Limits of mutual recognition in cooperation in criminal matters within the EU – especially in light of recent judgments of both European Courts

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This article analyses the limits of the principle of mutual recognition in cooperation in criminal matters. To start with, some characteristics of mutual recognition are analysed, which are the multilevel character of the principle, its functions and the degree to which it is realised. The limits are then analysed, and these are divided into three main groups; limits based on EU rules and principles, limits based on the character of cooperation in criminal matters and the limits based on fundamental rights. The case law of the CJEU is discussed in this context, especially where this impacts on the limits. The limits are then examined in relation to four levels; the EU legislative level, the EU application level, the national legislative level and the national application level, as the limits function differently depending on which level they actualise. What the limits mean are then examined after that, followed by some concluding remarks.

I. Introduction

Mutual recognition of judicial decisions in criminal matters is one of the main principles within the area of freedom, security and justice (AFSJ). Applying this principle has its main focus on effectiveness and recognition of foreign judicial decisions as national ones. The idea is that judicial decisions and judgments move freely within the AFSJ. The legislative competences on cooperation in criminal matters encompass the realisation of the principle of mutual recognition. Cooperation in criminal matters 'shall be based on the principle of mutual recognition of judgments and judicial decisions' (art. 82(1) TFEU)[1] and the Union is to ensure a high level of security through different measures combatting crime and also through cooperation based on mutual recognition (art. 67(3) TFEU).

Realisation of mutual recognition as the cornerstone of cooperation includes harmonisation of relevant areas, such as establishing rules for union wide recognition of judicial decisions (art. 82(1) TFEU). Minimum rules can be established, concerning evidence admissibility, the rights of individuals in criminal procedure and the rights of victims of crime. This is to be done in the extent necessary for the realisation of mutual recognition and police and judicial cooperation in criminal

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[1] Consolidated version of the Treaty on the Functioning of the European Union, OJ O 326/47, 26.10.2012.

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matters having a cross-border dimension. (art. 82(2) TFEU).[2] Instruments based on mutual recognition cover areas from arrest warrants, confiscation orders, and financial penalties, freezing orders, evidence, taking convictions into account, custodial sentences, suspended and alternative sentencing and the European supervision order as well as the European Investigation Order.[3]

This brief article analyses the limits of mutual recognition in EU cooperation in criminal matters. These limits of mutual recognition are not commonly defined.[4] They are essential in relation to the objectives and functions of mutual recognition as well as degrees to which mutual recognition is given effect. Otherwise, the functions of mutual recognition could be applied as far as possible. The same applies in relation to which all areas the EU can apply mutual recognition and what sort of decisions can be included in mutual recognition.

To start with, the characteristics of mutual recognition are presented. The multilevel character of the principle, its different functions and the degree to which it can be realised are relevant for setting the scene. After this, the limits of mutual recognition are focused upon. The limits are categorised in three different groups; first the limits based on EU rules and principles; secondly, limits based on the character of cooperation in criminal matters, or perhaps the special character of EU criminal law more generally is in focus; and thirdly, the limits based on fundamental rights are presented. This is followed by a chapter on when the limits are actualised in relation to the EU or the national level. Thereafter, a chapter on what the limits actually mean and what the consequences of when the limits actualise, are focused on. Some concluding remarks are presented in the last chapter.

[2] For more information on mutual recognition, see e. g. Janssens: *The Principle of Mutual Recognition in EU Law* (Oxford Univerity Press 2013), Suominen 2011 and Kinzler, *Das Prinzip gegenseitigr Anerkennung im europäisierten Strafverfahren am Beispiel von Auslieferung und Beweismitteltransfer* (Verlag Dr. Kovač 2010).

[3] Council framework decision on the European arrest warrant and the surrender procedures between Member States, OJ/2002 L 190/1, Council Framework Decision on the application of the principle of mutual recognition to confiscation orders, OJ L 328/59, 24/11/2006, Council Framework Decision on the application of the principle of mutual recognition to financial penalties, OJ L 76/16, 22/03/2005, Council framework decision on the execution in the European Union of orders freezing property or evidence, OJ L196/45, 2.8.2003, Council framework decision on the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters, OJ L 350/72, 30.12.2008, Council framework decision on taking account of convictions in the Member States of the European Union in the course of new criminal proceeding and custodial sentences, OJ L 220/32, 15.8.2008, Council framework decision on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union, OJ L 327/27, 5.12.2008 and Council Framework Decision on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions, OJ L 337/201, 16/12/2008 and Council framework decision on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention, OJ L 294/20, 11.11.2009. The newly agreed Directive of the European Parliament and of the Council regarding the European Investigation Order in criminal matters, 7.3.2014, 2010/0817, PE-CONS 122/13. See also Peers, The Analysis EU Justice and Home affairs legislation under the 2009-14term of the European Parliament on the agreed instruments within criminal law, available at www.statewatch.org (last visited 2.5.2014).

[4] See, however, A manifesto on European Criminal Procedure Law, Zeitschrift für Internationale Strafrechtsdogmatik – www.zis-online.com ZIS 11/2013 especially pp. 430-431 and 433-438 on the limits of mutual recognition.

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II. Characteristics of mutual recognition

The principle of mutual recognition, like other legal principles, has many different characteristics. The characteristics of mutual recognition are especially relevant for the limits and how these affect mutual recognition. In this chapter, the multilevel character of mutual recognition, its different functions and degrees to which it can be realised are presented. The different characteristics demonstrate mutual recognition as a legal principle and these are used especially in chapter 5 when analysing how the limits function.[5]

1. The functions of mutual recognition

Mutual recognition can be considered as having at least four different functions. These can be divided into primary functions, which are the legislative and interpretative functions and into secondary functions, which are the optimising and balancing functions. These are perhaps, as will be demonstrated below, more modes of application of the principle. The legislative and the interpretative functions are the most important ones. This is how mutual recognition is defined and expressed most visibly. All different functions are, however, relevant as the limits may restrict mutual recognition differently depending on what the functions are.

a) Primary functions

First, the principle of mutual recognition functions as a ground for, or as a legal principle for the construction of (future) legislation.[6] This can be called a *legislative function*. The form of this legislative function is general. It declares that decisions should be mutually recognised but does not further specify the extent or scope of mutual recognition. This legislative function can be seen as an expression of the nature of mutual recognition, as it does not as such define which decisions are to be recognised. In order to function properly, it requires further, explicit instruments.[7] Mutual recognition is used in its legislative function in all of the above-mentioned instruments, as these are based on the principle. The principle of mutual recognition could be seen as a principle with only a legislative function, which does not as such have an impact on decision making on recognition.[8] This seems, however, to be too narrow as regards the principle of mutual recognition. Its functions cannot be considered limited only to the legislative stage. Even though the legislative function is perhaps the most important one as regards to limits of the principle, other important functions can also be noted.

[5] On mutual recognition as a legal principle more generally, see Suominen 2011 pp. 333-359 and Asp, Mutual recognition qua legal principle, in *Festschrift für Helmut Fuchs*, eds. Reindl–Krauskopf et al. (Verlag Österreich 2014) pp. 1-17.

[6] Also Asp 2014 p. 8.

[7] Asp 2014 p. 9 considers mutual recognition to be empty and that it needs to be filled with something.

[8] See to? Pohl, Vorbehalt und Anerkennung. Der Europäische Haftbefehl zwischen Grundgesetz und europäischem Primärrecht (Nomos Verlagsgesellschaft 2009) pp. 77 and 271 where he seems to consider mutual recognition being exhausted as a legislative principle where it cannot as such have another effect (such as an interpretative function).

