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Mutual Recognition in Criminal Matters From Its Creation to the New Developments in the Lisbon Treaty (Draft version)

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Introduction

This paper aims at analysing the origins of this principle of mutual recognition, giving an overview of its evolution in the recent years until its incorporation in the Lisbon Treaty, which was signed on 13 December 2007. This will be done in the context of the European cooperation in criminal matters and the project of a European criminal law. Is this project feasible and was it clearly conceived from the beginning? An account of the mutual recognition measures which have been adopted so far will be given, considering their level of implementation and their effectiveness.

1 Mutual recognition vs. harmonisation in criminal law

Mutual recognition is the principle whereby a decision by the judicial authority of a Member State is recognised and, if necessary, enforced in another Member State.

Long before the European Union acquired some initial competence in criminal law areas, many international instruments of criminal law, mainly Conventions, were developed within the Council of Europe. As will be seen later, a few Conventions already included mutual recognition elements. The majority of these instruments were never ratified, due to the lack of confidence between the countries which were at that time members of the Council of Europe.

The European Union acquired its first modest competences in criminal matters as a result of the Maastricht Treaty (1992)[1]. Some years earlier however two important instruments had been concluded by the Benelux, France and Germany: the Schengen Agreement (1985) and the Convention implementing the Schengen Agreement (CISA, 1990), which were in 1997 integrated in the Amsterdam Treaty by means of a Protocol[2] . The Schengen *acquis* provided the Member States with mutual assistance tools for national police and judicial authorities.

In the period between Maastricht and Amsterdam, a great number of criminal law instruments were approved, but due to the absence of a coherent European criminal policy and rather weak Third Pillar instruments, the qualitative outcome was rather modest. Nevertheless, some clear signs were given that the European Union was heading towards more integrated judicial cooperation instead of a purely political inter-state cooperation.

The Amsterdam Treaty's goal of creating an Area of Freedom, Security and Justice resulted in the sharpening of judicial cooperation tools and in general a strengthening of the competences of the European institutions in criminal justice cooperation. More powerful Third Pillar legal instruments were created, in particular the Framework Decisions, which, together with the Decisions, were to be legally binding.

One of the first significant instruments approved in the post-Amsterdam era was undoubtedly the 2000 Convention on Mutual Legal Assistance, which substantially improved enhanced the role of the national judge by stressing the importance of direct contact between judges. The Convention also introduced joint investigation teams.[3] Furthermore, the *forum regit actum* principle, enshrined in this Convention,

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[1] Treaty of Maastricht, OJ C 191, 29/07/1992.

[2] Agreement between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders; Convention implementing the Schengen Agreement, OJ L 239 , 22/09/2000; Treaty of Amsterdam, OJ C 340, 10/11/1997. See M. Den Boer (ed.)- *The implementation of Schengen, Maastricht*, EIPA (1997).

[3] Council Act of 29 May 2000 establishing in accordance with Article 34 of the Treaty on European Union the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union, OJ C 197 of 12.07.2000 and Protocol, OJ C 326 of 16.10.2001. See in particular E. Denza- 'The 2000 Convention on Mutual Assistance in Criminal Matters' (2003) *Common Market Law Review* 1047.

enabled the requesting Member State to specify to the requested Member State how the gathering of evidence should be carried out in order to be valid in the requesting Member State.

At the Cardiff European Council in 1998 the Council was asked to "identify the scope for greater mutual recognition of decisions of each other's courts"[4]. As a result, the Tampere European Council one year later introduced for the first time in the Third Pillar the principle of mutual recognition. However, although mutual recognition is considered "the cornerstone of judicial cooperation in both civil and criminal matters within the Union"[5] in an area of freedom, security and justice, there are still very few instruments implementing it from a criminal law point of view and there is not much case law[6]. Mutual recognition is therefore at the moment more a political concept than a juridical one.

Mutual recognition is different from harmonisation. In a first attempt to define the two concepts, we may be tempted to argue that the latter's aim is to eliminate differences and create a homogeneous system possibly with one code and one judicial court, while in the former differences are kept within a system of cooperation and mutual trust. In the first case there is a common normative standard which is agreed by more subjects at the same time, whereas in the second case there are many normative standards that co-exist and every subject can impose its own standard through a request to another subject that is obliged to incorporate it into its system.

However, this attempt is doomed to fail as we look at the legal provisions and at the opinions of the experts. Both terms (harmonisation and mutual recognition) seem to be used in different contexts and with different purposes, sometimes with a lack of coherence. Harmonisation is sometimes seen more as approximation of rules, in the sense of bringing different laws of different states closer to each other. Sometimes it

[4]Cardiff European Council (15-16 June 1998) Presidency Conclusions, par. 39, available at http://europa.eu/european_council/conclusions/index_en.htm

[5] Tampere European Council (15-16 October 1999) Presidency Conclusions, par. 33, see link above.

[6] However, the ECJ held in Joined Cases C-187/01 and C-385/01, *Gőzűtok and Brűgge* that the *ne bis in idem* principle according to Art. 54 of the 1990 Schengen Convention implied that the Member States "have mutual trust in their criminal justice systems and that each of them recognises the criminal law in force in the other Member States even when the outcome would be different if its own national law were applied" (par.33).

only refers to substantive criminal law, some other times to procedural criminal law. Some authors do not consider harmonisation as elimination of differences, but rather as elimination of conflicts between different legal systems[7]. However, it is reasonable to believe that once a common model of law is created, at least some of the disparities need to disappear in order for it to function properly. In order to have a clearer concept of harmonisation, we may therefore distinguish different degrees, from the lowest, i.e. approximation, to the highest, i.e. unification, which is the one we have referred to above.

Mutual recognition applies to both final decisions and decisions taken before them. As far as the former are concerned, the definition of "final decision" has been worked out on the basis of already established texts, as, for instance, the provisions of the 1968 Brussels Convention[8]. A "final decision" is therefore to be considered as an act that resolves a matter with a binding effect and against which no appeal is possible or, if possible, has no suspensive effect. Such a decision may be adopted not only by a court, but also by other organs and it may also be an extra-judicial agreement between the accused person and the prosecution authorities[9].

As far as the other types of decisions are concerned, they are mostly adopted in the so-called pre-trial phase. They include such investigation measures as questioning suspects or witnesses or other methods of evidence-gathering (e.g. through wire-tapping or monitoring of bank accounts) as well as other measures such as freezing of assets, home detention during the investigation stage (so-called "house arrest") or non-custodial supervision measures.

Another problem is the distinction between criminal and non-criminal matters, which has for a long time been under debate. Some legislative instruments only consider the substance of the matter and include decisions of a non-criminal nature. This is the option chosen by the 1970 Hague Convention on the International Validity of Foreign

[7] F. M. Tadić- 'How harmonious can harmonisation be? A theoretical approach towards harmonisation of (criminal) law'- in A. Klip and H. van der Wilt (eds.)- *Harmonisation and harmonising measures in criminal law* (Amsterdam 2002) 1.
[8] Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, consolidated text: OJ C 27 of 26 January 1998.
[9] Communication from the Commission to the Council and the European Parliament- Mutual Recognition of Final Decisions in Criminal Matters, Brussels, COM(2000) 495 final

Criminal Sentences and the 1991 Convention on the Enforcement of Foreign Criminal Sentences. Indeed, Art. 1(b) and 1(1)(a) respectively of these two Conventions refer to decisions taken by administrative authorities, provided that the right of (fair) trial is granted to the accused person.

