by the new Regulation 1/2003. In the context of the present research, the introduction of horizontal elements is of great interest. It is rather unexpected that a measure of vertical cooperation that is supposed to be more efficient should be subjected to elements of horizontal cooperation at a later stage. According to its Articles 11-16, a close form of cooperation between the Commission and the Member States' national competition authorities has been introduced. It was intended to unburden the Commission of its heavy work load in prosecuting competition infringements and enable it to concentrate on matters of importance after the enlargement of the European Union.⁶⁰ From a structural point of view, it shows how a development in legal cooperation can take a turn and go in another direction as well. The purely vertical system has proven to be ineffective because too much responsibility lay with the Commission. Similarly, the purely horizontal system of cooperation in classical legal aid has proven to be ineffective, too, because the responsibility was entirely with the Member States. Both approaches have their undoubted merits: A horizontal cooperation preserves national legal traditions, a vertical cooperation leads to harmonic and unitary solutions. But in practice, both systems needed to be altered in the European judicial space. The European Union is neither a system of purely international cooperation, nor a unitary supranational body, but it has elements of both spheres. This is reflected in the forms of legal cooperation which are neither horizontal nor vertical but combine elements of both structures.

OLAF

OLAF, the European anti-fraud office, was founded in 1999 through a Commission decision⁶¹ and acts as successor to UCLAF.⁶² Its main task is to investigate fraud against the EU-budget, corruption and similar irregular activity. In contrast to Europol and Eurojust, OLAF does not have a legal personality, but forms a part of the

⁶⁰ See for details *Wahl*, in: *Sieber et al.* (eds.), *Europäisches Strafrecht*, § 7 para. 5ss.

⁶¹ 1999/352/EC (OJ L 136/20, 31.05.1999).

⁶² For the history of OLAF see *Brüner/Spitzer*, in: *Sieber et al.* (eds.), *Europäisches Strafrecht*, § 43 para. 17ss.

Commission. This means that OLAF can conduct both internal and external investigations and use the Commission's competences for external investigations. It is, on the other hand, completely independent of the Commission in fulfilling its tasks which is even subject to judicial review. Both internal and external investigations are explicitly set down as administrative procedures.⁶³ This has far-reaching consequences for the legal framework. Even though judicial review is granted, one prerequisite set up by the Court of First Instance is that the decision in question has binding effect on the individual and is not just preparatory.⁶⁴ Therefore, judicial review is in fact very limited.⁶⁵ The Civil Service Tribunal tried to change this,⁶⁶ but was overruled by the General Court.⁶⁷ This means that actions which in ordinary criminal proceedings are subject to judicial review can only be reviewed after a binding decision in the case of OLAF.

Conclusion

The procedures in the field of competition law and anti-fraud law are based on an administrative law rationale. That this is unsatisfactory, or even illegal, because it evades the application of fundamental guarantees of a criminal procedure has often been demonstrated and does not need to be reiterated here. Since this criticism has been taken on board, but the need for genuine European prosecution has remained, the institutional setting is subject to gradual change. The idea of a European public prosecutor has long been under discussion, but it is particularly relevant now that the Lisbon treaty has finally provided a basis for creating it. Since a European public prosecutor would in all probability take its basis in Eurojust as intended by the treaty, it is obvious that there is no clear distinction between horizontal and vertical cooperation and that both elements will always be prevalent in any form of

⁶³ With the respective consequences for cooperation, see *Schröder*, in: *Sieber et al.* (eds.), *Europäisches Strafrecht*, § 33 para. 19, 60ss.

⁶⁴ Court of First Instance, judgment of 6 April 2006, T-309/03 - *Camos-Grau*; Court of First Instance, judgment of 13 July 2004, T-29/03 - *Comunidad Autonoma de Andalucia*.

⁶⁵ *Brüner/Spitzer*, in: *Sieber et al.* (eds.), *Europäisches Strafrecht*, § 43 para. 61, 64.

⁶⁶ Civil Service Tribunal, judgment of 28 April 2009, joint cases F-05/05 and F-07/05 - *Schmit, Violetti et al.*

⁶⁷ General Court, judgment of 20 May 2010, T-261/09P.

cooperation. Still, it is necessary to clearly see the differences in the functioning of the horizontal and the vertical mechanism, and to know the advantages and disadvantages for the relevant area of criminal procedure so that a balanced legal framework can be developed for primarily vertical forms of cooperation. I will therefore first outline the existing European prosecution institutions and show their functioning, even though they are mainly founded on a horizontal cooperation basis. I will then outline how this will change when a European Public Prosecution is going to be set up, how this will affect the working of judicial cooperation and particularly individuals' rights in this context.

2.2.2 Criminal procedures

Europol

Europol too started its work in 1999 after the 1995 Convention had finally been ratified.⁶⁸ Its main aim is to improve the effectiveness and cooperation between Member State-authorities mainly by sharing and pooling information. Even though it has no executive powers, it is certainly going to have operative functions in the future. While Art. 30(2)(a) TEU and the consequent change of the Europol Convention allowed for some participation in operational police work, the Lisbon treaty has opened the path to giving Europol a central role in coordinating, organising and carrying out investigative and operative measures with Member States' authorities in accordance with regulations based on Art. 88(2)(b) TFEU.⁶⁹ Through these new mechanisms, Europol will become an actor in vertical cooperation. The decisions of Europol can be challenged before the Court of Justice from 2014 onwards, which will give Europol a clearer legal framework.

⁶⁸ OJ C 316/2 of 27 November 1995.

⁶⁹ See *Neumann*, in: *Sieber et al.* (eds.), *Europäisches Strafrecht*, § 44 para. 5.

Eurojust and the European Public Prosecutor

Eurojust was first founded as a judicial counterpart to Europol in 2002.⁷⁰ The aim was to create an institution fostering the exchange of information and providing aid for Member States in judicial cooperation. Eurojust consists of national members appointed by the Member States that can act independently or jointly in college.⁷¹ Since they do not appear before the Member States' courts or conduct measures themselves, the actions of Eurojust cannot be described as a form of vertical cooperation in a strict sense. Rather, Eurojust is based on a system of horizontal cooperation because the outcome of its work is to facilitate proceedings between the Member States by providing information. The fact that this horizontal model is upheld does however not exclude a change of perspective into a vertical system. The very creation of a Union body with specific tasks brings a third actor into the picture. A criminal trial is no longer a process that one Member State conducts independently, with or without the aid of another Member State, but also the result of a three-dimensional procedure.

This combination of horizontal and vertical elements is further highlighted by the proposals for the future development of Eurojust. Many proposals aim at strengthening the role of Eurojust⁷² and even go so far as to give it a right to resolve conflicts of jurisdiction or initiate proceedings that Member States have to execute⁷³ which is possible through a regulation according to Art. 85(1)(a) TFEU primarily for eurofraud. The most important step taken in this direction, however, is the possibility to create a European Public Prosecutor. The idea of creating a European Public Prosecutor was already established in the Corpus Juris⁷⁴ and the subsequent

⁷⁰ Council Decision 2002/187/JHA of 28 February 2002 (OJ 2002 L 63/1) as amended by Decision 2003/659/JHA of 18 June 2003 (OJ 2003 L 245/44).

⁷¹ See for details Grotz, in: Sieber et al. (eds.), *Europäisches Strafrecht*, § 45 para. 7, 33ss.

⁷² Council Decision 2009/426/JHA of 16 December 2008 (OJ 2009 L 138/14); see Nilsson, in: Guild et al. (eds.), *The Area of Freedom, Security and Justice ten years on*, p. 75.

⁷³ P. 24 of the Stockholm Programme.

⁷⁴ Delmas-Marty (ed.), *Corpus juris portant dispositions pénales pour la protection des intérêts financiers de l'Union européenne*, 1997; cf. also van den Wyngaert, in: Walker, Neil (ed.), *Europe's Area of Freedom, Security and Justice*, p. 215ss.; Killmann/Hofmann, in: Sieber et al. (eds.), *Europäisches Strafrecht*, § 48 para. 2ss.

Commission Green Paper.⁷⁵ However, the Lisbon treaty now sets down that the European Public Prosecutor could emerge from Eurojust through a regulation (Art. 86(1) TFEU).⁷⁶ The possible competences of a European Public Prosecutor are limited to fraud against the financial interests of the Union. But there is also the possibility of enlarging the scope of competence so that it encompasses areas of particularly serious crime with a cross-border dimension as defined in Art. 83 (cf. Art. 86(4) TFEU). This is a very wide concept, as has been seen in a different context above. It also shows that the idea of a European Public Prosecutor is taken very far and not limited to its core function in the eurofraud-area. The European Public Prosecutor will act as a prosecutor in front of Member States' courts and be responsible for investigating, prosecuting and bringing to judgment the perpetrator. The most contentious issues, such as the legal position of the European Public Prosecutor, procedural rules, admissibility of evidence and judicial review of procedural measures,⁷⁷ are left to the regulation, cf. Art. 86(3) TFEU. This shows that the idea of a European Public Prosecutor is still rather vague. Therefore, the Commission Green Paper will probably still be influential in shaping ideas of a European Public Prosecutor.

The Green Paper on establishing a European Public Prosecutor⁷⁸ shows the intertwining of horizontal and vertical cooperation in criminal matters, in that it closely links the idea of a European Public Prosecutor to the principle of mutual recognition.⁷⁹ It sets down that actions or measures of the European Public Prosecutor should have the same validity in every Member State and that it can use all national procedural measures, which can in turn be enforced in every other Member State. Instead of establishing harmonised rules for evidence gathering, the Green Paper sets down rules for the compulsory admissibility of evidence legally gathered in one Member State, which is mainly seen as a necessary requirement to

⁷⁵ COM/2001/715 fin. of 11 December 2001; see *Brüner/Spitzer*, NStZ 2002, p. 393ss; *Radtko*, GA 2004, p. 1ss.

⁷⁶ For these new possibilities see *Espina Ramos*, in: *Klip (ed.)*, Substantive Criminal Law, p. 35ss.

⁷⁷ See e.g. *Klip*, EU Criminal Law, p. 410, 431.

⁷⁸ COM/2001/715 fin.

⁷⁹ Cf. also *Brüner/Spitzer*, NStZ 2002, p. 395.

fulfill subsidiarity. This approach to the law of evidence is problematic, as will be shown in greater detail below. What is important here is that the problems for individuals' rights in this area are based on a confusion of horizontal and vertical cooperation. While in horizontal cooperation mutual recognition may, under certain circumstances, truly be neutral to individuals' rights, this is certainly not so in a vertical setting. In horizontal cooperation, mutual recognition simply means that an actor is faced with the decision of another actor, according to this actor's laws. But in vertical cooperation, a third actor can choose between several legal systems of all participating states. The outcome of the proceeding is not dependent on one or another legal order, but on the arbitrary decision of one particular actor. Hence, it is always close to "forum-shopping".

But, on the other hand, this responsibility of an independent third makes it easier to establish procedural rights in the context of vertical cooperation, and particularly for a European Public Prosecutor. There are a number of reasons. First of all, in an area of law that is already supranational, the fear of nation states to lose sovereignty through attempts at regulating procedural rights is less prevalent. Secondly, Member States might, despite initial drawbacks from collective authorship, be willing to regulate the actions of supranational agencies in order to restrict their scope of action. Therefore, whenever the European Public Prosecutor should be established, there will probably be a rather specific set of rules concerning individuals' rights that will apply, at least to a greater extent than in horizontal cooperation. These suggestions for a procedural framework may even serve as a model for an application to the area of horizontal cooperation. How such a framework, in theoretical terms, could be established, will be the topic of the last chapter.

Chapter 3 Main paradigm: Principle of mutual recognition

When we look at the specifically European take on horizontal judicial cooperation, we notice first of all that the language of classical legal aid is replaced more and more by a new terminology. The principles that are named in this context differ considerably from traditional ones. I will now outline the main principles of this area and analyse their specific function within the European judicial cooperation in criminal matters.

It will become clear that many of these concepts have a function quite unconnected with the specific content of judicial cooperation. Often, they are used to promote a criminal policy and link the integration in criminal matters to other areas of EU law. The most important principle is the principle of mutual recognition.

It has become a commonplace to say that since the Tampere European Council of 1999 mutual recognition has become the fundamental concept of European Criminal Procedure.⁸⁰ It is the basis for numerous legislative measures in the field of cooperation in criminal matters.

The time was favourable for the introduction of a new concept: a perceived rise in

⁸⁰ See the Presidency Conclusions of 15 and 16 October 1999: „33. Enhanced mutual recognition of judicial decisions and judgments 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 judgments and to other decisions of judicial authorities. [...] 36. 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. 37. The European Council asks the Council and the Commission to adopt, by December 2000, a programme of measures to implement the principle of mutual recognition. In this programme, work should also be launched on a European Enforcement Order and 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.“; see *Apap/Carrera*, European Arrest Warrant, p. 11s.; *Belfiore*, 17 EJCCL (2009), p. 2s.

cross-border crime seemed to make closer cooperation between the Member States necessary.⁸¹ At the same time the reformation of the lengthy and complex proceedings in legal aid proved unattainable and the creation of new mechanisms for an effective prosecution of crimes seemed imperative. As outlined above, a sufficient legal basis for harmonising the substantive law was nonexistent; at any rate, the Commission preferred mutual recognition as, according to its view, causing much less impairment on Member States' judicial systems.⁸² The concept in itself seemed equally well adapted to the purpose. The Commission drew an express analogy to the internal market:

Here, the principle of mutual recognition had been developed concerning the free movement of goods, as a means for the abolishment of trade barriers.⁸³ Furthermore, mutual recognition had been extended to professional qualifications.⁸⁴ The Commission considered this successful application of the principle of mutual recognition in other areas, while at the same time establishing it as a concept for a general coherence of EU law.⁸⁵ This approach and the very novelty of the concept of mutual recognition in judicial cooperation in criminal matters seemed promising for accomplishing the envisaged goals, just as the novelty of mutual recognition had given the development of the internal market a push when harmonisation seemed to lag.⁸⁶

But while the Tampere European Council is generally acknowledged to have set down mutual recognition as the corner stone of judicial cooperation in criminal matters and some writers trace it back to the UK Home Secretary Jack Straw's

⁸¹ For a more thorough analysis of this line of argumentation see below at point 7.2.

⁸² Green Paper on criminal-law protection of the financial interests of the Community and the establishment of a European Prosecutor (COM/2001/715 fin.), p. 29.

⁸³ ECJ judgment of 20 February 1979, C-120/78 - *Cassis de Dijon*; see in detail later 2.1.2.

⁸⁴ Directive 89/48/EEC on a general system for the recognition of higher-education diplomas (OJ 1989, L 19/16).

⁸⁵ *Mansel*, 70 *RabelsZ* (2006), p. 682.; cf. also *Schmidt*, 14 *JEPP* (2007), p. 671: an attempt to integrate all areas marked by different regulations.

⁸⁶ See *Schmidt*, 14 *JEPP* (2007), p. 667.

words⁸⁷ at the Council of Europe 1998 in Cardiff, many questions remain unanswered: What exactly is the difference between this new principle and the idea of mutual recognition as it has been discussed in classical legal aid for more than a century, that has been strived at in many treaties and national laws?

A possible answer could relate to the obligation to recognise and execute foreign decisions, as opposed to the mere possibility, although such an obligation is not uncommon in treaties on legal aid. Or it could be a potentially automatic enforcement of foreign judgments without an *exequatur*, i.e. a transformation into a domestic decision or a formal declaration of execution, thereby treating the foreign authorities like domestic authorities. A difference could also lie in a wider scope of recognising foreign decisions through the gradual abolition of classical grounds for refusal of legal aid,⁸⁸ such as dual criminality, the non-extradition of nationals, public policy exceptions, specialty etc. or through widening the range of application of mutual recognition from final judgments to procedural orders in the pre-sentencing stage – an area that had not been comprised under the term of “recognition” before.

But one could also think of “softer” effects of the extension of the principle of mutual recognition to criminal matters: These could simply be the particular dynamics that ensue when using an internal market language, with its implications of mutual trust, as it seemed to have worked for cooperation in civil matters, or the wish to find a new “big idea”⁸⁹ for further integration as other Union ideals had lost some of their appeal and public opinion became more sceptical.

In order to answer at least some of these questions it is important to explore the historical dimensions of this concept first. After that, I will explain the system of mutual recognition that existed before the “principle of mutual recognition” was introduced. This will also show that the principle of mutual recognition does in some respects have little legal content; it is rather a political concept. To sum up the historical development, it can be said that mutual recognition concerning judicial

⁸⁷ Mitsilegas, 43 CMLRev. (2006), p. 1278s.; Asp, in: Husabø/Strandbakken (eds.), Harmonisation, p. 26; van Bockel, ne bis in idem, p. 59.

⁸⁸ Cf. Bassiouni, in: *id.* (ed.), Int. Criminal Law Vol. II, p. 5s.

⁸⁹ Walker, Odyssey, at p. 13s. on the claims of Tampere.

cooperation in criminal matters is not a new idea as such. The actual changes that it does bring about will be discussed after the historic outline.

3.1 History of mutual recognition in classical judicial cooperation and modes of recognition

A brief outlook at the history of the recognition of foreign penal orders will show that the problems faced by judicial cooperation have been similar for a long time. The strategies and mechanisms used to address these have not been as different from today's ideas as one is apt to think, but a closer examination of the historical dimensions will help to clear up in what important points they actually did differ.

Extradition is believed to be the most ancient tool in legal aid⁹⁰ and can at least be traced back several centuries, although it took a while until states formed contractual obligations to this effect.⁹¹ Extradition was directed at „re-claiming“ suspects or convicts who had fled the country for the aim of prosecution or the execution of a sentence. Since this was, due to various reasons,⁹² fraught with difficulties, alternatives were soon put into practice. The vicarious administration of justice (applying either domestic or even foreign substantive criminal law) was not uncommon and Grotius even claimed an obligation under international law to either extradite or punish („aut dedere aut punire“).⁹³ This made the recognition and execution of foreign judgments not immediately necessary and explains its relatively late emergence; extradition itself was, on the other hand, not considered a form of recognition of a foreign decision.

⁹⁰ *Bassiouni*, in: *id.* (ed.), *Int. Criminal Law Vol. II*, p. 4; *Ligeti*, *Strafrecht und strafrechtliche Zusammenarbeit*, p. 115.

⁹¹ *Lammasch*, *Auslieferungspflicht und Asylrecht*, p. 3ss.

⁹² E.g. the more difficult modes of travelling and the relevant expenses, the commonness of political crimes that other states did not care to get involved in.

⁹³ Cf. to this *Ligeti*, *Strafrecht und strafrechtliche Zusammenarbeit*, p. 77ss.

3.1.1 Earlier times

In the Middle Ages, the recognition of a foreign judgment would have been incompatible with the prevailing concepts of sovereignty. The idea that a foreign authority's act could limit the sovereign exercise of power, even if voluntarily agreed on, was rejected. Instances of the enforcement of foreign judgments are rare and states only seem to have deviated from this maxim due to practical reasons. There are therefore a few treaties, especially in cities of Upper Italy. Venice most particularly took on convicts from many states as it needed workers for its fleet while landlocked countries could thereby impose a penalty not otherwise enforceable, the penalty of galley service.⁹⁴ Also, Monaco and Andorra sent convicts to France owing to their lack of enforcement capacities.⁹⁵

In time, the enforcement of foreign judgments became less exceptional, although the predominant rhetoric would still stress sovereignty as opposing this mechanism. In modern times there were already several treaties envisaging a recognition of foreign judgments, albeit within a very limited scope. The most prominent example, due to its long existence, is the Revised Act of the Shipment on the Rhine (revidierte Rheinschiffahrtsakte) of 1868 that is still in force today. It was initially concluded between France, several German states and the Netherlands (all concerned riparian states) and set down that the judgments of specific Rhine border courts had to be executed by all other states also in relation to criminal matters concerning the law of shipping and the like. The astonishing fact here is that, although an *exequatur* was required by national law,⁹⁶ there was no public policy exception set down.

Outside of special treaties, only very few laws provided for a possibility of recognising or enforcing foreign judgments. For example, in 1859, para. 231 subpara. 4 of the code of criminal procedure of the Kingdom of Hannover entitled the ministry of justice to replace an extradition with the enforcement of the relevant judgment, a provision that seems to have been rather singular in its wide scope of application. Art. 30 of the

⁹⁴ Cf. *Lammasch*, Auslieferungspflicht und Asylrecht, p. 824 nt 1; *Delius*, Ausländische Strafurtheile, p. 515s.

⁹⁵ *Delius*, Ausländische Strafurtheile, p. 516.

⁹⁶ Cf. *Delius*, Ausländische Strafurtheile, p. 528.

Swiss Federal Act of January 22, 1892 allows for the assumption of enforcement by mutual consent of all concerned.

Generally speaking, it can be said that up to the 19th century in international public law it was a “universally acknowledged principle that a state does not enforce foreign penal judgments, not even those envisaging fines”⁹⁷ and the exceptions could be termed singular.⁹⁸ The opponents of recognition had a clear majority.⁹⁹

3.1.2 19th century academic debate

It was not until the late nineteenth century that the debate about mutual recognition of penal judgments seriously began. Advocates of the principle became more frequent, following mainly two distinct lines of reasoning.

3.1.2.1 State-interests

On the one hand, mutual recognition was seen as a measure to promote political goals: In the formation of new political entities (such as the North German Confederation) and especially in nation-state-building mutual recognition served to make compatible diverse procedural orders and court systems among the relevant states until a more complete harmonisation could replace it.¹⁰⁰ Once seen in this way, mutual recognition remained a means of political rapprochement and was subject to a rather instrumentalist view.

A common approach to International Criminal Law was already regarded as a necessary reaction to a perceived rise in cross-border crime, an argument that should become a recurring line of reasoning, though empirical evidence to this effect was seldom given. Although international crime might really have increased, most

⁹⁷ *Delius*, *Ausländische Strafurtheile*, p. 515 [translation by author]; similarly *Bar*, *Das Internationale Privat- und Strafrecht*, p. 579.

⁹⁸ *Meili*, *Internationales Strafrecht*, p. 500; *Lammasch*, *Auslieferungspflicht und Asylrecht*, p. 823.

⁹⁹ See *Delius*, *Ausländische Strafurtheile*, p. 517 with further references.

¹⁰⁰ Cf. *Braum*, 125 GA (2005), p. 683; *Delius*, *Ausländische Strafurtheile*, p. 516.

acts in judicial cooperation were clearly covering the prosecution of purely national offenders and not the mobile, intelligent and well-equipped super-criminal.¹⁰¹ It has been sustained convincingly that the European Arrest Warrant, for example, is systematically issued for very minor offences.¹⁰² The main aim of judicial cooperation is, therefore, to avoid any loophole to a perpetrator,¹⁰³ its underlying rationale a prosecution without a gap.¹⁰⁴

We already find the idea of mutual trust as a postulate that creates maxims for state action.¹⁰⁵

These ideas are all in line with a pre-constitutional concept of legal aid, where the state interests and political negotiations and decisions are the main guidelines of any action taken. Thus *Delius* warns¹⁰⁶ of the damage that a too strict legal framework would ensue – judges especially could not decide whether the recognition of a sentence was opportune. The individual affected by a measure of legal aid does, on the other hand, not have a real rights-based position. Until late in the 20th century, especially in the continental legal doctrine, he was considered the „mere object“¹⁰⁷ of political actions between sovereign states. Constitutional rights were held to be not or only partly applicable (similar to an „effet atténué“), even the right to life.¹⁰⁸ In Germany, judicial review of decisions to extradite was restricted to the court-decision of admissibility, the final ministerial decision to extradite was on the other hand exempt from any review and pursued solely political purposes.

¹⁰¹ Cf. *Jäger*, Verfolgung durch Verwaltung.

¹⁰² Cf. lately the Commission report on the implementation since 2007 of the Council framework decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, COM/2011/175fin., p. 7.

¹⁰³ Cf. *Delius*, *Ausländische Strafurtheile*, p. 520.

¹⁰⁴ See *Braum*, 125 GA (2005), p. 685.

¹⁰⁵ *Delius*, *Ausländische Strafurtheile*, p. 515.

¹⁰⁶ At p. 523 s.

¹⁰⁷ Cf. e.g. *Schröder*, BayVBl. 1979, p. 231; cf. the critical approach of *Lagodny*, *Rechtsstellung des Auszuliefernden*, passim; see also *Ligeti*, *Strafrecht und strafrechtliche Zusammenarbeit*, p. 115.

¹⁰⁸ See for extradition the decision of the German Constitutional Court of 30 June 1964, BVerfGE 18, 112; for other form of judicial cooperation Higher Regional Court (OLG) Stuttgart of 07 May 1985, Justiz 1985, p. 324; OLG Köln of 28 May 1984, NJW 1985, p. 572.

This view of the individual as an object also explains why classical grounds for refusal of legal assistance were debated controversially when they were not needed to protect a public interest. Many authors raised the question of whether to keep dual criminality, but most of them still argued to maintain it so as not to force a state to execute a decision opposed to its own concepts of the administration of justice.¹⁰⁹ V. Liszt, however, clearly favours an abolition of this idea in legal aid so as to truly recognise a foreign level of substantive criminal law. Legal aid was to tear down the borders between states and be applied flexibly, according to political need.¹¹⁰ Some authors even went so far as to think of an abolition of any kind of *exequatur* and review on the merits when enforcing a foreign judgment,¹¹¹ an idea that would still count as progressive today.

3.1.2.2 Individual's interests: Reduction of the sentence

Another line of reasoning for the recognition of foreign judgments had the interests of the accused or convict at its core.

Quite early on it was regarded as contrary to the basic notions of justice to subject a person to a punishment for an act when a sentence had already been served in another country for the same deed. But an international *ne bis in idem* in the form of the recognition of a foreign case as *res judicata* was still mainly seen as incompatible with state sovereignty. The right of a state to punish an act could, according to this view, not be consumed by any foreign sentence or enforcement. Therefore, the effects of a foreign judgment were most often only seen in a reduction of the

¹⁰⁹ Delius, *Ausländische Strafurtheile*, p. 524ss.; Lammasch, *Auslieferungspflicht und Asylrecht*, p. 827, puts forward the idea of a reduced dual criminality concept: dual criminality is not to be required if the different criminal laws are based on external circumstances such as geography, e.g. a landlocked state should enforce penalties concerning crimes in the scope of the law of the sea. No state, however, should execute a decision if the different criminal laws reflect a different set of values.

¹¹⁰ V. Liszt, *Gleiche Grundsätze*, p. 90ss.

¹¹¹ Delius, *Ausländische Strafurtheile*, p. 520, though he finally refuses this idea.

domestic sentence,¹¹² a mechanism that is still employed today in the absence of international treaties.

3.1.2.3 Individual's interest: *Ne bis in idem*

However, on the 7th of September 1883 in Munich, the Institut de Droit International famously claimed a very far-reaching construction of an international *ne bis in idem*: In Art. 12 of its resolutions¹¹³ it proposes that any foreign judgment preclude renewed proceedings on the same issue if the sentences have been served, excluding only some offenses, e.g. acts against the safety of the state and the like.¹¹⁴ It also petitioned for a recognition of acquittals in Art. 13.¹¹⁵ Art. 15 extended the effects of a foreign judgment so that it could serve as a basis for recidivism, i.e. for aggravated sentences for repeat offenders.¹¹⁶ Due to the importance of the matter the Institut de Droit International slightly amended these resolutions in 1950.

It took a long time until states voluntarily accepted this idea and introduced statutes or concluded treaties implementing this principle. In the 19th century, Belgium seems

¹¹² Cf. Meili, Internationales Strafrecht, p. 505; Grützer, Zwischenstaatliche Anerkennung, p. 352 admits that a state cannot consume another state's right to punish but believes this right should be given up to the practical advantages a recognition would bring along.

¹¹³ „Les peines prononcées par jugement régulier des tribunaux d'un Etat quelconque, même non compétent, mais dûment subies doivent empêcher toute poursuite dirigée à raison du même fait contre le coupable. Seraient exceptés, toutefois, les délits contre la sûreté des Etats et les délits mentionnés ci-dessus à l'article 8. Une peine subie seulement en partie, s'il n'y a pas eu remise du reste, n'entraverait pas la poursuite devant les tribunaux d'un autre pays. Cependant, dans ce cas, on offrira l'extradition même d'un national, lorsqu'il y a extradition entre les pays respectifs et que le coupable préfère l'extradition; excepté seulement les cas des crimes et délits contre la sûreté de l'Etat et ceux mentionnés, ci-dessus, à l'article 8. Toutes les fois qu'il y a lieu d'exercer de nouvelles poursuites après un jugement prononcé à l'étranger, on tiendra compte de la peine que le coupable a déjà subie du chef du même fait. [...]“

¹¹⁴ This last requirement is still very common.

¹¹⁵ „Les acquittements prononcés du chef d'insuffisance des preuves produites contre l'accusé seraient valables partout. De même, les grâces accordées par le souverain d'un pays ayant sous sa main le coupable. Les acquittements motivés par la non-criminalité du fait auraient même force que la loi du pays déclarant non punissable ce même fait. [...]“

¹¹⁶ „L'aggravation de la peine à raison de récidive, quand la condamnation antérieure est émanée d'un tribunal étranger, ne peut être appliquée qu'après examen préalable de l'infraction antérieure. Cependant, selon l'avis du tribunal, le dossier de l'instruction étrangère pourra suffire. Le tribunal, vu les circonstances et les doutes soulevés, pourra écarter souverainement la question d'aggravation à raison de récidive.“

to have been the first to take such an approach, even anticipating the Institut de Droit International.¹¹⁷

3.1.2.4 Execution of foreign sentences

What is striking about the 1883 resolutions of the Institut de Droit International is that Art. 14 explicitly opposes the execution of a foreign judgment outside of an international convention or a treaty between confederate states.¹¹⁸ But the execution of a foreign judgment can be very well compatible with the rights of the individual, and even conducive to it. For a foreign convict it is most often a great relief to be able to serve the sentence in his country of origin where he knows the language and mentality and probably has his social ties. In the light of resocialisation it is more reasonable to have a sentence served where the convict will be living afterwards. Sometimes, when a convict is living in a country other than the sentencing state, a sentence will be too short to justify the total break in the individual's life that must follow an extradition to serve a sanction.¹¹⁹ This is also the reason why the surrender procedure for sentences under the European Arrest Warrant sets down a four-months-threshold, cf. Art. 2 (1) of the framework decision. That the assumption of execution through the authorities of the state of residence can be desirable was already seen in the 19th century when a Saxon convict was, on his request and with the consent of the Saxon king, allowed by the Austrian ministry of justice to serve his sentence in Austria to save him the long journey back, although this was clearly contrary to Austrian statutory law.¹²⁰

At the same time, the recognition and enforcement of foreign sentences might help to avoid the different treatment of foreigners and nationals concerning conditional measures: If a country could be certain that its decisions to supervise a convict would

¹¹⁷ Cf. *Grützner*, NJW 1969, p. 346.

¹¹⁸ „L'exécution de la peine ne peut jamais avoir lieu hors du pays où le jugement est prononcé, sauf le cas d'une convention internationale ou conclue entre les membres d'un Etat formant un système fédératif.“

¹¹⁹ See *Maag-Wydler*, Vollstreckung ausländischer Straferkenntnisse, p. 40ss.

¹²⁰ Reported in *Lammasch*, Auslieferungspflicht und Asylrecht, p. 825 and p. 825s. nt 3.

be enforced abroad, it might more willingly release foreigners conditionally from prison which it does not do to an equal degree owing to the greater risk that they might abscond.¹²¹

On the other hand it can be more likely to agree on the execution of a foreign judgment than to make an own judgment: A crime is usually prosecuted and the offender sentenced in the state where the crime has been committed (*locus delicti commissi*). This is due to the fact that the public interest in the prosecution of a crime is most pertinent there. Thus, if the sentencing state is not the state where the sentence shall be served, it is more likely that the offender is convicted in the state where the crime has been committed and then surrendered to the other state who then enforces the foreign judgment. The alternative would be to surrender the person without a trial and then make the indictment and the trial in the other state ("vicarious administration of justice"), but since this state has usually not an own interest of equal weight in prosecuting a crime that has not been committed on its territory, it tends to leave the prosecution to the state where the crime has taken place and only assumes the enforcement of the sentence.

3.1.3 Recent developments

A more considerable level of activity concerning the recognition and enforcement of judgments set in at the end of the 1940s.¹²²

The recognition of a foreign judgment is not necessarily seen as a restriction of the sovereignty of the executing state. At least it is treated as unproblematic if this state has restrained its sovereignty voluntarily.¹²³ Moreover, the mutuality of recognition also ensures a wider enforcement area for domestic decisions.¹²⁴ Another idea that is put forward here is the international solidarity and cooperation that should

¹²¹ Grützner, NJW 1969, p. 347; Maag-Wydler, Vollstreckung ausländischer Straferkenntnisse, p. 42s.

¹²² Cf. Grützner, NJW 1969, p. 345.

¹²³ Maag-Wydler, Vollstreckung ausländischer Straferkenntnisse, p. 32.

¹²⁴ Oehler, Recognition, p. 618; *idem*, Internationales Strafrecht, p. 588; Grützner, NJW 1969, p. 352; Maag-Wydler, Vollstreckung ausländischer Straferkenntnisse, p. 32.

overcome nationalist concepts of sovereignty.¹²⁵

One milestone has been the 1948 Convention between Norway and Sweden that is the basis for the Nordic Cooperation model, often seen as exemplary. At the beginning it was limited to the recognition of fines. Recognition often begins with regard to fines since the problems concerning the execution are less poignant here.¹²⁶ even if the sentencing state has a completely different sanctioning system from the executing state, fines can relatively easily be transformed and, if necessary, reduced. Additionally, financial penalties are less drastic than custodial penalties and can more easily be executed despite different values and different substantive criminal laws. Therefore, the first EU measure that explicitly sets down an obligation to enforce final judgments is the framework decision on the mutual recognition of financial penalties.¹²⁷ Although the scope of its application is rather limited, its functioning is quite progressive. The dual criminality requirement is abolished to the same degree as in the framework decision on the European Arrest Warrant.

Other sorts of sanctions are executed mainly within the framework of the Council of Europe conventions¹²⁸ such as the Convention on the Transfer of Sentenced Persons¹²⁹ and, for other orders, the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds From Crime,¹³⁰ later complemented by the 1985 Schengen Agreement. The Convention on the Transfer of Sentenced Persons aims at the assumption of execution but constitutes no actual obligation of either the sentencing state or the country of origin of the convict to do anything more than “cooperate”. For a more effective system, action on the EU level became necessary.¹³¹ One of the major objections to the execution of foreign judgments

¹²⁵ Jescheck, 76 ZStW (1964), p.68s.

¹²⁶ See already *Delius*, *Ausländische Strafurtheile*, p. 517; *Lammasch*, *Auslieferungspflicht und Asylrecht*, p. 826, proposes this form of recognition for neighbouring states.

¹²⁷ 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties.

¹²⁸ For an overview see *Weyembergh*, in: *Kerchove/ead.* (eds.), *La reconnaissance mutuelle*, p. 28ss.

¹²⁹ ETS-No. 112.

¹³⁰ ETS-No. 141.

¹³¹ See below for some examples.

remains the fact that it is difficult to make the different sanctioning systems and enforcement practices mutually compatible.¹³²

The Convention also maintains, of course, the dual criminality requirement.¹³³ One thing that has to be mentioned in this context is the intricate problem that arises through this requirement. While a state might find it very difficult in constitutional terms to execute a sentence on a person without considering his acts as punishable, it can be of the utmost importance for that person to serve that sentence in his home country, especially if he faces a lengthy imprisonment.¹³⁴ This dilemma precludes any easy answer and has to be discussed elsewhere.¹³⁵

The *ne bis in idem*¹³⁶ has been established through Art. 54 of the Schengen Convention¹³⁷ implementing the 1985 Schengen Agreement and is incorporated into Art. 50 of the Charter of Fundamental Rights¹³⁸.

3.1.4 Conclusion

It can be seen from this that the mutual recognition of penal judgments is by no means a totally new idea. Before the 19th century, however, the execution of a foreign judgement was seen as contrary to a state's sovereignty and only very exceptionally assumed, usually due to a practical need. Other mechanisms that fulfilled similar functions were preferred. Only in the 19th century did theoretical concepts emerge that would allow for a more general approach, based both on state

¹³² Cf. Grützner, NJW 1969, p. 349.

¹³³ Cf. Ligeti, Strafrecht und strafrechtliche Zusammenarbeit, p. 175ss.

¹³⁴ Cf. Weyembergh, in: Kerchove/ead. (eds.), La reconnaissance mutuelle, p. 26.

¹³⁵ Cf. only Satzger, European Assumption of Enforcement, p. 407s.

¹³⁶ See below under 6.6; cf. also Satzger, Int. u. Europ. Strafrecht, p. 128ss.; Ligeti, Strafrecht und strafrechtliche Zusammenarbeit, p. 97ss.

¹³⁷ „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.“

¹³⁸ „No one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law.“

interests and individuals' rights. Since then, the academic debate has been going on so that there is now a rather clear system to classify potential effects of foreign penal judgements. In classical legal aid, the recognition (and eventual enforcement) of a judgement could have the following legal effects:

1. Negative effects

The negative effects of a foreign judgment are those that block a renewed prosecution in another country, most notably the principle of *ne bis in idem*.¹³⁹ A prior stage in this area was the reduction of a domestic penalty in case a penalty had already been served in another country.¹⁴⁰ A possible future development could take this idea further and lead to a preclusion of proceedings once investigations are started in another country, without waiting a final judgement.¹⁴¹

2. Positive effects

Positive effects of the recognition of a foreign judgment result mainly in the assumption of the enforcement, but can extend to all other effects that criminal judgments have in the sentencing state,¹⁴² such as supervisory measures after a conditional release, extra-criminal effects like the loss of public (e.g. election) or private (e.g. heritage) rights, being the basis for a revocation of a conditional release or for recidivism.¹⁴³

The problems concerning the recognition and enforcement of foreign judgments have been similar to those that are now discussed under the new principle of mutual recognition in judicial cooperation in criminal matters within the EU. For example, the negative effects of foreign judgments are nowadays fully taken into account by the

¹³⁹ See *Jescheck*, 76 ZStW (1964), p. 70; *Oehler*, Recognition, 609ss.; *idem*, Internationales Strafrecht, p. 573ss.; *Weyembergh*, in: *Kerchove/ead.* (eds.), La reconnaissance mutuelle, p. 26.

¹⁴⁰ See *Jescheck*, 76 ZStW (1964), p. 70.

¹⁴¹ Take for example the suggestions of the Working Group on a Programme for European Criminal Justice in the preamble thereof.

¹⁴² See *Oehler*, Internationales Strafrecht, p. 573; *Jescheck*, 76 ZStW (1964), p. 70 ss.; *Meili*, Internationales Strafrecht, p. 512ss. to older concepts.

¹⁴³ It can be assumed that statutes taking into account recidivism are becoming fewer and fewer.

provisions on *ne bis in idem*.¹⁴⁴ The positive effects of the recognition of foreign judgments are regulated mainly by the framework decision of 24 February 2005 „on the application of the principle of mutual recognition to financial penalties“,¹⁴⁵ the framework decision 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“¹⁴⁶ and the framework decision of 24 July 2008 „on taking account of convictions in the Member States of the European Union in the course of new criminal proceedings“. ¹⁴⁷ The scope of the former two legislative measures is an enforcement of foreign penal judgments, the latter has the aim of giving previous foreign convictions all other effects which sentences may have, equally to the effects of previous national convictions. The outcome of this legislation is the mentioned positive effect of mutual recognition: all effects a criminal judgment may have are taken over by the other Member State.

This may be to the advantage as well as to the disadvantage of the accused: Under Article 3 of the framework decision of 24 July 2008, Member States must ensure that previous convictions in other Member States are „taken into account“. This rather vague wording leaves many possibilities of implementation as well as application by the courts. According to the law of the sentencing state, the former conviction may be a reason to raise the sentence because the offender has already shown disrespect to criminal norms before. But it may also give reasons to impose a lower total sentence if the applicable law does not simply add the sentences in case of multiple convictions but reduces the total amount proportionally.

¹⁴⁴ Art. 54 CISA; Art. 50 Charter of Fundamental Rights; framework decision 2009/948/JHA of 30 November 2009 on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings (OJ L 328/42 of 15.12.2009).

¹⁴⁵ 2005/214/JHA (OJ L 76/16 of 22.03.2005).

¹⁴⁶ 2008/909/JHA (OJ L 327/27 of 05.12.2008).

¹⁴⁷ 2008/675/JHA (OJ L 220/32 of 15.08.2008).

3.2 The spillover of the principle of mutual recognition from the internal market logic

Mutual recognition did thus exist in traditional legal aid, though the term was used mainly for final sentences and not for the investigative stages or for extradition. The question remains, then, of what is meant when mutual recognition in EU judicial cooperation is linked to mutual recognition in the internal market rather than to mutual recognition in legal aid. In order to understand this, it is important to look briefly at how mutual recognition operates in the internal market. This will show where the parallels to judicial cooperation are. After that, I will demonstrate how the analogy is flawed. This will bring us to the reasons of why the parallel was drawn at all and what impact it has.

The internal market has been the core project of European integration for decades. After it became clear in the 1950s that a political union could not be realised, all efforts were concentrated on creating an economic union that promoted prosperity and increased wealth in Europe, thereby making the European countries dependent on each other and reducing the possibilities of warfare.

For the purpose of this economic integration, mutual recognition was not the first instrument that the legislator availed himself of. Rather, concepts of a more substantive nature were in its focus, like the abolition of customs duties and non-tariff barriers as well as the harmonisation of legal and technical standards. However, these measures proved to be complex and time-consuming. The economic integration moved at a slow pace and the idea of one single European economy seemed without reach in the medium term. Harmonisation of standards was still a complex legislative procedure that could not (and was not necessarily intended to) keep up with the further integration of the internal market. At this stage, mutual recognition came in as a kind of catalyst. Its basic functioning was a shift from a more substantive to a formalistic approach. There should no longer be the need to set common standards and harmonise market conditions, but Member States should be obliged to recognise each other's domestic standards instead.

This principle of mutual recognition was mainly put forward by the Court of Justice in

its famous rulings in *Dassonville*,¹⁴⁸ *Cassis de Dijon*,¹⁴⁹ *Brasserie du Pêcheur*¹⁵⁰ and *Keck*¹⁵¹. All these decisions further developed the free movement of goods, which played a central role in the internal market as the most noticeable market freedom. In the *Dassonville*-judgment, a criminal law case, the Court developed the formula which defined the „measure of equivalent effect to a quantitative restriction“ (Art. 30 TEC / Art. 34 TFEU) as „all trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade“. This very wide definition therefore comprises every kind of legislative activity with any remote effect on trade. In its subsequent *Cassis*-judgment, this line of reasoning was further developed and the Court set down in how far product standards required by national laws might be justified. The result to barriers to trade was that disparities between national laws on product standards could not, as a rule, prevent products legally produced and marketed in one Member State from being marketed in another Member State. Exceptions were made only for reasons of taxation, public health, consumer protection, and later, in the *Keck*-decision, for selling arrangements. The result paved the way for a free circulation of goods based on the country of origin principle.

The jurisdiction of the ECJ thus brought forward the main ideas of economic integration: Market actors should not be confined by national borders, but only focus on the most efficient way of producing and marketing goods. Mutual recognition played an important role during this process, although its importance diminished with continuing harmonisation. The *Cassis*-rule of mutual recognition was readily taken up by the Commission in its White Paper on “Completing the internal market” in 1985.¹⁵² The new strategy was to introduce a specific balance between a system of mutual recognition and harmonisation.¹⁵³ It was taken further by the Single European Act

¹⁴⁸ ECJ of 11 July 1974, C-8/74; for the importance of these rulings in the present context cf. also *Gleß*, 116 ZStW (2004), p. 354ss.

¹⁴⁹ ECJ of 20 February 1979, C-120/78; a narrower interpretation of *Cassis* is given by *Armstrong*, in: *Barnard/Scott* (eds.), p. 233ss.

¹⁵⁰ ECJ of 12 March 1987, C-178/84.