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The principle of mutual recognition is often used as a legal argument. The second function of mutual recognition can be called *the interpretative function*. Mutual recognition is essential to the legislative phases on both EU and national levels, and this function adds a further dimension to the principle. This is in line with interpreting national implementing legislation in conformity with directives (and former framework decisions) and their results and aims. This interpretative function entails that the principle functions as a rationale when national authorities implement the instruments and apply the implementing legislation. The interpretative function is expressed when the national legislator decides how to implement the mutual recognition instruments as regards how far mutual recognition should be expressed. An example of this is the Swedish implementation of the framework decisions on freezing orders and financial penalties. Here the Swedish Government discussed how far the double criminality requirement should be regulated and used mutual recognition as an interpretative function.[9] Another example is the Swedish Supreme Court case *NJA 2007 s. 168*. In this case, mutual recognition has an influence on the decision-making, as the Swedish Supreme Court stated that the system of arrest warrants is based on mutual recognition and the foreign decision should not be questioned. Mutual recognition was used as an argument and recognition did take place.[10]

The interpretative function underlines the importance of the balancing that takes place at the national level, which is analysed below. This interpretative function of the principle of mutual recognition can furthermore only operate within certain limits.

b) Secondary functions (modes of application)

An *optimising function* can be noted in mutual recognition. This optimising function is achieved through the flexible use of mutual recognition, in the sense that when balancing different interests, mutual recognition is to be given greater importance. Mutual recognition instruments are drafted in a way which optimises mutual recognition and enables the realisation of the principle as far as possible. This can be seen in the framework decisions in the form of limits to applicable grounds for refusal. This optimising function is taken into account when the Court of Justice of the European Union (CJEU) decides on relevant cases.[11] Mutual recognition can therefore be seen as an optimising ground, which aims at the realisation and expression of mutual recognition to the largest possible extent. However, the limits are relevant in relation to this optimising function. Although mutual recognition might be optimised at the EU level, the solution might be the opposite at the national level.

[9] On the Swedish Freezing Act 500/2005, Lag om erkännande och verkställighet inom Europeiska Unionen av frysningsbeslut, see Government bill Prop. 2004/05: 115 pp. 51–54 and on the Swedish Financial Penalties Act 1427/2009, Lag om erka#nnande och verksta#llighet av bo#tesstraff inom Europeiska Unionen, see Government bill Prop. 2008/09:218 pp. 49–50.

[10] See Suominen 2011 pp. 212-213 and 323-324.

[11] Such as CJEU cases C-105/03 Pupino, C-303/05 Advocaten voor de Wereld, C–396/11 Radu, Case C-399/11 Melloni and C192/12 PPU West.

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Balancing can be seen as the fourth function of the principle of mutual recognition. Balancing legal principles against other principles express the *balancing function* of mutual recognition.[12] The more important principle takes precedence in that actual situation,[13] and balancing leads to applying mutual recognition more or less. The counter-principle(s) of mutual recognition are balanced against it in the actual case. The advantages and disadvantages of both principles are taken into account, and the level to which they apply is determined. In this balancing, the justification for mutual recognition is important. It expressed the need for more efficient tools in cooperation in criminal matters.[14] Depending on the counter-principle and its justifications, the balancing might have different outcomes. This balancing function can be seen as the result of balancing mutual recognition with other relevant principles, which is present when the EU legislator initiates mutual recognition instruments; is the mutual recognition instrument justified and how should it be expressed, especially as regards grounds for refusal? And by the national legislator; when implementing and determining if mutual recognition is more important than other principles and similarly at the application level where the collisions occur between relevant principles.

These secondary functions can also be considered as modes of application for the principle of mutual recognition. The principle of mutual recognition has a legislative function as its main function, which directs it and its application. It then needs, just like any legal principle, to be optimised and balanced against other principles and interests.

2. The multilevel character

Mutual recognition can be considered as having a multilevel character. This entails that mutual recognition functions at many levels, both the EU and the national ones. From the EU point of view, mutual recognition leads to having a common approach in cooperation and to accepting the different legal systems of the Member States. The starting point is that although different jurisdictions of the Member States are separate, these are seen as part of a single area of justice. This area, which can be considered synonymous with the AFSJ, is the area where mutual recognition functions. Mutual recognition from the EU perspective is a flexible multilevel principle with the aims of efficient cooperation and the free movement of judicial decisions within an AFSJ. It can have different functions and aims on different levels, but is considered a general legal principle regulating the cooperation and legislation on cooperation.

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[12] Alexy, Theory of Constitutional Rights (Oxford University Press 2002) pp. 50-54. Tridimas, The General Principles of EU Law (2nd Edition, Oxford University Press 2006) p. 1 also attaches weight as a character to legal principles. See also Asp 2014 pp. 5-9.

[13] Alexy 2002 op. cit. pp. 50-54, also Frände, Den straffrättsliga legalitetsprincipen (Juridiska föreningens i Finland publikationsserie N:o 52, 1989) pp. 54-56.

[14] How far the EU can go in the area of freedom, security and justice focusing mainly on the security-track is another question. See e. g. Hudson, Who needs justice? Who needs security? pp. 17-18 and Gröning, Security, justice and the criminal justice system: remarks on EU criminal law pp. 136-139, both in *Justice and Security in the 21st Century,* eds. Hudson, Ugelvik (Routledge 2012).

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From a Member State perspective, mutual recognition is the basis for shall-rules expressed in directives and framework decisions. In the national implementing process, mutual recognition is primarily directed at the national judicial authorities' level as a legislative shall-rule. Within the scope of implementing national legislation, decisions shall be recognised unless a predefined ground for refusal is applicable. This duty to recognise and execute decisions leads to the interpretative and optimising functions being important in addition to the legislative function. For the national legislator and judicial authorities, these imply that in situations where two solutions are comparable and possible, the one that better expresses mutual recognition should be chosen. This is especially true where the limits of mutual recognition become relevant. The extent of mutual recognition is, as can be seen below, sometimes more limited at this stage, depending on which limits actualise.

That mutual recognition takes on different forms at the EU and national level mainly tells us that the principle has a multilevel character and that it can apply different functions at different levels. The principle itself does not seem different per se, as mutual recognition is flexible and can be differently expressed in different situations. Sometimes, the provisions at the EU level express the principle to a greater extent than national implementing legislation, e. g. where no human rights grounds for refusal exist, but some Member States have chosen to insert such grounds.[15] Sometimes the situation is the opposite and mutual recognition is expressed more at the national level. This can be seen in the Swedish implementing solution when national legislation removed the double criminality requirement completely, even though some double criminality was maintained by the EU instrument.[16] The limits of mutual recognition are nevertheless present at both levels, but may actualise differently at different stages.[17]

The multilevel character of mutual recognition entails that the limits may actualise at different levels, both at the EU and national level and that the level might affect the consequences of the limits of mutual recognition.

3. The degree of mutual recognition

Mutual recognition is not absolute, as a principle cannot by nature be absolute. This can be seen from the limits presented below and this is furthermore clear from the optimising and balancing functions of mutual recognition, which express its nature as a legal principle. The degrees of mutual recognition can be analysed in terms of strictness. If applied fully, there would be no limits, except for those being prerequisites for or outcomes of mutual recognition, such as some formal requirements or *ne bis in idem*.[18] As can be seen below, many limits exist and mutual

[15] Such as the section 5(1)(6) of the Finnish Extradition Act 1286/2003, Lag om utlämning för brott mellan Finland och de övriga medlemsstaterna i Europeiska unionen and section 4(2) of chapter 2 of the Swedish Surrender Act 2003:1156, Lag om överlämnande från Sverige enligt en europeisk arresteringsorder. See also Suominen, Grundläggande rättigheter och straffrättsligt samarbete, JFT 1-2/2014 pp. 22-54 (Suominen 2014 a).

[16] Both acts mentioned above in note 9. See Suominen 2011 pp. 186-188 on this.

[17] The different stages are dealt with in chapter 5 below.

[18] Suominen 2011 pp. 282-284.

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recognition is not automatic. There are, nevertheless, several improvements and enhancements which make the distinction between mutual recognition and traditional judicial cooperation clear. Mutual recognition is always realised to different degrees, which can be seen e. g. through the different grounds for refusal and how far these go.

The degree to which mutual recognition is given effect can be different at the EU and national level. The above mentioned Swedish legislative solution for some of the implementing legislation, where mutual recognition is realised to a greater degree at the national level is such an example, whereas as regards human rights the opposite could be said, at least in part. Mutual recognition applied to different agreements occurs especially in situations where the limits are based on the character of criminal cooperation within the EU. Mutual recognition can be more narrowly applied at the national level if control over sovereign issues is considered important, such as not surrendering own nationals or *ordre public* issues. Mutual recognition is flexible, which makes determining the fixed degree of mutual recognition unnecessary, as the degree of the principle might vary from one situation to another.