Harmonisation and mutual recognition in criminal law matters represent two options that are often seen as alternatives. Those who oppose harmonisation argue that criminal law can only be dealt with properly at the national level, as it is rooted in the culture of a nation. Harmonisation as such leads to a repressive approach, as it involves the application of the same level of punishment to all States, regardless of how each crime is qualified in each legal system. They also believe that the institutional framework of the European Union in the Third Pillar lacks democratic legitimacy. In the context of co-operation in criminal matters, therefore, once mutual recognition is established, a system of harmonisation at *all* levels is not the best solution[10]. On the other hand, those who support harmonisation consider it as the most effective instrument to fight against transnational or "globalised" crime (as a single *corpus iuris* would be easier to apply) but they also believe it is able to provide better safeguards for human rights. According to this view, mutual recognition does not allow evaluation of the fairness of a trial, in particular as to the evidence gathered abroad[11].

If we look at the structure of the Third Pillar, in which some harmonisation and mutual recognition measures have taken place through Framework Decisions, we can easily notice relevant differences to the structure and functioning of the First Pillar. Most of the legislative power is attributed to the Council of the European Union, while the European Parliament only has a limited consultative role: there is therefore nothing comparable to the co-decision procedure in the First Pillar. The Commission shares its right of initiative with the Member States. The European Court of Justice, whose powers have been increased by the Maastricht Treaty, cannot verify the validity and proportionality of police or law enforcement operations and its power to

[10] T. Vander Beken- 'Freedom, security and justice in the European Union. A plea for alternative views on harmonisation', in A.Klip, H. van der Wilt (eds.), *supra*, 95.
[11] A.Klip- 'European integration and harmonisation and criminal law', in D.M. Curtin *et al* (eds.)., *European Integration and Law* (Intersentia METRO, Antwerpen-Oxford 2006) 134; J.R.Spencer- 'Why is the harmonisation of penal law necessary?', in A.Klip, H. van der Wilt (eds.), *supra*, 43.

take preliminary decisions depends on the consent of Member States[12] (moreover, there is no infringement procedure). As a result, an executive organ (the Council) has the power to deal with criminal matters through acts (the Framework Decisions) that do not need to be approved by the citizens of a State or ratified by a national Parliament. These acts are also deprived of direct effect. Finally, the unanimity rule makes the whole decision-making process lengthy and inefficient.

Harmonisation within Title VI of the Treaty of the European Union (TEU) takes place only to a certain degree, for limited areas and to the extent that a more effective inter-state co-operation is encouraged. This principle is clearly stated by the TEU, which in Art. 29 provides that the area of freedom, security and justice shall be achieved, *where necessary*, through approximation of rules on criminal matters, in accordance with Art. 31(e)[13].

From these provisions we can deduce that in the TEU:

(a) harmonisation is intended as approximation;
(b) it refers to substantive criminal law more explicitly than procedural criminal law- in particular, to the fields of organised crime, terrorism and illicit drug trafficking;
(c) it is aimed at establishing common minimum rules, therefore leaving the Member States free to adapt the remaining rules to their own system.

Approximation in the original spirit of the TEU is therefore an instrument to eliminate all the most relevant disparities in the criminal law of the Member States[14] and therefore render a foreign judicial decision more "recognisable" and easier to accept.

[12] More precisely, Member States can accept the Court's jurisdiction to give preliminary rulings through a declaration. The power to request preliminary ruling can be attributed either to any national court or tribunal or only to a court or tribunal against whose decisions there is no judicial remedy under national law (Article 35 TEU).
[13] Art. 31(e) encourages the Member States to adopt progressively measures establishing minimum rules relating to the constituent elements of criminal acts and to penalties in the field of organised crime, terrorism and illicit drug trafficking. The legal instrument designed for the approximation of the laws and regulations of the Member States is the Framework Decision as established by Art. 34(2)(b).
[14] Felicitas M. Tadić- *How harmonious can harmonisation be? A theoretical approach towards harmonisation of (criminal) law*- in A.Klip, H. van der Wilt (eds.), *supra* pp.1 *et seq.*

On the other hand, it could be argued that, just as the EC law principle of supremacy[15] represents a challenge to sovereignty along a *vertical* line (relating to the relationship between EC institutions and single Member States), so the principle of mutual recognition, in civil and, all the more so, in criminal matters is a challenge along a *horizontal* line (relating to the relationship between the States).

Both mutual recognition and approximation acquire a more defined status in the new Lisbon Treaty[16]. The new Treaty empowers the European Parliament and the Council to establish minimum rules relating to the definition of criminal offences and sanctions in the areas of a number of particularly serious cross-border crimes (Article 69 B as inserted by the Treaty, replacing Article 31 TEU). The *seriousness* of these crimes, justifying a stricter cooperation between the Member States, is determined through two criteria: the nature and impact of the offences and the need to combat them on a common basis. These criteria seem to be quite broad, just as the list of offences to which the norm applies. This list is indeed made up of *categories* of crime (including not only terrorism and organised crime but also, for instance, trafficking in human beings, money laundering, and computer crime). They are more numerous than in the current TEU and have all been subject to approximating measures[17].

We can therefore conclude that a means/ends relationship exists between approximation and mutual recognition. The former is conceived as a tool to promote the development of the latter. Their role and functioning are better defined than in the current EU legal landscape and lay the groundwork for an embryonic European criminal law. In particular, it should be welcomed that, for the first time, the principle of mutual recognition acquires a clear legal basis in the Treaty. This development is

[15] ECJ *Costa v. ENEL* Case 6/64.

[16] Treaty amending the TEU and the TEC, OJ 306 17/12/2007. The Treaty was signed on 13 December 2007 after the failed approval of the European Constitution (see Treaty establishing a Constitution for Europe, CIG 87/2/04 Rev 2, Brussels 29 October 2004). It needs to be ratified by all 27 Member States before entering into force.

[17] See, for instance, Council Framework Decision of 13 June 2002 on combating terrorism 2002/475/JHA or the new Proposal for a Council Framework Decision on the fight against organised crime, COM (2005) 6 final, which should be formally adopted soon. It is worth noting that approximation will be pursued by way of a new procedure involving the European Parliament and the Council (i.e. the co-decision procedure, renamed "ordinary legislative procedure") as well as new acts (i.e. directives, rather than framework decisions). However, only the Council may by unanimity extend the list, although the consent of the Parliament is required. Furthermore, the possibility of approximating criminal laws and regulations in other areas is ensured (par. 2 of the same Article).

even more important as far as approximation in procedural criminal law is concerned, as provided for by Article 69 A (2). Minimum rules may be established by the European Parliament and the Council (once again following the ordinary legislative procedure)[18].

