The Principle of Mutual Recognition in Criminal Matters: a New Model of Judicial Cooperation Within the European Union*

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Abstract

The construction of a European criminal area crystallises all the tensions of a repression which is taking place at an international level. The objectives of the Area of freedom, security and justice in judicial matters rely entirely on an outstanding principle, the principle of mutual recognition of judicial decisions. Imported from the internal market, the principle of mutual recognition is to achieve free movement of criminal decisions within the European Union. This dynamic, asserted in 1999, dawns in an a priori hostile field, and any technical definition of neither the principle of mutual recognition, nor the procedural mechanism are provided. This study aims to establish in legal terms the contents and the outline of the principle of mutual recognition in criminal matters, first by determining a legal definition of the principle in criminal matters and then a procedure for its implementation. Mutual recognition shall be viewed both as a new legal principle and, in a broader sense, a new system of European criminal cooperation.

Introduction

The principle of mutual recognition of judicial decisions, established as the "cornerstone" of a European judicial area at the Tampere Council in 1999[2], means that a judicial decision of a private or criminal nature which is issued by one State of the European union is deemed to have the same validity throughout the EU, regardless of the state of origin. In other words, it is clear that giving a judgement international validity is the same as setting up the mutual recognition of the judgement at an international level[3].

Significant issues arise from the meeting of the principle of mutual recognition and criminal law. Historically, criminal law has always been reluctant to deal with international legal situations[4]. It did not fall into the competence of European Communities. Judicial cooperation between the Member States consisted in implementing the Conventions of the Council of Europe[5]. In 1992, the Treaty of

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[2] Tampere Council Presidency conclusions, October 1999, §33.

[3] *M.-H. Descamps*, La reconnaissance mutuelle des décisions judiciaires pénales, in Actualités de droit pénal européen, *D. Flore* (dir.), La Charte, Bruxelles, 2003, p. 85.

[4] See *C. Lombois*, Droit pénal international, 2 e éd., Dalloz, 1979, p. 553

Maastricht introduced the pillar structure -the third pillar being dedicated to Justice and Home affairs- covering cooperation in criminal matters. The European legislation in this field was shaped by international norms because of the intergovernmental nature of the third pillar[6]. The characteristic of European judicial cooperation in criminal matters at that time had been primarily territoriality and national sovereignty[7]. One can be satisfied that judicial cooperation within the EU was not more efficient than judicial cooperation at an international level[8]. The shift was the Treaty of Amsterdam in 1999[9] which departed from the traditional paradigms of international criminal law. The European integration process, on which the construction of the EU had been based from practically the beginning, applies, aligned with the spill-over theory[10], in judicial fields with the launch of the area of freedom, security and justice[11]. The concept of "area" relies on the suppression of interior frontiers by the means of free movement. It is a breach with the principle of territoriality, underlying traditional judicial cooperation in criminal matters[12]. Indeed, the establishment of the area of freedom security and justice expresses the willingness to focus on citizens' political, judicial and social interests. Justice has, then, become one of the main objectives of the EU. Thus in 1999, mutual recognition was a new principle in EU law, specifically in judicial fields, as it tends to depart from traditional cooperation. The principle of mutual recognition aims at facilitating the judicial cooperation in criminal matters in order to struggle efficiently against cross-border criminality within the EU. In fact, mutual recognition of criminal decisions is a means for the objective of a European judicial area to be met. It has just been recognised in articles 67§3 and 70 of the Lisbon Treaty (in force in 2009).

Presenting the principle of mutual recognition as a shift in EU judicial cooperation entails, for the sound operation of criminal cooperation between the Member States, going through the "why and how" of it. The development of the principle of mutual recognition in criminal matters in the last few years justifies such an undertaking, owing to the difficulties revealed by these in respect of its implementation. Since 2005, a slowing of EU legislation occurred as far as the proper implementation of mutual recognition of criminal decisions was concerned[13]. The instru-

[5] See, as an example, the Agreement on the application among the member States of the European Communities of the Council of Europe Convention on the Transfer of Sentenced Persons 1987.

[6] See the Convention on simplified extradition procedure between the Member States of the European Union, 10 March 1995, the Convention relating to extradition between the Member States of the European Union, 27 September 1996, and the Convention on the protection of the European Communities' financial interests, 26 July 1995.

[7] *A. Bernardi*, Europe sans frontières et droit pénal, RSC, janv./mars 2002.

[8] *S. Manacorda*, Introduction, in L'intégration pénale indirecte. Interactions entre droit pénal et coopération judiciaire au sein de l'Union européenne, *G. Giudicelli-Delage* et *S. Manacorda* (dir.), Société de législation comparée, Vol. 10, Paris, 2005, p. 24.

[9] Treaty of Amsterdam, signed 2 October 1997, in force on the 1 May 1999.

[10] *P. Craig, G. De Burca*, EU LAW, Text, cases and materials, 5th ed., OUP, p. 2.

[11] Article 29 of the Treaty on the European Union.

[12] *D. Rebut*, Les effets des jugements répressifs, in Les effets des jugements nationaux dans les autres Etats membres de l'Union européenne, Université Lyon 3, Bruylant, 2001, p. 177, p. 192.