The degree of mutual recognition can furthermore vary depending on which function mutual recognition has at that moment and which form of cooperation it regulates. It is obvious that applying one principle to the whole area of cooperation implies a flexible and adjustable use of that principle. This denotes the degree of mutual recognition. Mutual recognition aims to cover all possible cooperation situations and applications, but at the same time to allow the differences and peculiarities of different forms of cooperation and different legal systems of the Member States. The degree of mutual recognition is somewhere in the middle of the scale of strictness at the moment; it allows certain restrictions, especially those connected closely to state sovereignty, but at the same time it aims to limit these restrictions, and as such, not many grounds for refusal are applied. The flexible form of mutual recognition allows the degree to be flexible. This means that the limits of mutual recognition can have different effects, which can be seen below. The more limits actualise, the lesser the degree of mutual recognition is realised.

III. The limits

For systematising the limits of mutual recognition, a division of limits is done here. Focus is first of all placed on the limits based on EU rules and principles. Secondly, limits based on the character of cooperation in criminal matters, or perhaps the special character of EU criminal law more generally, is focused on. Thirdly, the limits based on fundamental rights are presented. Admittedly, some of the limits also fit into other categories, but for systematisation, this division is applied here. It is not however meant to be understood too categorically.

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1. EU rules and principles

First of all, mutual recognition is limited by general EU rules and principles. Existing EU legal rules or principles limit mutual recognition. Especially where the EU legislator is concerned, this limits both the form of mutual recognition and what it can encompass. This is firstly expressed in article 82 TFEU, as it lays down the ground conditions for mutual recognition. Here, the extent of mutual recognition is defined rather widely, as rules and procedures for ensuring mutual recognition throughout the EU of *all forms of judgments and judicial decisions* are to be included (82(1) lit. a).Furthermore, article 82(2) states that establishing minimum rules for facilitating mutual recognition are to be made. Although not very limiting in effect, article 82 lays down a starting point for mutual recognition in cooperation in criminal matters.

Limits for the EU legislator further limit mutual recognition. Most important here are the principle of proportionality (article 5 TEU) and principle of subsidiarity (articles 5 and 6(3) TEU). These principles limit the overall application of mutual recognition and of EU criminal law in general. Mainly directed at the EU legislator, these limits actualise if it would be considered disproportionate or unnecessary to address cooperation matters through the principle of mutual recognition. These principles convey that mutual recognition instruments should be proportional, in relation to the legal measure sought and in relation to a cost-benefit analysis. They further convey that mutual recognition instruments should not exceed what is necessary in order to achieve the objectives of the Treaties.[19] Mutual recognition instruments should furthermore not be initiated, unless the measures intended cannot be sufficiently achieved by the Member States.

This means that the EU should not initiate mutual recognition instruments, unless dealing with that particular form of cooperation at the EU level manages to achieve this better. In many cases, having effective cooperation in the form of mutual recognition can be the best solution. This can, however, function as a limitation when certain parts of criminal procedure are regulated in a mutual recognition instrument, which do not as such add anything but rather disturb the national criminal justice systems. This means that mutual recognition instruments should not regulate all forms of cooperation where the added value of EU cannot be shown, but the detriment to the national system is present.[20] This further entails that each instrument should be proportionate but also that the different parts of each instrument should be proportionate and respect the principle of subsidiarity. An example here is that one can always ask whether it is proportionate (necessary and appropriate) to include a certain ground for non-recognition, or whether such a

[19] What the objective of the Treaties in relation to EU criminal law or mutual recognition cooperation are, or might be, is of course a further question which relates more generally to a European criminal policy.

[20] On coherence, see Asp, The importance of the principles of subsidiarity and coherence in the development of EU criminal law, EuCLR Vol. 1 1/2011 pp. 44-55 and Prechal and van Roermund (eds.): The coherence of EU law, the search for unity in divergent concepts (Oxford University Press 2008).

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ground should not be included in that particular case and be left to the Member States to decide upon.

The principles of loyal cooperation between Member States and solidarity between the Member States are correspondingly relevant. These can be considered limiting mutual recognition in the sense of not applying mutual recognition. Although not perhaps typical limits of mutual recognition, these principles limit the Member States when implementing and applying mutual recognition instruments and can therefore be considered included in the category of EU principles limiting mutual recognition. These entail that Member States should cooperate loyally within the application of mutual recognition instruments and that Member States in this cooperation should keep in mind the objectives of the EU legislator in relation to mutual recognition instruments. These principles limit the extensive use of grounds for refusal in a manner not intended in the instruments or other measures, which counter loyal cooperation between Member States. The principle of loyalty towards the EU is also relevant here, as it limits mutual recognition when the Member States implement and apply mutual recognition instruments. This means that Member States should not deviate too far from the mutual recognition instruments and their goals when implementing and applying mutual recognition legislation. Several Member States have considered implementing or applying additional grounds of refusal to be within their discretion.[21]

In relation to refusing recognition on a ground not found in the mutual recognition instrument, the CJEU has taken the opposite direction. In *Leymann* and *Pustovarov*, the Court stated that 'The principle of mutual recognition, which underpins the Framework Decision, also means that, in accordance with Article 1 (2) of the Framework Decision, the Member States are in principle obliged to act upon a European arrest warrant. They must or may refuse to execute a warrant only in the cases listed in Articles 3 and 4.'[22] The case concerned the interpretation of the specialty principle and refusal of an EAW in this respect. There should be sufficient correspondence between the information given in the arrest warrant and that contained in the later procedural document, and there was no room for refusal outside the said articles of the EAW.[23] In the *Mantello* case, this line of interpretation is confirmed. Here, the Court stated that a Member State 'may refuse to execute such a warrant only in the cases of mandatory non-execution laid down in Article 3 of the Framework Decision or in the cases listed in Article 4 thereof…'.[24] This case concerned the interpretation of *ne bis in idem* and the term 'same acts' in the EAW, which is considered constituting an autonomous concept of European Union law.

[21] Such as e. g. making optional grounds for refusal mandatory relating to nationality requirements and the EAW or inserting new grounds for refusal relating to human rights issues and the EAW. See also the Report with recommendations to the Commission on the review of the European Arrest Warrant (2013/2109(INL)) Committee on Civil Liberties, Justice and Home Affairs of 28.1.2014 on issued which need to be addressed in the context of the EAW.

[22] Case C-388/08 PPU Leymann and Pustovarov para. 51.

[23] Conclusion 1. See also case C-168/13 PPU Jeremy F on the specialty principle.

[24] Case C-261/09 Mantello para. 37.

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The CJEU has furthered this idea in two relatively new cases. In both cases, the Court has reaffirmed its position that Member States cannot refuse the recognition of an arrest warrant on other grounds than those found in the framework decision. In the *Radu* case,[25] the Court held that the recognition of an arrest warrant for prosecution cannot be refused based on the fact that the concerned person was not heard before the arrest warrant was issued.[26] The question then remains, whether this approach applies more generally to human rights aspects, or whether this only concerns the right to be heard. Much speaks for the latter one being the correct interpretation. That the person sought is heard before the arrest warrant is issued negatively affects the effectiveness of the instrument, as the whole point here is to recognise the arrest warrant and hear the person in the issuing state.[27]

In the *Melloni* case,[28] where the judgment was delivered around a month after *Radu*, the CJEU maintained this idea and states that a Member State cannot refuse the execution of an arrest warrant on other conditions than those found in the arrest warrant. If a Member State were to interpret the Charter so that the surrender of the person would be in conformity with the person (in this particular case) having been convicted in his absence, with a condition not found in the framework decision, this 'would undermine the principles of mutual trust and recognition which that decision purports to uphold'.[29] The *Melloni* case concerned surrender based on an arrest warrant where the judgment was made in the absence of the person concerned, an in absentia decision concerning the execution of the sentence and possibility to retry the case.[30]

These cases indicate that applying grounds for refusal outside of those listed in the relevant EU instrument, is not acceptable. Therefore the application of mutual recognition, or should we say the discretion of the executing state is limited in these cases. As will however be shown below, both the character of criminal law and fundamental rights can actualise as limits to mutual recognition.