¹⁵¹ ECJ of 24 November 1993, C-267/91 and C-268/91.

¹⁵² COM/1985/310fin.; see *Armstrong*, in: *Barnard/Scott* (eds.), p. 226s.

¹⁵³ Para. 63, 65 and 77ss. of the White Paper; *Armstrong*, in: *Barnard/Scott* (eds.), p. 227.

through the introduction of Art. 100b(1)(2) TEC whereby the Council could declare that the regulation of one Member State must be recognised as equivalent in another. The new regime of mutual recognition was generally perceived to be a great success. It was much faster than to wait for relevant harmonising measures in the areas concerned and it seemed to work, if not quite as well as harmonisation. However, in practice mutual recognition always remained just a corollary to harmonisation. It was mainly important as an interim concept before relevant harmonisation entered into force, because it became obvious that harmonisation operated more smoothly. In the Amsterdam treaty, this above-mentioned norm was therefore abolished. As of 2007, 75% of the internal market trade volume took place in harmonised areas, only 25% was on the basis of mutual recognition.¹⁵⁴

This practical development highlights the dilemma of mutual recognition. Mutual recognition is often chosen as the preferred mode of integration when forms of positive integration such as harmonisation are unsuccessful because Member States are not willing to move ahead collectively. It is easier for Member States to agree on forms of negative integration and accept other states' rules than to give up their own regulatory system altogether in favour of common standards.¹⁵⁵ Yet, mutual recognition as a mechanism is itself dependent on trust and solidarity and therefore needs to be complemented by a certain degree of harmonisation. So when mutual recognition is presented as a way to preserve diversity and leave national sovereignty untouched, this is only partially true, for first of all mutual recognition as a mechanism has a great deal of influence on regulatory systems of sovereign states, and secondly it is often the beginning of harmonising attempts.¹⁵⁶

Still, the success of mutual recognition had its effects on many other areas of law. Within the internal market, the White Paper already enlarged the scope of the

¹⁵⁴ Report of the European Parliament on the proposal for a regulation of the European Parliament and of the Council laying down procedures relating to the application of certain national technical rules to products lawfully marketed in another Member State and repealing decision, 3052/95/EC of 4.12.2007, A6-0489/2007, p. 45.

¹⁵⁵ *Sievers*, in: *Guild / Geyer* (eds.), p. 113; cf. also *Scharpf*, *Governing in Europe*, p. 43ss. for the asymmetry in favour of negative integration concerning the relation of competition frameworks to market correction through regulatory standards.

¹⁵⁶ Cf. also *Maduro*, 14 JEPP (2007), p. 818s.

“principle” of mutual recognition.¹⁵⁷

Later, the same approach was taken to such diverging areas as the recognition of professional qualifications¹⁵⁸ or expulsion decisions in immigration law.¹⁵⁹ This is interesting with regard to the relation of mutual recognition to harmonisation. For, when the recognition of professional qualifications was introduced, there had been hardly any harmonisation in this area. The same was true for immigration law.

Mutual recognition in civil matters

Strangely enough, mutual recognition in criminal matters is rarely likened to mutual recognition in civil matters,¹⁶⁰ just as mutual recognition in civil matters is not linked to the internal market logic to the same degree. This is particularly surprising because the Tampere European Council established the principle of mutual recognition as a corner stone for the areas of criminal and civil law at the same time. While this was regarded as a change of paradigm in criminal matters, the debate in civil matters was not comparable.¹⁶¹ Since mutual recognition had long been realised there, the terminology itself did not seem revolutionary; also, since civil law cooperation traditionally operates in a rather distinct sphere,¹⁶² it might not have been influenced as much by the debate in criminal law cooperation.

Mutual recognition of decisions in civil matters has a considerably longer tradition than mutual recognition in criminal matters. While states were very reluctant to give up their *ius puniendi* to another state, only private rights are at stake in civil proceedings. Treaties dealing with recognition in civil matters were therefore not infrequent. The 1968 Brussels Convention dealt with the recognition and

¹⁵⁷ At para. 79.

¹⁵⁸ Directive 89/48/EEC on a general system for the recognition of higher-education diplomas OJ 1989, L 19/16 and now directive 2005/36/EC; see *Armstrong*, in: *Barnard/Scott* (eds.), p. 252ss.; *Peers*, 41 CMLRev. (2004), p. 19.

¹⁵⁹ Directive 2001/40/EC of 28 May 2001 on the mutual recognition of decisions on the expulsion of third country nationals (OJ L 149/34 of 02.06.2001).

¹⁶⁰ See however *Peers*, 41 CMLRev. (2004), p. 20s.

¹⁶¹ Cf., however, *Mansel*, 70 *RabelsZ* (2006), p. 651 for a comprehensive debate.

¹⁶² Cf. e.g. *Walker*, *Odyssey*, p. 8 fn. 14.

enforcement of judgements extensively.¹⁶³ When it was largely supplanted by the Brussels I Regulation in 2000,¹⁶⁴ only few changes were made as to its content. The only reference to the dynamics of the internal market is found in the preamble. Recital 10 refers to the “free movement of judgments” in a specific case, and, if this is accepted as internal market language at all, mutual trust is given as a reason for automatic recognition and the narrow scope of the *exequatur*.

The link of cooperation in civil matters with the internal market becomes clear in Art. 81(2) TFEU (and even more so in ex-Art. 65 TEC). It sets out that measures of recognition and enforcement of decisions are to be adopted “particularly when necessary for the proper functioning of the internal market”. This makes sense, since judgments in civil matters are directly concerned with market freedoms. To regard a judgement in civil matters as subject to “free circulation”, so reiterating its resemblance to a product, seems not so far-fetched. There is a remote affinity to products, because cases in civil matters are subject to the principle of party disposition.¹⁶⁵ In civil procedure, parties are free to present their case to the court or end a trial, and therefore take an active role in the creation of a judgment. Still, the connection with the internal market has not led to such a seeming revolution in civil matters, even though a new regime of cooperation would be a lot easier to institute there. Even before mutual recognition became an internal market concept, there was harmonisation concerning jurisdiction, which facilitates recognition a great deal. Still, however, in cooperation measures in civil law there are a lot of exceptions, particularly a public policy exception, that, despite many attempts,¹⁶⁶ has not yet been abolished in the more far-reaching of the measures.

¹⁶³ Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters.

¹⁶⁴ Regulation 44/2001/EC of 22 December 2000, entry into force on 1 March 2002.

¹⁶⁵ Private law, not public law: see *Stessens*, in: *Kerchove/Weyembergh*, *La reconnaissance mutuelle*, p. 91, 97.

¹⁶⁶ Commission Communication and Proposal of 26 November 1997, COM/1997/609fin., p. 12, 36; Draft programme of measures for implementation of the principle of mutual recognition of decisions in civil and commercial matters, OJ C 12/1 of 15.01.2001, p. 5; ECJ of 11 May 2000, C-38/98: to be construed narrowly.

Mutual recognition in criminal matters

As outlined above, mutual recognition as a principle, not just as a factual occurrence, and the link to the internal market, were introduced to facilitate lengthy and complicated proceedings of classical legal aid in criminal matters. We find this idea recurring in literature. As early as 1991, for example, *Sieber* proposed to take on the idea of mutual recognition, which he regarded as a deregulation of the internal market, and apply it to criminal matters concerning the free movement of a European search warrant.¹⁶⁷

At the Cardiff European Council in 1998, the change of paradigm was not yet apparent. All that was asked for was that the Council identify “the scope for greater mutual recognition of decisions of each others’ courts”.¹⁶⁸ The ensuing Vienna Action Plan¹⁶⁹ “on how best to implement the provisions of the Treaty of Amsterdam on an area of freedom, security and justice” repeated this idea, but it is clear by the measures proposed (mainly to ratify the relevant conventions) that there was still no idea of a new system. Mutual recognition seems to be only one part of judicial cooperation, and by no means pivotal to the measures proposed.¹⁷⁰ On the contrary, it can be seen that mutual recognition is understood in a narrow way. Many of the proposed measures that are not linked with mutual recognition would now be regarded as prototypical fields of application for the principle of mutual recognition, for example the facilitation of extradition procedures. The subsequent Vienna European Council only acknowledged mutual recognition to the extent that it “urges the Council to start immediately with the implementation of the 2-year priorities”¹⁷¹ of the Action Plan, to which mutual recognition belongs. However, these priorities also comprise the implementation of treaties on legal assistance in- and outside of the TEU framework.

¹⁶⁷ *Sieber*, 103 ZStW (1991), p. 963.

¹⁶⁸ Para. 39 of the Presidency Conclusions; see *Mitsilegas*, 43 CMLRev. (2006), p. 1278s.; *Peers*, 41 CMLRev. (2004), p. 8s.

¹⁶⁹ OJ C 19/1 of 23.01.1999.

¹⁷⁰ Para. 45 of the Action Plan.

¹⁷¹ Para. 83 of the Presidency Conclusions.

It is the special European Council of Tampere that made a first step towards introducing mutual recognition as a new paradigm.¹⁷² It starts with transforming mutual recognition into a legal concept. So, for the first time in the official European documents mutual recognition was called the “principle” of mutual recognition. This change in language also denotes a breach with mutual recognition in the tradition of mutual legal assistance. First, a principle endorses quite different associations. Secondly, it is in the internal market that mutual recognition had begun to be commonly called a “principle”.¹⁷³ This understanding was alien to the terminology of judicial cooperation in criminal matters. Consequently, we already find the idea of abolishing extradition for a procedure of transfer, and under the heading of mutual recognition.¹⁷⁴ Additionally, it enlarges the scope to encompass more than just judgments. Other judicial decisions are to be recognised as well¹⁷⁵ and the principle is also linked to the admissibility of evidence: “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”.¹⁷⁶ Though the range of the idea is limited, this is more than just internal market language; this is internal market logic.

If one keeps in mind the specific dynamic which mutual recognition has given to the internal market, it is understandable that a similar catalyst was sought for cooperation in criminal matters as well. And indeed there are several parallels between internal market cooperation and cooperation in criminal proceedings which allow such a transposition of the principle of mutual recognition to criminal matters. The main similarity lies in the fact that different actors from different national legal systems interact in a larger space and can be hampered by differing regulatory standards. In transnational cases with pieces of evidence located in different states the procedural measures of criminal investigations, like searches, questionings, wire tapping and DNA analysis, sometimes have to take place in more than one

¹⁷² See above.

¹⁷³ As early as in the SEA, cf. above.

¹⁷⁴ At Para. 35 of the Presidency Conclusions.

¹⁷⁵ Cf. Para. 33 of the Presidency Conclusions.

¹⁷⁶ At Para. 36 of the Presidency Conclusions.

jurisdiction, bringing prosecutors and judges in the position to examine the enforceability of these measures and the admissibility in criminal trials. The idea of mutually recognising evidence was therefore one of the first applications of the principle of mutual recognition in criminal matters.¹⁷⁷ I will deal with this more in depth in the fifth chapter.¹⁷⁸ Likewise, the concept of mutual recognition was extended to the recognition of final sentences.¹⁷⁹

This kind of transposition of a legal concept from one area to another is not unjustified in the outset.¹⁸⁰ Similar to the internal market, different national standards of criminal procedure often impede a closer cooperation. Mutual recognition is once more regarded as a means to overcome these differences by simply accepting – recognising – the other Member States' different rules on criminal procedure, without the need to harmonise them on the European level; it is supposed to allow for diversity and respect sovereignty in an area where sovereignty seems to be even more important to Member States. But again, such a form of cooperation requires a sufficient amount of trust between the actors. I will treat this issue more extensively in the fourth chapter.¹⁸¹ Despite decades of cooperation in the EU, the differences between the Member States' systems of criminal justice are still much greater than the differences between their economic systems. There are many intrinsic factors like national traditions, criminal policy and police and judicial organisation, which are so heterogeneous in Europe that mutual recognition without any harmonisation quickly reaches its limits.

Moreover, the analogy between cooperation in the internal market and cooperation in criminal matters is flawed for a number of reasons. The main difference lies in the overall objective envisaged by the two forms of cooperation. Mutual recognition of products is already a manifestation of the goal of free trade. Mutual recognition in

¹⁷⁷ Tampere Presidency Conclusions of 15./16. October 1999, para 36, cited *supra* in nt. ...; Green Paper on criminal-law protection of the financial interests of the Community and the establishment of a European Prosecutor, COM/2001/715fin., p. 58s.

¹⁷⁸ *Infra*, p. ... (5.2)

¹⁷⁹ *Supra*, p. ...

¹⁸⁰ Cf. *Mitsilegas*, 43 CMLRev. (2006), p. 1281.

¹⁸¹ *Infra*, p. ...

criminal matters, on the other hand, is not an end in itself but just a means to enhance criminal prosecution. But Member States do not share the same fundamental beliefs on criminalisation as they share the concept of free markets. The examples of criminalisation of abortion in Ireland and decriminalization of certain forms of cannabis in the Netherlands and in the Czech Republic may suffice to illustrate the problem of differences that remain.

The market analogy is also inapplicable from a structural point of view. In the internal market, the states principally only provide for a legal framework and leave the activity to the various market actors, who are private subjects. In criminal law, however, state authorities themselves take the active part in cooperation, because public officials “create the products“. A mutual recognition of their actions thus raises the problem of national sovereignty in a much more acute manner than does the liberalisation of trade. Moreover, judicial decisions, especially at a pre-sentencing stage, do not compare with an existing product that may be subject to free movement.¹⁸² After all, a judicial decision or order, and a piece of evidence, are only existent through law and within a certain legal framework.¹⁸³ There is nothing factual that could be separated from the recognition of foreign legal standards and then circulate freely.

Additionally, the internal market principle of mutual recognition has as its core the promotion of freedom through recognition. Criminal law on the other hand is mainly restrictive of individuals' rights.¹⁸⁴ By instituting the principle of mutual recognition, states ensure that they can put through their *ius puniendi* Europe-wide – either as manifest in a final judgement, or in the course of enforcing it, as with pre-trial orders.¹⁸⁵ Admittedly, the recognition of judgments or pre-trial orders can also be conducive to individuals' rights. Such is the case when, for example, an acquittal is recognised or a final judgement is recognised not for its enforcement, but in order to prevent renewed proceedings in another Member State. Similarly, evidence from

¹⁸² Cf. *Gleß*, 116 ZStW (2004), p. 365s.; *ead.*, 115 ZStW (2003), p. 136ss.; *Satzger*, StV Beil. 2/2003, p. 142.

¹⁸³ Cf. *Lavenex*, 14 JEPP (2007), p. 762; *Peers*, 41 CMLRev. (2004), p. 5, 23.

¹⁸⁴ Cf. *Mitsilegas*, 43 CMLRev. (2006), p. 1280s.

¹⁸⁵ For pre-trial orders see *Barbe*, in: *Kerchove/Weyembergh* (eds.), *La reconnaissance mutuelle*, p. 81, 84ss.; *Schutte*, *ibid.*, p. 101; *Jones*, *ibid.*, p. 107, 112; *Kerchove*, *ibid.*, p. 113ss.

another Member State that has to be admitted might be extenuating. This, however, does not alter the basic position. It is merely the corollary of the restrictive nature of criminal law that a state may also not make use of its *ius puniendi*. The individual itself does not gain rights by this. He cannot institute proceedings against himself in one Member State so as to prevent prosecution elsewhere through a prior decision, or have his impunity recognised. Nor can he force states to cooperate in the obtaining of extenuating evidence. Unlike in civil law, the proceeding is not within his disposition. What is more, the freedoms within the internal market are an aim in themselves. Instead, the benefits that an individual might derive from mutual recognition are always ancillary to a criminal proceeding.

Finally, the outcome is very different. When diverging product standards or professional qualifications are recognised, this is mainly relevant for the individuals to whom these freedoms are conferred. Customers, who are not convinced of these, can in the end still decide not to accept a certain product, or avoid a certain professional for that reason. That is to say, the law operates within a framework of individual choice, unlike in criminal matters.

What then was the point of linking mutual recognition in criminal matters to the principle of mutual recognition within the internal market? Clearly, the principle of mutual recognition in criminal matters is not the same as within the internal market and does not function in the same way. Yet, it is related to it and has brought about substantial changes to judicial cooperation in criminal matters. On the other hand, the principle of mutual recognition cannot deny a strong link with principles of legal aid. This is what I will show now. The answers to this will finally bring us to the function of the introduction of the principle of mutual recognition.

3.3 A “Copernican Revolution”?

When one looks at the debate, it becomes clear that the main aim was to accelerate legal aid and make it more efficient and predictable. Most approaches that were used to realize these goals were then seen as characteristic features of the principle of mutual recognition.

Classical legal aid was so lengthy for different reasons. First, it was based on a system of requests that, in theory, had to be transmitted via the diplomatic channel.¹⁸⁶ More importantly, the granting of a request of legal aid is still a sovereign political act.

Since there was no legal framework for legal aid, through long-standing practice a couple of principles developed for political reasons. These, in their turn, often complicated the procedure of legal aid and seem slightly anachronistic. Among these principles is, first of all, the principle of reciprocity. It has its most important application in areas where there is no treaty for legal aid. It means that a state will only grant a request when the requesting state guarantees that in the future it would grant a similar request made by the requested state.

The principle of reciprocity developed into the requirement of dual criminality. This means that a state will only assist another state when the act in question also constitutes an offence under its own law. The idea behind this was that only such a hypothetical reversion of the facts could guarantee full reciprocity.¹⁸⁷ Dual criminality has been regarded as a major obstacle for effective judicial cooperation. It has also been criticized for the ideas it is founded on. This is because it seems wrong that a state should not be able to prosecute a crime only because the suspect has fled to a state that does not penalise the act, or because evidence is by chance located there.

The principle of mutual recognition is supposed to overcome all of these obstacles in time. It is to replace classical legal aid. In fact, many of the above-mentioned characteristics of legal aid are said to be no longer compatible with a regime of mutual recognition.

¹⁸⁶ There were already provisions on the acceleration in the Council of Europe Conventions, see e.g. Art. 20 of the European Convention on the Punishment of Road Traffic Offences of 30 November 1964 (ETS No. 52), which lifts the need for an authentication of documents.

¹⁸⁷ In doing so, the dual criminality requirement brought along considerable advantages for the suspect. It protected his legal positions and is therefore often invoked as a procedural safeguard. The history of this requirement is often held against this line of reasoning. However, the meaning of a legal concept is subject to change and not bound by its history. The more the individual acquires a rights-based position in legal aid, especially in extradition, the more will the classical concepts of legal aid be subject to a new interpretation.

The means that are used to this end are rather obvious. One way to speed up cooperation was to introduce strict time limits for the execution of requests.¹⁸⁸ Another way to enhance the effectiveness is to abolish many of the grounds for refusal. It is considered to be vital that no public policy exception should stand in the way of immediate recognition, not even a European one. The dual criminality requirement was to be curtailed. The request system is to be abolished altogether. This is first of all manifest in a change of language (“issuing” and “executing state” instead of “requesting” and “requested state”).¹⁸⁹ But it also has a strong content, as the political stage is done away with. The extradition – or surrender – of nationals has been introduced.

However, the picture painted of classical legal aid is merely theoretical. Some of these obstacles existed only in areas without treaties. Others were only applied in extradition proceedings, as these are (until now) the most far-reaching form of judicial cooperation. And when we look at the newer treaties on legal aid, we see that almost all of the above-mentioned approaches to overcome these obstacles were at least attempted. Most treaties on legal aid contain an obligation to execute a request, for example Art. 1(1) of the European Convention on Mutual Assistance in Criminal Matters¹⁹⁰, the mother convention of 1959. Its scope was further enlarged by its 1978 protocol.¹⁹¹ The EU convention of 29 May 2000 on mutual legal assistance in criminal matters,¹⁹² among other things, facilitates the forms and procedures of legal aid quite considerably by introducing a sort of time-limit set by the requesting state, establishing direct contact and requiring the requested states to comply with formalities indicated by the requesting state.

The development is similar in extradition law. The mother convention of 1957¹⁹³ is not yet very far-reaching, but its protocols that wanted to go beyond this level have not

¹⁸⁸ Cf. e.g. the time limits for the execution of a European Arrest Warrant according to Art. 17 of the framework decision (2002/584/JHA, OJ L190/1 of 18.07.2002).

¹⁸⁹ See also below.

¹⁹⁰ ETS No. 30.

¹⁹¹ ETS No. 99.

¹⁹² OJ C 197 of 12.07.2000.

¹⁹³ ETS No. 24.

been ratified by all states. To overcome these problems, the CISA introduced a simplified procedure for extradition.¹⁹⁴ The 1995 Convention on simplified extradition procedure between the Member States of the European Union¹⁹⁵ took this idea a lot further. It made extradition possible with very few formalities and in a very strict time frame. Due to the low number of ratifications, it was not applied Union-wide. The same fate faced the 1996 Convention relating to extradition between the Member States of the European Union.¹⁹⁶ It already set down that, in principle, the extradition of nationals could not be refused. It further enlarged the scope of application and abandoned the political crimes exception. Additionally, it further facilitated proceedings. Extradition requests could now be handled by the competent authorities via fax. These are just a few examples. In reality, almost every concept connected with the principle of mutual recognition can be found in some envisaged treaty.

The main problem in facilitating legal aid, then, was not that there were no legal instruments designed to achieve this. Rather, too few states ratified the treaties so that they could not enter into force, or only after a considerable lapse of time. Sometimes, the problem lay at an earlier stage and no consent could be reached. The reasons were mainly connected with the fear of giving up sovereignty. It is peculiar that, at a time when simple treaties on legal aid, or conventions within the EU framework, could not be ratified, the principle of mutual recognition was endorsed and framework decisions implementing it were - relatively - successfully adopted. For framework decisions required unanimity as well. And it does not seem that a framework decision or the principle of mutual recognition are less infringing on Member States' sovereignty, rather the opposite. So objectively, there was no reason to expect that framework decisions based on mutual recognition would answer the purpose; in fact, the development is almost paradoxical. Apparently, the principle of mutual recognition was seen as a way out of a deadlock situation because of its novelty. When classical mechanisms could not succeed anymore, a new dynamic like that of the internal market promised a solution. The central role that mutual

¹⁹⁴ Art. 66 CISA.

¹⁹⁵ OJ C 78/1 of 30.03.1995.

¹⁹⁶ OJ C 313/11 of 27.09.1996.

recognition acquired was thus not linked to its content, but rather to its aspirational potential.

While mutual recognition was always an issue in judicial cooperation, it was never such a central point. But does this make the introduction of the principle of mutual recognition a “Copernican revolution”¹⁹⁷ of judicial cooperation?

Certainly, it is a concept that is all-encompassing, because as a “principle” or a regime it does not just apply to judicial decisions, as mutual recognition in the former, more narrow sense. It also purports to include orders, standards of evidence gathering, and much more. In a legal sense, however, what it attempts is not completely new. This corresponds with the perception of practitioners that instruments based on mutual recognition are merely a further development of the classical scheme of judicial cooperation.¹⁹⁸ The original Conventions were not per se inapt to address the problems of legal aid. It is rather the peculiar dynamic of doing all at once and differently that helped to overcome the slow progress of legal aid. We will come back to this aspect of the functions of the principle of mutual recognition later.

The attempt to establish a new system for judicial cooperation through mutual recognition could not succeed without friction, as is evident in the implementation of the framework decision on the European Arrest Warrant. Although the implementation is generally regarded as successful, it is also an outstanding example of the practical compromises that the integration in the sphere of criminal law necessitates. Many national implementing laws fall quite clearly short of the requirements of the framework decision, sometimes more or less openly, sometimes

¹⁹⁷ The Parliament in the German version of a draft report on an Initiative by the Governments of the French Republic, the Kingdom of Sweden and the Kingdom of Belgium for the adoption by the Council of a framework decision on the execution in the European Union of orders freezing assets or evidence (5126/2001 – C5-0055/2001 – 2001/08043(CNS)), Committee on Citizens' Freedoms and Rights, Justice and Home Affairs, Rapporteur: Luís Marinho, VORLÄUFIG 2001/0803(CNS) REV 1 on p. 16; not in the English version, available at <http://www.europarl.europa.eu/meetdocs/committees/libe/20010710/443040DE.pdf>; AG Colomer in para. 41 of his Opinion in *Advocaten voor de Wereld* in the original Spanish version, also in the language of the Case (Dutch), not in English (C-303/05).

¹⁹⁸ See *Wahl*, Perception, p. 121.

by means of complex and confusing legal constructions.¹⁹⁹ Legal practice will have to find ways to cope with contradictions and integrate the national approaches. Considering the historical role of extradition and the pace at which the new framework decision was implemented, all this seems hardly surprising.

From a legal point of view, mutual recognition therefore did not lead to a fundamentally new system of cooperation. And ironically the term “mutual recognition” that was supposed to lead out of the problems of classical legal aid paved the way back into it to some degree.

In the internal market logic, mutual recognition is associated with Europe-wide recognition of certain standards. In legal aid, however, mutuality of recognition is a means to ensure reciprocity. The principle of reciprocity shows that extradition was always subject to reasonings of international politics rather than principles of law. That these reasonings are not overcome, and seemingly even reinforced through the mutual recognition regime can be seen by the readiness with which national actors use the terminology to reintroduce principles of classical extradition law.

A very striking example of this is the Spanish reaction that followed the famous *Darkazanli* decision of the German Constitutional Court.

Spanish Authorities had issued a European Arrest Warrant for *Darkazanli*, a German-Syrian national living in Germany. The execution was granted by the Hamburg Appellate Court²⁰⁰ and *Darkazanli* appealed to the Constitutional Court, arguing a breach of his constitutional rights through both the framework decision itself and the German implementing law. The Constitutional Court evaded the complex and controversial question of the relation between national constitutional rights and European framework decisions, and tried to argue as narrowly as possible, restraining itself to the implementing law and German nationals. It held that law to be invalid because it did not use the leeways left open by the framework decision in a way compatible with the German Constitution. The German Constitution precludes

¹⁹⁹ The Commission still sees major shortcomings in its report of 11 April 2011 on the implementation since 2007, COM/2011/175fin., p. 5.

²⁰⁰ Decision of the Oberlandesgericht Hamburg of 23 November 2004, Ausl 28/03.

the extradition of Germans, save to other EU countries or international courts under certain conditions (Art. 16(2)). The Court held that, in order to do justice to the special bond of citizens to their home country, the exceptions were to be exercised with caution. It then went on to differentiate between three typical situations based on the territory where the alleged offense had taken place and the necessary solutions. Since *Darkazanli* had acted mainly in Germany, but the law did not take this into account, it was declared void on the 18th July 2005.²⁰¹

Only three days later, on the 21st July, the *Audiencia Nacional* took a measure that seemed almost retaliatory.²⁰² Following a peculiar procedure of non-contentious decision under Spanish law, it announced that in the future it would probably treat all European Arrest Warrants coming from German Courts as classical requests for extradition (this first part was not followed strictly later on) and that it would not extradite or surrender Spanish nationals to Germany. The exact course to take was made dependant on how the reasoning of the German Constitutional Court would read. The Audiencia Nacional would then act exactly inversely, in order to secure the principle of reciprocity (Art. 13.3 of the Spanish Constitution) and the mutuality. This first decision was complemented by another one on 20th September 2005. Other Member States' courts threatened similar measures.²⁰³

At first glance, the step that the Spanish court took seems a logical reaction.²⁰⁴ After all, if one country does not recognise the European Arrest Warrant of another country, how can that country be expected to follow the path of “mutual” recognition? Clearly, Germany was in breach of its obligation to implement the framework decision.

However, the “mutual” recognition regime was never meant to be mutual, but universal. This is first of all true from a formalistic point of view. A framework decision

²⁰¹ Judgment of the Bundesverfassungsgericht of 18 July 2005, 2 BvR 2236/04.

²⁰² Cf. *Fichera*, 15 ELJ (2009), p. 87.

²⁰³ Cf. for Greece *Fabry*, European Arrest Warrant, p. 25.

²⁰⁴ Cf. also the reaction of the House of Lords Select Committee on European Union, minutes of evidence of 18 January 2006, available at <http://www.publications.parliament.uk/pa/ld200506/ldselect/ldcom/156/6011805.htm>.

by its very nature imposes independent obligations on all Member States to comply with it. If one Member State is in breach of its obligations, the obligations of the other Member States do not cease. All other approaches would defy the nature of a framework decision and classify it along with any treaty under international law where obligations are mutual. Even if a framework decision should be an international treaty, as is sometimes claimed, it would still be subject to the particularities of EU law. The obligation to transpose EU law is never interdependent.

More importantly, from a substantive point of view too, mutual recognition was never meant to be just “mutual” or reciprocal. It was a term introduced to trigger the development of a European judicial sphere where certain acts have universal validity. The long history of mutual recognition in judicial aid and its function of guaranteeing reciprocity were not taken into consideration. Thus, while purporting to tie the area of judicial cooperation in criminal matters to the internal market conceptually, the term “mutual recognition” makes it easy for Member States to revert to conventional judicial cooperation.

The legality of a similar course of action is now the object of a pending reference for a preliminary ruling.²⁰⁵ The Romanian Curtea de Apel Constanta referred, among others, the question of whether the executing state may refuse surrender on the ground that the issuing state has incorrectly transposed the framework decision on the European Arrest Warrant “in the sense that the condition of reciprocity has not been satisfied”.²⁰⁶ For the above-mentioned reasons concerning the functioning of mutual recognition, I would have considered it an *acte clair* that this is not permissible.

3.4 The functions of the principle of mutual recognition

If this is the ambiguous background picture, how can we specify the functions of the principle of mutual recognition?

²⁰⁵ ECJ, reference for a preliminary ruling, lodged on 27 July 2011, C-396/11 - *Radu*.

²⁰⁶ OJ C 282/14 and 282/15 of 24.09.2011, question 5.

There is, first of all, the legal function of the principle of mutual recognition. It was meant to accelerate and juridify judicial cooperation. By overcoming classical requirements for legal aid and classical procedures, and introducing strict time limits, this worked out successfully. Additionally, the abolition of the political stage and political grounds for refusal did not just speed up procedures, it also helped to set them within a strictly legal framework.

Although this was not wholly impossible to achieve through treaties in classical legal aid, it was very difficult to attain there. Certainly, the introduction of a completely new governing concept helped to take a wider approach and attempt to do away with all obstacles to efficient cooperation at once. Such a dynamic would have been very difficult to achieve through continuing the negotiations on classical treaties that were perceived to be a failure.

This is where the political function comes in. At the time, it was a lot easier to change the framework of legal aid by adopting a concept that seemed to be completely new in this area. Because of the link to the internal market, the principle of mutual recognition brought along the promise of success and on-going integration. It helped to place the Area of Freedom, Security and Justice at the core of European integration and close to other areas, because it serves as a structural principle for a general coherence of EU law.²⁰⁷ All this has had a huge impact on legal practice, so that in the end, the principle of mutual recognition seems indeed to be quite different from mutual recognition in the classical sense. The new dynamic caused mutual recognition to be regarded as a real principle so that in the future it may be used as an argument against national laws, even if there is no specific rule that is violated. It has also brought into judicial cooperation other implications, for example the idea of mutual trust.

Finally, if it has not built a completely new system of judicial cooperation as such, it has at least created a whole new vocabulary for it. A new language and terminology, new concepts and forms, have such a great influence in law that they in time shape the content of the law, even if the starting point was not so different from the

²⁰⁷ Cf. also *ManseI*, 70 *RabelsZ* (2006), p. 682.

traditional understanding of the area.

3.5 The role of concepts and forms in European criminal policy

The importance of new policy concepts and symbols for the evolution of new legal and theoretical approaches runs like a common thread through the whole of European law. For example, when European citizenship was introduced by the Treaty of Maastricht, there was little agreement as to its content. It may be assumed that even its originators did not have a clear idea of what it might mean and what it should lead to.²⁰⁸ While it was originally dismissed by many as mere symbolic activism devoid of any real content²⁰⁹ - and maybe rightly so - it must now be regarded as a central notion of EU law that has acquired specific legal content and lead to far-reaching case law.²¹⁰

This shows that in judicial cooperation in criminal matters, new terms are coined to create new concepts and forms and to bring about a new dynamic, more than for the sake of specific legal changes. The introduction of the “principle” of mutual recognition and the mutual recognition “regime” entailed a whole change of terminology for judicial cooperation.

First of all, the internal market parallel brought about many other parallels of the same kind. The idea of a free movement of evidence, of free circulation of judgements etc. all take up on this basic analogy. Similarly, the idea of mutual trust can partly be located here.

Secondly, the language is modelled to express a qualitatively new dimension of integration in criminal matters. Rather than continue with traditional concepts of judicial cooperation between sovereign states, the language tries to promote a European legal area dimension as a realisation of the Area of Freedom, Security and Justice. Thus, most measures implemented seem to introduce “European” acts.

²⁰⁸ Cf. *Nettesheim*, EuR 2009, p. 26.

²⁰⁹ *Jessurun d'Oliveira*, Union Citizenship, p. 82.

²¹⁰ *Wollenschläger*, Grundfreiheit ohne Markt.

The “European” Arrest Warrant is, of course, not a European warrant. Despite the standardized form on which it is transmitted, it is still a purely national decision, subject entirely to national law, without the least harmonisation or common requirements. The same is true for the “European” Evidence Order. The desire to create European orders went so far that the proposed framework decision on the European Enforcement Order²¹¹ twisted its intended meaning because of its conceptual ambitions. It was later adopted and had to be renamed as the Council framework decision “on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union”.²¹² The European Parliament had argued that recognition and enforcement should not take place on the basis of a European order, but on the basis of the original judgment and a certificate.²¹³

The idea of a European legal area also let the “request regime” seem inadequate. It was replaced by the mutual recognition regime, which, apart from the juridification of the procedure, means that the requesting state is now called issuing state, while the requested state is called executing state.²¹⁴ The goal that it envisages, the totally automatic recognition, or the genuine European validity of all decisions, is as yet only reached in the language.²¹⁵

The renaming of existing methods of cooperation is also seen in the creation of new principles. The “principle of availability” is increasingly discussed as another basis for

²¹¹ Council Doc. 7307/05 of 12 April 2005.

²¹² Council framework decision 2008/909/JHA of 27 November 2008; a European Enforcement Order, however, exists in cooperation in civil matters; for the re-naming see also *Morgenstern*, ZIS 2008, p. 76.

²¹³ Cf. the justification of the Draft European Parliament Legislative Resolution concerning amendment 1 in the report of the Committee on Civil Liberties, Justice and Home Affairs (Rapporteur: Ioannis Varvitsiotis) of 17 May 2006, A6-0187/2006 and the text subsequently adopted by Parliament, P6_TA(2006)0256. In Art. 1 of the original proposal, the enforcement order had been defined as “a decision delivered by a competent authority of the issuing State for the purpose of enforcing a final sentence imposed on a natural person by a court of that State”.

²¹⁴ As to the implications of this change in terminology see also *Weyembergh*, in: *Kerchove/ead.* (eds.), *La reconnaissance mutuelle*, p. 42 (“symboliquement très important”).

²¹⁵ Or not even there, since many Member States chose to retain their classic language, cf. e.g. *Gless*, in: *Sieber et al.* (eds.), *Europäisches Strafrecht*, § 39 para. 13.

the Area of Freedom, Security and Justice.²¹⁶ Taken in its widest meaning, it requires that data available to prosecuting authorities in one state should automatically be made available to prosecutions of all other Member States. It is mainly relevant to police cooperation. While the principle of availability might indeed have a rather specific content, it has become synonymous to cooperation in data exchange, which has more traditional intergovernmental connotations.

I will now discuss two specific examples on how the creation of new concepts that does not correspond with the creation of new content can actually nevertheless influence the interpretation of the law. First, I will look at extradition law where, among Member States, there is now the surrender procedure. After that, I will outline the relation of the principle of mutual recognition to mutual trust and its legal implications.

3.6 Extradition and surrender

Early on in the debates, we find the idea of simplifying extradition through fewer formalities. But the idea of replacing the extradition procedure through another system only seriously came up in connection with the principle of mutual recognition. Starting with the Tampere European Council,²¹⁷ it was thought that a simple “transfer” of persons would be more in line with an Area of Freedom, Security and Justice. As a consequence, the framework decision on the European Arrest Warrant only speaks of “surrender”.²¹⁸

It is not clear from these documents whether any change in the position of the individual was intended with it, and what exactly the difference to extradition was –

²¹⁶ Cf. Böse, *Der Grundsatz der Verfügbarkeit*, passim.

²¹⁷ Cf. above under 3.2; para. 35 of the Presidency Conclusions.

²¹⁸ Framework Decision 2002/584/JHA, recital 5 (“...abolishing extradition between Member States and replacing it by a system of surrender between judicial authorities”) and throughout, but point 4.5 of the Explanatory Memorandum to the proposal COM(2001) 522 fin./2 states that “it is to be treated as equivalent to it [i.e. extradition] for the interpretation of Article 5 of the European Convention of Human Rights relating to freedom and security”; see also *Apap/Carrera*, *European Arrest Warrant*, p. 6.

apart from those mechanisms ascribed to mutual recognition.²¹⁹ A surrender procedure sounds less consequential than an extradition.²²⁰ This is reinforced by the fact that “surrender”, or, in the German version “Übergabe”, also has a meaning in classical legal aid: it refers to the stage after an extradition request has been granted. When the request is executed by handing over the suspect to the foreign authorities, this factual act is called surrender. This terminology brings extradition within the European Union closer to intra-state cooperation.²²¹

However, Member States and scholars reacted very differently to this.²²² While English doctrine - though not the legislator²²³ - in the main took this on and changed its terminology, this is quite different in Germany. Courts and academics in the main still speak of extradition. Also the law implementing the framework decision still calls this procedure extradition and does not systematically differentiate between this and extradition to non-Member States.²²⁴ They are covered by the same statute which only provides for some complementary and modifying provisions regarding intra-European procedures.²²⁵ Therefore, there was no major rupture in the understanding of this procedure.

The most far-reaching debates about the nature of surrender arose in Poland. In the Polish law implementing the framework decision and in the famous ruling of the Polish Constitutional Court²²⁶ of 27 April 2005, we can see how a new terminology

²¹⁹ The ECtHR assumes that the new scheme of surrender “discontinues” the use of extradition procedures, but without drawing any conclusions from this, cf. judgment of 21 April 2009, no. 11956/07, para. 34 - *Stephens v Malta No. 1*; the ECJ holds that any limitation of grounds for refusal reinforces the system of surrender that is based on mutual recognition as opposed to the replaced extradition system, judgment of 6 October 2009, C-123/08, para. 54, 58 - *Wolzenburg*.

²²⁰ According to *Peers*, Justice and Home Affairs Law, p. 662 s., it suggests a more binding degree of obligation.

²²¹ Surrender is also practiced between states and international criminal tribunals, cf. *Plachta*, 11 EJCL (2003), p. 178, 192s.

²²² Cf. also *Deen-Racsmány*, 14 EJCL (2006), p. 273s.

²²³ Cf. the Extradition Act 2003.

²²⁴ §§ 2ss. IRG (Gesetz über die internationale Rechtshilfe in Strafsachen).

²²⁵ §§ 80ss. IRG.

²²⁶ An unofficial translation can be downloaded at: http://www.trybunal.gov.pl/eng/-summaries/summaries_assets/documents/P_1_05_full_GB.pdf; for a discussion of the judgment see also *Fichera*, 15 ELJ (2009), p. 82.

and a new conceptual approach can in themselves and without further, more concrete legal measures, influence the specific legal position of an individual. The decision of the court is highly interesting in many respects; however, I will confine myself to those issues directly concerned with the concept of surrender.

The Polish Constitution, under its Art. 55(1),²²⁷ prohibited the extradition of a Polish citizen. Nonetheless, Art. 607t(1) of the Polish Criminal Procedure Code allowed for the surrender of a Polish citizen to EU Member States under certain conditions following the transposition of the framework decision. A Polish citizen, *Maria D.*, was facing surrender to the Netherlands. The competent regional court put the question of the constitutionality of Art. 607t(1) before the Constitutional Court. The main argument in favour of this legislative decision was that a surrender procedure was something totally different from an extradition procedure and could, consequently, not be subject to this constitutional provision. The differences discussed were the abolition of classical grounds for refusal, mainly the absence of a dual criminality requirement, and the juridification of the procedure.

It is remarkable that this should have been put forward and taken seriously in law-making and legal argumentation. If anything, surrender is a highly intensified and streamlined form of extradition. The Constitutional Court rightly argued in this manner and stated that the provision would apply at least *a maiore ad minus* to the more infringing surrender.²²⁸

That the re-naming²²⁹ of the extradition procedure between Member States and a reorientation of the terminology of judicial cooperation could have such a bearing on the legal discourse clearly demonstrates the power of concepts. For when the framework decision was agreed on, there was no idea as to the exact implications of these new concepts.²³⁰

²²⁷ "The extradition of a Polish citizen shall be forbidden."

²²⁸ The law was not declared void, however, for another 18 months, during which the Constitution was amended.

²²⁹ Or the "misnomer" according to *Plachta*, 11 EJCCL (2003), p. 190.

²³⁰ Cf. for the contradictions *Plachta*, 11 EJCCL (2003), p. 190 ss.

Other frictions of this kind are to be expected. While new concepts are constantly put forward without any systematic and theoretical underpinning, the Member States are not well equipped to provide these through their traditional principles that are tailored to a different setting. It is important to develop a common frame for the further development of judicial cooperation.

Mutual recognition is thus a complex multifaceted policy concept that has links both to classical legal aid and to the dynamics of the internal market. It is also an expression of the tension within the area of EU judicial cooperation between national sovereignty and positive sum cooperation. Some of the paradoxes of mutual recognition are reflected in the debate on mutual trust. Trust is generally regarded as a precondition for mutual recognition and a way to deal with the hybrid nature of judicial cooperation that is meandering between mutual recognition and harmonisation. What exactly the concept of mutual trust means and how it influences judicial cooperation will be dealt with in the next chapter.

Chapter 4 Mutual trust and mutual recognition

As can be observed from this debate, new concepts, forms and terminology play an important role in European Criminal Procedure just as they do in other areas of Union law. New concepts seem to possess a great integrative force that cannot be easily equalled by integration through law. Far-reaching legal acts require a prior understanding of its intricate functioning and agreement of specific goals, which is not easily reached. The mere adoption of a new concept - in being more flexible and open to the imagination - often leads to a new dynamic. The concept thus becomes self-fulfilling and helps to pave the way towards a favourable reception of legislative proposals. A particularly important example of a development like this is the approach towards mutual trust. The concept of mutual trust is almost omnipresent. Starting with the 19th century, it has been named as the basis for mutual recognition in criminal matters. Since mutual recognition has come to the fore of judicial cooperation, mutual trust has therefore experienced a similarly steep career. In some respects, it seems to have gained an even higher priority for new legislative efforts and taken the place of mutual recognition. This is a little surprising, since there seems to be even less agreement on what trust means and what its problem-solving capacity is.

In the early stages of mutual recognition in judicial cooperation (both in civil and criminal matters), trust was mainly treated as a **given social phenomenon** that was the motivation for entering into treaties with other states. As such it is no applicable legal rule in itself, but rather the rationale behind judicial cooperation in general and mutual recognition in particular. As *Delius* put it in 1896²³¹: „In view of the trust that a state cannot, as a rule, deny to the courts of another civilised state [...], it does not appear presumptuous to propose an amendment of the current law so that the enforcement of foreign penal sentences be possible, if reciprocity be guaranteed.”

²³¹ *Delius*, *Ausländische Strafurtheile*, p. 515, translation by author.

However, its practical application has long outgrown these modest beginnings. The notion of trust features more and more prominently in all legal acts and policy papers concerning mutual recognition; it is often referred to as a “principle” of mutual trust, and it has established itself as a legal concept in the case law of the ECJ. As such, it is generally used to explain why obstacles to mutual recognition are no longer needed and a **higher degree of cooperation** is possible.