[13] *I. Jegouzo*, Le développement progressif du principe de reconnaissance mutuelle des décisions judiciaires pénales dans l'Union européenne, in Le droit pénal de l'Union européenne, Association internationale de droit pénal, RIDP, Vol. 77, n°1-2, 2006.

ments adopted then reintroduced some core traditional cooperation features, such as double criminality, along with a classical ban on cooperation. The Framework decision of 27 November, 2008, 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[14], is the perfect illustration that the aim and specificities of mutual recognition are getting lost in favour of sovereignty protectionism of the Member States. Furthermore, when some authors qualify mutual recognition of judicial decisions as a "revolution" in cooperation[15], it might also be considered as a very simple concept[16]. However, a misunderstanding of the content of mutual recognition may explain why the principle of mutual recognition as a principle in itself has not yet been translated into the national legislation of the majority of the member states. More than that, the reluctance of the states to accept mutual recognition may be identified in the way they use their margin of appreciation when implementing the framework decisions in the national legal order[17]. Meanwhile, the importance of mutual recognition in criminal fields has been increasing in EU law. The number of instruments adopted, especially the Directives proposed or already in force since 2010[18], testifies that mutual recognition is necessary for the European judicial area to become a reality. Moreover, EU primary law, and especially the Lisbon Treaty, strengthen the role of mutual recognition on the European criminal cooperation scene. One can be satisfied that the relationship between mutual recognition and criminal matters has evolved from a *blind date* to an engagement[19]. Consequently, the elements within it are interpreted as a call for overcoming obstacles of recognition of this new principle of criminal cooperation within the EU.

After a decade, a choice had to be made for the future of mutual recognition within the EU as to whether those contradictory phenomena and opinions would remain, or if a clarification of the terms of modern judicial cooperation based on mutual recognition should be attempted. From both judicial and practical points of view, the second option would be the most effective when seeking to achieve a systematic approach of mutual recognition in criminal fields[20]. The main difficulty

[14] 2008/909/JHA.

[15] See *A. Suominen*, The principle of mutual recognition in cooperation in criminal matters, Intersentia, 2011, n. 11.

[16] Communication from the Commission to the Council and the European Parliament. Mutual recognition of final decisions in criminal matters, COM/ 2000/ 0495 final.

[17] See the French law (articles 695-11 to 695-51 of the Code procedure pénale) of implementation of the Framework-decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, 2002/584/JHA.

[18] Directive 2012/64/EU of 20 October 2010 on the right to interpretation and translation in criminal proceedings; Proposal for a directive establishing minimum standards on the rights, support, and protection of victims of crime, May 2011; Proposal for a Directive on the right of access to a lawyer and of notification of custody to a third person in criminal proceedings, June 2011.

[19] See *G. Taupiac-Nouvel*, Le principe de reconnaissance mutuelle en matière répressive dans l'Union européenne: from a blind date to an engagement, RPDP, 3/2012.

[20] As demonstrated by Phd thesis undertaken throughout the EU. See *A. Suominen*, The principle of mutual recognition in cooperation in criminal matters, Intersentia, 2011, n. 11.

turns out to be the absence of an official definition of mutual recognition in judicial matters. What does mutual recognition technically mean? The core features of the extraterritorial validity of a criminal decision, based on mutual recognition, must be proposed. In other words, the first step in the building of a model of free movement of criminal decisions is to define mutual recognition within EU law. It is worth mentioning that the traditional principles of international criminal law will have to be integrated into a European model for free movement of decisions in criminal matters. Consequently, defining mutual recognition entails, with regard to the objective of a systematisation of mutual recognition, presenting the procedural aspects of the functioning of the principle of mutual recognition. How is this new principle in criminal cooperation articulated with rules such as conflicts of competence or the protection of fundamental rights?

This work is not built on the method elected by the majority of academic writers who write on this topic. In spite of the fact that adopted framework decisions were not grounded on a pre-existing definition and technical approach, starting with the analysis of each instrument of mutual recognition is not, if systemisation of the principle is the aim, the proper way to achieve the objective of our undertaking.[21]The method here consists in not focusing, initially, on the outcome of the implementation of mutual recognition since 2002. The demonstration of how mutual recognition has become a new model of judicial cooperation in criminal matters is to be located in the aftermath of the transfer of the concept of mutual recognition from the Single market to the area of freedom, security and justice prior to the adoption of EU legislation for its implementation. The understanding of mutual recognition entails going through the European construction. The starting point is, more precisely, located in the European integration process, and the part taken in by mutual recognition must be analysed. It appears that the governing principle of free movement within the European Union, which relies on mutual trust between Member States, is the feature of a "genetic code" of mutual recognition. Both the definition of mutual recognition in judicial fields (I) and the procedure of implementation (II) are rooted in this "genetic code" and lead to mutual recognition being concretised as a new model of judicial cooperation in the EU.

I. Definition of the Principle of Mutual Recognition of Judicial Decisions in Criminal Matters: a New Legal Principle in Judicial Cooperation[22]

For now, given the absence of an official definition of mutual recognition in judicial cooperation, one can say that the concept of "mutual recognition" in this field belongs to the category of a general idea in EU law. Thus, it is a source of

[21] In that line, see *A. Lazowski*, From EU with trust : the potential and limits of the mutual recognition in the third pillar from the Polish perspective, in L'avenir de la reconnaissance mutuelle en matière pénale dans l'Union européenne, *G. Vernimmen-Van Tiggelen, L. Surano, A. Weyembergh* (éd.), Université de Bruxelles, IEE, 2009, p. 419.

embarrassment to assert that mutual recognition is a strategy of judicial nature in criminal cooperation. The approach is even more complicated when considering the existence of mutual recognition both in the Single market and the area of freedom, security and justice. The transfer of mutual recognition from the Single market to the AFSJ may be interpreted in two ways.. First, such an import means that a concept applied in economic fields may bring an increased value to the European penal area. Secondly, such a transfer offers the basis of the definition of mutual recognition in EU law. As already pointed out, the principle of mutual recognition is rooted in the integration process of the European Union. This has been thus since the beginning when Europe considered mutual recognition as a mode of integration[23]. Conceived in 1979 in the context of the European economic integration, mutual recognition is deemed to be an alternative method to harmonisation of national legislation within the EU. In the "Cassis de Dijon" Case[24], the European Court of justice considers that a product lawfully manufactured by one Member state has to be marketed by other Member states although there is no harmonised legislation at a European level in respect of production requirements.