It is further possible that mutual recognition is limited when it collides with other EU principles or rules. Mutual recognition is then limited based on a 'Union-legal' ground. Such a ground could be an on-going European procedure which needs to be decided on before mutual recognition takes place. An asylum-seeking process

[25] Case C-396/11 Radu. See e. g. Tinsley, The reference in case C-396/11 Radu: when does the protection of fundamental rights require non-execution of a European Arrest Warrant? EuCLR 3/2012 pp. 338-352 on this case.

[26] The right to be heard is based on both article 6 ECHR and articles 47 and 48 of the Charter.

[27] The CJEU argued similarly in its para. 40. When it comes to the use of proportional measures, one can agree with this not always being the case at the EU-level, as the EAW is so efficient. It can therefore be questioned whether a more coherent EU-system would solve similar problems, see critically on this A manifesto on European Criminal Procedure Law op. cit. pp. 438-440.

[28] Case C-399/11 Melloni. See Cavallone, European arrest warrant and fundamental rights in decisions rendered in absentia: the extent of Union law in the case C-399/11 Melloni v. Ministerio Fiscal, EuCLR 1/2014 pp. 19-40.

[29] Para. 63.

[30] In A manifesto on European Criminal Procedure Law p. 434 the approach in both the Radu case and the Melloni case are criticised. The new art. 4 a) of the EAW regulates judgments in absentia and is based on the Council Framework Decision 2009/299/JHA of 26 February 2009 amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial, OJ L 81/24, 27.3.2009.

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could be foreseen as an example of a 'Union-legal' ground refusing the recognition and execution of an arrest warrant. There are today no provisions in mutual recognition instruments (on EU or national level) on this.[31] This can be due to the fact that such collisions were not foreseen when initiating mutual recognition instruments. The refusal of recognition based on a 'Union-legal' ground is based on the legal system of the Union. Therefore accepting that mutual recognition is, or can be limited in such situations ensures the effective application of EU law, as both contradicting interests are based on EU law. Although not an added ground as such, refusal in such cases seems to be within the Member States' margin of discretion.[32]

The situation where the person for whom an arrest warrant has been issued has applied for asylum in the executing Member State has come before a court in Finland. The Finnish cases *Gataeva Khadizhat* and *Gatev Malik,*[33] concerned two Russian nationals sought by arrest warrants issued by Lithuania for the execution of sentences. Both persons had applied for asylum in Finland when the arrest warrant was received. The Helsinki district court decided that these persons should not be extradited[34] based on the human rights ground for refusal in the Finnish Extradition Act, which is a mandatory ground for refusal. The Court considered that extraditing these persons while the asylum procedure was ongoing could endanger their right to a fair trial. The case was appealed to the Supreme Court,[35] which requested a preliminary ruling from the CJEU on whether the execution of the arrest warrant could be refused based on the human rights ground.[36] The request for preliminary ruling was however removed as the judgments in the issuing state were reversed and the arrest warrant was revoked.[37] This case shows that situations where mutual recognition is limited by a Union-legal ground is not unlikely to happen in the future.

[31] See Suominen 2014 a p. 47-48 on this.

[32] See Suominen 2011 pp. 73-78 on the margin of discretion for framework decisions and below chapter 4.3 where the impacts of the Lisbon Treaty are briefly mentioned.

[33] Cases R 10/363 Helsinki district court of 25.1.2010 and R 10/359 Helsinki district court of 25.1.2010.

[34] The Finnish Act still applies the old terminology; therefore the term extradition is used here, as in the national system.

[35] In the current Finnish system, decisions on EAW are directly appealable to the Supreme Court, and do not have to go through the Appellate Court. Appeal Dnro 1/22/10 by the district prosecutor.

[36] Request for preliminary ruling CJEU case C-105/10 PPU. The Supreme Court requested clarity on several questions; a) how the relationship between the directive regulating asylum matters, and the EAW is to be interpreted on that specific question and whether the question can be solved pursuant to national law; b) whether a framework decision was to be interpreted in such a way that recognition could be refused on grounds for which there are no explicit provisions in the framework decision, and if so, on which conditions; c) whether the judgment to be executed or the appropriateness of the court proceedings resulting in that judgment can be questioned especially if asylum is applied on the same grounds as the surrender is opposed was raised; d) which grounds for refusal are then to be applied, those laid down by the ECtHR in relation to the ECHR, and if asylum is granted, whether the executing Member State must refuse surrender and e) whether the obligation to interpret national law in conformity with framework decisions is valid regardless of whether this interpretation would lead to disadvantage for the individual party. Taking into account the case law of the CJEU mentioned just above, it would have been interesting to see whether the CJEU would have answered differently in this case, where a clear violation of fundamental rights was at stake. See also what is mentioned in chapter 3.3 on the case law of the CJEU.

[37] Removal of 3.7.2010.

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2. The character of criminal cooperation within the EU

Secondly, mutual recognition is limited by certain aspects stemming from the character of criminal law cooperation within the EU. There are four relevant aspects here: respect for the core of state sovereignty, ordre public, national identity and coherence.

This first limit of mutual recognition is *the respect for the core of state sovereignty*. As criminal law competence is closely connected to the core of the Member States' sovereignty, it is natural that mutual recognition is limited in this respect. The Member States are reluctant to relinquish control over these issues. This limit is important for all general aspects of mutual recognition and means that in situations connected to the core of state sovereignty, mutual recognition can be limited at both the EU and national level. Directed primarily at the EU legislator, this means that the mutual recognition instruments should not interfere with the most fundamental aspects of state sovereignty. The functions and degrees of mutual recognition are limited in this respect. Mutual recognition operates within the criminal law systems of the Member States, which further limits the legislative, interpretative and optimising function of mutual recognition.

The starting point is that the Member States have competence to regulate the extent of their criminal jurisdiction, determine the scope for exercising criminal competence and legislation on own nationals in addition to determine the conditions of criminal responsibility.[38]Mutual recognition is, as EU criminal law more general sense, limited with regards to these aspects. This is a result of the competence of the EU legislator and that the criminal law competence is still, to a large extent, national. This obviously limits the EU legislator in relation to what mutual recognition instruments can concern and encompass. Furthermore, mutual recognition is limited by these aspects in the form of grounds for refusal. Mutual recognition does not exist with the purpose of infringing Member States' core state sovereignty. Instead, mutual recognition should make cooperation more efficient and allow the different legal systems of the Member States to function without harmonising these. The limits based on the core of state sovereignty can be considered essential parts of a sovereign state's criminal law competences.

The second limit within this category is the principle of *ordre public*. Although this could be considered entailing the same as what is above described as the respect for the core of state sovereignty, *ordre public* can include further aspects, which cannot be acceptable in a legal order, but which are not part of the core of state sovereignty. Mutual recognition can therefore be limited by *ordre public* in situations such as to what evidence is not allowed in court or what possibilities the prosecutorial side has in the criminal process. Cooperation within the EU should not lead to different rules or standards being applied in national cases contra transnational cases. Or if different rules or standards are applied, these are to be clearly stated and motivated and there should be a limit as to how far these can

[38] Suominen 2011 pp. 286-290.

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differ from those applied in a national setting. Noteworthy is that *ordre public* safeguards values of such importance in the national legal system where deviating from these cannot be acceptable. This seems to imply that the limit is absolute. *Ordre public* as a limit to mutual recognition resembles the respect for national identities and coherence to some extent.

The third limit of mutual recognition within this category is the *preservation of national identities of the Member States*. Article 4(2) TEU states that the EU shall respect the Member States 'national identities, inherent in their fundamental structures, political and constitutional,' and also respect the state functions in 'maintaining law and order and safeguarding national security'. National security remains the sole responsibility of each Member State. This article can be seen as strengthening the limitation related to the core of state sovereignty. National constitutional identities are respected and the same applies for the national security. Similar to *ordre public*, this entails that mutual recognition instruments should not impose measures contrary to article 4(2) TEU on the Member States. This limit seems to be primarily directed at the EU legislator and entailing that mutual recognition instruments should be flexible to a certain degree, so that Member States identities can be respected when implementing and applying the instruments. Limits of mutual recognition based on national identity admittedly adhere to the limits based on *ordre public*. National identity can however limit mutual recognition when aspects of the national system are concerned, which might not all be covered by *ordre public*. Examples here are how the whole criminal procedure is construed in the national system, taking into account its structure and balance. National identity is however not easy to separate from coherence.