It must be pointed out that what is provided for here is not *full* harmonisation, but a lower degree. This is why Article 69 A (2) carefully requires respect for the differences between the legal traditions and systems of the Member States. Politically, this reflects the choice of the Heads of State to opt for the combination approximation/mutual recognition and create the basis for a "minimum" European criminal law, rather than pursue the radical harmonisation approach.

The question therefore is whether such a system can effectively guarantee a uniform development of the "European judicial space" in any case or whether insoluble contrasts between the criminal policies of some Member States may pave the way for fractions and ultimately undermine the project mentioned above. This is not a purely theoretical consideration. Examples may be a disagreement between Sweden and the Netherlands in establishing an adequate level of penalties for drug trafficking or in qualifying possession of illicit drug as an offence (Dutch drug policy being much more permissive than the Swedish one); or failure to reach a compromise as to which evidence should be admitted in court (for instance, which value should be given to the testimony of an accused in a closely connected trial, to what extent the witness should be protected, etc.)[19]. What follows is an analysis of the birth and the development of mutual recognition in Europe, in order to identify its main features and draw some conclusion on its essence and functioning.

[18] These rules will relate to: mutual admissibility of evidence between Member states; the rights of individuals in criminal procedure; the rights of victims of crime; any other aspect of criminal procedure (in which case, the Council may act by unanimity vote after the consent of the Parliament).

[19] In both types of approximation a "safeguard clause" ("emergency break") allows any Member State that believes that fundamental aspects of its criminal justice system are affected to request that the draft directive be referred to the European Council. In this case the procedure is suspended until the decision of the European Council and starts again if within four months a consensus is reached. Where consensus is not reached, a mechanism of "enhanced cooperation" is supposed to avoid potential stalemates: such mechanism can only be triggered by at least nine countries (currently a third), which wish to adopt the directive notwithstanding the opposition of one or more other States

2 Mutual recognition of decisions in criminal matters

The concept of mutual recognition is relatively old. In Community law, it was first applied in the area of diplomas and professional qualifications and then developed in the internal market law and in the area of recognition of civil and commercial matters. As far as far the internal market is concerned, after attempts to establish free trade through harmonisation failed, the European Court of Justice introduced the principle of mutual recognition in the area of free movement of goods in its famous judgment *Cassis de Dijon*[20]. In this judgment the Court held that products lawfully marketed in one Member State could in principle be sold in any other Member State. However, no analogy can be found between the internal market and criminal law, mainly because "criminal law products" are only "a legal fiction that represents no economic value"[21].

The need to fight new types of criminality evolving in the last decades of the past century encouraged States to give up part of their national sovereignty in order to develop new instruments of cooperation. There are indeed many problems connected to the recognition and enforcement of judgments[22]: some States distinguish three types of penalties entailing deprivation of freedom (penal servitude, imprisonment and detention), some others two or one; the minimum and maximum of a sanction can vary considerably; in some States a judgment may have other effects than in another.

The first initiatives took place within the framework of the Council of Europe. Examples of these are: the European Convention on the Supervision of Conditionally Sentenced or Conditionally Released Offenders and the European Convention on the Punishment of Road Traffic Offences, both of them of 30 November 1964[23]; the European Convention on the International Validity of Criminal Judgments, agreed at The Hague in May 1970; the European Convention on the Transfer of Proceedings in

[20] ECJ Case 120/78 *Rewe* (*Cassis de Dijon)*. The approach adopted afterwards, however, was a mixture of mutual recognition and harmonisation. See Commission White Paper "Completing the Single Market" COM (85) 310.
[21] A.Klip- 'European integration and harmonisation and criminal law' *supra* 133; see also S. Peers- 'Mutual recognition and criminal law in the European Union: has the Council got it wrong?' (2004) 41 *Common Market Law Review* 23.
[22] D.McClean, *International Co-operation in civil and criminal matters*, (Oxford University Press 2002).
[23] ETS n. 51 and n. 52. They entered into force, respectively, on 22/8/1975 and 18/7/1972.

Criminal Matters of 15 May 1972; the Convention on the Transfer of Sentenced Persons of 21 March 1983. There is also a Convention between the Member States of the European Communities on the Enforcement of Foreign Criminal Sentences of 13 November 1991. All the Conventions mentioned above have a regional or sub-regional scope[24].

The first two European Conventions mentioned above already contain a few provisions aiming at speeding up and simplifying the procedure of recognition and enforcement of decisions[25]. They also contain mandatory and optional grounds of refusal (including the double criminality requirement[26]) and ensure the application of a set of common rules. The first one allows sentenced persons to leave the territory of the requesting State in which they have been sentenced or conditionally released and to be placed under the supervision of the authorities of the requested State. The second provides for the possibility for the State of the offence to request the enforcement of a judgment or administrative decision to the State of residence.

The 1970 European Convention entered into force on 26 July 1974. It goes a step forward as it has a more general scope and contains some important definitions. For instance, it defines "European criminal judgment" as any final decision delivered by a criminal court of a Contracting State as a result of criminal proceedings and "sanction" as any punishment or other measure expressly imposed on a person, in respect of an offence, in a European criminal judgment, or in an *ordonnance pénale*. It was decided that "considerations of national sovereignty (…) should no longer be an obstacle to the recognition of the legal effects of foreign judgments", due to the existing "mutual confidence" between Member States of the Council of Europe[27]. The Convention only applies to sanctions involving deprivation of liberty, fines or confiscation and disqualifications (Article 2). Therefore, the seriousness of the

[24] See respectively The Hague, 28/5/1970, ETS n. 70; Strasbourg, 15/5/1972, ETS n. 73; Strasbourg, 21/3/1983, ETS n. 112. See also E. Müller-Rappard, 'Inter-State Cooperation in Penal Matters Within the Council of Europe Framework' in M. C. Bassiouni (ed.), *International Criminal Law, Procedural and Enforcement Mechanisms* (2nd ed. Transnational Publishers 1999) 331.

[25] See, for example, Art. 9 and 30 of the European Convention on the Supervision of Conditionally Sentenced or Conditionally Released Offenders and Art. 20 of the European Convention on the Punishment of Road Traffic Offences, *supra*.

[26] See Art. 4 of the European Convention on the Supervision of Conditionally Sentenced or Conditionally Released Offenders *supra*.