As a "genetic code" of this general method of integration, one can say that mutual recognition can only be opted for in an ongoing integration process of States, and that mutual recognition is directly linked to freedom of movement. In this perspective, freedom of movement is the underlying principle of the construction of the EU on which mutual recognition is grounded. Thus, the latter may be deemed to be characteristic of EU identity. The transfer of mutual recognition in judicial fields in 1999 was justified by the launch of an integrated area of free movement of individuals and judicial decisions. Moreover, mutual trust in this field between the national judicial authorities and the imperative for legal certainty make this innovation in criminal cooperation tenable. All these changes mark a shift in the traditional criminal cooperation model. Although the "genetic code" of mutual recognition, as a European integrative method, represents the first step in the definition process[25], distinctions have to be noted depending on the fields in which it applies. The discrepancies as to the understanding of mutual recognition are not therefore related to its general features. The terms of mutual recognition would have to be different if it is to deal with goods or judicial decisions. The specificity of the area covered by EU law entails complementary features with respect to a

[22] It is worth mentioning that although a parallel with judicial cooperation in civil and commercial matters may be drawn, it will not be covered in the frame of this paper which focuses on criminal matters. See *G. Taupiac-Nouvel*, Le principe de reconnaissance mutuelle des décisions répressives dans l'Union européenne. Contribution à l'étude d'un modèle de libre circulation des décisions de justice, Coll. Fondation Varenne, LGDJ, Dec. 2011.

[23] *P. Craig, G. De Burca*, EU LAW, Text, cases and materials, 5th ed., OUP, p. 595, 596.

[24] ECJ C 120/78 *Rewe-Zentrale AG v. Bundesmonopolverwaltung für Branntwein*, 1979. The Communication from the Commission concerning the consequences of the judgment given by the Court of justice, Feburary, 1979 (OJ C 256/2, 1980) represents the formal birth of mutual recognition.

[25] The idea of equivalence is also a feature of the genetic code of mutual recognition in the EU. In judicial matters for example, it is known that the legal systems of the Member states are deemed to be similar, which permits mutual recognition to be implemented in those States.

definition of mutual recognition which will belong to the category of technical terms of mutual recognition in criminal matters.

In respect of the cooperation in criminal matters, quite comprehensive definition of mutual recognition has been established by the Belgian Government according to which "*the principle of mutual recognition derives from the idea of a common area of justice, encompassing the territory of the Member states of the Union, within which there would be free movement of judgements. More concretely, it signifies that when a decision has been handed down by a judicial authority which has competence under the law of the Member state in which it is situated, in accordance with the law of that State, the decision becomes fully and directly effective throughout the territory of the Union and that the competent authorities in the Member States in the territory of which the decision may be enforced assist in the enforcement of the decision as if it were a decision handed down by a competent authority in that State*"[26]. This definition is a departure from mutual recognition being regarded as a mere aspect of judicial cooperation. It enhances the possibility to find the technical terms of the new model of free movement of criminal decisions within the EU. Taking the view that mutual recognition of judicial decisions is linked to the imperative of free movement within the EU, a criminal decision issued by the judicial authority of one Member state which has jurisdiction will have the same value in the other Member states[27]. Indeed, it has to deal with the extraterritorial efficiency of the criminal decisions within the EU. In the application of mutual recognition, how does a judicial decision rendered in one State keep its value of "origins" when crossing borders? The model of extraterritorial efficiency of judicial decisions into which mutual recognition fits has to be determined.

Previously, it was necessary to give a definition for the "extraterritorial efficiency" of a judicial decision. This expression corresponds to the legal scope of the foreign judicial decision in another national legal order. What is of importance is that it has nothing to do with the procedures in the different States with respect to the enforcement of foreign decisions. The extraterritorial efficiency answers previous questions related to the value of a judicial decision, judgement or other, once it has crossed the national frontiers of the territory on which it was rendered. In line with other academic writings so far, and seeking legal terms of the definition of mutual recognition of criminal decisions, it is safe to refer to the existing international models of movement of foreign judicial decisions. At first sight, there are two options: mutual recognition, as a model of extraterritorial efficiency of a judicial decision, may fit into the classical model of international criminal law or into the traditional model of private international law.

Concerning the first of these, it seems tough to work out a definition of mutual recognition on the basis of the classical model of judicial cooperation in criminal matters, which is also called judicial assistance. The principal reason is related to the methods of international criminal law. Basically, judicial cooperation in criminal

[26] Belgium, Chamber of the representants, Document 51-279/001, p. 7.

[27] *D. Flore*, Reconnaissance mutuelle, double incrimination et territorialité, in La reconnaissance mutuelle des décisions pénales dans l'Union européenne, *G. De Kerchove* and *A. Weyembergh* (ed.), Univ. of Brussels, 2001, p. 75.