Fourthly, mutual recognition can be limited by the *coherence* of the national criminal procedural system, and the criminal justice system. Perhaps coherence is not easy to separate from the core of state sovereignty (how the national legal system is built up can be closely related to matters considered being the core of state sovereignty, such as the hierarchy of courts and procedural system) nor from *ordre public* (as a measure which cannot be acceptable in one legal order, such as can either be considered based on *ordre public* or the coherence of the national legal system) or national identities (what the difference is and depending on how the national legal order is construed, may vary). However, coherence has its own value in relation to being a limit of mutual recognition, as the national criminal justice systems, within which mutual recognition works, have a balanced coherence. The system is built up so that measures have their counter-measures and the outcome is (supposed to be) a fair criminal process. The rules on admissibility of evidence (or the lack of such) and more generally how defence rights are construed are examples here. Mutual recognition instruments should respect this coherence and these instruments should not disturb the coherence more than necessary. Measures which are contrary to the coherence of the national criminal legal system should not be imposed without flexibility, so that the national criminal justice systems can function with these instruments being applied.

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Concluding, this means that limits stemming from the character of cooperation within the EU include limits based on the respect for the core of state sovereignty and aspects which could be characterised under *ordre public.* Furthermore, a wider range of limits in relation to what constitutes the national identity and coherence are included. It is of relevance that some parts of national criminal procedure might be of such character that they cannot be regulated or stirred from the EU, albeit they are not as such part of the core of state sovereignty, or even *ordre public*. Mutual recognition is, however, limited in relation to how interfering the instruments can be and how much foreign elements Member States can be forced to accept. Taking into account the aim of mutual recognition, to enhance cooperation, these limits preclude the use of the principle too extensively.

3. Fundamental rights

Fundamental rights and freedoms limit mutual recognition. To some extent, fundamental rights could be considered covered already by the two above-mentioned categories. Due to the importance of preserving fundamental rights, these do, however, constitute a category of their own in relation to limits of mutual recognition. If the costs of achieving mutual recognition are too big a loss of the individual's rights and liberties, mutual recognition should not be attempted.[39] Fundamental rights limit mutual recognition and entail that the setting of transnational criminal procedure might include some measures where the individual cannot use the normal (meaning national) countermeasures or where measures do not even exist. Relevant at EU level, for the legislator and at the national level, for the legislator and application of mutual recognition instruments, fundamental rights are not to be bypassed in the name of effective cooperation.

Especially relevant in this respect are the rights of the defendant, such as the right to a defence and to bring certain questions to trial during the preliminary investigation. The position of the individual should not suffer insomuch as the proceeding has a European character and his rights should not become less protected due to mutual recognition being applied. Cooperation where e. g. Eurojust is involved is a good example of a situation where the equality of arms of the parties is not necessarily very balanced. Effectiveness of mutual recognition cooperation is a primary goal, much else would not make sense, but this effectiveness should not concur all and lessen the effect of the rights of the defendant. The EU criminal justice 'system' is not yet complete, and therefore focus might be more on effectiveness aspects, whereas the rights of the defendant is not focused upon as much.[40]

Mutual trust is important especially in connection to fundamental freedoms, as it is dependent on sufficient common protection of fundamental rights and freedoms

[39] Möstl, Preconditions and limits of mutual recognition.CMLRev 47: 2010 pp. 420-421.

[40] See however also what is mentioned concerning the current focus within the AFSJ in Suominen, What role for legal certainty in criminal law within the area of freedom, security and justice in the EU? Bergen Journal of Criminal Law and Criminal Justice (BJCLCJ) 1/2014 pp. 1-31 (Suominen 2014 b).

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which should be safeguarded and guaranteed throughout the Union. Regardless of whether these human rights limits are stated as explicit grounds for refusal in the implementing legislation, limiting mutual recognition based on these should always be possible.

There are some cases from both European courts, the ECtHR and the CJEU which state exactly this. These cases are relevant for the limit of mutual recognition based on fundamental rights.

The *I.B.* case[41] concerned surrender and the possibility of guarantees to be issued by the issuing state. This case was decided upon during the previous provision on judgments in absentia in the EAW.[42] The CJEU stated that 'given the level of protection of fundamental rights and freedoms by the Member States of the European Union, Member States are to be regarded as constituting safe countries of origin in respect of each other for all legal and practical purposes in relation to asylum matters.'[43] This case seems to imply that an asylum process could not influence the execution of an arrest warrant and that this level of protection is equal as regards asylum matters and criminal cooperation.

However, if looking at the CJEU case in *N.S.*,[44] we can see that the Court here takes a completely different approach. The case concerned the common European asylum system and more specifically, the transfer of asylum seekers between the Member States and whether all Member States can be presumed to be safe countries. The presumption of all Member States treating asylum seekers in compliance with the Charter[45] and the ECHR was actualised. Mutual trust was highlighted and the relevance of this trust for the common European asylum system within an area of freedom, security and justice. The Court came to the conclusion that the presumption of all Member States complying with fundamental rights must be rebuttable in situations where Member States have systemic flaws in the asylum procedure and reception conditions for asylum applicants. Article 4 of the Charter is to be interpreted so that an 'amount to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment within the meaning of that provision' results in the transfer of the asylum applicant being impossible.[46] A Member State cannot be unaware of such systemic deficiencies in the asylum procedure. The CJEU did not take the I.B case into account, but draws on the case law of the ECtHR, and especially the *M.S. S.* case.

Earlier in the same year, the ECtHR had in the *M.S. S.* case found that the Belgian asylum authorities had acted against the prohibition of torture or inhuman

[41] Case C-306/09 I. B.

[42] As compared to the Melloni case mentioned above.

[43] Para. 44.

[44] Joined cases C-411/10 and C-493/10 N. S.

[45] Especially art. 4 is relevant here, which states that 'No one shall be subjected to torture or to inhuman or degrading treatment or punishment' and art. 19(2) which states that 'No one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.'

[46] Second point in the conclusion.

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or degrading treatment or punishment in article 3 ECHR, when, based on the Dublin regulation, the sent an asylum applicant back to Greece.[47] At that time, there were well-documented indications of the Greek asylum reception conditions not being in line with Greece's international obligations, especially under the ECHR. The ECtHR came to the conclusion that Belgium had violated article 3 first of all for exposing the asylum applicant to the risks inherent in the deficiencies in the asylum procedure in Greece. The Belgian authorities knew or ought to have known that the asylum applicant had no guarantee that the Greek authorities would seriously examine his application. Secondly, article 3 was violated when the Belgian authorities knowingly exposed the asylum applicant to conditions of detention and living conditions that amounted to degrading treatment.[48] Interestingly enough here, the Court criticised the extremely urgent procedure, the lack for the asylum applicant to state reasons against the transfer and the fact that persons concerned were prevented from establishing the arguable nature of their complaints as regards fundamental rights.[49]

The CJEU has continued down the same path in the fairly recent *Abdullahi* case.[50] The Court states here that 'the only way in which the applicant for asylum can call into question the choice of that criterion is by pleading systemic deficiencies in the asylum procedure and in the conditions for the reception of applicants for asylum in that Member State, which provide substantial grounds for believing that the applicant for asylum would face a real risk of being subjected to inhuman or degrading treatment within the meaning of Article 4 of the Charter of Fundamental Rights of the European Union'.[51] Therefore, the presumption is rebuttable in asylum cases.

The report of the UNHCR (The UN Refugee Agency) on the Bulgarian reception system of asylum applicants can be mentioned in this context. This report states that the Bulgarian reception system does not fulfil the conditions of protection of fundamental rights and that there are systematic deficiencies which lead to asylum applicants being at risk of being subjected to inhumane and degrading treatment. Therefore asylum applicants should not be returned to Bulgaria.[52] This is another example of a situation within the EU where a Member State does not fulfil the requirements of fundamental rights.

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[47] M.S.S. v. Belgium and Greece, appl. nr. 30696/09.

