

## THE CONSTITUTIONAL IMPLICATIONS OF MUTUAL RECOGNITION IN CRIMINAL MATTERS IN THE EU

VALSAMIS MITSILEGAS\*

### 1. Introduction

Application of the principle of mutual recognition has been the motor of European integration in criminal matters in the recent past. The adoption in 2002 of the European Arrest Warrant constituted a spectacular development for European Union criminal law, and was followed by a series of further mutual recognition measures. The emphasis on mutual recognition is likely to continue – like its Tampere predecessor, the Hague Programme setting the agenda for EU Justice and Home Affairs until 2009 refers to mutual recognition as “the cornerstone” of judicial co-operation in criminal matters. However, the application of the principle in practice has not been devoid of complications and objections. The implementation of the European Arrest Warrant, and its interpretation by national constitutional courts, have cast light on a series of significant challenges that mutual recognition in criminal matters may pose to the constitutional traditions of Member States and fundamental rights and have caused the debate on primacy of European Union law over national constitutional law to resurface. At the same time, accompanying measures proposed or taken by the European Union in order to alleviate constitutional concerns caused by mutual recognition (such as the Commission’s proposal on minimum standards on defence rights across the EU) may also have significant constitutional implications for the European Union, bringing to the fore issues of competence and legitimacy, and the reframing of the relationship between the Union and Member States in the field of criminal law. This paper will explore these challenges, by focusing on the application of mutual recognition in criminal matters and the specific measures adopted, its implementation and interpretation by national constitutional courts, and the accompanying measures put forward at EU level to address constitutional concerns.

\* Department of Law, Queen Mary University of London. The author may be contacted at [v.mitsilegas@qmul.ac.uk](mailto:v.mitsilegas@qmul.ac.uk).

## 2. The principle of mutual recognition and EU criminal law

Notwithstanding the introduction of the “third pillar” in the European Union legal framework by the Maastricht Treaty, granting the Union express powers to legislate in a series of criminal matters, EU action in criminal law remained limited in the early to mid-1990s. This was partly due to the constitutional constraints of the Maastricht third pillar, which could be explained by Member States’ reluctance to cede too much sovereignty in the field: criminal law measures could be adopted by unanimity in the form of Joint Actions (whose legal effects are still contested), and Conventions – which, as the name suggests, resemble more an international law instrument (requiring ratification by national parliaments of Member States) than a Community form of legislative action.<sup>1</sup> As a result of these constraints, only a limited number of criminal law harmonization measures were adopted by the late 1990s.<sup>2</sup> In the field of judicial co-operation in criminal matters, steps were taken to simplify and enhance co-operation, but progress was slow as the legislative choice was third pillar Conventions, which were subject to ratification by national parliaments.<sup>3</sup>

In order to address concerns regarding the slow pace of improvement of judicial co-operation in criminal matters in the EU, but at the same time to reassure those sceptical of further EU harmonization in criminal matters, the UK Government put forward during its EU Presidency in 1998 the idea of applying the mutual recognition principle in the field of criminal law, leading to the recognition by the European Council at Cardiff of “the need to enhance the ability of national legal systems to work closely together” and a request to the Council “to identify the scope for greater mutual recognition of decisions of each others’ courts”.<sup>4</sup> The emphasis on mutual recognition was justified by the UK on the grounds that the differences between Member States’ legal systems limit the progress which is possible by other means and render harmonization of criminal law time-consuming, difficult to negotiate and (if full scale) unrealistic.<sup>5</sup> According to Jack Straw, then UK Home Secretary, inspiration could be taken from the way the internal market was “un-

1. See Mitsilegas, Monar and Rees, *The European Union and Internal Security* (Palgrave/Macmillan 2003), pp. 32–33.

2. See e.g. the Joint Action on criminalizing participation in a criminal organization in the EU (O.J. 1998, L 351/1), and the Joint Action to combat racism and xenophobia (O.J.1996, L 185). On a detailed list of adopted measures, see Mitsilegas et al., *op.cit. supra* note 1, chapt. 4.

3. In particular the 1995 and 1996 EU Conventions on extradition: O.J. 1995, C78/2, and O.J. 1996, C 313/1.

4. Para 39, doc. SN 150/1/98 REV 1.

5. See document submitted by the UK delegation to the (then) K4 Committee, doc. 7090/99, Brussels 29 March 1999, paras. 7 and 8.

blocked” in the 1980s and, instead of opting for total harmonization, one might conceive of a situation “where each Member State recognizes the validity of decisions of courts from other Member States in criminal matters with a minimum of procedure and formality”.<sup>6</sup>

The momentum for enhancing co-operation in criminal matters in the EU via mutual recognition was maintained in the following years.<sup>7</sup> In its 1999 Tampere Conclusions, setting up a five year agenda for EU Justice and Home Affairs, the European Council endorsed the principle of mutual recognition, which in its view, “should become the cornerstone of judicial co-operation” in criminal matters.<sup>8</sup> This led in 2001 to the adoption by Member States of a very detailed Programme of measures to implement the principle of mutual recognition of decisions in criminal matters, which called on the Council to adopt no less than 24 measures in the field.<sup>9</sup> The previous year, the Commission published a Communication presenting the institution’s thoughts on mutual recognition.<sup>10</sup> The Commission expressed the view that the traditional system of co-operation is slow, cumbersome and uncertain, and provided its own understanding of how mutual recognition might work:

“Thus, borrowing from concepts that have worked very well in the creation of the Single Market, the idea was born that judicial co-operation might also benefit from the concept of mutual recognition which, simply stated, means that once a certain measure, such as a decision taken by a judge in exercising his or her official powers in one Member State, has been taken, that measure – in so far as it has extranational implications – would *automatically* be accepted in all other Member States, and have the same or at least similar effects there”.<sup>11</sup>

Thus, the turn of the century saw a consensus on the desirability of the application of the mutual recognition principle in the criminal law sphere in the

6. In La Documentation Française, Ministère de la justice, *L'Espace Judiciaire Européen. Actes du Colloque d'Avignon*, (Paris 1999), p. 89. My translation.

