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# Free Movement of Judicial Decisions

Application of the Principle of Mutual Recognition  
on the European Arrest Warrant

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# Summary

This thesis touches upon the principle of mutual recognition and the conditions for its application on the Framework decision on the European arrest warrant.<sup>1</sup> This Framework decision was the first third pillar instrument based upon this principle. The European arrest warrant was introduced as a new and efficient alternative to the old classic system of extradition of suspects between Member States. The principle of mutual recognition was introduced for the first time at the Tampere Council in 1999, where it was stated that this principle shall be one of the cornerstones of the judicial co-operation in both civil and criminal matters within the EU.<sup>2</sup> Hence, this was the starting point for a new approach in the combat against criminals. Several Framework decisions has been adopted based upon this principle and there are proposals that will most likely be adopted in the near future. The Framework decision on the European arrest warrant was however the first to be adopted and implemented in the Member States national laws.

The application of the principle on the European arrest warrant implies that judicial authorities in one Member State can send an arrest warrant (in form of a judicial decision), with the aim to have a wanted person prosecuted or to have a sentence or a detention order against a wanted person carried out by another Member State. The European arrest warrant must automatically be recognised and executed by the receiving Member State. The most striking feature of the European arrest warrant is the abolition of the principle of dual criminality for 32 offences. This implies that an arrest warrant based on any of these listed crimes must be automatically recognised by each Member State, even if it does not constitute a crime under the executing state's criminal law.

The principle of mutual recognition derives from the *Cassis de Dijon*<sup>3</sup> judgement, where the ECJ held that Member States must mutually recognise each others legal systems, even though they are different, in order to facilitate the free movement of goods. The principle was extended to other legal areas within the first pillar such as; free movement of workers, freedom to provide services and freedom to establishment. The principle was implemented in the legislation covering the mentioned areas. The legislation in the different legal areas had however been subject to previous harmonization of the Member States' national laws, which facilitated the mutual trust for each others legal systems. The condition for the application of the principle of mutual recognition on first pillar law are therefore;

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<sup>1</sup> Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member , OJ L 190, 18/07/2002, P 001-0020.

<sup>2</sup> Tampere European Council Presidency Conclusions, 15 and 16 October 1999 para 33.

<sup>3</sup> Case 120/78, Rewe - Zentrale AG v. Bundesmonopolverwaltung für Brantweinn [1979] ECR 649 (*Cassis de Dijon*).

*comparability* of the national laws. However, criminal law has not been harmonized in the Union. This means that the conditions for the application of the principle on the European arrest warrant do not follow the model for its application in the first pillar. The application of the principle of mutual recognition has, nevertheless, created an efficient free movement of judicial decisions in the EU.

# Preface

This thesis has now come to its end and it is with mixed feelings that I write these final words as a student, with only few weeks left in Lund. It has now been my home for almost six years and contained both challenges, inspiration, friendship, frustration, happiness, and love. As an old and dear Professor told me; “one chapter has now come to its end and a new is about to start. That is a great thing, since life does not contain that many chapters”. I fully agree with this old and wise man! Attending the Masters of European Affairs program was the best part of this chapter. This year has been enormously interesting and challenging but most and for all it has given me the opportunity to meet wonderful people from all over the world. This program has not only given me a LL.M in European Law, but also beautiful friends that I will always keep in my heart!

Writing this thesis has been interesting and has given me a deeper understanding for the judicial co-operation in criminal matters within the EU. I owe the greatest of gratitude to my tutor Christoffer Wong for his help and inspiration to finalise this thesis in relatively short time. I am also very grateful for the invitation to the seminar on the “Constitutional Changes to the European Arrest Warrant” in Brussels 13 of February this year. Many thanks to my thesis colleague; attorney Jonathan D Messinger for proof reading this thesis and for being such a nice friend. Good luck with your stuff “over there”!

I also want to thank my family for their support and love, my old friends that have been patient with my “absence” through out this year, and all my new MEA – friends for joy, parties and forever friendship. I also want to thank my former colleagues at Europol for help concerning the European arrest warrant, a special thank to Dan Persson at the Swedish Desk.

Last but not least, to my beloved Björn for everything. I love you!

17 of May 2006, Lund.

# Abbreviations

CML Review	Common Market Law Review
Commission	European Commission
COREPER	Committee of the Permanent
Council	The Council of the European Union Representatives (of the Member States)
Court	Court of Justice for the European Communities
EC	Treaty establishing the European Community (Rome Treaty 1958) or European Community
ECJ	Court of Justice for the European Communities
ELJ	European Law Journal
ETS	European Treaty Series
EU or Union	European Union or Treaty on European Union
Europol	European Police Office
JCMS	Journal of Common Market Studies
MJ	Maastricht Journal of European Comparative Law
NGO	Non Governmental Organization
n.y.r	not yet reported (in ECR)
OJ	Official Journal
Parliament	European Parliament
Prop.	Proposition (Preparatory work from the Swedish Government)

RB	Rättegångsbalken (the Swedish civil and criminal procedural Code)
SLIM	Simpler Legislation for the Internal Market
SvJT	Svensk Jurist Tidning
TN	Treaty of Nice
ToA	Treaty of Amsterdam
UN	United Nations
YBEL	Yearbook of European Law



# 1 Introduction

## 1.1 Background

The free movement of goods, persons and services within EU, have been facilitated by the application of the principle of mutual recognition. This principle, stemming from the *Cassis de Dijon*<sup>4</sup> judgement, has been essential for the establishment and functioning of the internal market. The *free movement of judicial decisions* was introduced in 1999 at the Tampere Council<sup>5</sup>, where the principle of mutual recognition, for the first time, was extended to judicial co-operation in both civil and criminal matters.

“Free movement of judicial decisions” is not an official EU-term but explains well the purpose behind the application of the principle of mutual recognition on criminal co-operation<sup>6</sup>. At the Tampere Council it was concluded that the principle of mutual recognition shall be one of the cornerstones of criminal co-operation in the EU.<sup>7</sup> The extension of the principle to the third pillar area had implications on the adoption of Framework decisions. The European arrest warrant was the first Framework decision which implemented this principle. The Framework decision on the European arrest warrant<sup>8</sup> abolished the classical extradition system between the Member States, and introduced instead a surrender system.

The European arrest warrant is based on the principle of mutual recognition which enables judicial authorities in one Member State to send an arrest warrant (in the form of a judicial decision), with the aim to have a wanted person prosecuted or to have a sentence or a detention order against a wanted person to be carried out by another Member State. The European arrest warrant must automatically be recognised and executed by the receiving Member State. The automatic recognition of the arrest warrant is the main rule, but there are both mandatory and optional grounds for refusal. The most striking feature of the European arrest warrant, is the abolition of the principle of dual criminality for 32 offences. An arrest warrant based on any of these listed crimes must be automatically recognised, even if it does not constitute a crime under the executing state’s criminal law. This system is opposite from the classical extradition system which was based on the principle of dual criminality and constituted a guarantee for legal certainty.<sup>9</sup>

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<sup>4</sup> Case 120/78, *Rewe - Zentrale AG v. Bundesmonopolverwaltung für Branntwein* [1979] ECR 649 (*Cassis de Dijon*).

<sup>5</sup> Tampere European Council Presidency Conclusions, 15 and 16 October 1999.

<sup>6</sup> This is the term I will use through out the thesis for the general judicial and police co-operation in criminal matters.

<sup>7</sup> *Ibid*, para 33.

<sup>8</sup> Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member , OJ L 190, 18/07/2002, P 001-0020.

<sup>9</sup> Schunke Thunberg, Malin, *Internationell rättslig hjälp inom EU. Effektivitet v. Rättssäkerhet*, p.191-261.

The guarantee which was assured by the principle of dual criminality is replaced by the application of the principle of mutual recognition which implies that Member States shall have mutual trust for each others national legal systems. Mutual trust is now the foundation for guaranteeing legal certainty in an extradition, or a surrender of suspects. This means that the executing Member State shall *assume* that the issuing Member State has both reason and competence to issue a European arrest warrant.<sup>10</sup>

The principle of mutual recognition, stemming from the *Cassis de Dijon* ruling, established that Member States shall mutually recognise and mutual trust each others legal systems. This principle, established for first pillar areas, was preceded by harmonization of Member States national laws in relevant areas. After the establishment of the principle in 1979, subsequent legislation has been based on this previous harmonization and comparability of substantive national laws. This is however not the case when it comes to the adoption of third pillar legislation. There is no coherent criminal law in the EU today. Criminal law is still based on national legal traditions and criminal policies in the various Member States. However, the application of the principle of mutual recognition regarding criminal co-operation within the third pillar has created an internal market for judicial decisions. The free movement of judicial decisions has facilitated the fight against crimes in EU, since it has above all, created an efficient- and quick system for surrender of suspects. Even though, the European arrest warrant is undoubtedly an effective instrument for the fight against crimes in EU, it is still crucial to have a critical position in order to evaluate its correctness and its function within national criminal systems.

## 1.2 Purpose and structure

The principle of mutual recognition has been applied to third pillar legislation by analogy from the development and application of this principle on first pillar legislation. The purpose of this thesis is to analyse the principle of mutual recognition and the analogous application of the principle on the criminal co-operation. Does the implementation of the principle on third pillar legislation follow the model for the application of the principle within the first pillar? Are the conditions for its application the same in the first and the third pillar? In order to make this analysis, I shall focus on one area in the first pillar and one in the third pillar. For the development of the conditions of its application to the first pillar, I have chosen to make a case study in the field of free movement of workers, freedom to provides services but also freedom to establishment, more particularly *qualified professionals*. This study will be based on a model of constructs which I have developed in sections 3.3.1-3.3.6. I shall analyse legislation on qualified professionals from the 1970's until today. By making this survey of legislation based on the principle of mutual recognition, one can easily evaluate conditions for its application. For the

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<sup>10</sup> Prop. 2003/04:07, p. 77

establishment of the principle within the third pillar, I have chosen to analyse the application of the principle on the *European arrest warrant*. The analysis of its application on the European arrest warrant can be found in chapter 4.5. There is also a descriptive discussion of the Framework decision on the European arrest warrant in section 4.3.2.

The structure of this thesis is based on an analysis of this legislation on qualified professionals and the Framework decision on the European arrest warrant, the latter being the main focus of this thesis. However, I will start in chapter 2, by giving a short description and some background regarding the concept of the principle of mutual recognition.

In chapter 3, a discussion regarding the principle of mutual recognition within the first pillar will follow. First by providing the background to the principle as first recognised in the *Cassis de Dijon* judgment. Then I shall focus on the legislation based on the principle of mutual recognition particularly on qualified professionals in sections 3.3.2-3.3.6. These sections will constitute an analysis of legislation and case-law based on a model where I have constructed the legislation into four parts. The chapter then concludes with an analysis of conditions for the application of the principle on the legislation of qualified professionals.

In chapter 4, I will move on to analyse the application of the principle of mutual recognition to the third pillar legislation. I shall first give a general introduction and historical background of the criminal law in the EU. Furthermore, I will discuss the Tampere milestones and the establishment of the application of the principle of mutual recognition to judicial decisions. In chapter 4.3, I will give a description of adopted third pillar legislation that implements the principle of mutual recognition. This sub-chapter also contains a description of current proposals for Framework decisions implementing this principle. This part is mainly descriptive, but is however necessary to give a clear picture of the application of the principle to third pillar legislation. In chapter 4.5, I will analyse the European arrest warrant more in depth. Here I will discuss whether the conditions, following the model, developed in the first pillar, are upheld in the application of the principle of mutual recognition on the European arrest warrant.

In chapter 5 I shall draw the conclusions of this thesis and finally in chapter 6 will be my final remarks.

## **1.3 Method and materials**

The research of this thesis is based on a traditional legal dogmatic method. This method implies a description, examination and analysis of legislation, preparatory work, principles, case-law and doctrine. The main focus of this thesis is an analysis of the principle of mutual recognition. However, this analysis is dependent upon an examination and analysis of other legal instruments. The different sources of laws that I have been looking at cover

treaties, directives, framework decisions, decisions, Swedish national laws, etc. The legal dogmatic method also implies analysis of different preparatory work. In this thesis I have looked into preparatory work at both EU and national levels. Preparatory work at the EU level implies research of the Commission proposals, but also proposals from Member States. At the national level, I have been looking into the preparatory work of the implementation of the European arrest warrant into Swedish legislation. Moreover, I have examined case-law. Since there are still very few cases from ECJ interpreting third pillar legislation, there will be mainly case-law from the first pillar area. I have also studied doctrine from various Member States.

I also had the opportunity to attend a seminar on “Constitutional changes to the European Arrest Warrant”, which was held by the Centre for European Policy Studies in Brussels on 13 of February 2006. This seminar was attended by many of the most prominent scholars in the EU on criminal law and representatives from the Member States, the Commission and the Council. Moreover, I have also attended lectures on criminal law within the EU on 24 of April 2006 and on the European arrest warrant on 5 of May 2006. These lectures were held by Professor Per-Ole Tråskman at the Faculty of Law in Lund. Both these lectures and the seminar in Brussels have given me a deeper understanding for criminal co-operation in EU and the functioning of the European arrest warrant between Member States.

## **1.4 Delimitations**

This thesis will focus solely on the implementation and application of the principle of mutual recognition on legislation at EU level. The principle of mutual recognition constitutes also the foundation of the recognition of judgements in civil and commercial matters. This will however not be examined in this thesis. Moreover, in section 4.5.3 where I will discuss the conditions for the application of the principle on the European arrest warrant, I will only focus on the relevant EU definitions of offences adopted in Framework decisions. Subsequently, I will leave out conventions and other legal instruments adopted by the European Council or UN.

## 2 The concept of mutual recognition

*“Thou shalt neither vex a stranger, nor oppress him: for ye were strangers in the land of Egypt.”*

Book of Exodus 22:21

Before going into the application of the principle of mutual recognition within the EU, I shall start with describing the concept as such. The aim of this background is to give a general understanding of the concept of mutual recognition. Mutual recognition is a concept that integrates the unknown into a more fixed and established forum. The concept of mutual recognition is, however, not exclusively reserved for the EU integration process, it has a wider application and can be found in other integration processes at different levels of society. The concept can be described as the *integration* of “aliens” into a “homogenous” society with nationals, who have been living there for a long time. It has three different forms; *ghettoization* or *apartheid*, *assimilation* and *mutual recognition*.<sup>11</sup>

- In a *ghettoization* or *apartheid*, diversity will be recognised but not very much valued. Diversity is therefore marginalized and segregated from the centre of the society.
- In the form of *assimilation*, which can be either closed or open, diversity is not accepted. It has no (in its closed form) or limited value (in its open form). Subsequently, diversity is not recognised or even eliminated, which will force the minority to assimilate the identity and to adopt the manners of the majority in the society.
- *Mutual recognition* accepts and puts value in diversity without segregating it. It can be explained as a more significant phenomenon than tolerance. Tolerance requires some form of asymmetry between the tolerator and the tolerated, whereas mutual recognition is based on a *reciprocal respect*.

In the social and economic development of the Union, the integration process has moved from assimilation (in its open form) to mutual recognition. Mutual recognition is a delicate strategy to attain harmonization, co-ordination, convergence or to strengthen co-operation. This form of integration requires mediation for its success. However, from a historical perspective this form of integration has been filled of both success and failure. The recipe for success has been the ability to accept *unity in diversity*. Already 2 500 years ago, the Greek Heraclitus was saying “from the strain of binding opposites comes harmony”.<sup>12</sup>

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<sup>11</sup> Schioppa Padoa, Fiorelli Kostoris, *The principle of Recognition in the European Integration Process*, Preface viii-ix.

<sup>12</sup> Ibid.

The concept of mutual recognition has had an important impact on the integration of the EU, and this form of integration can be found in many different areas of the first pillar, and lately in the third pillar area. In the EU internal market, this concept implies the recognition of the regulations in the different Member States. This concept of mutual recognition will facilitate the free movement of goods, persons and services. The concept of mutual recognition at EU-level is stemming from the establishment of the principle of mutual recognition in the *Cassis de Dijon* judgement<sup>13</sup>. This principle constitutes the core element for the establishment of the internal market. The principle of mutual recognition was for twenty years reserved for the first pillar area, but was in 1999 extended to the third pillar and the judicial and criminal co-operation area. The concept of mutual recognition, as it was established at the Tampere Council, implies that the Member States must recognise and respect each others' judicial decisions.<sup>14</sup>

As initially stated in this chapter, mutual recognition is not a concept reserved for the internal market and the judicial and criminal co-operation. It is also a concept in the area of civil and commercial judgments. Mutual recognition in the field of private international law is established in the Brussels Regulation 44/2001<sup>15</sup>, which replaced the 1968 Brussels Convention<sup>16</sup>. Mutual recognition is most evident in family matters, and especially in the field of parental responsibility and marriage. The concept of mutual recognition is applicable to marriages, divorces and judgements of parental responsibility. One cannot deny that we live in a globalized world. People move more easily across borders and this movement must therefore be met on a legislative level. The concept of mutual recognition will bridge the different legal systems in the world and will constitute an efficient tool to reconcile clashes of rules. Perhaps it will not solve all practical problems when different worlds collide. To recognise a divorce between a Muslim and a secularised person might have consequences that create doubt about the recognition in a secularised society. For further reading on mutual recognition of judgements in civil and commercial matters, I refer to Professor Michael Bogdan.<sup>17</sup>

In the following chapters I will focus solely on the concept of mutual recognition in the first pillar and third pillar areas of the EU. Therefore, I will start the next chapter by giving a general introduction of the principle of mutual recognition stemming from the *Cassis de Dijon* judgement.