[48] Paras. 358, 360 and 367. See also Ryngaert, Oscillating between Embracing and Avoiding Bosphorus: Recent Developments in the European Court of Human Rights Case Law on Member State Responsibility in Connection with the Acts of International Organizations, the European Union in Particular, European Law Review 2014, 39(2) pp. 176-192 on interesting aspects of this case law, also Smith, Running before we can walk? Mutual recognition at the expense of fair trials in Europe's area of freedom, security and justice. NJECL Vol. 4, Issue 1-2, 2013 pp. 89-90 and Brouwer, Mutual trust and the Dublin regulation: protection of fundamental rights in the EU and the burden of proof, Utrecht Law Review, vol. 9 1/2013 pp. 140-143.

[49] Especially paras. 351, 389 and 390.

[50] Case C-394/12, Abdullahi.

[51] Para. 60.

[52] UNHCR Observations on the Current Situation of Asylum in Bulgaria – January 2014 – http://www.asylumineurope.org/reports/country/bulgaria (last visited 28.2.2014).

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In this light, it is interesting to note that the Dublin III regulation has chosen to specifically regulate this matter.[53] In article 3(2), second paragraph, the situation where the transfer of an asylum applicant is impossible due to systemic flaws in the asylum procedure and reception conditions resulting in a risk of inhuman or degrading treatment is addressed. The determining Member State shall then continue to examine the criteria in order to establish if the person can be returned to another Member State. That this possibility has been included in the regulation can be seen as an improvement, as it accepts the possibility that not all Member States can safeguard fundamental rights at all times.[54]

The fact that the presumption that all Member States are acting in compliance with fundamental rights is rebuttable as regards asylum applications which indicated that the mutual trust between Member States in cooperation in criminal matters is perhaps not a very functional concept. It has been stated that systematic flaws in a Member State's legal system could also lead to refusing recognition based on fundamental rights aspects as a limit.[55] Another question is of course how transferable this presumption is to cooperation in criminal matters. Mutual recognition builds upon mutual trust and whether there can be different levels of mutual trust within the area of freedom, security and justice for asylum matters and criminal cooperation, where in some situations the conditions, facilities and implication of transferring the person to another Member State without making further requires into these conditions are very similar, is not easy to answer.[56]

IV. When do the limits become relevant?

The limits mentioned above can actualise at different stages. It is especially interesting to note which limits are relevant for the EU level and which ones are relevant for the national level. It should be noted initially that the EU application level (4.2.) and the national application level (4.4) resemble each other to a large extent. However, at the EU application level the limits actualise as abstract interpreting collisions and at the national application level these actualise as concrete collisions. These will therefore be dealt with separately in the following.

1. The EU legislative level

Some of the limits are most important at the EU legislative level. These are directed primarily to the EU legislator. Mutual recognition is primarily directed at

[53] Regulation 604/2013 of the European Parliament and of the Council of 26.6.2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), OJ L 180/31, 29.6. 2013, in force from 1.1.2014.

[54] On the case law's impact on the new provision, see Ippolito, The contribution of the European courts to the common European asylum system and its ongoing recast process, MJ 2 (2013) p. 270.

[55] Billing, The parallel between non-removal of asylum seekers and non-execution of a European arrest warrant on human rights grounds: The CJEU case of N. S. v. Secretary of State for the Home Department, EuCLR 1/ 2012 pp. 88-90 and Suominen 2014 a pp. 45-47.

[56] See more on this in Suominen 2014 a pp. 49-51.

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the EU legislator and the legislative function of it is expressed in this. This means that the characteristics of mutual recognition are expressed to a large extent at this level. Its legislative, interpretative, optimising and balancing functions as well as its degrees are expressed mainly at this level. This also applies for the limits of mutual recognition. The limits actualising at this level are important, as these guide how far the legislator can use mutual recognition and the EU legislative level is perhaps the most important level as regards the limits of the principle.[57]

First of all, the EU rules and principles limiting mutual recognition are considered to be directed to the EU legislator. The EU legislator should not initiate mutual recognition instruments contradicting their own rules and principles. If a contradicting situation occurs, it should preferably be solved by the EU legislator. Relevant here are especially the principles of subsidiarity and proportionality, which function as general limits for the EU legislator when initiating mutual recognition instruments. Mutual recognition instruments should not be legislated, unless these are within the legislative competence, as the matter needs to be regulated at the EU level and, in particular, the requirements stemming from the principles of subsidiarity and proportionality must be fulfilled.

The limits based on the character of criminal cooperation within the EU are further relevant for the EU legislator. Mutual recognition instruments are not to interfere too much with the core of state sovereignty and *ordre public* and they should respect national identities and the coherence of the national system. This already follows through from the principles of subsidiarity and proportionality, but also from the fact that criminal law relates so closely to state sovereignty. This also means that when initiating mutual recognition instruments, the EU legislator should respect fundamental rights. The limits of mutual recognition based on fundamental rights also actualise at the EU legislative level. Therefore, all limits mentioned above actualise at the EU level for the EU legislator, and this level remains the most important level as regards the legislative function of mutual recognition. This level is perhaps also the one where the limits most importantly must actualise. If the instrument is agreed on overstepping its limits, the consequences can be difficult to repair at the other levels. This applies especially in situations where the EU legislator considers the possibilities for the Member States to refuse recognition restricted to those appearing in the instrument itself (as mentioned above in the *Melloni* case).

The new article 11 f) of the European Investigation Order (EIO) shows that the EU also takes the aspect seriously now.[58] Previously, the EU legislator has not considered human rights grounds for refusal necessary to include in the mutual recognition instruments, but the approach has changed with the EIO.[59]

[57] Also Asp 2014 p. 8.

[58] Its art. 11 f) states that the recognition and execution of an EIO may be refused if 'there are substantial grounds to believe that the execution of the investigative measure indicated in the EIO would be incompatible with the executing State's obligations in accordance with Article 6 TEU and the Charter'.

[59] Also pointed out in Suominen 2014 a pp. 52-53.

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2. The EU application level

Mutual recognition limits can secondly actualise at the EU application level, where the CJEU and Eurojust are of special importance. The same limits seem to actualise here at the EU application level as for the EU legislator, but the limits of mutual recognition based on other EU rules and principles are particularly relevant. All relevant problematic situations where mutual recognition collides with other Union obligations, either based on rules or principles, might not be actualised by the EU legislator, mainly due to the fact that such a limit was not foreseen. When a case where mutual recognition collides with another EU principle or rule comes before the CJEU, as a request for preliminary ruling, then the CJEU needs to resolve this. In such a situation it might not be clear which EU based obligation should prevail. The limits of mutual recognition are therefore highly relevant for the CJEU. An example is the above-mentioned situations where surrender based on the EAW and an asylum application based on the Dublin-convention collide.

The limits in relation to the character of criminal cooperation within the EU may also actualise here. This applies where a part regulated by mutual recognition in a certain Member State is regulated by the constitution or in another way is considered part of the core of state sovereignty, *ordre public* or national identity. A cooperation situation based on mutual recognition may bring out limits based on the national legal system, which were not foreseen by the EU legislator, and which therefore need to be resolved by the CJEU. The limits of mutual recognition based on fundamental rights further actualise at the EU application level. Another EU rule or principle may safeguard a fundamental right or a limit, based on the character or cooperation that may actualise when a Member State has regulated a fundamental right issue differently than the other state involved in cooperation. These situations might occur when the EU legislator has not solved it in its legislation, as it might not have foreseen such a situation to become relevant.

The limits of mutual recognition can actualise also in Eurojust's cooperation situations. In a similar sense as for the CJEU, this can take place where the collision was not foreseen at the EU legislative level. In the daily work of Eurojust, probably quite a few situations arise where the limits of mutual recognition actualise. This applies especially for the limits based on EU rules and principles, but also for the limits based on the character of cooperation between the Member States connected to the fundamental rights, especially where the Member States have different rules at different levels of the criminal procedure.

3. The national implementing level

When implementing mutual recognition instruments, Member States adjust the instruments to the national legal order. The national legislator is a legislator applying the EU instruments to the national systems. The margin of discretion when implementing mutual recognition instruments is relatively flexible, at least for the

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situation pre-Lisbon.[60] The interpretative and optimising functions of mutual recognition are present at the implementing level. The interpretative function when interpreting the provisions of the framework decisions and when implementing these and the optimising function in situations where mutual recognition could be expressed in implementing legislation to a greater extent than in the EU instrument. Unless a limit restricts this, this is within the Member States' competence.