[27] European Convention on the international validity of criminal judgments, Explanatory Report, ETS n. 070, par. 1.

offence is not a condition for the application of these provisions. The procedure provided for by the Convention starts with a request by one Contracting State (the "sentencing State") to enforce the sanction in another Contracting State. This sanction, although imposed in the former, is enforceable in the latter State provided that one or more of the conditions set out in Art. 5 are fulfilled[28]. The principles of double criminality and *ne bis in idem* (as a mandatory ground for refusal) have to be respected as well[29]. Double criminality *in concreto* is applied: it is required that the act which gave rise to a judgment in a State would have been punishable if committed in the requested State and if the person who performed it could have been sanctioned under the law of the requested State[30]. It is not necessary that the legal classification of the act be exactly the same. A list of optional grounds of refusal is also provided for (Art. 6), including the case in which enforcement would run counter to the fundamental principles of the legal system of the requested State, the political or military exception, age limits, statute of limitation, etc. Enforcement is governed by the law of the requested State, while the requesting State has the right to decide on any application for review of sentence. As far as the effects of the transfer of enforcement are concerned, proceedings for any offence committed prior to the surrender of the person concerned can only be commenced by the State of enforcement in respect of that offence for which the sentence or detention order to be enforced was imposed. Moreover, the sentencing State may only begin enforcement of a sanction involving deprivation of liberty when the sentenced person is already detained on its territory at the moment of the presentation of the request of

[28] The conditions are: a) if the person sentenced is ordinarily resident in the other State; b) if the enforcement of the sanction in the other State is likely to improve the prospects for the social rehabilitation of the person sentenced; c) if, in the case of a sanction involving deprivation of liberty, the sanction could be enforced following the enforcement of another sanction involving deprivation of liberty which the person sentenced is undergoing or is to undergo in the other State; d) if the other State is the State of origin of the person sentenced and has declared itself willing to accept responsibility for the enforcement of that sanction; e) if it considers that it cannot itself enforce the sanction, even by having recourse to extradition, and that the other State can.

[29] See Articles 4 and 7 and also Art. 53-55 European Convention on the international validity of criminal judgments, *supra*. However, a Contracting State must not, unless it has itself requested the proceedings, be obliged to recognise the effect of *ne bis in idem* : if the act which gave rise to the judgment was directed against either a person or an institution or anything having public status in that State, or if the subject of the judgment had himself a public status in that State; if the act was committed in that Contracting State or was considered as such according to the law of that State.

[30] This option, rather than dual criminality *in abstracto* (simply requiring that the facts are punishable by the laws of both States), was preferred by the sub-committee of the European Committee on Crime Problems. See European Convention on the international validity of criminal judgments, Explanatory Report, *supra*, par. 1.

enforcement. In certain circumstances the right of enforcement must revert to the requesting State (Article 11).

Articles 31-36 are worth mentioning, as they provide for the possibility to take provisional measures, in particular the arrest of the offender and the seizure of goods. On the one hand, the requesting State may arrest the sentenced person with a view to his transfer to the requested State, once notification of the acceptance of a request for enforcement of a sentence involving deprivation of liberty is received and provided that the sentenced person is present in its territory. On the other hand, the requested State may arrest the sentenced person if, under its own law, the offence justifies remand in custody and if there is a danger of abscondence or, in case of a judgment rendered *in absentia,* a danger of secretion of evidence. The requesting State may specifically request an arrest, in which case it will need to mention in its application the offence which led to the judgment, the time and place of its perpetration, an accurate description of the person sentenced and the facts on which the judgment is based; however, the person in custody must be released if the requested State did not receive, within 18 days from the date of the arrest, the request and the other necessary documents. The person sentenced (who is held in custody in accordance with the law of the requested State) must be released in any case after a period equal to the period of deprivation of liberty imposed in the judgment. The requesting State may also request enforcement of a confiscation of property, which is carried out if the law of the requested State provides for seizure in respect of similar facts.

A sanction imposed in the requesting State may only be enforced in the requested State by a decision of the court of the requested State. Before a court takes a decision, the sentenced person must be given the opportunity to state his views and, upon application, he must be heard by the court either by letters rogatory or in person. He may expressly require to be heard in person (Article 37 *et seq.*).

Under Article 15, all requests must be sent either by the Ministry of Justice of the requesting State to the Ministry of Justice of the requested State or, if the Contracting States so agree, direct by the authorities of the requesting State to those of the requested State. In urgent cases, requests and communications may be sent through the International Criminal Police Organisation (Interpol).

The European Convention on the Transfer of Proceedings in Criminal Matters of 15 May 1972[31] also includes, apart from provisions concerning grounds of refusal and *ne bis in idem*[32], the possibility for the requested State, on application by the requesting state, to provisionally arrest a suspected person if it is believed that he will abscond or will cause evidence to be suppressed as well as to seize property[33]. In this case specific rules are provided to safeguard the procedural rights and the period of custody must not exceed 40 days. Here too, the provisional arrest and the seizure of property are governed by the law of the requested State[34]. The transfer of the proceedings must occur as soon as possible and the States concerned may agree that the request be sent directly by the authorities of the requesting State to those of the requested State, without the Ministry of Justice acting as intermediary[35]. There are specific provisions that govern conflicts of competence[36]. As a general rule, any Contracting State must have competence to prosecute under its own criminal law any offence to which the law of another Contracting State is applicable, upon a request to take proceedings by that State. If there are no other grounds for competence, the suspected person must be allowed to present his own views before the requested State has taken a decision on the request[37]. However, any Contracting State having competence under its law to prosecute an offence *may* waive or desist from proceedings against a suspected person who is being or will be prosecuted for the same offence by another Contracting State; it *must* discontinue proceedings when to its knowledge the right of punishment is extinguished under the law of the requesting State for a reason other than time-limitation. If the Contracting State decides not to waive or suspend its own proceedings, it must notify the other state in good time and in any event before judgment is given on the merits. A consultative procedure is provided for to allow the States to determine which of them alone must continue to conduct proceedings. This is also the case both when several distinct offences covered

[31] It entered into force on 30 March 1978.
[32] See Articles 10 and 11, as well 35-37 of the European Convention on the Transfer of Proceedings in Criminal Matters, *supra*.
[33] See Articles 27-29 *ibid*.
[34] Articles 28 and 29 *ibid*.
[35] Articles 13 *ibid.*
[36] Articles 2-5 *ibid*. As declared in the Preamble, the Contracting States seek "(…)to ensure, in a spirit of mutual confidence, the organisation of criminal proceedings on the international level, in particular, by avoiding the disadvantages resulting from conflicts of competence".
[37] Article 17 *ibid.*

by the criminal law of each of those States are ascribed to a single or several persons having acted in unison and when a single offence is ascribed to several persons having acted in unison[38]. It must be pointed out that the scope of application of this Convention was limited by further possibilities of refusing requests given to the States under Appendix I and II.

The Council of Europe Convention on the Transfer of Sentenced Persons[39] entered into force on 1 July 1985. There is no obligation to transfer (and therefore, no grounds for refusal). Transfer may be requested either by the State in which the sentence was imposed (the sentencing State) or by the State of which the sentenced person is a national (the administering State). The consent of the sentenced person is necessary. The procedure is more simplified than the one provided for by the European Convention on the International Validity of Criminal Judgments[40]. The competent authorities of the State of enforcement must either immediately enforce the sentence or convert it, through a judicial or administrative procedure, into a decision of that State, in which case the penalty imposed in the sentencing State is substituted by the penalty prescribed by the law of the administering State for the same offence. Enforcement is governed by the law of the administering State. Although a sentenced person may be transferred only if he or she is a national of the administering State, any State may by a declaration define, as far as it is concerned, the term "national" for the purpose of the Convention. The main idea behind this international instrument (just as in the 1970 Convention) is that of facilitating the rehabilitation of the prisoner through a quick and efficient procedure. As a result, all provisions must be interpreted in this light. However, the Convention was supplemented by an Additional Protocol in 1997, in order to cover some gaps, i.e. those situations in which the transfer could not take place, namely where the person, after being sentenced, flees to his State of nationality and where he