This development is often criticized by scholars as transforming mutual trust into a mere **postulate**, imposed from above,²³² that does not reflect the real level of trust between states which may be lower than claimed. As a result, there is a call for **trust-building measures**, often through approximation and harmonisation of fundamental rights standards, which is now answered by the Commission.²³³

Some, however, see the potential of trust in functioning as a **behavioural frame** that need not have a strong factual basis, letting suffice the technical process of cooperation.²³⁴

The idea that mutual trust is necessary for a close cooperation between several sovereign states is in itself not surprising. Obviously, cooperation will only be effective and fruitful if the agents trust in each other. Therefore, mutual trust is rightly considered as a basis of mutual recognition. Yet the exact functions of mutual trust and its interrelation with mutual recognition are anything but clear. Is it a factual or a legal concept? Is it the prerequisite or the result of mutual recognition? Does trust require harmonisation or render it superfluous?

The theoretical starting point must be the notion of mutual trust in a broader conceptual context. Mutual trust in judicial cooperation is basically an extrinsic factor. It refers to an extra-legal idea that everybody has a general understanding of. This is why it is rarely defined by those who use it. However, a theoretical analysis in the law

²³² Cf. *Blobel/Späth*, 30 ELRev. (2005), p. 540 ss. on these views; see also *de Hoyos Sancho, Montserrat*, in: *ead.* (ed.), p. 42: “stated intention”.

²³³ See below in this chapter and in chapter 7.

²³⁴ See below for examples from the case law of the ECJ that are indicative of such a conception.

is still missing. This is why it is so important to take into consideration the works of economics and social sciences, where more thorough analyses have been undertaken. In the law, trust has mainly been dealt with between private parties in contract law (good faith) or as the trust of an individual vis-à-vis the state, its legislation and administration. The trust between states in each others' legislations and of foreign judicial authorities in each others' decisions in cooperative relations has not been given priority. In economics and social sciences however, the special role of trust in cooperation has been under scrutiny for a long time.

I will therefore look briefly at the main traits of definitions of trust in cooperative relations in the social sciences. While I am aware that it would be well beyond the scope of this work to attempt any exhaustive evaluation of these approaches, I still believe it is important to outline some fundamental assumptions that can help to structure the legal debate. Against this background, I will look at the notion of mutual trust in cooperation in criminal, in civil and in asylum matters as it appears in the case law of the ECJ, in legislative approaches and in the academic debate. Its application in the context of cooperation in civil matters is particularly interesting in that it shows how the ECJ tends to develop mutual trust into a true normative principle, instead of only dealing with it as a factual basis, or a *telos*. The comparison to European Civil Procedural law is also rewarding since the recognition of final judgements (as a form of mutual recognition) in civil law is much older than in criminal law. Thus, problems that are only now emerging in criminal law might have been successfully addressed by civil law. After that, I will render my own analysis of what mutual trust in judicial cooperation in criminal matters means, how it could be used to improve judicial cooperation, but also what its limitations are.

4.1 Trust in society

While *Luhmann* could still complain in 1968 that literature with trust as its main focus was sparse, this certainly no longer holds true. The importance of trust in a complex environment has long been at the heart of social theorizing.²³⁵

²³⁵ *Blobel/Späth*, 30 ELRev. (2005), nt 71.

What most theories on trust agree on is that trust presupposes a degree of uncertainty that the trustor has in relation to the actions of the trustee. One actor relies on the future behaviour of another actor without knowing if his expectations will be met, because that actor has the freedom to disappoint.²³⁶ When one party exerts control or force, or when it knows the outcome for certain, it need not - in fact, cannot - trust. One "trusts [...] when one cannot know, when one has not the capabilities to apprehend or check on the other and so has no choice but to *trust*."²³⁷ Therefore, this uncertainty is a constituent element of trust.

But trust is also the mechanism that helps us to deal with this uncertainty. As *Luhmann* explained early on,²³⁸ trust (and even distrust²³⁹) serves to reduce social complexity and thus enables us to make an intuitive decision because it structures the environment in a categorically preformed way. By deciding between trust and distrust, the actor effectively deals with, or reflects, contingency.²⁴⁰

Whether a certain degree of pre-existing trust is necessary for successful cooperation is under constant debate, though it is required by most models.²⁴¹ As an example of the opposite view, we can take *Axelrod* who argues from a game-theoretical perspective that cooperation can emerge without trust when it is beneficial to the actors and there is the probability of future interaction so that cooperation can be maintained through reciprocity.²⁴² Similarly, cooperation could emerge accidentally rather than intentionally, and the actors could decide to uphold this pattern. Trust may then follow cooperation. This is an interesting thought because its underlying arguments are comparable to the approach that treats trust as a behavioural frame in judicial cooperation, which we will deal with later. There, actors are required to

²³⁶ *Gambetta*, Can we trust trust? p. 218; *Luhmann*, Vertrauen, passim, esp. p. 38.

²³⁷ *Seligman*, The problem of trust, p. 21.

²³⁸ In the first edition of *Vertrauen* in 1968; his notion of trust might however have changed as his systems theory advanced further.

²³⁹ As distrust is the functional equivalent and reduces complexity through negative expectations.

²⁴⁰ *Luhmann*, *Vertrauen*, p. 29.

²⁴¹ *Blobel/Späth*, 30 *ELRev.* (2005) nt 61.

²⁴² *Axelrod*, The evolution of cooperation, p. 169ss.

cooperate independently of their expectations which is regarded as the essence of trust; however, positive expectations might nonetheless follow.

Somewhat related to this idea is the “as-if”- approach. In the absence of pre-existing trust, it can be necessary to act as if one trusted “until more stable beliefs can be established”.²⁴³ The evolution of trust requires “trusting trust”²⁴⁴, a “leap of faith”.²⁴⁵ Successful cooperation can then in its turn reinforce trust, so that the trust invested will ideally initiate an upward-moving spiral. It is related to models of cooperation without trust because it does not require trust for the “first move”, or rather, only trust in trust and not in the other party.

While there is wide agreement on some elements of trust, the differentiation between trust and confidence is all but clear.²⁴⁶ Some theorists²⁴⁷ hardly draw any distinction at all. The most convincing approach differentiates, among other things, along the lines of certainty. While trust is extended to the unknown, confidence is an expectation that has its basis in fact and knowledge. Trust is “that in which we must invest when we do not - or do not yet - have confidence in the workings of the institutions or the behaviour of other agents. In other words, while confidence is an accomplished state upon which we can more or less passively rely; trust is an active way of building confidence.”²⁴⁸

On an EU level, confidence can thus be described as a state that legislation intends to realize and reinforce,²⁴⁹ whereas promoting trust instead implies that it is necessary to trust because confidence has not yet been achieved. Trust will probably always be needed in EU cooperation since it is impossible, despite all efforts to

²⁴³ *Gambetta*, Can we trust trust? p. 234.

²⁴⁴ *Gambetta*, Can we trust trust? p. 234.

²⁴⁵ *Walker*, The problem of trust, p. 31.

²⁴⁶ *Luhmann*, Familiarity, p. 97s., defines confidence as a situation where alternatives are not considered, whereas trust requires a situation of risk and a conscious choice in the face of possible disappointment.

²⁴⁷ *Lipset/Schneider*, The Confidence gap.

²⁴⁸ *Walker*, The problem of trust, p. 22.

²⁴⁹ This becomes even more obvious when we accept the idea that security necessitates confidence in the absence of threats to one’s social and material environment, cf. *Walker*, The problem of trust, p. 21.

further common action and mutual knowledge, to reach a state where every agent in judicial cooperation knows the law and practice of all others and can thereupon form positive expectations.²⁵⁰ The official terminology however treats both words as synonymous. While trust is more widely used in all legal acts, policy papers, judgments etc., it is sometimes substituted for confidence. This seems to happen randomly rather than as the result of any differing conceptual understanding. The draft Constitutional Treaty, for example, spoke of “promoting mutual confidence”, although “mutual trust” would have been preferable - or at least acceptable - in this context.²⁵¹ One should, however, hesitate to draw any conclusions as to the legislator’s conception from this. Although any language can explain the two concepts of trust and confidence, there is not often a semantic equivalent to this terminological couple. Thus, other language versions of official texts always use the same word, even when the English language version differentiates.²⁵²

These basic ideas will allow us to analyse the notions of trust in the EU judicial cooperation much better and help to tackle a volatile legal concept.

4.2 Trust in the law

As we have seen above, trust is one of the major reasons for states to enter into a fixed framework of judicial cooperation. Even the classical extradition treaties necessitated a certain degree of trust so that states would agree on certain rules and abide by them.²⁵³ Trust in this sense has three elements. It means that one state considers the other states’ legal systems to be compatible enough with its own, that it considers the fundamental rights standards to be adequate and that it expects the other to fulfill its obligations under the treaty as well. The Luhmannian notion of

²⁵⁰ Walker, *The problem of trust*, p. 30s.

²⁵¹ Art. I-41 [1b], see below for a more thorough analysis.

²⁵² The German version still speaks of “Vertrauen”, the Dutch of “vertrouwen”, the French of “confiance” etc.; for an etymological analysis see *Blobel/Späth*, 30 *ELRev.* (2005), p. 535s.; personally, I doubt the usefulness of etymology as an interpretation device in law.

²⁵³ Cf. for example the European Convention on the Transfer of Proceedings in Criminal matters of the 15 May 1972, ETS No. 073: “in a spirit of mutual confidence”; *Van Hoek/Luchtman*, 1 *Utrecht Law Review* (2005), p. 2; for the differences of the “old” and the “new” notion of trust and their merger by the ECJ cf. *Flore*, *Confiance*, p. 18s.

complexity reduction has a lot to do with this.

When states decide to cooperate and recognise each others' decisions, they effectively channel future judicial decisions in a certain direction. They thereby render further inquiry into this matter superfluous. This is a great advantage over case-by-case agreement between states that must be reached in the absence of a general extradition treaty. It will allow the judicial authority to avoid looking into the complexities of foreign procedural and substantive criminal law.²⁵⁴ A principle of mutual trust as such was, however rather foreign to the courts of all the Member States save, perhaps, the Netherlands.²⁵⁵

Thus, trust is not only the basis for classical treaties on legal aid, but even more so for all EU measures based on mutual recognition.²⁵⁶ It features more and more prominently both in legal acts, and in policy papers.

In civil matters, trust was at first only mentioned as a reason for the absence of review on the substance of jurisdictional questions and the assumption that any court has applied its rules on jurisdiction correctly in the Jenard-report on the Brussels Convention.²⁵⁷ Over time, however, it was elevated to a "principle" of mutual trust in the Brussels I- and Brussels IIa Regulations, the Regulation on insolvency proceedings and the like, and features in the respective recitals²⁵⁸ as the justification for automatic recognition, for efficient and rapid cooperation and for minimizing grounds for non-recognition and shifting them to the appeal stage. In measures of criminal procedure, it is just as important.

This is a similar line of argumentation as in criminal matters. Although mutual trust is not referred to in the conclusions of Tampere, it is invoked by the programme of

²⁵⁴ This basically resembles a rule of non-inquiry, cf. *Van Hoek/Luchtman*, 1 Utrecht Law Review (2005), p. 2s.

²⁵⁵ See *de Groot*, Mutual Trust, p. 85, 87s., with further references.

²⁵⁶ *Apap/Carrera*, European Arrest Warrant, p. 4, 16.

²⁵⁷ Comment on Art. 28; Report published in OJ C 59/1 of 05.03.1979.

²⁵⁸ Brussels I-Regulation (44/2001/EC of 22 December 2000), recitals 16 and 17; Brussels IIa-Regulation (2201/2003/EC of 27 November 2003), recital 21; Regulation on insolvency proceedings (1346/2000/EC of 29 May 2000), recital 22.

measures to implement the programme of mutual recognition in criminal matters.²⁵⁹ In legal acts, a “high level of confidence” is seen as the justification for, among others, the mechanism of the European Arrest Warrant²⁶⁰ and the European Evidence Warrant,²⁶¹ the 2009 Stockholm Programme,²⁶² and the framework decision on the execution of freezing orders.²⁶³ At the moment, trust is incessantly put forward and named as the basis for measures in EU criminal law cooperation, and, as we will see, particularly in very controversial areas.²⁶⁴

This leads one to wonder whether there might not be a purpose in the very mentioning of trust itself. It is a feature of trust that its declaration can encourage the other party to commit in turn and thereby accept the trust vested by the other party.²⁶⁵ A mere rhetoric of trust in the EU could therefore be conducive to real trust.

For a more profound analysis of the concept of mutual trust I will take into account the case law of the ECJ with regard to mutual trust. The rulings of the ECJ have, in fact, had a greater influence on the mechanisms of trust than any theoretical debate. I will then look at the approach of legislation and EU policy in criminal matters and finally discuss this concept with regard to current doctrine, define the concept of mutual trust as I understand it and illustrate its functions and limitations.

4.3 Trust as a legal principle in civil procedure

In civil matters, the ECJ has rendered several very important judgments concerning

²⁵⁹ OJ C 12/02 of 15.01.2001.

²⁶⁰ Recital 10 of framework decision 2002/584/JHA of 13 June 2002.

²⁶¹ Recital 8 of framework decision 2008/978/JHA of 18 December 2008.

²⁶² Council Doc. 17024/09, p. 25, 37. The Stockholm conclusions seek “to foster a genuine European judicial and law enforcement culture” (p. 8).

²⁶³ Framework decision 2003/577/JHA of 22 July 2003, recital 4 of the preamble “confidence”.

²⁶⁴ The concept of trust is not restricted to judicial recognition. It is in fact an inherent part of the development of the internal market and is often said to underlie the famous *Cassis de Dijon* ruling and the White paper on completing the internal Market of 1985 and, in this area as well, it is found in many acts requiring recognition. Cf. to this: *Blobel/Späth*, 30 ELRev. (2005), p. 533s.; if trust in judicial cooperation is again introduced to create a parallelism to the common market dynamic, the same criticism as with mutual recognition applies, cf. *Nettesheim*, EuR 2009, p. 39.

²⁶⁵ *Gambetta*, Can we trust trust? p. 234; *Walker*, The problem of trust, p. 23.

mutual trust. Three of them have contributed towards establishing a true legal principle of trust and are particularly helpful in understanding the ECJ's notion of the relation of trust and fundamental rights.

The decisions in *Gasser* and in *Turner v Grovit* were both concerned with problems of torpedo-litigation.²⁶⁶ Thereby, a party that might be sued seeks a declaration for non-liability as a procedural tactic; mostly a very slow and incompetent forum is chosen merely to prevent the other party from enforcing its claims. The ECJ started with a relatively modest take on trust. In *Gasser*, it mainly used trust as a strong interpretative tool. In *Turner v Grovit*, it develops a principle of mutual trust that has a specific legal content. In *Zarraga*, the latest and most far-reaching decision, it requires trust as a principle to be applied even when its factual basis has been undermined by a manifestly false statement of the court of the state of origin.

All these decisions take it as an element of trust to leave the solution of a fundamental rights problem to the state of origin.

Another important factor running through the case-law is the pivotal role that a uniform allocation of jurisdiction plays in connection with the development of a principle of mutual trust.

The ruling in *Gasser*

MISAT, an Italian company, feared to be sued by the Austrian *Gasser* for breach of contract in Austria and therefore sought a negative declaration for non-liability before a court in Rome, despite an exclusive jurisdiction clause in favour of Austrian courts. According to Art. 23 Brussels Convention²⁶⁷ any court second seized would have to stay its proceedings. When *Gasser* later brought an action for payment in Austria, the question arose whether the jurisdiction clause gave the Austrian courts the right to deviate from the *lis pendens*-rule so that the prorogated forum could prevail, or if the courts of the prorogated forum could at least decide on the jurisdiction of the court first seized, and, more importantly, if this was at least exceptionally permissible

²⁶⁶ Cf. *Jandoli*, IIC 2000, p. 783ss and *Thode*, BauR 2005, p. 1533ss.

²⁶⁷ Now Art. 27(2) Brussels-I Regulation.

when in the courts of one Member State certain proceedings were excessively protracted, causing one party extreme disadvantages.²⁶⁸ The ECJ very concisely rejects this idea.²⁶⁹ Since no express mention of this situation is found in the Convention,²⁷⁰ the mutual trust in “each other’s legal systems and institutions” as the basis of the Convention precludes subjecting the *lis pendens* rule to the quality of proceedings before another Member State’s courts.²⁷¹ Any problems concerning the access to justice for parties affected by this kind of litigation are not discussed.

Basically, the notion of trust is used as an argument against a more limited understanding of the *lis pendens*-rule. This form of purposive interpretation is not yet very unusual. However, by not addressing the fundamental rights concerns raised by the referring court, even though they were based on systemic problems, it is already implied that trust will be given an abstract meaning. Once it has been declared as the basis of a certain form of cooperation, the ECJ does not question its factual basis.

Interestingly, the Court did not fully follow the line of argument of Advocate General Léger. Instead of relying on the trust between states in their respective justice systems, he stressed the importance of the classical legal concept of trust that private parties in international trade need to have in their (jurisdiction) agreements and used this sort of classical legal understanding of trust in favour of a derogation from the *lis pendens* rule in such cases.²⁷²

A second important issue is the relation of trust and jurisdiction. Mutual recognition is regarded as the basis of the compulsory system of jurisdiction that the convention lays down. Surprisingly, simplified recognition and enforcement on the basis of common, rather than national, rules, are regarded as a “corollary” of this allocation of jurisdiction.²⁷³ In criminal matters, simplified recognition has been introduced without

²⁶⁸ In *Gasser* the question related to more than half a year for a decision on jurisdiction and three years for a first instance decision on the merits in Italy, para. 59s. of the judgment.

²⁶⁹ ECJ judgment of 24 January 2004, C-116/02 - *Gasser*.

²⁷⁰ Para. 71.

²⁷¹ Para. 72.

²⁷² Para 71, 83, 92 of the opinion.

²⁷³ Para 72.

any allocation of jurisdiction, so that, if anything, jurisdiction might become the corollary of mutual recognition. The connection of jurisdictional rules and recognition in civil matters highlights how important it is to have some degree of minimum harmonisation for mutual recognition. It is logical that states should first agree on the conditions under which a judgment should be recognised and should collectively agree on the courts best placed before giving judgments an EU-wide enforceability.²⁷⁴ The criminal law approach of reducing a uniform allocation of jurisdiction - of even just the reduction of jurisdictional conflicts - to an afterthought, on the other hand, seems the wrong way around. It is again indicative of the tendency to use mutual recognition in criminal matters as a seemingly easy way to cooperate without any loss of sovereignty and any visible collective authorship.

The strong connection of trust as a legal principle to the allocation of jurisdiction remains a major line of reasoning in decision in civil matters.

The ruling in *Turner v Grovit*

The case of *Turner v Grovit*²⁷⁵ treats the question of whether anti-suit injunctions prohibiting one party from litigating abroad are still a valid instrument in a common European judicial space characterized by a unitary regime for the allocation of jurisdiction in Continental-European tradition.²⁷⁶ That English courts saw it necessary to issue anti-suit injunctions to counter abuses of European litigation shows that a substantive trust is not fully established between the courts of the Member States. The ECJ did not content itself with this state of facts but interpreted mutual trust as a legal principle, as a legal imperative to be followed by the courts of the Member States.

Anti-suit injunctions are issued to restrain one party from initiating or continuing proceedings against the party seeking the injunction if the proceedings in another

²⁷⁴ Cf. also *Klip*, EU Criminal Law, p. 424.

²⁷⁵ ECJ judgment of 27 April 2004, C-159/02 - *Turner v Grovit*.

²⁷⁶ This ruling caused a lot of discussion because it curtailed the scope of a very important and ancient tool of English civil procedure. In fact, these injunctions had already been established in the 15th century in equity to prevent proceedings in a common law court, *Ingenhoven*, *Rechtsschutz*, p. 276.

forum are vexatious or oppressive, unconscionable or contrary to an obligation, i.e. jurisdiction or an arbitration clause. They are issued *in personam* and do not immediately affect the foreign proceeding itself. Any violation can result in damages and constitutes a contempt of court, giving rise to fines and other penalties. England will not recognise a foreign judgment contrary to an injunction on grounds of public policy. In cases of perceived abuse English courts did not hesitate to issue anti-suit injunctions even in cases governed by the Brussels Convention.²⁷⁷

Turner was a Briton domiciled in England and had worked under the management of *Grovit* first in England, then in Spain. He later started proceedings before the Employment Tribunal in London for unlawful termination of the contract. When *Turner* got awarded damages, another company of the employer's group instituted proceedings in Madrid against *Turner* for terminating his contract untimely, claiming high damages in turn. The House of Lords referred the question to the ECJ whether an English court could issue a restraining order against a defendant instituting foreign proceedings in bad faith to obstruct the English proceedings in cases where the Brussels Convention applied.

Issuing an anti-suit injunction in a case like this is problematic because according to the mechanism of the Brussels I regulation²⁷⁸ the English court could have continued its own proceedings while the Spanish Court would have ruled on its own jurisdiction of its own motion and, had it judged on the identity of the parties and the matter in dispute in the same manner, it would have stayed its proceedings or dismissed the action according to Art. 27. The question is therefore whether the functioning of Art. 27 must be regarded as exhaustive.

The ECJ answered clearly in the affirmative. The importance of this decision lies in

²⁷⁷ They rather seem to have tried, as long as possible, to avoid any reference to the ECJ, surprisingly regarding any possible doubts as to the lawfulness of this action as unfounded; in *Continental Bank*, a case similar to *Gasser* but involving an anti-suit injunction, the question was declared to be an *acte clair*, Lord Steyn in *Continental Bank N.A. v Aeakos Compania Naviera S.A. and Others*, CA [1994] 1 WLR 588, p. 599 with further references, in response to the defendant who had demanded that the question be referred to the ECJ.

²⁷⁸ I will refer to the Regulation although the decision was still based on the Convention in order to draw more general conclusions.

the decisive weight²⁷⁹ the court attributes to a concept that was before merely a justification, a part of the ratio behind the Brussels Regime. Following AG *Colomer's* reasoning who saw a contradiction to the spirit of mutual trust in issuing an anti-suit injunction,²⁸⁰ the court carefully establishes a *principle of mutual trust*. It reiterates its ruling on trust from Gasser²⁸¹ and defines it as an element of this mutual trust that a court has to rely on the conviction that each Member State's courts will be able to judge with the same authority on questions of jurisdiction. The mere fact that an anti-suit injunction will deprive the court second seized of the possibility to decide on its own jurisdiction is seen as a violation of this principle.²⁸² Instead of trusting the Spanish court to stay its proceedings if this should be necessary, the English court placed its own evaluation higher.²⁸³ Any assessment as to the appropriateness of foreign proceedings, or criticism of the defendant for bringing them, is regarded as contrary to the principle of mutual trust.²⁸⁴ Advocate General *Colomer* even attempts to give a specific definition of mutual trust.²⁸⁵ He states that trust in general "presupposes that each State recognises the capacity of the other legal systems to contribute independently, but harmoniously, to attainment of the stated objectives of integration".²⁸⁶ Additionally, in applying common rules on jurisdiction, trust means that there are no superior national authorities and that they meet on an equal footing.²⁸⁷ Thus, the notion of trust is complemented by the elements of a common goal and is based on equality.

The case of *Turner v Grovit* therefore gives a striking example of how the concept of

²⁷⁹ *Blobel/Späth*, 30 ELRev. (2005), p. 285.

²⁸⁰ Para. 30ss.

²⁸¹ Namely, that mutual recognition is a "corollary" to jurisdiction, para. 24.

²⁸² Para. 25s.; see also *Harris*, 115 LQR (1999), p. 579.

²⁸³ The *in personam* effect was seen as artificial, since the party could be forced to withdraw its actions abroad through fines, so that the foreign court would never have an opportunity to answer jurisdictional questions differently from English courts, para 27; cf. also *Kruger*, 53 ICLQ (2004), 1035; this had been the main argument of the proponents, cf. the submitted observations of the UK government, para. 21 of the judgment, and the Court of Appeal decision, [2000] QB 435 (CA 1999).

²⁸⁴ Para. 28.

²⁸⁵ Which he sometimes refers to as a principle.

²⁸⁶ Para. 31 of the opinion.

²⁸⁷ Para. 31, 33 of the opinion.

mutual trust is developed by the Court of Justice. The ruling shows that in its view mutual trust is not only a concept that is behind the European system of civil procedure, but a legal principle that may be applied in order to decide a particular case. Once more, uniform allocation of jurisdiction is one of the main reasons that allow the Court to rely on mutual trust so fully. The AG's notion of independence in contributing toward the common goal of integration and of equality in doing so is dependent on the fact that states have agreed beforehand why the assessment and decision of one Member State's court should prevail in a certain case. If a state accepts in advance the competence of another state's courts, it must adhere to this system of jurisdiction also in disputed cases.

The ruling in *Zarraga*

Recently, the ECJ took the notion of trust much further. The *Zarraga* case²⁸⁸ is a decision concerning mutual recognition in family law, namely concerning the simplified recognition of judgments concerning the return of a child according to the Brussels IIa Regulation. Like all other mutual recognition instruments, the Regulation states mutual trust as the basis for this simplified recognition mechanism that keeps grounds for refusal to the minimum.²⁸⁹

The case deals with two questions of the greatest possible importance in the area of mutual recognition in general and provides some perspectives on criminal law.

The two questions of particular interest were if a state might exceptionally assume a power of review even within a system of automatic recognition and enforcement if the decision to be enforced contains a serious infringement of fundamental rights and secondly, whether enforcement is still mandatory when the certificate issued by the Member State of origin that makes a decision enforceable contains a declaration which is manifestly inaccurate.

Zarraga, a Spaniard, had married a German woman and they had a daughter. The family's habitual residence was Spain. When the parents separated and started

²⁸⁸ ECJ judgment of 22 December 2010, C-491/10PPU - *Zarraga*.

²⁸⁹ Recital 21.

divorce proceedings, the father was provisionally awarded rights of custody by the Court of First Instance and Preliminary Investigations No 5 of Bilbao, whereafter the daughter lived with her father. After having moved back to Germany, the mother did not send her daughter back to her father after an agreed visit. The Spanish court then issued several provisional measures according to which the daughter could not leave Spain with her mother (if she should have returned) and continued its main proceedings. A date was fixed for hearing the views of the mother and daughter, but neither attended. This was mainly due to the fact that the court could not guarantee mother and daughter to be able to leave Spain after the hearing (in view of the provisional measure). Hearing the daughter via video conference was denied. The father was then awarded sole custody in the main proceedings. An appeal against this based on the missing hearing of the daughter was dismissed, since she had been notified but voluntarily not appeared. The court did however take into account the hearing before the German court. In the German proceedings the father asked for the return of his daughter. This was denied by the Oberlandesgericht Celle, even when a certificate according to Art. 42(2) of the Brussels IIa-Regulation was issued by the Spanish court which should have led to immediate recognition of the decision to return the daughter. The Oberlandesgericht did not want to enforce this judgment since the Spanish court had not heard the child's statement. In the opinion of the Oberlandesgericht the certificate was incorrect, because it stated that the court had fulfilled its obligations to hear the child but, according to the Oberlandesgericht, in the light of Art. 24(1) of the Charter, greater effort should have been given to fulfill the requirement of providing an "opportunity to be heard" within the meaning of Art. 42(2) of the regulation and no actual hearing had been held.

The ECJ held that, among other reasons, the allocation of jurisdiction and the lack of grounds for refusal obliges the courts of another Member State to declare any judgment enforceable that is certified with the content outlined in the Regulation, even if the content should be incorrect.²⁹⁰ The system of mutual trust dictates, according to this view, that any fundamental rights issues must be left to resolve within the legal system of the Member State of origin, since all states have to trust

²⁹⁰ Para. 49; it did not, however, subscribe to the view that the certificate was *actually* wrong.

that “their respective national legal systems are capable of providing an equivalent and effective protection of fundamental rights [...]”.²⁹¹

Advocate General Bot was even more explicit in his opinion: “The mutual trust and recognition which govern Regulation No 2201/2003 are accordingly intended to create, in the European judicial area, a system which resembles so far as possible the situation which pertains within a single Member State...”,²⁹² “...the level of mutual trust between the Member States in the capacity of the courts of the other Member States to ensure genuine protection for those rights made it possible to take that logic to its ultimate conclusion and confer on the final judgment delivered by the court with territorial jurisdiction a specific enforceability which cannot be challenged in the other Member States.”²⁹³ “Even if the child has not been given an opportunity to be heard, contrary to the information provided on the certificate issued under Article 42 of Regulation No 2201/2003 and in breach of the provisions of that article and of the fundamental right under Article 24(1) of the Charter of Fundamental Rights of the European Union, that regulation must be interpreted as meaning that the court of the requested Member State may not oppose the enforcement of a certified judgment ordering the return of a child delivered on the basis of Article 11(8) of that regulation.”²⁹⁴

If we take this line of reasoning seriously, it shows an understanding of trust that strips it of any meaningful empirical content. If trust is a certain expectation you form of another’s behaviour in the absence of full knowledge, any exact previous knowledge of sure disappointment erodes trust. When the ECJ and the AG still ask a Member State to have trust in the face of false statements and knowledge of breach of fundamental rights, it basically renders a definition of trust as a behavioural frame. Trusting is then the outward behaviour of cooperation and trust is just a code for a model of cooperation without any substantive trust. It seems that the ECJ subscribes to those models of cooperation that see a possibility for cooperation

²⁹¹ Para. 70.

²⁹² Para. 98

²⁹³ Para. 128 of the opinion.

²⁹⁴ Para. 140 of the opinion.

without trust, and just renames it trust. Or, in other words, states are expected to behave “as if” they trusted each other, only that the pretence is not a first step until more stable beliefs can be established.²⁹⁵ Rather, it is an eternal and static “as-if”-approach. The dangers of this are obvious, so that this decision has been called the “low point” of the doctrine of mutual trust.²⁹⁶ It also leaves open a very important question concerning the responsibility for maintaining fundamental rights standards. If a state knowingly assists in a return of a child that will result in a flagrant breach of fundamental rights, it might itself be responsible for it both under the Charter and the ECHR / Art. 6 TEU. The interpretation of a Regulation contrary to primary law would then not be possible. We will deal with this question in the part on fundamental rights. It seems that this fundamental rights angle could be the key to the end of this far-reaching legal trust concept.

The idea of a European judicial space modelled to resemble the situation within a single Member State also shows the inherent belief that closer cooperation is always good, even though the goal might be unclear. In actual fact, the idea of a single state seems to rely on ‘common market dynamics’ once more, despite its being obvious that a European judicial space should and must be quite different from a single Member State.

The problems with incorrect certificates that are the basis for recognition could arise in criminal matters in a very similar way. As outlined above, most mutual recognition instruments contain a warrant or similar document that certifies certain aspects in a specified form. These could also be wrong, and this could be known to the executing authority, whereby fundamental rights problems might arise. The related question of whose view on the fulfilment of certain requirements is decisive has already been under scrutiny by the ECJ.²⁹⁷

²⁹⁵ *Gambetta*, Can we trust trust? p. 234, see above.

²⁹⁶ *Peers*, 48 CMLRev. (2011), p. 693 nt. 224.

²⁹⁷ In the *Mantello* case, ECJ (Grand Chamber) judgment of 16 November 2010, C-261/09: the law of the issuing Member State of a European Arrest Warrant is decisive for the question of whether the person has been finally judged in that country; the executing Member State may not decide on this; cf. also the case note of *Ouwerkerk*, 48 CMLRev. (2011), p. 1687.

In criminal procedure, on the contrary, no such system of uniform allocation of jurisdiction is adopted, nor is it likely to come into force in the medium term. The cooperation has no equal duration and intensity. However, there are at least strong hints that mutual trust might be applied as a legal principle in this area of law as well.

4.4 Trust as a legal principle in criminal procedure

As outlined above, in criminal procedural law the concept of mutual trust is regularly invoked. However, the case law of the ECJ is not yet as elaborate in transforming the concept of mutual trust into a legal principle. This seems, however, due to the more limited competences that the ECJ had according to the ex-Art. 35 EU and the relative novelty of this area of law rather than to a different understanding on the side of the court. Moreover, the ECJ already indicated a similar interpretation in joint decisions *Gözütok/Brügge*.²⁹⁸ In both of these cases, the question concerned the interpretation of Art. 54 of the Schengen Convention (*ne bis in idem*), namely whether the decision of a public prosecutor to discontinue proceedings against an individual can mean that a person's trial has been "finally disposed of".

Gözütok was a Turkish national, domiciled in the Netherlands. In his snack bar, the Dutch police twice seized considerable amounts of drugs in 1996. When *Gözütok* accepted the prosecution's offer to pay a certain sum of money ("transactie"), proceedings against him were stopped with the effect that any future proceedings on the same grounds are barred in the Netherlands (Art. 74(1) of the Dutch criminal code). German authorities found out about his activities and later arrested *Gözütok* in Germany in 1997, assuming jurisdiction on the basis of § 6 Nr. 5 German Penal Code (StGB). The Oberlandesgericht Köln referred the above-mentioned question to the ECJ.

Brügge was a German national, resident in Germany, who was accused of having wounded a Belgian woman in Belgium. After the German prosecution had discontinued the proceedings following a payment of 1.000 DM according to § 153 a

²⁹⁸ ECJ judgment of 11 February 2003, C-187/01 and C-385/01.

German Code of Criminal Procedure (StPO), proceedings were started in Belgium. The Rechtbank van Eerste Aanleg Veurne referred a similar question, wanting to know whether the Belgian proceedings could continue.²⁹⁹

The ECJ interpreted the questions as meaning if a case can be considered “finally disposed of” even if no court or tribunal is involved in the proceedings and the final order does not take the form of a judicial decision. It simply states that, in the absence of a contrary provision in the Schengen Convention, it must suffice if future prosecution is barred in a Member State and some kind of atonement has been done.³⁰⁰ It then makes a very significant statement: since nowhere in the Schengen Convention any degree of harmonisation or approximation of national laws is required for the full application of Art. 54, this means that “there is a necessary implication that the Member States have mutual trust in their criminal justice systems and that each of them recognises the criminal law in force in the other Member States even when the outcome would be different if its own national law were applied”.³⁰¹ This clearly shows that the court regards mutual trust as a *legal* principle, since for a social phenomenon this would be circular³⁰²: the court deduces trust from the unlimited scope of Art. 54, since such a far reaching mechanism of recognition requires trust.³⁰³ The first mentioned trust must thus be a normative concept, while the second is the factual state of trust. This shows the terminological, but also the conceptual, confusion that generally exists with regard to trust. The judgment, however, is not solely based on this principle but also relies on purposive interpretation to promote free movement.³⁰⁴

²⁹⁹ In Germany, according to § 153 a para. 1 s. 5 of the Code of Criminal Procedure, *Brügge* could not be prosecuted on the basis of the same facts again unless the legal evaluation changes (from a Vergehen to a Verbrechen, an offence that carries a minimum prison term of one year; so-called eingeschränkte materielle Rechtskraft).

³⁰⁰ Para. 30s.

³⁰¹ Para. 33.

³⁰² Cf. also *Flore*, *Confiance*, p. 18.

³⁰³ See also *Conway*, 13 EJCCL (2005), p. 280.

³⁰⁴ Only this understanding of Art. 54 will support the full free movement of persons instead of endangering persons who have committed only minor offences and consequently not been subject to a court trial. It also tries to contradict the literal, systematic and historical interpretation of Art. 54-58 of the convention as advanced by several governments which seem to further the opposite view, cf. *Hecker*, *Europäisches Strafrecht*, p. 497ss.

As concerns the principle of mutual trust, AG *Colomer* was actually more radical than the court: “This shared goal [an area of freedom, security and justice] cannot be achieved without the mutual trust of the Member States in their criminal justice systems and without the mutual recognition of their respective judgments, adopted in *a true common market of fundamental rights*. Indeed, recognition is based on the thought that while another State may not deal with a certain matter in the same or even a similar way as one's own State, the outcome will be such that it is accepted as equivalent to a decision by one's own State because it reflects the same principles and values. Mutual trust is an essential element in the development of the European Union: trust in the adequacy of one's partners' rules and also trust that these rules are correctly applied.”³⁰⁵

While his definition of mutual trust is much the same as that of the court, *Colomer* tries to tie mutual trust and mutual recognition back into a common market language. The futility of this has been amply described above. What exactly a common market of fundamental rights is supposed to be remains in the dark, and why this common market should be necessary for mutual trust and mutual recognition is equally unclear. Obviously, fundamental rights are not going to be marketed in different countries. If this only means that different fundamental rights standards are going to be treated as equivalent by judicial authorities, it would have sufficed to say so. The apparent overall coherence of EU law implied by such language on the other hand is both misleading and confusing.

In *Bourquain*, another - very peculiar - case concerning the *ne bis in idem*- principle, the ECJ merely reiterated its understanding of trust in *Gözütok/Brügge*. Advocate General *Colomer*, however, seized the opportunity to give a new analysis of the concept of mutual trust. In his view, the past understanding of mutual trust has been utilitarian vis-à-vis mutual recognition³⁰⁶ and has been applied as a legal principle: “Although it must be assumed that there is, between the States, a respect for certain conditions, especially regarding fundamental rights, experience shows that mutual

³⁰⁵ Para. 124 of the opinion, highlighted by author.

³⁰⁶ Para. 41.

trust applies in a similar way to a normative principle which encapsulates the interpretative rules concerning obligations relating to the ‘third pillar’, fulfilling a role similar to that of loyal cooperation.”³⁰⁷ The problems arising from this could, according to his view, be solved through harmonisation of procedural and substantive criminal law, or in the absence of this, through supplementing the cooperation system through a reference framework of fundamental rights. This corresponds to the observation that mutual recognition, though originating from the field of inter-state cooperation, has materialised in individual safeguards.³⁰⁸

This is the first time any of the institutions have acknowledged the fundamental rights problems that might follow an overly functionalist view of mutual trust. The Court itself, however, did not pursue this thought. Any clear take on mutual trust cannot really be distinguished. There seems to be a great difference of opinion as regards mutual trust. Advocate General *Sharpston*, for instance, suspects in her analysis in *Gasparini*³⁰⁹ that mutual recognition and mutual trust are just “different names for the same principle”, that in fact the ECJ prefers trust, while the other institutions use recognition. She - unsuccessfully - argues that trust is not a sensible basis for *ne bis in idem*. The fact that trust has an important place in the Court’s jurisdiction in criminal cases has often been attributed to the fact that it has arisen in cases concerning *ne bis in idem*, where trust is generally conducive to freedom. This might be the reason why AG *Sharpston* tries to limit the application of the principle of mutual trust and recognition. Since she follows a very traditional, nation-state-based approach to criminal law in the EU,³¹⁰ she argues for a substance-based definition of *ne bis in idem*, where a judicial decision barring further proceedings due to the fact

³⁰⁷ Para. 45 of the opinion.

³⁰⁸ Para. 46.

³⁰⁹ Para. 107 nt. 87 of the opinion. In this case, the Court did not follow her opinion.

³¹⁰ Overstating, in my view, the varying values that are expressed in criminal law and their incompatibility with recognition. After all, many current forms of criminal law and procedure are not necessarily an expression of deep cultural beliefs of the public, but the result of a historical development based on many accidental factors as well. Even if there should be great cultural differences expressed in criminal law, this does not mean that states are not willing to overcome them in a common interest, cf. *Sugmann Stubbs / Jager*, KritV 2008, p. 66 nt. 32; cf. for ideas on criminal law as a constitutive element of European identity *Hildebrandt*, 1 Crim.Law and Philos. (2007), p. 57.

that they are time-barred should not partake of this protection. Thus criminalisation – which she calls “safety” – should prevail over free movement and recognition in such cases.

4.5 Outlook

If the ECJ really only follows a broad approach towards trust in criminal matters because the *ne bis in idem*-principle is conducive to freedom, or if it will do so irrespective of fundamental rights as it does in civil matters, remains speculative. The Court will soon have a chance to clarify its approach as a case concerning the responsibility of the executing state in judicial cooperation for fundamental rights violations in the issuing state is now pending.³¹¹

If we take into account the recent development of asylum law, the Court may well take a more critical approach to absolute, or normative, views on trust. The jurisdiction of the ECtHR seems to have had some influence on this. It has now decided in *M.S.S. v. Belgium and Greece*³¹² that a state is in breach of its obligations under the ECHR when it transfers an asylum seeker to another EU Member state that is primarily responsible under the EU’s Dublin-system when it knows that the person will be subjected to detention and living conditions that are contrary to Convention rights. At least when the transferring state has a discretionary power to assume responsibility, it cannot rely on inter-state confidence or a presumption of equivalent protection in that Member State.³¹³ It follows that neither a state’s accession to the ECHR nor the transfer of powers to an EU system can build an irrebuttable presumption that another state will honour its obligations with regard to fundamental rights. Since then, Advocate General *Trstenjak* has given two similar

³¹¹ ECJ, reference for a preliminary ruling, lodged on 27 July 2011, C-396/11 - *Radu*.

³¹² ECtHR judgment of 21 January 2011, no. 30696/09 - *M.S.S. v. Belgium and Greece*.

³¹³ The presumption of Convention compliance was outlined in the *Bosphorus* case and stated that, when parties to the Convention have given power to an international organisation that has an equivalent degree of fundamental rights protection such as the EU and apply EU measures without any margin of appreciation, they can rely on the presumption of Convention compliance, unless the protection is manifestly deficient in a given case, cf. ECtHR judgment of 30 June 2005, no. 45036/98 - *Bosphorus*.

opinions on the 22 September 2011 in the now joint cases of N.S. and M.E.,³¹⁴ stating that “the conclusive presumption that the asylum seeker’s fundamental rights will be observed in the Member State primarily responsible for his application is incompatible with the Member State’s duty to interpret and apply Regulation No 343/2003 in a manner consistent with fundamental rights [...]” Only a rebuttable presumption might be acceptable.³¹⁵ This development has been discussed under the heading of a possible “death of ‘mutual trust’”.³¹⁶ The ECJ has mainly followed this reasoning³¹⁷ and, significantly, added that any secondary legislation requiring such a conclusive presumption might itself be contrary to fundamental rights.³¹⁸ Even though the observations on mutual trust and fundamental rights might be of general validity, it still does not seem to me that the ECJ will in the future reduce the scope of the principle of mutual trust generally. After all, the opinions were rendered in an area of most systematic fundamental rights violations by one Member State that are more or less generally acknowledged.³¹⁹ The systemic nature of the deficiencies of the conditions for asylum seekers in Greece were an important argument in the judgment.³²⁰ Furthermore, any other reasoning would have resulted in an open conflict with the ECtHR³²¹. The ECtHR has not yet³²² taken a similar approach in criminal matters.

³¹⁴ Joint cases C-411/10 and C-493/10.

³¹⁵ Opinion in N.S., para. 131, 133.

³¹⁶ Peers, The death of ‘Mutual Trust’?.

³¹⁷ ECJ judgment of 21 December 2011, joined cases C-411/10 and C-493/10 at para. 99ss.

³¹⁸ At para. 100.

³¹⁹ Both the ECJ and the ECtHR refer to the unanimous reports of international non-governmental organisations, correspondence of the UNHCR and Commission reports on the evaluation of the Dublin system that expose degrading living conditions, cf. the ECJ at para. 90, ECtHR in *M.S.S. v. Belgium and Greece* at para. 347ss.

³²⁰ At para. 86, 89.

³²¹ The judgment relies heavily on the judgment of the ECtHR in *M.S.S. v. Belgium and Greece*, cf. para. 86ss. and the factual findings of the ECtHR.

³²² It might have done so in the case of *Pianese v. Italy and the Netherlands* (no. 14929/08) with regard to the European Arrest Warrant in a case where, inter alia, the Dutch courts had relied on a presumption that Italian courts would respect the right to liberty of Art. 5(1) ECHR, but with a decision of 27 September 2011, the application was considered inadmissible for being out of time (Art. 35(1) ECHR) in this regard and out of time and manifestly ill-founded (Art. 35(3) ECHR) as to his other complaints following a partial decision of 15 June 2010.