7. For a detailed look at negotiations at the time see Nilsson, “Mutual Trust or Mutual Mistrust?”, in de Kerchove and Weyembergh (Eds.), *La Confiance Mutuelle dans l'Espace Pénal Européen/Mutual Trust in the European Criminal Area*, (Editions de l'Université de Bruxelles, 2005) pp. 29–33. For an overview of the development of the principle in criminal matters, see also Peers, “Mutual Recognition and Criminal Law in the European Union: Has the Council Got it Wrong?”, 41 CML Rev. (2004) 5–36.

8. Para 33. The reference to mutual recognition as the “cornerstone” of judicial co-operation in criminal matters in the EU was reiterated 5 years later, in the Hague Programme extending the EU JHA agenda to 2009 – para 3.3.1.

9. O.J. 2001, C 12/10

10. Communication from the Commission to the Council and the European Parliament, *Mutual Recognition of Final Decisions in Criminal Matters*, COM(2000)495 final, Brussels 26 July 2000.

11. *Ibid.*, p. 2. Emphasis added.

EU. For those opposing harmonization in criminal matters, mutual recognition is handy as it can provide results for judges and prosecutors when co-operating across borders, while *prima facie* Member States do not have to change their domestic criminal law to implement EU standards. For supporters of integration mutual recognition is also welcome. It helps avoid EU legislative stagnation in criminal matters, by pushing forward a detailed legislative agenda to achieve mutual recognition, and promoting co-operation. On the other hand, as evidenced in the Commission's 2000 Communication,<sup>12</sup> supporters of integration also view mutual recognition as a motor for harmonization, since – as in the internal market – the smooth functioning of mutual recognition would require minimum harmonization of standards among Member States and thus lead to a “spill-over” of further measures in the field.<sup>13</sup>

However, the extent to which one can successfully “borrow” the mutual recognition principle from its internal market framework and transplant it to the criminal law sphere is a contested issue. The main objection that could be voiced against such transplant is one of principle, namely that criminal law and justice is an area of law and regulation which is qualitatively different from the regulation of trade and markets. Criminal law regulates the relationship between the individual and the State, and guarantees not only State interests but also individual freedoms and rights in limiting State intervention. Court orders and judgments in the criminal sphere may have a substantial impact on fundamental rights, and any inroads to such rights caused by criminal law must be extensively debated and justified. Using mutual recognition to achieve regulatory competition (as has been the case in the internal market) cannot be repeated in the criminal law sphere, as the logic of criminal law is different and market considerations cannot give a solution.<sup>14</sup> While market efficiency requires a degree of flexibility and aims at profit maximization, clear and predictable criminal law principles are essential to provide legal certainty in a society based on the rule of law. The existence of these – publicly negotiated – rules is a condition of public trust in the national legal order. For these reasons, EU intervention in criminal matters may not be equated with intervention regarding the internal market.

12. *Ibid.*, p. 4.

13. See Mitsilegas, “Trust-building Measures in the European Judicial Area in Criminal Matters: Issues of Competence, Legitimacy and Inter-institutional Balance”, in Carrera and Balzacq (Eds.), *Security versus Freedom: A Challenge for Europe's Future* (Ashgate, forthcoming).

14. On mutual recognition and regulatory competition see Majone, *Dilemmas of European Integration. The Ambiguities and Pitfalls of Integration by Stealth* (OUP, 2005), p. 71. On the incompatibility of the two fields see Weyembergh and Khabipour, “Quelle confiance mutuelle ailleurs?”, in de Kerchove and Weyembergh, *op. cit. supra* note 7, p. 265.

This fundamental objection is coupled with a further pivotal difference between market and crime mutual recognition: this concerns the mode and effect of recognition. Mutual recognition in the internal market involves the recognition of national regulatory standards and controls,<sup>15</sup> is geared to national administrators and legislators,<sup>16</sup> and results in facilitating the free movement of products and persons, thus enabling the enjoyment of fundamental Community law rights. Mutual recognition in criminal matters on the other hand involves the recognition and execution of court decisions by judges, in order to primarily facilitate the movement of enforcement rulings. Moreover, the intensity of intervention of the requested authority is greater in criminal matters, as further action may be needed in order to execute the judgment/order (such as arrest and surrender to the requesting State.) While the logic behind recognition in the internal market and criminal law may be similar (there should be no obstacles to movement in a borderless EU) – which, in criminal matters leads to calls for compensatory measures (criminals should not benefit from the abolition of borders in the EU) – there is a different rationale between facilitating the exercise of a right to free movement of an individual and facilitating a decision that may ultimately limit this and other rights.