[38] Articles 30-34 *ibid.* In general, it is not required that the competence of one of the States concerned be contested, it being sufficient that two or more States are acting simultaneously. See European Convention on the Transfer of Proceedings in Criminal Matters, Explanatory Report, *supra* par. 33.
[39] Convention on the Transfer of Sentenced Persons, *supra*.
[40] On this, see Convention on the Transfer of Sentenced Persons, Explanatory Report, ETS n. 112, par. 10-11. The Convention is not qualified "European", as the intention was to leave it open to other like-minded democratic States. Indeed, Canada and the US were represented as observers at the meetings of the Select Committee.

is subject to an expulsion or deportation order or any other equivalent measure[41]. In these circumstances, there is a high risk that the person escapes punishment, as extradition of nationals is not allowed in some States, starting a new trial in the State of refuge (in application of the *aut dedere aut judicare* principle) might be costly and transfer of the sentence might not be practicable, because not all States have ratified the 1970 Convention[42]. Therefore the need to permit effective execution of a sentence was met by allowing the State of refuge, upon request by the sentencing State, to "take over" such task or in any case agree the transfer of the person without his consent. This requires a re-balancing of the rights of the individual and the objective of enforcement of sentences: in case of transfer, the person may avail himself of the speciality rule and his opinion has to be taken into account (especially when he has more than one nationality)[43]. It must be pointed out, however, that this Protocol has not been ratified by all the Member States of the European Union.

The 1970 Hague Convention was supplemented by two other Conventions: the Convention on Double Jeopardy, agreed in Brussels in 1987 and the Convention on the Enforcement of Foreign Criminal Sentences of 1991. The former was based on the principle of *ne bis in idem*, although this was subject to a number of exceptions[44]. The latter allows the administering state to carry out an arrest as a provisional measure, similarly to the European Convention on the Transfer of Proceedings in Criminal Matters[45]. The circumstances under which transfer of enforcement could be requested were more numerous than in the 1970 Convention and the grounds of refusal were similar[46]. The Preamble of this Convention is worth mentioning, as it stresses "the importance of strengthening judicial cooperation in view of the creation of a European area without internal frontiers in which the free movement of persons shall be guaranteed (…)". These Conventions, however, have never entered into force, since they too have not been ratified by all the Member States. The provisions of the first Convention were replaced by those of Articles 54 to 57 of the Convention

[41] Additional Protocol to the European Convention on the Transfer of Sentenced Persons, Strasbourg, 18/12/1997, ETS n. 167, in particular Articles 2 and 3.
[42] See Additional Protocol to the European Convention on the Transfer of Sentenced Persons, Explanatory Report, ETS n. 167, par. 12-14.
[43] Additional Protocol, *supra* Article 3.
[44] D. McClean- *supra* p.374
[45] See Article 10 Convention between the Member States of the European Community on the Enforcement of Foreign Criminal Sentences, *supra*.
[46] D. McClean- *supra* p. 375

implementing the Schengen Agreement[47]. The reason for this lack of ratification lies probably in the fact that mutual confidence between the Member States had not developed at that time to a sufficient degree.

We can conclude that the common points of these Conventions are: the general rule that enforcement is governed by the law of the requested State; the provision of a number of grounds of refusal; in some of them, the possibility for the State of enforcement to arrest the offender upon request of another State and to seize his assets (subject to conditions and limits); the possibility given to the State of enforcement of converting the penalty issued in another State into a penalty provided for by its national law for the same or comparable offences, provided that the penal situation of the sentenced person is not aggravated.

A few sub-regional Conventions have also been agreed in the sixties. They apply the principle of mutual recognition in different ways. First of all, the Treaty of 26 September 1968 between Belgium, the Netherlands and Luxembourg on the enforcement of judgments in criminal matters (the "Benelux Treaty") applies to custodial penalties or measures, fines, confiscations or disqualifications and judgments ruling solely on the question of guilt. Although the "Benelux Treaty" never entered into force, it is worth noting that it provided for the possibility for the requested State to immediately arrest the offender whenever the requesting State issued an arrest warrant or any other form of detention order and asked for the sentence to be enforced. In urgent cases the requested State could adopt this measure even before the documents that should accompany the request of enforcement were transmitted, provided that they were received within the next 18 days. As in the case of the European Convention on the Transfer of Proceedings in criminal matters, the issues of arrest or detention were governed by the law of the requested State and were subject to a number of temporal limits[48].

Another example of regional convention is the Cooperation Agreement between Denmark, Finland, Iceland, Norway and Sweden, signed on 23 March 1962 (the "Helsinki Agreement"). The States concerned have adopted, on the basis of this

[47] Convention Implementing the 1985 Schengen Agreement, OJ 22/09/2000.
[48] See Art. 30 and 31 *ibid*.

agreement, a number of similar rules on the recognition and enforcement of judgments as well as on the transfer of prisoners. One of the main features of such agreement is the elimination of the double criminality requirement[49].

The issue of mutual recognition was at one point moved within the framework of the European Union, in which the Cardiff European Council (already mentioned) was followed by the 1998 Vienna Action Plan[50] and the Tampere European Council. The Vienna Action Plan called for the adoption within two years after the entry into force of the Treaty of Amsterdam of measures with a view to facilitating mutual recognition of decisions and enforcement of judgments in criminal matters[51]. It also stressed, on one hand, the connection between Article 31 (e) TEU dealing with prevention and fight against crime and Article 61 (a) TEC dealing with free movement of persons[52] and, on the other, the need to establish minimum rules relating to the constituent elements and to penalties in the field of organised crime, terrorism and drug trafficking, as well as other crimes specifically mentioned[53]. A report on the first steps is contained in the Communication from the Commission on the Mutual Recognition of Final Decisions in Criminal Matters in July 2000[54]. This document pointed out that no one of the previous international instruments would be sufficient to establish a full regime of mutual recognition and that traditional judicial cooperation in criminal matters, based on the "request" principle, was slow and cumbersome and led to uncertain results. Indeed, common rules on jurisdiction were necessary and the number of grounds for refusal was too high. Hence the need for a European registry of criminal sentences and of criminal proceedings, which would avoid problems connected to the *ne bis in idem* principle and conflicts of jurisdiction, ensuring at the same time data protection[55]. The Commission also suggested that a set of common rules on jurisdiction, identifying only one Member State as having competence, could be agreed, similarly to what already exists in the area of civil and commercial matters.

[49] Insert footnote.
[50] Action Plan of the Council and the Commission on How to Best Implement the Provisions of the Treaty of Amsterdam on an Area of Freedom, Security and Justice, 3 December 1998 (OJ C 19/01)
[51] See point 45 (f).
[52] See points 5 and 25.
[53] See points 18 and 46 (a) and (b).
[54] Communication from the Commission to the Council and the European Parliament- Mutual Recognition of Final Decisions in Criminal Matters COM(2000) 495 final
[55] The Vienna Action Plan, point 49(e), already required, as one of the measures to be taken within five years of the entry into force of the Amsterdam Treaty, an examination of the possibility to create a register of pending cases.