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<sup>13</sup> Case 120/78, *Rewe - Zentrale AG v. Bundesmonopolverwaltung für Brantweinn* [1979] ECR 649, (*Cassis de Dijon*).

<sup>14</sup> Tampere European Council Presidency Conclusions, 15 and 16 October 1999.

<sup>15</sup> Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 012 , 16/01/2001 P. 0001 – 0023.

<sup>16</sup> 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters (consolidated version), OJ C 027 , 26/01/1998 P. 0001 – 0027.

<sup>17</sup> Bogdan, Michael, *Svensk Internationell Privat- och Processrätt*, 2004.

# 3 The principle of mutual recognition within the first pillar

## 3.1 Background

In the 1960's and 1970's, the political and legislative approaches within the Community, were characterised by harmonisation and approximation of different Member States' national laws. The *Cassis de Dijon*<sup>18</sup> judgment changed the Commission's harmonisation approach and paved the way for a new way of thinking. This new approach was characterised by tolerance for diversity, traditions and specific national, regional and local characteristics in the Member States.<sup>19</sup>

In the *Cassis de Dijon* case, the ECJ stated for the first time that a Member State must recognise a product lawfully produced and marketed in another Member State, even if the product is produced according to technical or quality requirements which differ from those imposed on its domestic products. A product, in this case a bottle of *Cassis de Dijon*, could therefore not be subject to specific legal prohibitions to be sold in another Member State, due to the fact that it contained a lower alcohol content than the limits set by the national rules in the other Member State. The rules of a minimum alcohol content constituted an obstacle to trade which was incompatible with the provisions of Article 28 (ex 30) EC. Even though rules on the content of alcohol were indistinctly applicable to domestic and foreign producers, the national rules created unlawful barriers to the free trade between the countries.<sup>20</sup>

This means that any product imported from a Member State should, in principle, be allowed entry into another Member State's territory if it has been lawfully produced, if it is in conformity with the regulations and with the production processes of the exporting country and marketed within that country. Member States may only contravene this principle in very limited circumstances, which involve "overriding requirements of general public importance", such as public health, protection of consumers or the

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<sup>18</sup> Case 120/78, *Rewe - Zentrale AG v. Bundesmonopolverwaltung für Brantweinn* [1979] ECR 649, (*Cassis de Dijon*).

<sup>19</sup> Mattered Alfonso, "The Principle of Mutual Recognition and Respect for National, Regional and Local Identities and Traditions", in *The Principle of Mutual Recognition in the European Integration Process*, p.1.

<sup>20</sup> Craig, Paul & de Búrca, Gráinne, *EU Law – Text, Cases and Materials*, pp.636-639.

environment. Any measures taken by Member States must also be both necessary and proportionate.<sup>21</sup>

The principle of mutual recognition can be defined “as a contractual norm between governments whereby they agree to the transfer of regulatory authority from the host country (or jurisdiction) where a transaction takes place, to the home country (or jurisdiction) from which a product, a person, a service or a firm originates”. The “recognition” implies equivalence or compatibility, or at a minimum the acceptance, by host countries, whereas “mutual” implies reciprocity and simultaneity.<sup>22</sup> Where a product “suitably and satisfactorily” fulfils the legitimate objective of a Member State’s own rules (public safety, protection of the consumer or the environment, etc.) the importing country cannot justify prohibiting its sale in its territory by claiming that the way it fulfils the objective is different from that imposed on domestic products.<sup>23</sup>

The *Cassis de Dijon* ruling and the principle of mutual recognition stemming from this judgement paved the way for the creation of the internal market.<sup>24</sup> The new legislative approach, based on the principle of mutual recognition was extended to other regulatory areas of the first pillar, areas such as the free movement of workers, freedom to provide services and the right of establishment, particularly *qualified professionals*. The principle was further developed in subsequent legislation and case-law in these areas.

### **3.2 Legislation based on the principle of mutual recognition**

The principle of mutual recognition has no direct legal basis in the EC or EU Treaty. As described above, the principle derives instead from the *Cassis de Dijon* ruling. Although it is seen as the core principle for the establishment of the internal market, it still not a general principle of Community Law. Moreover, it was never included in the rejected Constitutional Treaty. The legislation implementing the principle finds its legal basis in the Articles establishing the free movement of goods, respectively persons and services. There are two articles in the EC Treaty that directly mention the principle, namely;

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<sup>21</sup> Kalypso, Nicolaïdis, “Globalization with Human Faces: Managed Mutual Recognition and the Free Movement of Professionals”, in *The Principle of Mutual Recognition in the European Integration Process*, p. 137.

<sup>22</sup> Ibid.

<sup>23</sup> Communication from the Commission concerning the consequences of the judgment given by the Court of Justice on 20 February 1979 in case 120/78 ('Cassis de Dijon'), OJ C 256 , 03.10.1980 P. 002-003.

<sup>24</sup> Hor Ng, Der-Chin, *The Principle of Mutual Recognition, The European Union’s Practice, World Competition*, 22(2), 1999, p. 135.



- Article 47, which states that “ in order to make it easier for persons to take up and pursue activities as self-employed persons, The Council shall, acting in accordance with the procedure referred to in Article 251, issue directives for the mutual recognition of diplomas, certificates and other evidence of formal qualifications”
- Article 293, which states that “Member States shall, so far as is necessary, enter into negotiations with each other with a view to securing for the benefit of their nationals ... the mutual recognition of companies or firms within the meaning of the second paragraph of Article 48, the retention of legal personality in the event of transfer of their seat from one country to another, and the possibility of mergers between companies or firms governed by the laws of different countries”.

These provisions are merely identifying objectives which policy makers must observe.<sup>25</sup>

In the next chapter I will look into adopted legislation and case-law that confirmed and developed the principle deriving from the *Cassis de Dijon* ruling. This part does not aim to give a complete description of the existing legislation within the first pillar. The aim is instead to give an example of one regulatory area where the Community has based its legislation on the principle of mutual recognition. There is a lot of material in the area of goods, but I have instead chosen to make a case study on the legislation of qualifications of professionals. My choice of case study is based on the fact that qualifications of professionals is most similar to criminal matters since they both concern the regulations of natural persons.

In the next chapter I will analyse the conditions for the application of the principle of mutual recognition within the first pillar, in particular qualifications of professionals. I will also analyse the legislation which is based on the principle of mutual recognition, and will consistently apply the principle as it was spelled out in the *Cassis de Dijon* ruling.

## **3.3 Mutual recognition of professional qualifications**

### **3.3.1 A model of construct**

The mutual recognition of qualifications was introduced to facilitate the free movement of persons and the freedom to provide services, which would in turn create an ever closer Community. Professional qualification covers

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<sup>25</sup> Alfonso, Mattera, “The Principle of Mutual Recognition and Respect for National, Regional and Local Identities and Traditions”, in *The Principle of Mutual Recognition in the European Integration Process*, p.6.

different concepts such as; a diploma guaranteeing professional education, professional experience obtained for a certain period in a Member State, license, certificate, education and the membership of professional associations.<sup>26</sup>

The legislative activity (based on the principle of mutual recognition) within the field of professional qualification has developed over time, and hence so have conditions for the application of the principle of mutual recognition. Legislative regulation of mutual recognition of professional qualifications has been described in legal doctrine as three different “legislative areas”<sup>27</sup> or “three categories”<sup>28</sup>. It can even be described as “three paradigms”<sup>29</sup>. There are different ways of structuring and looking at this legislative development. I have chosen to structure this legislative activity in four different constructs. My model of construct can be explained as a structure based upon the development of an active community approach rather than a passive development of Community law. I will discuss the directives adopted under each and every legislative construct in order to evaluate the conditions for the application of the principle. By this model of construct one can easily observe the development of the implementation of the principle of mutual recognition on the legislation of professional qualifications. Furthermore, the model of construct facilitates to draw conclusions about relevant conditions for the application of the principle of mutual recognition. These conditions will constitute a model for the application of the principle in the first pillar.

### **3.3.2 First legislative construct – automatic mutual recognition**

The recognition of qualifications goes back to 1960’s and to the old harmonisation approach programme. The first legislative measure taken in this field was an attempt to harmonize the Member States’ national laws on professional training standards. Harmonization constituted a condition for the mutual recognition of diplomas.<sup>30</sup> In 1969-70, the Commission, together with representatives from the Member States, made a proposal for training standards in twenty professions such as; pharmacists, doctors, dentists, engineers, architects, accountants, lawyers, veterinarians, midwives, opticians, nurses. These proposals resulted in several directives on minimum

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<sup>26</sup> Kalypso, Nicolaïdis, “Globalization with Human Faces: Managed Mutual Recognition and the Free Movement of Professionals”, in *The Principle of Mutual Recognition in the European Integration Process*, p. 132.

<sup>27</sup> Peers, Steve, Mutual Recognition and Criminal Law in the European Union: Has the Council got it wrong?, *CML Review* 41, 2004:5, p.20.

<sup>28</sup> Hor Ng, Der-Chin, The Principle of Mutual Recognition, *The European Union’s Practice, World Competition*, 22 (2),1999, p 135.

<sup>29</sup> Kalypso Nicolaïdis, “Globalization with Human Faces: Managed Mutual Recognition and the Free Movement of Professionals”, in *The Principle of Mutual Recognition in the European Integration Process*, pp. 135-137.

<sup>30</sup> *Ibid*, p.136.

standards on the training requirements of each and every profession.<sup>31</sup> These directives provided for *automatic* mutual recognition as soon as the training was completed and the person had qualified for the profession.<sup>32</sup> Subsequently, the qualification obtained in the home country was then considered to be equivalent to the qualification in the host country. In the *Hocsman* case, the ECJ stated that a Member State is obliged to accept the equivalence of certain diplomas and could not require more than what was regulated by a minimum standard directive.<sup>33</sup>

Mutual recognition during this first legislative activity was based on the guarantee of a minimum level of training for a specific profession covered by one of the harmonization directives. Member States could therefore have a mutual trust for each others' qualification of professions. In the *Carbonari*<sup>34</sup> case, pay during training for doctors, had been harmonised through Directive 82/76 and Member States were therefore guaranteed an equal value of the national legislation. Harmonized common standards are here to be seen as the lowest common denominator for the automatic application of the principle of mutual recognition. In conclusion, the condition deriving from the first legislative construct, is characterised by harmonized common training standards.

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<sup>31</sup> Council Directive 75/362/EEC of 16 June 1975 concerning the mutual recognition of diplomas, certificates and other evidence of formal qualifications in medicine, including measures to facilitate the effective exercise of the right of establishment and freedom to provide services, OJ L167, 30/06/1975 P. 0001 – 0013, Council Directive 75/363/EEC of 16 June 1975 concerning the coordination of provisions laid down by law, regulation or administrative action in respect of activities of doctors, OJ L 167 , 30/06/1975 P. 0014 – 0016, amended by Council Directive 82/76/EEC of 26 January 1982 amending Directive 75/362/EEC concerning the mutual recognition of diplomas, certificates and other evidence of formal qualifications in medicine, including measures to facilitate effective exercise of the right of establishment and freedom to provide services and Directive 75/363/EEC concerning the coordination of provisions laid down by law, regulation or administrative action in respect of activities of doctors, OJ 043 , 15/02/1982 P. 0021 – 0025  
Council Directive 77/452/EEC of 27 June 1977 concerning the mutual recognition of diplomas, certificates and other evidence of the formal qualifications of nurses responsible for general care, including measures to facilitate the effective exercise of this right of establishment and freedom to provide services, OJ L 176 , 15/07/1977 P. 0001 - 0007 ,  
Council Directive 78/686/EEC of 25 July 1978 concerning the mutual recognition of diplomas, certificates and other evidence of the formal qualifications of practitioners of dentistry, including measures to facilitate the effective exercise of the right of establishment and freedom to provide services, OJ L 233 , 24/08/1978 P. 0001 – 0009, Council Directive 78/1026/EEC of 18 December 1978 concerning the mutual recognition of diplomas, certificates and other evidence of formal qualifications in veterinary medicine, including measures to facilitate the effective exercise of the right of establishment and freedom to provide services, OJ L 362 , 23/12/1978 P. 0001 – 0006, etc.

<sup>32</sup> Case C-154/93 Abdullah Tawil-Albertini v. Ministre des Affaires Sociales [1994] ECR I-451, para 11.

<sup>33</sup> Case C-238/98 Hocsman v. Ministre de l'Emploie er de la Solidarité [2000] ECR I-6623, para 33.

<sup>34</sup> Case C-131/97, Carbonari and others v. Università degli Studi di Bologna [1999] ECR I –1103.

The general sectoral directives on harmonization of minimum standards of training were later consolidated by Directive 99/42/EC<sup>35</sup>. Unlike the sectoral directives which were based on formal qualifications or diplomas, this new consolidated directive is based on the mutual recognition of periods of working time and the possession of skills.<sup>36</sup> Directive 99/42/EC applies a similar approach to mutual recognition as Directive 89/48/EC on the mutual recognition of higher education diplomas and Directive 92/51/EC on a second general system for the recognition of professional education and training, supplementing Directive 89/48/EEC<sup>37</sup>. Directive 99/42/EC replaces the sectoral directives, to be discussed in the third legislative construct in section 3.3.4

Directives 89/48/EEC and 99/42/EC were the result of a new approach based on the principle of mutual recognition stemming from the *Cassis de Dijon* and *Vlassopoulou*<sup>38</sup> judgments. The subsequent legislation was inspired from these rulings and this is when the second legislative construct starts to take its forms.

### **3.3.3 Second legislative construct – conditional mutual recognition**

Directive 89/48/EC on the mutual recognition of higher education diplomas<sup>39</sup> was the first directive establishing a “general system” of recognition. It was a construction of a system which was not focused on the different professions, but instead on the length and character of the studies or training required to gain access to a profession. By adopting this “general system” of recognition, a slow and time consuming harmonization process for each and every profession could be avoided. However, the disadvantage of the so-called *horizontal approach*<sup>40</sup> was that it did not provide for the automatic mutual recognition characterised by the sectoral directives. The new general system of mutual recognition gave instead the person that wanted to have his/hers profession recognised a chance to have it scrutinised and examined by the relevant authorities in the hosting Member State. The hosting Member State was then free to evaluate, after the scrutiny of the

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<sup>35</sup> Directive 1999/42/EC of the European Parliament and of the Council of 7 June 1999 establishing a mechanism for the recognition of qualifications in respect of the professional activities covered by the Directives on liberalisation and transitional measures and supplementing the general systems for the recognition of qualifications, OJ L 201, 31/07/1999 P. 0077 – 0093.

<sup>36</sup> Craig, Paul & de Búrca, Gráinne, *EU Law – Text, Cases and Materials*, p.779.

<sup>37</sup> Council Directive 89/48/EEC of 21 December 1988 on a general system for the recognition of higher-education diplomas awarded on completion of professional education and training of at least three years' duration, OJ L 019, 24/01/1989 P. 0016 - 0023 and Council Directive 92/51/EEC of 18 June 1992 on a second general system for the recognition of professional education and training to supplement Directive 89/48/EEC, OJ L 209, 24/07/1992 P. 0025 – 0045.

<sup>38</sup> Case C-340789, *Vlassopoulou v. Ministerium für Justiz, Bundes und Europaangelegenheiten Baden-Württemberg* [1991] ECR 2357.

<sup>39</sup> Directive 89/48 [1989] O.J L19/16.

<sup>40</sup> Barnard, Catherine, *The Substantive Law of the EU, The four freedoms*, p. 300.

qualification, whether the content of the education or training obtained in the home state was equivalent to the requirements in the host state. In case of inadequacy, the host state was allowed to require compensation in the form of aptitude test or an adaptation period.<sup>41</sup>

The legal basis for creating a general system of recognition is the Articles 49, 57(1) and 99 EC Treaty. These articles do not directly establish mutual recognition, but it can be argued that recognition of each Member State's requirement of education and training standards for access to a profession abolishes the obstacles to free movement of persons, the freedom to provide services and freedom of establishment. Moreover, the level and duration of education and training governing access to a profession had been regulated in a similar manner in all the Member States or had been subject of minimal harmonization in order to create sectoral systems for the mutual recognition of diplomas.<sup>42</sup> The previous harmonization process had led to a similar legal approach in all the Member State and was now seen as the foundation for creating a "general system" of mutual recognition. This *horizontal approach* was based on a tolerance for diversity, traditions and specific national, regional and local characteristics in the Member States.<sup>43</sup>

The scope of the Directive 89/48/EEC covered all kind of diplomas awarded on completion of professional education and training of at least three years of university training which was not covered by any of the other sectoral directives. The recognition was based on mutual trust without a requirement of prior conditions for the education and training courses in the different Member States. This new type of *horizontal approach* was in line with the general ruling in the *Cassis de Dijon* judgment that goods which had been "lawfully produced and marketed" in one Member State shall not be subject to hindrance to enter another Member State's market.<sup>44</sup> This new type of horizontal approach could also be found in the *Vlassopoulou* case.

Vlassopoulou was a Greek lawyer, working in Germany, who wanted to join the German bar association. Her application was rejected due to the fact that she had no German law degree even though she had a German doctorate. Even though the provisions in the directive was not applicable to the situation in this case, the ECJ adopted a similar approach as in the Directive 89/48/EC. The time-limit for the implementation of the Directive had not yet expired, but the effect of Article 43 was that a Member State cannot refuse a person access to a profession or to the practise of a trade based on the ground that he or she does not hold the required domestic qualification, even when the host state has not yet recognised the equivalence of the home state's qualification requirements. The host state must *compare* the

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<sup>41</sup> Craig, Paul & de Búrca, Gráinne, *EU Law Text, Cases and Materials*, p.778.

<sup>42</sup> Preamble of Directive 89/48 [1989] O.J L19/1.