These differences notwithstanding, the founding principle of mutual recognition in both internal market and criminal law is similar: the recognition of national standards by other EU Member States. In that sense, as Nicolaidis and Shaffer have noted, “recognition creates extraterritoriality”.<sup>17</sup> National standards must be recognized “extraterritorially”, in the sense that they must be applied and/or enforced by another Member State. The central element of the mechanism is that it is an individual *national* standard, judgment or order that must be recognized by other Member States – and not an EU-wide negotiated standard.<sup>18</sup> In recognizing these standards in specific cases, national authorities implicitly accept as legitimate the national regulatory/legal/justice system which has produced them in the first place.<sup>19</sup> In that sense, mutual recognition represents a “*journey into the unknown*”, where

15. Armstrong, “Mutual recognition”, in Barnard and Scott, *The Law of the Single European Market: Unpacking the Premises* (Oxford, Hart, 2002), pp. 230–231.

16. Barnard, *The Substantive Law of the EU. The Four Freedoms* (OUP, 2004), p.507.

17. Nicolaidis and Shaffer, “Transnational Mutual Recognition Regimes: Governance without global government”, 68 *Law and Contemporary Problems* (2005), 267.

18. Guild seems to find this at odds with the abolition of borders in the EU. She notes that “there is an inversion of an area without borders into an area that respects without question borders (i.e. mutual recognition).” Guild, “Crime and the EU’s Constitutional Future in an Area of Freedom, Security and Justice”, 10 *ELJ* (2004), 219.

19. On the need to look at the specific regulatory history of a product for standards to be recognized in the context of the internal market, see Armstrong, *op. cit. supra* note 15, p. 231.

national authorities are in principle obliged to recognize standards emanating from the national system of any EU Member State on the basis of mutual trust, with a minimum of formality. Although accepting – and applying – foreign law has been a central element in private international law, this “journey into the unknown” in mutual recognition is different and raises a number of concerns in the sensitive field of criminal law where a high level of legal certainty is required and the relationship between the individual and the State is at stake.<sup>20</sup>

It is this potential “journey into the unknown” which has led to mechanisms of control, involving checks in order to avoid total automaticity when it comes to mutual recognition in the internal market. These checks may take the form of leaving national authorities leeway to assess whether there is a level of functional equivalence between the systems of the home and host country prior to agreeing to recognize the home country’s standards;<sup>21</sup> and the possibility for Member States to refuse mutual recognition when evoking mandatory requirements.<sup>22</sup> As will be seen below, similar mechanisms and safeguards have been introduced in the context of mutual recognition in criminal matters, in order to avoid the automatic recognition and execution of judgments in the field. However, these efforts – along with the very application of the mutual recognition principle in the criminal law field – are being contested. Mutual recognition challenges traditional concepts of territoriality and sovereignty. Viewing the European Union as a single “area” where national enforcement tools circulate freely, even if no EU-wide standards are created, may lead to a renegotiation of fundamental constitutional principles both at national and EU level.<sup>23</sup> This renegotiation is under

20. In the case of private international law, it is the court of the “executing” Member State which takes the decision applying if appropriate foreign law. However, in mutual recognition, the Court in the executing State has to accept and recognize a judicial decision issued by a court in a foreign country under foreign law. In private international law the “ordre public” safeguard has been used. For similar safeguards in EU criminal law see below.

21. Armstrong calls this “active” mutual recognition – op. cit. *supra* note 15, p. 241. Peers refers to “comparability” between systems. Peers, op. cit. *supra* note 7, pp. 19–23. Peers argues that such comparability does not exist in criminal matters, due to the abolition of the dual criminality requirement regarding a number of offences when recognizing court decisions in criminal matters. However, comparability refers to the system that produces the specific standard. In the internal market an example (which Peers uses) would be comparability of training requirements to enter a profession. In criminal law, this would translate to comparability of national judicial systems and procedures leading to the judgment to be recognized and executed (and not whether a behaviour is an offence in both the requesting and requested State).

22. The concept was introduced by the *Cassis de Dijon* ruling (Case 120/78, *Rewe-Zentralfinanz v. Bundesmonopolverwaltung für Branntwein*, [1979] ECR 649). On the evolution of mandatory requirements see *inter alia* Barnard, op. cit. *supra* note 16, pp. 108–112; Craig and de Burca, *EU Law. Text, Cases and Materials*, 3<sup>rd</sup> ed. (OUP, 2003), pp. 659–668.

23. Françoise Tulkens spoke as early as 2001 of “reinvention” of paradigms. Tulkens, “La Reconnaissance Mutuelle des Décisions Sentencielles. Enjeux et Perspectives” in de Kerchove

way as the first examples of mutual recognition in criminal matters have emerged.

### 3. Examples of mutual recognition in criminal matters and resulting constitutional concerns

#### 3.1. Examples of mutual recognition

The first, and most analysed, example of mutual recognition in criminal matters in the European Union has been the European Arrest Warrant.<sup>24</sup> Its adoption was prioritized after the 9/11 events, and political agreement on the relevant Framework Decision was reached in the Council in December 2001, after very limited debate in the European Parliament and national parliaments.<sup>25</sup> Pushed through as “emergency legislation”, the European Arrest Warrant has radically changed existing arrangements of co-operation on extradition and constitutes a strong precedent for the application of mutual recognition in criminal matters in the European Union.<sup>26</sup> This is recognized in the Preamble of the Framework Decision which states that the warrant “is the first concrete measure in the field of criminal law implementing the principle of mutual recognition which the European Council referred to as the ‘cornerstone’ of judicial co-operation”.<sup>27</sup>

The European Arrest Warrant is a judicial decision issued by a Member State with a view to the arrest and surrender by another Member State of an

and Weyembergh (Eds.), *La Reconnaissance Mutuelle des Décisions Judiciaires Pénales dans l’Union Européenne*, (Editions de l’Université de Bruxelles, 2001), p. 166.

24. Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States, O.J. 2002, L 190/1.

25. For a background to the negotiations of the European Arrest warrant see Plachta and Van Ballegooij, “The Framework Decision on the European Arrest Warrant and Surrender Procedures between Member States of the European Union” in Blekxtoon (Ed.), *Handbook on the European Arrest Warrant*, (TMC Asser Press, the Hague, 2005), pp. 32–36. On scrutiny by national parliaments and the limited time available see House of Lords European Union Committee, *The European Arrest Warrant*, 16<sup>th</sup> Report, session 2001–02, HL Paper 89.

26. For an analysis of various aspects of the European Arrest Warrant see *inter alia*: Alegre and Leaf, “Mutual recognition in European Judicial Co-operation: A step too far too soon? Case Study – the European Arrest Warrant”, 10 ELJ (2004), 200–217; Venemann, “The European Arrest Warrant and its Human Rights implications”, 63 ZaoRV (2003), 103–121; Wouters and Naert, “Of arrest warrants, terrorist offences and extradition deals: An appraisal of the EU’s main criminal law measures against terrorism after ’11 September””, 41 CML Rev. (2004), 911–926; Gilmore, *The Twin Towers and the Third Pillar: Some Security Agenda Developments*, EUI Working Paper LAW No 2003/7; Spencer, “The European Arrest Warrant”, 6 CYELS (2003–04), 201–217; Blekxtoon, op. cit. *supra* note 25.

27. Recital 6.

individual for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order.<sup>28</sup> The Warrant is thus a national judicial decision which must be recognized and executed by the requested State. Co-operation is formalized, as the Warrant takes the form of a Certificate – a pro-forma form which is attached to the Framework Decision and contains a set of information on the requested person and the offence committed.<sup>29</sup> The Warrant must be dealt with as a matter of urgency and the final decision on its execution must be taken within a period of 60 days – or exceptionally 90 days – from the arrest of the requested person.<sup>30</sup> The requested authority is provided with very limited grounds for refusal to recognize and execute a Warrant.<sup>31</sup> With some exceptions, the arrested person must be surrendered no later than 10 days after the final decision on the execution of the Warrant.<sup>32</sup> The European Arrest Warrant thus introduces a procedure marked by automatization and speed. A judicial authority of an EU Member State must give effect to a decision by a similar authority in another Member State with a minimum of formality: suspects or convicted persons must be surrendered as soon as possible, on the basis of completed forms, and ideally without the executing authorities looking beyond the form.

Given its adoption as a response to the 9/11 events, a striking feature of the European Arrest Warrant is that its scope is not limited to terrorist offences. A Warrant may in fact be issued for acts punishable by the law of the issuing Member State by a custodial sentence or detention order of a maximum period of at least 12 months or, where a sentence has been passed or a detention order made, for sentences of at least four months.<sup>33</sup> So a wide range of conduct and offences may fall within the scope of the Framework Decision. Moreover, a wide range of offences give rise to surrender without verification of the dual criminality of the act. This is the case for a list of 32 offences expressly enumerated in the Framework Decision, provided that they are punishable in the Member State issuing the European Arrest Warrant by a custodial sentence or a detention order for a maximum period of at least three years.<sup>34</sup> The list includes offences which are both very common and diverse, both national and transnational. Some of these have been subject to harmonization at EU level (such as drug trafficking, human traffick-

28. Art. 1(1) of Framework Decision.

29. See also Art. 8(1).

30. Art. 17(1), (3) and (4).

31. For further details, see section 4.

32. Art. 23(2)–(4).

33. Art. 2(1).

34. Art. 2(2).



ing and organized crime), whereas others remain defined strictly by national law (such as murder, grievous bodily injury, rape).<sup>35</sup> For offences other than the 32 on the list, Member States may require that dual criminality is verified prior to the execution of a Warrant.<sup>36</sup>

The European Arrest Warrant is not the only example of mutual recognition in criminal matters. It was followed by the adoption of a series of measures applying the mutual recognition principle to primarily the financial side of criminal law enforcement.<sup>37</sup> In 2003, the Council adopted a Framework Decision on the execution of orders freezing property and evidence.<sup>38</sup> Freezing orders from the issuing State must be recognized “without any further formality” by the executing State, which must “forthwith” take the necessary measures for their “immediate execution” in the same way as for a freezing order made by the executing State.<sup>39</sup> This was followed by the adoption of a Framework Decision applying mutual recognition to financial penalties.<sup>40</sup> In a similar wording to the freezing orders instrument, decisions imposing financial penalties must be recognized without formality and executed “forthwith”.<sup>41</sup> Finally, the Council has reached political agreement on an initiative by Denmark for a Framework Decision on the application of the principle of mutual recognition to confiscation orders.<sup>42</sup> Recognition and execution of confiscation orders must take place on the same terms as in the

35. For an analysis see Keijzer, “The Double Criminality Requirement”, in Blekxtoon, op. cit. *supra* note 25, pp. 137–163.