4.6 Criticism and Consequences

From all that we have seen, it seems the only one thing that can be said about mutual trust with any certainty is that it is a most variable concept. Almost all activity in the area of freedom, security and justice is to some degree concerned with the idea of mutual trust. Hardly any policy document, new piece of legislation or judicial decision does not at least give a passing reference to it.³²³ The focus has been so much on promoting mutual trust recently that one could almost presume a shift of focus from mutual recognition as the driving concept toward the newer concept of mutual trust. Given this, it is surprising that it is hardly ever defined or explained by those who use it. It is interchangeably referred to as respect, a presumption, or confidence. The conceptual vagueness might serve its own purposes. In the eyes of the Commission and the Council, leaving the exact implications of trust open is advantageous as it guarantees that it stays a dynamic concept, and one that many (differing) hopes can be vested in. As for the ECJ, it is not unusual that it does not first define a concept and then deduct principles from it, but that it follows the reverse method, so that its conceptual understanding becomes clearer only from the entirety of its judgments.³²⁴

It seems to be the common understanding of most that trust between “Member

³²³ Green Paper “Strengthening mutual trust in the European judicial area – A Green Paper on the application of EU criminal justice legislation in the field of detention”, COM/2011/327fin.; Stockholm Programme, Council Doc. 17024/09, p. 25, 37; Green Paper “The Presumption of Innocence”, COM/2006/174fin., p. 3; Green Paper on the approximation, mutual recognition and enforcement of criminal sanctions in the European Union, COM/2004/334fin., p. 10, 12; Green Paper on criminal-law protection of the financial interests of the Community and the establishment of a European Prosecutor, COM/2001/715fin., p. 17, 48ss.; Programme of measures to implement the principle of mutual recognition of decisions in criminal matters, OJ C 12/10 of 15 January 2001; Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings, recitals 4, 6, 7, 9, 12; Council Framework Decision 2008/978/JHA of 18 December 2008 on the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters, recital 8; Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence, recital 4; Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, recital 10; ECJ judgment of 11 December 2008, C-297/07 (*Bourquain*), para 37; ECJ judgment of 28 September 2006, C-467/04 (*Gasparini*), para 30; ECJ judgment of 11 February 2003, C-187/01 and C-385/01 (*Gözütok/Brügge*), para 33.

³²⁴ Similarly *Nettesheim*, EuR 2009, p. 28, concerning European citizenship.

States” is necessary for mutual recognition. Not even this is clear, however. At the high point of the principle of trust - the inclusion in Art. 41(1) of the draft Constitutional Treaty - mutual confidence was to be promoted “on the basis of mutual recognition”, so that the relation between the two was essentially reversed, and cooperation was supposed to bring along the confidence needed.³²⁵

If we try to shed light on the basic division between a factual and a normative concept, one aspect is obvious: regardless of the initial significance of mutual trust, the ECJ tends to develop it into a true legal principle that - in the analysis of Advocate General *Colomer*³²⁶ - resembles the duty of loyal cooperation.³²⁷ This must be taken into account in all areas where mutual trust is used since it carries specific implications.

But the area of civil procedure also shows the negative tendency that such a juridification of mutual trust may lead to. The ECJ has not finally dispelled the concerns raised by the Member States’ courts. Although both *Gasser* and *Turner v Grovit* might have been decided correctly, in both cases the national courts were faced with pressing problems. This mistrust they had towards the foreign courts that was based on previous experience cannot easily be overcome without addressing the fundamental rights issue behind it. Even more so in *Zarraga*, the German court was asked to participate in what was, in its own estimation, a flagrant violation of fundamental rights.

In the ambit of criminal procedure, the question of factual mistrust is even more pertinent, owing to the special nature of criminal law as an integral part of national sovereignty. But as we have seen above, mutual trust has taken a similar direction in the case law of the ECJ on cooperation in criminal matters. Trust is invoked although it has no factual basis – the fact that *Gözütok* and *Brügge* reached the ECJ in the first place shows that there is still a great scepticism in practice between the Member States. In criminal proceedings especially it seems to be very difficult for states to

³²⁵ *Flore*, *Confiance*, p. 20.

³²⁶ See above.

³²⁷ *Blobel/Späth*, 30 *ELRev.* (2005), p. 535, identify it as a subcategory.

accept differing values of other states and waive their own *ius puniendi*. The decision of *Gözütok* was less about the exact interpretation of Art. 54 of the Schengen Convention than about lack of trust - or more correctly, about disapproval: the German prosecution did not want to accept – that is to recognise – the differing Dutch law and policy on drugs; it considered it too lenient. Similarly, in *Brügge*, the Belgian authorities did not want to put up with the “lean” German law. It is clear that there is a great need to enhance Member States’ readiness to recognise different legislations.

This is often called „blind“ or „imposed“ trust.³²⁸ When we look at it more closely, we will see that the charge of relying on “blind” trust refers to two different situations: When it refers to far-reaching measures that the Commission and Council want, basing it on trust without any factual basis, it refers to the complete leap of faith that is required, and where the possible outcome cannot be assessed beforehand. When it is raised against trust as a normative concept and the way the Court uses it to order a certain performance despite a known outcome, it is something different. In reality, it has nothing to do with trust. In such decisions, the Court deviates from the basic assumption that some degree of uncertainty is necessary for trust. If a Member State does not want to recognise another Member State’s decision, it already knows the outcome, and it is not mistrust, but simply disapproval. So, in *Gözütok* and *Brügge*, states disapproved of each others’ legislations and the decisions based on them. Similarly, in *Zarraga*, the German court disapproved of the proceedings that it had been informed of. In these situations, trust as the decision to form positive expectations in the face of uncertainty is impossible. If the Court “orders” trust, it is obsolete. If the agents are not free and trust is no longer conditional on the behaviour of the others it cannot and need not exist. Coercion is not a way to enforce trust; it is an alternative to trust in cooperation, and a rather shaky one. If we then still expect the actors to trust, even though they know and disapprove the outcome, by saying that they should consider these as equivalent, or equally good, or equally compatible with fundamental rights, the concept of trust acquires almost religious overtones, since it requires the agents to live with a paradox and live with their ineptitude to form

³²⁸ “Almost blind”: *Mitsilegas*, Trust-building measures, p. 280; *Kotzurek*, ZIS 2006, p. 129.

an opinion of the facts before them, or blind themselves. In such situations, trust can at best exist as a second order trust in general, but not in the particular case.

In contrast to this far-reaching approach to trust, we find the factual situation. Many people do not have trust towards foreign judicial and police authorities.³²⁹ Many authorities do not believe that a case will be dealt with in accordance with common fundamental rights standards, even though they might generally trust their counterparts. Even states and governments do not trust – although they agree first, they may later draw back in the implementation stage.³³⁰ Thus, for example, the framework decision on the European Arrest Warrant has not yet been fully transposed by all.³³¹

At this point, harmonisation comes in. While many still think that harmonisation is unnecessary³³² and the ECJ stresses that measures requiring recognition are based on trust and do not require any degree of harmonisation - that in fact it is an alternative - most scholars have recognised that some degree of harmonisation is needed.³³³ In fact, for this view, trust provides the link between mutual recognition and harmonisation. The concept of trust is the ambiguous dividing line for those who want recognition to go along with harmonisation and those who want it to stand on its own. Depending on this preference, trust as an a priori concept is used as an argument that harmonisation is not needed; or alternatively, another notion of trust, its basis in reality, is used to require a greater degree of harmonisation.

That mutual trust is sometimes a mere postulate, imposed from above, or just “declared”,³³⁴ has now been accepted even by the Commission, so that increasingly

³²⁹ Cf. e.g. the article in The Telegraph of 26 July 2010 “Britons to be spied on by foreign police”, available under <http://www.telegraph.co.uk/news/uknews/law-and-order/7909314/Britons-to-be-spied-on-by-foreign-police.html>, on the European Investigation Order.

³³⁰ Cf. *Impalà*, 1 Utrecht Law Review (2005), 56ss.

³³¹ Commission report on the implementation since 2007 of the Council framework decision of 13 June 2002 on the European arrest warrant and the surrender procedures between member states, COM/2011/175fin., p. 5.

³³² *De Biolley*, *Confiance*, p. 181 s., wants to further co-existence of legal orders and prefers direct contact over harmonisation.

³³³ See e.g. *de Hoyos Sancho*, in: *ead.* (ed.), *Criminal Proceedings in the EU*, p. 42ss., with further references.

³³⁴ *Nilsson*, *Mutual trust*, p. 38, on *Gözütok*.

it tries to promote trust actively.³³⁵ One of the main areas in which trust seems to be lacking is the protection of fundamental rights. Just as mutual trust is supposed to serve and further mutual recognition – a utilitarian understanding according to AG *Colomer* – fundamental rights are therefore now promoted to further mutual trust. If states are unwilling to cooperate due to a possible violation of fundamental rights in another Member State, this is often described as distrust which hinders mutual recognition.

A supposed existence of sufficient fundamental rights protection on a general level is often used as a reason to require trust and not exercise control on a case by case basis.³³⁶ Thus, many proposals tackle fundamental rights in this way. The Commission Communication on the implementation of the Charter³³⁷ even seems to regard it as one of the main aims of effective fundamental rights protection to help promote confidence, so that its lack does not “hinder the operation and strengthening of cooperation machinery in the area of freedom, security and justice”.³³⁸ Overall, the Commission today repeatedly stresses that a factual, real trust in fundamental rights protection of all Member States should be built in order to achieve closer judicial cooperation.³³⁹

Similarly, the recent Green Paper on mutual trust and detention conditions,³⁴⁰ intends

³³⁵ See the examples in the following paragraphs.

³³⁶ Commission report on the European Arrest Warrant, revised version, COM/2006/8fin., point 2.2.3.: “Contrary to what certain Member States have done, the Council did not intend to make the general condition of respect for fundamental rights an explicit ground for refusal in the event of infringement. A judicial authority is, of course, always entitled to refuse to execute an arrest warrant, if it finds that the proceedings have been vitiated by infringement of Article 6 of the Treaty on European Union and the constitutional principles common to the Member States; in a system based on mutual trust, such a situation should remain exceptional.” It would have been preferable if the Commission had meant that infringements of Art. 6 ought to remain exceptional, rather than refusals based on it.

³³⁷ Commission Communication “Strategy for the effective implementation of the Charter of Fundamental Rights by the European Union”, COM/2010/573fin.

³³⁸ P. 3s.

³³⁹ Similarly already in the Communication on the mutual recognition of judicial decisions in criminal matters and the strengthening of mutual trust between Member States, COM/2005/195fin. in the wake of the Hague programme.

³⁴⁰ Green Paper of 14 June 2011 “Strengthening mutual trust in the European judicial area - a Green Paper on the application of European criminal justice legislation in the field of detention” COM/2011/327fin. This is part of the procedural rights package in the wake of the Roadmap for strengthening procedural rights of suspected persons in criminal proceedings.

to promote trust so that mutual recognition can operate more effectively. It also regards mutual trust as the “necessary counterbalance to judicial co-operation measures that enhance the powers of prosecutors, courts and investigating officers”.³⁴¹ That seems to imply that trust and fundamental rights are basically the same - how else could trust counterbalance powers of prosecutors? - but it might be due to terminological inconsistencies.³⁴² The functionalist view on fundamental rights in this particular case might partly be due to competence issues, since the EU needs to justify its involvement in detention conditions, but it is regrettable that efficient cooperation rather than common European values are regarded as the primary basis for creating better detention conditions, and that the latter are only alluded to in passing. It seems to me that through mutual recognition which greatly enhances effectivity and enforceability of prison sentences, there is already a basis for EU involvement in this area.

And secondly, on a general level, it appears wrong to me to remove fundamental rights from the heart of mutual recognition and cooperation and make them an auxiliary to mutual trust. Such a functionalist view of fundamental rights openly lowers their value because it implies that, if more Member States were willing to “trust” each other and cooperate in the face of low human rights standards, this would be acceptable for the European Union’s area of freedom, security and justice. Only if Member States’ judicial authorities begin to mind, and throw sand in the gears of the so-called cooperation machinery, fundamental rights seem to have a meaning - being oil for that very same machinery. This is more than just a theoretical problem. When Member States raised the argument of inter-community trust before the ECtHR in *M.S.S. v. Belgium and Greece*³⁴³ so as not to have to assume responsibility for asylum proceedings, it seems that this cynical view of “trust” was adopted because states did not mind to cooperate when an Afghan asylum seeker’s fundamental rights were at stake. According to the functionalist approach to fundamental rights, this would not require the European Union to concern itself with

³⁴¹ P. 3.

³⁴² The paper is a curious mixture of ambitious ideas and a simplistic presentation, trying to illustrate its point through the stories of “Peter”, “Anna” and “Hans”.

³⁴³ ECtHR judgment of 21 January 2011, no. 30696/09 - *M.S.S. v. Belgium and Greece*.

establishing new or upholding its already established standards for fundamental rights in this area - only now the ECtHR has stepped in.

Fundamental rights should, from the beginning, be an integral part of judicial cooperation through mutual recognition because this sort of mechanism is particularly dangerous for them and poses new and particular problems. Rights are not there to make recognition instruments function more smoothly. This reverses the order. They are a precondition. One must agree beforehand what one wants to recognise under what fundamental rights standards.

Also, by making fundamental rights a vehicle for trust and cooperation, the individual is removed from the centre.³⁴⁴ Fundamental rights are not there to promote and help cooperation, but to protect the individual and safeguard him in criminal proceedings and also in judicial cooperation. It is encouraging that the recent Stockholm Programme and the Treaty of Lisbon focus more on the individual.³⁴⁵ Fundamental rights are not something that has to be made effective as a counterbalance to judicial cooperation; it is inherent in cooperation, an integral part of it. Cooperation needs to serve security and freedom equally; at the moment, it is just serving one of them, and then trying desperately to “counterbalance” its ill effects. In an area of freedom, security and justice there must be some common values and rights beyond minimum standards. The fundamental rights discussion should be more visionary and less nationally confined.

If we speak about common standards in cooperation, the questions asked should not be functional. The main point is not how to achieve ever more cooperation, and how to achieve trust insofar as it is necessary for it. It should be a substantive question as to what the conditions are under which we want to make recognition more effective. What individual rights, what procedural safeguards and what degree of compatibility do we as a community consider necessary in order to make a decision enforceable everywhere throughout the Union? If agreement could be reached on these points, and their application secured, trust and confidence would follow by themselves and

³⁴⁴ Advocate General *Colomer* acknowledges as much in his opinion in *Bourquain*, cf. above.

³⁴⁵ Stockholm Programme, OJ C 115/1 of 04.05.2010, p. 8; *Meyer*, EuR 2011, p. 193.

could be furthered by flanking measures. Trust can only be a policy concept, but it cannot be the basis to fill a vacuum of legal measures for the protection of fundamental rights.

What then, is trust? It is important to acknowledge that trust is a concept with inherent limitations. It cannot solve all that it is burdened with. The different positions on trust, and especially on trust and harmonisation, are just two extremes. If we have complete procedural and substantive harmonisation and application of these rules, i.e. if all concerned in judicial cooperation know that all others will adhere to the exact same standards, trust is rendered redundant. With no harmonisation, and no shared goal or values, trust on the other hand is a pure gamble. It also becomes dangerous, as trusting makes the other's actions more effective. Trust, like recognition, is a concept to deal with diversity;³⁴⁶ the question that concerns us here is what its legal implications are, and what legislative activity must be connected with mutual trust. Some harmonisation is certainly necessary, but I think that this harmonisation need not be of substantive criminal law. More important is the harmonisation of procedural measures. Most important, in my view, is the uniform allocation of jurisdiction. The creation of fundamental rights should be advanced independently of this.

Let us first look at the nature of mutual trust. As we have seen, it is often interpreted as a legal principle by those who think no harmonisation is necessary for it. To my mind, however, it is only a sublegal category and cannot convincingly be transformed into a normative concept. Firstly, there is no legal basis for it. While mutual recognition is now mentioned in the TFEU – even though that does not necessarily transform it into a legal principle – the inclusion of trust or confidence as envisaged by the draft Constitutional Treaty was unsuccessful. Trust is instead introduced into the debate as a mechanism that is supposed to further mutual recognition. If it is mentioned in legal acts, it is mainly found in the preambles. The binding value of this

³⁴⁶ A way to 'pull off' the paradox, expressed also in the Union's motto *United in diversity*; cf. Nuotio, Significance, p. 210; Möstl, 47 CMLRev. (2010), p. 405.

is doubtful.³⁴⁷ Its legal link is therefore very remote.³⁴⁸ More important than the question of a basis for it in legal texts (which, after all, could simply be created) is the substantial ineptness of the notion of trust to be transformed into a normative concept. The instant that trust is used as a normative principle, or worse, a legal rule, is so much disconnected from the meaning of the term „trust“ in sociology and ordinary language, that there seems no point in keeping it. It then just is a rule that tells judicial authorities to recognise foreign decisions under all circumstances and compensates for deficiencies in clarity of the underlying legal acts. This is not a very promising route. Factual trust is important for cooperation, but not so much for trust as a normative concept, because in fact the law could just require judicial authorities to act in a certain way, independently of their feeling and expectations,³⁴⁹ but for cooperation to work efficiently. Experience shows that, even in a strict legal framework, both abuse of trust and distrust may carry the day, because there is always a way around trusting. For governments, they can begin to breach trust by not implementing legislation properly. Judicial authorities have the possibility to use the grey areas of the law when they do not trust, to slow proceedings up, not to adhere to procedures properly, or to find ways around it. Similarly, courts can circumvent certain questions and not ask for a preliminary ruling. As we have seen, the possibility of cooperation without trust is doubtful. But even if we followed an approach that accepted this, it would require the application of reciprocity.³⁵⁰ Reciprocity in a strict meaning is however just what the European sphere was supposed to overcome. As we have seen above, states may not revert to this rule in the EU. However, it will certainly be done in practice, as the example of the reactions of Spain and other states towards Germany after the judgment of the Constitutional

³⁴⁷ See for the debate *Blekxtoon*, Commentary, p. 219, and *Tinkl*, Rechtsstellung, p. 76s., who follows the opposite view.

³⁴⁸ *Fletcher/Löff/Gilmore*, EU Criminal Law, p. 52, criticize it as a concept “twice removed” from the ex-Title VI EU. Some, on the other hand, believe it may even be part of the general principles of Union law, cf. *Blobel/Späth*, 30 ELRev. (2005), p. 535.

³⁴⁹ *Fletcher/Löff/Gilmore*, EU Criminal Law, p. 214.

³⁵⁰ See above 4.1.

Court on the transposition of the European Arrest Warrant show.³⁵¹

As a policy concept, trust should be used sparingly. It is important, but more so when it stays a background narrative that binds together legislation and soft measures. It cannot be taken down to the level of practical legal application.

If we look at the content of mutual trust in judicial cooperation, we see that trust can play a part both on a more abstract level between governments or Member States and on an operational level between judicial authorities. While trust can work as a postulate on the first level, as a well-phrased aspiration,³⁵² because political will is often more important than a factual situation, it will be sabotaged at the second. Therefore trust is something that mainly needs to be strengthened on an operational level, through exchange of information, training, networks etc.³⁵³ A paradoxical effect of more knowledge, however, can be that it might be detrimental to trust in that it leaves less room for illusions.³⁵⁴ This is because trust is always intersubjective and might be strongest when there is less reason for it.³⁵⁵

What legal implications does trust have, then? As indicated before, mutual recognition requires us to ask what the conditions are under which states should cooperate. To agree on these common standards and to harmonise laws that are necessary for the protection of these standards, must be part of any cooperation framework. Trust is the effect that these measures should have. If we have already built this kind of fundamental rights framework, and continue to do so in acts requiring mutual recognition, then we can say that we might want to promote trust

³⁵¹ The uncertainty is well reflected in the minutes of evidence of 18 January 2006 of the House of Lords Select Committee on European Union (available at <http://www.publications.parliament.uk/pa/ld200506/ldselect/ldcom/156/6011805.htm>) where Andy Burnham, MP, clearly states that the system would break down if states were to return to a tit-for-tat approach, but he also stresses the importance of reciprocity and a possible change in attitude, should the situation in Germany and other states not be resolved, cf. the answer to questions 50 to 59.

³⁵² Cf. for general observations on “aspirational taglines” *Fletcher/Löff/Gilmore*, EU Criminal Law, p. 20.

³⁵³ This corresponds with the importance practitioners expressed for this kind of flanking measures, *Wahl*, Perception, p. 142ss.

³⁵⁴ Cf. for the area of police cooperation *Rijken*, 2 Utrecht Law Review (2006), 116.

³⁵⁵ *Flore*, Confidence, p. 28.

through flanking measures, as there is already a basis for it. These should lead to the expectation between judicial authorities that the other Member States' authorities will apply measures requiring mutual recognition lawfully, that they pay respect to all fundamental rights provisions relevant to a case, and that these provisions are adequate with regard to the common values of the Union.

I think that harmonisation is necessary mainly in the area of fundamental rights and that EU legislation should resolve fundamental rights problems at the earliest possible stage in legal acts requiring mutual recognition besides the more general fundamental rights frameworks. This should be done first and foremost because of the intrinsic value of fundamental rights, and the common cause that they present for the Union, not primarily to build trust in order to facilitate recognition. That may or may not be the effect it sometimes has. Granted, this sounds like a play on words, but in practice it will make a difference in the extent and scope of proposals. It will always make differences in practice, particularly in court decisions, whether a functionalist or a non-functionalist approach lies at the bottom of legal rules. As fundamental rights are part of judicial cooperation, it becomes necessary to work more narrowly on a possible legal and theoretical framework that can help to develop a coherent approach to fundamental rights in judicial cooperation. The EU offers great chances of finding a framework that does not have a blind spot in judicial cooperation, as is often the case with nation states. It is optimal for taking into account specific dangers for fundamental rights in transnational proceedings and trying to adapt the fundamental rights framework to this. The last chapter of the thesis will be dedicated to this attempt.

The second major area requiring harmonisation is the area of jurisdiction. In this regard, I consider a more functionalist approach to trust acceptable, because jurisdiction is not just a question of individuals' rights,³⁵⁶ it is also asking states to give up their own *ius puniendi*, an important part of their sovereignty. Member States will be more willing to accept each other's judicial decisions if they know why they should be relying on one state's estimation more than on another's or their own. The

³⁵⁶ For this aspect of jurisdiction see below.

importance of this for recognition in civil matters has been amply highlighted by the ECJ. The distrust that judicial authorities often feel towards the criminal laws of another state might be lessened if there was a reason why that state's law should prevail. If states agree beforehand through abstract rules on the most appropriate forum, they might be more induced to accept laws that, for example, in their estimation, are too lenient, as in *Gözütok/Brügge*. A Member State's readiness to recognise a foreign judgment will certainly increase if the authorities of the sentencing state were competent according to its view. A state can accept that another state's criminal law prevails in a specific case if this is due to a rule applicable in all Member States. The state authorities would know that, in a parallel case, its own criminal law would have prevailed. The law that is applied would then not depend so much on chance as it is the case now (for example, currently prosecution authorities might have to compete in terms of who is faster in prosecuting the defendant). Additionally, this would be in line with the idea of a common European judicial space.

Such a uniform allocation of jurisdiction would also resolve different problems in other areas of mutual recognition in criminal matters³⁵⁷ and therefore be a means to build up mutual trust. The adoption of a legislative act would be an anticipated declaration of mutual trust on the part of the Member States and therefore fulfill a positive function of encouraging trust. The negative process of the postulation of mutual trust that in effect leads to factual distrust could be stopped by measures of this kind. How the idea of jurisdiction features in judicial cooperation will be the point of chapter 6.

It must be noted, however, that the problems discussed under the name of failure of trust can never be totally resolved. Even the highest level of harmonisation cannot exclude the possibility that some courts will hold a circumstance to be a violation of fundamental rights, while others will not. In these cases, it is futile to discuss the substantive issue. In law, the question of who decides, whose estimation is decisive, is always central, in fact, just as central as the substantive issue itself. If we build a

³⁵⁷ Such as the principle of maximum punitivity, cf. *Deiters*, ZRP 2003, p. 359 ss.

system of mutual recognition built on the trust that a uniform allocation of jurisdiction brings about, cooperation will be a lot more efficient, because it will avoid frictions. But we must see that frictions do sometimes serve the individual, because one agent can correct the mistakes of other agents. If closer integration is wanted, cases where a court cannot step in to do this will occur, just as they do on a national level.

Chapter 5 Mutual recognition in the law of evidence-gathering

Every criminal procedure, be it domestic, foreign or transnational, necessitates great sensitivity to individuals' rights.³⁵⁸ In such procedures, the state has great powers as opposed to the individual and there is a great risk that his rights could be infringed. I am only addressing the problems that arise for individuals' rights specifically through a transnational or supranational procedure as opposed to purely domestic procedures and the question of European activity in that respect.

Difficulties for the individual are mainly based on two particularities of judicial cooperation.

First of all, frictions occur because in one instance of judicial cooperation, different aspects of different legal systems are applied at different stages of the procedure. Apart from the national substantive and procedural laws, there are the European rules on judicial cooperation as transposed by the affected Member States. While each system of law might in itself be well-balanced, there are few rules on how to reach this same balance in a combination of different legal systems. I am going to illustrate this aspect of the issue by analysing the frictions that occur in an area that is emblematic for the problems in judicial cooperation: the area of judicial cooperation in evidence-gathering.

The second problem occurs not because different legal systems are applied only in part, but because there is a conflict as to which legal system will be applied, even as a whole. This is, therefore, the question of jurisdiction that is responsible for many of the legal and political issues in judicial cooperation as has been outlined before and will be dealt with more thoroughly in chapter six. After analysing the legal issues of jurisdiction in international and European criminal law settings I will develop a

³⁵⁸ This is clearly stated by the European Council in the recent Stockholm programme: "The protection of the rights of suspected and accused persons in criminal proceedings is a fundamental value of the Union, which is essential in order to maintain mutual trust between the Member States and public confidence in the European Union." (Council Doc. 17024/09, p. 17).

theoretical framework according to which questions of individuals' rights in European Criminal Procedure should be resolved.

The particular interest of the law of evidence lies in the fact that in this area the hybrid nature of judicial cooperation in general, and of mutual recognition in that context, become visible. In order to recognise a foreign evidence order, different legal systems must interact in a framework that is far from clear: The authorities of state A issue an evidence order according to their own law and then have to request state B to collect the respective piece of evidence or conduct the investigative measure. State B will try to grant this, using another legal regime. State A will then try to use this evidence in its own trial.

5.1 Development of evidence-gathering

The history of judicial cooperation concerning the collection of evidence is less complex than that of final sentences: a request to conduct a certain measure was traditionally granted quite easily.³⁵⁹ It was mainly based on international treaties that often even contained strict obligations; however, these dealings were not yet called the recognition of a foreign order.³⁶⁰ One of the reasons might be that the collection of evidence is much more practical than the enforcement of a foreign final sentence. If the authorities of state A suppose a certain piece of evidence abroad, they would not ask the foreign authorities to recognise their order but rather only request the evidence to be taken. On the other hand, as long as there is no third entity that could be interested in a free movement of evidence³⁶¹ state B does not care whether state A will recognise the evidence it collected as equivalent in a later trial and finally admit it.

The direct contact between the concerned judicial authorities (e.g. the courts) is said to have been very common already in the 19th century due to the extreme tardiness

³⁵⁹ Cf. *Bar*, Das Internationale Privat- und Strafrecht, p. 578.

³⁶⁰ Cf. only *Lammasch*, Auslieferungspflicht und Asylrecht, p. 847ss; see also *Bassiouni*, in: *id.* (ed.), Int. Criminal Law Vol. II, p. 7s. who sees the historical basis in international comity.

³⁶¹ See below in this chapter and chapter 7.

of the diplomatic procedure, even in states where this practice was unlawful.³⁶² Classical grounds for refusal such as the exception of political crimes or the dual criminality requirement were maintained.³⁶³

Interestingly, the question of the law applicable to the collection of the evidence was answered similarly to most legal acts of today: the *lex fori* was to be obeyed, but the authorities should strive as far as possible to respect the necessary formalities of the law of the requesting state so as to promote the admissibility in court of the evidence obtained.³⁶⁴ The question of the law that should apply in judging the legality and admissibility of the evidence was already discussed. *Bar*³⁶⁵ for example suggested to determine the formal value of the evidence according to the state where it was obtained, leaving its substantive value to the sentencing state.

The actions of the requested state were usually limited to its own territory. It was, however, discussed whether it should force witnesses to appear in court abroad if their personal appearance was needed, a difficult question considering the available modes of travelling and communication.³⁶⁶

At the present moment, the transfer of evidence is still characterized by the classical mechanisms of legal aid, governed by the Council of Europe Conventions of 1959 and its protocols³⁶⁷ and complemented by the Schengen Convention of 1990.³⁶⁸ The Convention of 1959 is the more basic convention that covers most areas of legal aid apart from extradition and recognition of judgments. It does not require dual criminality, apparently because it is unclear whether the collection of evidence might

³⁶² See *Lammasch*, *Auslieferungspflicht und Asylrecht*, p. 868.

³⁶³ Cf. *Lammasch*, *Auslieferungspflicht und Asylrecht*, p. 853s.

³⁶⁴ Cf. *Lammasch*, *Auslieferungspflicht und Asylrecht*, p. 858s.

³⁶⁵ *Bar*, *Das Internationale Privat- und Strafrecht*, p. 577.

³⁶⁶ So difficult that *Lammasch* in 1887 wished very much for the further development of telephoning to be able to question witnesses directly, see *Auslieferungspflicht und Asylrecht*, p. 863ss.

³⁶⁷ 1959 European Convention on mutual assistance in criminal matters and its additional protocols of 1978 and 2001 (ETS No. 30, 99 and 182).

³⁶⁸ Convention of 19 June 1990 implementing the Schengen Agreement of 14 June 1985 on the gradual abolition of checks at the common borders (OJ L 239/19 of 22.09.2000).

not serve the defendant and establish his innocence.³⁶⁹ A state can, however, declare an exception from this if third persons are affected by a certain measure, e.g. a search. The convention upholds other grounds for refusal, such as a public policy exception.³⁷⁰ Evidence is collected under the law of the requested state, i.e. according to the *lex fori* (Art. 3).³⁷¹ The EU Convention on Mutual Assistance in Criminal Matters of 2000 and its Protocol³⁷² were meant to implement some major extensions and facilitations, such as telephone-tapping or the questioning of witnesses via video-conference; the Convention only reached the necessary number of ratifications in 2005 and entered into force on 23 August 2005, but is still not ratified by all Member States; the same is true for its Protocol that entered into force on 6 October 2005.

5.2 Prospects on EU-level: the European Evidence Warrant and its successors

Let us now look at how the new principle of mutual recognition in judicial cooperation in criminal matters has affected the law of the transnational collection of evidence.

On the 18th of December 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,³⁷³ trying to establish the principle of mutual recognition in this field. The framework decision substitutes the Council of Europe Convention of 1959, but leaves scope for the EU Conventions. It is also meant to

³⁶⁹ Cf. *Ligeti*, *Strafrecht und strafrechtliche Zusammenarbeit*, p. 141s.

³⁷⁰ See *Weyembergh*, in: *Kerchove/ead.* (eds.), *La reconnaissance mutuelle*, p. 45.

³⁷¹ "The requested Party shall execute in the manner provided for by its law any letters rogatory relating to a criminal matter and addressed to it by the judicial authorities of the requesting Party for the purpose of procuring evidence or transmitting articles to be produced in evidence, records or documents."

³⁷² Convention of 29 May 2000 on Mutual Assistance in Criminal Matters between the Member States of the European Union (OJ C 197/1 of 12.07.2000) and its protocol (OJ C 326/1 of 21.11.2001).

³⁷³ 2008/978/JHA (OJ L 350/72 of 30.12.2008).

complement the framework decision on freezing orders³⁷⁴ that only provides for provisional measures.

After the experiences with the European Arrest Warrant that had shown that mutual recognition was not always lenient on national legal systems and that a high degree of trust between Member States did not necessarily exist, the European Evidence Warrant has been subject to much criticism. This may be the reason why its adoption has been delayed by several years.³⁷⁵ In particular, the lack of procedural safeguards, the danger of forum shopping and the unclear legal framework have been attacked.³⁷⁶ In 2006, an international expert group presented a “Programme for European Criminal Justice”,³⁷⁷ containing a model law that could govern the whole of judicial cooperation in criminal matters within the EU. In the following analysis, I will refer to this work as a conceptual alternative.

The European Evidence Warrant is limited in scope to certain kinds of evidence and was meant as a first step towards a unitary instrument.³⁷⁸ This may be an additional reason why Member States were reluctant to implement it into national law. By 2011, only Denmark the relevant legislation, even though transposition was mandatory by the 19 January 2011.³⁷⁹ Member States’ willingness to implement the framework decision on the European Evidence Warrant was probably further diminished by the European Investigation Order that was proposed in the meantime. The proposed Directive on the Investigation Order was brought into the legislative procedure upon the initiative of seven Member States³⁸⁰ and is supposed to become the ‘unitary instrument’ envisaged earlier.³⁸¹ In December 2011, a general approach has been

³⁷⁴ Council framework decision of 22 July 2003 (2003/577/JHA) on the execution of orders freezing property or evidence (OJ L 196/45 of 02.08.2003); cf. Explanatory Memorandum para. 28; see *Barbe*, in: *Kerchove/Weyembergh* (eds.), *La reconnaissance mutuelle*, p. 81ss.; *Stessens*, *ibid.*, p. 91ss.

³⁷⁵ The proposal for the framework decisions is dated 14.11.2003, COM/2003/688 fin.

³⁷⁶ See below.

³⁷⁷ Cf. *Schünemann* (ed.), *A Programme for European Criminal Justice*, p. VIII.

³⁷⁸ See recital 25 of the framework decision.

³⁷⁹ See the report by *Gleß*, in: *Sieber et al.* (eds.), *Europäisches Strafrecht*, § 38 para. 8.

³⁸⁰ Initiative of 24.06.2010, OJ C 165/22.

³⁸¹ Cf. recitals 6ss.

reached,³⁸² which will be considered for the present analysis.

The framework decision on the European Evidence Warrant and the newly proposed legislation are both based on the principle of mutual recognition³⁸³ and have a certain link with the idea of a free movement of evidence that was conceived mainly in connection with supranational criminal proceedings.³⁸⁴

5.3 Scope of the proposed legislation

The scope of the legislation on transnational evidence-gathering was one of the most contested questions in the legislative process. The type of evidence for which a European Evidence Warrant may be issued is listed in Art. 4: It encompasses documents, objects and data, with the very important limitation that it must be existing and available evidence.³⁸⁵ This means that no obtaining of evidence in real-time – such as communications interception, hearing of witnesses, or monitoring of bank accounts – can be ordered via the Evidence Warrant. The same goes for evidence from the body of persons and evidence necessitating further enquiries. Historical data stemming from these (e.g. protocols of previous hearings), however, fall under the scope of the framework decision. This limitation of the Evidence Warrant would lead to further fragmentation in the framework of judicial cooperation.

The Evidence Warrant was meant for a transitional period.³⁸⁶ After the Stockholm programme provided a new political basis for a comprehensive system for obtaining evidence in all cases with a crossborder dimension,³⁸⁷ the new proposed European Investigation Order shall become a unitary instrument. It comprises all types of

³⁸² Council Doc. 18918/11 of 21 December 2011; cf. Council Doc. 7014/12 of 29 February 2012 for subsequent observations of the delegations.

³⁸³ Cf. for an analysis of mutual recognition with regard to the European Investigation Order Sayers, *European Investigation Order*, p. 2ss.

³⁸⁴ E.g. Art. 33 para. 2 of the *Corpus Juris portant dispositions pénales pour la protection des intérêts financiers de l'Union européenne*, Delmas-Marty (ed.), 1997.

³⁸⁵ See also Belfiore, 17 *EJCCL* (2009), p. 5.

³⁸⁶ Recital 25.

³⁸⁷ Council Doc. 17024/09 p. 22.

investigation measures, with the sole exception of joint investigation teams.³⁸⁸ The former exception of certain measures of telecommunication interception³⁸⁹ has been omitted in the present proposal so that they now fall within the scope of the European Investigation Order,³⁹⁰ just as the obtaining other non-pre-existing data.

It is important to note that an Evidence Warrant or an Investigation Order cannot be ordered only for criminal proceedings, but also for certain types of administrative proceedings concerning punishable infringements.³⁹¹

5.4 Functioning of the proposed legislation

5.4.1 The order

Like the Arrest Warrant, the Evidence Warrant and the Investigation Order are (standardized) judicial decisions, issued by a competent authority (judges, magistrates or prosecutors) in a Member State according to its own national laws.³⁹² One of the most important implications of the principle of mutual recognition is not only the obligation for other Member States to recognise and execute the decision, which, as seen above, forms a part of many treaties on legal aid, but the fact that Member States recognise and execute these orders like their own judicial decisions, especially without the necessity of transforming them into a new decision.³⁹³ This approach leads to the consequence that a foreign authority has to be considered as equal to any domestic authority. For example, the decision of a foreign public prosecutor to conduct a search of the dwelling of a person would have to be

³⁸⁸ Art. 3 of the general approach. See also *Bachmaier Winter*, ZIS 2010, p. 583s.

³⁸⁹ Art. 3; see OJ C 165, 24.06.2010, p. 25.

³⁹⁰ Cf. also Art. 27(b) and (d) for specific provisions.

³⁹¹ This is a novelty in judicial cooperation and would, for instance, encompass the German *Ordnungswidrigkeiten*; these are minor infractions that are dealt with by an administrative authority that can order fines without the involvement of a court. In a purely national light, many coercive measures would be regarded as contrary to proportionality in this context, see *Ahlbrecht*, NStZ 2006, p. 71 nt. 18.

³⁹² Art. 1, 2 of the respective legislative acts.

³⁹³ Art. 11 EEW / Art. 8 EIO; cf. *Belfiore*, 17 EJCCL (2009), p. 6.

executed in Germany notwithstanding the fact that, according to German constitutional law, such a measure would require a judge's order.³⁹⁴

5.4.2 The execution

The execution itself is usually carried out according to the laws of the executing state (principle of "locus regit actum").³⁹⁵ But the notions of mutual recognition and a common judicial space are carried further towards the principle of "forum regit actum"³⁹⁶: The issuing state can ask the executing state to comply with certain formalities as long as these are not contrary to fundamental principles of law of that state.³⁹⁷ Such a formality may be the presence of a representative of the issuing state during the execution.³⁹⁸ This might be expedient with a view to the later admissibility of evidence in the court proceedings of the issuing state,³⁹⁹ but it also leads to rather unclear responsibilities and legal bases. Therefore, the framework decision on the Evidence Warrant differs from the Commission's proposal in an important point: The use of coercive measures can no longer be requested by the issuing state,⁴⁰⁰ but is in the discretion of the executing state.⁴⁰¹ Thus the execution can be carried out in accordance with the laws of the executing state and a split of the applicable law is avoided. The proposed directive on the Investigation Order, instead, allows the use of coercive measures and the assistance of officials from the issuing state, but subjects these to the law of the executing state,⁴⁰² thereby creating clear responsibilities.

³⁹⁴ Art. 13(2) Grundgesetz (German Basic Law); see in general *Braum*, 125 GA (2005), p. 697, 690; critical also *Kotzurek*, ZIS 2006, p. 135; *Gazeas*, ZRP 2005, p. 21.

³⁹⁵ Art. 11(2) EEW.

³⁹⁶ See *Gleß*, StV 2004, p. 680; *Kotzurek*, ZIS 2006, p. 131; *Rijken*, 47 CMLRev. (2010), p. 1474.

³⁹⁷ Art. 12 EEW / Art. 8(2) EIO.

³⁹⁸ Recital 14 EEW / Art. 8(3) EIO.

³⁹⁹ *Gleß*, StV 2004, p. 683; *Kotzurek*, ZIS 2006, p. 131.

⁴⁰⁰ As provided by Art. 13 lit. a of the proposal, COM/2003/688 fin.

⁴⁰¹ See now Art. 11 (2) and 12 of the framework decision.

⁴⁰² Art. 8(3a) EIO.

The 2006 “Programme for European Criminal Justice” deals with the question of the applicable law in another manner. It proposes a system of transnational procedural unity under which one single state⁴⁰³ is responsible for conducting the investigation and the proceedings of the case. Thus, the competent authorities can issue orders if needed according to their own national law and execute them themselves, or leave that to the executing state. As Art. 4 para. 1 puts it: “The responsible prosecuting authority of the investigating State may carry out investigatory acts in all member States (executing States) or can have these acts carried out by the locally responsible criminal prosecution authority”.⁴⁰⁴ However, according to para. 2 “Coercive measures are to be executed by the agencies of the executing State, coordinated by the locally responsible criminal prosecution authority”. But even if the executing state carries out a measure, this is only meant as a further safeguard for the individual concerned. The applicable law is still that of the issuing state.⁴⁰⁵ And further (para 3 sec. 1): “Admissibility, form and appealability of the investigatory acts are determined on the basis of the law of the investigating state.”

For the later admissibility of evidence in the courts of the issuing state, this would be an ideal situation: the evidence obtained abroad could be treated like any other evidence and be measured against the same standards. The legal responsibilities seem to be clear. On the other hand, it does not seem very likely that any authority in a Member State will be able, even upon close consultation, to apply the foreign law of every other Member State in a correct manner. Trying to implement this theoretically well-planned idea might prove to be very time-consuming and expensive, and it might be better to simply apply the principle of mutual recognition within a clearer framework than the proposed European legislation gives.

5.5 Dual criminality

The requirement of dual criminality, that is, as seen above, one of the basic

⁴⁰³ That has been determined according to the procedure set out in Article 2.

⁴⁰⁴ *Schünemann* (ed.), A Programme for European Criminal Justice.

⁴⁰⁵ Cf. *Schünemann* (ed.), A Programme for European Criminal Justice, p. 265.

principles of traditional judicial cooperation, has long been seen as a chief obstacle to full effectivity of the principle of mutual recognition. The Council regards it as an impediment and therefore tries to limit its scope.⁴⁰⁶ Indeed, it would seem inconsistent that in a common judicial space, built on mutual trust, a state could not prosecute an offence committed on its territory effectively only because the relevant evidence is in – or even has been purposely brought to – another Member State that has other values and thus other substantive criminal laws. It is the very essence of mutual recognition (and trust) that one recognises penal laws that are different, not only those that are equal.⁴⁰⁷

A limitation of this requirement was therefore already laid down in Art. 51 of the Schengen Convention.⁴⁰⁸ The framework decision on the European Arrest Warrant took this idea further, although an abolition of the principle, as had been the original plan of the Commission, proved unachievable. The legislation introduced the well-known and very controversial method of listing certain types of offences for which verification⁴⁰⁹ of dual criminality is not required.

A similar, but more far-reaching approach can be found in the legislation on evidence-gathering. No dual criminality is required where no coercive measures are necessary⁴¹⁰ (i.e.: regularly no dual criminality!⁴¹¹) or, if these should be necessary, if the offence falls within the category of the offences listed.⁴¹² The list proves to be an amended version of the list of the framework decision on the European Arrest Warrant.

⁴⁰⁶ Recital 16; see also the Commission's view in the explanatory memorandum on the proposal, para. 105; cf. *Kotzurek*, ZIS 2006, p. 127.

⁴⁰⁷ The same result is found in ECJ joint cases C-187/01, C-385/01 (*Gözütok/Brügge*), based on the implications of mutual trust.

⁴⁰⁸ See *Hamilton*, Mutual assistance in criminal matters, p. 65.

⁴⁰⁹ Whether the "verification" has any substantive meaning is still under debate, cf. e.g. *Satzger/Zimmermann*, From Traditional Models of Judicial Assistance to the Principle of Mutual Recognition, p. 354.

⁴¹⁰ Art. 14(1) EEW (search and seizure) / Art. 10(1a) EIO (any coercive measure).

⁴¹¹ This reverses the functioning of the mechanism in, for example, the framework decision on the European Arrest Warrant, where, as a general rule, dual criminality may still be required and the list of offences is the exception, cf. Art. 2(4), 4(1).

⁴¹² Art. 14(2) EEW / Art. 10(1b) and Annex EIO.

This idea of partially abolishing the requirement of dual criminality is criticized for the same reasons as were brought forward concerning the Arrest Warrant. While this approach might serve the aims of mutual recognition, it also causes serious problems in the relation of the executing state to the persons affected. A state may be forced to participate in the prosecution of an act that it considers as legal, or even as the exercise of a fundamental right. Some regard this therefore as a system of maximum punitivity,⁴¹³ meaning that the legal order which has the strictest penal laws in a specific case will prevail over all the others.