Some limits might actualise at this level, even if a Member State has not considered the instrument to be problematic at the EU legislative level, but at the implementing stage it realises its problematic nature. The national legislator can then amend it to better fit into the national legal system. The possibility for the Commission based on art. 258 TFEU is however relevant here, as not correctly implementing an instrument can constitute a failure to fulfil an obligation under the Treaties. It remains somewhat unclear how far Member States can introduce new limits in mutual recognition instruments.

What if a Member State considers the EU legislator having acted outside its competence and the mutual recognition instrument to be contrary to the principles of subsidiarity or proportionality? This might specifically be the case, if a Member State has already expressed its views on the instrument and considered it to be outside of the legislative competence and beyond the principles of subsidiarity and proportionality, but the instrument has regardless of this been adopted with the quality majority voting.[61] It is then possible for the Member State to bring that instrument before the CJEU for the court to review its legality pursuant to art. 263 TFEU (as an action for annulment). This makes it possible for the Member State to ask the court to review the legality of the instrument on grounds of 'lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or of any rule of law relating to their application, or misuse of power'. This needs to be done within 2 months of the publication of the measure (which is a very limited time-frame). Many limits based on the character of criminal cooperation within the EU especially could be foreseen here and this might demonstrate a different understanding of mutual recognition compared to that of the EU legislator. It is nevertheless a possibility for a Member State to use this possibility if it considers a mutual recognition instrument to be contrary to the legislative competence of the EU on mutual recognition.[62]

The limits based on the character of the cooperation most generally actualise at this level. Although a Member State can choose to go further than these limits and apply mutual recognition more broadly, this might not normally be the case, rather the opposite. A Member State might want to limit mutual recognition much more than the actual instrument would seem to allow, based on the fact that the coopera-

[60] How flexible this margin of discretion is today with the Lisbon Treaty is not yet clear, but this will become clearer with the end of the transition period until 1.12.2014, see Art. 10 of the Protocol 36 on transitional provisions in relation to acts adopted before the entry into force of the Lisbon Treaty OJ C 83/322, 30.3.2010.

[61] This possibility however applies even if a Member State has not raised its concerns earlier in the legislative procedure.

[62] See also Lenaerts et. al. EU procedural law (Oxford 2014) pp. 253 ff. on the action for annulment.

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tion instrument does not fit into its legal system. Here, coherence and national identity are of importance. How far these limits can be applied is limited by the principle of loyal cooperation. Member States should be loyal towards the Union in relation to applying and realising that particular Union policy.[63] This principle of loyalty restricts the use of other limits in the implementation of mutual recognition instruments, and therefore the first limit of mutual recognition based on EU rules and principles is also relevant here.

The limits based on fundamental rights further actualise at the national implementing level. Having legislation where collisions with fundamental rights obligations might actualise is usually not considered desirable and the principle of coherence is relevant in this respect. Many Member States have considered that mutual recognition legislation should include human rights grounds for refusal. These have often been inserted as mandatory human rights grounds for refusal, such as in some Nordic Member States.[64] Safeguarding fundamental rights in cooperation on criminal matters has by several Member States been considered very important and one could even say that the Member States respect this limit of mutual recognition more than the EU sometimes.

4. The national application level

At the national application level the limits of mutual recognition have a tangible effect. When the limits actualise at this level, recognition is restricted or refused. The limits take the form of grounds for refusal and the national judicial authorities are the relevant actors.[65] The limits based on EU rules and principles are to be mainly respected already by the EU legislator, but at the national application level, it is possible that another EU principle limits the application of mutual recognition. Situations where limits actualise at the national application level can arise, where in the actual case other relevant EU principles already have actualised. Mutual recognition cannot then be applied, and the aforementioned situation of an arrest warrant where the person sought is an asylum applicant is such an example where mutual recognition would be limited by the national judicial authorities.

Perhaps more important still at this level are the limits based on the character of criminal cooperation within the EU and fundamental rights. These limits affect the fundamental aspects of the national legal orders and the national criminal procedures. In a criminal proceeding, applying mutual recognition might lead to the detriment of the individual, without this being the intention behind the instrument. When different rules regulate different parts of the proceedings, the outcome might not be fair. This might not always be possible for the legislator, the EU or the

[63] CJEU case law C-68/88 *Commission v Greece*, confirmed later in cases C-186/98 *Nunes and de Matos*, C-333/99 *Commission v France* and C-457/02 *Antonio Nisselli*. See also Tridimas 2006 pp. 419-420.

[64] Section 5(1)(6) of the Finnish Extradition Act and section 4(2) of chapter 2 of the Swedish Surrender Act. See also Suominen 2011 pp. 205-223 and Suominen 2014 a pp. 26-29 and 31-32.

[65] On the grounds for refusal in general, see Suominen 2011 pp. 111-277.

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national, to foresee. Fundamental rights limits may especially actualise here where the fairness of the process is at stake.

It is also possible that the judicial authorities of a Member State considers something other than what is mentioned in the mutual recognition instruments to be a limit of mutual recognition. In particular, matters of coherence and fundamental rights might actualise in a case in a situation which has not been considered before. New situations arise where new limits become relevant and although these limits should actualise at the national implementing level, this is not always the case, as the legislator is not aware of such situations. The limits of mutual recognition are nevertheless relevant here and these actualise at the national application level.

5. Some concluding remarks

In relation to what has been mentioned above with regards to the national implementing and application level, where a Member State would implement or apply a ground for refusal or limit mutual recognition in another way, contrary to the EU instrument, this would construe a conflict of law. The CJEU would undoubtedly resolve this based on the supremacy of EU law and the situation would be resolved without it being a question of limiting mutual recognition. Regardless of this, the limits of mutual recognition are important also at the national level.

In light of this and the case law mentioned above, the question is how to apply the limits of mutual recognition? Can the national legislator limit mutual recognition further? Is there still room for the national judicial authorities to limit the principle more than that which is stated in the national legislation? To answer these questions, one has to look at what the limits mean.

V. What do the limits mean?

We can see that the different limits of mutual recognition actualise at different stages. When a limit actualises, what does this mean? Asp has stated that mutual recognition *should be viewed* as a legal principle (contrary to that it *is* a legal principle). He attached three aspects to this; the principle does not dictate the outcome, the outcome depends on complex interaction with other principles and the values behind the principle need to be taken into account when arguing on the principle.[66] This induction explains also how the limits function, as mutual recognition as a legal principle is flexible, as has been shown above with its characteristics. The limits do not necessarily dictate the outcome either; rather the interaction between mutual recognition and its limits and the values behind also needs to be taken into account when examining the limits. These are firstly analysed in relation to the functions of mutual recognition and secondly based on their strictness.

[66] Asp 2014 pp. 16–17.

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1. Limits and the functions of mutual recognition

The legislative function of mutual recognition is probably its best-known function. After all, many instruments embody this principle and the principle is visible in both the instruments and implementing legislation. The limits are of utter importance at the legislative level. This leads to the legislative function of mutual recognition being also of importance. The limits relevant for legislative function are all of those mentioned, as the limits of the legislative function affects which instruments are enacted, how these instruments are construed, what possibilities there are to refuse recognition and which aspects the instruments encompass. The limits based on EU rules and characters shape how the legislative function of mutual recognition is understood. An example here is that mutual recognition is not extended to cover all aspects of cooperation and that certain aspects of cooperation is left for the Member States. Those limits based on the character of cooperation limit the legislative function as regards to which aspects are not to be regulated by the EU. An example here is how certain grounds for refusal are construed. These do not harmonise fundamental aspects of the Member States' legal systems but leave room for applying such grounds. The limits based on fundamental rights limit the legislative function for the fundamental rights. An example here is the human rights ground for refusal inserted in the EIO.