36. Art. 2(4).

37. Another mutual recognition instrument, the European Evidence Warrant, is currently being negotiated. (Initial Commission proposal: COM(2003)688 final, Brussels 14 Nov. 2003; latest publicly available version: Council document 15957/05, Brussels 20 Dec. 2005). For further information, see the special issue of the *ERA-Forum, Dealing with European Evidence in Criminal Proceedings: National Practice and European Union Policy*, 2005 (edited by Peter Cullen).

38. O.J. 2003, L 196/45.

39. Art. 5(1). For background to the proposal for the Framework Decision see 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 and Evidence”, in de Kerchove and Weyembergh, op. cit. *supra* note 23, pp. 91–100.

40. O.J. 2005, L 76/16.

41. Art. 6. For background to the proposal for the Framework Decision see Bradley, “The Joint Initiative of the UK, France and Sweden for the Adoption of a Council Framework Decision on the Application of the Principle of Mutual Recognition to Financial Penalties”, in de Kerchove and Weyembergh, op. cit. *supra* note 23, pp. 125–132. See also Genson, “Observations personnelles à propos des initiatives récentes relatives aux sanctions pécuniaires”, *ibid.*, pp. 141–146.

42. Latest Council document 14622/04, Copen 135, Brussels, 17 Dec. 2004. It is interesting to note that all 3 Framework Decisions were tabled on the initiative of Member States, within the framework of their powers under the third pillar.

other Framework Decisions.<sup>43</sup> But in the light of the very different constitutional traditions of Member States, this measure was accompanied by a Framework Decision aiming to bring about a minimum harmonization of confiscation procedures in Member States.<sup>44</sup> As in the European Arrest Warrant, in all three instruments co-operation takes place on the basis of a Certificate that has to be completed by the issuing State, and a standard form is attached in each of the Framework Decisions. Similarly to the European Arrest warrant, the three Framework Decisions apply to a wide range of offences, for many of which the verification of the dual criminality requirement is abolished.<sup>45</sup>

### 3.2. *Constitutional concerns*

The application of the mutual recognition principle in criminal matters on the terms described above, has raised a number of constitutional concerns. A major objection has centred on the abolition of the dual criminality requirement, which is seen to constitute a breach of the legality principle. While proponents of mutual recognition have argued that maintaining dual criminality is contrary to the very principle of mutual recognition,<sup>46</sup> those expressing concerns note that the abolition of dual criminality is contrary to the – constitutionally enshrined in a number of Member States – principle of legality (or *nullum crimen sine lege*). As has been noted, constitutionally it is not acceptable to execute an enforcement decision related to an act that is not an offence under the law of the executing State.<sup>47</sup> The executing State should not be asked to employ its criminal enforcement mechanism to help prosecute/punish behaviour which is not a criminal offence in its national legal

43. Art. 7(1).

44. O.J. 2005, L 68/49. As Peers notes, the relationship of these 2 measures follows the classic internal market pattern (Peers, op. cit. *supra* note 7, 31). For an analysis of the relationship between the 2 instruments with regard to the grounds for refusal, see part 4 below.

45. All 3 Framework Decisions apply to orders stemming from acts constituting any offence under the laws of the executing State (Arts. 3(3), 5(3) and 6(3) respectively – unlike the European Arrest Warrant, there is no penalty threshold for these offences in these instruments). Verification of dual criminality is abolished in similar terms to the European Arrest Warrant on the Framework Decisions on freezing orders and confiscation (3 year maximum penalty threshold and list of 32 offences – Arts. 3(2) and 6(2) respectively). The scope of the financial penalties Framework Decision is broader: verification of dual criminality is abolished for a list of 39 offences, without any penalty threshold being required (Art. 5(1)).

46. Nilsson, op. cit. *supra* note 7, p. 158.

47. See in particular Kaiafa-Gbandi, *To Poiniko Dikaio stin Europaiki Enossi (Criminal Law in the European Union)*, (Sakkoulas editions, Athens-Thessaloniki, 2003), p. 328 (in Greek, my translation).

order.<sup>48</sup> Concerns in this context involve in particular offences such as murder which have not been harmonized at EU level – although harmonization does not always provide the answer.<sup>49</sup>

A related, but broader concern involves the link between legality and legitimacy of criminal law at the national, and EU, level.<sup>50</sup> As noted above, criminal law is fundamental in a society governed by the rule of law, as it contains rules delineating the relationship between the individual and the State and thus providing guarantees and safeguards for the individual regarding the extent and limits of acceptable behaviour and reach of State power and force.<sup>51</sup> Criminal law and the limits that it sets must be openly negotiated and agreed via a democratic process, and citizens must be aware of exactly what the rules are. However, mutual recognition challenges this framework. Contrary to harmonization, which would involve – even with the current prominent democratic deficit in the third pillar – a set of concrete EU-wide standards which would be negotiated and agreed by the EU institutions, mutual recognition does not involve a commonly negotiated standard.<sup>52</sup> On the contrary, EU Member States must recognize decisions

48. These concerns are exacerbated when the enforcement measures used in the executing State are themselves invasive. In the first major challenge to the abolition of dual criminality in mutual recognition, Germany, playing the unanimity card, recently insisted that inroads to the list of the 32 offences were made regarding another major mutual recognition proposal, the European Evidence Warrant (EEW). According to the Conclusions of the June 2006 Justice and Home Affairs Council, where Member States reached a “general approach” on the Evidence Warrant, Germany may by a Declaration reserve its right to make the execution of an EEW subject to verification of double criminality in cases relating to terrorism, computer related crime, racism and xenophobia, sabotage, racketeering and extortion or swindling, if it is necessary to carry out a search or seizure for the execution of the EEW (Document 9409/06 Presse 144).