matters is grounded on the dogmatic theory of territorial sovereignty of the States which is in itself a ban on movement of criminal decisions. It is apparent in domestic law and even in International Conventions that enforcing foreign criminal judgements or decisions is exceptional[28]. In most situations, the foreign decision is to be considered by the national authority as a fact which makes it impossible to characterise an extraterritorial efficiency of the judgement. However, it was argued that mutual recognition in European judicial cooperation is either a copy, or a further development of what has been established by the Convention on the International Validity of Criminal Judgments 1970[29]. This element led us to go through that Convention in order to find the features of the extraterritorial efficiency of foreign judgements. Mutual recognition has been considered equivalent to the principle of assimilation[30] According to the Explanatory report of the Convention mentioned above, "*the fundamental concept behind the Convention is the assimilation of a foreign judgment to a judgment emanating from the courts of another Contracting State. This concept is applied in three different respects, namely to the enforcement of the sentence, the ne bis in idem effect, the taking into consideration of foreign judgments*". Is the principle of assimilation a legal principle upon which criminal cooperation has been based? The answer may be found in the applications of this principle. Although it is set out in the Explanatory report, the Convention only mentions assimilation in article 26§4 with respect to pre-trial decisions[31]. In other words, the principle of assimilation, and any other principle, has never been recognised as a governing principle of criminal cooperation. These elements lead to the conclusion that the movement of foreign judicial decisions does not rely on a model of judicial cooperation in criminal matters. The features of classical judicial cooperation in criminal matters are pragmatism, occasional necessity, and diplomatic concerns. However, as stated by Professors Fletcher, Loof and Gilmore, the principle of mutual recognition is a "massive conceptual shift in the realm of international cooperation in criminal matters"[32]. It just emphasizes the impossibility for the classical model of criminal cooperation to give the principle of mutual recognition its legal terms.

In any event, a criminal decision has the capacity to cross the border and to produce its legal consequence in a different legal order other than that of its origin[33]. Therefore, it is safely arguable that the principle of mutual recognition of judicial decisions could correspond to the classical model of private international law. In this field, there is no doubt that a model of extraterritorial efficiency of

[28] The Convention on the transfer of sentenced persons, 1983, is certainly the only illustration of a real process of enforcement of foreign criminal judgement.

[29] See *L. Moreillon* and *A. Willi-Jayet*, Coopération judiciaire pénale dans l'Union européenne, in Dossiers de droit européen, *C. Kaddous* and *P. Mercier*, Helbing et Lichtenhahn, Bruylant, LGDL, 2005, p. 301 to 338.

[30] *M. Masse*, L'entraide judiciaire internationale, version française – suite, RSC, oct./déc. 2005, p. 952.

[31] The principle of assimilation is also set out in the European Convention on the transfer of sentenced persons, 1983.

[32] *Fletcher, Loof* and *Gilmore*, EU criminal law and justice, Elgar European Law, 2008, p. 16. The authors add that "starting with the Tampere Declaration, the EU seems to have expressed an implicit wish to change paradigms for its international system of cooperation in matters of criminal law and justice"

[33] *H. Donnedieu de Vabres*, Les principes modernes du droit pénal international, Ed. Pantheon-Assas, LGDJ, 2004, p. 4 and pp. 306.

judicial decisions exists. There must, then, be a distinction between, on the one hand, the input of an application of the classical model of private international law in criminal matters and, on the other hand, the limits of this model in the European judicial area. Regarding the first point, the model of extraterritorial efficiency of the decision in private international law may be applicable to criminal matters when a parallel is drawn between judicial decisions in both fields. Indeed, an analysis of the structure of the judicial decision, which focuses on the *res judicata* and the enforceability of the judgement and decision, is essential to the reasoning in private international law. Since it could be assessed that the same reasoning applies to criminal decisions for the simple reason that they are judicial decisions, *res judicata* and enforceability can be located in criminal decisions. Consequently, it is tenable to put forward the ability of criminal decisions to cross borders. Furthermore, it is not right to say that private international law does not protect the Sovereignty of the State[34]. Under classical private international law, a foreign judicial decision can only be accepted in the welcoming State if some national requirements laid down in domestic law, also called international validity requirements, are fulfilled by the decision. In other words, the heart of the classical model is that each country is able to determine when and how a foreign decision is recognised and/or enforced in its own territory[35]. According to these elements, the absence of movement of criminal decisions is difficult to understand[36]. Nevertheless, the classical model of private international law cannot be retained for the definition of mutual recognition within the EU because it does not appear to match the objective of "free" movement. To conclude, considering the impossibility to determine the legal terms of mutual recognition of criminal decisions by referring to the classical model of both international criminal law and private International law and along with the imperative of free movement within the European judicial area, an autonomous European model of cooperation in criminal matters had to be set up.

To assess the autonomy of the principle of mutual recognition in criminal matters, features of the new model of extraterritorial efficiency of judicial decisions must be proposed.

The first feature is the function of mutual recognition in criminal matters. Mutual recognition only concerns criminal decisions of a judicial nature. This limited scope scribes to define "judicial decisions" in that context. Since the early beginnings of mutual recognition in criminal fields, the European institutions had considered that this principle applied to "pre-trial decisions", "decisions taken in the course of a trial", "final decisions", and "decisions taken after such a final decision"[37]. The advantage of such a categorisation is to encompass the different terminology in force

[34] *D. Bureau, H. Muir Watt*, Droit international privé, Tome I, PUF, 2010, p. 221.

[35] On this method, see *M.-L. Niboyet, G. de Geouffre de la Pradelle*, Droit international privé, 2 e éd., LGDJ, 2009, p. 520 ; *H. Peroz*, La réception des jugements étrangers dans l'ordre juridique français, LGDJ, 2005, p. 72.

[36] In that line, *H. Donnedieu de Vabres*, Traité de droit criminel et de législation pénale comparée, 2nd ed., Sirey, 1943.