In my view, the true problem is that mutual recognition would then only mean the recognition of the penalization of a certain behaviour and never the recognition of the decision not to make something punishable. But criminal law is always a fragmentary approach to setting social norms, and by punishing one special kind of behaviour, the legislator implicitly declares legal everything else. If we take the idea of mutual recognition seriously, we should at least consider not only to recognise punishability, but also to recognise impunity.

The problem of an accumulation of punishable behaviour is often answered by a simple reference to the historical implications of dual criminality which did not initially intend to protect individuals,⁴¹⁴ but was rather aimed at protecting state sovereignty and complementing the principle of reciprocity. But this, certainly, cannot be the only answer.

The important point is that it is not the abolition of dual criminality that makes the strictest law prevail, but rather the assumption of extraterritorial jurisdiction.⁴¹⁵ While it seems understandable that a state should be able to effectively prosecute an offence that was committed on its territory even if some evidence should be within a jurisdiction that judges differently, in cases of extraterritorial jurisdiction this appears

⁴¹³ *Braum*, 125 GA (2005), p. 694; *Gazeas*, ZRP 2005, p. 21; *Schünemann*, ZRP 2003, p. 187; *id*, ZRP 2003, p. 407.

⁴¹⁴ See for this question *Rohlf*, Der Europäische Haftbefehl, p. 83ss; for an analysis of other possible functions of the principle cf. *Asp / von Hirsch / Frände*, ZIS 2006, p. 512ss.

⁴¹⁵ To this connection cf. *Klip*, 117 ZStW (2005), p. 901ss.; *Deiters*, ZRP 2003, p. 361; disagreeing: *Flore*, Reconnaissance mutuelle, p. 74.

very dubitable.⁴¹⁶ For the first case, take the example of a French national who commits an illegal act of euthanasia in France. The Netherlands would have to assist in the evidence-gathering even if the same act had been legal in the Netherlands. This might be justified with the idea of mutually recognising the French decision of punishing euthanasia. But in the second case, since France claims extraterritorial jurisdiction in euthanasia cases regarding their own nationals, the legislation on evidence-gathering would impose the same obligation to assist if the act had been committed in the Netherlands. This would then place the decision to punish above the decision not to punish – throughout the whole of the EU⁴¹⁷. The Council realized this problem and introduced grounds for refusal in cases where the act is seen as having been committed in the executing state.⁴¹⁸

This rule (that is also found in the framework decision on the Arrest Warrant⁴¹⁹), however, still favours the decision to punish in certain cases of conflicting jurisdictions. Let us continue the example: If a French national had committed a lawful euthanasia in the Netherlands, Germany would have to assist the French prosecutors, because the German law on international crimes would also assume jurisdiction, had the offender been a German national. Thereby, the French decision to punish gets more weight internationally than the Dutch decision not to punish, and for an act committed on Dutch territory. It is clear from this that a real solution can only be based on a uniform allocation of jurisdiction within the EU.⁴²⁰ That would at the same time determine the applicable substantive criminal law because of the traditional – though not necessary⁴²¹ – link between jurisdiction and applicable law. Such a uniform allocation of jurisdiction would have the further advantage of solving problems in other areas of European criminal justice in a consistent way, e.g. of how

⁴¹⁶ Cf. *Spencer*, An Academic Critique, p. 32, with typical examples.

⁴¹⁷ See also *Deiters*, ZRP 2003, p. 361.

⁴¹⁸ See Art. 13 (1) lit. f (I) EEW / Art. 10(1f) EIO (differently).

⁴¹⁹ The fact that Germany had not made use of this was even one of the reasons that the implementing act was declared void, cf. decision of the German Constitutional Court of 18 July 2005 – 2 BvR 2236/04, para. 94.

⁴²⁰ *Klip*, 117 ZStW (2005), 901; *Fuchs*, Regulation of Jurisdiction, p. 369.

⁴²¹ Cf. *Deiters*, ZIS 2006, p. 477ss.

to secure best the transnational *ne bis in idem*.⁴²²

As long as this is not achieved, the requirement of dual criminality must still be taken seriously into account. For the European Evidence Warrant, the Council already shortened the list of offences and set down a maximum penalty of at least three years as a condition.⁴²³

The already mentioned „Programme for European Criminal Justice“ has another approach to dual criminality. Because it develops the idea of transnational procedural unity and seeks the application of a single law to a case, dual criminality is not necessary for any measure. This is partly atoned for by the fact that only a single state is competent for the case. The competent state is to be determined at the very beginning of the proceedings according to a complex procedure including Eurojust and taking into account every party's interests. But this mode of determining jurisdiction is very open in its outcome. Even if it helps to avoid competing jurisdictions, it cannot give the affected individual the legal certainty as to the applicable substantive criminal law that is desirable.

Still another approach is found by *Fuchs*⁴²⁴, who believes the link between the jurisdiction and the applicable law to be the real cause of the problem and seems to favour the application of the substantive criminal law of the offender's home state. Although the application of foreign criminal law cannot be rejected as a matter of principle, this proposal seems to me so wholly incompatible with the primary purpose of criminal law to regulate the conduct of the people in a certain territory that it does not really make sense, even if this doctrine was predominant some centuries ago.⁴²⁵

⁴²² Cf. *Vander Beken/Vermeulen/Lagodny*, NSTZ 2002, p. 624 ss.

⁴²³ Art. 14 (2) EEW / see also Art. 10(1b) EIO; Germany, as it favoured to have definitions for the offences (cf. eg. the resolution of the Bundestag, BT-Drs. 15/3831 p. 4 f.), has now the possibility to opt out concerning certain types, cf. Art. 23(4) EEW.

⁴²⁴ *Fuchs*, Regulation of Jurisdiction, p. 362ss.

⁴²⁵ *Staubach*, Die Anwendung ausländischen Strafrechts, passim.

5.6 Further safeguards and grounds for refusal

The Commission has taken an active position to promote mutual trust and uses procedural safeguards in evidence-gathering as a means to establish this basis for mutual recognition.⁴²⁶

5.6.1 Issuing of the order

Therefore, an Evidence Warrant / Investigation Order may only be issued when it is necessary and proportionate for the purpose of the proceedings.⁴²⁷ Since there is no corresponding ground for refusal,⁴²⁸ this rather general rule will be interpreted by the issuing state only and thus has a mainly exhortatory value.

More important is another provision: the issuing authority must make sure that the evidence could be collected in similar, purely domestic circumstances.⁴²⁹ This provision seeks to eliminate the danger of evidence shopping that might arise in transnational contexts because of the division of responsibilities.⁴³⁰ Additionally, the evidence must be likely to be admissible in the court proceedings. This last condition has been expressly stated in the Commission's Proposal for the Evidence Warrant⁴³¹ and cannot be found in the adopted and proposed legislation anymore, since the gathering of *a priori* inadmissible evidence would already violate the proportionality principle.⁴³²

⁴²⁶ Williams, ERA-document, p. 23; *idem*, in: Vervaele (ed.), European Evidence Warrant, p. 74; Kotzurek, ZIS 2006, p. 137; to this understanding of trust see also above in chapter 4.

⁴²⁷ Art. 7 lit. a EEW / Art. 5a(1a) EIO.

⁴²⁸ Kotzurek, ZIS 2006, p. 138, disagrees with regard to the Commission's Proposal (COM/2003/688fin.), but this point is now clarified by the addition of a subparagraph that states that the compliance with these requirements shall only be assessed by the issuing state, see Art. 7 EEW. Instead, Art. 5a(2) EIO drops the word „only“.

⁴²⁹ Art. 7 lit. b EEW / Art. 5a(1b) EIO.

⁴³⁰ Gleß, in: Sieber *et al.* (eds.), Europäisches Strafrecht, § 38 para. 25.

⁴³¹ Art. 6(c) (COM/2003/688fin.).

⁴³² Kotzurek, ZIS 2006, p. 128.

5.6.2 Execution of the order

As to the execution of the Evidence Warrant, the Commission had proposed some precise substantive conditions⁴³³ that were not common to all Member States. For example, a search of premises shall not start at night time unless unavoidable,⁴³⁴ a novelty in the UK.⁴³⁵ Persons whose premises have been searched shall be informed of this⁴³⁶. Another protected right is the right of natural persons⁴³⁷ not to incriminate themselves (*nemo tenetur*).⁴³⁸ This might have had practical relevance as concerns “production orders”, i.e. an order requiring the custodian of a document to deliver it to law enforcement.⁴³⁹ Although these safeguards were not all-encompassing, they have been deleted in the Council framework decision. The stated reason for this was that the Council aimed at working on a coherent and generally applicable body of procedural safeguards that would also be valid in other areas of judicial cooperation in order to avoid fragmentation. This is ironic in the face of the failure of the framework decision on procedural safeguards and the evolution of the new step-by-step-approach.⁴⁴⁰

Even though it is certainly necessary to establish generally applicable rights in judicial cooperation, this does not render superfluous those rights that are adapted to a

⁴³³ For formal requirements see above.

⁴³⁴ Art. 12(2)(a) of the Commission Proposal, COM/2003/688fin.

⁴³⁵ *Spencer*, An Academic Critique, p. 36.

⁴³⁶ Art. 12(2)(b)(c) of the Commission Proposal.

⁴³⁷ The Parliament wished to cover all persons, cf. legislative resolution of the 31/3/2004 (P5_TA-PROV(2004)0243, amendment 9.

⁴³⁸ Art. 12(2)(b) of the Commission Proposal.

⁴³⁹ Cf. e.g. the case of *Malik v Manchester Crown Court and the Chief Constable of Greater Manchester Police* [2008] E.M.L.R. 19 at para. 73ss. with general criteria for a production order based on Schedule 5 of the Terrorism Act 2000 in a case where the document could be used for a charge against the journalist on the basis of sections 19 and 38B of the same act.

⁴⁴⁰ See the Proposal for a Council Framework Decision on certain procedural rights, COM/2004/328fin.; the discussion of this by *Brants*, in: *Vervaele* (ed.), *European Evidence Warrant*, p. 103ss. *Löffel*, 12 ELJ (2006), p. 421ss.; *Aragüena Fanego*, in: *de Hoyos Sancho, Montserrat* (ed.), p. 131 ss.; the subsequent Council Resolution of 20 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings, OJ C 295/1 of 04.12.2009; legislation was adopted as to the right to translation etc., cf. Directive 2010/64/EU; critically *Rijken*, 47 CMLRev. (2010), p. 1489s.

specific area of judicial cooperation and its specific problem. On the contrary, it is contradictory to adopt a measure with hardly any safeguards that has then to be transposed by the Member States in the hope of a future coherent approach that cannot any longer be taken into account by the Member States.

5.6.3 Grounds for refusal

Some other safeguards can be deduced from the grounds for non-recognition. At the present state, there are only specific, enumerated grounds for refusal. They comprise inter alia an infringement of the *ne bis in idem* principle; immunities or privileges in the executing state and national security interests.⁴⁴¹

It is clear that this rather random selection of procedural safeguards cannot – or at least should not – be the only set of guarantees in transnational proceedings within the EU. Otherwise, this would only go to show that EU common policy always leads to a minimum standard.⁴⁴² One area that has obviously been left out is the possible exemption of people from searches who, as witnesses, might refuse to give evidence (e.g. journalists).⁴⁴³ The European Parliament originally wanted to include a reference to fundamental rights and the right to a fair trial as set out in Art. 6 TEU as a ground for refusal.⁴⁴⁴ This last point is in my opinion the best way to ensure procedural rights within the current legal framework of EU criminal justice, at least as long as no agreement can be reached on adopting a more coherent approach to fundamental rights that are specifically adapted to judicial cooperation.

A general clause on procedural rights is also contained in the „Programme for European Criminal Justice“ that states: “coercive measures shall not be conducted if they are incompatible with the ECHR or with the foundations of the law of the

⁴⁴¹ See Art. 13 EEW / Art. 10 EIO; cf. *Belfiore*, 17 EJCCL (2009), p. 7s.

⁴⁴² *Gleß*, StV 2004, p. 683.

⁴⁴³ This is no privilege in the sense of Art. 13(1)(d) EEW, cf. *Gazeas*, ZRP 2005, p. 21; critical also *Braum*, 125 GA (2005), p. 695.

⁴⁴⁴ Cf. legislative resolution of the 31/3/2004 (P5_TA-PROV(2004)0243, amendment 11 introducing a new Article 15(1)(f), along with more specific requirements.

executing state”⁴⁴⁵. Moreover, there are special provisions for pre-trial custody, the confiscation of assets of significant value and the deployment of undercover police investigators.⁴⁴⁶

5.7 Legal remedies

The question of legal remedies against evidence-gathering measures is only dealt with in part by the legislation. Member States are obliged to procure legal remedies equivalent to the remedies available in a purely national case,⁴⁴⁷ but only after the order has been executed.⁴⁴⁸ The substantive conditions for the issuing of the order can only be challenged in the courts of the issuing Member State. This might be due to the fact that otherwise a court would have to apply foreign law.⁴⁴⁹ A similar provision is proposed by the „Programme for European Criminal Justice“.⁴⁵⁰ This system causes serious impairments on access to justice: Persons who are affected by an investigation measure might have to initiate proceedings in a foreign legal system, a foreign language and probably at much higher costs, although they might never have even left their home country (e.g. when a person’s dwelling is searched to find a letter).⁴⁵¹

There are several possible ways to address this problem. One rather simple, but possibly equally ineffective method would be to institute a proceeding of transmitting claims that are brought in the executing state to the competent foreign authority.⁴⁵² Other proposals want to exempt bona fide third persons from this provision.⁴⁵³ But to

⁴⁴⁵ Art. 4 para. 3 sec. 2, *Schünemann* (ed.), A Programme for European Criminal Justice.

⁴⁴⁶ Art. 4 para. 4.

⁴⁴⁷ Art. 18 EEW / Art. 13 EIO.

⁴⁴⁸ Critical *Gleß*, in: *Sieber et al.* (eds.), *Europäisches Strafrecht*, § 38 para. 66s; cf. however now Art. 12(1a) EIO, according to which the transfer of evidence *may* be suspended pending the decision regarding a legal remedy under certain circumstances.

⁴⁴⁹ *Kotzurek*, ZIS 2006, p. 139.

⁴⁵⁰ Art. 6(2): sole recourse to the courts of the issuing state, with some exceptions.

⁴⁵¹ Critical *Ahlbrecht*, NSTZ 2006, p. 74; *Gleß*, in: *Sieber et al.* (eds.), *Europäisches Strafrecht*, § 38 para. 66, 74.

⁴⁵² *Kotzurek*, ZIS 2006, p. 139.

⁴⁵³ Cf. e.g. the position mentioned in the Council Doc. 15957/05, p. 4, 38.

differentiate between a bona fide and a non bona fide person seems to me almost impossible, especially as the accused (who is not a third person) might be equally innocent and have equally little connections with the issuing state. I therefore think it inevitable that at least certain important rights must be litigible in the executing state as well. Among these should be at least all those standards that are uniform throughout the EU, e.g. proportionality or standards of fair trial, as follow from Art. 6 TEU. The requirement of obtainability of the evidence in the issuing state under similar circumstances,⁴⁵⁴ on the other hand, might indeed prove to be too complex for the executing state to control.

If, however, a consistent set of procedural safeguards should be established throughout the Union, one could in the long term also think of introducing a whole regime of transnational evidence-gathering that would be applicable in cases such as these. This regime would complement the law for purely national evidence-gathering. The judicial control would lie with the national courts of either of the two legal systems concerned, complemented by the jurisdiction of the ECJ. This would also correspond to a wide construction of the principle of mutual recognition: the recognition of an evidence order would bring about a recognition of the legal responsibilities for the order.⁴⁵⁵

5.8 Admissibility of evidence

One key problem of transnational evidence-gathering is the subsequent admissibility in court of the evidence obtained. Without admissibility of evidence, the mutual recognition of evidence orders would not fulfill its purpose. The question is whether the principle of mutual recognition has to be extended so far as to oblige every Member State to accept evidence which was lawfully obtained in another Member State.⁴⁵⁶ With the treaty of Lisbon, the EU has competence to regulate the „mutual

⁴⁵⁴ A criterion set by Art. 7 lit. b EEW / Art. 5a(1b) EIO.

⁴⁵⁵ *Klip*, 117 ZStW (2005), p. 910s.

⁴⁵⁶ See *Spencer*, An Academic Critique, p. 35ss.; *Gleß*, in: *Vervaele* (ed.), European Evidence Warrant, p. 122s. Concerning the background of this concept, esp. in the Green Paper on criminal law protection of the financial interests of the Community and the establishment of a

admissibility of evidence between Member States“.⁴⁵⁷

In the framework decision on the European Evidence Warrant, there is one article that directly addresses the questions of admissibility: The use of personal data is permitted for the prevention of serious threats to public security (Art. 10 (1) lit. c), as well as for all proceedings “for which the EEW may be issued” (Art. 10 (1) lit. a). This provision amounts to an abolition of the principle of specialty, because the data obtained can be used for other proceedings than the one that it was issued for.⁴⁵⁸ If this is read only as a general reference to the proceedings for which an Evidence Warrant may be issued (that are listed in Art. 5), it is feared that this might lead to a circumvention of the conditions specified for the order of an Evidence Warrant. An issuing state might order an Evidence Warrant for a specific proceeding while in reality intending to use the evidence obtained for another proceeding for which it could not have issued an Evidence Warrant, because it would not have met the proportionality principle or the other requirements of Art. 7. It has therefore been suggested to read the words “may be issued” not as a general reference to Art. 5 only, but as a reference to the specific requirements under which an EEW may be issued, mainly to Art. 7 of the framework decision.⁴⁵⁹ In my opinion, this is not necessary. Since the original gathering of the evidence must be legal to meet the requirements of Art. 10 (i.e. there must really be a proceeding for which the evidence is needed and the Warrant may be issued), there is already a safeguard against circumvention.

Apart from this, there is no rule dealing with the admissibility of evidence. The Commission attributes this to the fact that consultation with experts has proved the need for further preparatory work.⁴⁶⁰ For this purpose, it commissioned the study on the laws of evidence throughout the EU⁴⁶¹ and consulted with the public by the

European Prosecutor see *eadem*, ZStW 2003, p. 131ss.

⁴⁵⁷ Art. 82(2)(a) TFEU.

⁴⁵⁸ Critical *Ahlbrecht*, NSTZ 2006, p. 73.

⁴⁵⁹ *Kotzurek*, ZIS 2006, p. 133 (with regard to Art. 6 of the Commission Proposal).

⁴⁶⁰ See the Commission Proposal, Explanatory Memorandum, para. 58.

⁴⁶¹ Available at <http://www.cybex.es/AGIS2005docs/Study%20Law%20Society-%20of%20England%20and%20Wales.pdf>

„Green Paper on obtaining evidence in criminal matters from one Member State to another and securing its admissibility“.⁴⁶² The study shows the great existing differences. Although the legislative acts are clearly aimed at facilitating the admissibility of evidence in the issuing state,⁴⁶³ there is as yet neither free movement of evidence, nor an obligation to admit evidence collected lawfully in another Member State.⁴⁶⁴ *Hamilton*⁴⁶⁵ attributes this to the degree of criticism that was invoked by the more radical concept. I believe, however, that the concept of free movement of evidence is in any case more appropriate for a supranational context (i.e. the investigations of a European Prosecutor). There it might be expedient to have common rules. In a national area, however, it seems acceptable that the law of the forum decides on the admission of evidence, since its collection was from the first ancillary to the criminal proceedings there.⁴⁶⁶ The laws of admission of evidence are in fact so diverse, that standardization seems very difficult.⁴⁶⁷ In Germany, for example, no violation of German or foreign law on the collection of evidence necessarily leads to its inadmissibility in court – it is quite the contrary, as evidence that has been collected abroad is regularly admissible, even if the foreign laws have been violated. It remains for the judge assessing the evidence to take into account the circumstances of its gathering.⁴⁶⁸ On the other hand, the lawful collection of evidence does not in every case assure its admissibility.⁴⁶⁹ Since these rules are very different in other countries, standardization would not serve any of the differing

⁴⁶² Green Paper of 11 November 2009, COM/2009/624fin.

⁴⁶³ E.g. Art. 12, 17.

⁴⁶⁴ See *Kotzurek*, ZIS 2006, p. 134.

⁴⁶⁵ Mutual assistance in criminal matters, p. 67.

⁴⁶⁶ Böse, in: *Fragmentarisches Strafrecht*, p. 248; *Kotzurek*, ZIS 2006, p. 133.

⁴⁶⁷ For discussion of examples from the ECtHR case law cf. *Esser*, in: *Marauhn* (ed.), p. 49ss.

⁴⁶⁸ Böse, 114 ZStW (2002), p. 151; *Kotzurek*, ZIS 2006, p. 126; the so-called “Beweiswürdigungslösung”; for an analysis of possible approaches with a focus on U.S. cases with a trans-border dimension cf. *Gane / Mackarek*, 4 EJCCL (1996), p. 109; for a comparison of different domestic laws cf. *Spencer*, in: *Delmas-Marty, Mireille / id.*(eds.), p. 594.

⁴⁶⁹ So-called “selbständige Beweisverwertungsverbote”; for example, even if a car is *legally* wire-tapped, a recorded soliloquy may not be used as evidence due to constitutional personality rights, cf. BGH judgment of 22 December 2012 - 2 StR 509/10, NJW 2012, p. 945; also, if telecommunication is intercepted *legally*, the evidence obtained may only be used as evidence for certain very grave crimes according to paragraphs 100a and 477(2) StPO (German Code of Criminal Procedure).

systems.

Still, it seems that, even if there is no obligation to admit evidence, there should at least be a common rule on the admissibility of evidence that was collected in breach of common principles. Since evidence is always collected for a (future) trial, and the admission of a piece of evidence is decisive for the persons affected, only this could give full – and equal – effectivity to procedural safeguards. This would be even more so, should it be possible to establish a comprehensive system of transnational evidence-gathering in the EU. The concept of free movement of evidence, too, might then appear in a new light.

5.9 Conclusion

At the moment, it is impossible to tell which legislative measure will come into practice. The Evidence Warrant might still be transposed, but it could just as easily be overtaken by the Investigation Order. In either case, proceedings will be faster. The obligation to recognise and execute foreign orders, within strict time limits, together with the restriction of grounds for refusal, cannot but expedite the proceedings that necessitate transnational evidence-gathering.⁴⁷⁰ At the same time, this might also serve the accused, because mitigating evidence will be more quickly obtained as well.

In a more general light, however, mutual recognition, as it appears in the envisaged laws, will be very infringing on individuals' rights, which is supposed to be prevented by the general reference to Art. 6 TEU.⁴⁷¹ The Commission proposal for the Evidence Warrant stipulated some safeguards.⁴⁷² However, these rights have mostly been omitted by the Council. Even if future legislation as to procedural rights will be adopted following the Stockholm programme and the Council roadmap, it cannot be of the kind the Commission suggested: In the explanatory memorandum on the

⁴⁷⁰ Williams, ERA-document, p. 21ss.; Gleß, in: Sieber *et al.* (eds.), *Europäisches Strafrecht*, § 38 para. 44; Rijken, 47 CMLRev. (2010), p. 1474.

⁴⁷¹ Art. 1(3) EEW/EIO.

⁴⁷² Explanatory Memorandum, para. 41ss.

proposal, the Commission said that the proposal aimed at enhancing “the effectiveness, consistency and visibility of *some of the standards* relevant for obtaining evidence at EU level”⁴⁷³ [highlighted by author]. It is obvious that a legal instrument that aims at greatly enhancing the quickness and effectivity of judicial cooperation in transnational evidence-gathering in a common interest must at once address all standards that are relevant in this context. The debate on what the conditions are under which Evidence Orders should be carried out throughout the whole Union is a question that must be answered collectively; it cannot be left to a later stage. As it is, many problems are again consciously left unresolved and will probably be solved in inconsistent ways through differing national practices.

A proposal that is often made is the adoption of a European public policy exception to judicial cooperation, here to the gathering of evidence. The Council pushed this idea by introducing the reference to fundamental common European principles in Art. 1(3) of the legislation, although this unfortunately leaves open the question of whether the executing authority may invoke this.⁴⁷⁴

A European public policy exception – as opposed to a national one, that is also called for⁴⁷⁵ – has the advantage of preventing executing authorities from sometimes pushing through their national interests.⁴⁷⁶ However, with such a general exception, it would be very difficult to have a unitary development and interpretation. Therefore, I think that the enumeration of specific rights is still very important. The reference to Art. 6 TEU cannot obviate this.⁴⁷⁷ In the long term, the development of a coherent and comprehensive system of procedural rights for transnational evidence-gathering would in my opinion be more appropriate. Until now, the law that was proposed for the application in transnational evidence-gathering was always a national one. In

⁴⁷³ Explanatory Memorandum, para. 46.

⁴⁷⁴ See also *Gleß*, in: *Sieber et al.* (eds.), *Europäisches Strafrecht*, § 38 para. 59; a similar issue is under discussion with the EAW, cf. e.g. *Peers*, *EU Justice and Home affairs law*, p. 705, 709; *Tinkl*, *Rechtsstellung*, p. 210s., for further references cf. below 7.1.; see also the contradictory approach of the Commission, SEC2006/79 COM2006 0008 final (revised commission report based on Art. 34 FD) point 2.2.3.

⁴⁷⁵ *Braum*, 125 GA (2005), p. 694.

⁴⁷⁶ *Kotzurek*, ZIS 2006, p. 136.

⁴⁷⁷ Similarly *Apap/Carrera*, *European Arrest Warrant*, p. 13, with respect to the EAW.

classical legal aid the executing state applied its own law to any investigative measure; when the problems this causes for the admission of evidence in the requesting state's courts became plain, more progressive legal acts, including the present proposal, opted for a combination with the law of the requesting state, as far as the requested state's law would allow. This, however, only results in a hybrid legal structure which one should avoid for the sake of legal certainty. For that reason, the "Programme for European Criminal Justice" envisages a single legal framework that is but another national legal system, this time that of the executing state. Although better for the investigating state, this system causes even more uncertainties for the concerned individuals, exposing them to 27 different legal orders. To me, therefore, it seems most logical to strive at a genuine European system of evidence-gathering that includes rules on the admissibility of evidence in the Member States. Two clearly distinct systems of evidence-gathering would then be all that a citizen had to face.

When a system for European transnational evidence-gathering will be established (including rules on the admissibility of evidence) and its judicial control (through Member States' courts) secured, then the general European public policy exception would have fulfilled its transitional purpose and could be abolished again in favour of specific safeguards.

Another area that needs to be considered is, as I have shown, the uniform allocation of jurisdiction. If such a set of rules could be established EU-wide, this would certainly increase Member States' readiness to recognise differing values and systems of criminal law, since it would be clear that and why in a specific case the values of one system should prevail over those of the others. A uniform allocation of jurisdiction would also help to solve problems in other areas of judicial cooperation.⁴⁷⁸

The proposed European Investigation Order will at least be an adequate response to some of the criticism the Evidence Warrant received: As the Evidence Warrant has a limited scope of application, critics feared a further fragmentation of this area of judicial cooperation. This may be improved by the proposed new legislation.⁴⁷⁹

⁴⁷⁸ See above.

⁴⁷⁹ *Bachmaier Winter*, ZIS 2010, p. 586.

However, in order to effectively address the problems of mutual recognition in transnational evidence-gathering, a comprehensive approach and an idea of the intended development of the whole area are indispensable.

After having illustrated some of the problems of the mechanism of mutual recognition in a specific area, I will now move to the two areas where solutions can be found. We will first look at the problems of jurisdiction, then turn to fundamental rights in mutual recognition.

Chapter 6 Jurisdiction in European Criminal Procedure

The present study has shown the particular nature of European judicial cooperation in criminal matters. Due to competence issues and political unwillingness, there is no coherent system of substantial or procedural rules applicable to a case. The so-called „principles“ of mutual recognition and mutual trust are in fact no legal principles, but policy concepts that achieve their legal significance chiefly through their rhetoric value. We have seen that for both of these concepts, a uniform allocation of jurisdiction is desirable both for theoretical and for practical considerations. From a theoretical perspective, a coherent and planned approach is preferable to randomness. For the individual, foreseeability of the criminal law that he will be subject to is an important aspect. From a practical perspective, we have seen that the current framework favours more punitive systems over lenient ones. The fact that the *ne bis in idem* applies only after a decision has been rendered can lead to a certain rush for a judgment in cases of positive conflicts of jurisdiction.⁴⁸⁰ The analysis of the envisaged EU framework for evidence gathering has also shown some of the problems that will in all probability arise from the lack of common jurisdictional rules in this area. The idea that at least some sort of EU activity in this respect is highly expedient seems to be universally accepted. I will try provide a theoretical approach to the issue of jurisdiction within a European judicial space. For that, I will first outline the basic concepts of jurisdiction and their respective implications. After that, I will explore how issues of jurisdiction are currently addressed by European legislation and by representative proposals in the literature. In the end, I will define some of the necessary features of a possible European set of jurisdictional rules.

⁴⁸⁰ See also *Klip*, EU Criminal Law, p. 423.

6.1 Conflicts of jurisdiction

Conflicts of jurisdiction can occur in two ways: positive and negative conflicts. While a positive conflict refers to a situation in which more than one state assumes jurisdiction, a negative conflict, also called a *vacuum iuris*, describes the absence of any competent forum. In international criminal cases, concurrent jurisdictions represent the rule rather than the exception. In this respect it differs greatly from the private law sphere. This development is the consequence of the different objectives of jurisdiction in these two branches of law. Whereas in civil matters states provide private parties with access to justice and are not all averse to restraining their jurisdiction, in criminal matters the states' own interests are concerned. The idea of a criminal prosecution without a gap, together with a traditionally purely national take on criminal matters, leads to uncoordinated and widely overlapping jurisdictions. More specifically, positive conflicts of jurisdiction are the result of a dual clash: Firstly, states use different links to determine their jurisdiction. Secondly, even if they should use the "same" link, a different construction of the rule can give rise to multiple proceedings:

The most common clash within the first category, i.e. the use of different links, is the difference between the jurisdiction of the *locus delicti commissi* and the jurisdiction of the defendant's home country. If, for example, a German citizen commits a theft in the Netherlands, he could be prosecuted in the Netherlands because the crime was committed on that territory and the Netherlands apply the territoriality principle, but he could also be persecuted in Germany because German law assumes jurisdiction for crimes committed by German citizens under certain conditions according to the active personality principle.

However, the common links in international criminal law are far from being unambiguous in themselves. Not only can the same factual criterion be fulfilled in several states (e.g. in cases of dual nationality), but also can one link be construed in different ways. Therefore it can encompass different situations both within one jurisdiction and between jurisdictions. This is particularly true for the territoriality principle. If a national piece of legislation ascribes jurisdiction to the courts of this

state if the offence has been committed on its territory, does this refer to the act of volition? Or to the completion of the offence? To the harmful results? In some legal orders it refers to one of these, in others to all and even more situations, so that the territoriality principle consists in fact of a multitude of links. Intersections and overlaps are inevitable. Additionally, diverging rules on evidence can cause courts to come to different conclusions in ascertaining the place of committal.

How courts will interpret a provision on jurisdiction depends greatly on the function that jurisdictional rules have within that legal system. In order to find viable suggestions for EU cooperation it is therefore necessary to consider more closely methodological approaches to jurisdiction, its systematic position within different legal orders and the historical development of and reasoning behind the most widely used principles of jurisdiction.

6.2 Nature of jurisdiction rules

It is very difficult to say what jurisdiction actually is. For centuries, there has been debate over this and in every legal order it has developed differently. Additionally, the self-conception of a legal order need not represent the true function a set of norms has. The term jurisdiction is misleading in itself, for it carries more or less specific conceptual implications so that it forestalls a correct answer to this question. One should better ask: of what nature are the rules from which it follows that a state's courts may try a case? The main differentiation here is between procedural and substantive theories. Procedural theories state that such laws are of a purely procedural nature because they set down the prerequisites that must be fulfilled to enable national prosecution authorities and courts to take action. Substantive theories on the other hand hold that these rules are, either in fact or logically, in some form an element of the substantive criminal law. In between, we find theories that stress the hybrid nature of these rules or that contest that they fall into either of the categories, being a set of norms *sui generis*. This debate is not just of academic interest, but actually of great practical import. Courts and scholars in every country are ready to draw legal conclusions from this systematic classification, because

different principles apply to procedural and substantive criminal law.

For example, almost all legal systems do not apply the prohibition of retrospective laws as strictly in procedural matters as they do in substantive criminal law. The principle of “*nullum crimen sine lege certa praevia*” is not applicable. States that regard jurisdiction as a purely procedural matter, for example most common law countries or Spain, can make use of this. Spanish courts for example used exactly this line of argumentation in the *Pinochet* case.⁴⁸¹ When Pinochet had travelled to London for medical treatment in 1998, Spain requested his extradition on the basis of two international arrest warrants. He was being prosecuted, among other things, on the basis of the passive personality principle and/or the universality principle⁴⁸² for the torture of Spanish citizens and the murder of a diplomat as well as a conspiracy on the basis of the territoriality principle. The Audiencia Nacional was faced with the problem that the provision granting Spanish courts jurisdiction regarding Pinochet’s crimes in Chile (Article 23(4) Ley Orgánica del Poder Judicial of the 1st of July 1985) had been adopted after he had committed them. However, the court held that, as jurisdiction was solely a matter of procedure, this amendment did not cause any legal problems.⁴⁸³

⁴⁸¹ I will confine myself to the facts that are relevant at this particular point and lay aside all the other intricate legal problems. For an overview see *Gärditz*, *Weltrechtspflege*, p. 191s.; *Ambos*, *Mutual Recognition*, p. 6. The House of Lords was mainly concerned with the problem of immunity and, more relevant here, extraterritoriality and double criminality in the extradition procedure.

⁴⁸² Cf. for the uncertainty *Goldstone/Smith*, p. 116s; *Roht-Arriaza*, 35 *New Eng. L. Rev.* (2001), p. 314s.; although the legal provision is based on the universality principle, the warrants explicitly referred to Spanish victims.

⁴⁸³ Audiencia Nacional, Sala de lo penal pleno, Rollo de apelación 173/98 of 5 November 1998, available at <http://www.elmundo.es/internacional/chile/pinochet/autochile.html>, under “tercero”: “El citado artículo 23, apartado cuatro, de la Ley Orgánica del Poder Judicial no es norma de punición, sino procesal. No tipifica o pena ninguna acción u omisión y se limita a proclamar la jurisdicción de España para el enjuiciamiento de delitos definidos y sancionados en otras Leyes. La norma procesal en cuestión ni es sancionadora desfavorable ni es restrictiva de derechos individuales, por lo que su aplicación a efectos de enjuiciamiento penal de hechos anteriores a su vigencia no contraviene el artículo 9, apartado tres, de la Constitución Española. La consecuencia jurídica restrictiva de derechos derivada de la comisión de un delito de genocidio ñla penañ trae causa de la norma penal que castiga el genocidio, no de la norma procesal que atribuye jurisdicción a España para castigar el delito. El principio de legalidad (artículo 25 de la Constitución Española) impone que los hechos sean delito conforme a las Leyes españolas, segn el artículo 23, apartado cuatro, tan mencionado cuando su ocurrencia, que la pena que pueda ser impuesta venga ya determinada por ley anterior a la perpetración del crimen, pero no que la norma de jurisdicción y de procedimiento sea preexistente al hecho enjuiciable. La jurisdicción es presupuesto del proceso, no del

There are also theories that regard jurisdiction as a matter of substantive criminal law. Most far-reaching here is a theory that states jurisdiction to be one element of the three-dimensional scope of incidence of criminal norms, i.e. definition of the crime, time of the crime and locus of the crime. In Germany, jurisdiction in criminal law is said to follow from substantive law that determines the applicability of the penal code (“Strafanwendungsrecht”, “objektive Bedingung der Strafbarkeit”). If jurisdictional rules were of a substantive nature, the principles of criminal law, such as “in dubio pro reo” or specificity would have to be applied and, if taken literally, the defendant would have to be acquitted in case the conditions for jurisdiction should turn out not to be fulfilled. So, if for example the charge is based on the territoriality principle because the defendant was supposed to have uploaded criminal content on the internet in one country and a doubt arises as to the place where he acted, because it is not sure from which computer he accessed the server, he would have to be acquitted. The result would be that he could not be tried again in this state even if other pieces of evidence should turn up (national *ne bis in idem*). More importantly, in contexts where the principle of *ne bis in idem* is applicable internationally,⁴⁸⁴ no other courts could hear the case, not even in the country where he actually uploaded the content.

This and other unfortunate consequences are avoided in practice by ascribing a hybrid or dual nature to these rules. Such an interpretation does certainly do justice to the need for flexibility, but it lacks consistency. A pertinent example is a provision in the German penal code according to which Germany has jurisdiction over crimes committed by German nationals abroad, even if the defendant becomes naturalised after the offence has been committed.⁴⁸⁵ This is not a case of (forbidden) retrospective application of a law, but a case in which the punishability is made dependent on facts that occur after the event has been committed. Because of the dual nature of jurisdiction this is held to be permissible.⁴⁸⁶

delito. “

⁴⁸⁴ Such as in the application of EU law under Art. 50 of the Charter of Fundamental Rights.

⁴⁸⁵ § 7(2) Strafgesetzbuch (penal code).

⁴⁸⁶ See e.g. *Ambos*, in: Münchener Kommentar zum StGB, § 7 para. 26.

To me it seems more convincing to say that jurisdictional rules are neither procedural nor substantive. At least in the international sphere they must be treated as being a category *sui generis*. This may not be a very ambitious or illuminative approach, but it has the advantage of being modest. The rules we are talking about can be looked at from many angles, but if feasible suggestions for the EU are to be made, it is impossible to use categories that are already burdened with national traditions. The consequences of decisions based on a legislative act must be the same wherever it is applied and an autonomous interpretation is not enough. It is important to exercise a certain self-restraint and regard these rules in a purely functional, teleological light. I will, however, go on to name these rules jurisdictional rules, for the sake of simplicity and in the absence of any better term.

If we are to talk about jurisdiction, it also makes sense to differentiate between jurisdiction to prescribe, jurisdiction to adjudicate and jurisdiction to enforce,⁴⁸⁷ referring respectively to the legislative, the judicial and the executive competence to deal with a criminal case. In the following, we will be mainly concerned with jurisdiction to prescribe and jurisdiction to adjudicate.

6.3 Jurisdiction rules and international law

All national and EU legislation on jurisdiction in international criminal cases must take into account the limitations through international law: If a state claims jurisdiction over a case that also has links to other countries, it is an issue of international non-interference to respect other countries' interests. However, there are only marginal restrictions on states' possibilities of claiming jurisdiction, mainly because of the fact that there is no internationally accepted principle of *ne bis in idem* and the other state is not barred to initiate a second proceeding. Therefore, it is accepted since the *Lotus* case⁴⁸⁸ that any reasonable link to a state enables it to claim jurisdiction,⁴⁸⁹ although the common law doctrine in particular tries to set up a framework that is

⁴⁸⁷ See, for example, *Ligeti*, *Strafrecht und strafrechtliche Zusammenarbeit*, p. 69.

⁴⁸⁸ Judgment of the Permanent Court of International Justice of September 7, 1927 (PCIJ, Ser. A., No. 10, 1927).

⁴⁸⁹ Cf. *Amalfitano*, *Conflitti di giurisdizione*, p. 4ss.

more specific. As far as EU criminal justice is concerned the restrictions to jurisdiction must be even less: In public international law, the necessity of a reasonable link is owing to state sovereignty. In the ambit of the EU, instead, Member States have transferred their sovereignty partly onto the EU. Consequently, one cannot regard the exercise of jurisdiction in a matter of common policy by one Member State as a violation of another Member State's sovereignty - in this respect one has to consider the two states as parts of the common judicial space. This idea has taken shape in the framework decision on combating terrorism,⁴⁹⁰ where Member States are given the possibility of extending their jurisdiction to terrorist acts committed on the territory of another Member State, even if there is no other link to their territory .⁴⁹¹

6.4 Bases for jurisdiction

There are numerous links that can be considered in assuming jurisdiction over a case. As there are only very few restrictions under public international law, states are practically free to extend their jurisdiction as they see fit. The relevant criteria have been developed over a long time in history and basically fall under the following categories:

6.4.1 Territoriality

Territoriality is rightly called the basic principle of international criminal law. It is generally considered reasonable to assign jurisdiction to the courts of the state where the offence has been committed. The effects of a crime will normally be greatest at the locus delicti. Evidence (witnesses) will be more easily accessible, so that the trial can be conducted more efficiently. The defendant, on the other hand, will hardly ever be surprised to be tried in this particular forum and be subjected to its laws. Territoriality, therefore, is in perfect conformity with international law and has

⁴⁹⁰ Council framework decision of 13 June 2002 on combating terrorism (2002/475/JHA); I will deal with this legislation in detail later.

⁴⁹¹ Cf. Art. 9(1)(a) of FD 2002/475/JHA.

sometimes been regarded as the only such criterion.⁴⁹²

However, even a strict application of the territoriality principle does not help to avoid multiple fora. On the contrary, *Hein* calls it the prime “multiplier of jurisdictional conflicts”.⁴⁹³ The reason for this is rather obvious. Since the locus of a crime is far from being clear, the territoriality principle can be used both to widen and to limit jurisdiction.⁴⁹⁴ How courts will construe this principle depends greatly on the objectives that the respective legal order pursues with rules on jurisdiction and on the function these rules have. In this respect, there is a surprisingly clear divide between English and continental legal doctrine.⁴⁹⁵ In the common law tradition, adherence to the territoriality principle is rather strict and its interpretation narrow. The main reason for this is that, for centuries, territoriality was regarded as lying at the heart of procedural justice. Continental laws instead used to consider jurisdiction and territoriality as a question of sovereignty.

Let us first look at English law. Here, the evolution of the territoriality principle took place in close connection with the evolution of the jury. According to the ancient concept of the jury,⁴⁹⁶ criminal proceedings should take place before a local jury, because local men of standing were considered best qualified to take into account the circumstances of a particular case and its social significance. They might know the people concerned personally and thus be able to judge rightly.⁴⁹⁷ The reason why a “body of neighbours”⁴⁹⁸ should hear a case was first seen mainly as a means to secure speedy trials and thereby increase the proceeds from justice. But soon it was clear that it served as a safeguard against arbitrary or wrongful prosecution. This

⁴⁹² In English doctrine it is sometimes considered to be the only feasible criterion, but these views are changing, see *Hirst*, Jurisdiction and the Ambit of the Criminal Law, p. 6 ss., 45 ss.; cf. also *Cockayne*, 3 JICJ (2005), p. 515ss.

⁴⁹³ *Hein*, Zuständigkeitskonflikte, p. 32, translation by author.

⁴⁹⁴ Cf. *Klip*, EU Criminal Law, p. 179.

⁴⁹⁵ See *Oehler*, Internationales Strafrecht, p. 54: different roots in English and continental law; see also *Gärditz*, Weltrechtspflege, p. 54ss. Sometimes, in practice, quite different results may occur, especially concerning distance crimes (p. 57s.).

⁴⁹⁶ *Hirst*, Jurisdiction and the Ambit of the Criminal Law, p. 28.

⁴⁹⁷ *Lew*, 27 ICLQ (1978), p. 168; *Oehler*, Internationales Strafrecht, p. 61.

⁴⁹⁸ *Gärditz*, Weltrechtspflege, p. 74, cites *Holdsworth* vol. 1, 7th ed., p. 317.

understanding of local jury and territoriality dates back as far as the Magna Carta⁴⁹⁹ and had great influence on the further development. Because a trial was only considered fair when it was heard by a local jury, the territoriality principle was applied very rigidly. Originally this idea extended even to the relation of the different counties (i.e. principle of locality). This resulted in the absence of any venue rather often, especially concerning crimes committed over a distance.

Exceptions to this were thus very few,⁵⁰⁰ limited to specific courts and some crimes only (like high treason, later also homicide).