49. E.g. offences, such as participation in a criminal organization, although “harmonized”, still leave great discretion to Member States as to implementation; this may lead to considerable discrepancies in the treatment of the offence in national criminal laws. See Mitsilegas, “Defining organised crime in the European Union: The limits of European criminal law in an Area of Freedom, Security and Justice”, 26 *EL Rev.* (2001), 565–581.

50. On the link between legality and legitimacy in EU criminal law in general see Van den Wyngaert, “Eurojust and the European Public Prosecutor in the *Corpus Juris* Model: Water and Fire?”, in Walker (Ed.), *Europe’s Area of Freedom, Security and Justice* (OUP, 2004), p. 232. The article draws upon the analysis of legitimacy in Lenaerts and Desomer, “New models of Constitution-Making in Europe: the Quest for Legitimacy”, 39 *CML Rev.* (2002), 1217–1253, especially 1223–1228.

51. Kaiafa-Gbandi calls criminal law “a measure of the citizen’s freedom”: Kaiafa-Gbandi, “The development towards harmonization within criminal law in the European Union – A Citizen’s Perspective”, 9 *European Journal of Crime, Criminal Law and Criminal Justice* (2001), 242.

52. This has led to calls for a level of approximation/harmonization to accompany mutual recognition in criminal matters. See Peers, *op. cit. supra* note 7; Weyembergh, “Approximation

stemming from the national law of other Member States. Aspects of the legal systems of each Member State must thus be recognized – however, as mentioned above, this constitutes a “journey into the unknown”, as citizens in the other Member States are not in the position to know how other national systems have developed. Agreeing on the procedure to recognize national decisions, rather than substantive rules in the field of criminal law reflects a legitimacy and democracy deficit. Indeed, it has been said that one is led towards a “government-led”, as opposed to parliamentary, production of criminal law norms.<sup>53</sup> At the same time, mutual recognition without any level of open, democratic debate contributes towards a lack of clarity as to the objectives, content and direction of EU criminal law – what, if any, are the interests to be protected by it?<sup>54</sup>

The “extraterritorial” reach of national criminal law decisions in these terms poses significant challenges to the position of the individual in the national legal order. By recognizing and executing a decision by another Member State, the guarantees of the criminal law of the executing Member State are challenged, as the limits of the criminal law become uncertain. This may lead to the worsening of the position of the individual, by enhancing prosecutorial efficiency. It may lead to cases where applying mutual recognition would result in compromising well-established constitutional protection in the executing State and thus challenge the relationship between the individual and the State created on the basis of citizenship and territoriality (such as, in the case of the European Arrest Warrant, the constitutional bar to extraditing own nationals).<sup>55</sup> By requiring authorities in EU Member States to recognize and execute enforcement decisions from any other Member State, citizens and residents in the EU are subject to an area where, in order to address the abolition of borders and the movement it entails, the individual is subject to a proliferation of enforcement action taken to protect in-

of Criminal Laws, the Constitutional Treaty and the Hague Programme”, 42 CML Rev. (2005), 1574–1577; Weyembergh, “The Functions of Approximation of Penal Legislation within the European Union”, 12 MJ (2005), 155–163.

53. See Schünemann, “Fortschritte und Fehlritte in der Strafrechtspflege der EU”, *Goldammer’s Archiv für Strafrecht* (2004), 203.

54. On this question, also in the context of the Constitutional Treaty, see Hassemer, “Strafrecht in einem europäischen Verfassungsvertrag”, 116 ZStW (2004), 312–313.

55. On this issue, see part 5 below. Another constitutional concern arises from the very different national constitutional traditions regarding confiscation. What is acceptable in some countries (such as the “criminal lifestyle” provisions in the UK Proceeds of Crime Act) may be unconstitutional in other Member States, where confiscation powers are much narrower. These differences are reflected in the Framework Decision on confiscation, which – as a minimum harmonization – contains three different options for confiscation for Member States to choose from.

terests defined at national level. This leads to the over-extension of the punitive sphere in the “area of freedom, security and justice”.<sup>56</sup>

A related concern, voiced primarily with regard to the application of the European Arrest Warrant in practice, is the concern that the recognition of Warrants with the minimum of formality along with the abolition of the dual criminality requirement will lead to the breach of suspects’ rights.<sup>57</sup> Concerns have been focusing in particular on whether the suspect will enjoy ECHR rights in the issuing State, in particular the right to a fair trial and the protection from torture. The issue of human rights protection was very prominent in the debate on the European Arrest Warrant in national parliaments, and is inextricably linked with perceptions of the existence – or not – of mutual trust in Member States’ criminal justice systems. The mutual recognition measures themselves assume that a high level of confidence between Member States exists, and this has been reiterated by the ECJ.<sup>58</sup> However, debates in national parliaments and the press have shown that this is not necessarily the case.<sup>59</sup> The legal profession, in particular defence lawyers, have also shown a particular scepticism as to the capacity of the criminal justice systems across the enlarged EU to protect human rights in the light of the intensification of prosecutorial co-operation with the European Arrest Warrant.<sup>60</sup> Human rights (and, to some extent, broader constitutional) concerns, along with the implicit lack of trust in the legal systems of Member States, have led to the introduction of a series of safeguards in the mutual recognition instruments and elsewhere.