<sup>43</sup> Mattered Alfonso, "The Principle of Mutual Recognition and Respect for National, Regional and Local Identities and Traditions", in *The Principle of Mutual Recognition in the European Integration Process*, p.1.

<sup>44</sup> Kalypso, Nicolaïdis, "Globalization with Human Faces: Managed Mutual Recognition and the Free Movement of Professionals", in *The Principle of Mutual Recognition in the European Integration Process*, p. 137.

qualifications obtained in the home state with the requirements in the host state, to see whether the person has the appropriate skills to join the equivalent profession. If the qualification is not identical but at least equivalent, then the host state is obliged to recognize the diploma.

The new “general system” did not provide for automatic mutual recognition since it took a step away from harmonization standards. Harmonization standards are based on a case-by-case co-operation and are incompatible with the horizontal approach.<sup>45</sup> The “general system” directives merely guaranteed that the person who wanted to work or establish in another Member State would be subject to control and scrutiny by the competent authority in the host state. In the *Heylen*<sup>46</sup> judgment, decided one year before the 1989 Directive entered into force, the Court held that the Member State should “take into account” training received in the home country and could not refuse access to a profession if such training was in compliance with a number of criteria of equivalence. This judgment concerned workers but could be applied by analogy to professions. However, a “community element” was however required to the situation, in order to rely on Directive 89/48. The applicant in the *Anestis Kapsakalis*<sup>47</sup> judgement, did not fulfil the requirement of a purely internal situation for the Directive 89/48 to be applicable.

If there was a lack of required qualifications, in terms of duration and substance, or if there were major differences in education and training, the host Member State had then the possibility to require compensatory mechanism in form of an aptitude test or an adaptation period. Where there are differences in national systems as to the substance of qualifications and differences concerning how professions are regulated, such compensatory strategies build “bridges” between the home and the host state.<sup>48</sup> From my perspective, these connection points are important in a system without automatic mutual recognition since there are no harmonization standards in the background.

A person holding the required three-years higher-education, in accordance with the Directive 89/48/EC, who has completed necessary professional training to be accepted to a certain profession in their home state, could not be refused permission to practice on grounds of inadequate qualifications in the host state. Where the duration of the education or training was at least one year less than that required in the host Member State, the Directive allowed the host Member State to require evidence from the applicant that he or she had obtained the requisite professional experience.<sup>49</sup>

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<sup>45</sup> Ibid, p. 138.

<sup>46</sup> Case C-222/86, *UNECTEF v. Heylen*, [1987] ECR 4097.

<sup>47</sup> Joined cases C-225-227/95 *Kapsakalis v. Greece* [1998] ECR I-4329.

<sup>48</sup> Kalypso, Nicolaïdis, “Globalization with Human Faces: Managed Mutual Recognition and the Free Movement of Professionals”, in *The Principle of Mutual Recognition in the European Integration Process*, p. 138.

<sup>49</sup> Article 4, Directive 89/48 [1989] O.J L19/1.

Permission to work or establish was conditional on training and experience that the person had undergone and whether the qualification obtained in the home state was *comparable* to the requirements of the host state. The “general system” of recognition was therefore *conditional*, not automatic.

The second “general system” directive was Directive 92/51/EC, which supplemented Directive 89/48/EC and followed the same *horizontal approach*. Directive 92/51/EC covered education and training other than three-year education required in Directive 89/48/EC. The scope of the Directive covered diplomas acquired from a post-secondary course of at least one year and which qualified for a regulated profession, as well as certificates acquired from educational or training courses other than these post-secondary courses of one year’s duration. It also covered those certificates acquired after a probationary or professional practice period, or after vocational training, which qualified the person to work within the regulated profession.<sup>50</sup>

Both directives were amended by Directive 2001/19/EC<sup>51</sup> the so-called “SLIM Directive”, which amended many of the sectoral directives. In the 2001 Directive, a requirement was incorporated that the host state must examine whether the professional experience gained by the applicant is to be evaluated as *equal* to the requirement of theoretical and practical education and training to have access to a profession in the host state. Subsequently, the SLIM directive requires a *comparison* between the regulation for training and education of the regulated profession, and such training must be *comparable* in order to allow the applicant to enter the profession of the host state.<sup>52</sup> This could be seen as *conditional equivalence*.

The horizontal approach, which allows Member States to control and compare their respective training and education requirements, gives certainly more room for each Member State’s own interpretation. Although, the “general system” directives require adequate qualifications, as long as the migrant professional holds these requirements then, the host state cannot claim inadequate qualification. The host state must mutually recognise the regulated profession in the home country, which is an explicit expression of the *Cassis de Dijon* ruling.

The horizontal approach does not provide for an automatic application of the principle of mutual recognition. Instead it implies *comparability* of the national laws before the host state will mutually recognise the regulated

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<sup>50</sup> Craig, Paul & de Búrca, Gráinne, *EU Law Text, Cases and Materials*, p.779.

<sup>51</sup> Directive 2001/19/EC of the European Parliament and of the Council of 14 May 2001 amending Council Directives 89/48/EEC and 92/51/EEC on the general system for the recognition of professional qualifications and Council Directives 77/452/EEC, 77/453/EEC, 78/686/EEC, 78/687/EEC, 78/1026/EEC, 78/1027/EEC, 80/154/EEC, 80/155/EEC, 85/384/EEC, 85/432/EEC, 85/433/EEC and 93/16/EEC concerning the professions of nurse responsible for general care, dental practitioner, veterinary surgeon, midwife, architect, pharmacist and doctor (Text with EEA relevance.) – Statements, OJ L 206 , 31/07/2001 P. 0001 – 0051.

<sup>52</sup> Craig, Paul & de Búrca, Gráinne, *EU Law Text, Cases and Materials*, pp.778-779.

profession, which entails a reliance on the competent authority and a mutual trust of each country's system.<sup>53</sup>

### 3.3.4 Third legislative construct – automatic mutual recognition

In the third legislative construct, Directive 99/42/EC, repealed over thirty of the liberalizing and transitional directives that regulated qualified professionals in the 1960's and 70's. These directives were applicable to activities in the skilled craft, industry and commercial sectors, such as plumbers, travel agents, hotel managers and hairdressers. The 1999 directive is based on the same horizontal approach as the two other "general system" directives, Directive 89/42/EEC and Directive 92/51/EEC and is therefore called the "third general directive".<sup>54</sup> This directive has significantly extended the principle of mutual recognition approach established in the "general system" directives to the industrial and professional sectors previously regulated by vertical directives. Directive 99/42/EC recognises not only formal qualifications but also experience and skills. When a Member State requires a general, commercial or professional qualification for a specific profession to be carried out, that professional qualification could be satisfied if the person had carried out that type of activity for a specified period or practice in another Member State. In that case, the host country has to *automatically* permit the person who wants to carry out comparable activity in another Member State; "that Member State shall accept as sufficient evidence of such knowledge and ability the fact that the activity in question has been pursued in another Member State".<sup>55</sup>

This type of automatic mutual recognition approach seem to assume a similarity in how activities are regulated in the different Member States. However, these type of industrial and professional sectors are usually not meticulously regulated in the Member States. As a result, automatic mutual recognition and application of the home country's regulations are possible. Automatic application therefore presumes *similarities* and *comparability* in the underlying substantive law for the principle of mutual recognition to be applied.<sup>56</sup>

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<sup>53</sup> Pertrek, J, Free Movement of professionals and Recognition of Higher Education Diplomas, 12 *YBEL*, 1992, 20-1.

<sup>54</sup> Craig, Paul & de Búrca, Gráinne, *EU Law Text, Cases and Materials*, p.779.

<sup>55</sup> Article 4, Directive 99/42/EC [1999] OJ 201/77.

<sup>56</sup> Peers, Steve, Mutual Recognition and Criminal Law in the European Union: Has the Council got it wrong?, *CML Review* 41, 2004:5, p.21.



### 3.3.5 Forth legislative construct – encouraging more automatic mutual recognition

The forth legislative construct was introduced in 2005 by Directive 2005/36/EC, which entered into force on 20 October 2005.<sup>57</sup> This directive constitutes a reform of the system of the recognition for professional qualifications, introduced to make the labour market more flexible, further liberalize the provisions of services, *encourage more automatic recognition* of qualifications, and simplify administrative procedures.<sup>58</sup> This Directive aims at consolidate twelve of the sectoral directives<sup>59</sup> and the three “general system” directives<sup>60</sup> discussed above into one combined directive. These fifteen directives will be repealed by 20 October 2007, which is the end of the transition date for implementation.

The Directive makes a distinction between “freedom to provide services” and “freedom of establishment” based on the criteria established by the ECJ in *Gebhard*<sup>61</sup> case. It facilitates the temporary and occasionally based cross-

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<sup>57</sup> Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualification, OJ L 255 , 30/09/2005 P. 0022 – 0142.

<sup>58</sup> Summaries of legislation; Reform of the system for the recognition of professional qualifications; <http://europa.eu.int/scadplus/leg/en/cha/c11065.htm>, per 18.04.2006.

<sup>59</sup> Directives; 77/452/EEC [1977] OJ L 176/1, Council Directive 77/453/EEC of 27 June 1977 concerning the coordination of provisions laid down by Law, Regulation or Administrative Action in respect of the activities of nurses responsible for general care, OJ L 176 , 15/07/1977 P. 0008 - 0010 , 78/686/EEC [1978] OJ L 233/1, Council Directive 78/687/EEC of 25 July 1978 concerning the coordination of provisions laid down by Law, Regulation or Administrative Action in respect of the activities of dental practitioners OJ L 233 , 24/08/1978 P. 0010 - 0014, 78/1026/EEC, 78/1027/EEC [1978] OJ L 362/1, Council Directive 80/154/EEC of 21 January 1980 concerning the mutual recognition of diplomas, certificates and other evidence of formal qualifications in midwifery and including measures to facilitate the effective exercise of the right of establishment and freedom to provide services, OJ L 033 , 11/02/1980 P. 0001 - 0007, Council Directive 80/155/EEC of 21 January 1980 concerning the coordination of provisions laid down by Law, Regulation or Administrative Action relating to the taking up and pursuit of the activities of midwives, OJ L 033 , 11/02/1980 P. 0008 - 0012, Council Directive 85/384/EEC of 10 June 1985 on the mutual recognition of diplomas, certificates and other evidence of formal qualifications in architecture, including measures to facilitate the effective exercise of the right of establishment and freedom to provide services, OJ L 223 , 21/08/1985 P. 0015 - 0025, Council Directive 85/432/EEC of 16 September 1985 concerning the coordination of provisions laid down by Law, Regulation or Administrative Action in respect of certain activities in the field of pharmacy, OJ L 253, 24/09/1985 P. 0034 - 0036, Council Directive 85/433/EEC of 16 September 1985 concerning the mutual recognition of diplomas, certificates and other evidence of formal qualifications in pharmacy, including measures to facilitate the effective exercise of the right of establishment relating to certain activities in the field of pharmacy, OJ L 253 , 24/09/1985 P. 0037 - 0042 covering seven of the professions of doctor, nurse, dental practitioner, veterinary surgeon, midwife, pharmacist and architect.

<sup>60</sup> Directives 89/48/EEC [1989] OJ L 019/16, 92/51/EEC [1992] OJ L 209/25 and 99/42/EC [1999] OJ 201/77.

<sup>61</sup> Case C-55/94 Gebhard v. Consiglio dell'Ordine degli Avvocati e Procuratori di Milano [1995] ECR I 4165. The freedom to provide services or establishment is determined by whether the economic activities are stable or more on a temporary basis. The Temporary nature of the activities has to be determined in the light, not only of the duration of the

border services and improves the existing system of recognition for the purpose of permanent establishment in another Member State. The Directive combines the three existing systems of recognition, which are divided into three separate chapters in the Directive. Chapter I of the Directive contains a general system for the recognition of evidence of training, chapter II a system of automatic recognition of qualifications attested by professional experience and chapter III a system of automatic recognition for specific professions.<sup>62</sup>

The first chapter corresponds to the two first general system directives; Directives 89/48/EEC and 92/51/EEC. The host state shall recognise professional qualifications obtained in the home state if the level of training is at least equivalent to that level or to one immediately below that required in the host state. This chapter concerns the general system of recognition. Subsequently, the provisions under this chapter apply to professions that have not been subject to minimum standard harmonisation at the EU-level.<sup>63</sup>

Due to the fact that Member States still have the competence to regulate (or not regulate) professions in their territory, and that there is a lack of harmonization of training standards, there will be differences in national requirements. If there are substantial differences in qualification requirements, the applicant shall be subject to compensatory measures, in the form of an adaptation period or an aptitude test. It is up to the migrant to choose between these two compensatory measures.<sup>64</sup>

The condition for application of the principle of mutual recognition is, like in the two first general system directives, *conditional*. This implies that the qualification acquired in the home state must be equivalent, hence be *comparable* with the requirements in the host state. Article 15 of Directive 2005/36/EC introduced a so-called “common platform” which will make it easier for Member State to recognise professional qualifications. This new provision encourages and promotes Member State to seek a *more automatic recognition* of qualified professions.<sup>65</sup> The common platform aims to facilitate the free movement of professions via a case-by-case assessment of applications by the competent national authority and an increased legal security for the applicant concerning the outcome of the application for access to a profession. The common platform will constitute a “set of criteria of professional qualifications which are suitable for compensating for substantial differences which have been identified between the training requirements existing in the various Member States for a given

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provision of service, but also of its regularity, periodicity or continuity. It is possible to have some infrastructure such as an office, chambers or consulting room as far as it is necessary for the service.

<sup>62</sup> Summaries of legislation; Reform of the system for the recognition of professional qualifications; <http://europa.eu.int/scadplus/leg/en/cha/c11065.htm>, per 18.04.2006.

<sup>63</sup> Ibid.

<sup>64</sup> Ibid.

<sup>65</sup> Preamble (16), Directive 2005/36/EC [2005] OJ L 255/22.

profession”<sup>66</sup>. The identified substantial differences shall be identified by comparing the content of the training and duration in two-thirds of the Member States, and in all Member States which regulate that profession.<sup>67</sup>

The criteria set out in this “common platform” will “bridge” substantial differences between different conditions for training and duration in the Member States. This would mean that the host state may have a higher training requirement than the home state, but cannot require a professional from the home state to take compensatory measures (an adaptation test or an aptitude test), since in accordance with the criteria of the platform, this professional has already compensated for the differences in advance. The criteria in the platform creates a mechanism to overcome the differences in the national qualification requirements and subsequently the need for compensatory measures.<sup>68</sup>

The “common platform” does not affect the Member States competence to decide the requirements to have access to a specific profession in its territory. The provisions are only of voluntary nature and professional organisations are by no means forced to create a common platform or to present it to the Commission. A qualified profession that does not comply with the common platform will come under normal recognition and may undergo compensatory measures.<sup>69</sup> The “common platform” is only a voluntary system that encourage an automatic recognition of the different national training standards.

The second chapter corresponds to the old Directive 99/42/EC and aims to facilitate legislation for the recognition of professional experience in certain industrial, craft and commercial activities. The conditions for recognition of profession experience is based on duration and form. Training could also be taken into account. The applicant must however prove by a certificate recognised by the Member State or judged by a competent professional body to be valid and to have it reduced from the required amount of professional experience. This type of recognition is, as with Directive 99/43/EC, of an automatic nature. Consequently, there was no need to establish a common platform for the recognition of professional experience.<sup>70</sup>

This is also the case for the third chapter, which presents a system of automatic recognition for the professions of doctor, nurse, dentist, veterinary surgeon, midwife, pharmacist and architect. Each Member State

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<sup>66</sup> Article 15(1), Directive 2005/36/EC[2005] OJ L 255/22.

<sup>67</sup> Summaries of legislation; Reform of the system for the recognition of professional qualifications; <http://europa.eu.int/scadplus/leg/en/cha/c11065.htm>, per18.04.2006.

<sup>68</sup> EU-document on how to establish a platform in accordance with Article 15(1), Directive 2005/36/EC[2005] OJ L 255/22.  
[http://europa.eu.int/comm/internal\\_market/qualifications/docs/future/platforms\\_en.pdf](http://europa.eu.int/comm/internal_market/qualifications/docs/future/platforms_en.pdf), per 19.04.2006.

<sup>69</sup> Ibid.

<sup>70</sup> Summaries of legislation; Reform of the system for the recognition of professional qualifications; <http://europa.eu.int/scadplus/leg/en/cha/c11065.htm>, per18.04.2006.

shall automatically recognise evidence of formal qualifications, i.e. certificates of training giving access to professional activities as a doctor, nurse responsible for general care, dental practitioner, veterinary surgeon, midwife, pharmacist and architect, covered by Annex V to the Directive. The directive also sets up minimum training conditions for these professions which will make qualifications more equivalent.<sup>71</sup>

### 3.3.6 Implications of the legislative constructs

As discussed in this chapter, the principle of mutual recognition in the field of professional qualification has been developed through case-law and Community legislation. The implications of my model of construct are four different legislative constructs. The first legislative construct was based on minimum harmonized standards which made it possible to *automatically* recognise another Member State's requirements concerning access to a profession. A minimum standard of a specific profession created similar minimum rules and requirements in the different Member States. This led to a *mutual trust* for other Member States' systems of professional qualifications and made it possible to automatically recognise diplomas awarded in the home state. A prerequisite for such mutual trust was consequently *comparability* of substantive national laws.

In the second legislative construct, the "general system" directives changed the standard harmonization approach and introduced a new *horizontal approach*. These general directives were based on a *conditional* recognition which gave Member States the right to make a comparison between the home state and the host state's regulation before permitting access to a profession. This horizontal approach was possible due to the fact that there already, to a certain extent, had been harmonization in the field of the substantive national laws (the vertical directives; liberalization and transition directives) but because those professions had been regulated in a similar manner in the different Member States. The automatic regulation approach was thus abolished.