In this context, however, the Commission recognised that mutual recognition cannot be understood in absolute terms, as a system with no form of *exequatur* procedure at all is not feasible. Minimum rules should at least provide for a translation of the text and a control as to whether the decision has been issued by a competent authority. We can therefore summarise the main features of this new form of international cooperation: more rapidity, more certainty, less discretion.

A Programme of measures to implement the principle of mutual recognition of decisions in criminal matters was then issued by the European Council in November 2000[56]. In this Programme priority rating 1 was accorded to the need to draw up an instrument on mutual recognition of decisions on the freezing of evidence and of an instrument on mutual recognition of orders to freeze assets. The need to introduce an arrest warrant was only accorded priority rating 2 and was limited to the most serious offences in Art. 29 TEU, i.e. terrorism, trafficking in persons and offences against children, illicit drugs trafficking, illicit arms trafficking, corruption and fraud[57].

Specific measures implementing the principle at issue were then adopted, but, following the events of 9/11, the Council Framework Decision on the European Arrest Warrant was adopted first and quite rapidly; this was followed by the Council Framework Decisions on the freezing of assets, on confiscation of crime-related proceeds and on the application of the principle of mutual recognition to financial penalties. These measures will be examined in detail below, but it should be pointed out here that, as far as the arrest warrant is concerned, its applicability is not restricted to a few serious crimes, but extends to all those punishable by the law of the issuing Member State by a custodial sentence or detention order for a maximum period of at least 12 months or, where a sentence has been passed or a detention order has been made, for sentences of at least four months.

[56] Programme of measures to implement the principle of mutual recognition of decisions in criminal matters (OJ C 12/02 15/01/2001)

[57] The Programme also refers to recommendation N. 28 of the European Union's Strategy for the beginning of the new millennium, which envisaged the possibility to create a single European legal area for extradition.

3 Recent developments of mutual recognition in criminal matters: a new concept of mutual recognition?

In order to fix priorities and assess the implementation of the measures in the field of freedom, security and justice, the idea of a multiannual programme, which had been inaugurated with the Tampere Programme, was further developed with the Hague Programme, at the European Council of 4-5 November 2004. This programme identifies the objectives of strengthening freedom, security and justice as well as ten priorities for the period 2005-2009. According to Priority n. 9, "(…) Approximation will be pursued, in particular through the adoption of rules ensuring a high degree of protection of persons, with a view to building mutual trust and strengthening mutual recognition, which remains the cornerstone of judicial cooperation"[58]. A more detailed list of measures is provided for in the Action Plan[59], which is considered as part of a framework including the Drugs Action Plan, the Action Plan on Combating Terrorism and the Strategy on the external aspects of the area of freedom, security and justice. An annual report on the implementation of the Hague Programme (called the "Scoreboard plus") is required, in order to evaluate the progress achieved in the adoption of the legislative acts and in the implementation of the measures at the national level. The first "Scoreboard plus" has already been presented in 2006[60].

All the legislative measures adopted so far have taken the form of a Framework Decision, which is the main instrument within the Third Pillar.[61] The first instrument of mutual recognition to be created (in 2002) was the European Arrest Warrant,[62] which is applicable both to final judgments and the pre-trial phase. Other instruments within the Mutual Recognition Programme followed afterwards. They can all be

[58] Communication from the Commission to the Council and the European Parliament- The Hague Programme: Ten Priorities for the next five years- COM (2005) 184 final

[59] Council and Commission Action Plan implementing the Hague Programme on strengthening freedom, security and justice in the European Union (OJ C 198/01 12/8/2005)

[60] Communication from the Commission to the Council and the European Parliament - Implementing the Hague Programme: the way forward COM (2006) 331 final; Communication from the Commission to the Council and the European Parliament - Evaluation of EU Policies on Freedom, Security and Justice COM (2006) 332 final; Communication from the Commission to the Council and the European Parliament COM (2006) 333 final

[61] The reasons why this instrument was chosen and its many flaws cannot be analysed here. See for instance A. Klip and H. van der Wilt *supra*.

[62] Council Framework Decision 2002/584/JHA on the European Arrest Warrant and the surrender procedure between Member States, OJ L 190 18/07/2002.

grouped according to the phase of criminal proceedings to which they apply. The execution of orders freezing property or evidence, confiscation orders, non-custodial pre-trial supervision measures and the European Evidence Warrant[63] all belong to the pre-trial phase. A proposal for a Framework Decision on taking account of previous convictions in the course of new criminal proceedings is also on the table[64]. Finally, a general approach has been agreed on the mutual recognition of judgements imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in their European Union[65].

The first of the instruments mentioned above aims at securing evidence, which can then be used by the issuing Member State; it can also be issued for the purpose of confiscation, which is dealt with by another Framework Decision. Recognition of freezing orders must occur without formality and the execution must be 'immediate'. In any case, the judicial authority of the executing State must observe the formalities and procedures indicated by the competent judicial authority of the issuing State.[66] The non-custodial pre-trial supervision measures can be applied to persons in their country of origin. More specifically, the European supervision order is a decision issued by a judicial authority in one Member State that must be recognised by a competent authority in another Member State. The purpose is to guarantee the suspect a pre-trial supervision measure in his or her natural environment (i.e. his or her residence). The European Evidence Warrant, on which political agreement on the general approach to be adopted was reached in the JHA Council of June 2006[67], can

[63] Council Framework Decision 2003/577/JHA on the execution in the European Union of orders freezing property or evidence OJ L 196 02/08/2003; Council Framework Decision 2005/212/JHA on Confiscation of Crime-Related Proceeds, Instrumentalities and Property concerning minimum harmonisation of confiscation procedures in Member States, OJ L 68 15/03/2005; Council Framework Decision 2006/783/JHA on the application of the principle of mutual recognition to confiscation orders, OJ L 328 24/11/2006; Proposal for a Council Framework Decision on the European supervision order in pre-trial procedures between Member States of the European Union, Brussels, 13 December 2007 Doc. 16494/07 COPEN 181; Proposal for a Council FD on the European Evidence Warrant, Brussels, 14.11.2003 COM (2003) 688 final.

[64] Draft Framework Decision on taking account of convictions in the Member States of the European Union in the course of new criminal proceedings, Brussels, 11 June 2008 Doc. 9960/08 COPEN 103.

[65] Draft Council Framework Decision on the application of the principle of mutual recognition to judgements in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union, Brussels, 22 May 2007, Doc. 9688/07 COPEN 68.

[66] Art. 5(1) of the Framework Decision.

[67] Justice and Home Affairs Council, Luxembourg, 1-2 June 2006, see Council of the European Union Document 10081/06 Presse 168. The latest document available is: Brussels, 21 December 2007, Doc. 13076/07 COPEN 132.

be issued, as mentioned in the previous section, for the purpose of obtaining objects, documents and data for use in criminal proceedings. The double criminality requirement is lifted for a list of thirty-two crimes, just as in the case of the European Arrest Warrant, although Germany may reserve its right to maintain it for some offences.[68] The negotiation of this Framework Decision was extremely lengthy and political agreement was hard to achieve.[69]

Concerning final judgments, one of the main instruments is the Framework Decision on the mutual recognition of financial penalties.[70] It applies to final decisions requiring a financial penalty to be paid following a criminal offence. Here again we may observe that decisions must be recognised without formality and immediately executed. The list of offences for which double criminality is excluded is broader than in previous Framework Decisions. Implementation by all Member States should have been completed by March 2007.