56. See also Schünemann, *op. cit. supra* note 53, 313.

57. See in particular Alegre and Leaf, *op. cit. supra* note 26; Venemann, *op. cit. supra* note 26; Garlick, “The European Arrest Warrant and the ECHR”, in Blekxtoon, *op. cit. supra* note 25, pp. 167–182,

58. See e.g. recital 10 of the European Arrest Warrant and recital 4 of the freezing orders Framework Decision and the Court’s ruling in *Gözütök* – for an analysis see section 6 below.

59. The debate on the 2003 Extradition Act – which implemented the European Arrest Warrant in the UK – is illuminating. David Cameron, then only an MP for the Conservative party, opposed the abolition of dual criminality and said: “To put the matter in tabloid form, the Minister is not telling us to trust the current Greek, Portuguese or Spanish criminal justice systems. Instead, he is saying that we must trust any criminal justice system of any present or future EU country not as it is today but as it may be decades in the future” *Hansard* 25 March 2003, col.197.

60. See the debate on defence rights, part 7 below. Spencer is very critical of what he calls “a smug sense of cultural superiority” in this context. *op. cit. supra* note 26, p. 217.

#### 4. Addressing constitutional concerns in the mutual recognition instruments

##### 4.1. *The instruments*

Concerns on the operation of the mutual recognition principle have been addressed mainly by stopping short of making the recognition and execution of decisions automatic, and giving the executing judge the power to refuse to execute such decision on the basis of limited and expressly enumerated grounds. The European Arrest Warrant contains grounds of mandatory non-execution, including the granting of amnesty in the executing Member State, the existence of a final judgment in a Member State for the same acts, and the suspect being a minor.<sup>61</sup> The text also contains in Article 4 a longer list of optional grounds of non-execution of a Warrant. The provision includes the existence of aspects of *ne bis in idem* as a ground for refusal, and addresses the territoriality/dual criminality concern by granting discretion to national authorities to refuse execution if an offence is regarded by the law of the executing State as having been committed in whole or in part in its territory, or if an offence has been committed outside the territory of the issuing Member State and the law of the executing State does not allow prosecution for the same offences when committed outside its territory.<sup>62</sup> This provision aims to alleviate concerns regarding the abolition of dual criminality by preventing the execution of a warrant if there is some sort of connection with the territory of the executing Member State, or if there is no connection with the territory of the issuing State (which exercises extraterritorial jurisdiction).<sup>63</sup> Finally, beyond the specifically enumerated grounds for refusal, the Framework Decision grants discretion to the executing Member State to make the execution of a Warrant conditional upon the existence of a series of safeguards and assurances by the issuing State.<sup>64</sup>

The other mutual recognition instruments contain less extensive grounds for refusal. In all three instruments, grounds for non-recognition and execution (of a freezing or confiscation order or a financial penalty) are op-

61. Art. 3.

62. Art. 4(7).

63. However, as it has been noted, for the safeguard of this provision to be more clear-cut, Art. 4(7) should refer to “acts”, and not “offences”. Blekxtoon, “Commentary on an Article by Article basis”, in Blekxtoon, op. cit. *supra* note 25, p. 236.

64. Art. 5 – these include cases where a person is being surrendered to execute a sentence imposed by an in absentia decision; surrender for an offence punishable by custodial life sentence or life-time detention order; and cases involving nationals of residents of the executing State.

tional.<sup>65</sup> All three instruments contain a ground for refusal specifically linked to the Certificate – they can refuse if the latter has not been produced, is incomplete or manifestly does not correspond to the order made.<sup>66</sup> Similarly, they all in some form or other, make reference to refusal to execute on *ne bis in idem* grounds.<sup>67</sup> Other grounds for refusal appear in some of the instruments, but not all: for instance, a similar “territoriality” clause to the European Arrest Warrant appears in the financial penalties instrument<sup>68</sup> and the confiscation Framework Decision.<sup>69</sup> Finally, given the considerable differences between the confiscation systems of Member States, the Framework Decision on the execution of confiscation orders provides that, if the executing Member State has not adopted the same confiscation option (from those listed in the parallel Framework Decision on confiscation) to the issuing Member State, the executing Member State must execute the confiscation order “at least to the extent provided for in similar domestic cases under national law”.<sup>70</sup>

Another way to alleviate constitutional concerns arising from mutual recognition instruments has been to add references to human rights protection in their text. However, adequate protection of human rights was not added as a specific ground for refusal. This reflects the tension in the debate on the European Arrest Warrant – and subsequent instruments – between those of the view that the protection of human rights must be paramount and must be taken into account by the judge when dealing with European Arrest Warrants and similar decisions, and those believing that a reference to human rights protection is superfluous. Proponents of the first view advocated an examination of the substance of decisions to be executed, looking beyond the form, while opponents noted that this was contrary to mutual trust and the almost automatic character of mutual recognition leading to speed and efficiency. Proponents of the importance of human rights noted that mutual trust is not always justified, as all EU Member States have been and are potentially in breach of international human rights instruments, such as the ECHR, while opponents noted that all Member States are ECHR signatories in the first place, and their human rights credentials are good enough to grant them

65. Art. 7(1), freezing orders and financial penalties; Art. 8(1) confiscation orders.

66. Art. 7(1)(a) freezing orders; Art. 7(1) financial penalties; Art. 8(1) confiscation orders.

67. Freezing orders 7(1)(c), confiscation orders 8(2)(a) specifically refer to “*ne bis in idem*”. Art. 7(2)(a) of the financial penalties instrument on the other hand provides a ground for refusal “if it is established that a decision against the sentenced person in respect of the same acts has been delivered in the executing State or in any State other than the issuing or the executing State, and in the latter case, the decision has been executed”.