With the long-lasting application of the territoriality principle the understanding of crime itself changed. It was now perceived to be local in effect and by nature, leading to the famous dictum of *Lord Halsbury* in 1891: “All crime is local. The jurisdiction over crime belongs to the country where the crime is committed”.⁵⁰¹ This concept is still very influential in the legal doctrine, even though *Lord Griffiths* announced in *Liangsiriprasert (Somchai) v Government of the United States of America*.⁵⁰² “crime has ceased to be largely local in origin and effect”.

The development on the continent was altogether different. The strong tradition of personality-based jurisdiction, i.e. jurisdiction based on the nationality of the defendant or the victim,⁵⁰³ never quite ceased. On the contrary, territorial jurisdiction was generally regarded as just one among many possible criteria for the assumption of jurisdiction. One of the reasons for this is the preference continental systems gave to justice in substance over a procedural struggle for justice.⁵⁰⁴ This affinity was furthered by the influence of absolute theories of punishment by *Hegel* and *Kant* on the legal doctrine. Universal justice was the aim, and territoriality was regarded as one way towards achieving it.

⁴⁹⁹ Art. 20.

⁵⁰⁰ *Oehler*, Internationales Strafrecht, p. 61.

⁵⁰¹ *Lord Halsbury* in *Macleod v. Attorney-General for New South Wales* [1891] AC 455, 458.

⁵⁰² [1991] 1 AC 225, 251.

⁵⁰³ See below for a more thorough analysis.

⁵⁰⁴ *Oehler*, Internationales Strafrecht.

A theoretical underpinning came with territorial concepts of sovereignty. It was considered to be an essential attribute of sovereignty to be able to exercise jurisdiction over every act occurring within the territory, but it was not considered to limit sovereignty correspondingly. While legal doctrine could therefore use social contract theories extensively to justify territorial sovereignty (based on temporary submission of foreigners and permanent submission of resident nationals), it did not hesitate to use other theories for other principles.

Arguments for the territoriality principle as the exclusive source of jurisdiction were only put forward by liberals, especially in Prussia, at the close of the nineteenth century. This was directed against a tendency of the authoritarian state to secure universal control over its subjects through wide jurisdiction. However, it met with little success. Far from thinking extraterritorial jurisdiction an interference in other states' internal matters, trying only crimes committed on the territory was considered as showing disrespect to other sovereigns. As a leading scholar of the time, *Binding*, puts it: territoriality is "the principle of the most despicable selfishness".⁵⁰⁵

It is not surprising then, that the territoriality principle as set down in §§ 3 and 9 of the German penal code is very wide. In fact, it sets down the principle of ubiquity. A crime is consequently committed in every place where the defendant a) acted, b) should have acted, c) where the crime was completed, d) where the crime was meant to be completed by the defendant e) where specifically defined elements of the crime have been completed; for other participants any of the places where the main offender acted according to a) to e) and where criteria a) to e) are fulfilled by him.

That these criteria can cause problems in the international arena is evident and can be illustrated with a case involving cybercrime that was decided by the Bundesgerichtshof in 2000⁵⁰⁶ (simplified): The defendant *Töben*, an Australian citizen, had founded the Adelaide Institute in Australia, a pseudo-scientific anti-

⁵⁰⁵ *Binding*, Handbuch, vol. 1, p. 383, concerning territorial application of the substantive law, translation by author.

⁵⁰⁶ BGH, judgment of 12 December 2000 - 1 StR 184/99, NJW 2001, p. 624.

Semitic organisation. While being in Australia physically, he had uploaded several articles in the English language on the institute's website that was using an Australian server. These articles were belittling or denying the holocaust and decrying its witnesses, pretending to be based on academic research. There was no evidence that any one in Germany other than the police had accessed the website.

Under German substantive law, the publishing of the articles would amount to a qualified "Auschwitz-lie"⁵⁰⁷ and libel. *Töben* was arrested on a visit to Germany. The Bundesgerichtshof held that German courts had jurisdiction on the basis of the territoriality principle. The act had been committed in Germany because its harmful result, i.e. the completion, had occurred there. The argument was as follows: the completion of the Auschwitz-lie consisted in the creation of a danger for the protected legal interest. The articles were threatening public peace in Germany, since they were accessible to everyone. By choosing the internet for publication the defendant had shown that he wanted worldwide publicity, including Germany.

That this argument, satisfactory though the outcome might be, is not very convincing in legal terms, need hardly be said. It was criticized heavily in Germany for ascribing territoriality-based jurisdiction to all states in the world concerning cyber crime.⁵⁰⁸

The confusion that would arise in Europe can be illustrated if we modify the facts slightly. Despite Article 6 of the Council of Europe's 2003 additional protocol to the convention on cyber crime and the proposed framework decision on combating racism and xenophobia the Auschwitz-lie, if unaccompanied by other circumstances, is still not punishable in the majority of Member States. In Spain, for example, the Constitutional Court ruled that the respective criminal provision was partly unconstitutional.⁵⁰⁹ Let us now presume that the same events had taken place in England, committed by a British citizen and

a) Germany issues a European Arrest Warrant for arrest in England.

⁵⁰⁷ Para. 130 (1) and (3) of the German Penal Code (StGB).

⁵⁰⁸ Cf. e.g. *Vec*, NJW 2002, p. 1536s.

⁵⁰⁹ Judgment of 7 November 2007 (STC 235/2007); the criminalisation of the denial, not the justification was held unconstitutional.

b) When the defendant is on a holiday in Spain, Germany issues a European Arrest Warrant for arrest in Spain.

c) The defendant travels to Austria. Germany issues a Warrant for arrest in Austria.

In case a), the warrant would normally have to be executed according to Article 1(2) of the framework decision.⁵¹⁰ That the act does not constitute a criminal offence in England does not signify anything, for, according to Article 2(2), double criminality must not be verified (here: “computer-related crime” and “racism and xenophobia”). But Article 4(7)(a) lays down that execution may be denied when the European Arrest Warrant relates to offences which

“are regarded *by the law of the executing Member State* as having been committed in whole or in part in the territory of the executing Member State or in a place treated as such” [highlighted by author].

As we see here, a state can determine and interpret the territoriality principle independently if the question is whether the act was committed on its territory. England and countries with similar legislation could therefore refuse to execute the arrest warrant.

This happened in fact in the case of the very same Töben. After his conviction in Germany, he served a nine month prison term and then continued his internet publications. Thus, Germany issued a European Arrest Warrant for further offences of „Auschwitz-lie“. On 1 October 2008, Töben was arrested on Heathrow airport by British authorities executing the Arrest Warrant. The Magistrates’ Court, however, dismissed the Arrest Warrant on October 29, 2008, because it contained inadequate detail about the offences. This shows exactly the problematic nature of the territoriality principle: As the territoriality of an internet crime is very uncertain,⁵¹¹ the British judge could validly argue that the act might have been committed on British

⁵¹⁰ Council framework decision of 13 June 2002 on the European Arrest Warrant (2002/584/JHA).

⁵¹¹ See also the corresponding discussion in civil procedure on the interpretation of Art. 5(3) of Regulation 44/2001/EC (jurisdiction in the place where a tort or delict has been committed); lastly ECJ judgment of 25 October 2011, joint cases C-509/09 and C-161/10 (*eDate* and *Martinez*).

territory as well. This would constitute a ground for refusal according to section 64(2)(a) of the Extradition Act 2003, which requires that „no part of it occurs in the United Kingdom“. Since the German authorities did not precisely state that the act did not occur in the UK, there was too little information in the Arrest Warrant.

We can see from these examples that there are two problems with the independent interpretation of the territoriality principle by the executing Member State. First of all, a state with a wide interpretation of territoriality, such as Germany itself, could very often refuse to execute Arrest Warrants concerning cyber crimes, for they would almost always have been committed “in part” on its territory. Secondly, under Art. 4(7)(a) of the framework decision all countries are still free to execute an Arrest Warrant under such circumstances; the refusal is just an option.⁵¹² For an individual who acts in another state that is willing to extradite him, this might mean that he would very unexpectedly be confronted with German law.

In case b), the steps are the same: at first glance, execution is obligatory and double criminality not required. However, Spain, not having such a wide understanding of territoriality as Germany and not having the same factual link as England, could not apply Article 4(7)(a). There remains Article 4 (7)(b) which says that execution may be denied where the European Arrest Warrant relates to offences which

“have been committed outside the territory of the issuing Member State and the law of the executing Member State does not allow prosecution for the same offences when committed outside its territory.”

Here the framework decision does not specify which law is to determine whether the act was committed “outside the territory of the issuing Member State”: From a systematic view it could be parallel to (a), so that (b) would apply only when the issuing Member State assumes extraterritorial jurisdiction according to its national law. But Germany attributes its jurisdiction to territoriality. This construction would therefore mean that Spain would have to surrender the defendant.

⁵¹² N.B.: The wording gives a leeway to the “executing judicial authority” on an individual basis, but some states make use of this through their legislation on a general basis.

However, one could also argue that, since (b) does not refer to the law of the issuing state, as does (a), *e contrario* the issuing state's law has to be disregarded. But since no national law determines when a crime has been committed within or outside of the territory of another Member State, this could then only mean that the facts of the case would have to be adapted and then Spain would have to determine whether the act would have been committed inside or outside of its territory had it been in the same factual position as Germany. Since Spanish jurisdiction rules concerning cyber crime are not as wide, it would probably have been outside. The next step is now to determine whether it allows prosecution for the same offences extraterritorially. We have seen that an equivalent offence does not exist any more. A wide understanding of this could lead to the conclusion that not criminalizing an act necessarily excludes extraterritorial prosecution for the act. But in reality, the argument would here be on a different level, i.e. double criminality and not jurisdiction, so it is neither a very elegant nor a cogent reasoning. Spain would not have to surrender the defendant.

The third possibility would be to rely on an autonomous, uniform interpretation of the norm. There is, however, no indication that this was intended and it would in fact be very difficult to find a European understanding of territoriality. Member states' laws are too different and European legislative acts trying to define territoriality are still too vague to serve this purpose (see below). It is not possible to determine whether Spain would have to surrender the defendant.

In case c), Austria could most probably rely on (a). Although Austria, as far as I can see, has not yet had to judge a similar case, its jurisdictional provisions are so similar to Germany's that the act could be regarded as having been committed partly on its territory. It could therefore refuse to surrender the defendant according to (a), but would probably have no interest in doing so because the „Auschwitz-lie“ is a punishable offence under Austrian law, too.

What can be seen from this case is that, without a common approach to jurisdiction, the defendant's legal position is difficult to foresee and will always depend on the contingencies of the case. Even when just one jurisdictional principle, territoriality, is used, it is unclear why and when an arrest warrant concerning the same act is

recognised and when it is not. And in no case would a state's decision (here England) not to criminalize a certain behaviour be recognised by other states. If the execution of the arrest warrant can be refused, this depends on other criteria.

To say that the territoriality principle is advantageous because it creates individual justice in bringing a substantive criminal law to application that could be expected by the defendant is too short-sighted.

Therefore, there have always been voices requiring the foreseeability of the applicable norm. The argument was founded on different principles, either the rule of law⁵¹³ or the principle of *nullum crimen sine lege*⁵¹⁴ or on democratic elements, i.e. the non-participation of foreigners in legislation.⁵¹⁵ How this can be better substantiated on a European level will be shown below.

6.4.2 Flag Principle

The flag principle holds that actions occurring onboard a vessel or aircraft carrying a state's flag are subject to that state's jurisdiction. It was often described as a subcategory of the territoriality principle, the vessel being a *territoire flottant* or *floating territory*.⁵¹⁶ This flawed description still appears occasionally.⁵¹⁷ It is now, however, well established that vessels and aircraft are not extraterritorial when travelling through another state's territory. Therefore, the riparian state is free to exercise full jurisdiction on the basis of the territoriality principle unless otherwise agreed on.

It is true that traditionally the flag principle was based on the idea of the close

⁵¹³ Oehler, Internationales Strafrecht, p. 132: Rechtsstaatsprinzip.

⁵¹⁴ Germann, 69 ZStrR (1954), p. 237ss.

⁵¹⁵ Böckenförde, Festgabe für Carl Schmitt, p. 131 nt. 33. If taken literally, this should be favourable to the active personality principle.

⁵¹⁶ Oehler, Internationales Strafrecht, p. 313.

⁵¹⁷ Colangelo, 36 Georgetown Journal of Int. Law (2005), p. 539: "the vessel is that state's territory." Midway the Italian *Codice Penale*, Art. 4 para. 2: „Le navi e gli aeromobili italiani sono considerati come territorio dello Stato, ovunque si trovino [...]“; Ligeti, Strafrecht und strafrechtliche Zusammenarbeit, p. 72: „quasi-territorial“.

connection of a ship to the home country and the domestic sovereign, which is a territorial element. But since the carrying of flags is often dependent on the owner's nationality, there are also many similarities to the active and passive personality principle (see below).

Considering how laws differ and how easily some states' flags may be carried, one must state that the justification of this principle today does not lie in any specific link to the home country. The main advantage instead is that the flag can easily be determined and is unambiguous. If crew members and passengers have different nationalities and many countries are passed through, sometimes at high speed, any other link seems more random.

The flag principle is so widespread that it is laid down in many treaties as the primary link to be used in the limited context of international aviation and ship transport, other forms of jurisdiction being subsidiary or excluded.

6.4.3 Active Personality Principle

Just like the territoriality principle, the active personality principle is one of the classical links in international criminal law. It states that the nationals of a state are, under certain conditions, subject to that state's law. It can already be found in archaic laws because of the importance of the clan. Just like in private law, a person was believed to carry their respective 'personal statutes' with them. The principle experienced a revival in the 19th century when an authoritarian and paternalistic concept of the nation state gave rise to a new rationale behind the personality principle: A citizen was believed to owe a duty to his state of staying faithful to its laws.⁵¹⁸ Additionally, it was mistakenly regarded as the logical consequence of the passive personality principle:⁵¹⁹ a national who was protected by his own criminal law abroad should also have to abide by it abroad. When this idea was manifested in the

⁵¹⁸ See e.g. *Ambos*, in: Münchener Kommentar zum StGB, Vor §§ 3-7, para. 37.

⁵¹⁹ *Oehler*, Internationales Strafrecht, p. 151; cf. also *Blakesley*, in: *Bassiouni* (ed.), Int. Criminal Law Vol. II, p. 117.

French *Code d'instruction* in 1866,⁵²⁰ it had great appeal to other continental legislations, especially to German states. It seemed to be conducive to absolute justice and was quickly adopted. Tellingly, it became the basic principle of German law from 1940 to 1974. Thus, Germans committing crimes in Germany were not tried on the basis of the territoriality principle, but on the basis of the active personality principle.

However, it were not only nationalistic considerations that helped this principle to spread: from the first, there was also an element of international comity involved. It was considered to be against public morality to offer a loophole to nationals who had perpetrated abroad. Since a states' own nationals were - in civil law jurisdictions - normally not extradited, it was regarded as a matter of respect to a foreign sovereign to try the defendant (*aut dedere aut iudicare*).⁵²¹

This idea is still existent today,⁵²² so that the rationale behind the active personality principle may be said to be the idea of abstract solidarity between the states. It is also sometimes found in European legislative acts when a state that will not extradite in certain cases is required to create a basis for jurisdiction (see below).

One of the main problems in this context is of course the role that the substantive criminal law of the *locus delicti commissi* is to play. As always, jurisdiction of the home country will lead to the application of domestic law. That it can be an undue hardship to disregard the law of the country where the defendant acted is often acknowledged, without taking this as a starting point for a more thorough analysis of the problem (see below).

Sometimes the existence of a *lex loci* is thought to be imperative, sometimes commendable. Germany for example requires such a law in some cases of extraterritorial jurisdiction, but not in all. Other suggestions recommend to apply the milder of the two laws in question, the *lex mitior*, in all cases (Switzerland) or to

⁵²⁰ Art. 5, *Oehler*, Internationales Strafrecht, p. 142.

⁵²¹ See *Blakesley*, in: *Bassiouni* (ed.), Int. Crim. Law Vol. II, p. 117.

⁵²² Cf. *Hein*, Zuständigkeitskonflikte, p. 35, 45.

regard the foreign law as the maximum threshold.⁵²³ However, the real problem still remains whether it is appropriate at all to apply the substantive law of the home country or not.

Closely connected to this is the link of the permanent residence or domicile of the defendant. This is often found in European legislation instead of or in addition to the active personality principle. It is altogether better adapted to the realities of modern life and takes into account the interest in resocialising the defendant.⁵²⁴

6.4.4 Passive Personality Principle

A state can also assert jurisdiction because of the nationality of the victim. This form of jurisdiction is, like the active personality principle, independent of the locus of the offence, but it may be limited to certain types of offences. It is part of the protective principle because it is supposed to protect nationals abroad. As a link in international criminal law it is very controversial and has been called “the worst of all principles”.⁵²⁵

The passive personality principle is almost always characterized by a certain distrust towards foreign administration of justice. The fear is that the foreign legislator or the foreign authorities will not take enough efforts to protect aliens.⁵²⁶ Although one could argue that this principle is thus contrary to the idea of a system of mutual recognition based on mutual trust, it found its way into European legislation (see below). The reason for this, however, cannot really be the protection of one’s own nationals abroad. For often the offender is unaware of the nationality of his victim and, in any case, is unlikely to be influenced by thoughts about the international criminal law of his victim’s home country.⁵²⁷ The real rationale then is that the public interest in a prosecution of the crime and in retribution will usually be great in a victim’s home

⁵²³ For this question see also *van den Wyngaert*, Double Criminality as a Requirement to Jurisdiction, p. 46.

⁵²⁴ Cf. *Juppe*, Gegenseitige Anerkennung, p. 95ss.

⁵²⁵ *Oehler*, Internationales Strafrecht, p. 116; see also *Böse/Meyer*, ZIS 2011, p. 341s.

⁵²⁶ *Gerritsen*, Jurisdiction, p. 58.

⁵²⁷ Thus *Schultz*, Neue Entwicklungen, p. 312, regards it as a form of vicarious administration of justice.

country. Without going into the legitimacy of this desire there is one substantial argument, even though it might not possess the greatest weight: The passive personality principle massively facilitates a participation of the alleged victim in the proceedings. This might be relatively important for him in countries where he can partake in the proceedings as a party or with considerable procedural rights.

When the nationality of the victim is not known or not discernible by the offender, there are again serious problems, for the offender had no reason to believe that he could ever be subject to any law but that of the country he was acting in. *Oehler* asserts that in these circumstances the passive personality principle should not be applied “for lack of reasons of justice”.⁵²⁸ On a European level, it would be more desirable to find specifically legal reason for such considerations, as will be shown later.

Both *Oehler*⁵²⁹ and *Hein*⁵³⁰ require the existence of a *lex loci*, or an equivalent norm for reasons of international law, in order to avoid an infringement of the principle of non-interference. These views reflect the doubtful legitimacy of the passive personality principle.

6.4.5 Protective Principle

The protective principle is based on the idea that every state must be competent to judge crimes that affect its very own interests. All states will take on jurisdiction over offences which concern their existence, security, functioning, honour etc. such as, for example, high treason or crimes concerning betrayal of state secrets. It should be noted, however, that the UK still uses this form of extraterritorial jurisdiction sparingly against aliens, i.e. mainly only as an active personality principle.

The reason why states assume this form of jurisdiction is not only based on the nature of the protected interests, but also on the fact that other states have rarely

⁵²⁸ *Oehler*, Internationales Strafrecht, p. 136.

⁵²⁹ Loc. cit.

⁵³⁰ *Hein*, Zuständigkeitskonflikte, p. 37.

any interest in asserting jurisdiction for crimes directed against other states or in applying sufficient sanctions. This idea is also expressed in the possible exceptions a state can make under Art. 55(1)(b) CISA to avoid the application of *ne bis in idem* concerning offences against national security and other „equally essential interests“.⁵³¹

6.4.6 Universality Principle

The universality principle allows for the worldwide prosecution of offences independent of territory, nationality of the defendant or nationality of the victims and is meant for those acts that are directed against legal and cultural interests, both individual and collective, whose protection is in the common interest of all states. The basis of this principle is therefore solidarity. Its development was triggered through the experience of the 20th century, but it was not unknown before. It was first applied in connection with piracy. Examples for crimes that are often subject to universal jurisdiction are genocide, crimes against humanity, war crimes etc. The definition of crimes for which universal jurisdiction should exist is difficult to determine, especially as a purely national definition seems hardly justifiable. The Rome Statute is generally believed to be an acceptable orientation.⁵³² Due to its width and the lacking connection of the act to the sentencing state the universality principle is a widely contested jurisdictional basis.⁵³³

6.4.7 Vicarious Administration of Justice

One speaks of vicarious administration of justice when the state where the defendant is present tries him without any further connection to the crime or interest in the prosecution.⁵³⁴ The rationale behind this form of jurisdiction is the solidarity of states. Thus, vicarious administration is generally only subsidiary and takes place when

⁵³¹ See also Böse/Meyer, ZIS 2011, p. 342.

⁵³² Ligeti, Strafrecht und strafrechtliche Zusammenarbeit, p. 76.

⁵³³ See Cockayne, 3 JICJ (2005), p. 518ss.

⁵³⁴ Cf. Meyer, 31 Harvard Int'l. L.J. (1990), p. 108, 115 s. on this principle.

extradition fails and, according to a narrow understanding, where it is requested by a state that has jurisdiction. It is, however, increasingly used in situations where extradition or a trial is neither requested nor welcomed by the other state, for example in highly political cases where every state with a better basis for jurisdiction fears consequent internal conflicts. The reason for jurisdiction would then only be abstract solidarity with the concerned states and a desire to avoid loopholes. This is very doubtful in the light of international law and the defendant's position. The vicarious principle is often linked with universal jurisdiction, as it can apply to crimes committed anywhere and by anyone; however, it is conceived of as a residual principle that has a gap-filling jurisdictional function.

6.4.8 Protection of EU interests

The jurisdiction of Member States to try crimes directed against EU interests is a new form of jurisdiction that results from the lack of a European administration of justice in criminal matters.⁵³⁵

6.4.9 Other

There are several other forms of jurisdiction that are sometimes named, but often they only reflect another theoretical system for deciding principles of jurisdiction. For example, the negotiation over the distribution of jurisdiction in the international sphere and the conclusion of jurisdictional treaties is sometimes referred to as a principle of competence-distribution. This is especially important in the new framework decision of 30 November 2009 on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings.⁵³⁶ However, the actual jurisdiction that is agreed on is still based on a traditional principle of jurisdiction, so that it seems unnecessary to regard the negotiation-process as a different principle.

⁵³⁵ Cf. below under 6.5 for examples and further explanations; see also *Vervaele*, 8 Colum. J.Eur.L. (2008), p. 151ss., 171.

⁵³⁶ 2009/948/JHA; see below.

6.5 Analysis of existing approaches to jurisdiction

6.5.1 Jurisdiction in current EU legislation

When analysing the different attempts to deal with the issue of jurisdiction, the most important source lies in the various framework decisions that have been adopted to implement the EU's criminal policy. These legislative measures usually deal with elements of substantive criminal law first and then set down criteria for the jurisdiction of Member States' courts in the ambit of the framework decision.

The solutions in the respective acts are not always uniform, but differ in many details. A chronological overview shall give an impression of how the rationales for the allocation of jurisdiction have changed over time. After that I will try to explain why these systems for the allocation of jurisdiction vary and to outline the underlying principles that hold them together.

6.5.1.1 Framework decision on counterfeiting of the Euro

In 2000, the Council adopted a framework decision on sanctions against counterfeiting of the Euro⁵³⁷. Even before the introduction of the euro-banknotes, the Council saw the need for an efficient protection of the common currency. It was particularly concerned over the "worldwide importance of the Euro"⁵³⁸ that might attract people to counterfeit banknotes all over the world and adopted an unusual measure.

According to Article 7 of the framework decision, a Member State's courts are competent if the offence has been committed in whole or in part within its territory. This shows that on the European level the territoriality principle remains the basic

⁵³⁷ Council framework decision of 29 May 2000 on increasing protection by criminal penalties and other sanctions against counterfeiting in connection with the introduction of the Euro (2000/383/JHA), amended by framework decision 2001/888/JHA.

⁵³⁸ Recital 7.

factor in determining jurisdiction. It was later on followed by all the other framework decisions.

But the territoriality principle is supplemented by a very broad provision which requires the states of the eurozone, not all Member States, to “take the appropriate measures to ensure that the prosecution of counterfeiting, at least in respect of the Euro, is possible, independently of the nationality of the offender and the place where the offence has been committed”⁵³⁹. This provision obliges the states to assume extraterritorial jurisdiction over every crime in connection with counterfeiting of the Euro, regardless of whether a more specific connection exists.⁵⁴⁰ If a Paraguayan citizen develops a computer program for counterfeiting of the Euro in India, he can be tried before an Italian court. Such a wide assumption of jurisdiction can be explained with the protective principle: The states of the Eurozone claim extraterritorial jurisdiction over each crime against the common currency, because it is their own currency and thus in their own national interest to defend the currency and thereby the economy. Additionally, the European interest can, as shown above 6.4.8, only be protected through the Member States’ criminal justice. The adoption of this principle must be seen in view of recital 7 and the fear of the legislator of criminal acts in foreign states due to the worldwide importance of the euro.

Since all Eurozone states are in the same position regarding extraterritorial acts (except factually, e.g. availability of evidence etc.), this form of jurisdiction always carries the risk of multiple fora. The European legislator not only accepts these positive conflicts, but encourages them in order to avoid the possibility of a negative conflict of jurisdiction.⁵⁴¹ Its solution to this conflict here is a form of “cooperation” between the Member States with a view of centralising the prosecution in one state,⁵⁴² which is a very vague approach.

⁵³⁹ Art. 7(2).

⁵⁴⁰ Cf. also *Vervaele*, 8 Colum. J.Eur.L. (2008), p. 171.

⁵⁴¹ Cf. *Juppe*, *Gegenseitige Anerkennung*, p. 102 s.

⁵⁴² Art. 7(3); see *Hecker*, ZIS 2011, p. 61.

6.5.1.2 Framework decision on combating racism and xenophobia

The framework decision on combating racism and xenophobia⁵⁴³ introduced a more complex system for the allocation of jurisdiction. The basis is again the territoriality principle as set down in Article 9(1)(a). This principle is extended, though, by a more specific definition of the place of the crime: Spreading racist material over the internet will be regarded as a crime on a state's "territory" either if the person acting is physically present on its territory or if the content is hosted on an internet server on its territory.⁵⁴⁴ This definition, however, is not complete. It is meant to be a minimum standard for jurisdiction of the Member States. There might be other places where jurisdiction could reasonably be established, for example the place where the effects of racism are meant to take place by the offender, where material is meant to be accessed or downloaded etc. The framework decision does not say anything on the location of effect. Nor does it preclude an extraordinarily wide construction of the territoriality principle as is, for example, the case in Germany.

This somewhat unclear principle of territoriality is complemented by a personality principle in Article 9(1)(b) and (c). According to these provisions, a Member State's courts are competent if the offence was committed by one of its nationals or for the benefit of a legal person on its territory. The Commission's proposal, instead, provided that not only the act needs to be committed by one of its nationals, but also that it affects individuals or groups of this state. This had been a very interesting combination of the active and the passive personality (protective) principle: Not only the perpetrator must be a national, but also the victim. Thus cumulating two prerequisites, the personality principle was given a very restricted scope and probably it is for this reason that the Council did not adopt this restriction, nor has it been followed in subsequent legislation (see *infra*).

Another important restriction to the principle of personality, however, is set in Article 9(3) of the framework decision, which stipulates the general possibility to exclude the

⁵⁴³ Council framework decision 2008/913/JHA of 28 November 2008 (OJ L 328/55 of 06.12.2008). See also the Proposal for the framework decision COM/2001/664fin. (OJ C 75 E/269 of 26.03.2002).

⁵⁴⁴ Cf. Art. 9(2).

application of this principle. Member States thus can choose to make territoriality the only basis for jurisdiction in their implementing laws. The legislator had to pay respect to the fact that not all Member States accept extraterritorial jurisdiction, which would be a direct effect of claiming jurisdiction over its own nationals regardless of the place where the crime has been committed. The Commission had proposed a more advanced system of jurisdiction that required the Member States to extradite their own nationals if they do not claim jurisdiction over them, i.e. if they do not adopt the active personality principle.⁵⁴⁵ But this obligation has been removed by the Council.

A special treatment of legal persons is found in Article 9(1)(c). A Member State has jurisdiction over a case if the crime has been committed “for the benefit of a legal person that has its head office in the territory of that Member State”. Thus, the offender can be a foreigner who acts on foreign territory, but will be held liable before another Member State’s courts because he acted to serve a legal person on its territory. This is a specific form of the active personality principle: Because a legal person cannot act itself, one has to assess the actions of its representatives. But the question of jurisdiction is nevertheless judged according to the head office of the legal person, because the representative is acting on its behalf. One may say that this legal mechanism is a consistent step in adopting the active personality principle. And more importantly, it is vital because some Member States do accept a criminal responsibility of legal persons and others do not: Article 9(1)(c) ensures an equal application of the allocation of jurisdiction regardless of these national differences.

6.5.1.3 Framework decision on non-cash means of payment

The model of jurisdiction introduced by the proposal on the framework decision on combating racism was the first elaborate solution which served as a model for later legislation. In the subsequent framework decision on the protection of non-cash means of payment,⁵⁴⁶ the Council again takes territoriality as a compulsory basis for

⁵⁴⁵ See Articles 12(3) and 13(1) of the Commission Proposal COM/2001/664fin. (OJ C 75 E/269 of 26.03.2002).

⁵⁴⁶ Council framework decision of 28 May 2001 combating fraud and counterfeiting of non-cash means of payment (2001/413/JHA).

the allocation of jurisdiction.⁵⁴⁷

The active personality principle, instead, is compulsory only for those Member States that do not extradite their nationals.⁵⁴⁸ And it is still further restrained in this framework decision: National legislation can limit the application of the personality principle to those cases where the act is also punishable under the law of the (foreign) state where it was committed. This requirement of a double criminality, effectively a *lex loci*, is exclusively found in this framework decision.

As to the question of avoiding multiple fora, Article 11(2) only provides for consultations, as did the framework decision on eurocounterfeiting.⁵⁴⁹

6.5.1.4 Framework decision on combating terrorism

The most extensive rules for the allocation of jurisdiction were adopted by the 2002 framework decision on combating terrorism.⁵⁵⁰ Here, the Council not only provided for ample possibilities of assuming jurisdiction, but also developed a more decisive approach towards multiple fora.

The first basis for claiming jurisdiction is, again, the territoriality principle.⁵⁵¹ But in contrast to all other legislative acts, territoriality can be understood as a pan-European territoriality: It is left open to the Member States to claim jurisdiction whenever an offence is committed on the territory of another Member State. If a national legislation adopts this concept, it will claim extraterritorial jurisdiction even in cases where there is no significant link to its own territory. Such a universal jurisdiction is rare in the existing legislation as outlined above. Although this form of the universality principle would entail problems in public international law if a state were to apply it of its own motion, it is possible to implement it through a framework

⁵⁴⁷ Article 9(1)(a).

⁵⁴⁸ Article 9(2) and (3).

⁵⁴⁹ Art. 7(3) of that framework decision, see above.

⁵⁵⁰ Council framework decision of 13 June 2002 on combating terrorism (2002/475/JHA); amended by Council framework decision of 28 November 2008 (2008/919/JHA).

⁵⁵¹ Article 9(1)(a).

decision on the European level. From the standpoint of European Union legislation, it seems to be regarded as an adequate means to protect vital interests that are common to all Member States. Additionally, we find the flag principle for offences committed on board a vessel or an aircraft mentioned in Article 9(1)(b);⁵⁵² this principle is not widened to a European flag principle but represents the traditional flag principle.

But there is not only an extension of the territoriality principle - the active personality principle is widened as well: Article 9(1)(c) allocates jurisdiction to Member States over their own nationals, but also over persons residing on their territory. Which are the reasons for claiming jurisdiction over cases where the terrorist act is committed in another country and the offender is no citizen of the state? A similar proposal had been made by the European Parliament in its opinion on the framework decision on child pornography. It suggested to claim jurisdiction if “the offender is one of its nationals, or resides permanently or temporarily on the territory of the Member State concerned”.⁵⁵³ But this proposal of extending jurisdiction to residents had not been adopted in the framework decision on child pornography. Probably the provision of the framework decision on combating terrorism is a singular reaction to the fear of foreign citizens planning terrorist acts on the territory of the EU and executing them abroad, as has happened in the assaults of September 11, 2001.

To complete the survey on jurisdiction in the framework decision on combating terrorism, one must pay attention to Article 9(1)(e) that establishes the protective principle in this ambit: A Member State has jurisdiction if “the offence is committed against the institutions or people of the Member State in question or against an institution of the European Union or a body set up in accordance with the Treaty establishing the European Community or the Treaty on European Union and based in that Member State.” The protective principle comprises, generally speaking, the passive personality principle (the offence is committed against the state’s nationals) and the protection of state interests (the offence is directed against other national

⁵⁵² Cf. *Klip*, EU Criminal Law, p. 181.

⁵⁵³ Document A5-0206/2001fin., p. 16.

interests). Article 9(1)(e) comprises both aspects and thereby tries to extend a Member State's jurisdiction over terrorist acts. It even extends the passive personality principle to the "people" of the Member State, so that not only its nationals are protected.

It has become a commonplace to argue that an extension of jurisdiction is undesirable because it leads to legal uncertainty. The legislator seems to accept this uncertainty in order to avoid "loopholes" for criminals.⁵⁵⁴ It tries to deal with the inevitable positive conflicts of jurisdiction on a second step: In Article 9(2), the Council creates a detailed procedure in multiple fora-cases. The respective Member States shall "cooperate" to find an exclusive place for jurisdiction by applying the principles of territoriality, active personality/residence, passive personality and lastly the state of arrest as hierarchical criteria (the framework decision speaks of "sequential account").⁵⁵⁵ This is an important progress in comparison to earlier legislation where the Council contented itself with a simple recourse to "consultation".

Whether this system of first widening jurisdiction and then solving conflicts on a second step is a feasible concept will be revealed in practice. The question here is not whether this system can work in practice, but rather what it implies about the European legislator's understanding of criminal justice. I will deal with this in more detail later. Here it is sufficient to say that the extension of jurisdiction is an express aim of the legislator. If one accepts this political goal, the framework decision on combating terrorism is a step forward on the legal level, because it at least establishes legal criteria for dealing with multiple proceedings. It would, however, have been a still more far-reaching step to provide for a conflict-solving mechanism, as proposed by the opinion of the European Parliament.⁵⁵⁶ It may occur that a simple "cooperation" between the Member States will not suffice to assign the jurisdiction to one Member State in cases of controversy. There is no binding decision-making procedure if one Member State does not want to waive its jurisdiction. The

⁵⁵⁴ See *infra*.

⁵⁵⁵ See e.g. *Hecker*, ZIS 2011, p. 61.

⁵⁵⁶ Report on the Commission proposal for a Council framework decision on combating terrorism, A5-0397/2001 final.

Parliament brought forward the idea of giving Eurojust or the European Court of Justice a competence to finally decide on the question of jurisdiction according to the criteria of the framework decision,⁵⁵⁷ which would be a desirable step forward.

6.5.1.5 Framework decision on corruption in the private sector

The very extensive approach to jurisdiction, as introduced by the framework decision on terrorism, has remained singular. The 2003 framework decision on combating corruption in the private sector⁵⁵⁸ has returned to the original system again: It prescribes jurisdiction on the basis of territoriality and active personality (including the above-mentioned system for legal persons), but makes this extraterritorial jurisdiction optional to those states who surrender their own nationals.⁵⁵⁹ However, a system of dealing with multiple fora is not implemented here.

6.5.1.6 Framework decisions on child pornography, on trafficking in human beings and on drug trafficking

In the succeeding framework decisions on child pornography,⁵⁶⁰ on trafficking in human beings⁵⁶¹ and on drug trafficking,⁵⁶² a very similar concept can be found. Articles 8, 6, and 8, respectively, take over the model of the earlier legislation: Territoriality and limited personality principle. This can therefore be regarded as the common “acquis” of a jurisdictional pattern in the former EU third pillar measures. Yet again, the issue of multiple fora is not dealt with.

⁵⁵⁷ Cf. amendment 40 with the view of introducing a new Article 12(2a).

⁵⁵⁸ Council framework decision of 22 July 2003 on combating corruption in the private sector (2003/568/JHA).

⁵⁵⁹ Cf. Article 7(1)-(3).

⁵⁶⁰ Council framework decision of 22 December 2003 on combating the sexual exploitation of children and child pornography (2004/68/JHA).

⁵⁶¹ Council framework decision of 19 July 2002 on combating trafficking in human beings (2002/629/JHA).

⁵⁶² Council framework decision of 25 October 2004 laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking (2004/757/JHA).

6.5.1.7 Framework decision on attacks against information systems

The framework decision on attacks against information systems⁵⁶³ provides again a more complex approach to jurisdiction, similar to the system of the framework decision on combating terrorism. The first relevant link is once more the territoriality principle.⁵⁶⁴ This principle is then defined more specifically as the place where the offender is physically present or as the place where the attacked information system is situated. Thus, the Council clearly states that “territoriality” means the location of action as well as the location of the effect. Each link will suffice on its own to give the Member State jurisdiction over a “computer crime” so that the framework decision institutes the principle of ubiquity, albeit not in the broadest possible way. It thereby reflects the two basic aspects of criminal law: controlling the offenders’ actions (location of act) and protecting the victims’ interests (location of effect).

The other provisions of the framework decision on attacks against information systems are known from the framework decision on terrorism: A limited personality principle is adopted, whereby Member States have to claim jurisdiction if they do not extradite.⁵⁶⁵ An interesting aspect in comparing the two framework decisions is the fact that the very wide extensions of jurisdiction in the framework decision on terrorism are no longer followed. One can observe an interdependence between the gravity of the crime and the expansion of jurisdiction: Terrorism is regarded as a universally disapproved act so that extraterritorial jurisdiction may be assumed in a large number of cases. The framework decision on information systems, in contrast, also deals with minor crimes that may vary more significantly from state to state. Therefore, the relevant link to the sentencing state must be closer.

The problem of multiple proceedings in various Member States due to extraterritorial jurisdiction is dealt with in the known way, by mainly restating the system found in the framework decision on terrorism. Member states shall cooperate in order to

⁵⁶³ Council framework decision of 24 February 2005 on attacks against information systems (2005/222/JHA).

⁵⁶⁴ Article 10(1)(a).

⁵⁶⁵ Article 10(1) and (3).

concentrate proceedings in one Member State only. The hierarchy of the relevant links to be taken into account in determining the competent state remains the same, but seems to be no longer legally binding: The new legislation has a slightly different wording in respect to the older framework decision on terrorism: Instead of “shall be taken”⁵⁶⁶ we read “may have recourse”. Thus, the hierarchy of the relevant links is no longer a legal determinant, but only a non-binding legal argument. This avoidance of clear and obligatory criteria may lead to more legal uncertainty in solving positive conflicts of jurisdiction.

6.5.2 Impacts of the framework decisions

6.5.2.1 Priority of the territoriality principle

In all legislative acts, the territoriality principle is the basic principle for the allocation of jurisdiction. It is applicable without restrictions and seems to be the greatest common denominator in a European debate on jurisdiction criteria. While other bases for jurisdiction may be optional to the national legislators implementing the framework decisions, jurisdiction on the basis of the territoriality principle must be established by all Member States in all cases.

6.5.2.2 Interpretation of the territoriality principle

The territory refers to the Member States’ territories in most cases. The framework decision on combating terrorism, however, allows for the creation of a European territory as an entity in national jurisdiction laws.⁵⁶⁷

More important is the question of where an act is considered to have been committed. As outlined in the first part, there are numerous possibilities, especially the place (or places) where the defendant acted and the place where the harm was

⁵⁶⁶ Council framework decision of 13 June 2002 on combating terrorism (2002/475/JHA), Article 9(2).

⁵⁶⁷ Article 9(1)(a).

inferred or the act completed. An explicit indication of these places is only given in two cases, namely in the framework decision on racism and xenophobia⁵⁶⁸ and the framework decision on attacks against information systems⁵⁶⁹ where we find the principle of ubiquity. This difference may be owing to practical considerations. Although a divergence of the place where the defendant acted and where the act was completed can occur with respect to many crimes, it is certainly most typical in cases of cybercrime. Surprisingly, territorial jurisdiction concerning child pornography need only be assumed for the place where the defendant acted.⁵⁷⁰

It would appear, then, that the principle of territoriality means different things in EU legislative acts. However, it is dangerous to infer too much from this, because there seems to be no theoretical concept behind this differentiation. Rather, it is a reaction to practical needs and political feasibility.

6.5.2.3 Development of the personality principle

The personality principle, especially the active personality principle, is present in almost all the framework decisions, but in different forms. There is, however, a clear development over time:

In the framework decision on counterfeiting of the Euro there is no personal element in jurisdiction. The framework decision on racism and xenophobia introduces the active personality principle. The framework decision on non-cash means of payment also adopts the active personality principle, but allows to subject it to the requirement of a *lex loci*, thus introducing a double criminality requirement. The framework decision on terrorism widens the scope of personality to include residents and applies the passive personality principle independently. From the framework decision on corruption in the private sector onwards, the personality principle is a standard.

The active personality principle is generally optional. In the latest framework

⁵⁶⁸ Article 9(2).

⁵⁶⁹ Article 10(2).

⁵⁷⁰ Article 8(5) of the framework decision: Member States must open a forum if a computer system was “accessed from its territory”.

decisions, however, it is only optional if states are ready to surrender their own nationals both generally (as they now have to) and in the individual case. This amounts to vicarious administration according to the principle of “aut dedere aut iudicare”.

The question that remains is why solutions to the question of jurisdiction that are so similar in the overall conception often vary in seemingly insignificant details. This is especially true for the cooperation that Member States should use to concentrate proceedings in one state. In some measures there are no criteria given that could be used in the negotiations. In others there are slightly different hierarchical orders. A particular conceptual reason for this is not apparent. The reasons can, as indicated above, only be found on a practical, political level. These framework decisions only concern themselves with measures that seemed relevant at the time of the adoption and confine themselves to typical situations as illustrated with the framework decisions on racism and attacks on information systems; the typical image here was cybercrime. The motivation also plays an important part: the framework decision on terrorism is certainly most far-reaching.

6.5.2.4 Protective principle

The protective principle as such is only found in the framework decision on terrorism (Article 9(3)) and the framework decision on counterfeiting of the Euro (Article 7(1)), but in a very wide form: every state always has jurisdiction. That only these two acts set down the protective principle is due to the subject-matter: they are the only framework decisions that could concern genuine state interests.

6.5.2.5 Exorbitant jurisdictions

The basic concept of all these legal acts seems to rest on two steps. First, one seeks to create as many fora for a certain case as possible, later one seeks to limit the consequences of this by requiring states to cooperate. For this cooperation, however, there are neither strict criteria nor is there an obligation to succeed. The new

framework decisions follow this basic pattern and further elaborate it.

This procedure cannot convince. It does not give the least attention to the interest of a defendant in being able to predict the jurisdiction he will be subjected to and to defend himself adequately. The framework decision on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings purposely avoids answering the question of whether an individual may have a right to be tried in a specific jurisdiction and leaves it entirely to national law.⁵⁷¹ That this “interest” can actually be a real procedural right on a European level will be shown later. Suffice it to say here that independently of any individual-rights-based position, criminal procedural law in general serves to give a framework to the exercise of state power. Were prosecutions to negotiate freely over jurisdiction on the European level, this would open the way to forum shopping and undermine the trust in the impartiality of criminal proceedings.

All this goes to show that, on the European level, there is a change of the understanding of criminal law. Instead of being the last resort, the ultima ratio of state measures,⁵⁷² it is regarded as an effective means to fight all unwelcome developments in society. A wide jurisdiction of many states is therefore positive per se, whereas negative conflicts of jurisdiction are a real threat. That this is not just speculation can be seen in the explanatory memorandum to the Commission’s proposal on trafficking in human beings and on child pornography⁵⁷³ that claims the need to create competences “which are as clear and as far reaching as national legal systems will allow in order to guard against persons evading prosecution.”