In the third legislative construct, the "general system" was extended to include professions such as, hairdressers and hotel managers, not normally highly regulated in the Member States. These type of professions should be automatically recognised if the person applying to work or establish in the host state has acquired a certain period of consecutive experience and possession of skills in another Member State. Furthermore, requirements for these types of professions seem not to differ that widely between the Member States.<sup>72</sup> The connection point in the third legislative construct is, like in the two previous legislative constructs, *comparability* between the substantive national laws.

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<sup>71</sup> Ibid.

<sup>72</sup> Peers, Steve, Mutual Recognition and Criminal Law in the European Union: Has the Council got it wrong?, *CML Review* 41, 2004:5, p.21.

Finally, in the fourth legislative construct, the three previous constructs come into one single directive. In Article 4(2) of the Directive 2005/36 mutual recognition of professional qualification is restricted to those activities that are *comparable*. In accordance with the purpose of the Directive, comparability shall guide whether a profession, which the applicant wishes to have access to in the host state, can be permitted. Mutual recognition is therefore not a phenomenon that promotes an automatic recognition without comparing national systems. Even though the new “common platform” facilitates the free movement of professionals and creates a system with “predefined” qualification criteria in order to overcome the substantial differences in the Member States and abolishes the need for compensatory measures, comparability prevails the encouragement of an automatic recognition of professional qualification.

In conclusion, the conditions for the application of the principle of mutual recognition are three-fold. First, a certain *harmonization* of national training standards is required before the principle of mutual recognition is applicable to the relevant field of law. Second, *similar regulatory traditions of the field of law due to similar social development* in the Member States are necessary for the application of the principle. This implies that there must be a certain type of *comparability* of the underlying substantive law. These conditions are inter-related and must be evaluated together. These conclusions are drawn from the case study of qualified professionals discussed in chapter 3.3.2-3.3.5. However, conditions for the application of the principle of mutual recognition are also applicable on other areas within the first pillar. Professional qualifications are presented merely as an example.

These conditions must then be considered as the core of the application of the principle, because they express a level of comfort and confidence in other Member States’ legal systems which is important for the functioning of mutual recognition. Comparability between national laws promotes mutual trust between legal systems. Chapter 4 will be an examination of whether these conditions apply to the application of the principle of mutual recognition within the third pillar and particularly on the European arrest warrant. Criminal co-operation still rests within the competence of the Member States and there is still a lack of harmonization of criminal law. Is it then possible to apply the principle by analogy on judicial decisions? Is qualified professionals comparable to an European arrest warrant?

### **3.4 Conclusion of the principle of mutual recognition within the first pillar**

So far, we can conclude that the principle of mutual recognition, deriving from the judgment in *Cassis de Dijon*, implies that a Member State must recognise a product lawfully produced and marketed in another Member State, even if the product is produced according to technical or quality requirements which differ from those imposed on its domestic products. This principle was developed in different areas within the first pillar with

the purpose of the establishment of the internal market, subsequent legislation in these areas was therefore based on this principle. The legislation in the field of qualified professionals constitutes an example of this, and can be explained in four different constructs.

Through legislative constructs one can more easily understand the structure of the conditions for the application of the principle of mutual recognition. The conclusion of these four legislative constructs is that in order for the principle of mutual recognition to be applicable there are three prerequisites that must be fulfilled. The first prerequisite is some kind of harmonization of the national substantive law; second, there must be some type of similar regulations dependent on similar development in these Member States' societies. Finally, the conclusion of these prerequisites is that there must be some type of comparability between the national substantive laws. If these prerequisites are fulfilled, then both automatic and conditional mutual recognition can be applicable to an area within the first pillar.

# 4 Application of the principle of mutual recognition within the third pillar

## 4.1 Introduction

In this chapter I will analyse the transfer of the principle of mutual recognition and its application within the third pillar. The Framework decision on the European arrest warrant<sup>73</sup> was the first legislative example where the principle of mutual recognition was extended to the third pillar. The criminal law has not been harmonised in the EU but still the criminal co-operation within the Justice and Home Affairs policy area have developed rapidly since the beginning of the 1990's.<sup>74</sup>

In 1999 at the Council Tampere it was decided that the principle of mutual recognition was going to be extended to judicial decisions and judgements.<sup>75</sup> The principle of mutual recognition, which had been developed through legislation and case-law for the establishment of the internal market, was now going to be applicable to criminal co-operation within the third pillar. The principle of mutual recognition became one of the *cornerstones* for judicial co-operation in criminal matters.<sup>76</sup> The Framework decision on the European Arrest Warrant which entered into force already on 1 January in 2004, is the first example of this break through development. A number of legislative instruments based on the principle of mutual recognition have been adopted since then, and there are proposals for more.

The legislative evolution of the principle within the first pillar, as discussed in chapter 3, has shown that the conditions for its application are harmonization, similar regulations due to a common social development and comparability between national substantive laws. When it comes to the third pillar, the situation is slightly different. There is still a lack of harmonisation of the criminal law in the EU and more over, criminal law is regulated differently in all Member States. The aim of this chapter is to analyse third pillar legislation based on the principle of mutual recognition, particularly the Framework decision on the European Arrest Warrant and the conditions for its application. However, the analysis requires that the criminal law of the EU is put in context. Therefore I will start with a short description of its historical background.

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<sup>73</sup> OJ L 190/1, 18/07/2002.

<sup>74</sup> Monar, Jörg, The Dynamics of Justice and Home Affairs:Laboratories, Driving Forces and Costs, *JCMS*, Vol. 39, No. 4, p. 747.

<sup>75</sup> Tampere European Council, 15-16 October 1999.

<sup>76</sup> *Ibid*, para 33.

## 4.2 Criminal law within the EU

### 4.2.1 Introduction and historical background

Criminal co-operation was never one of the objectives for the establishment of the European Community in the 1950's. Criminal law was seen as an area sovereign for the Member States and was excluded from the Community agenda.<sup>77</sup> In 1957, the European Committee on Crime Problems (CDPC), was established by the Council of Europe.<sup>78</sup> The results achieved by the Council of Europe are still of importance for the development of criminal co-operation within the EU today. Several conventions adopted between the 1950's and the mid-1990's have become the basis for the development of criminal co-operation on enforcement policies and these conventions have been defined as *aquis* since they had to be implemented by the Member States into their national laws.<sup>79</sup> The conventions have been particularly important in the area of cooperation in criminal and penal matters and include; The European Convention on Extradition (1957)<sup>80</sup> and its protocol (1975)<sup>81</sup>, the European Convention on Mutual Assistance in Criminal Matters (1959)<sup>82</sup> and additional protocols (1978)<sup>83</sup>, the European Convention of the International Validity of Criminal Judgements (1970)<sup>84</sup> and the Convention on the Transfer of Sentenced Persons (1983)<sup>85</sup>. Many of these conventions have provided a starting point for the adoption of further measures within the Union.<sup>86</sup>

The so-called Trevi co-operation was established in 1975. It provided the Member States with a framework for the development of co-operation in the fight against drug-trafficking and organized crime. Trevi was a rather loose form of intergovernmental co-operation on crime prevention but paved the way for a more structured co-operation in the third pillar in the 1990's. It played an important role for the creation of the Europol Convention.<sup>87</sup> Most

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<sup>77</sup> Asp, Petter, "EU och den svenska straffrätten", *SvJT*, No 86, 2001, p. 555.

<sup>78</sup> Nilsson, Hans G, Tredje pelaren mellan Maastricht och Amsterdam, *SvJT*, No 84, 1999, p. 711.

<sup>79</sup> Monar, Jörg, The Dynamics of Justice and Home Affairs: Laboratories, Driving Forces and Costs, *JCMS*, Vol. 39, No. 4, p. 749.

<sup>80</sup> Council of Europe 1957 European Extradition Convention, Paris 13 XII 1957, ETS No 24.

<sup>81</sup> Council of Europe 1975 Additional Protocol to the European Convention on Extraditions 1957, ETS No 86

<sup>82</sup> Council of Europe 1959 Convention on Mutual Assistance in Criminal Matters, ETS Treaty Series No 30.

<sup>83</sup> Council of Europe 1978 Protocol to the 1959 Convention on Mutual Assistance in Criminal Matters, ETS No 99.

<sup>84</sup> Council of Europe 1970 Convention on the International Validity of Criminal Judgements, ETS No 70.

<sup>85</sup> Council of Europe 1983 Convention on the Transfer of Sentences Persons, ETS No 112

<sup>86</sup> Monar, Jörg, The Dynamics of Justice and Home Affairs: Laboratories, Driving Forces and Costs, *JCMS*, Vol. 39, No. 4, p. 749.

<sup>87</sup> Council Act of 26 July 1995 drawing up the Convention on the establishment of a European Police Office (Europol Convention) OJ C 316 of 27.11.1995.



of the substance of the Europol Convention was elaborated together with the Trevi-Europol working party. The Trevi co-operation lasted until 1993.<sup>88</sup>

The third pillar was created by the Treaty on the European Union, brought criminal co-operation to the agenda of the EU and furthermore brought it under one institutionalised framework. The structure of the third pillar comprised the Council which adopted common positions, decisions and drawing up agreements; the COREPER which is the Member States' permanent representations and embassies and the K-4 committee which includes representatives from the Member States' Justice and Home Affairs Ministries, set up to help the Council.<sup>89</sup> The creation of the Justice and Home Affairs pillar governed the policies of asylum, immigration, and "third country" nationals. It also included judicial, customs, police co-operation and the establishment of Europol.<sup>90</sup> Criminal co-operation was at this point an important tool for the creation of an internal market. The new economic and political integration and the openness of the internal borders required a new approach to new cross-border crimes within the EU.<sup>91</sup>

The establishment of the Amsterdam Treaty deepened EU criminal co-operation. The aim of the third pillar was to create an area of freedom, security and justice for all EU citizens.<sup>92</sup> "Common actions" were taken in three areas; police co-operation in criminal matters, judicial co-operation in judicial matters and combating of racism and xenophobia. Specific targets were terrorism, drug and arms trafficking, trafficking in persons, crimes against children, corruption and fraud.<sup>93</sup> Under the Amsterdam Treaty, asylum and immigration subjects were transferred to the first pillar, while some procedures were kept from the third pillar. During a transitional period of five years, Member States could together with the Commission take initiative to implement such measures. The structure of co-operation was made more clear for the rest of third pillar co-operation (the police and criminal co-operation), where all measures are to be adopted by the Council on an initiative from the Commission or from a Member State.<sup>94</sup> Another

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<sup>88</sup> Monar, Jörg, *The Dynamics of Justice and Home Affairs: Laboratories, Driving Forces and Costs*, *JCMS*, Vol. 39, No. 4, p. 749.

<sup>89</sup> Craig, Paul & de Búrca, Gráinne, *EU Law Text, Cases and Materials*, p.26.

<sup>90</sup> *Europol* is the European Police office, located in the Haag, the Netherlands which has as its mandate to improve the effectiveness and cooperation of the competent authorities in the Member States in preventing and combating terrorism, unlawful drug trafficking and other serious forms of international crimes which involve organized criminal structures and more than two Member States. (Art 2 in the Europol Convention [1995] OJ C316/2. Europol's task is to help exchange information between the Member States, to collect information and to analyse this information in the AWF (analytical work files), to inform the Member States about suspect crimes.

<sup>91</sup> Träskman, Per-Ole, *Strafflagen för Europeiska Unionen-Fakta och fiktion!*, *SvJT*, No 87, 2002, pp.345-362

<sup>92</sup> Article 2 and 29 EU.

<sup>93</sup> Craig, Paul & De Búrca, Gráinne. *EU Law Text, Cases and Materials*, p.39.

<sup>94</sup> Nilsson, Hans G, *Tredje pelaren mellan Maastricht och Amsterdam*, *SvJT*, No 84, 1999, p 730.

institutional change was that the Parliament, except for the *common positions*, was given an advisory role in the decision-making process.<sup>95</sup>

The Council may adopt four different legal instruments; *common positions*, *framework decisions*, *decisions* and *conventions*.<sup>96</sup> The common positions define the EU's approach in specific matters. The framework decisions enable Member States to create harmonization in a particular field. The framework decisions are binding for Member States, but measures concerning how to achieve results of the decision are up to the Member States. However, framework decisions do not have direct effect.<sup>97</sup> In the *Pupino*<sup>98</sup> case, the ECJ developed somehow, or gave flesh to the bones of Article 34 (2b) EU and gave a judgement on the implementation of framework decisions into the Member States national laws:

“ [...] the national court that is called upon to interpret it must do so *as far as possible in the light of the wording and purpose* (my italic) of the framework decision in order to attain the result which it pursues and thus comply with Article 34 (2b) EU.”<sup>99</sup>

The *Pupino* case concerned a teacher that had maltreated her five-year old pupils. According to Italian national law, it was not possible to take testimony from the children (by a special procedure for taking evidence) before the trial against Ms Pupino. The prosecutor wanted to take early testimony on the grounds that the evidence could not be deferred until the trial due to the witness' youth, psychological state and a possible process of repression of the children. The framework decision required the Member State to ensure that victims are treated with due respect for their personal dignity. According to the ECJ, national courts must take into consideration all the rules of national law and to interpret them, so far as possible, in the light of the wording and purpose of a framework decision adopted under the third pillar.

*Decisions*, on the other hand, are more like regulations and/or decisions in the first pillar. Like the framework decisions, these have no direct effect in the Member States. Finally, *Conventions* shall be adopted by the Member States in accordance with their constitutional implementation measures of international instruments.<sup>100</sup>

The ECJ has jurisdiction over framework decisions and may give preliminary rulings similar to the Article 234 procedure in the first pillar. Preliminary ruling under the third pillar are however, only applicable to Member States that have explicitly accepted the jurisdiction of the ECJ. Furthermore, the ECJ also has the jurisdiction to review the legality of

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<sup>95</sup> Craig, Paul & De Búrqa, Gráinne. *EU Law Text, Cases and Materials*, p.40.

<sup>96</sup> Article 34 EU.

<sup>97</sup> Art 34 (2b) EU.

<sup>98</sup> Case C-105/03 Criminal proceedings against Maria Pupino, [2005] ECR I – 5285.

<sup>99</sup> Ibid, para 43.

<sup>100</sup> Craig, Paul & De Búrqa, Gráinne. *EU Law Text, Cases and Materials*, p.40.

framework decisions and decisions, similar to the Article 230 procedure under the first pillar.<sup>101</sup>

## 4.2.2 Criminal co-operation within the third pillar

One of the objectives of the Union is to maintain and develop an area of freedom, security and justice where the free movement of persons is assured.<sup>102</sup> Title VI of the EU Treaty establishes the provisions on police and judicial co-operation in criminal matters. In Article 29 EU sets out the objective to create a high level of safety within an area of freedom, security and justice. The task of the third pillar is to secure such an area.

Since the establishment of the third pillar area, criminal co-operation has been intensified. Today there is a consistent focus on criminal issues. The development is closely related to the development and establishment of the internal market and an area where people can easily move freely. This development in combination with new types of crimes, especially IT-crimes, has resulted in the proliferation of new kinds of cross-border crimes. Open borders do merely allow additional free movement of goods, persons, services and capital. They also open up for new cross border crime opportunities. This is the consequence of uncontrolled movements. Uncontrolled movements is a laudable political goal and one of the keys to European integration, so perhaps cross border crime is a price we have to pay. IT-crimes across borders now utilise novel techniques facilitated by global communication.<sup>103</sup> This communication can however be used by both the good and the evil.<sup>104</sup>

The new development of cross border crime has triggered a common approach for the combat against EU crimes. These crimes are often seen as threat against the objectives of the Union and are often classified as crimes with an organized criminal structure. Examples of organized crime are drug-trafficking, trafficking in and smuggling of human beings, money laundering, drugs and arms trafficking, etc.<sup>105</sup> Another crime that has been given high priority is the fight against crimes against the financial interests of the EU. This type of crime is seen especially as a threat against the completion of the internal market which guarantees the four freedoms.<sup>106</sup>

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<sup>101</sup> Article 35 EU.

<sup>102</sup> Article 2 EU.

<sup>103</sup> Tråskman, Per-Ole, *Strafflagen för Europeiska Unionen-Fakta och fiktion*, *SvJT*, No 87, (2002), pp. 350 –351.

<sup>104</sup> *Ibid*, p. 351.

<sup>105</sup> *Ibid*, p. 350.

<sup>106</sup> Ferola, Laura "Facing the emerging challenges of transnational crime: What role for the European Union? A legal analysis of its instruments, limits and perspectives", *MJ* No7, 2000, pp. 373-375.

By a Council decision, Europol's mandate was extended in 1999, to fight against forgery of money and means of payment.<sup>107</sup>

The draw backs of EU integration are subsequent developments of new types of crimes. The current situation in the EU today has led to a new focus on combating these new cross border crimes with efficient measures in which the EU can guarantee the objectives of the Union; namely to create an area of freedom, security and justice. In order to assure EU-citizens such an area, the Union was forced to take a further step.