It is possible to note some common points in all these measures: the provision of a certificate to be completed by the issuing State as well as of a standard form, the speeding up of the procedures for recognition and execution of decisions, a limited list of mandatory and optional grounds for refusal. The non-inclusion of the protection of human rights among the specific grounds for refusal has already built up some frictions and ambiguities which are likely to continue in the future, perhaps until the European Court of Justice intervenes to clarify the scope of protection to human rights which Member States can offer.[71]

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[68] They are: terrorism, racketeering and extortion, swindling, racism and xenophobia, sabotage, environmental crime, computer-related crime. See Document 9409/06 Presse 144.

[69] For instance, the Netherlands pushed for a partial application of the territoriality principle, to allow it to refuse to comply with an EEW relating to offences committed wholly or partly in its territory.

[70] Council Framework Decision 2005/214/JHA on the application of the principle of mutual recognition to financial penalties OJ L 76 22/03/2005.The others are the European Arrest Warrant, and the proposals on confiscation orders and on the taking account of previous convictions. A proposal on the *ne bis in idem* principle is expected in the near future. See Initiative of the Hellenic Republic for the adoption of a Framework decision of the Council on the application of the *ne bis in idem* principle, Council doc. 6356/03 Brussels 13 February 2003.

[71] Article 1(3) of the Framework Decision on the EAW for instance specifies that nothing in this instrument has the effect of modifying the obligation to respect fundamental rights and fundamental legal principles under Art. 6 TEU. Recital 12 in the Preamble of the same Framework Decision also pays attention to the protection of human rights. However, the problem is that the former, albeit not listed among the grounds for refusal, might be given the same effect in practice.

As regards the mutual recognition of judgements imposing custodial sentences or measures restricting individual liberty, it is designed to allow enforcement of a sentence in the executing State instead of the issuing State, whenever this is considered to facilitate the social reintegration of the sentenced person. Contrary to the 1983 Convention on the Transfer of Sentenced Person (and related 1997 Protocol), the recognition of the judgement and the enforcement of the sentence delivered in one State is compulsory[72]. However, this may only occur following the consent of the sentenced person given under the law of the issuing State, unless the judgement and related certificate are sent to the State of nationality where he lives or is deported or the State to which he has fled or otherwise returned[73]. Moreover, a relatively high number of grounds for refusal is provided for, including cases where less than six months of the sentence remain to be served or where the sentence contains measures of psychiatric or health care or other restricting measures which cannot be executed in the legal system of the executing State[74]. Finally, it is worth noting that recital 1 of the preamble to the Framework Decision timidly suggests that mutual recognition "(...) *should become* the cornerstone of judicial cooperation", whereas priority n. 9 of the Communication from the Commission to the Council and the European Parliament on The Hague Programme[75] claimed that the principle "(...) *has become* the cornerstone of judicial cooperation".

To sum up, the main obstacle facing the implementation of the mutual recognition programme at the moment appears to be a growing lack of enthusiasm on the part of certain Member States. Whereas the Framework Decision on the European Arrest Warrant was approved within a relatively short timeframe, the procedure for the

[72] Draft Council Framework Decision on the application of the principle of mutual recognition to judgements in criminal matters imposing custodial sentences *supra* Article 3 (1). For the Convention on the Transfer of Sentenced Persons, see *supra*.

[73] Draft Council Framework Decision on the application of the principle of mutual recognition to judgements in criminal matters imposing custodial sentences *supra* Article 5(1) and (1) (a). When the person is still in the issuing State, he must be given the opportunity to state his opinion and this opinion must be taken into account. Moreover, the provision not requiring consent when the judgement is sent to the State of nationality where the person lives is no applicable to Poland where the judgement has been issued within five years of the date by which Member States are required to comply with the Framework Decision: see par. 2 and 4 of the same Article.

[74] Draft Council Framework Decision on the application of the principle of mutual recognition to judgements in criminal matters imposing custodial sentences *supra* Article 9.

[75] Communication from the Commission to the Council and the European Parliament on The Hague Programme: Ten Priorities for the next five years, *supra*.

approval of all other measures was quite lengthy, especially with respect to the European Evidence Warrant, as already seen.

However, even the implementation of the Framework Decision on the EAW has faced obstacles and presents some flaws. Amongst others, we can mention the failure to bring it into force on time and the inclusion of further grounds of refusal, both optional and mandatory, in the Member States' implementing legislation. Difficulties were also encountered at the constitutional level in Germany, Poland and Cyprus, whose respective Constitutional Courts declared null the European Arrest Warrant whenever this involves nationals of their countries[76]. In the same period, the Belgian Constitutional Court referred to the European Court of Justice the preliminary question of the compatibility of the Framework Decision with art. 34(2)(b) TEU as well as art. 6(2) TEU (which states the principles of legality, equality and non-discrimination). The applicant, which had submitted an annulment action of the Belgian legislation enacting the EAW before the Belgian *Cour d'arbitrage*, also argued that international cooperation in criminal matters should be regulated by Convention and not by Framework Decision[77]. This reflects the view of those who believe that, under Article 29, 31(e) and 34 (2)(b) TEU, Framework Decisions only have the purpose of adopting minimum rules relating to the constituent elements of criminal acts and penalties (and only in the fields of organised crime, terrorism and illicit drug trafficking)[78]. The European Court of Justice has nevertheless decided that the Framework Decision does not violate the principles of legality and non-discrimination and that the Council is free to select a Framework Decision rather than a Convention as the most appropriate instrument even outside the scope defined by Art. 31 (1) (e) TEU[79].

The implementation of the Framework Decision on the freezing of assets and evidence was also difficult. Although the decision should have been implemented in

[76]Polish Constitutional Court, Judgment P 1/05 of 27 April 2005; German Constitutional Court BVerfG, 2 BvR 2236/04 of 18 July 2005; Cyprus Constitutional Court Judgment of 7 November 2005. In Germany, a new law was issued in July 2006, taking into account the Court's decision. See *Bundesgesetzblatt Jahrgang 2006 Teil I n.36, 25 Juli 2006*.
[77] See Belgian *Cour d'arbitrage*, Judgment n. 124/2005 of 13 July 2005.
[78] G. Vermeulen, 'Where do we currently stand with harmonisation in Europe?', in A.Klip, H. van der Wilt (eds.), *supra* 68.
[79] ECJ C-303/05 *Advocaten voor de Wereld v Leden van de Ministerraad*, 3 May 2007.

all Member States by August 2005, only nine countries had done it by the spring of 2006[80]. Another example is represented by the European Evidence Warrant, whose text has been agreed on 1 June 2006 at the Luxembourg JHA Council, after three years of lengthy negotiations[81].