[37] Programme of measures to implement the principle of mutual recognition of decisions in criminal matters, OJ, C 12/10, 15. 1. 2001, p. 10-22.

in the twenty-seven Member states. However, the lack of clarity of the European terminology may lead to misunderstandings and difficulties in implementing the various instruments of mutual recognition. Hence, a unique criteria to define judicial decision, as far as judicial cooperation in criminal matters in the EU is concerned, is proposed. The criteria for a final act from a Court (*acte juridictionnel passé en force de chose jugée*), allows different types of judicial decision to be covered, not only judgement, when the condition of a decision made by a judge is reached[38]. The presentation of this function of mutual recognition permits an exclusion within this principle in respect of the issue of application of the penal foreign law[39]. The second feature of the new model of cooperation is related to the acceptance of the foreign judicial decision in the *for*. In compliance with the imperative of free movement, and all the elements pointed out so far, extraterritorial efficiency is to be direct. National requirements for the validity of the foreign decisions have to be avoided. Thus an "assumption of validity" of foreign decisions is the rule governing the mode of its acceptance. This assumption of validity, which is the choice of terminology used here, means that the judicial decision has the same value and efficiency acquired in the State of origin, in all the Member states of the EU. Assuming the validity of the foreign decisions, the welcoming Member states are prevented from checking any additional requirements as to the validity of it. The consequence of direct extraterritorial efficiency is that the issuing Member state of the judicial decision is responsible for its validity. This assumption of validity of a criminal decision is supposed to lead to free movement of judicial decisions. Along similar lines, the changes in criminal cooperation go further. Indeed, the classical conditions of traditional cooperation that deal with the nature of the offence, and double criminality have been abandoned[40]. This means that the scope of the new model of criminal cooperation is broad[41].

To conclude, the features of the autonomy of mutual recognition as a new model of cooperation on the International scene have been identified by assessing the originality of this principle established in criminal matters in 1999. The definition of mutual recognition of criminal decisions, however, needs to be completed with a study of the new regime of judicial cooperation.

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[38] According to this criteria, it is then possible to consider in France the "homologation", or the decision related to preventive detention for example, such as judicial decisions covered by mutual recognition. See the French academic literature on the definition of a "judicial decision": *J. Heron* et *T. le Bars*, Droit judiciaire privé, 4th ed., Montchrestien, 2010, pp. 264; *L. Cadiet, E. Jeuland*, Droit judiciaire privé, 6th ed., 2009, p.63.

[39] On this topic, see *C. Lombois*, Droit penal international, 2nd ed., Dalloz, 1979, p. 480.

[40] On this issue, see *J. Pradel*, Le mandat d'arrêt européen. Un premier pas vers une révolution copernicienne dans le droit français de l'extradition, Dalloz, n°20, 21; *G. Stessens*, The joint Initiative of France, Sweden and Belgium for the adoption of a Council Framework Decision on the execution in the European Union of orders freezing assets or evidence, in La reconnaissance mutuelle des décisions judiciaires pénales dans l'Union européenne, *G. De Kerchove* and *A. Weyembergh* (ed.), Univ. Brussels, 2001, p. 91; *S. Manacorda*, La dérogation à la double incrimination dans le mandat d'arrêt européen et le principe de la légalité, CDE, 2007, p. 149.

[41] This scope tends to become broader with the developments of the integration process in criminal fields.

II. Implementation of Mutual Recognition of Criminal Decisions: a New System of Judicial Cooperation

Free movement of criminal decisions within the EU signifies, concretely, that the legal effects of the foreign decision in respect of its *res judicata* or enforceability are admitted in all the Member states. In the same line, it was said that "*the concept of mutual recognition could, of course, also be understood in a broader sense, implying that judgments should be recognised not only for the purpose of enforcement, but also be recognised in a more general sense (…) Thus, one can say that "mutual recognition" is a general concept that includes several different legal dimensions (recognition for enforcement purposes, recognition for the purpose of precluding prosecution, recognition for the purpose of sentencing recidivists etc)*"[42]. The model of extraterritorial efficiency on which mutual recognition is based focuses on the validity of the judicial decision crossing the borders. Thus once the validity of the decision is accepted, it has to produce its legal effects in the executing Member state. In other words, a distinction has to be made between, on the one hand, the acceptance of the validity of the foreign decision and, on the other hand, the procedure to recognise and enforce it on the territory of the *for*. The principle of a straight extraterritorial validity of a criminal decision does not prevent the procedure of implementation of mutual recognition from being indirect, i. e. conditional.

The conditions of mutual recognition have to be consistent with the aforementioned definition of the principle. In that perspective, given that the validity of the criminal decision is acquired in the State of origin of the decision, and is not controlled by the executing authorities, the foreign decision will not have to comply with the legal order of the *for*. More precisely, the foreign decision shall only be prevented from being integrated in the legal order of the *for* if it does not comply with the formal requirements of the procedure of mutual recognition[43] or if it is inconsistent with the principles of the European judicial area. In those circumstances, recognition and enforcement of the criminal decision may be refused. For example, a decision on financial penalties is valid in the Member state in which it was rendered, but there is an error on the European certificate which incorporates that decision. In that situation, the extraterritorial efficiency of the decision is not discussed. However, it is complicated to envisage the implementation of that decision despite a formal condition of mutual recognition not being fulfilled. Basically, the lawyer has to be aware that the application of mutual recognition in criminal matters entails determining the relationships between this new principle of judicial cooperation and the principles and rules of criminal law. Mutual recognition of foreign decisions is to be shaped by two different set of rules which are central to extraterritorial criminal law. The rationale for this is to incorporate each set of rules in the mutual recognition procedure. Therein, the rules on conflicts of criminal

[42] *P. Asp*, The Nordic « system » for Mutual recognition in criminal matters, in La reconnaissance mutuelle des décisions judiciaires pénales dans l'Union européenne, *G. De Kerchove* et *A. Weyembergh* (éd.), Université de Bruxelles, IEE, 2001, p. 224.

[43] See below.

competences and those related to the protection of fundamental rights are addressed. Are those rules an impediment to free movement of criminal decisions within the European Union? Furthermore, do they have legitimacy as material conditions of mutual recognition?