This step resulted in the introduction of the principle of mutual recognition to the third pillar and co-operation in criminal matters. The application of the principle of mutual recognition on judicial decisions was established for the first time at the Tampere Council in 1999.<sup>108</sup> The conclusions from this Council are often referred to as the "Tampere milestones", which was a clear indication that criminal co-operation shall be given high priority within the EU.<sup>109</sup>

### 4.2.3 The Tampere milestones

The discussions of an extension of the principle of mutual recognition to the third pillar was already introduced during a lunch meeting for the Council, during the UK presidency, in February of 1998. These discussions were then further elaborated in the Cardiff conclusions in 1998<sup>110</sup> and in the Vienna action plan<sup>111</sup>, where it was concluded that a process with the aim of extending the principle was about to start. The UK continued their discussions in the K4-committee and in the horizontal working group. These discussions led to question whether the principle of mutual recognition also should be extended to the decisions of the courts in the Member States.<sup>112</sup>

However, the principle of mutual recognition was established for the first time in the summit of the Tampere Council meeting in 1999. The extension of the principle to the third pillar constituted a paradigm shift in the criminal co-operation.<sup>113</sup> It was concluded that the principle of mutual recognition should be one of the *cornerstones* of the judicial co-operation in both civil and criminal matters in the EU. This is a milestone in European criminal co-

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<sup>107</sup> Council Decision of 29 April 1999 extending Europol's mandate to deal with forgery of money and means of payment, OJ C 149 , 28/05/1999 P. 0016 – 0017.

<sup>108</sup> Tampere European Council, 15-16 October 1999.

<sup>109</sup> Träskman, Per-Ole, Vad gör vi med den europeiska kriminalpolitiken?, *SvJT* No 90, 2005, p.859.

<sup>110</sup> The Cardiff European Council on 15 and 16 June 1998, The UK Presidency conclusions.

<sup>111</sup> 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 - Text adopted by the Justice and Home Affairs Council of 3 December 1998, OJ C 019 , 23/01/1999 P. 0001 – 0015.

<sup>112</sup> Nilsson, Hans G, Ömsesidigt erkännande, *SvJT*, No 90, 2005, pp. 888-889.

<sup>113</sup> Nilsson, Hans G, Ömsesidigt erkännande, *SvJT*, No 90, 2005, p. 889.

operation history and worthy of its nickname, “the Tampere milestones”. Paragraph 33 states:

“Enhanced mutual recognition of judicial decisions and judgements and the necessary approximation of legislation would facilitate co-operation between and the judicial protection of individual rights. The European Council therefore endorses the principle of mutual recognition which, in its view, should become the cornerstone of judicial co-operation in both civil and criminal matters within the Union. The principle should apply both to judgements and to other decisions of judicial authorities.”

This was an attempt to create an internal market for the criminal co-operation within the EU by facilitating the free movement of judicial decisions and judgements. This new area was supposed to replace the traditional intergovernmental co-operation in extradition between the Member States.<sup>114</sup>

The principle of mutual recognition, as explicitly stated in the Tampere summit, means that a judicial decision or judgement drawn up in one Member State must be recognised and enforced by judicial authorities in other Member States without further control of the decision. The application of the principle implies here an *automatic* recognition of the other Member States’ legal systems and criminal laws. The executing state shall recognise the judicial decision without questioning its correctness.

In the Tampere conclusions, the Commission was asked by the Council to set up a programme of measures to implement the principle of mutual recognition in criminal matters.<sup>115</sup> This programme of measures was set up by the Council on 30 of November 2000 with the aim of giving effect to the conclusions of the Tampere European Council.<sup>116</sup> The starting point for the programme was that mutual recognition was seen as strengthening criminal co-operation, but at the same time it emphasised individual rights, rehabilitation of offenders, legal certainty and fast track extradition. The program constituted twenty-four measures which have now ended up in several Framework decisions and proposals for Framework decisions based on the principle of mutual recognition. These legislative measures will be discussed in the following chapter.

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<sup>114</sup> Nilsson, Hans G, Ömsesidigt erkännande, *SvJT*, No 90, 2005, p. 889.

<sup>115</sup> Para 37, Tampere European Council, 15-16 October 1999.

<sup>116</sup> Programme of measures to implement the principle of mutual recognition of decisions in criminal matters, OJC 012 , 15/01/2001 P. 0010 – 0022.

## 4.3 Third pillar legislation and proposals based on the principle of mutual recognition

### 4.3.1 General comments

This chapter aims to describe the current situation regarding measures adopted based on the principle of mutual recognition, as well as a survey of proposals for legislation based on the principle. This is necessary in order to give a clear picture of the application of the principle of mutual recognition to third pillar legislation.

So what has been done so far? Several framework decisions based on the principle of mutual recognition have now been adopted. The Framework decision on the European Arrest Warrant and surrender procedure<sup>117</sup> is the first Framework decision that applies the principle of mutual recognition, followed by the Framework decision on execution of orders freezing property and evidence<sup>118</sup> and the Framework decision on the application of the principle of mutual recognition to financial penalties<sup>119</sup>.

There are also proposals for legislation based on the principle of mutual recognition under consultation and negotiation procedures. These proposals include a Framework decision on the application of mutual recognition to confiscation orders<sup>120</sup> initiated by Denmark, and a proposal from the Commission on a Framework decision on the European evidence warrant for obtaining objects, documents and data for use in proceedings in criminal matters<sup>121</sup>.

The following sections (4.3.2-4.3.6 ) describe adopted and proposed framework decisions implementing the principle of mutual recognition. An analysis and conclusion of these adopted and proposed Framework decisions will take place in section 4.3.7. The Framework decision on a European arrest warrant will be discussed in 4.3.2, but a deeper analysis of the European arrest warrant will take place in chapter 4.5.

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<sup>117</sup> OJ L 190/1, 18.07.2002.

<sup>118</sup> Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence, OJ L 196 , 02/08/2003 P. 0045 – 0055.

<sup>119</sup> Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties, OJ L 076 , 22/03/2005 P. 0016 – 0030.

<sup>120</sup> Initiative of the Kingdom of Denmark with a view to the adoption of a Council Framework Decision on the execution in the European Union of confiscation orders OJ C 184 , 02/08/2002 P. 0008 - 0014 [CNS/2002/0816](#) .

<sup>121</sup> Proposal for a COUNCIL FRAMEWORK DECISION on the European Evidence Warrant for obtaining objects, documents and data for use in proceedings in criminal matters, COM (2003) 688(01), [2003/0270/CNS](#).

### 4.3.2 The Framework decision on the European Arrest Warrant

The Framework decision on the European Arrest Warrant and surrender procedure<sup>122</sup> was the first third pillar instrument which implemented the principle of mutual recognition. The event of 9/11 was a catalyst for legal activity in the third pillar. There was already a Commission proposal for the Framework decision before the attacks, but it was adopted earlier because of the events in New York and Washington.<sup>123</sup>

The Framework decision replaced the classical extradition system between Member States, and introduced a new judicial system.<sup>124</sup> This means that the judicial authority in the issuing Member State could require the executing Member State to recognise a judicial decision to have a person surrendered from that Member State.<sup>125</sup> It constitutes an efficient measure for the surrender of people whose return is sought for prosecution or to execute a prison sentence. Article 1 (2) of the Framework decision states that:

“Member States shall execute any European arrest warrant on the basis of the principle of mutual recognition and in accordance with the provisions of this Framework Decision.”<sup>126</sup>

This provision on mutual recognition means that the executing Member State that receives an arrest warrant must recognise the decision of another (the issuing Member State) Member State to surrender that sought person. The framework decision defines a "European arrest warrant" as any judicial decision issued by a Member State with a view to arrest or surrender by another Member State of a requested person, for the purposes of conducting a criminal prosecution, executing a custodial sentence or executing a detention order.<sup>127</sup> The scope of the European arrest warrant is established in Article 2(1) of the Framework decision and establishes that a warrant is applicable where a final sentence of imprisonment or a detention order has been imposed for a period of at least four months for offences punishable by

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<sup>122</sup> OJ L 190/1, 18.07.2002.

<sup>123</sup> Nilsson, Hans G, Ömsesdigt erkännande, *SvJT*, No 90, 2005, p. 890.

<sup>124</sup> The Framework decision on European arrest warrant replaces the 1957 European Extradition Convention, Paris 13 XII 1957, ETS No 24 the European Convention on the suppression of terrorism concluded at Strasbourg on 27 January 1977, ETS No 90, the Convention drawn up on the basis of Article K.3 of the Treaty on European Union on simplified extradition procedure between the Member States of the European Union, OJ C 078, 30/03/1995 P. 0002 - 0010, Council Act of 27 September 1996 drawing up the Convention relating to extradition between the Member States of the European Union, OJ C 313, 23/10/1996 P. 0011 – 0011, relevant provisions in the 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, 22.09.2000, p. 19.

<sup>125</sup> Summaries of legislation, European arrest warrant, <http://europa.eu.int/scadplus/leg/en/lvb/l33167.htm>, per 30.04.2006.

<sup>126</sup> Article 1 (2).

<sup>127</sup> OJ L 190, 18.07.2002, Article 1 (1).

imprisonment or a detention order for a maximum period of at least one year. If a crime is punishable in the issuing Member State by a custodial sentence of at least three years and is covered states by the “list” in Article 2(2), it may lead to surrender even though the crime is not an offence in the executing Member State. The crimes listed in Article 2 contain 32 categories for which the authority in the issuing Member State is entitled to request a person to be surrendered even though the act is not punishable under the criminal law of that Member State. The principle of dual criminality has been abolished for these listed crimes.<sup>128</sup> The listed offences, are among others; terrorism, trafficking in human beings, corruption, participation in a criminal organisation, counterfeiting currency, murder, racism and xenophobia, rape, trafficking in stolen vehicles, fraud including that affecting the financial interest of the Communities.

There are two different categories of grounds for refusal to recognise or to execute an European arrest warrant. The *mandatory* grounds for refusal are established in Article 3 and the *optional* grounds for refusal are established in Article 4. There are three grounds for mandatory non-recognition/execution and seven grounds for optional non-recognition/execution.<sup>129</sup>

The mandatory grounds for refusal means that the executing Member State is obliged to refuse to recognise or execute the arrest warrant if:

- there has already been a final judgment concerning the same (the *ne bis in idem* principle<sup>130</sup>);
- the arrest warrant is based upon an offence which is covered by an amnesty in the executing Member State;
- the person who is subject to the arrest warrant can not be held criminally responsible by the executing State due to his young age.

The optional grounds for refusal means that the executing Member State can choose to recognise the arrest warrant or not. There is however an obligation to examine whether the arrest warrant and the national provisions issued in one Member State are comparable or are to be seen as equivalent to the national laws of the executing Member State.<sup>131</sup> Some of those optional grounds are applicable if:

- a crime is not punishable under the executing Member States law and is not covered by any of the 32 listed offences in Article 2(2) (the principle of dual criminality is applicable here);

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<sup>128</sup> Keijzer, Nico, *The EAW Framework Decision between Past and Future*, Centre for European Policy Studies, p.2.

<sup>129</sup> Peers, Steve, *Mutual Recognition and Criminal Law in the European Union: Has the Council got it wrong?*, *CML Review* 41, 2004:5, p.16.

<sup>130</sup> The principle of *ne bis in idem* means that a person can not be sentenced for the same crime two times.

<sup>131</sup> Peers, Steve, *Mutual Recognition and Criminal Law in the European Union: Has the Council got it wrong?*, *CML Review* 41, 2004:5, p.15.



- the requested person is prosecuted for the same offence in the executing Member State;
- the judicial authority in the executing Member State has decided not to prosecute or decided to stay the proceedings for the same offence which the European arrest warrant is based upon;
- the statutory time limitations under the executing Member State's national law would be violated and if the offence falls within the jurisdiction of the executing Member State and under its criminal law;
- there has already been carried out a final judgement against the requested person for the same offence judged by a third country (extending *the ne bis in idem*-principle to third countries).

The main rule in the Framework decision is automatic mutual recognition, which implies that the executing Member State must immediately recognise a European arrest warrant issued in another Member State. However, the executing Member State can use either the mandatory or the optional grounds for refusal to recognise the arrest warrant. The optional grounds for refusal can be seen as a conditional application of the principle of mutual recognition. If the executing Member State finds the European arrest warrant to be based on provisions that are not seen as equivalent to the national laws in that state, it has the possibility to refuse to recognise the judicial decision. Nevertheless, if an arrest warrant is based on any of the offence listed in Article 2, the judicial decision must be recognised in the executing state, regardless of whether that offence is an offence under that Member State's national criminal law. Immediately, this optional ground for refusal changes from a conditional to automatic application of the principle of mutual recognition.

In chapter 4.5, I shall discuss further the extension and application of the principle of mutual recognition on the European arrest warrant. I will look into the implementation of the principle from a more practical perspective in order to evaluate the conditions for its application. I have chosen to make a case study on the European arrest warrant since this is the Framework decision for which there is a lot of written material. I will however continue to give a survey of the other third pillar legislation that have implemented the principle of mutual recognition.

### **4.3.3 The Framework decision on freezing of property and evidence**

The Framework decision on freezing property and evidence<sup>132</sup> was adopted in 2003 on the initiative of Belgium, Sweden and France. These Member States had made the proposal for the Framework decision already during the Belgium presidency in 2001, but the 9/11-attacks stopped plans for its immediate adoption. Criminal co-operation got a new meaning after the attacks in New York and Washington and the focus shifted to the

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<sup>132</sup> OJ L 196/45, 02.08.2003.

Framework decision on the European arrest warrant.<sup>133</sup> The Framework decision on freezing property and evidence entered into force on the 2 August in 2005.<sup>134</sup> The Council extends by this Framework Decision the principle of mutual recognition to pre-trial orders freezing property or evidence.<sup>135</sup>

The Framework decision makes it possible for a judge in one Member State to send an order to another Member State to freeze assets with the aim of obtaining evidence or with a view for future confiscation of the property.<sup>136</sup> An order to freeze assets and evidence shall be recognised in the executing Member State without any further required formality. The judicial authority of the executing state must take all necessary measures to immediately execute the order just like it was an order from a judicial authority in that Member State.<sup>137</sup>

The immediate execution of a freezing order implies that the application of the principle of mutual recognition is, like in the case of the European Arrest warrant, of an *automatic* character. The executive state must recognise the other Member State's order and subsequently recognise that Member States criminal legal system. This presumes that the executive state must have trust in the issuing state's legal system and that the freezing order is well-judged. Moreover, the automatic application of the principle is also evident due to the fact that there are very few grounds for refusal a freezing order. Article 7 gives the ground for when the competent judicial authorities of the executing state may refuse to recognise or execute the freezing order. The executive Member State may refuse to recognise the order if for example:

- the certificate is incomplete or manifestly does not correspond to the freezing order;
- immunity or privilege under the law of the executing Member State makes it impossible to execute the freezing order;
- a final judgment has already been given for the same facts (infringement of the *ne bis in idem* principle).

The final ground for refusal presumes that the order does not cover one of the listed offences in Article 3. The application of the principle of mutual recognition is here *conditional*, in that sense that if the freezing order is based on an act that is not an offence in the executive Member State, then there is no requirement to automatically recognise the order from the issuing Member State. However, if the freezing order covers an offence in the so-called positive list, it must be *automatically* recognised in the executive Member State. This list covers a series of serious offences for which the requirement of double criminality has

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<sup>133</sup> Nilsson, Hans G, Ömsesidigt erkännande, *SvJT*, No 90, 2005, p. 890.

<sup>134</sup> Ibid, p. 892.

<sup>135</sup> Summaries of legislation; Execution of freezing property or evidence, <http://www.europa.eu.int/scadplus/leg/en/lvb/l16009.htm>, per 25.04.2006.

<sup>136</sup> Article 3 (1 a, b).

<sup>137</sup> Article 5.

been abolished. These are cases where the offences are punishable in the issuing State by a custodial sentence of a maximum period of at least three years. The offences include; participation in a criminal organisation; terrorism; kidnapping; corruption and fraud; murder and grievous bodily injury; trafficking in human beings; racism; rape, etc. The list is however not exhaustive and the Council has therefore included the possibility to decide at any time to add offences to the list.<sup>138</sup> The Framework decision is therefore a dynamic instrument, where amendments can be made as soon as new types of crime appear in the society.

#### **4.3.4 The Framework decision on the application of the principle of mutual recognition to financial penalties**

Free trade between Member States and the fact that people and companies can move easily across the borders have created new problems for the enforcement of financial penalties. This is particularly the case with financial penalties against those not residing in the country where the offence is committed. Those offences which carry financial penalties have the risk of not being enforced due to the risk that the person being punished can easily escape to another country.<sup>139</sup>

The Council adopted the Framework decision on the application of the principle of mutual recognition to financial penalties<sup>140</sup> in 2005 on the initiative of the UK, Ireland, France and Sweden. The new Framework decision will facilitate an efficient and fast enforcement of the penalty. A person being fined in Sweden or any other Member State can no longer escape that easily from the fine just by leaving the country. The Framework decision will assure that individuals and companies may not avoid paying their fines. It will enable the competent authority to send, for execution, a financial penalty direct to an authority in that Member State where the natural or legal person has property, income, where he or her resides or where the company is registered.<sup>141</sup>

The enforcement of a financial penalty in another Member State requires that the principle of mutual recognition apply. Article 6 states:

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<sup>138</sup> Summaries of legislation; Execution of freezing property or evidence, <http://www.europa.eu.int/scadplus/leg/en/lvb/l16009.htm>, per 26.04.2006.

<sup>139</sup> EU-document on “ The recognition and enforcement of financial penalties throughout the European Union” ; [http://www.europa.eu.int/comm/justice\\_home/fsj/criminal/recognition/fsj\\_criminal\\_financial\\_penalties\\_en.htm](http://www.europa.eu.int/comm/justice_home/fsj/criminal/recognition/fsj_criminal_financial_penalties_en.htm), per 27.04.2006.

<sup>140</sup> OJ L 76/16, 22.03.2005.