As for the interpretative function, most of the limits of mutual recognition are relevant in relation to this function. Mutual recognition is often used as an interpretative tool, where the aims of the cooperation are concerned. The limits then actualise as far as this interpretative function can be applied. This applies especially to those limits related to the character of criminal cooperation within the EU. The above mentioned Swedish Supreme Court case *NJA 2007 s. 168* is an example of where the court has considered a presupposed meaning of mutual recognition. Here, mutual recognition was used as an argument in its interpretative function, which resulted in recognition taking place. How far this interpretative function can be used depends however on the aims and values of the limits. Limits based on EU rules and principles seem to have a similar interpretative function as mutual recognition. After all, mutual recognition is one legal principle among many others in the EU system. The limits based on the character of cooperation and those safeguarding fundamental rights again seem stricter for the interpretative function of mutual recognition. Here the arguments and values behind mutual recognition come to test, as has been commented on above.

When a limit of mutual recognition actualises, it entails that mutual recognition is balanced against the limit. This balancing function is relevant for all of the limits, as this express mutual recognition as a legal principle. When mutual recognition contradicts other principles, these are balanced against each other. This is a typical balancing function attached to principles. In this balancing, the different values and weight of the principles need to be taken into account and this is what a national judicial authority typically would do when such limits become relevant in a case. The optimising function of mutual recognition can be considered part of this

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balancing in this context, as the idea is optimising mutual recognition and through this to increase effective cooperation.

Mutual recognition can be considered more a policy safeguarding collective rights than a principle safeguarding individual rights.[67] When weighing principles and policies, the outcome should always be that the individual rights prevail. Therefore, those limits of mutual recognition based on individual rights, such as some of the limits based on other EU principles or those based on fundamental rights, would seem to actually limit the application of mutual recognition in such situations. Such balancing can also be done in addition to the national application level at the national legislative level, when the national legislator balances these limits against mutual recognition.

2. Limits and their strictness

Firstly, when a limit of mutual recognition actualises, it can mean that the flexible form of mutual recognition is enacted. This flexible form is to some extent similar to the balancing mentioned above, but this flexibility is based on the flexibility the principle itself entails. This can be the case when the limit is based on another EU principle, where both safeguard collective rights, such as preserving the core of national sovereignty where this is not expressed as an individual right. Another possibility is when a limit relating to the character of criminal cooperation within the EU actualises and mutual recognition takes another form, which makes it acceptable in that legal order. If the core of state sovereignty, *ordre public*, national identity or coherence can be preserved with mutual recognition adapting a different form, then the limits no longer apply. An example here is when a different measure in criminal proceedings is used or when a sentence is altered to fit into the national system.

Secondly, when a limit of mutual recognition actualises, it may mean that mutual recognition should not take place, unless specifically motivated. This applies for those limits based on the character of criminal cooperation within the EU, where other EU rules and principles also become relevant. The EU legislator should limit itself accordingly when legislating mutual recognition instruments. The principles of subsidiarity, proportionality, the respect for the specific character of criminal law and especially the principle of coherence are relevant limits here. Therefore, EU actions on mutual recognition should be motivated for appropriately. Mutual recognition instruments should only be initiated in accordance with the principle of subsidiarity; they should be proportional and at the same time respect the specific character of criminal law, often expressed by the principle of coherence. If mutual recognition cannot be sufficiently motivated, the limits restrict the use of mutual recognition instruments and are primarily directed at the EU legislator. These limits might also actualise at the Member State level. This might entail that the EU

[67] Dworkin, Taking Rights Seriously (Harvard University Press 1978) pp. 22, 82 and 90 and Dworkin, Law's Empire (Harvard University Press 1986) pp. 221-224 and Alexy, Individuelle Rechte und kollektive Güter, in Recht, Vernuft, Diskurs Studien zur Rechtsphilosophie ed. Alexy (Suhrkamp 1995) pp. 243-261 and Alexy 2002 pp. 62 and 65.

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legislator considers the measure within its competence and within the limits of mutual recognition, but the Member States are of the opposite opinion. Taking into account the situation post-Lisbon, the possibilities for the Member States not to comply with mutual recognition instruments adopted by the EU are restricted and this scenario might prove problematic.

Thirdly, the strictest outcome of a limit of mutual recognition entails that mutual recognition should not take place. In some situations, the limits of mutual recognition are of such importance that mutual recognition has to submit to these. These limits mean at the EU level that the instruments should not be initiated, and a mutual recognition instrument should not be initiated if contradicting with the principles of subsidiarity and proportionality. The core of state sovereignty may also be relevant here, if the instrument would infringe fundamental aspects of criminal procedure and not be within the legislative competence of the EU. At the national level these limits entail that mutual recognition should not be applied, this can mean that recognition is refused, or that the measure to be mutually recognised is not acknowledged.

3. Concluding remarks on the meaning of the limits

The limits of mutual recognition manifest themselves differently. Some entail that mutual recognition instruments should not be legislated on at all, some that the form of mutual recognition needs to be adjustable, some that certain parts should not be regulated and others that possibilities for refusal must be allowed. The nature of the limits is a further question; when does the limit entail that mutual recognition cannot take place, either as the instrument should not be legislated, or that the decision should not be recognised? The limits are different, as are the functions of mutual recognition and therefore stating something in a general sense on the limits is difficult.

One question that becomes relevant is whether a Member State can refuse recognition based on a limit, where it is not expressed as a ground for refusal, either in the instrument or in the implementing legislation. As mentioned in the case law above, the CJEU considers that Member States can only refuse mutual recognition in those situations where a ground for refusal is applicable. However, the case law concerns those aspects of grounds for refusal, which have been harmonised to some extent, such as the grounds for refusal based on a judgment in absentia or the *ne bis in idem* principle, which can both be considered as EU concepts, subject to prior harmonisation. Therefore, a Member State cannot choose to refuse mutual recognition based on a ground not found in the instrument, if the matter concerned is a Union concept, which has been subjected to harmonisation. That standard, set either by the EU legislator or the CJEU, applies. However, for situations where there are no such standards, the Member States can, and especially in situations of human rights infringements, should refuse recognition. This is based on the international obligations of all Member States, and in addition to the latter case law of the CJEU in asylum matters. The Member States should today not hide between each other and blame the responsibility to safeguard fundamental rights on each other.

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Each Member State needs to take responsibility for these and effective cooperation in the name of mutual recognition cannot override these responsibilities.[68]

VI. Some concluding remarks

Mutual recognition is a general principle regulating cooperation in criminal matters. This obviously entails that its characteristics are varying and reflect the overall function of the principle. The multilevel character of mutual recognition, its different functions and degrees to which it can be realised have been analysed above to give a starting point for the limits of mutual recognition. This article has analysed the limits of mutual recognition and demonstrated how the limits function, when actualised. The limits of mutual recognition are many and these have different features. In this article, a division into those limits based on EU rules and principles, those based on the character of criminal cooperation within the EU and fundamental rights has been applied. Common for all limits of mutual recognition is that they actualise at different levels, and can function differently even within one level. The flexible form of mutual recognition allows it to function within the limits set.

The most essential limits are those which enact at the EU legislative level. This is where the legislative framework is laid down and mutual recognition formed. If the limits are not respected at this level, respecting these at the national level might prove problematic, as has been demonstrated above. This might in the future prove especially important taking into account the possibilities under the Lisbon Treaty soon to also be applicable to mutual recognition instruments. A Member State failing to fulfil its obligation under the Treaties can be brought to the CJEU by the Commission. It will be interesting to see if this will be used frequently for mutual recognition instruments and how the Member States will react to this.

The limits do not always have clear consequences, but mutual recognition often adapts due to its flexible nature. It is nevertheless imperative that certain limits are respected. This applies especially for the limits based on fundamental rights. Effective cooperation should never lead to setting these fundamental rights aside. The Member States are obliged always to respect these, and mutual recognition should not override these. In this respect, the insertion of a ground for refusal in the EIO is positive. The case law of both European courts has shown that Member States have to take their responsibilities seriously as regards safeguarding fundamental rights. This applies equally in asylum cases as in mutual recognition cooperation. In today's world with many factors, such as economic crises, which affect the systems of the Member States, these cannot simply shun their responsibilities to safeguard fundamental rights. This also entails that the EU legislator needs to respect the limits of mutual recognition, especially when legislating mutual recognition instruments. It is in the interests of the EU and the Member States to ensure that fundamental rights are not violated, irrespective of what form of cooperation is at stake.

[68] Also Suominen 2014 a p. 51-54.

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