First and foremost, rules on conflicts of competences and protection of fundamental rights provisions shall not be considered as conditions of mutual recognition unless they are in coherence with the terms of this principle. In other words, the rules on conflicts of criminal competences and on protection of fundamental rights can only be consistently incorporated in the new mechanism of judicial cooperation if they are not connected with the sovereignty of the state[44]. It would be paradoxical to create a new and autonomous model of judicial cooperation, departing from traditional cooperation in criminal matters, and retain a national approach of the validity of a foreign decision. It would have meant that the conditions of mutual recognition are inferred on the validity of the foreign decision. This does not sound very coherent in keeping with what has been said so far. Consequently, still in line with the assessment of a direct extraterritorial efficiency of the decision which does not imply automatic recognition of it in another Member state, it appeared necessary to outline the criteria which convert a specific set of rules into conditions of mutual recognition. One can argue that it is not a matter of validity of the foreign decision but of compliance with the principles in force within the European Union.

A judicial decision will not be recognised or enforced in another Member State if its authorities may raise a competitive claim to decide upon the case. Independence of States as to the exercise of criminal competences has always been the rule[45]. The criteria for the jurisdiction of the national legal order are established by each States. It is part of their sovereignty to determine the connecting factor of a legal situation with its national criminal system (law and judicial system). In respect of the jurisdiction of their national order, States act unilaterally in international criminal law. As a consequence, a real problem arose from the movement of criminal decisions throughout the EU. Indeed, the competition between the national authorities to prosecute or convict an individual for the same offense may hinder free movement of judgments and decisions[46]. Although the issue of conflicts of jurisdictions in criminal law is of a highly complex nature[47], it seems obvious to attempt to find solutions at a European level in order to consistently place all the elements of the new model of judicial cooperation together[48]. Founded in the European penal area,

[44] See above.

[45] *A. Huet, R. Koering-Joulin*, Compétence des tribunaux répressifs français et de la loi pénale française, Infractions commises à l'étranger, Jscl Droit international, fasc. 403-10.

[46] See for example the ground for refusal based on the extraterritorial jurisdiction of the issuing state of a European arrest warrant, admitted by the Supreme Court of Ireland to refuse the execution of the warrant issued by France, Supreme Court, *Minister for Justice Equality and Law Reform v. Bailey*, [2012] IESC 16, 1.03. 2012.

[47] *E. Barbe*, Comment pallier l'absence de règles harmonisées de conflit de compétences en matière pénale ?, in L'espace judiciaire européen civil et pénal. Regards croisés, *F. Jault-Seseke, J. Lelieur, C. Pigache* (dir.), Dalloz, 2009, p. 92.

[48] The attempts of the EU since 2005 have failed. The Framework decision adopted is providing for guidelines when Member States want to avoid parallel procedure. This text splits up with the proposition which established a real and comprehensive mechanism of prevention of conflict of criminal competence within the EU. No doubt it was

the principle of *Ne bis in idem* has to be referred to as the overarching principle. This principle means that no one can be tried or punished twice for an offence[49]. The principle of *ne bis in idem* in respect of the resolution of conflicts of competence is not new unless it can be asserted that its definition has changed[50]. Concretely, *ne bis in idem* may be regarded as the fundamental right for the individuals of "unity of criminal actions" within the EU[51]. According to this broad approach of *ne bis in idem,* a conflict of national competence which arises in the frame of the implementation of a European arrest warrant for example, shall be resolved by verifying the respect of the unity of criminal actions between the Member states[52]. Different situations have been envisaged in order to propose the proper means to resolve the conflict in favour of free movement of the decisions. In this concise study, it is impossible to go into any great depth. However, on the basis of the general approach of *ne bis in idem* within the EU, new conditions of implementation have been identified. *Ne bis in idem* is not solely connected to the rules related to the *res judicata* of a decision. Given the case law of the European Court of Justice and the outlined rationale for the European penal area, the conditions of implementation of the *ne bis in idem* principle had to be reviewed. Integrated into the mechanism of mutual recognition of criminal decision, *ne bis in idem* permits the objective to avoid irreconcilable judgements being met[53].

The Treaty of Lisbon emphasises the respect of fundamental rights in the Union that now represents the area of freedom, security and justice[54]. This perspective implies that the procedure of mutual recognition of criminal decisions guarantees the fundamental rights of the person involved in the proceeding[55]. Nevertheless, *"une chose est de reconnaître en quoi la mise sur pied de l'espace commun de liberté, de sécurité et de justice peut contribuer au meilleur respect des droits de l'homme au sein de l'Union européenne; autre chose est de s'interroger sur les limites que les droits de l'homme peuvent imposer à la construction de cet espace judiciaire commun et à sa « pierre angulaire »,*

a step forward although one can be satisfied that prevention of conflicts is not sufficient to avoid the rise of conflicts at a later stage in the process of cooperation, i. e. when the foreign decision has to be recognised or enforced. See, for example, ECJ, Miraglia, C-460/03, 10. 05. 2005.

[49] See Article 4 of Protocol 7 to the ECHR, article 50 of the Charter of Fundamental rights, article 54 of the Convention of implementation of the Schengen Agreement.

[50] *S. Peers*, Double jeopardy and EU law: time for a change?, European journal of Law reform, Vol. VIII, n°2/3, 2006, pp. 199-222.

[51] *J. Lelieur Fischer*, La règle ne bis in idem. Du principe de l'autorité de la chose jugée au principe d'unicité d'action répressive : étude à la lumière des droits français, allemand et européen, Thèse dactyl., Paris I, 2005.