<sup>141</sup> EU-document on “ The recognition and enforcement of financial penalties throughout the European Union” ; [http://www.europa.eu.int/comm/justice\\_home/fsj/criminal/recognition/fsj\\_criminal\\_financial\\_penalties\\_en.htm](http://www.europa.eu.int/comm/justice_home/fsj/criminal/recognition/fsj_criminal_financial_penalties_en.htm), per 27.04.2006.

“The competent authorities in the executing State shall recognise a decision which has been transmitted in accordance with Article 4 without any further formality being required and shall forthwith take all the necessary measures for its execution, unless the competent authority decides to invoke one of the grounds for non-recognition or non-execution provided for in Article 7.”

This implies an *automatic* recognition of the decision to have the financial penalty executed in the Member State where the natural or legal person has property, income or resides or is registered. The fine shall be executed without further formality and the executing Member State must take all necessary measures to have it executed. There is however, like in the case of the Framework decision of freezing property or evidence, a *conditional* recognition of the decision to have a financial penalty executed in another Member State. The executing Member State can refuse to recognise the decision where:

- the certificate is incomplete or manifestly does not correspond to the decision to have a financial penalty executed;
- a decision to have financial penalty executed has already been made against the person for the same offence (the *ne bis in idem* principle);
- the decision relates to acts which are not punishable under the law of the executing Member State;
- where execution is impossible due to according to the law of the executing State; where the principle of dual criminality applies;
- where there is an issue of jurisdiction due to the same act ;
- immunity makes it impossible to execute the decision;
- where the person that is subject to the judicial decision is under the age of criminal liability in the executing Member State;
- where a decision was made in absentia and where the fine is below €70.<sup>142</sup>

The decision shall be *automatically* recognised if the offence for which the financial penalty has been carried out is covered by the list in Article 5. The principle of dual criminality has been abolished for listed offences, and hence the crime does not have to be an offence under the law of the executing state. The list covers offences such as; terrorism, trafficking in human beings, sexual exploitation of children and child pornography, corruption, murder, grievous bodily injury, trafficking in stolen vehicles, conduct which infringes road traffic regulations (including breaches of regulations pertaining to driving hours and rest periods) and regulations on hazardous goods, etc. The list covers criminal offences but also road traffic and health and safety offences which may escape effective cross border enforcement.<sup>143</sup> All these offences will be covered by an *automatic* mutual recognition.

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<sup>142</sup> EU-document on “ The recognition and enforcement of financial penalties throughout the European Union” concerning Article 7;  
[http://www.europa.eu.int/comm/justice\\_home/fsj/criminal/recognition/fsj\\_criminal\\_financial\\_penalties\\_en.htm](http://www.europa.eu.int/comm/justice_home/fsj/criminal/recognition/fsj_criminal_financial_penalties_en.htm), per 27.04.2006.

<sup>143</sup>Ibid.

The Framework decision entered into force on 22nd of March 2005. The deadline for its transposition into the Member States national law is on 22nd of March 2007.<sup>144</sup>

#### **4.3.5 A proposal for a Framework decision on the application of mutual recognition to confiscation orders**

In 2002, Denmark initiated a proposal for the adoption of a Framework decision on the application of mutual recognition to confiscation orders.<sup>145</sup> It has not been adopted yet but is being negotiated between the Member States and the Commission.<sup>146</sup> This Framework decision is closely related to and supplements the Framework decision on orders of freezing property and evidence.<sup>147</sup> The Framework decision defines “confiscation” as a measure that aims to remove property from the person committing one of the offences listed in the decision.

The proposal will enable a judicial authority of one Member State to send an order directly to the judicial authority of another Member State to have the property confiscated. The competent authority will recognise and execute it without further formality.<sup>148</sup> Like in the previous Framework decisions applying the principle of mutual recognition, *automatic* recognition will be applicable unless one of the grounds for non-recognition is invoked. The grounds for non-recognition are similar to the grounds in the above-mentioned Framework decisions and constitutes a *conditional* application of the principle of mutual recognition.<sup>149</sup>

The principle of dual criminal will not be applicable to the listed offences in the Framework decision. The offence must, however, be punished by the issuing Member State through the imposition of a custodial sentence of at least three years. The listed offences for which dual criminality have been abolished are; terrorism, illicit drug-trafficking, cyber-crime, euro counterfeiting, corruption, fraud, racism and xenophobia, crimes falling within the remit of the International Criminal Court, etc. A confiscation order based upon one of these listed offences must be *automatically*

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<sup>144</sup> Summaries of legislation on Mutual recognition of financial penalties; <http://europa.eu.int/scadplus/leg/en/lvb/l16003.htm>, per 13.05.2006.

<sup>145</sup> OJ C 184/8 , 02/08/2002 , [CNS/2002/0816](http://europa.eu.int/legislation/special-acts/cns/2002/0816)

<sup>146</sup> [CNS/2002/0816](http://europa.eu.int/legislation/special-acts/cns/2002/0816).

<sup>147</sup> Eu-document on “The freezing and confiscation of property across borders has become an essential tool in the fight against crime”; [http://www.europa.eu.int/comm/justice\\_home/fsj/criminal/recognition/fsj\\_criminal\\_confiscation\\_en.htm](http://www.europa.eu.int/comm/justice_home/fsj/criminal/recognition/fsj_criminal_confiscation_en.htm) , per 27.04.2006.

<sup>148</sup> Summaries of legislation: Recognition and execution of confiscation orders <http://europa.eu.int/scadplus/leg/en/lvb/l33202.htm> , per 27.04.2006.

<sup>149</sup> Eu-document on “The freezing and confiscation of property across borders has become an essential tool in the fight against crime”; [http://www.europa.eu.int/comm/justice\\_home/fsj/criminal/recognition/fsj\\_criminal\\_confiscation\\_en.htm](http://www.europa.eu.int/comm/justice_home/fsj/criminal/recognition/fsj_criminal_confiscation_en.htm) , per 27.04.2006.

recognised and executed without further formalities. It will be executed in accordance with the law of the executing Member State.<sup>150</sup>

### 4.3.6 A proposal for a Framework decision on the European evidence warrant

On 14 of November 2003 the Commission made a proposal for a Council Framework decision on the European evidence warrant for obtaining objects, documents and data for use in proceedings in criminal matters.<sup>151</sup> The Framework decision does not directly aim at mutual admissibility of evidence, nevertheless it aims to *facilitate* the admissibility of evidence obtained in other Member States.<sup>152</sup> By applying the principle of mutual recognition on the European evidence warrant this will lead to a more efficient judicial co-operation in criminal matters.<sup>153</sup>

Article 11 in the proposal lays down the rules for mutual recognition and execution. It states that; “This Article requires that the competent authorities of the executing State recognise a European Evidence Warrant without any further formality being required and forth with take the necessary measures for its execution. The execution of the warrant should be carried out in the same way as the objects, documents or data would be obtained by an authority of the executing State.”<sup>154</sup>

The existing mutual assistance regime is regulated by the Council of Europe 1959 Convention on Mutual Assistance in Criminal Matters.<sup>155</sup> This Convention gives the framework for co-operation on obtaining evidence. The current co-operation is based on requests for mutual assistance from one Member State to another, and the request will be executed in accordance with the law of the executing Member State. The Convention does permit several grounds for refusal to execute a request for assistance in an evidence case. The 1959 Convention has been supplemented by its protocol in 1978<sup>156</sup> and in 2001<sup>157</sup>. It has also been supplemented with the Schengen Convention<sup>158</sup>, the EU Convention of May 2000 on Mutual

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<sup>150</sup> Summaries of legislation: Recognition and execution of confiscation orders <http://europa.eu.int/scadplus/leg/en/lvb/l33202.htm>, per 27.04.2006.

<sup>151</sup> COM/2003/0688 final, CNS 2003/0270.

<sup>152</sup> Vervaele, J.A.E, (ed.), *European Evidence Warrant Transnational Judicial Inquiries in the EU*, foreword vi.

<sup>153</sup> Ijzerman, A, From the Cats Portfolio: European Evidence Warrant, in *European Evidence Warrant Transnational Judicial Inquiries in the EU*, editor Vervaele J.A.E, p.9

<sup>154</sup> Article 11.

<sup>155</sup> Council of Europe 1959 Convention on Mutual Assistance in Criminal Matters, ETS No 30.

<sup>156</sup> Council of Europe 1978 Protocol to the 1959 Convention on Mutual Assistance in Criminal Matters, ETS No 99.

<sup>157</sup> Council of Europe 2001 Protocol to the 1959 Convention on Mutual Assistance in Criminal Matters, ETS No 182.

<sup>158</sup> 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, 22.09.2000, p. 19.

Assistance in Criminal Matters<sup>159</sup> and its 2001 Protocol<sup>160</sup>, which have strengthened criminal co-operation for obtaining evidence within the EU. The EU 2000 Convention and its 2001 Protocol have not yet entered into force.

Even though these instruments have improved the co-operation in obtaining evidence, the co-operation is still based on mutual assistance which can slow down the process and make it non-efficient. The proposal for a European evidence warrant, would according the Commission, speed up the process. The application of the principle of mutual recognition to the evidence warrant implies that a request made by a judicial authority in one Member State will be directly recognised in the executing state. This will make the process much more efficient.<sup>161</sup>

Article 15 in the proposal lays down the grounds for non-recognition and non-execution of the evidence warrant. A decision of non-recognition or non-execution can only be made by a judge, investigating magistrate or prosecutor in the executing Member State. A Member State may refuse to recognise or execute an evidence warrant issued by another Member State where; the *ne bis in idem*-principle is applicable<sup>162</sup>, where an immunity or privilege under the law of the executing Member State makes it impossible to execute the warrant<sup>163</sup>, where the evidence warrant is based on an act which does not constitute an offence under the national law of the executing Member State.<sup>164</sup> The last ground does not apply if the offence is covered by the positive list. Like in the previous Framework decision, automatic mutual recognition is applicable to any of these listed crimes. The listed offences are copies of the offences listed in the Framework decision on the European arrest warrant.<sup>165</sup>

### **4.3.7 Conclusions of the legislation implementing the principle of mutual recognition**

The framework decisions implementing the principle of mutual recognition are constructed in a similar manner. The aim of these decisions is to enhance criminal and judicial co-operation between the Member States. By applying the principle of mutual recognition to these legislative measures one opens

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<sup>159</sup> Convention of 29 May 2000 on Mutual Assistance in Criminal Matters between the Member States of the European Union, OJ C 197, 12.07.2000.

<sup>160</sup> Council Act of 16 October 2001 establishing, in accordance with Article 34 of the Treaty on European Union, the Protocol to the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union, OJ C 326, 21.11.2001, p. 1.

<sup>161</sup> COM/2003/0688 final, CNS 2003/0270.

<sup>162</sup> Ibid, para 103.

<sup>163</sup> Ibid, para 104.

<sup>164</sup> Ibid, para 105.

<sup>165</sup> Ibid, para 108

up for a more efficient and quicker procedure in the fight against crimes in the EU.

The application of the principle of mutual recognition means that a judicial decision or judgement taken in one Member State (the issuing Member State) shall be recognised and executed in another Member State (the executive Member State). The main rule is an *automatic* recognition of the other Member State's judicial decision and should be followed by an *automatic* execution. This implies that the Member States must have mutual trust in each other and not opposing each others legal systems. The application of the principle in its pure form means that a Member State shall not make any further examinations before executing the judicial decision.

The framework decisions contain however provisions for which the mutual recognition is *conditional*. *Conditional* mutual recognition enables the executing Member State to compare its national law with the law of the issuing Member State and there through evaluate whether the provisions are comparable and considered to be equivalent to its national rules. Consequently, conditional mutual recognition gives the executing Member State a choice to recognise the judicial decision or not. For example; if a judicial decision to freeze property is not seen as similar to the national law in the executing Member State it can refuse to recognise and execute the decision. Nevertheless, Member States are still under an obligation to examine the facts to see whether the national laws are sufficiently similar<sup>166</sup>

On the other hand, *conditional* mutual recognition is not applicable to any of the listed offences for which the principle of dual criminality has been abolished. Any judicial decisions based on any of these listed offences must be *automatically* recognised in the executing Member State. From my point of view this is a drastic restriction of the Member States sovereignty, and a far-reaching interference of the Member States national legal systems and the judiciary.

The Framework decision regarding a European arrest warrant contains both mandatory and optional grounds for refusal, whereas the other Framework decisions solely contains optional grounds for refusal. The Framework decision on freezing property and evidence contains fewer optional grounds for refusal than those in the Framework decision of the European arrest warrant. The grounds for refusal in the proposal for a Framework decision on the application of mutual recognition to confiscation orders, together with other grounds for refusal such as; that the confiscation order was issued under the issuing Member State's rules on extending confiscation.<sup>167</sup> Finally, the Framework decision on the application of the principle of mutual recognition to financial penalties and the Framework decision on the European evidence warrant contain several optional grounds for non-recognition, including a human rights exception.

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<sup>166</sup> Peers, Steve, Mutual Recognition and Criminal Law in the European Union: Has the Council got it wrong?, *CML Review* 41, 2004:5, p.15.

<sup>167</sup> Article 6 (4), OJ C 184/8, 02.08.2002.



By studying the legislation implementing the principle of mutual recognition one can clearly see that the principle, as developed for the establishment of the internal market, has been extended directly to the area of criminal co-operation. These legislative measures and the proposals that are under negotiation are based on a principle that needed harmonization to be applicable within the first pillar. The previous harmonization measures and the comparability between national laws have led to a mutual trust for the different national legal systems. But how can there be mutual trust for the various national criminal legal systems when there is no previous harmonization of criminal law in the EU? The national criminal law in EU is still widely different in the various Member States national laws. From my perspective mutual trust for each others legal systems is something that is going to take time. It is nothing that just can be created from one day to another. However the ECJ held in the joined cases *Götütok/Brügge*<sup>168</sup> that [...]“Member States shall have mutual trust in their criminal justice systems and that each of them recognises the criminal law enforced in the other Member State even when the outcome would be different if its own national law were applies”. The case concerned the interpretation of the ne bis idem principle and whether Article 54 of the Schengen Implementation Convention stopped Germany to prosecute a man for an act which had already been finally judged in The Netherlands. This case is seen as a *landmark case* as it is considered as a third pillar “*Cassis de Dijon*”.<sup>169</sup>

Before going into an analysis of the European arrest warrant I shall give a short presentation on the Green book which has been issued by the Commission on the approximation, mutual recognition and enforcement of criminal sanctions in the European Union. The Green book is not a sufficient legal source, subsequently legal argumentation can not be based on the Commissions ideas in this thesis. I therefore excluded this part in chapter 4.3. Nevertheless, it contains interesting ideas and thoughts about the concept of mutual recognition in the field of criminal co-operation.

## **4.4 Green book on approximation, mutual recognition and enforcement of criminal sanctions in the European Union**

The Commission presented its Green book on the approximation, mutual recognition and enforcement of criminal sanctions in the European Union on 7 May 2004.<sup>170</sup> It includes far-reaching ideas on common criminal sanctions in the EU. It aims at analysing whether the differences in the

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<sup>168</sup> Case C-187/1 and Case C-385/01, para 33, Hüseyin Götütok and Klaus Brügge, [2003] ECR I 5689.

<sup>169</sup> Nilsson, Hans G, Ömsesidigt erkännande, *SvJT*, No 90, 2005, p. 892.

<sup>170</sup> COM (2004) 334 final, GREEN PAPER on the approximation, mutual recognition and enforcement of criminal sanctions in the European Union.

various Member States are an obstacle to attain the objective of the EU, which is to create a high level of protection in an area of freedom, security and justice. According to the Green book, it is also important to analyse whether these differences are creating problems for the judicial co-operation between the Member States in their work to implement the principle of mutual recognition.<sup>171</sup>

The Council has adopted several Framework decisions on criminal offences, such as fraud involving non-cash means of payment, euro counterfeiting, money laundering, terrorism, environmental crime, on the fight against ship-source pollution, trafficking in human beings and facilitation of unauthorised entry and residence. There is also a proposal for Framework Decisions on racism and xenophobia.<sup>172</sup> The purpose behind these measures is to approximate the Member States' legislation and regulations. The penalties set out in these instruments are more of a minimum levels for maximum penalties and not so much of determining effective proportionate and dissuasive penalties. These penalties which are characterised of custodial sentences constitute minimum approximation, which are according to the Commission to meet the objective to assure an area of freedom, justice and security. The Commission argues that there are "sharp" differences in the national laws on penalties due to historical, cultural and legal reasons that reflect different developments in each specific Member State. Despite these differences, and in accordance with the principle of subsidiarity, it is crucial to identify differences in the national criminal laws which are harmful to create a safe area within the EU. The argumentation of an approximation of the criminal penalties is based on several objectives. One of the mentioned objectives is the *symbolic message*, that the Union would put out by defining common offences and penalties in relation to certain forms of crimes. The Commission states that;

"The approximation of penalties would help to give the general public a shared sense of justice, which is one of the conditions for establishing the area of freedom, security and justice. It would also be a clear signal that certain forms of conduct are unacceptable and punished on an equivalent basis. The sexual exploitation of children is a good example. Approximation of the definition of the offence and of the level of the penalty incurred for it, provides effective and equivalent protection for citizens throughout the Union against a phenomenon that strikes against the principles and values shared by the Member States."<sup>173</sup>

According to the Green book, same criminal act would lead to the same penalty wherever the offence is committed in the Union. Furthermore, the new type of cross-border crimes need a degree of approximation of the substantive criminal law since Member States are not capable of solving these crimes on their own. Minimum standards would prevent the creation of so called "free-states" where criminals can take advantage of differences

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<sup>171</sup> Ibid, p.2.

<sup>172</sup> See chapter 4.5.3.