At the same time, the failed approval of the Framework Decision on procedural rights[82] is a warning sign: while, on the one hand, the prosecution and enforcement side of the Third Pillar has been developed considerably in the last years, much more is required to strengthen human rights protection. In addition, the safeguards envisaged by the proposal, even in its original version, were still largely incomplete[83], as they did not include, for instance, rules on the presumption of innocence, right to bail, double jeopardy or admission of evidence[84].

More in general, the main flaws of mutual recognition in criminal matters can be identified in: slow negotiation process; decision-making in the third pillar (which has been, *inter alia*, blamed for lack of transparency); lack of rules on conflicts of jurisdiction and *ne bis in idem*; lack of rules on procedural guarantees, presumption of

[80] Insert footnote.

[81] Council of the European Union, 10081/06 (Presse 168) European Evidence Warrant: Council reached a general approach. For instance, the Netherlands pushed for a partial application of the territoriality principle, to allow it to refuse to comply with an EEW relating to offences committed wholly or partly in its territory. Germany has the possibility by means of a declaration to make execution of a EEW conditional on the verification of double criminality for six categories of offences: terrorism, computer-related crime, racism and xenophobia, sabotage, racketeering and extortion, swindling. This does not apply when the issuing authority has declared that the offence concerned under its own national law is covered by the criteria defined in the declaration.

[82] Proposal for a Council Framework Decision on certain procedural rights in criminal proceedings throughout the European Union, Brussels, 28/04/2004, COM (2004) 328 final. See M. Jimeno-Bulnes, 'The Proposal for a Council Framework Decision on Certain Procedural Rights in Criminal Proceedings throughout the European Union' in E. Guild, F. Geyer (eds.), *Security versus Justice? Police and Judicial Cooperation in the European Union* (Ashgate, Aldershot 2008).

[83] The original proposal included: right to legal advice, right to free interpretation and translation, right to receive appropriate attention if not able to understand or follow the proceedings, right to communicate, *inter alia*, with foreign authorities in the case of foreign suspects, right to be notified of one's own rights by means of a written "Letter of Rights". Interestingly, during the consultation process preceding the adoption of the Green Paper, many more rights were considered. See M. Jimeno-Bulnes, 'The Proposal for a Council Framework Decision on Certain Procedural Rights' *supra* 174-175.

[84] The right to bail is supposed to be the subject of a future Green Paper. On the presumption of innocence, see European Commission Green Paper: The Presumption of Innocence, Brussels, 26/04/2006, COM (2006) 174 final. On double jeopardy, see European Commission Green Paper on conflicts of jurisdiction and the principle of *ne bis in idem* in criminal proceedings, Brussels, 23/12/2005, COM (2005) 696 final. A Green Paper on the handling of evidence and a Proposal on minimum standards relating to the taking of evidence were initially envisaged in the Council and Commission Action Plan implementing the Hague Programme on strengthening freedom, security and justice in the European Union, OJ C 198 12/08/2005.

innocence, minimum standards for evidence-gathering; problems in defining the grounds for refusal, the requirement of double criminality and the offences to which the measures should apply. In addition, it seems that the various instruments of mutual recognition present different features in terms, for instance, of dual criminality and grounds for refusal. More coherence would be desirable. These issues are all connected to the question of the competence of the European Community in criminal law. The European Court of Justice, in a conflict of competence between the Council and the Commission over the subject of environmental protection, confirmed its view that both substantive and procedural criminal law are not included in the European Community's competence. However, measures may still be taken when the application of effective, proportionate and dissuasive penalties by the competent national authorities is necessary in the fight against serious environmental offences[85]. Since the question is general and touches upon the very nature of the European Union, disputes in other sectors have been emerging recently[86]. Do the powers of the Community extend to the possibility of prescribing penalties and defining the offences and to all other aspects of criminal law or are they limited to the identification of cases in which criminal penalties are necessary in order to provide an effective, proportionate and dissuasive sanction?

The Finnish Presidency of the Council of the European Union, which started on 1 July 2006, put as one of the priorities of its agenda the need "to explore ways of reinforcing decision-making on criminal law and police cooperation"[87]. An informal JHA Ministerial Meeting was held in Tampere, on 20-22 September 2006. From that meeting it emerged that, while the Commission and the Parliament tended to favour the use of the "bridging" clause, among the Member States only Finland and France clearly supported this view, with Germany, Ireland, the Netherlands and Slovakia more inclined to retain their veto power. The UK was reported to implicitly oppose the new proposal[88]. Some suggested, as a compromise, to apply the so-called

[85] ECJ Case C-176/03, *Commission v. Council*.
[86] See e.g. Case C-440/05 *Commission v. Council* (Ship source pollution).
[87] Finnish Prime Minister's Office Press Release - 30 June 2006- http://www.eu2006.fi/news_and_documents/press_releases/vko26_/en_GB/162650/?u4.highlight
[88] Assemblée Nationale- Rapport d'information n. 2829 sur les consequences de l'arrêt de la Cour de Justice 13 septembre 2005, 25 janvier 2006; House of Lords European Union Committee, 42nd Report of Session 2005-06, 28 July 2006, p. 35; EUObserver.com- EU wants more powers in criminal matters, 8 May 2006; EUPolitix.com-EU to clash on national justice vetoes, 20 September 2006

"emergency brake" procedure, already provided for by Art. III-270 and 271 of the European Constitution, which (prior to the signing of the Lisbon Treaty) would have allowed Member States to opt out of those proposals which affect the nature of their national penal systems[89].

4 Conclusion

Concluding, one may wonder whether the mutual recognition agenda is the way forward for building up the project of a European criminal law. Certainly, cooperation in criminal matters as shaped by the new pieces of legislation and case law (not only at the European, but also at the national level), is far from featuring the classical elements of national criminal law, in particular sufficient safeguards of individual rights and monopoly of force originating from a single, well-defined source. While this second aspect may be appropriately adapted to the EU entity (whether or not in line with a federalising aim), and is therefore open to derogations and flexible solutions, the first aspect needs to be handled with much more care. One of the main reasons is that a lack of adequate provisions for instance on the rights of the defence risks to undermine mutual trust, thus triggering a self-destructive vicious circle.

The consolidation of mutual recognition in its "new" form, while imposing a pure obligation to execute upon the States, still has to cope with problems of definition and a variable number of grounds for refusal, which highlights a limit to smooth cooperation and mutual trust.

More fundamentally, there is a problem of legitimacy and coherence that will still be evident in the Lisbon Treaty scenario, in which the Third Pillar and the First Pillar will be merged. However, leaving aside the question of the EU competence in criminal law, it emerges from the analysis carried out above that there is a pressing need for more approximation both from the substantive and procedural point of view and that the approach through which mutual recognition has been conceived and

[89] Interview with Franco Frattini, EUPolitix.com, 26 June 2006; Financial Times, Drive to give European court a role in settling asylum cases, 28 June 2006. See also Treaty Establishing a Constitution for Europe, OJ C 310 16/12/2004.

implemented is far from uniform. It is to be hoped that the new legal framework provided by the Lisbon Treaty will be the starting point from which it will be possible to re-adjust European cooperation in penal matters.