[52] This concerns several provisions of the Framework-decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, 2002/584/JHA: articles 3§2, 4§2, §3, §7.

[53] A different schema of solutions had to be set up. The rule of reference could be chronological. The "first seized, first served" approach is not effective, however, for situations where two national authorities of different states involved in the same penal procedure, and in the execution of a European arrest warrant, for example, have both ruled on the facts. In this case, the object of the conflict is the final judgments in itself. Further development in *G. Taupiac-Nouvel*, Le principe de reconnaissance mutuelle des décisions répressives dans l'Union européenne. Contribution à l'étude d'un modèle de libre circulation des décisions de justice, Coll. Fondation Varenne, LGDJ, Dec. 2011, pp. 292-302.

[54] Article 67 TFEU.

[55] Communication from the Commission to the council and the European Parliament on Mutual recognition of final decisions in criminal matters, 26. 7. 2000, COM(2000)495 final.

la reconnaissance mutuelle des décisions de justice rendues en matière répressive"[56]. Fundamental rights must be effectively guaranteed in the frame of the procedure of recognition and enforcement of the foreign criminal decision. But to what extent may a limit to mutual recognition founded on the protection of fundamental rights may be admitted? In international criminal law, the respect of fundamental rights, according to the national appreciation, is systematically raised to ban cooperation[57]. This sensitive issue is then of significant importance. When does the protection of fundamental rights in criminal matters represent a limit to mutual recognition? This is something that has to be determined. In order to prevent a breach in mutual trust between the national authorities it appeared desirable to make the protection of fundamental rights a condition of mutual recognition[58]. It is therefore possible to build the protection of fundamental rights condition on the general spirit of the new model of judicial cooperation in criminal matters.

However, the analysis of the texts and working papers of the European institutions reveals the refusal to incorporate a condition related to the protection of fundamental rights into the mechanism of mutual recognition in criminal matters[59]. Both primary and secondary law provide a general obligation to protect the fundamental rights in each national system. This general obligation may not be furthered in a condition of mutual recognition because its scope is limited to the procedure of recognition or enforcement of the foreign decision. A distinction does, however, need to be made between the terms of this implementing procedure and the procedure of mutual recognition in itself which corresponds to the stages of the decision-making process on acceptance of the foreign decision. Notwithstanding the existing liability of the Member States to respect the Fundamental rights of the individuals in a criminal proceeding, the protection has to be enforced at the stage of the decision on the acceptance of the criminal decision. More concretely, it is presumed that the procedure of movement of the criminal decision within the EU may be in breach of the fundamental rights of the suspect. Thus, the problem goes beyond the question of mutual trust between the Member states[60]. As an example, National Courts cope with difficulties in the implementation of the European arrest

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[56] *O. de Schutter*, L'espace de liberté, de sécurité et de justice et la responsabilité individuelle des Etats au regard de la CEDH, in L'espace pénal européen : enjeux et perspectives, *G. De Kerchove* et *A. Weyembergh* (éd.), Université de Bruxelles, 2002, p. 229.

[57] *M.-E. Cartier*, « Déplacer le tabouret ou le piano » Quelques réflexions sur un nouvel instrument : le mandat d'arrêt européen, in Apprendre à douter. Questions de droit, Questions sur le droit, Etudes offertes à *C. Lombois, Pulim*, 2004, pp. 639.

[58] See, *A. Suominen*, The principle of mutual recognition in cooperation in criminal matters, Intersentia, 2011, n. 11, p. 222. "The human rights restrictions do limit mutual recognition, but their existence cannot be seen as excessively limiting the scope or application of mutual recognition. These are more to be seen as *preconditions* for mutual recognition. They are essential for the proper functioning of mutual recognition".

[59] Communication from the Commission to the Council and the European Parliament on mutual recognition of judicial decisions in criminal matters and the strengthening of mutual trust between Member states, COM (2005) 195 final, 19. 05. 2005.

[60] On mutual trust, see *B. de Lamy*, La confiance mutuelle comme fondement du mandat d'arrêt européen. Un peu, mais pas trop…pour l'instant, in Les droits et le droit, *Mélanges Bouloc*, Dalloz, 2007, p. 559 ; *V. Malabat*, Confiance mutuelle et mise en oeuvre du mandat d'arrêt européen, in Justices et droit du procès, Du légalisme procédural à l'humanisme processuel, Mélanges en l'honneur de *Serge Guinchard*, Dalloz, 2010, p. 974.

warrant. How can the right of the defence be protected if the national criminal proceeding is not adapted to the strict time-limit of the European arrest warrant execution procedure[61]? Is it still possible to execute a European arrest warrant when, in the course of the trial in the issuing Member State, it appears that there is not sufficient evidence to prosecute the individual detained in the executing Member state?[62].

Consequently, this work aimed to propose in each instrument implementing mutual recognition a unique provision laying down the terms of the protection of fundamental rights, and specifically the rights of the defence, at the stage of movement of the judicial decision[63]. This proposal is made notwithstanding the need for harmonized minimum standards on the guarantee of fundamental rights in the national legal orders that would enhance mutual trust within the EU[64].

To conclude, the issue of the conditions of mutual recognition is relevant to the rise of a new type of regularity of the foreign decision which would be the "European validity" of the criminal decisions. This model of cooperation in criminal matters narrows the margin of appreciation of the Member states which is then limited to the protection of their own public order not covered by the European common shared values.