<sup>173</sup> COM (2004) 334 final, p.9.

in penalties in the various Member States and move from one state to another in order to evade prosecution or enforcement of penalties.<sup>174</sup>

Moreover, the Commission argues that approximation of the criminal law concerning sanctions and their enforcement would facilitate the acceptance of the mutual recognition of judicial decision and judgements since it would enhance mutual trust for each others legal systems. However, minimum standards are according to the Commission not a pre-requisite for the application of the principle of mutual recognition on judicial decisions and judgements. Approximation and mutual recognition shall be seen as complementary to each other in order to achieve the goal of an area of freedom, justice and security.<sup>175</sup>

The outcome of the Green book is leaning towards a single European jurisdiction with a common criminal legal system. These ideas are based on the conception that there are common values in Europe, and that a criminal legal system concerning sanctions and the enforcement of these penalties can be based upon these values. The Green book includes far-reaching ideas, which would have huge impact on the criminal legal systems in the different Member States. The criminal legal systems are very different today and perhaps an approximation would solve the problem of mistrust for each others legal systems.

In the next chapter I shall analyse the European arrest warrant and the impact of the application of the mutual recognition on the European arrest warrant.

## **4.5 The European Arrest Warrant**

### **4.5.1 The general structure of the European Arrest Warrant**

As described in the chapter 4.3.2, the Framework decision on the European arrest warrant<sup>176</sup> was the first directive applying the principle of mutual recognition. The European arrest warrant replaces classical extradition procedure between the Member State by applying the principle of mutual recognition to a judicial decision in order to have a person surrendered to the issuing Member State. The traditional request system between the Member States is abolished and replaced by a system where Member States must recognise each others legal systems. The arrest warrant is based on the issuing states legislation which implies that the receiving state must have fully trust for the recognition of the order of arrest, or surrender of a sought person. This means that the Member States must accept and recognise that the national laws in the different Member States are just *different*.<sup>177</sup>

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<sup>174</sup> Ibid.

<sup>175</sup> Ibid, p.10.

<sup>176</sup> OJ L 190/1, 18.07.2002.

<sup>177</sup> Nilsson, Hans G, Ömsesidigt erkännande, *SvJT*, No 90, 2005, p. 892.

The acceptance of the differences in the various national criminal law is the outcome of the application of the principle of mutual recognition on the European arrest warrant. An automatic recognition implies that Member States must have full faith and trust in each others legal systems.<sup>178</sup> The European arrest warrant is communicated between the judicial authorities in the issuing Member State and the executing Member State. This means that the Member States also have to have full faith and trust in their judges and in their decision making. In contrast with the classic extradition system, the new system of surrender between the Member States abolishes political intervention such as diplomatic authorities or even Ministries of Justice. Instead the executive power controls the arrest warrant and takes a decision on the basis of political considerations.<sup>179</sup>

The most striking feature with the Framework decision is the abolishment of *the principle of dual criminality*. In classical extradition terms, the principle means that a country cannot accept a request to extradite if the extradition is based on an act which is not an offence in the executing Member State. However, in the Framework decision on the European arrest warrant the principle of dual criminality has been abolished for 32 crimes listed in Article 2(2). As been discussed above this means that if an arrest warrant contains any of the listed offences, the executing Member State must recognise and execute the warrant without any further control, hence an *automatic* recognition of the European arrest warrant. The list has been criticised by many legal scholars and NGOs. According to them, it is too imprecise, especially since the list covers offences such as IT-crimes, terrorism and environmental related crimes.<sup>180</sup> The scholars, that take a more positive view on the European arrest warrant, claim that the lack of precise definitions of the offences is not a problem since it is the definition of the offence under the issuing state's law and not the executing state's definition that will be applicable on the arrest warrant. These scholars also claim that an European arrest warrant only can be subject to the abolition of the principle of dual criminality if the offence is punishable in the issuing Member State by a custodial sentence or a detention order for a minimum period of at least three years.<sup>181</sup> And if the crime is not covered by the list or is punishable with less than 3 years, the principle of dual criminality is still applicable. One can assume that the 32 categories of offences are all severe crimes that are covered by most Member States criminal laws. In practice this could mean that there will not be major differences to mutually recognise each others judicial decisions.<sup>182</sup> All the arguments given by the more positive school might hold true. But if one look at the European arrest warrant from a more practical point of view, one realises that the image is

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<sup>178</sup> Nilsson, Hans G, "Mutual trust and mutual recognition of our differences" in *La reconnaissance de décisions judiciaires pénales dans l'Union européenne*, (ed.) De Kerhove, Gilles & Weyembergh, Anne, p.159.

<sup>179</sup> Document from the European Parliament on the European Arrest Warrant; [http://www.europarl.eu.int/comparl/libe/elsj/zoom\\_in/16\\_en.htm](http://www.europarl.eu.int/comparl/libe/elsj/zoom_in/16_en.htm), per 02.05.2006.

<sup>180</sup> Nilsson, Hans G, Ömsesidigt erkännande, *SvJT*, No 90, 2005, p.891.

<sup>181</sup> Article 2(2).

<sup>182</sup> Nilsson, Hans G, Ömsesidigt erkännande, *SvJT*, No 90, 2005, p. 892.

not complete. There are cracks in the mirror. The practical application of the arrest warrant will be discussed in the next chapter.

## 4.5.2 The practical application of the European Arrest Warrant

The European arrest warrant is characterised of efficiency and a quick surrender system. Practically, the new system of surrender instead of extradition has been successful. According to the Framework decision an arrest warrant shall be executed within 60 days from the day that the requested person was arrested.<sup>183</sup> If the requested person consents to the surrender, the European arrest warrant shall be executed within 10 days.<sup>184</sup> Where the execution cannot be made within these time-limits the judicial authority shall inform the issuing state about the reasons for why the arrest warrant could not be executed within the time-limits and could ask for an extension of 30 days.<sup>185</sup> The time-limits are short with respect to the time-frames in the old extradition system, where a request to extradite a person was executed after 12-18 months.<sup>186</sup> According to the Commission's report based on Article 34 of the Framework decision on the European arrest warrant<sup>187</sup>, Member States have "amply" fulfilled the obligation to execute a warrant within the time-limits set out in Article 17. According to this report, the average time for the execution of a warrant is now 43 days. For those requests of persons consenting the surrender to the issuing state the average is only 13 days.<sup>188</sup> For example; in France it is possible to execute a warrant within 9 days. If there is opposition to execute the warrant, a cap of 20 days is to be expected. Since approximately 98 percent of all arrest warrants are based on crimes committed in the issuing Member State, one realises the importance for the victims, which are waiting for justice, that the procedure is efficient.<sup>189</sup> In Sweden, an European arrest warrant can be executed relatively quickly, and in Spain an execution will be done within 26 days which is a clear improvement since the adoption of the Framework decision on the European arrest warrant. Before the adoption it could take years to extradite the requested person.<sup>190</sup>

According to the Commission's evaluation report on the European arrest warrant, the Framework decision has granted a greater efficiency since it limits the grounds for refusal to surrender a requested person. The Commission states that, in general, the Framework decision has been respected. In September 2004, nine months after the expiring date for implementation of the Framework decision, 2603 warrants were issued. Of

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<sup>183</sup> Article 17(3).

<sup>184</sup> Article 17(2).

<sup>185</sup> Article 17(4).

<sup>186</sup> Nilsson, Hans G, Ömsesidigt erkännande, *SvJT*, No 90, 2005, p. 892.

<sup>187</sup> COM (2006) 8 final, 24.01.2006.

<sup>188</sup> *Ibid*, p.5.

<sup>189</sup> Nilsson, Hans G, Ömsesidigt erkännande, *SvJT*, No 90, 2005, p. 892.

<sup>190</sup> *Ibid*.

those 2603 warrants, 653 persons got arrested and 104 persons got surrendered. Few cases rendered in a refusal to execute an arrest warrant. These statistics cover only 20 of the 25 Member States. According to the Commission's report these numbers can only be improved since the Framework decision is now implemented in all Member States.<sup>191</sup> There will be a second report published in June 2006, which will update the evaluation of the implementation of the Framework decision.<sup>192</sup>

Apart from the efficiency that the European arrest warrant has created for the Member States in their fight against crimes within EU, there are still differences in the legal systems in the various countries. Due to the fact that there is no harmonization in the area of criminal law, the application of the principle of mutual recognition creates practical problems. The abolishment of dual criminality have led to that many Member States had to make changes in their constitutions in order to comply with the Framework decision and the application of the principle of mutual recognition. Despite the fact that the ECJ in the *Pupino* case<sup>193</sup>, stated that national law must be interpreted and implemented in the light of the Framework decision, Framework decisions do not have a general supremacy over the Member States constitutions and national law.

The expiring date for the transposition of the Framework decision was 1 of January 2004. There was however initial implementation problems in several of the Member States which delayed the full transposition of the decision. This delay was mainly a consequence of constitutional problems in Cyprus, Germany and Poland. Constitutional provisions prohibiting the extradition of national citizens created problems for the implementation of the Framework decision in these Member States. The constitutional courts in these countries declared the Framework decision to be incompatible with the provisions of their constitutions.<sup>194</sup> The Polish Constitutional court stated on 27 of April in 2005 that the Framework decision and the provision to extradite the Member State's own nationals was contradictory to the Polish Constitution. The German Constitutional court came to the same verdict on 18 July 2005 and the Cypriot Constitutional court on 7 of November 2005.<sup>195</sup>

The Framework decision on the European arrest warrant has in some Member States created problems for the implementation of the very strong form of the principle of mutual recognition. However, the application of this principle on the criminal co-operation has a good purpose. Let us take a practical example. The Swedish foreign minister Anna Lindh was murdered in 2002. Her murderer was eventually caught and sentenced to long imprisonment. Suppose that after a couple of months the murderer escapes

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<sup>191</sup> COM (2006) 8 final, p.4 24.01.2006.

<sup>192</sup> Ibid, p.2.

<sup>193</sup> Case C-105/03 Criminal proceedings against Maria Pupino, [2005] ECR I – 5285.

<sup>194</sup> Document from the European Parliament on the European Arrest Warrant; [http://www.europarl.eu.int/comparl/libe/elsj/zoom\\_in/16\\_en.htm](http://www.europarl.eu.int/comparl/libe/elsj/zoom_in/16_en.htm), per 02.05.2006.

<sup>195</sup> Ibid.

from the Swedish prison, and makes his way to France. An European arrest warrant would then be a very efficient and quick tool to have the murderer surrendered back to Sweden. Since “murder” is one of the listed offences, for which the principle of dual criminality has been abolished, France must execute the arrest warrant automatically. However, in the case of murder the abolishment of dual criminality does not make much of a difference since murder is a crime which is presumably also an offence in France. The trial would probably be relatively similar in France as to the one in Sweden, and the sentence would probably look rather similar. Therefore no major difficulties for France to mutually recognise the judicial decision and to have the murderer surrendered back to Sweden will occur. In case of relatively equal rules this would facilitate the mutual trust for each others judicial decisions. This example shows how the principle of mutual recognition can make the criminal co-operation more efficient. An European arrest warrant will make it possible to have an escaped murderer surrendered from France within approximately one and a half month.

The above mentioned example shows how successful the European arrest warrant potentially can be. However, this is not always the case. Suppose that Sweden search for a man in the UK, having committed a drug crime in Sweden. The Swedish judicial authority sends an European arrest warrant to the British judicial authority to have the person surrendered for the purpose to have him detained in Sweden. The arrest warrant is based on evidence obtained by the Swedish police in accordance with the principle of free assessment of evidence. Free assessment of evidence means that the Swedish police can use any type of evidence (written or oral) in order to have the suspect person detained. Even though bugging is not allowed under Swedish procedural criminal law, any evidence obtained on a tape can be used as evidence in a trial.<sup>196</sup> However, since the UK has a strict assessment of evidence, which only allows a person to be detained based on evidence taken in accordance with the law, this may lead to conflict with the Swedish arrest warrant which is based on evidence obtained in accordance with Swedish procedure rules and the principle of free assessment of evidence. Since the arrest warrant concerns one of the listed offences, the UK shall not question the judicial decision as such and shall automatically recognise the arrest warrant even though the evidence would not have led to detention in the UK. The British procedural laws must be set aside even though it is against the foundations of UK criminal and procedural law. Consequently, the UK is bound to arrest and detain this person on its territory based on evidence obtained in another Member State in an, for the UK, unlawful manner. The application of mutual recognition will in this case lead to an obligation to recognise another Member States less stricter assessment of evidence. The application of the principle of mutual recognition on the European arrest warrant is here extended to the national procedural rules. This means that a British citizen can be arrested in the UK for evidence obtained in accordance with the procedural rules in Sweden. In this situation, the UK is expected to have full faith and trust in a judicial

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<sup>196</sup> RB 35:1.

decision which would not be lawful in that country. From my point of view this creates a situation of legal uncertainty. Even though the same type of crime is punishable in both the issuing and the executing Member State, this does not mean that the procedural rules are the same in these two countries. For example bank robbery is presumably punishable in both Sweden and the UK. Although the evidence is enough to have the criminal sentenced in Sweden, this does not necessarily need to be the case in the UK due to different procedural criminal rules.

The application of the principle of mutual recognition on the European arrest warrant can obviously meet obstacles in the executing state. These obstacles are nonetheless non-conquerable since an arrest warrant based on any of the listed offences must be immediately recognised and without any further controls of the judicial decision. However, where the national rules are different there is a risk of *mutual mistrust*. This problem raises the question whether the application of the principle of mutual recognition is the right alternative in the combat against crimes within EU or is harmonization of criminal law a better solution? In the next chapter I shall discuss the reason why the application of the principle of mutual recognition creates awkward situations in some cases but not in other.

### **4.5.3 Conditions for the application of the principle of mutual recognition on the European Arrest Warrant – is there a sufficient harmonization?**

The application of the principle of mutual recognition on the European arrest warrant could be compared to the application of the principle on the first pillar and the free movement of goods, persons and services. The abolition of the principle of dual criminality in the European arrest warrant is a consequence of the extension of the principle of mutual recognition to the criminal co-operation within the EU. The principle implies that that the executing Member State must recognise the issuing Member State's judicial decision to have a person surrendered. Like in the first pillar, the host/executing state is not allowed to refuse entrance due to different regulations in the issuing/home state. Differences in regulations are not valid reasons for refusal. Is it correct to make an analogy between the shape of a banana or the training standard for a specific professions and a judicial decision or a judgement?

The analysis of the first pillar legislation in chapter 3, led to the conclusion that there are conditions for the application of the principle. The prerequisites for the application of the principle of mutual recognition is firstly harmonization in the specific field of law, secondly there is a need of a common legal approach due to a similar social development in the society and thirdly there is a need of comparability of the national laws in the Member States. These conditions for the application of the principle of



mutual recognition are not separated from each other. They should be evaluated together as they are dependent on each other. Comparable underlying substantive law is here a result of harmonization and similar legal traditions. This is obvious in the field of qualified professionals. For example, a dentist or a nurse can go to another Member State and have its qualification *automatically* recognised, since there has been a previous harmonization of the training standards in the different Member States. Are these conditions applicable to the implementation of the principle of mutual recognition on the European arrest warrant? Is there a sufficient harmonization in the field of criminal law which can legitimise an *automatic* application of the principle of mutual recognition on the European arrest warrant? As this chapter will show, in some cases the conditions actually apply, whereas in other cases, the conditions only apply to a certain extent.

The mutual recognition of another Member States regulations on goods, persons and services is a result of a prior harmonization process within EU. A similar harmonization process cannot be found in the field of EU criminal law. Since the adoption of the Amsterdam Treaty, the criminal co-operation have led to the adoption and proposals for adoption on several EU measures concerning the combating of specific crimes such as; participation in a criminal co-operation<sup>197</sup>, terrorism<sup>198</sup>, trafficking in human beings<sup>199</sup>, sexual exploitation of children and child pornography<sup>200</sup>, corruption<sup>201</sup>, fraud against the EC budget<sup>202</sup>, money laundering<sup>203</sup>, counterfeiting currency<sup>204</sup>,

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<sup>197</sup> Joint action of 21 December 1998 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, on making it a criminal offence to participate in a criminal organisation in the Member States of the European Union, OJ L 351 , 29/12/1998 P. 0001 – 0003.

<sup>198</sup> Council Framework Decision of 13 June 2002 on combating terrorism, OJ L 164 , 22/06/2002 P. 0003 – 0007.

<sup>199</sup> Council Framework Decision of 19 July 2002 on combating trafficking in human beings, OJ L 203 , 01/08/2002 P. 0001 – 0004.

<sup>200</sup> Council framework Decision 2004/68/JHA of 22 December 2003 on combating the sexual exploitation of children and child pornography, OJ L 013 , 20/01/2004 P. 0044 – 0048.

<sup>201</sup> Council Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector, OJ L 192 , 31/07/2003 P. 0054 – 0056.

<sup>202</sup> Council Act of 26 July 1995 drawing up the Convention on the protection of the European Communities' financial interests, Council Act of 27 September 1996 drawing up a Protocol to the Convention on the protection of the European Communities' financial interests, OJ C 313 , 23/10/1996 P. 0001 – 0001, Second Protocol, drawn up on the basis of Article K.3 of the treaty on European Union, to the Convention on the protection of the European Communities' financial interests - Joint Declaration on Article 13 (2) - Commission Declaration on Article 7, OJ C 221 , 19/07/1997 P. 0012 – 0022.

<sup>203</sup> Council Directive 91/308/EEC of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering, OJ L 166 , 28/06/1991 P. 0077 – 0083, Directive 2001/97/EC of the European Parliament and of the Council of 4 December 2001 amending Council Directive 91/308/EEC on prevention of the use of the financial system for the purpose of money laundering - Commission Declaration, OJ L 344 , 28/12/2001 P. 0076 – 0082.