Or, in the words of the Committee of the Regions on the same legislation:⁵⁷⁴ “The Committee of the Regions [...] highlights the particular importance of international extradition agreements and national provisions on criminal law jurisdiction with a view to ensuring that criminal acts committed wholly or partially outside the home country

⁵⁷¹ Framework decision 2009/948/JHA of 30 November 2009 (OJ L 328/42 of 15.12.2009), recital 17.

⁵⁷² Cf. also *Herlin-Karnell*, 15 ELJ (2009), p. 351 to this aspect.

⁵⁷³ COM/2000/854fin. p. 17 and p. 27.

⁵⁷⁴ CdR 87/2001fin. at recital 26.

of the offender can be punished under criminal law without loopholes”.

Loopholes, however, can be avoided through extradition alone. The system of the European Arrest Warrant is already so advanced that, if there were a system of uniform allocation of jurisdiction, loopholes would hardly exist. The added “advantage” of multiple proceedings over extradition is based on the better and faster results prosecutors can get when they cooperate. If multiple investigations are initiated, cooperating Member States can at any given moment choose the most practical forum for a trial, combine their knowledge through data exchange and exchange of evidence and react flexibly to new developments in the investigation. It is clear that this results in a direct disadvantage to the defendant who will normally not be able to defend himself adequately in several different countries simultaneously, as he will be faced with investigations based on different legal orders and in different languages, which, among other things, also multiplies the costs of adequate legal representation during the investigating stage.

Finally, the conscious creation of positive conflicts of jurisdiction certainly violates Article 82 para. 1 lit. b TFEU (ex-Art. 31(d) EU) that requires EU action to prevent and settle conflicts of jurisdiction.⁵⁷⁵

6.6 Jurisdiction and ne bis in idem

Because of the freedom of states to assert their own jurisdiction in general and the great preference that EU legislative acts give to extensive jurisdiction in harmonised areas of criminal law, multiple proceedings for criminal acts will increase.

Although the need to prevent positive conflicts of jurisdiction is often recognised, there is as yet no piece of legislation that sets substantive, binding and rights-based criteria for the allocation of jurisdiction. The framework decision on conflicts of jurisdiction does admittedly not aim at advancing predictability for the individual through its negotiating procedure.

⁵⁷⁵ See *Fletcher*, 26 Yearbook of European Law (2007), p. 10; *Vander Beken/Vermeulen/Lagodny*, NStZ 2002, p. 625.

The only further legal barriers to Member States in their assumption and exercise of jurisdiction are *ne bis in idem* rules, mainly Articles 54 ss. of the Convention Implementing the Schengen Agreement (CISA) and now Article 50 of the Charter. There is a host of literature on the evolution and the meaning of the transnational *ne bis in idem*,⁵⁷⁶ and it is not my aim to add to this. I will instead concentrate on the few aspects relevant for this study in trying to explain the function that the *ne bis in idem* principle has acquired over time, and why it is an inadequate mechanism to resolve most of the problems associated with conflicts of jurisdiction.

The *ne bis in idem* only applies to final sentences. This means, first of all, that multiple proceedings in different Member States are not avoided, which is both a waste of resources and a tremendous practical problem for an adequate defence strategy and the procedural rights of the suspect. But even if it were to be widened in scope so as to include *lis pendens* (other states would then have to stay their proceedings pending the outcome of the prosecution in the first state) this would still mean that mainly decisions to criminalise a certain act would prevail, because normally there is no prosecution without an offence. Additionally, Art. 54 of the CISA requires that, if a penalty has been imposed, *ne bis in idem* will not apply unless that penalty “has been enforced, is actually in the process of being enforced or can no longer be enforced [...]”.⁵⁷⁷ Thirdly, the *ne bis in idem* gives no consideration to the jurisdictional basis on which a decision rests. The question of which states’ criminal laws and jurisdictional rules will be recognised Union-wide is totally random, as it is generally the first final decision that will profit by the *ne bis in idem*,⁵⁷⁸ but if another

⁵⁷⁶ Cf. only *van Bockel*, *ne bis in idem*; *Mansdöfer*, *ne bis in idem*; *Kniebühler*, *ne bis in idem*; *Jagla*, *ne bis in idem*; *Eser*, in: Sieber et al. (eds.), *Europäisches Strafrecht*, § 36; *Löff* 15 EJCCL (2007), p. 309; *Klip*, *EU Criminal Law*, p. 231ss; *van den Wyngaert / Stessens*, 48 ICLQ (1999), p. 779; *Vervaele*, 1 *Utrecht Law Review* (2005), p. 100.

⁵⁷⁷ This requirement is not reiterated in Art. 50 of the Charter. The meaning of this is under debate. German courts still apply the criteria of Art. 54 CISA, see *Landgericht Aachen* of 08 December 2009, 52 Ks 9/08 (*Strafverteidiger* 2010, 237); *Bundesgerichtshof* of 25 October 2010, 1 StR 57/10 (BGHSt 57, 11), citing the Explanations relating to the Charter (OJ C 303/17 of 14.12.2007, p. 31); *Bundesgerichtshof* of 01 December 2010, 2 StR 420/10; upheld by the *Bundesverfassungsgericht* of 15 December 2011, 2 BvR 148/11; see for further details *Böse*, *Gegenseitige Anerkennung unter Lissabon*, p. 70ss.; *id.*, GA 2011, p. 504ss.; *Hackner*, *NStZ* 2011, p. 426 ss.

⁵⁷⁸ Cf. *Klip*, *EU Criminal Law*, p. 423; *Juppe*, *Gegenseitige Anerkennung*, p. 90 s.

state can beat it concerning the enforcement stage, it can still gain recognition. *Ne bis in idem*, then, is not a means of allocating jurisdiction, and on deciding which state should be able to determine if certain acts constitute a crime or not and if a certain person is guilty or not, but just a tool to lessen the negative effects of multiple proceedings while trying to uphold as far as possible state sovereignty.

Since it is the only mechanism of resolving these problems at the moment, however, the ECJ has taken a very proactive approach towards it. This has been mainly done through the link of Art. 54 CISA with the right to free movement. What is a very welcome development from the point of view of the individual cases and the fundamental rights of the defendants has none the less led to some inconsistencies that are new to the *ne bis in idem* framework. From a doctrinal point of view, and with regard to the increasing level of integration in criminal matters, it seems odd that *ne bis in idem*, one of the most fundamental principles of criminal law, should be interpreted with regard to the right to free movement instead of in accordance with its own specific function in a European criminal justice sphere. This might, however, change with Art. 50 of the Charter, as unlike the CISA, the Charter is not primarily created for dealing with the effects of lifting internal border controls. It is then possible to interpret a transnational *ne bis in idem* not mainly with regard to its effects on free movement, but its effect on the individual in a broader sense, similar to the national *ne bis in idem*.

From a systematic view, the current approach leads to contradictory results in practice. For example, the ECJ has repeatedly (and rightly) decided that Art. 54 CISA applies to acquittals as well as to convictions, also in cases where this was based on lack of evidence or on a time-bar.⁵⁷⁹ This leads to the paradoxical situation that a person who is threatened with prosecution in one Member State but is not guilty according to the laws of another Member state with jurisdiction, e.g. because his acts do not constitute an offence there, or the time-bar applies, can only wish that, through some mistake, he will be prosecuted, charged and acquitted in that other Member State. Then, he would fully benefit from the *ne bis in idem*. In a case where

⁵⁷⁹ ECJ judgment of 28 September 2006, C-150/05 - *Van Straaten*; ECJ judgment of 28 September 2006, C-467/04 - *Gasparini*.

the prosecution correctly determines beforehand not to bring charges, this would leave the first state free to charge that person.⁵⁸⁰ It should, however, not make any difference if a person is acquitted because of a time-bar, or if he is not even charged for that same reason. This is again one of the reasons why a common basis for the allocation of jurisdiction is necessary.⁵⁸¹

6.7 Suggestions for jurisdiction in EU criminal procedure

The difficulty lies in determining just what cause to keep in mind when attempting to agree on common European rules for jurisdiction in criminal matters. The starting point should be the purpose of jurisdictional rules.

One answer that is often given is that jurisdiction rules should help to avoid any loopholes so that offenders can be called to account.⁵⁸² However, this answer does not really help to tackle the problem, for one of the main problems of jurisdiction is the question of which national law should decide whether an act is a criminal offence or acceptable behaviour, and which national law should not. Thus, it is circular to argue that jurisdiction should help to prosecute offenders, when it is necessary to determine the conditions of someone's being an "offender". To favour wide jurisdiction rules would not help to avoid loopholes for criminals, rather, it would itself generate these criminals.

Another theory says that jurisdiction rules are based on the two pillars of self-protection of the state and solidarity and have to be measured against these.⁵⁸³ Although not wrong, the only real conclusion that can be drawn from this is that there must be a substantive interest in the prosecution of the defendant.

⁵⁸⁰ As this is not normally a final decision within the meaning of Art. 54 CISA.

⁵⁸¹ As outlined above, Advocate General Sharpston used the *Gasparini* case as an occasion to elaborate her differing understanding of the *ne bis in idem*. In her state-based approach, the dilemma depicted is not a problem for the defendant's fundamental rights, but rather an incentive to undesirable "jurisdiction-shopping" by him, para. 104 of the opinion, and a threat to safety in the area of freedom, security and justice.

⁵⁸² *Feller*, 16 Israel Law Review (1981), p. 40; see also above 6.5.2.5 for the Commission's approach.

⁵⁸³ *Oehler*, Internationales Strafrecht, p. 130.

Since jurisdiction and criminal proceedings are ancillary to substantive criminal law and punishment, I would concur with theories that take into account the reasons behind these and try to effectuate them through jurisdictional rules. This would mean that jurisdiction must help to protect certain legal interests that are behind criminal norms⁵⁸⁴ and can thus vary according to substance matter. They must equally serve to further the aims of punishment, e.g. rehabilitation, deterrence or retribution.⁵⁸⁵

Therefore, jurisdictional rules should be based on specific needs of the area they apply to and define their jurisdictional criteria accordingly. This idea can be seen to a limited extent in both the framework decision on xenophobia and the framework decision on attacks on information systems where the place of commission is described specifically for these offences. Similar approaches should be adopted for more areas of crime in order to determine what state would be more appropriate to deal with certain facts and why. The purpose of the substantive criminal law should be at the bottom of all models of allocation of jurisdiction. The approaches to the allocation of jurisdiction in legislation and doctrine can be traced back to three basic models.

6.7.1 Cooperation model

The most obvious approach leaves it to the states themselves to coordinate their activities and their exercise of jurisdiction and tries to provide a better framework for this.

The Commission, contrary to its position displayed in the framework decisions, has published a Green Paper on conflicts of jurisdiction and the principle of *ne bis in idem* in criminal proceedings in 2005⁵⁸⁶ and the Council has finally adopted a framework

⁵⁸⁴ Similarly *Nowakowski*, 6 ÖZÖR (1955), p. 129.

⁵⁸⁵ *Brocher*, 7 Rev. droit int. et lég. comp. (1875), 128; similarly *Gärditz*, *Weltrechtspflege*, p. 316-349, who tries to legitimize the universality principle through certain reasons for punishment.

⁵⁸⁶ COM/2005/696 final.

decision at the end of 2009.⁵⁸⁷

The framework decision is a lot more vague than the proposal in the Green Paper. It mainly aims at rendering criminal prosecution more efficient by avoiding multiple proceedings. The only duties it sets up for cooperation of the Member States are the duty to contact another Member State if it is suspected that parallel proceedings exist in that state, and a duty to reply when contacted (Art. 5, 6). If parallel proceedings exist, states must enter into direct consultations (Art. 10). There is certainly no duty to reach an agreement, nor any provision for this procedure or any relevant substantive criterion.

The Green Paper was rather vague itself, but it had at least some substantive provisions. It suggested a three-stage procedure consisting of an initial informational stage, a consultation stage and finally, mediation. On the first stage, Member States' authorities that have started or are about to start criminal proceedings shall be required to inform all Member States that might be interested. The second step would be a "duty to enter into discussions" for those prosecuting authorities that wish to prosecute. Ideally, all but one state would close or halt their proceedings. If no such settlement should be reached, the Commission proposed a mediation stage with Eurojust acting as a mediator and toyed with the idea of introducing a fourth stage where an EU body could take a binding decision if mediation fails. The Commission was rather vague about what criteria should be used to assume jurisdiction. Under 2.5. it simply enumerates the known principles: "In particular, the list could include *territoriality, criteria related to the suspect or defendant, victims' interests, criteria related to State interests, and certain other criteria related to efficiency and rapidity of the proceedings*. Perhaps, certain factors which should *not* be of relevance could also be identified." It then adds that "a more flexible approach could be preferred. [...]. For example, such a principle could refer to **reasonableness** and/or **due process**."

This approach resembled those taken in the framework decisions on substantive

⁵⁸⁷ Council framework decision of 30 November 2009, 2009/948/JHA; to be implemented until 15.06.2012.

criminal law, but it was too wide to help to avoid negative effects and legal problems of the allocation of jurisdiction, because it focussed too much on avoiding multiple proceedings and too little on determining the appropriate forum predictably.⁵⁸⁸

Still, compared to the current framework decision, it seems like the height of procedural fairness and transparency. Now, states shall simply “consider the facts and merits of the case and all the factors which they consider to be relevant”⁵⁸⁹ - factors which are always observed in international law and seem hardly worth mentioning. However, according to Art. 12(2) the matter can be referred to Eurojust, which, though not able to force states to accept a solution, might help to unify approaches.⁵⁹⁰

6.7.2 Model specifying soft criteria

More ambitious models mainly try to establish more specific criteria that might be in a certain hierarchical order, but that are not strictly binding in all cases.

*Lagodny*⁵⁹¹ and *Vander Beken* and *Vermeulen*⁵⁹² independently published two studies that addressed jurisdictional problems and came to rather similar results.⁵⁹³ They proposed a system in which the principles for jurisdiction are in a hierarchical order, but this hierarchical order is dependent on qualitative criteria or gravity. So, although the higher criteria (e.g. territoriality) should be given priority, this changes when other, subordinate criteria have a better qualitative position. For example, if the territorial link is very remote and all evidence is in another country where the defendant also happens to be resident, this last state would be allowed to prosecute

⁵⁸⁸ Cf. for the necessity of explicit criteria *Juppe*, *Gegenseitige Anerkennung*, p. 89 s.

⁵⁸⁹ Art. 11 of the framework decision.

⁵⁹⁰ The effects of the framework decision are perceived differently. While *Peers*, *EU Justice and Home Affairs Law*, p. 833, calls it “disappointing”, *Hecker*, *ZIS* 2011, p. 61 is more optimistic. Since information and consultation among states are obligatory, the Commission could institute infringement proceedings if Member States omitted this. Cf. also *Eser*, in: *Sieber et al.* (eds.), *Europäisches Strafrecht*, § 36 para. 100.

⁵⁹¹ *Lagodny*, *Empfiehl es sich, eine Europäische Gerichtskompetenz für Strafgewaltkonflikte vorzusehen?* 2001.

⁵⁹² *Vander Beken/Vermeulen*, *Finding the best place for prosecution*, 2002.

⁵⁹³ Published together as *Vander Beken/Vermeulen/Lagodny*, *NSZ* 2002, p. 624.

the act. The suggestion is based on both an abstract hierarchy and an individual weighing-up. They also try to involve European bodies in the control of the respective decisions. Sometimes, Eurojust is also named as a possible body to decide on conflicts according to these criteria, and subject to the jurisdiction of the ECJ.⁵⁹⁴

There are also some more far-reaching models that opt for a stricter application of the criteria. *Hein*⁵⁹⁵ proposes a model convention to this end and takes into account the interests of the state in prosecuting an act, the interests of the victims and the interests of the defendant. His conclusion is that the interests of a particular state can only override other interests when the state is the direct target of a crime,⁵⁹⁶ which is a recourse to the protective principle. In all other cases he believes that the defendant is the only person who has a legally relevant and material interest in the allocation of jurisdiction, for example resocialisation. Therefore he wants to give him the choice between all the jurisdictions that are willing to prosecute the case.⁵⁹⁷

Although this suggestion certainly avoids multiple fora and is favourable for the defendant, it does not do so on the basis of sound legal considerations. There is no reason why a defendant should be able to choose his forum and, consequently, the applicable criminal law. If either the defendant, or, as in other suggestions, the prosecution, gets to choose the forum, there is a great danger that the expected outcome will determine the choice, independent of the appropriateness of the application of that law. Without a useful and well-founded jurisdiction, however, criminal law cannot perform its fundamental functions.

6.7.3 Model specifying strict criteria

As already outlined before, I think that a strict allocation of jurisdiction that leaves just one forum for certain acts is necessary and desirable. Although it can lead to a forum

⁵⁹⁴ *Amalfitano*, *Conflitti di giurisdizione*, p. 354ss.; *Juppe*, *Gegenseitige Anerkennung*, p. 99ss.; *Hecker*, *ZIS* 2011, p. 62s.

⁵⁹⁵ *Hein*, *Zuständigkeitskonflikte*, p. 223ss.

⁵⁹⁶ Art. 2 draft treaty, p. 254.

⁵⁹⁷ Art. 3 draft treaty, p. 254, with default rules.

that, in a very specific case, might not be the most practical forum, it has the great advantage of being foreseeable. For the recognition of decisions and for the mutual trust it is a great advantage if a state's decisions are enforced throughout the whole Union because they are based on criteria that have been previously agreed on and that are the most appropriate for certain crimes according to the common values that have brought about this choice. The allocation of jurisdiction would then also lead to the recognition of the substantive choices of the competent state *not* to punish a certain act, and would avoid multiple prosecutions.

One can even ask whether a uniform allocation of jurisdiction is not, independently of the functioning of mutual recognition and the creation of trust, already required by principles of European law: according to the principle of the court specified by law that is set down in Art. 6 ECHR and Art. 47(2) of the Charter and is part of the constitutional traditions common to the Member States (Art. 6 TEU), the competent court must be determined by law when the offence is committed,⁵⁹⁸ although admittedly its content varies greatly between Member States.⁵⁹⁹ But in actual fact, this rule is even much more important on the international level because of the traditional link between the forum and the applicable substantive law in criminal matters (i.e. the *lex fori*). It is very disturbing that the substantive law to which an offender will be subjected depends on random developments after the offence has been committed.⁶⁰⁰ This is problematic with regard to another fundamental right, namely the legality principle as laid down in Art. 7 ECHR / Art. 49(1) Charter.⁶⁰¹ If we

⁵⁹⁸ Cf. *Impalà*, 1 Utrecht Law Review (2005), p. 65s.; *Luchtman*, 7 Utrecht Law Review (2011), p. 76s., 90ss.; on the Commission's Greenpaper see *Braum*, ZRP 2002, p. 512s.; *Satzger*, StV Beilage 2/2003, p. 140.

⁵⁹⁹ In most continental law doctrines, it is a very strict constitutional principle that even requires that the particular judges who sit on case are unambiguously determined by law prior to the commission of the offence, for example in Germany (Art. 101 para. 1 clause 2 of the Basic Law), Austria (Art. 83 para. 2 of the Constitution), Italy (Art. 25 of the Constitution) or Belgium (Art. 13 of the Constitution). On the other hand, the UK has no constitutional provisions concerning the legally competent or the natural judge, cf. *Muessing*, 47 Am.J.LegalHist. (2005), p. 161ss.; *Eser*, Der "Gesetzliche Richter" und seine Bestimmung für den Einzelfall, p. 247ss.

⁶⁰⁰ Cf. also *Mansdörfer*, ne bis in idem, p. 164.

⁶⁰¹ For a general overview of this principle see *Bassiouni*, in: *id.* (ed.), Int. Criminal Law Vol. I, p. 73ss.; *Bernardi*, in: *Bassiouni et al.* (eds.), p. 97s.

take the purely national understanding of these rights, as it is mainly done today,⁶⁰² none of these rights would be violated. In a traditional interpretation, it is enough in cooperation that each national law adheres to these standards in isolation. This view is however overly formalistic and does not take into account the close cooperation within the European Union. The interpretation of these rights must change with increasing integration that is supposed to lead to a European judicial space. Since on a European level we now have a new level of sovereignty and a new entity with specific responsibilities, it seems more than plausible that these rights should pose obligations for the EU when it tries to make cooperation more effective.⁶⁰³ At least when the EU itself tries to harmonise substantive criminal laws and assigns jurisdiction for it, it should be obliged to guarantee these rights in a functionally equivalent way to their meaning within a nation state. This question will be dealt with in the next chapter.

Additionally, the difficulties in reaching a coherent approach to jurisdiction are once more emblematic of the difficulties within the Union to find a collective answer to a question of joint responsibility. Since the judiciaries of Member States are already heavily intertwined through EU measures of mutual recognition and harmonising measures, a common approach to the question of jurisdiction is the only way out of a system whose outcome depends on serendipity rather than on choice and foresight.

To outline why and how uniform allocation of jurisdiction is necessary for Europe's Area of Freedom, Security and Justice was the main focus of this chapter. In contrast, the question of what specific jurisdictional basis could be used for what forms of crime, and how they should be defined in concreto, is only of secondary importance to the theoretical framework and cannot be dealt with extensively in the scope of the present work. It seems however most feasible and rational to depend mainly on territorial jurisdiction for the reasons mentioned.⁶⁰⁴ The law of the state

⁶⁰² Cf. for example the argument of *Eser/Burchard*, *Interlokales "ne bis in idem" in Europa*, p. 518s.

⁶⁰³ Cf. similarly *Nettesheim*, *EuR* 2009, p. 41; *Luchtman*, p. 93.

⁶⁰⁴ Cf. for the reduction of extraterritorial jurisdiction *Böse/Meyer*, *ZIS* 2011, p. 336ss.

where a person acted is, first of all, foreseeable, which is important from the individual's perspective. Since criminal laws try to direct behaviour with regard to certain legal interests, the *lex loci* is also the one that can best further this aim. Finally, deterrence and retribution as rationales for punishment are generally needed in the state where a person acted and where society was affected. Rehabilitation, on the other hand, can just as well be served through the enforcement of the sentence in the state of residence. But since, as we have seen, territoriality is a multi-faceted concept with no real boundaries, it would have to be defined autonomously. In order to further the aims of substantive criminal laws, it could be defined with regard to the specific area of crime that is addressed in a legislative act. Certain crimes for which no territorial links exist or for which this might not be enough⁶⁰⁵ would have to be based on other jurisdictional links. If the ECJ could be given the competence to decide on issues of doubt to prevent that multiple proceedings are initiated, a consistent development could set in. The loss of efficiency for the prosecution that could result if other prosecutions do not work on a case simultaneously should be compensated by a closer cooperation in the investigative stage where the authorities of the state with exclusive jurisdiction could depend on other prosecutions to execute their orders. As outlined before, common jurisdictional rules are a necessary basis for mutual recognition.

⁶⁰⁵ See above.

Chapter 7 Procedural rights and safeguards in the context of multi-layered judicial cooperation

How adequate jurisdictional rules can be generated is a question that cannot be addressed on its own. It is closely connected with the general question of how standards for procedural safeguards may be developed in the European sphere. This is why I will now look at procedural safeguards and fundamental rights in a more general context.

7.1 Introduction

The question of procedural safeguards in the area of criminal law cooperation is a controversial one. It is however widely accepted that individuals' rights need strengthening in this context.⁶⁰⁶ Several initiatives of Member States, as well as Commission proposals and activities of the European Parliament urge their further development.⁶⁰⁷ Still, there is a surprising vacuum. While every piece of legislation acknowledges the necessity to respect fundamental rights, there is generally a great reluctance to establish a binding and specific set of rules against which EU action could be measured. At the present stage, provisions on procedural rights are found in separate legislative acts, as their primary content, as well as in legislation on specific substance matters, like the European Arrest Warrant, as a corollary. As for specific legislation on procedural rights, there is mainly the right of access to an interpreter and translation.⁶⁰⁸ Apart from this, there are two proposed directives on procedural rights. One of them deals with the right of access to a lawyer and to

⁶⁰⁶ *Apap/Carrera*, European Arrest Warrant, p. 11; *Fichera*, 15 ELJ (2009), p. 96; *Smeulers*, in: *Vervaele* (ed.), European Evidence Warrant, p. 79ss.

⁶⁰⁷ Cf. only the recent Stockholm Programme on the future agenda for the area of freedom, security and justice, Council Doc. 17024/09, p. 12.

⁶⁰⁸ Cf. Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings, OJ L 280 of 26.10.2010, p. 1.

inform a third person of an arrest;⁶⁰⁹ the other sets down, as a kind of flanking measure, the right of the person accused to be informed of his rights.⁶¹⁰ Thereby the European legislator has only provided for some few and - albeit their importance in themselves - rather randomly chosen procedural rights. In the ambit of specific legislation, where such rights have a limited scope of application – for example within a single framework decision – a general reference to common standards is usually all that is found. Apart from a very few (and random) rights and procedural safeguards that are named in the framework decisions, any clear rule is avoided. So, most mutual recognition instruments, for example, the framework decision on the European Arrest Warrant,⁶¹¹ the framework decision on the European Evidence Warrant,⁶¹² the proposed directive regarding the European investigation order,⁶¹³ the framework decision on freezing orders⁶¹⁴ and many others contain a general reference to fundamental rights and the principles of Art. 6 TEU and the Charter. However, there is no mention of whether violations may serve as a ground for refusal under certain circumstances; such a reference is limited to cases of discriminatory prosecution and its binding effect as part of the preamble is dubitable. In some instances, we find the declaration that the respective piece of legislation does not modify the obligations to respect these rights in the main body of the text, as in Articles 1(3) of the framework decisions on the European Arrest Warrant and the European Evidence Warrant or the proposed directive regarding the European Investigation Order. Member States, courts and scholars have widely differing opinions on whether this may justify a refusal to execute a decision,⁶¹⁵ and the

⁶⁰⁹ Proposal for a Directive of the European Parliament and of the Council on the right of access to a lawyer in criminal proceedings and European arrest warrant proceedings and on the right to communicate upon arrest, Revised Text, Council-Doc. 7337/12 of 9 March 2012.

⁶¹⁰ Proposal for a Directive of the European Parliament and of the Council on the right to information in criminal proceedings, COM/2010/392fin., and Council-Doc. 18410/11.

⁶¹¹ Recital 12.

⁶¹² Recitals 27s.

⁶¹³ Recitals 17; more specific rights in recital 17a of the general approach.

⁶¹⁴ Recital 6; more specific rights mentioned in recital 5.

⁶¹⁵ Cf. *Mitsilegas*, 43 CMLRev. (2006), p. 1290ss; *Alegre/Leaf*, 10 ELJ (2004), p. 203ss; *Peers*, EU Justice and Home affairs law, p. 705, 709; *Tinkl*, Rechtsstellung, p. 210s; *Keijzer*, Extradition and Human Rights, p. 193; *Smeulers*, in: *Vervaele (ed.)*, European Evidence Warrant, p. 91; for differing implementations in the Member States cf. Annex SEC(2005) 267, p. 5s to the report COM/2005/63fin.; cf. also above under 5.9.

Commission itself seems to have an openly contradictory approach. In its 2006 report on the European Arrest Warrant it elaborates that: “Contrary to what certain Member States have done, the Council did not intend to make the general condition of respect for fundamental rights an explicit ground for refusal in the event of infringement. A judicial authority is, of course, always entitled to refuse to execute an arrest warrant, if it finds that the proceedings have been vitiated by infringement of Article 6 of the Treaty on European Union and the constitutional principles common to the Member States; in a system based on mutual trust, such a situation should remain exceptional.”⁶¹⁶ This statement adequately demonstrates the overly tentative approach to fundamental rights in judicial cooperation that shrinks from any real commitment and authorship. A human rights clause is rather meaningless if there is no rule on which state’s evaluation is decisive and what the consequences are.

While some provisions, for example Art. 3 No. 2 or Art. 5 No. 1 of the framework decision on the European Arrest Warrant, set down some specific requirements to protect individuals, many controversial aspects remain deliberately unanswered. This can be seen by the fact that specific suggestions are sometimes eliminated in the process of adopting a framework decision without intending to make any statement about the eliminated rights in either direction. So, as we have seen, during the adoption of the framework decision on the European Evidence Warrant, Parliament had suggested several specific rights as grounds for refusal, such as for witnesses who might refuse to give evidence in some states. These were not included in the framework decision, while it was vaguely alluded to the fact that they might, under certain circumstances, still serve as grounds for refusal.⁶¹⁷ All these facts point to the conclusion that contentious issues are consciously left unresolved at the level where they first arise. It is then left to the practice of the national authorities to find a working mode to compensate for the lack of unity and the resulting inconsistencies and deficits.

The situation becomes even more complex whenever it is attempted to establish

⁶¹⁶ Commission report on the European Arrest Warrant, revised version, COM/2006/8fin., point 2.2.3. Cf. also above 4.6.

⁶¹⁷ See above Chapter 5.

more general individual rights that will either be applicable in all matters of judicial cooperation or that will even have to be observed in a purely national context. The history of the framework decision on procedural safeguards and the new step-by-step approach amply illustrate this.⁶¹⁸ In a more general area, it can also be seen in the debates on the Charter and the “opt-out” of the UK, Poland and the Czech Republic.⁶¹⁹

As a result, we now have a very mixed system with overlapping protection of fundamental rights through national (constitutional) procedural rights, the procedural rights of the ECHR, the procedural rights from the Charter, the general principles of Union law and specific rights in secondary Union law. The relation of these, particularly between the ECHR and the Charter, and their scope of application is far from clear. There will be even more issue for debate when the European Union will accede to the ECHR.

The reasons for this development are manifold. Most importantly, there is as yet no well-founded theoretical concept of transnational procedural safeguards. Ideas as to sources, functions and content of such rights are varied, if any thought is given to them at all. A great contributing factor to this is that the debate on procedural safeguards is dominated by two strong opposing forces that channel the proposed solutions in a certain direction. The debate about procedural safeguards and fundamental rights is most often termed as a question of “balancing” freedom and security within the Area of Freedom, Security and Justice. An efficiency-based approach stresses the importance of creating cooperation mechanisms and

⁶¹⁸ See above under 5.6.2.

⁶¹⁹ The “opt-out” of the UK and Poland through the Protocol No 30 to the Lisbon Treaty, to which the Czech Republic is to accede, is, if correctly interpreted, not a real opt-out. Art. 1(1) of the protocol sets down that the Charter does not extend respective national courts’ and the EU courts’ power to find respective national laws incompatible with Charter rights. Thereby it merely restates the content of Art. 51 of the Charter, cf. Belling, p. 260; cf. also the Advocate General’s opinion in the *N.S.* case discussed above, C-411/10, at para. 167ss. and the ECJ’s judgment on the joint *N.S.* and *M.E.* cases (C-411/10 and C-493/10) at para. 117ss; *Peers*, The death of ‘Mutual Trust’. The status is more difficult to answer in relation to social rights and Art. 1(2) of the protocol, which concerns rights not at issue here; suffice it to say that Art. 1(2) might be a partial opt-out, but many of the social rights are already part of the general principles of Union law and can still apply; cf. to the applicability of general principles besides the Charter *Belling*, 18 ELJ (2012), p. 261s.

prosecution competences to achieve the necessary level of security in the face of a perceived threat. Its opponents, on the other hand, believe that the time has come to counter-balance the current cooperation mechanisms with strengthening individual rights and safeguards and thereby focus more on “freedom” than on “security”. But while these views seem to be diametrically opposed to each other, they are also equal. They concur in their conceptual understanding of the Area of Freedom, Security and Justice. Both regard freedom and security as public goods that are opposed to each other and need to be put into a just relation through an act of balancing. They mainly vary in the priority they accord to one good over the other.

7.2 Efficiency approach

To a certain extent, a security-bias that focuses on efficient prosecution of crimes and closer judicial cooperation has been part of the logic behind the development of the AFSJ from the start. Partly, the reason for this lies in the fact that closer police and judicial cooperation in criminal matters has generally been triggered by outward events and been regarded as a response to these. The rise of international terrorism in the 1960s and 1970s and the need for coordination were the main reason for the first meeting of the Justice and Home Affairs Ministers in 1975 that resulted in the TREVI network. Later on, organised crime, and especially drug related crime, came to the fore. The most obvious single event that shaped the framework of police and judicial cooperation is, of course, the attack of September 11.⁶²⁰

In the reactive rush that follows such events, certain responses are presented as compelling and without alternative. Specific events are taken as indicators that a change has taken place, and that threats to society are now so high that security has to take precedence over individual freedoms. This bias found its clearest expression in the ex-Art. 29 TEU, whereby the Union was to “provide citizens with a high level of safety within an area of freedom, security and justice”.

Apart from single events, this line of thought has also gained prominence through the

⁶²⁰ See *Monar*, *The Problems of Balance*, p. 177ss.

spillover of the principle of mutual recognition from the area of the internal market to judicial cooperation.⁶²¹ The idea that criminals could benefit from free movement was often used as an argument for the analogy that free movement and mutual recognition should also apply to judicial decisions and measures. In fact, the increasing integration through the internal market is often regarded as a very great factor for a rise in cross-border crime. By proponents of this line of argument, it is taken for granted that cross-border crime has in fact risen and that the four freedoms are the cause for this. It is then concluded that compensatory competences for the prosecution are *necessary* flanking measures of this development.⁶²²

Traces of this way of thinking can certainly be found in the early Commission proposals in this area. Already in the White Paper of 1985 on completing the internal market, the Commission was of the opinion that the abolishment of internal frontier controls by 1992 would require new protective measures against terrorism and drugs. Besides closer cooperation of national authorities, the Commission was also aiming at approximating drugs legislation through directives.⁶²³ After the Single European Act, in its 1988 Communication on the abolition of controls of persons at intra-Community borders the Commission clearly stated that the removal of internal frontiers required a coordination of extradition laws and closer judicial cooperation to avoid safe havens for criminals under the European Political Cooperation⁶²⁴ as well as approximation of drugs and weapons legislation and action against terrorism.⁶²⁵ The Coordinators' Group on Free Movement of Persons that was set up at the Rhodes European Council in 1988 then set out to propose a whole set of measures to react to the perceived dangers in the so-called Palma document and subsequent reports. With deepening integration, the argument was put forward with ever greater fervour. It is underlying every widening of the Union's competences in this area.

⁶²¹ See above 3.2.

⁶²² *Douglas-Scott*, The rule of law in the European Union, at p. 222 speaks of a "compelling need" for action at supra-national level in the wake of the single market.

⁶²³ COM/1985/310fin., para. 29, 55.

⁶²⁴ COM/1988/640fin., at para. 16 (vi) and (viii).

⁶²⁵ COM/1988/640fin., at para. 16 (ii), (iii) and (viii) and annex.

Such an argument certainly seems plausible at first sight.⁶²⁶ After all, the facilitation of cross-border financial transactions and the possibility to move freely are likely to enlarge the scope of activity for any form of organised crime. But it is very difficult to find conclusive evidence as to the reality of this phenomenon. Indeed, empirical data proving a rise in transnational crime is hard to find, as it is not easy to measure. Criminologists dealing with crime in Europe rely heavily on the so-called European Source Book of Crime and Criminal Justice Statistics, a Council of Europe project that is financed by several national governments.⁶²⁷ These multi-annual publications compare police and judicial crime statistics of European countries since 1990. However, they do not give indications of the transnational relevance of crime phenomena, as these are generally not recorded in national crime statistics. The Sourcebook does not provide statistics with a specific European perspective. It would, in fact, be very difficult to come by reliable data on transnational crime. First of all, there is no universally accepted definition of transnational crime. More importantly, national police and judicial statistics do not collect the necessary data. Even though it is important for the investigations, it is usually of no importance for a national trial whether there is a transnational element involved in a certain crime or whether it has been committed by locally or nationally organised criminals and can therefore not be put into numbers as easily. In order to raise statistics on these questions, one would have to work with very different methods and collect other data. Scholars often admit this lack of data. But while some conclude that the threat scenario is unrealistic and is being used to create fear for political ends, others still see a real danger.⁶²⁸

Even if one were to presume a potential rise in transnational crime rates, proving that the internal market is the cause for this is almost impossible. There are countless other possible causes for this mere correlation. During the last two decades, the fall of the iron curtain and the general process of globalization have brought along a deepening of worldwide economic integration and a steady rise in international travel,

⁶²⁶ Cf. also *Fletcher/Löf/Gilmore*, EU Criminal Law, p. 24ss.

⁶²⁷ Full texts available at <http://europeansourcebook.org>.

⁶²⁸ See for this aspect *Van Duyne*, (Transnational) Organised Crime.

transport of goods, financial transactions and so on. This was further aided by technical innovations like the internet and mobile communication. Therefore, a possible rise in transnational crime might be linked more to these general factors than to the specific changes brought along by the internal market. Moreover, even between non EU-countries with less market integration and strict border controls cross-border crime rates can be very high. There is a continuous flow of illegal firearms, drugs, and illegal immigrants over the U.S.-Mexican border. Or, to stay within the EU sphere, the highest levels of transborder crime are not found on the inner borders of the EU, but on its outer borders. In its annual reports on organised crime in the European Union (OCTA), Europol identifies five so-called “EU Criminal Hubs”, all located on the outer borders of the EU.⁶²⁹ The OCTA-reports are mainly concerned with specific sectors of organised crime such as drugs, trafficking in human beings or fraud for which the involvement of Europol seems useful. Even though these reports sometimes allude to the same basic assumption that the internal market gave rise to organised transnational crime,⁶³⁰ they do not provide any empirical data or any analysis to support this view. They do confirm, however, that the *general* rise of transport, travel and technical means *is* a factor that causes a rise in cross-border crime.⁶³¹ Finally, since this argument has been used ever since the 19th century, it appears unlikely that the rise has been as high as was supposed. It seems safe to assume, therefore, that the development of the internal market has not had such an overwhelming effect on transnational crime as is generally taken for granted.

So both arguments, namely, that society has to deal with certain new threats and that the abuse of market freedoms by criminals causes rising cross-border crime-rates, are not necessarily wrong. It should be noted, however, that they can never *require* specific policy choices.⁶³² Often, they are the result of a pre-existing policy agenda

⁶²⁹ See the EU Organised Crime Threat Assessment (OCTA) 2011, p. 50 (available at <https://www.europol.europa.eu>).

⁶³⁰ EU Organised Crime Threat Assessment (OCTA) 2007, p. 22.

⁶³¹ EU Organised Crime Threat Assessment (OCTA) 2007, p. 19s. (traffic); EU Organised Crime Threat Assessment (OCTA) 2011, p. 43s. (internet).

⁶³² Walker, *Odyssey*, p. 12: “[...] security policy is never *compelled* by external events”; Fletcher/Löff/Gilmore, *EU Criminal Law*, p. 29.

that is merely introduced at a seemingly opportune moment. After all, it is more difficult for political opponents and citizens alike to oppose certain measures that are presented as the response to external events and therefore seem to be an objective demand of reason. The security-bias is not just a result of the subject-matter of cooperation in criminal matters which is concerned with the public good of security. It also follows from the general tendency of public authorities to widen rather than limit their own competences. In this sense, seemingly reactive policy choices could be termed proactive.⁶³³

This theoretical conception often influences how the mechanism of mutual recognition is perceived. In line with a certain security bias, mutual recognition is regarded as a wholly beneficial mechanism by the early official approach.⁶³⁴ It is not considered to have negative effects on individuals' rights, but rather to be neutral in that it does not interfere with national rights standards. If certain elements of mutual recognition, such as the abolition of classical grounds for refusal or automatic recognition instead of *exequatur*-proceedings are criticized for curtailing individuals' rights, it is argued that these never served individuals' rights in the first place, but were upheld for *raisons d'Etat*.⁶³⁵ More importantly, it is pointed out that mutual recognition has juridified a procedure that was formerly merely a political act – a process which necessarily improves the individual's position. The importance of establishing individuals' rights is, however, not completely ignored. But, as we have seen above, establishing procedural safeguards is usually considered in terms of trust-building measures which will in turn enhance the efficiency of judicial cooperation, rather than as an integral part of a fair procedure.

To some extent, it is true that the principle of mutual recognition even strengthens the individual's position because it provides a legal framework based on legal principles. Apart from theoretical considerations, there is one practical aspect that

⁶³³ Walker, *Odyssey*, p. 11ss.

⁶³⁴ See for example the programme of measures to implement the principle of mutual recognition of decisions in criminal matters, OJ C 12/10 of 15 January 2001, that expects mutual recognition to strengthen Member State cooperation, to enhance the protection of individual rights, to facilitate rehabilitation and contribute to legal certainty all at the same time.

⁶³⁵ Cf. Böse, in: *Fragmentarisches Strafrecht*, p. 242ss.

makes mutual recognition conducive to individuals' rights. Since nationals are now subject to surrender, legislators, courts, state authorities, academics and of course the general public have been much more concerned with procedural safeguards than ever before. It is not by chance that important national rulings concerning the European Arrest Warrant were often about nationals.⁶³⁶ This has increased the general awareness of the problem of procedural safeguards. However, this is only a very remote and general mechanism. In the end, the position of the individual depends on the specific safeguards an individual has in a specific procedure, and on his ways to enforce these. The model of cooperation chosen is merely a framework for this.

7.3 Rights-based approach

The efficiency approach is often criticized for unduly favouring security over freedom in the Area of Freedom, Security and Justice.⁶³⁷ Closer judicial cooperation as it is developing at the moment is conceived as a direct threat to individuals' rights and freedoms and to well-balanced national criminal law systems.⁶³⁸ This view tends to establish procedural safeguards as counter-rights to judicial cooperation.

Proponents of this approach often dismiss mutual recognition as detrimental to individuals' rights.⁶³⁹ The abolition of classical grounds for refusal, faster procedures and the automatic recognition of foreign standards, are regarded as jeopardising the safeguards that protect the individual.⁶⁴⁰ It is often ignored that classical legal aid was

⁶³⁶ For example, although the *Darkazanli* judgment of the Bundesverfassungsgericht of 18 July 2005, 2 BvR 2236/04, was only about the special relation of nationals and their state, it sheds light on systematic problems with jurisdiction and territoriality in the EU.

⁶³⁷ *Apap/Carrera*, European Arrest Warrant, p. 15.

⁶³⁸ Cf. *Albrecht*, ZRP 2004, p. 1ss regards the European judicial sphere in criminal matters as a "nightmare".

⁶³⁹ *Schünemann*, ZRP 2003, p. 472, speaks of the "sinister" effect of mutual recognition, and calls the principle a "Trojan horse" and a "Wolf in Sheep's Clothing" in GA 2004, p. 202; *Albrecht*, Stellungnahme, B I and *Schünemann*, ZRP 2003, 187, call it the "gravedigger" of fair trial.

⁶⁴⁰ For *Schünemann*, GA 2004, p. 202, the abolishment of dual criminality creates "a sort of state terrorism" by forcing the executing state to prosecute people who are innocent in its own view.

anything but rights-based. It was merely a system of cooperation created in the interest of sovereign states, ignoring largely the individual's perspective.

Mutual recognition is also blamed for creating a level of “maximum punitivity”.⁶⁴¹ It is true that at the moment, the principle of mutual recognition promotes punitivity rather than impunity. The problem with this, however, lies more with jurisdiction than with mutual recognition, as we have seen.⁶⁴² The rights that are finally brought into the discussion are either extremely vague or they are extremely limited in that they simply mirror one Member State’s legal order. The internal market dynamic of mutual recognition is rejected entirely.

There seems to be a general - and not entirely unreasonable - feeling that, after a long phase of creating new competences for law enforcement and public authorities, it is now time to compensate for these measures with a greater focus on human rights.⁶⁴³ This is generally discussed under the heading of balancing “freedom” and “security”, though sometimes human rights are also discussed as part of “justice”.⁶⁴⁴ The bias of ex-Art. 29 TEU gave way to a more prominent place for fundamental rights in the Area of Freedom, Security and Justice through the new Art. 67(1) TFEU, with the “high level of security” appearing only in Art. 67(3).