The last characteristic of the new model of cooperation which has to be studied is the mechanism of mutual recognition in itself. The practical terms of the movement of criminal decision within the EU are relevant to the formal conditions of mutual recognition. The provisions related to the procedure of mutual recognition in the adopted Framework-decisions are presented as features of the new principle. It means that the originality of mutual recognition in the judicial field is partly explained by the proceeding of recognition and enforcement of the decisions. Considering the definition of mutual recognition previously established, the procedure of implementation has to allow a free movement of criminal decisions within the European area. The procedure of mutual recognition, therefore, has to be the illustration of the autonomy of the new model of judicial cooperation in criminal matters. It is necessary to be mindful that with the new instruments adopted since 2002 in the EU, the main shift is that cooperation is now built upon direct contact between the national judicial authorities. The request model of traditional cooperation has been totally suppressed in favour of a model of movement of judicial decisions. Deleted from its political aspect, judicial cooperation makes the criminal

[61] See for example, Cass. Crim., 24 November 2004, n°04-86314; 14 December 2004, n°04-68695; 14 September 2005.

[62] Re (Hilali) Governor of HMP Whitemoor, 30 janvier 2008, 2 WRL; *Hilali F. v. Governor of HMP Whitemoor*, 25 avril 2007, case n° CO/9725/2006.

[63] For the terms of the infringement which should be regarded as a limit of mutual recognition, see *G. Vernimmen-Van Tiggelen* and *L. Surano*, Rapport final, Analyse de l'avenir de la reconnaissance mutuelle en matière pénale dans l'Union européenne, ULB, ECLAN, November 2008, p. 26.

[64] In that line, progress has been made in the last few years. Directive 2010/64/EU of 20 October 2010 on the right to interpretation and translation in criminal proceedings; Directive 26 April 2012 on the right to information in criminal proceedings; Proposal of Directive on the right to have access to a lawyer and the rights of the defence, June 2011.

decisions circulate from one national legal order to another, and one can say that the national judicial authorities are the principal actors of the mutual recognition procedure. The European judicial order intervenes in the mechanism of mutual recognition in order to guarantee its efficiency. In the end, functioning of mutual recognition is characterised by a double level of procedure. To go further into the details of the procedure, the different stages of the mechanism must be distinguished[65]. Firstly, the incorporation of the decision into the European certificate has been pointed out, so has the transfer of the certificate to the competent executing authority. Secondly, the decision on the acceptance of the foreign decision in the national legal order has also been mentioned. Thirdly, the last stage of the procedure deals with the consequences of the decision to accept the foreign judgment when recognition or enforcement is at stake. Furthermore, in the instruments adopted, the mode of acceptance of the foreign criminal decision is laid down and it shall match free movement of decisions. Indeed, a judicial decision is accepted in the executing Member state firstly, if the European certificate in which the decision is incorporated, like the European warrant, passes the control of its formal regularity and, secondly, if the conditions related to conflict of jurisdictions and respect of the fundamental rights are fulfilled. This mode of acceptance excludes all the national authorities' checks focusing on the protection of the *for*. The approach of the mechanism in some of the latter instruments should then be revisited.

The mechanism of free movement shall be applied to different types of criminal decisions[66]. The implementation process of mutual recognition in criminal law is not, however, achieved. The pre-trial decisions and the sentences turn out to be sensitive issues in respect of the mutual recognition procedure[67]. Added to that, the default of achievement may be explained by the lack of protection of the victims in the procedure of mutual recognition[68]. As it has been outlined, the mutual recognition procedure is run both by national and European actors. The latter are deemed to be a guarantee for the future of mutual recognition of criminal decisions within the EU[69]. Indeed, in order to promote the efficiency of mutual recognition, the European bodies such as Eurojust and the European judicial network shall be a means to overcome the difficulties pointed out. For example, Eurojust could be a reference in the frame of the resolution of conflicts of jurisdictions[70]. Furthermore,

[65] It is agreed that the distinction drawn is of doctrinal concerns. That is to say, maybe it is not practically relevant but it serves the purpose.

[66] See above the categorisation of criminal decision covered by the principle of mutual recognition.

[67] Firstly, the Framework decision 2008/675/JHA on taking account of convictions in the Member states of the European Union in the course of new criminal proceedings, 24 July, 2008, could be reviewed in order to be directly connected to the principle of mutual recognition. Secondly, the Framework decision 2008/909/JHA 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, 27 November, 2008, is partly implementing mutual recognition while the rest of the text refers to the traditional model of judicial cooperation in criminal matters.

[68] However, improvements have been made in respect of the protection of victims, see Directive 2011/99/EU on the European protection order, December, 2011.

[69] The vertical and horizontal evaluation process of the implementation of mutual recognition instruments is also of importance. This is a means to enhance mutual trust between the national authorities and to promote the effectiveness of judicial cooperation in criminal matters within the EU.

the European Court of Justice has a central role in the implementation process of mutual recognition of criminal decisions. Basically, the European institution gives a uniform interpretation of the Framework decisions' provisions when it answers to a request for a preliminary ruling[71] and, with the Lisbon Treaty, its general jurisdiction in criminal matters[72].

As a conclusion, the new model of judicial cooperation within the EU is based both on the definition of mutual recognition as a means to achieve free movement of criminal decisions, along with the procedural mechanism to implement it. Rooted in the integration process of the EU, the principle of mutual recognition in criminal matters follows the logic of European construction. Consequently, this principle serves European integration as much as the latter represents an increased value for the fight against crime within the EU. The major actors of this system, however, are the national Courts and authorities which imply going further in the adaptation of judicial practises in the Member States.

[70] The Treaty of Lisbon; Article 85, increases the powers of Eurojust. This European entity would now have the capacity to drive the intra-European conflicts of jurisdictions resolution.

[71] See *D. Simon*, Le système juridique communautaire, PUF, 2001.

[72] This general jurisdiction of the ECJ, which is binding from 2014, may be a means to deal with the issues related to the protection of fundamental rights in the procedure of mutual recognition of judicial decisions.