<sup>204</sup> 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, OJ L 140 , 14/06/2000 P. 0001 – 0003.

computer related crime<sup>205</sup>, environmental crime,<sup>206</sup> facilitation of unauthorized entry or residence<sup>207</sup>, racism and xenophobia<sup>208</sup>, drug trafficking<sup>209</sup> and forgery of means of payment<sup>210</sup>. Some of these crimes are covered by Council of Europe or UN measures or is listed in the annex to the Europol Convention. These measures cover also some of the other listed offences in the European arrest warrant.<sup>211</sup> Due to the limitations of this thesis, I will focus solely on the EU measures.

The third pillar instruments refer only to the definitions of crimes, and do not set out the conditions for criminal liability. Subsequently, the relevant Framework decisions do not give the circumstances in which a criminal offence has been committed.<sup>212</sup> Further more, these legal acts only set out minimum sanctions and the requirement that these measures shall be as effective as possible. The Framework decisions therefore allow national interpretation, which makes it possible to implement the decisions in line with legal tradition and criminal policy in the country.

However, the adopted Framework decisions do not cover all the 32 listed crimes in the European arrest warrant. This means that there is still a lack of harmonized definitions of several of the listed offences in the so called “list”. These offences are for example; murder and grievous bodily injury, kidnapping, rape, sabotage, arson, armed robbery, etc. Perhaps, it is possible to presume that there is a similar criminalization of many of the listed offences in the Member States. For example murder, is presumably an offence in all the Member States. One can also presume that murder is punishable by a custodial sentence of at least three years in all the Member States. But can we assume that all the offences are punishable in all Member States? To a certain extent, such an assumption is probably correct. The listed offences are de facto of a severe character and therefore the list seems rather logical. But this does not mean that the definitions, sanctions and criminal liability are exactly similarly considered in all Member States.

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<sup>205</sup> Council Framework Decision 2005/222/JHA of 24 February 2005 on attacks against information systems, OJ L 069 , 16/03/2005 P. 0067 – 0071.

<sup>206</sup> OJ L 255/11, 30.09.2005, OJ L 255/164, 30.09.2005, Framework decision in the Protection of the environment through criminal law OJ L 29/55 , 05.02.2003 was annulled by the ECJ’s judgement of 13.9.2005 in case C-176/03, *Commission v. Council*, Judgment of the Court of 13.9.2005, n.y.r..

<sup>207</sup> Council Framework Decision 2002/946/JHA of 28 November on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence, OJ L 328 05/12/2002, P. 001-003.

<sup>208</sup> Proposal for a COUNCIL FRAMEWORK DECISION on combating racism and xenophobia, COM 2001 (64), 2001/0270/CNS.

<sup>209</sup> Council Framework Decision 2004/757/JHA of 25 october 2004 laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking, OJ L 335 , 11/11/2004 P. 0008 – 0011.

<sup>210</sup> Council Framework Decision 2001/413/JHA of 28 May 2001 combating fraud and counterfeiting of non-cash means of payment, OJ L 149 , 02/06/2001 P. 0001 – 0004.

<sup>211</sup> Peers, Steve, Mutual Recognition and Criminal Law in the European Union: Has the Council got it wrong?, *CML Review* 41, 2004:5, p.30-34.

<sup>212</sup> *Ibid*, p.32.

For example *participation in a criminal organisation* is not an offence under the Swedish criminal law. In the Swedish preparatory work for the implementation of the Framework decision on an European arrest warrant, the Swedish government states that the differences in the national laws can be of a mere technical nature. For example liability concerning attempt and preparation to commit a crime can have different structures in the various Member States. This is the case concerning “participation in a criminal organisation”. Participation in such an organisation can be considered as an attempt or preparation to a serious crime under Swedish criminal law, whereas in other Member States “participation in a criminal organisation” is considered as an independent crime. According to the Swedish government the differences are only of a technical nature.<sup>213</sup> Professor Per-Ole Tråskman claims that this observation is correct, but at the same time opposes that this is enough reason to abolish dual criminality. If criminal liability is applicable in a certain case in both Member State A, and Member State B, then the requirement of dual criminality is fulfilled even though the provisions are differently applied and are based on different technical solutions. Nevertheless, if criminal liability is not applicable, the requirement on dual criminality is not fulfilled due to differences in the legal-political discussions in the two countries.<sup>214</sup> Subsequently, where there is a difference in criminal liability this implies that an automatic recognition of an arrest warrant will constitute recognition of a crime which does not constitute a crime under that Member State’s national law.

A closer examination of the 32 listed offences lead to the discovery that the list is nothing more than a *list*. It simply outlines the crimes for which the principle of dual criminality has been abolished, but does not specify or give any further details of which acts that would come under a specific type of crime. The 32 different types of crimes are simply mentioned in these terms:

1. participation in a criminal organisation
2. terrorism
3. trafficking in human beings
4. sexual exploitation of children and child pornography
5. illicit trafficking in narcotic drugs and psychotropic substances
6. illicit trafficking in weapons, munitions and explosives
7. corruption
8. fraud, including that affecting the financial interests of the European Communities within the meaning of the Convention of 26 July 1995 on the protection of the European Communities' financial interests
9. laundering of the proceeds of crime
10. counterfeiting currency, including of the euro
11. computer-related crime
12. environmental crime, including illicit trafficking in endangered animal species and in endangered plant species and varieties,
13. facilitation of unauthorised entry and residence

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<sup>213</sup> Prop.2003/04:07. p.78.

<sup>214</sup> Hand-out from Professor Per-Ole Tråskman’s lecture on the European Arrest Warrant, 5 of May 2006.

14. murder, grievous bodily injury
15. illicit trade in human organs and tissue
16. kidnapping, illegal restraint and hostage-taking
17. racism and xenophobia
18. organised or armed robbery
19. illicit trafficking in cultural goods, including antiques and works of art
20. swindling
21. racketeering and extortion
22. counterfeiting and piracy of products
23. forgery of administrative documents and trafficking therein
24. forgery of means of payment
25. illicit trafficking in hormonal substances and other growth promoters
26. illicit trafficking in nuclear or radioactive materials
27. trafficking in stolen vehicles
28. rape
29. arson
30. crimes within the jurisdiction of the International Criminal Court
31. unlawful seizure of aircraft/ships
32. sabotage

The reason for the lack of further specification of the listed offences is dependent on the fact that each Member State has still the competence to design its own criminal system. The national criminal system is still a matter of the Member State's internal affairs and all the decisions to criminalize an act is still taken at the national level. The national legislator decides which acts should be punishable and the sanctions for committing these crimes. This is the fundament of the criminal co-operation in EU today, and the common EU criminal system is still secondary in relation to the national criminal system.<sup>215</sup>

There are national differences in what type of act should be criminalized but also differences concerning sanctions for the different type of crimes. The explanation to this, could be differences in the need of fighting different crimes in each specific country. The need to criminalize is depending on social, economic and the general situation in the country which will have effect on which type of crimes that are criminalized.<sup>216</sup> According to Professor Per Ole Tråskman, the differences in the criminalization also depends on a dissension which is based on different ideological ideas or different set of values. These ideologies or values will affect the assessment of which act that should be criminalized. Some countries think it is wrong to criminalize specific acts which are criminalized in other Member States.<sup>217</sup> Such an act could for example be holocaust denial or prostitution. In Sweden, the purchase of sex is criminalized, which is not the case in both

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<sup>215</sup> Tråskman, Per-Ole, *Den Europeiska Arresteringsordern*, Hand out from lecture on the 5 of May, 2006, p. 11.

<sup>216</sup> Prop. 2003/04:7, p.78.

<sup>217</sup> Tråskman Per-Ole, *Den Europeiska Arresteringsordern*, Hand out from lecture on the 5 of May, 2006, p. 11.

Germany and the Netherlands. Holocaust denial which is an offence in Austria, would in Sweden be considered as contradictory to the freedom of expression. This does not mean that Sweden accepts acts that are related to xenophobia. These are just examples where different values and fundamental ideology will have an impact on the criminalization process in the Member States.<sup>218</sup> The differences will have an effect on the implementation of the Framework decisions, and consequently there will be differences in criminalization and sanctions of those crimes. Due to the differences in criminal policies and legal traditions in the Member States, big differences in the implementation into the national criminal laws and subsequently a divergence in practice is to be expected.<sup>219</sup>

In conclusion, there are some offences that are presumably similar punished and sanctioned in all Member States. Murder would constitute such a crime. This implies that these types of offences can be subject for an automatic application of the principle of mutual recognition. An automatic application would be legitimised due to the comparability between the Member States criminal law. Consequently, there is a need of comparability between the underlying national laws for a correct application of the principle. However, in those cases where there is a lack of comparability of the underlying substantive law, an automatic application of the principle is more problematic. Its application is dependent on a mutual trust for each others system in order to be fully effective. There will be a lack of mutual trust where there is insufficient harmonization.<sup>220</sup>

So what shall we do with the general mistrust between Member States' governments and between Member States' judicial authorities? Is harmonization of the Member States criminal laws the only solution to the practical problems that appears? A harmonization would bridge the differences and the mistrust that exist to a large extent within EU today. Without a harmonization we will live with the mistrust which the differences in the criminal legal systems create. And we have to live with the idea that the differences might lead to the surrender of a person for a crime for which is not an offence under the executing Member State's national criminal law.<sup>221</sup> Since there is still a mistrust for each others legal systems, one can draw the conclusion that the Council has taken a step too fast assuming that there is no need of harmonized and comparable national rules. The conditions for the application of the principle of mutual recognition on the European arrest warrant are not fulfilled, following the model applicable to mutual recognition of qualified professionals in the first pillar. The reason for not harmonising, at least to some part of the Member States criminal legal systems before applying an automatic mutual recognition on judicial decision, is to be proven by those who dislike the thought of EU as one jurisdiction.

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<sup>218</sup> Tråskman, Per-Ole, lecture on the European arrest warrant on the 5 of May 2006.

<sup>219</sup> Peers, Steve, Mutual Recognition and Criminal Law in the European Union: Has the Council got it wrong?, *CML Review* 41, 2004:5, p.34.

<sup>220</sup> Nilsson, Hans G, Ömsesidigt erkännande, *SvJT*, No 90, 2005, p.895.

<sup>221</sup> *Ibid.*

## 5 Conclusion

The application of the principle of mutual recognition on the first pillar area has been enormously important for the creation of the internal market. Goods, persons and services can move more easily in an area as a consequence of that Member States mutually recognise each others regulations and legal systems. The automatic mutual recognition has been a successful concept in the first pillar area. The idea behind this success was the judgement in *Cassis de Dijon*.<sup>222</sup> The case concerned one Member State's regulations on the content of alcohol which had to be recognised by other Member States, even though this was contrary to other countries regulation on alcohol content. This case concerned particularly a bottle of *Cassis de Dijon* and in general the goods flowing between the Member States. The principle was later on extended to other areas within the first pillar. In the area of qualified professionals, the application of the principle has lead to the fact that a teacher, hair-dresser or a doctor can go to another Member State to have his or hers professional automatically accepted and recognised. This has been a successful instrument to facilitate the free movement of professionals in EU.

The conditions for the application of the principle of mutual recognition within the first pillar were developed in legislation and case-law. The principle had been preceded by harmonization of the relevant regulations in various legal fields. The harmonization process had been a rather slow process and the introduction of the principle of mutual recognition was seen as a more efficient alternative and preserved at the same time the national differences. However, the switch to a legislation that was based on an automatic mutual recognition was possible thanks to the previous harmonization process in the different areas. The first legislative construct was based on an early harmonization of rules and the principle of mutual recognition could be based on an automatic application. The second legislative construct was instead based on a conditional mutual recognition and opened up for the so called "general system" directives. These directives allowed Member States to compare the differences in the national substantive laws and to evaluate if they were considered to be equal. If they were not considered to be so, Member State had then the possibility to refuse to recognise a certain professional. However, this conditional recognition was possible due to a similar development in the specific legal field which meant a similar legal approach. The third legislative construct was based on the same approach, although the general system was extended to professions which are normally not highly educated. The conditional mutual recognition was here instead focused on consecutive experience and possession of skills obtained in another Member State. In the fourth legislative construct, which is the contemporary legislative construct,

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<sup>222</sup> Case 120/78, *Rewe - Zentrale AG v. Bundesmonopolverwaltung für Brantweinn* [1979] ECR 649 (*Cassis de Dijon*).

automatic mutual recognition is emphasised. The new directive consolidates over thirty old “general system” directives. The four legislative constructs set out the conditions for the application of an automatic and a conditional mutual recognition. The establishment of the principle of mutual recognition in the legislation process was dependent on a previous harmonization. An early harmonization process has led to a similar development of the legal traditions in the Member State. This development paved the way for the introduction of the “general system” directives and the conditional mutual recognition. The conditions for the application of the principle of mutual recognition are subsequently a previous harmonization, a similar development in the societies which have led to similar legal traditions, hence comparability between the underlying substantive law. Member States can therefore have a mutual trust for each others legal systems and system regulating the qualified professionals.

As has already been pointed out; the principle of mutual recognition has an enormously importance for the establishment and sustainability of the internal market. However, does a successful application of the principle in the first pillar necessarily mean a similar success in the third pillar? Do the same conditions exist for the application of the principle on the criminal co-operation in the third pillar?

The principle was extended to the criminal co-operation in 1999 at the Tampere Council. Without any further explanations for the conditions to be applicable, the model of the principle was extended from the first pillar to the third pillar. The principle shall be seen as one of the cornerstones of the criminal co-operation in the EU. The Framework decision on the European arrest warrant was the first measure to be adopted based on the principle of mutual recognition. The application of the automatic mutual recognition on arrest warrants has however not been without practical problems. An automatic recognition of the arrest warrant was introduced for the 32 crimes that are listed in the so called “list”. An arrest warrant which is based on any of these crimes must be automatically recognised by the executing Member State. The list does not give any further details about the definitions of the crimes. Some of these crimes have been subject to Framework decisions where the definitions for the crimes are set out. These definitions leave however room for the Member States own interpretation and to implement them in line with the criminal legal system in each Member State. Moreover, these Framework decisions do not cover all the listed offences. For example, there is no common definition of murder. However, this is an offence which is presumably punishable with more than three years in every Member State. In these cases, an automatic mutual recognition can be successful and serve its purpose of being an efficient tool in the fight against crimes in the EU.

A successful automatic recognition requires comparability between the criminal law of the legal systems. Therefore, the application of automatic mutual recognition will be different for those crimes which are not similarly criminalized in the issuing state and the executing state. Even though the

offence is similarly punishable, differences in the procedural rules may lead to mistrust for each others system. Mutual recognition shall be based on mutual trust for each others legal system, but also trust in that the judicial decision is well-judged. From my point of view this will be problematic in those cases where there is no comparability between the criminal law of the two states. This is even more obvious in a case where a Member State has to surrender a citizen for having committed a crime in another Member State which is not an offence in the first Member State. After all, free movement of judicial decisions seems more like a political aim than a well functional legal instrument in combating criminality in EU.



## 6 Final remarks

Despite the fact that the application of the principle of mutual recognition on the European arrest warrant seem hasty, it has above all created an efficient extradition system. Member States have now accepted to apply the European arrest warrant and this implies an acceptance of each others legal systems even though there might be differences. The fact that these differences might lead to legal uncertainty is perhaps a prize Member States have to pay. The concept of mutual recognition, as was discussed in chapter 1, implies acceptance and puts values in diversity without segregating it. Acceptance is a more significant form of tolerance which is based on reciprocal respect for the differences. Where there is no sufficient harmonization the only thing that seems to remain is to have respect for each others differences. However, as this thesis has shown the mutual respect does not come without obstacles. Differences in legal traditions and legal systems will lead to practical problems in the reciprocal respect. Nonetheless, practical problems that might appear are perhaps something that we have to take into account. Perhaps the goal to combat crimes in an efficient manner takes priority over the means that we are using to achieve that goal. I agree that this goal is of high priority, nevertheless that does not exclude that putting critical questions to the agenda.

To mutually recognise other legal systems presupposes sufficient harmonization of the national legal systems. Where there is a lack of comparable substantive laws, mutual recognition will always lead to situations where Member States must recognise unfamiliar systems. This is however not merely a situation for states executing an arrest warrant. This situation will also appear in other areas where the principle of mutual recognition is applicable and where there is no sufficient harmonization. This is perhaps most evident in the field of private international law and mutual recognition of family laws. However, due to practical reasons, states must recognise a marriage between a Muslim and a secularised western person, even though the foundations of a Muslim marriage is rather different from a secularised one. The practical problems that appear in the recognition of an institution from an unknown legal system are perhaps something that states must learn to accept. The reason for this is that love knows no limits, and neither do crimes.

Nonetheless, mutual recognition of marriages, divorces, parental responsibilities, etc. are perhaps slightly different from mutual recognition of judicial decisions concerning crimes. First, mutual recognition of a marriage does not have the same interest to be protected by a state. To freely contract a marriage does not have the same legal implications as to be surrendered to another Member State based on a crime which does not constitute a crime under its own national law. Second, a judicial decision that shall be mutually recognised might be subject to the breach of the well established criminal law principle; *nullum crimen, nulla poena sine lege*.

This principle stipulates that there is no crime or punishment without being regulated in law. Without harmonized criminal laws this principle seems to fade away. A common criminal system might override the friction of mutually recognising judicial decisions from Member States with different criminal legal system. The idea of a common criminal system can also be found in the Commission's Green book on the approximation, mutual recognition and enforcement of criminal sanction in EU. From my perspective, the future work of implementing the principle of mutual recognition must, however, proceed with caution and carefulness. A potential harmonization must consider the design of the different legal systems in the Union in order not to tear them apart.

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