One main feature of this view is that “freedom” is once more understood as freedom in its traditional understanding, as a safeguard against state intervention. In contrast, in the evolution of the AFSJ, freedom had often been used and interpreted by the efficiency approach and given the additional notion of “freedom from fear”.⁶⁴⁵ This view was reflected in the Vienna Action Plan of 1998 where freedom in the AFSJ was interpreted as free movement of persons plus “freedom to live in a law-abiding

⁶⁴¹ *Braum*, 125 GA (2005), p. 694; *Gazeas*, ZRP p. 2005, 21; *Schünemann*, ZRP 2003, p. 187; *id*, ZRP 2003, p. 407.

⁶⁴² Cf. also *Deiters*, ZRP 2003, p. 359ss.

⁶⁴³ *Fletcher/Löff/Gilmore*, EU Criminal Law, p. 49ss. regard this as a form of “secondary spillover” as - in their understanding - the legitimacy of fundamental rights action is derived from the existence of the first spillover in the eyes of its proponents .

⁶⁴⁴ Cf. e.g. the titles of the books by *Balzacq/Carrera* (eds.), *Security versus Freedom?* and *Guild/Geyer* (eds.), *Security versus Justice?*

⁶⁴⁵ Cf. to this aspect *Monar*, *The Problems of Balance*, p. 166; *Di Fabio*, NJW 2008, p. 422; cf. also *Fletcher/Löff/Gilmore*, EU Criminal Law, p. 22.

environment” where public authorities “combat and contain those who seek to deny or abuse that freedom”.⁶⁴⁶ Besides free movement, hardly any mention is made of any freedom against state intervention.⁶⁴⁷

Mirroring this argument, security can be interpreted as security from state intervention, as the powers of the state pose another threat that is a danger to the individual.⁶⁴⁸ There is no guarantee that new competences will be used in order to achieve more security and that they might not be abused by the state. In fact, new powers are hardly ever retracted even if society should become more secure, so that, according to the idea of balancing, more freedom could be introduced.

Both of these interpretations have a certain validity. If we stopped at this point, the approaches would be crossed over in a chiasmic structure that does not really offer a solution to the basic problem, but takes us back to where we started.

The question remains whether the act of balancing freedom and security can lead us anywhere. The idea of balancing is really a metaphor that, as we have seen, conveys the misleading notion of objectivity and necessity while it is in fact based on a number of choices.⁶⁴⁹ It has also rightly been outlined that both security and freedom are public goods that affect different groups of society differently. Not unfrequently, a majority group will profit by (alleged) gains in safety, while a minority group will have to pay for this in terms of infringements of their freedoms, as can be seen in the effect that national anti-terrorism laws have.⁶⁵⁰

Finally, when mechanisms of judicial cooperation and new competences for criminal investigations and prosecutions are justified with security arguments, the actual

⁶⁴⁶ Action plan of the Council and the Commission on how best to implement the provisions of the Treaty of Amsterdam on an Area of Freedom, Security and Justice, OJ C 19/1 of 23.01.1999, at p. 3.

⁶⁴⁷ An exception is the right to privacy.

⁶⁴⁸ *Walker*, *Odyssey*, p. 25; *Waldron*, 11 *Journal of Political Philosophy* (2003), p. 205ss.; *Di Fabio*, *NJW* 2008, p. 422.

⁶⁴⁹ *Gibbs*, 17 *ELJ* (2011), p. 121ss., suggests countering these concerns by using the symbolic element of the AFSJ in the form of a common political experience in making reasoned judgments about balance.

⁶⁵⁰ *Waldron*, 11 *Journal of Political Philosophy* (2003), p. 194, 200ss.; more generally *Walker*, *Odyssey*, p. 25.

effects of legislation on crime phenomena are often overrated.⁶⁵¹ It is part of the global tendency to use punitive measures for a symbolic purpose, that is to contend public opinion by the enactment of criminal laws.

7.4 Transnational approach

It does, therefore, not seem useful to uphold the dichotomy between freedom and security and discuss procedural safeguards of judicial cooperation mainly as a question of balance. This phrasing of the conflict is only partially true and the debate, if put this way, misses out on the main problem.

Firstly, on an abstract level, security and freedom are more than equiprimordial; they are interdependent rather than opposed to each other, and one cannot be generated without the other.⁶⁵² On a more specific level, defence rights are not opposed to an efficient prosecution, because they are an integral part of a fair trial. And it is only a fair trial that will lead to convictions that are right according to the rules and values society gave itself. Since this is the goal of prosecution, lack of procedural safeguards cannot make it “efficient” in achieving this goal.⁶⁵³ Hopefully, this is what the European Council meant under point 1.1. of the Stockholm Programme:⁶⁵⁴ “The challenge will be to ensure respect for fundamental rights and freedoms and integrity of the person while guaranteeing security in Europe. It is of paramount importance that law enforcement measures, on the one hand, and measures to safeguard individual rights, the rule of law and international protection rules, on the other, go hand in hand in the same direction and are mutually reinforced.” Since a coherent approach to fundamental rights must be an integral part of every Union policy, it cannot as such be discussed under the heading of a human rights competence of the Union as has been done until now.

⁶⁵¹ Cf. generally *Waldron*, 11 *Journal of Political Philosophy* (2003), p. 195, 209.

⁶⁵² *Di Fabio*, NJW 2008, p. 422.

⁶⁵³ Similarly, *Waldron*, 11 *The Journal of Political Philosophy* (2003), p. 191, 209 s., argues that security cannot be enhanced by taking away due process rights that will make the outcome less reliable - it can only serve a symbolic or psychological purpose.

⁶⁵⁴ Council Doc. 17024/09, adopted by the European Council on 11 December 2009, EUCO 6/09; see also the Commission's action plan COM/2010/171.

Secondly, if individual freedoms are discussed in terms of balancing within the AFSJ, the fundamental notions inferred from this tend to stay too general. After all, freedom, security and justice, though it can be filled with meaning, is nonetheless a “highly abstract triumvirate of values”,⁶⁵⁵ a “pleasing triplet”.⁶⁵⁶ It does not necessarily help in creating specific rights that are adapted to specific conflicts that arise in transnational criminal proceedings. If this is not kept in mind, negotiations on fundamental rights often lead to strange compromises in specific legal acts that have no basis in a systematic conception of judicial cooperation. An appropriate approach will have to result from a coherent and proactive policy that questions the effect of specific measures on fundamental rights⁶⁵⁷ and resolves conflicts at the earliest possible stage.⁶⁵⁸

Thirdly, the issue is not whether advanced forms of judicial cooperation curtail existing concepts of individuals’ rights in legal aid and in criminal procedure. The question is rather how rights can be generated that do justice to the newly emerging multi-layered legal system of cooperation in criminal matters. If frictions occur, this is often not the result of a conscious choice to disregard individuals’ rights. Rather, even those who wish to set down procedural safeguards are not certain which legal framework to observe. So, despite many drawbacks, there is quite a lot of activity in this area⁶⁵⁹ that cannot be dismissed as mere window-dressing. It is, however, not fully effective because of a vague understanding of both the source and the reach of individuals’ rights in this area. The courts are also aware of the importance of individuals’ rights. However, in court cases concerning extradition matters the

⁶⁵⁵ *Walker*, *Odyssey*, p. 5.

⁶⁵⁶ *Fletcher/Löff/Gilmore*, *EU Criminal Law*, p. 20.

⁶⁵⁷ From an institutional standpoint, see *Alston, Philip / Weiler, Joseph H.H.* An “Ever Closer Union” in Need of a Human Rights Policy; critical: *von Bogdandy*, 37 CMLRev. 2000, p. 1307; on the advantages of such an approach based on the idea of mainstreaming cf. *De Schutter*, *Mainstreaming Fundamental Rights in the European Union*, p. 43ss.; dismissive of the idea of human rights mainstreaming *Koskeniemi*, 1 *Humanity* (2010), p. 47 .

⁶⁵⁸ This is compatible with, and even required by, the principle of subsidiarity, as the Union is best placed to deal with fundamental rights issues following from its own measures and the transnational dimension of its effects in this area; cf. also *Alston/ Weiler*, An “Ever Closer Union” in Need of a Human Rights Policy, p. 27.

⁶⁵⁹ Cf. above as to the Council Resolution on Procedural Rights and the Stockholm Programme.

solution is usually very pragmatic and does not go into the interaction of different legal orders. Both the ECtHR and the ECJ have had to deal with individuals' rights in extradition cases, but both have avoided to find any comprehensive theoretical underpinning for it. This is more understandable in the case of the ECtHR, as I will show. The main problem in this is that all possible sources for individuals' rights in extradition have their basis, directly or indirectly, in national legal systems.

This is problematic in two respects. First of all, national legal systems have never established any real procedural safeguards for extradition or other forms of legal aid. The reason for this is that, until recently, legal aid has always been a political area that was not juridified. This has led to the fact that there are few, if any, particular rights for individuals in the situation of judicial cooperation. For a long time, individuals affected by judicial cooperation were merely considered the object of a matter between sovereign states.⁶⁶⁰ The idea of giving these persons subjective rights is in itself relatively new. If rights have been granted, then these have usually been derived from rights granted in ordinary criminal proceedings, but to a lesser extent (*effet atténué*). None of the rights discussed is, in its content, a decision of how to bring procedural fairness to the conflicting interests in judicial cooperation.

The other reason for the lack of procedural rights in judicial cooperation is closely connected with this. The perspective of judicial cooperation is still a national, rather than a transnational one. This means that each state will only take on the responsibility for its own actions and disregard the doings of the other state. To a certain extent, this does make sense for a nation state from a legalistic standpoint, because the rights in question have been designed to bind that sovereign only, and usually in a national context. This is the reason why many states have carried this notion extremely far. Even states that protect the right to life and have abolished the death penalty did often not hesitate to extradite people to states where they would in all probability be executed.⁶⁶¹ This view has long been challenged and finally undergone a gradual change, where a limited effect is granted to such rights. But it

⁶⁶⁰ Cf. *Tinkl*, Rechtsstellung, p. 5, 45ss.

⁶⁶¹ See above 3.1.2.1.

is still the conceptual basis of rights in extradition procedures, even though it does not do justice to the multi-layered legal system of the EU where the blind spot of nation states could effectively be left behind.

In order to find out why this is not done, it is important to look at the sources that are used in this context and to see how they are interpreted in a European framework.

The most important, but also the most amorphous, concept is that of the common constitutional traditions of the Member States as expressed in Art. 6(3) TEU as general principles of Union law. It can serve to introduce many of the Member States' basic concepts of criminal procedure into the balancing. Among these are the principle of legality (*nulla poena sine lege*),⁶⁶² the principle of *ne bis in idem*, the presumption of innocence, the right to a fair trial, the right to a court previously established by law, the privilege against self-incrimination (*nemo tenetur se ipsum accusare*), the right to life and liberty, and many more.

On a similar level (i.e. as general principles) are the many fundamental rights and procedural safeguards of the ECHR.

Both of these sources of rights are not specifically adapted to transnational proceedings. While the national constitutional traditions are, by origin, national, the ECHR is no less designed for national systems and contains only minimum standards for these. How this limits the effective development of individuals' rights will be shown by discussing the most important cases in this area. I will then also determine if and how an accession of the EU to the ECHR according to Art. 6(2) TEU would change this.

Another major source that, at least on the surface, seems to be less nationally confined in outlook is the Charter of fundamental rights of the EU, cf. Art. 6(1) TEU. The Charter does indeed set down many relevant rights, particularly judicial rights in Art. 47 ss. It is however obvious that these reflect the ECHR and the constitutional

⁶⁶² For an overview of this principle in international and domestic criminal law see *Bassiouni*, in: *id.* (ed.), *Int. Criminal Law Vol. I*, p. 73ss.

tradition.⁶⁶³ I will discuss how these could be interpreted in line with a European transnational dimension.

Finally, there are those few specific rights that are set down in acts of judicial cooperation or in particular secondary legal acts.

Let us first look at how the existing framework of individuals' rights is used in judicial cooperation and how this use limits individuals' rights by analysing the most influential decisions of the ECtHR and the ECJ. All of these decisions are mainly concerned with the question of when a state might be responsible for a breach of fundamental rights that takes place in another state in cooperation proceedings. None of these decisions deals with the question of whether these fundamental rights should be given a cooperation-based content. The courts carefully try to outline the scope and reach of these rights, but do not discuss whether their content must be adapted and interpreted differently in judicial cooperation.

The Soering Decision⁶⁶⁴ and related ECtHR decisions

Söring is a German national who was accused of having killed his girlfriends' parents in Virginia in 1985. He was arrested in England in 1986 and then indicted, *inter alia*, with capital murder in Virginia. On the 11th of August 1986 the US government requested his extradition under the terms of the 1972 extradition treaty between the UK and the US. The UK Home Secretary then ordered the competent court to issue an arrest warrant for the extradition of Söring. Since the death penalty had been abolished in the UK the treaty provided for the possibility to refuse extradition unless satisfactory assurance was given as to its not being carried out (Art. IV). When the British Embassy in Washington then (29th October 1986) sought an assurance that the death penalty, if imposed, would not be carried out, or that such a recommendation would be given, the competent attorney swore affidavits that he would represent the UK's wishes to the judge. However, later on the Virginia authorities told the UK government that the very same attorney would not give any

⁶⁶³ For the complex relation between these see *Esser*, in: *Sieber et al.* (eds.), *Europäisches Strafrecht*, § 53 para. 19 ss.; *Peers*, *EU Justice and Home Affairs Law*, p. 100 s.

⁶⁶⁴ ECtHR of 7 July 1989, No. 14038/88.

further such assurances as he was planning to seek the death penalty for Söring in court.

The UK authorities proceeded with the extradition and, after Söring had exhausted national remedies, on 3 August 1988 the Secretary of State signed a warrant ordering his surrender to the US. Pending the decision of the ECtHR, this warrant was not carried out as an interim measure.⁶⁶⁵

The complaint that Söring lodged with the Commission was based on three grounds. Firstly, he asserted that the assurances given by the US authorities concerning the death penalty were not sufficient. There was, in fact, a substantial risk that the death penalty would be carried out. This would make him subject to the death row phenomenon which would constitute a breach of Art. 3 of the Convention (inhuman or degrading treatment). Secondly, he maintained that his right to a fair trial (Art. 6) was ignored due to the lack of proper legal aid in Virginia. He also claimed a violation of Art. 6 through a specific aspect of the extradition procedure in the UK; this issue, however, was not admitted by the Court for procedural reasons. Lastly, that the UK provided no proper procedure to control the application of the convention since a breach of the convention was no legal ground to stop extradition. This amounted to a breach of Art. 13.

Of these three points, only the breach of Art. 13 can be considered without further justification. It is directly connected with the administration of justice within the UK. The UK, as a contracting party, is bound by the convention and responsible for any violations. It is possible that a lack of legal remedies or reviewability of the breach of the convention is contrary to Art. 13. However, to serve the purpose of the applicant there would have to be an actual breach of the convention to be reviewed which can only be based on a breach of Art. 3.

This, however, presents intricate legal problems. It is mainly based on the situation in the US, a third country to the convention. Inhuman and degrading treatment by US authorities is, however, neither directly necessary nor sufficient to constitute a

⁶⁶⁵ In the meantime, the competent German authorities had also sought his extradition for prosecution in Germany, to which Söring was willing to submit.

violation of Art. 3 by the UK through an extradition. The extradition in itself could be of such a nature as to violate human rights, for example through the conditions in extradition arrest. On the other hand, if a person is unexpectedly subjected to inhuman or degrading treatment in a third country, this is normally of no concern to the extraditing state that is not accountable for such acts and did not commit them itself.⁶⁶⁶ Whether this attribution of responsibility can ever be different has been an ongoing issue in extradition law. If a complaint in extradition matters is based on the situation in a third country, there are four questions to take into consideration.

First, fundamental or human rights have to be applicable in extradition matters at all. While the ECtHR has long taken this position concerning the Convention, national courts have, with many different arguments, often taken an antagonistic position, especially concerning their constitutional rights. This did not only concern the stage after the surrender of the individual, but also the stages within the jurisdiction following the extradition request.

Secondly, the situation in the third country has to amount to a violation of convention rights. Here, it is also pertinent to discuss the degree of violation. Whether any breach is enough or whether it is necessary to have a gross or an evident violation or a violation of the most important rights is subject to discussion and closely connected with the first question, namely, if fundamental rights apply as a whole and completely, or only more remotely.

Thirdly, one needs to determine under what circumstances a contracting party can be held accountable for this situation when extraditing an individual. The relevant factor here is mainly the degree of foreseeability.

Lastly, the relation between the second and the third question becomes relevant. Does the necessary degree of foreseeability change with the gravity of the impending violation?

⁶⁶⁶ ECtHR of 30 October 1991 July 1991, no. 13163/87 et al. - *Vilvarajah and others v. the United Kingdom*, para. 108 and 112 makes it clear that concerning asylum seekers that, even if ill-treatment occurs upon their return, the ex ante foreseeability is decisive for the responsibility; see also *Smeulers*, in: *Vervaele (ed.)*, *European Evidence Warrant*, p. 87.

The different answers given to these questions by the parties, the Commission and the Court are indicative of the difficulties of finding a standard of fundamental rights in extradition law.

The UK exhibited a very classical, nationally confined understanding of human rights in legal aid. It submitted primarily that a contracting state could not be in breach of its obligations under the Convention through the actions of a third state since it was in no way responsible for events within another state's jurisdiction and that therefore Art. 3 should not be applicable with regard to these events.⁶⁶⁷

The applicant on the other hand argued that the Convention imposed a duty on extraditing states to protect individuals and thus make certain that they would not be subject to inhuman or degrading treatment in third states.

The Commission and Germany tried to find a middle way by acknowledging that states could be in breach of their own duties through third state actions contrary to the Convention where there was serious reason to believe that an individual would be subject to such treatment, though they drew different conclusions from this for the actual case: The Commission did not see a breach of Art. 3.

The Court first stresses the fact that the Convention is indeed territorially confined. It then argues that one state may be responsible for another state's inhuman or degrading treatment of an extradited person where there are substantial grounds for a real risk of being exposed to such treatment. This argument is mainly based on the underlying values and the spirit of Art. 3 and the Convention in general. As to this particular case, it held that the death row phenomenon constituted inhuman and degrading treatment and that, due to the non-binding assurances and the intention of the attorney to seek the death penalty, there was a substantial risk for the applicant. An extradition would therefore, in itself, amount to a breach of Art. 3.

⁶⁶⁷ In the alternative, it was argued that Art. 3 should only be applied when a breach was certain, imminent and serious. The UK did not see this criterion fulfilled in this particular case since the delay of an execution and the resulting death row phenomenon would have been caused by legal remedies used by the applicant. This was the only line of argumentation brought forward before the Commission since the Commission had already declared its view on the main line of argumentation in prior cases.

As to a violation of the right to a fair trial by the UK due to the lack of legal aid in Virginia, the Court introduces the “flagrant denial” criterion without much reasoning. This is supposed to limit a violation of Art. 6 by assisting another state to exceptional cases, which was not held to be the case here.⁶⁶⁸

This ruling is most important for European criminal cooperation for many reasons. While most states do now agree that extradition procedures are not exempt from human rights in their own jurisdiction (so that they must have legal remedies and proper detention conditions etc.) the next question is how to take these considerations one step further. Before the *Soering* ruling many states still split the extradition proceedings into two distinct parts, one in their own jurisdiction, for which they are responsible, and one in a foreign jurisdiction, for which no responsibility is taken on. The *Soering* decision is one of the few that leaves behind the purely national sphere and tries to establish a certain responsibility for the entirety of the proceedings. This corresponds with the position of the individual for whom a legal split-up must appear artificial. Through this decision both the *Soering* ruling and the ECHR have become a standard reference point in EU criminal cooperation. However, while the ruling of the ECtHR is progressive for its particular case it is not at all adapted to the EU setting.

The ruling of the ECtHR is progressive because it applies Convention rights in extradition cases with third states, constitutes a certain responsibility of the Convention state and, it must be said, tries to refute the death penalty without being openly able to say so because of Art. 2(1) s. 2 of the Convention.⁶⁶⁹ The problem is that Convention rights themselves, though, are only meant to set minimum standards for national proceedings. They have no specific content for transnational cases. Furthermore, the community of Convention states is not an entity that could in itself have responsibility for criminal cooperation. The ECtHR tries to promote individuals’ rights despite these limiting factors. It broadens the national perspective without, however, introducing a new level. Therefore, in its area, the decision is really

⁶⁶⁸ At para. 113.

⁶⁶⁹ *Schabas*, 25 Loy. L.A. Int’l & Comp. L. Rev. (2002-2003), p. 590s., 595.

progressive. What is progressive in that respect is, however, not necessarily progressive or even suited to the EU criminal cooperation system. The ECtHR has already shown in the *Stapleton* decision⁶⁷⁰ that it will not alter its perspective in EU measures. According to this decision, the protection of fundamental rights does not have to take place at the first possible occasion, i.e. in the executing state, but can be left to the issuing state without a breach of Art. 6. Additionally, it affirms once more that only a “flagrant” violation of this article by the issuing state would oblige the executing state to protect the individual.⁶⁷¹ The *Soering*-threshold was not lessened and the application deemed inadmissible. Whether the ECJ has a different understanding of the responsibilities of the executing and issuing Member States might be decided in the pending *Radu*-case.⁶⁷²

The ECtHR is implying in the *Soering* decision that not all Convention rights, but only the more fundamental rights can give rise to a duty of the extraditing state to protect the individual. Namely, an extraditing state does *not* need to be satisfied that the conditions for the extraditee are “in full accord with each of the safeguards of the Convention”.⁶⁷³ Additionally, it stresses that the “beneficial purpose of extradition” is a matter that needs to be taken into account not only in justifying a violation, but already in determining the scope of application of the Convention rights.⁶⁷⁴ Even for the specific and substantial interpretation of the notions of inhuman and degrading treatment in extradition cases, the Court wants to take account of the purpose of extradition,⁶⁷⁵ so that basically, what amounts to inhuman and degrading treatment in ordinary cases does not necessarily do so in extradition cases.

So as to the first systematic question we asked above on the applicability of human rights in extradition, the ECtHR declares that Convention rights are applicable, but

⁶⁷⁰ ECtHR decision of 4 May 2010, no. 56588/07 - *Stapleton v Ireland* - declaring the inadmissibility of the action.

⁶⁷¹ Cf. to this standard *Fletcher/Löf/Gilmore*, EU criminal law, p. 126, who believe that the ECtHR does not want contracting parties to pass judgments on each others' systems in the guise of extradition decisions.

⁶⁷² ECJ, reference for a preliminary ruling, lodged on 27 July 2011, C-396/11 - *Radu*.

⁶⁷³ At para. 86.

⁶⁷⁴ At para. 86.

⁶⁷⁵ At para. 89.

answers the second question (situation in the third country) by a triple limitation: it limits the applicable rights, it limits the notion and content of these rights, and it limits the relevance to certain grave violations by the third state, depending on the specific Convention right. It sets a relatively high threshold for the foreseeability in answer to the third question, but does not go into the fourth question systematic question we asked, namely, if lesser violations are sufficient for a breach when there is a greater degree of certainty that they will occur.

The criterion of a “flagrant” violation for Article 6 was also upheld for other areas of criminal cooperation, namely the enforcement of foreign penal sentences in *Drozdz and Janousek v. France and Spain*.⁶⁷⁶ A relevant argument was once more not to “thwart the current trend towards strengthening international cooperation in the administration of justice, a trend which is in principle in the interests of the persons concerned”.⁶⁷⁷ In his concurring opinion, judge *Matscher* regards this criterion as an expression of the international principle of granting rights only a “reduced effect” in recognising foreign sentences.

The criterion of a “flagrant” violation in relation to article 6 has often been criticized. Indeed, first of all it is rather vague.⁶⁷⁸ It is unclear whether it refers to a very grave violation, or whether it refers to cases of - from a legal standpoint⁶⁷⁹ - a very obvious violation. The dissenting judges in *Mamatkulov v. Turkey* acknowledged the uncertainty and tried to define it as a breach “so fundamental as to amount to a nullification, or destruction of the very essence, of the right guaranteed”,⁶⁸⁰ thus setting a very high threshold that refers to the degree of violation. More importantly, it is questionable why, when there are substantial grounds to expect a violation of Convention rights in a third state, the minimum threshold of the Convention should

⁶⁷⁶ Judgment of 26 June 1992, No 12747/87; cf. also *Smeulers*, in: *Vervaele (ed.)*, European Evidence Warrant, p. 94s.

⁶⁷⁷ At para. 110.

⁶⁷⁸ Cf. para. 14 of the joint partly dissenting opinion of judges Bratza, Bonello and Hedigan in the case of *Mamatkulov and Askarov v. Turkey*, ECtHR of 4 February 2005, no 46827/99 et al.: “not fully explained in the Court’s jurisprudence”.

⁶⁷⁹ The factual side of the matter is a question of foreseeability and thus the “substantial grounds” criterion.

⁶⁸⁰ *Ibid.*

be lowered, particularly when a person is extradited to another Convention state.⁶⁸¹ After all, this does not impose national standards on a foreign state. Rather, it limits the cases in which assistance is given to that third state.

While the *Soering* case was concerned with the question of whether one state may assist another state in what would be a violation of the Convention, the question remains of whether the actions of two states viewed together can be a violation of the Convention. If one state makes use of the acts of the other, one could attribute responsibility to this state on the basis of derived responsibility. If two states cooperate in a violation, one could also hold them jointly responsible.

These questions arose within a dispute on a hearing within a “reasonable time” as required by Art. 6(1) ECHR in the *Sari* case.⁶⁸² A Turkish citizen was prosecuted for a homicide he had committed in Denmark. Investigations were being conducted in both states. Between the first relevant prosecutorial act in Denmark and the final sentence in Turkey, more than eight and a half years had passed. In Denmark itself, the proceedings had lasted for over four years and in Turkey approximately eight years and four months. The temporarily parallel proceedings had initially involved an extradition request and a request of transfer of proceedings with long-standing negotiations between the two countries involved. Somewhat surprisingly, the Court states without much reasoning that, for the “reasonable time” frame, the whole of the proceedings in both states needs to be considered together.⁶⁸³ It then tests whether the time-frame was reasonable by taking into account the behaviour of the relevant authorities. Although it saw a lack in promptness during the legal assistance stages that it ascribes to a joint responsibility of both states,⁶⁸⁴ it did not find a violation of Art. 6(1) by either state. As a reason, it relies on the nature of mutual legal assistance: “the delays that have occurred therefore have to be considered as being part of a classic system that, unfortunately, takes time and thus has to pass as inevitable, at least if one believes the facts presented by the parties” [translation by

⁶⁸¹ *Smeulers*, in: *Vervaele (ed.)*, *European Evidence Warrant*, p. 89.

⁶⁸² *Sari v. Turkey and Denmark*, ECtHR of 8 November 2001, no. 21889/93.

⁶⁸³ Para. 66-68.

⁶⁸⁴ Para. 91, 96.

author].⁶⁸⁵ Unlike the applicant, who had argued that both states had to be held equally responsible for the delay,⁶⁸⁶ it was precisely this joint responsibility that held the court from attributing individual responsibility to either state. It concluded that, on the whole (“globalement”), the states had acted diligently.⁶⁸⁷ Because both states caused a delay in an interdependent way, no state was held responsible individually on a basis of derived responsibility for the actions of the other state, but they were also not held jointly responsible.⁶⁸⁸

But in a system based on mutual recognition, such a nationally confined and separating approach is no longer justified. In fact, if one state profits by a swift, almost automatic system, it has to share in the liability for this and be responsible for the actions of the other state, even if, taken alone, its actions would not have amounted to a violation.⁶⁸⁹ Shared benefits of cooperation require a sharing of the burden.⁶⁹⁰

The ECtHR tended to stay within a system where it attributed responsibility only to one state at a time, but in the *Stojkovic* case⁶⁹¹ it showed that this view might change in the future. In this case, the applicant was interviewed by Belgian authorities as a “legally assisted witness” upon a French request, as he was suspected of having committed robberies in France. Even though French authorities and the applicant requested a (French) lawyer to be present, this was not carried out by the Belgian authorities. Thereby, Belgium might have been in breach of Art. 6(3)(c) ECHR (access to a lawyer); however, the application against Belgium was inadmissible.⁶⁹²

⁶⁸⁵ Para. 92.

⁶⁸⁶ Para. 93.

⁶⁸⁷ Para. 99.

⁶⁸⁸ Cf. also *den Heijer*, p. 29s. for an assessment against the background of the International Law Commission’s Draft Articles on Responsibility of States for Internationally Wrongful Acts.

⁶⁸⁹ *Smeulers*, in: *Vervaele* (ed.), *European Evidence Warrant*, p. 94 goes even further and suggests that in transnational evidence-gathering, a state might be held liable for a delay even if the delay is solely due the other state, as it is the result of the misplaced and unjustified trust displayed by the first.

⁶⁹⁰ Cf. also *Keijzer*, *Extradition and Human Rights*, p. 194: “If human rights are endangered, anywhere within the Union, no Member State can wash its hands in innocence.”

⁶⁹¹ *Stojkovic v. France and Belgium*, ECtHR of 27 October 2011 no. 25303/08.

⁶⁹² It was out of time according to Art. 35(1) and (4) ECHR; cf. the judgment at para. 38ss.

But, though France was not responsible for this interrogation that took place according to Belgian law, it was held to have violated Art. 6 (1) taken together with 6 (3)(c) of the Convention for not having remedied this breach in Belgium by taking it into account in the ensuing French proceedings and thus failing to provide the overall fairness of a process required by Art. 6.⁶⁹³ The Court even indicated that France might have been held responsible for the violation in the Belgian interrogation if this had taken place under the regime of the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union of 29 May 2000⁶⁹⁴ as opposed to the 1959 Convention. According to Art. 4(1) of the 2000 Convention, the interrogation would have had to be held in accordance with the formalities and procedures indicated by the requesting Member State.⁶⁹⁵ This issue will be particularly relevant in the future, as this rule is found in most new proposals, for example in Art. 8(2) of the proposed Directive regarding the EIO and Art. 12 of the Framework Decision on the EEW.

Despite these first attempts to take into account the special nature of transnational cooperation, the ECHR still remains a Convention with minimum rights for a national setting and cannot replace a debate about fundamental rights in judicial cooperation. Because of this continuing nation state-based understanding, EU criminal justice is unduly dominated and restricted by a purely national understanding of individuals' rights. This fact will be illustrated by the famous 2007 ECJ case of *Advocaten voor de Wereld* concerning the European Arrest Warrant.

The *Advocaten voor de Wereld* decision⁶⁹⁶

In 2004, *Advocaten voor der Wereld* sought an annulment of the Belgian law implementing the framework decision on the European Arrest Warrant before the Belgian Arbitragehof. The Arbitragehof made a reference for a preliminary ruling to the ECJ in 2005 asking two questions, namely 1. whether a framework decision

⁶⁹³ At para. 56s.

⁶⁹⁴ OJ C 197/1 of 12.07.2000.

⁶⁹⁵ At para. 55.

⁶⁹⁶ ECJ judgment of 3 May 2007, C-303/05 - *Advocaten voor de Wereld*; for an analysis of this decision see also *Fichera*, 15 ELJ (2009), p. 84ss; *Braum*, *wistra* 2007, p. 401.

might have been chosen for the European Arrest Warrant according to Art. 34(2)(b) and 2. whether Article 2(2) of the framework decision is „in so far as it sets aside verification of the requirement of double criminality for the offences listed therein, compatible with Article 6(2) of the [EU] Treaty [...] and, more specifically, with the principle of legality in criminal proceedings guaranteed by that provision and with the principle of equality and non-discrimination“. It is the second question that is most important in the area of individuals' rights.

With regard to these rights, *Advocaten voor de Wereld* argued that the list containing the 32 categories of offences for which no verification of dual criminality was needed constituted a breach of the principle of legality. This list in Art. 2(2) of the framework decision makes a surrender mandatory without the verification of dual criminality if the acts fall within any of the listed categories. The main argument is that a person affected by extradition cannot know with sufficient certainty whether one of his acts will fall within these categories and whether he will therefore be threatened by extradition. The listed categories are not defined and no specific offences, but, as has often been said, criminological classifications. This would then infringe legality and also lead to differing applications of the law by different Member States. Furthermore, since dual criminality is still the standard for all other offences, this was said to breach equality and non-discrimination because individuals were treated differently in extradition law on the basis of the offence they had committed.

Advocate General *Colomer* outlines that the rights mentioned were general principles of community law following Art. 6(2) EU. He then states that the principle of equality is not violated since the differentiation is based on objective criteria – thereby he seems to mean general criteria – and that the distinction is reasonable since it serves a legitimate goal. He also dismisses any inequality before the law. What is more important for the question of transnational rights than these aspects are the arguments in connection with the principle of legality or *nullum crimen, nulla poena sine lege*. The main argument for a breach here was the fact that the list of offences is too vague. *Colomer* outlines that this principle has two aspects to it. First, it means that on the substantive side criminal offences have to be defined before their commission. On another level, which he calls procedural, it means that the offences

are determined by law. He explains that these requirements are however only applicable to laws that directly impose punishments. Since the surrender of a person is not in itself punitive, but just an assistance to a national criminal proceeding, he concludes that the principle of legality is not applicable to the extradition procedure. It is only required that the issuing state observes the principle of legality concerning the offence in question in its own law.

The Court too acknowledges the principle of legality as a general principle of community law according to Art. 6(2) EU by referring to Member States' constitutions, the ECHR, the Charter and other international treaties. It does not see any breach of this principle since the issuing Member State must, in its own law, respect the principle of legality. The court even refers to Art. 1(3) of the framework decision that obliges the issuing state to observe human rights. The question of equality is answered similarly to the Advocate General, as a differentiation that is justified.

The line of argumentation of the Advocate General and particularly the ECJ concerning the principle of legality is very revealing. Even though they may be right in their outcome (i.e.: the abolishment of dual criminality does not infringe the principle of legality) they have missed an opportunity to give procedural guarantees in criminal law a transnational perspective. For both the Court and the Advocate General take the principle of legality as it is found within national legal systems. Therein, it means no more than that an offence must be defined by law prior to its commission within that system, i.e. by the same sovereign. In extradition procedures, the principle of legality is now interpreted in the same way. Since extradition rules do not impose punishments, the principle of legality is as a whole deemed to be inapplicable in connection to these. It is considered sufficient that each Member State observes the principle of legality in the framework of its own national law. It seems as though the fact that Member States are now cooperating in a juridified and compulsory framework of extradition that is based on EU legislation and specific EU interests could not make any difference in the interpretation of the content of the principle of legality.

7.5 Conclusions

What, then, is the right direction for an EU policy of transnational fundamental rights in judicial cooperation?

The most important part is to acknowledge that fundamental rights are always an integral part of judicial cooperation. Any piece of legislation in the area and any new mechanism of cooperation causes new and specific conflicts for individual rights that need to be addressed at the earliest possible stage. It is not in line with the principle of subsidiarity to leave these issues unresolved, as it is often consciously done. Solutions that Member States implement on their own lead to distortions and are never as effective. Neither is it sufficient to leave questions of fundamental rights out of specific legislation and refer to general bodies of rights. Important as these are for guaranteeing certain minimum standards, they can never replace a debate about the particular choices concerning human rights that are made when a specific legal act with its particular functioning is adopted. Procedural rights are no abstract ideas, but need to be reflected by the concrete dispositions of the law. If Member States and the EU are willing to take on collective authorship in cooperation to achieve a common goal, they must also be able to openly reveal their choice of what rights an individual should and should not have in the specific context.

At the moment, the development of common transnational fundamental rights is somewhat limited because existing bodies of rights were all developed in a national context that does not have to provide for a responsibility of one sovereign for the actions of another sovereign. To me, the problem is not that an EU framework of rights is based on national principles. But it is not adequate to simply require that this principle be observed only by each Member State within its own jurisdiction. So, for example in the *Advocaten* decision, it would have been necessary to look at the function and the rationale of the principle of legality within a single jurisdiction, and then try to give it a functionally equivalent interpretation on the European level. If one does take this seriously, then it becomes quite clear that the framework decision on the European Arrest Warrant does have problems with the principle of legality, even though not because of the abolishment of the dual criminality requirement. The

framework decision on the European Arrest Warrant does, as has been outlined above, create a situation in which it is never clear which state's assessment of a certain behaviour will prevail, and which criminal law will be applied, while at the same time it is clear that it will never be the assessment of a state that does not punish the act. This is greatly due to the lack of a uniform allocation of jurisdiction. Within a single jurisdiction, this situation would never be tolerated. But the problem with the principle of legality is often not recognised because of a purely national perspective. The challenge of seizing the chance and the responsibility of creating a new dimension for procedural safeguards is not used because the blind spot of nation states is taken on to a new level.

Apart from the principle of legality, there are several other rights that are very likely to be affected by EU judicial cooperation. At the stage before trial, proceedings in different states for the same act can impede an effective defence whereby the defendant may forfeit his position. More importantly, the fact that it is not clear in which state a certain case will be tried, that this is open to negotiations, leads to the situation that neither the court nor the applicable criminal law in concreto are known beforehand. At first sight, this can, independently of forum shopping, conflict with many principles, among these are also the lawful court, *ne bis in idem* etc. From the purist point of view of national law, however, none of these principles would be violated, for these are held to be applicable only with regard to the same sovereign and the exercise of the same *ius puniendi*. Thus, if a person is persecuted for the same act in France and Germany, and via "consultation" or "cooperation" they agree to leave the case to French jurisdiction, this causes a problem for neither state. Both France and Germany will have set up the lawful court before, there is no retrospective application of substantive criminal law, and, even if the *nulla poena*-principle should apply to jurisdictional rules, it will not be violated because both systems of norms declared themselves applicable before the act was committed. The idea is that a state cannot normally violate its own laws by ignoring the actions of another because there is no basis for an attribution.

This does make sense in a purely international law context since states will have to deal with each other as equal sovereigns. Exceptions from this are only made in

more extreme circumstances and at a slow pace. For example, even though an international *ne bis in idem* is not accepted as such outside a treaty framework, most states will at least not disregard a sentence served for the same offence in another state and release the individual earlier.

On the European level, however, the situation is different. The EU can create a new dimension of common action in judicial cooperation, but the counterpart of this must be a new dimension of accountability. This means that the more the EU tries to facilitate common action and judicial cooperation by stepping towards a unitary legal sphere, the more it must counterbalance frictions for individuals that occur because of this. Such a legal framework can first of all be created by analysing common fundamental rights in national criminal law and procedure, as well as in classical legal aid, and interpreting their content according to their function in a national legal system. Additionally, specific problems arising through transnational procedures must be addressed by specific safeguards for typical transnational situations.

In doing this, it is clear that Europe has a multi-layered legal system where differences caused by different national laws must not be eliminated. But the degree of protection must vary according to where the responsibility lies and where frictions can be adequately resolved. So, for example, if an EU legislative act requires states to punish a certain behaviour in the common interest, it is possible to leave it to the Member States to observe the general principles of Union law in implementing this provision into their national laws. There is no point that could not be adequately addressed by the states themselves. If later there should be a breach of individuals' rights in the law concerning this offence, the Member State will be responsible for this breach. If, however, the EU has a common interest in the prosecution of this offence in all states, as for example in the framework decision on terrorism, and therefore sets down jurisdiction for all states, then the resulting conflicts can only be addressed on an EU level because the states do not initiate simultaneous proceedings out of their sovereign right, but out of a common interest.

It is therefore important to address each question on the level where the responsibility lies, by making use of classical fundamental rights in a functionalist

interpretation and by creating particular transnational rights that are adapted to the particular area of judicial cooperation. These rights should not be minimum guarantees, but true legal standards. An accession to the ECHR would certainly help with this approach as it would force the EU to guarantee the Convention rights not in each national legal system, but throughout the EU as a whole, even though the rights of the ECHR are not specific enough for this area and only contain minimum standards. The accession is at present mainly discussed from an institutional and procedural viewpoint, especially as to who would be the right defendant and what court would have what jurisdiction.⁶⁹⁷ It is, however, very interesting to see the possibilities an accession gives to transform fundamental rights into more than the sum of the national protection of all Member States.⁶⁹⁸ From the draft accession agreement of the Steering Committee for Human Rights (CCDH) it is clear that for the purpose of the Convention, within its competences, the EU will be treated as one authority.⁶⁹⁹ Hopefully, this will give new impetus to a debate on the creation of a true judicial “area” with transnational rights and values.⁷⁰⁰

⁶⁹⁷ Cf. *Jacqué*, 48 CMLRev. (2011), p. 1011ss.; *Peers*, EU Justice and Home Affairs Law, p. 102s; *O'Meara*, 12 German Law Journal (2011), p. 1832.

⁶⁹⁸ Some thoughts in this direction are offered by *Greer and Williams*, 15 ELJ (2009), p. 462, 476ss., 480; see also *Rijken*, 47 CMLRev. (2010), p. 1488.

⁶⁹⁹ Cf. the changes to Art. 59 ECHR introduced by the interpretation clause of Art. 1 lit. d and e of the Draft Accession Agreement CCDH(2011)009.

⁷⁰⁰ Cf. also *Meyer*, EuR 2011, p. 192s.

Chapter 8 Concluding remarks

From what we have seen, it is obvious that the development of the area of European Criminal Procedure is one of the most ambitious projects of European integration. However, the direction in which it is heading is often unclear. This is partly the result of a lack of visionary theoretical approaches to it, but it is just as much a conscious political choice. While there is a general agreement to take judicial cooperation further, it is often very difficult to reach agreement on far-reaching proposals. By leaving a certain grey area, these measures can develop their own dynamic in practice. Judicial cooperation in criminal matters is evolving between the traditions of classical legal aid and the attempt to overcome these ties entirely in an Area of Freedom, Security and Justice. This as well as the unclear responsibilities of Member States and the EU have led to a legal hybrid that is continually changing its shape.

The existing theoretical approaches to this field of study are often nationally confined. In fact, when one follows the debate in different Member States, one could almost believe them to be about different subject matters and different legal orders. Similarly, the high technicality of legislation in judicial cooperation and its necessary interlocking with domestic criminal and procedural laws have isolated this area further from other sectors of the law.

Scholars with a background in domestic criminal law tend to focus on legalistic aspects of judicial cooperation and often point at the deficits of it, especially in terms of democracy, sovereignty and legitimacy on the one hand, and fundamental rights on the other hand. This is why the dynamics of this area and of mutual recognition in particular are often under attack. There is of course a great deal of justification for this. But the criticism is mainly phrased in terms of a purely national understanding of rights and a very state-based approach to democracy and legitimacy. This point of view is, however, also a part of the problem. Without a more common approach to the role of a European citizen in an Area of Freedom, Security and Justice, these

problems cannot be overcome. While it is true, as we have seen, that individuals often suffer from the combination of different legal orders in judicial cooperation, these developments also offer great chances. At the current moment, states are still free to extend their *ius puniendi* and their corresponding jurisdiction according to their very own understanding of criminal justice. Individuals are thereby confronted with randomness and unconnected value choices. If a true European criminal justice system could evolve, transnational cases could be reconnected to the purpose of criminal law and be subject to proceedings that are based on a common understanding of substantive and procedural justice. The European Union can effectively step beyond the blind spot of nation states and benefit individuals with a system that is specifically adapted to these situations.

To this end, judicial cooperation should be embedded in a common criminal policy instead of being distinct from it. Judicial cooperation and mutual recognition are mostly concerned with procedural justice, but in the end they are also very closely connected to substantive criminal law. They have partly the same objective because they declare the substantive law applicable and render it effective.

At the moment, the Union has a criminal policy that is very much confined. As we have seen, it is mainly instrumentalist and uses criminal law to further other (political and social) goals. Sometimes, it is almost crude, equating criminalisation of an act and producing safety. For a future criminal policy, we would have to realise that safety and freedom are interdependent and can both be furthered by a coherent policy. For this, an open theoretical debate is necessary prior to establishing new competences. The characteristics of a European judicial space should, as far as possible, be a matter of conscious choice. We need to ask ourselves what kind of criminal law we want for the European Union, what procedures of criminal law should be dealt with by European bodies, and what should be left to the Member States. Finally, for judicial cooperation, there needs to be a notion of the conditions under which we want to enforce decisions Union-wide and accept them as the balanced outcome of a proceeding that has observed those principles that are deemed necessary for a common understanding of justice.

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