68. Art. 7(2)(d)

69. Art. 8(2)(f)

70. Art. 8(3).

membership to the European Union, which is founded upon human rights and the rule of law and where respect for human rights is a condition of entry and disrespect may bring sanctions (Arts. 6 and 7 TEU).<sup>71</sup>

In the case of the European Arrest Warrant, the compromise reached was Article 1(3), stating that “this Framework Decision shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the TEU”.<sup>72</sup> Moreover, recital 12 in the Preamble, using a slightly different wording, confirms that “this Framework Decision respects fundamental rights” and observes the principles recognized in Article 6 TEU and the Charter of Fundamental Rights and adds that nothing in the Framework Decision may be interpreted as prohibiting refusal to surrender when there are objective reasons to believe that the Warrant has been issued “for the purpose of prosecuting or punishing a person on the grounds of his or her sex, race, religion, ethnic origin, nationality, language, political opinions or sexual orientation, or that that person’s position may be prejudiced for any of these reasons”. The recital continues by affirming that the Framework Decision does not prevent a Member State from applying its constitutional rules relating to due process, freedom of association, freedom of the press and freedom of expression in other media.<sup>73</sup> The exact effect of these preambular clauses is not clear, especially given the debate regarding the binding force and influence of Preambles. In fact, the wording of recital 12 has been repeated verbatim in the three other adopted mutual recognition instruments.<sup>74</sup> However, none of these contains in its text a clause similar to Article 1(3). It is this clause – and its potential to justify refusals of execution – that has caused considerable debate in the implementation of the European Arrest Warrant Framework Decision.

#### 4.2. *Implementation – the European Arrest Warrant*

Legislation to implement the European Arrest Warrant has now been passed in all 25 EU Member States. The Commission has published thus far two detailed implementation Reports, one in 2005 dealing with implementation in

71. See Alegre and Leaf, *op. cit. supra* note 26; for a vivid illustration of the concerns raised, see the evidence produced in House of Lords EU Committee, *The European Arrest Warrant*, 16<sup>th</sup> Report, session 2001–02.

72. But this provision is not under Art. 3 – grounds for mandatory execution – but Art. 1, headed “Definition of the European arrest warrant and obligation to execute it”.

73. Recital 13 on the other hand contains extradition-specific safeguards.

74. Recital 6, freezing orders (recital 5 also states that “rights granted to the parties or bona fide interested third parties should be preserved”). Recitals 5 and 6, financial penalties instrument. Recitals 13 and 14, confiscation instrument.



EU-24, and one in 2006, which is the earlier version plus a Report on Italy, the last country to have implemented the Framework Decision.<sup>75</sup> These Reports provide a wealth of information on the implementation of the Framework Decision, in particular its safeguards. A prevailing tendency appears to be that a considerable number of Member States have made some or all of the optional grounds for refusal mandatory in their implementing legislation. However, a number of Member States have also added as grounds for refusal additional grounds related either to human rights in general – stemming from Article 1(3) and recital 12 of the Framework Decision – or specific grounds including those related to national security and surrender for political reasons.<sup>76</sup> The Commission finds the introduction of grounds not provided for in the Framework Decision “disturbing”<sup>77</sup> – however, it does not have the power to institute infringement proceedings under the third pillar. On a somewhat calmer note, the Justice and Home Affairs Council commenting on the Report noted that “several politically important questions came to light”, including the additional ground for refusal based on fundamental rights.<sup>78</sup>

It appears thus that a significant number of Member States would interpret the European Arrest Warrant as permitting refusal to execute on human rights grounds. To take one such example, the UK Extradition Act 2003 allows refusal when the extradition would be unjust or oppressive in the light of the person’s physical or mental condition,<sup>79</sup> and when extradition would not be compatible with the wanted person’s rights under the European Convention.<sup>80</sup> These are not grounds for refusal explicitly listed as such in the European Arrest Warrant. It appears thus that the UK has rendered the provisions of Article 1(3) and recital 12 into a mandatory ground for refusal. The Greek legislator, on the other hand, has opted to make part of recital 12 of the Framework Decision a mandatory ground for refusal – this will take place if a Warrant has been issued “for the purpose of prosecuting or punishing a person on the grounds of his or her sex, race, religion, ethnic origin, nationality, language, political opinions or sexual orientation”.<sup>81</sup> The Greek law goes beyond the Framework Decision by adding to the list, in order to

75. *Report from the Commission based on Article 34 of the Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States*, COM(2005)63 final, Brussels, 23 Feb. 2005 and SEC(2005)267; and COM(2006)8 final, Brussels, 24 Jan. 2006, and SEC(2006)79.

76. Commission, *op. cit.*, p. 5.

77. *Ibid.*

78. Conclusions of 2–3 June 2005, doc. 8849/05, p. 10.

79. Section 25.

80. Section 21. See also Spencer, *op. cit. supra* note 26, pp. 214–215; Garlick, *op. cit. supra* note 57, 181.

81. Law 3251/2004, Art. 11(e).

conform to the Greek Constitution, “action to defend liberty” as a ground for refusal.<sup>82</sup> On the other hand, Article 1(3) and recital 13 of the Framework Decision have been transposed verbatim in Article 1(2) of the Greek law.<sup>83</sup> The Commission may not be satisfied by some of these legislative choices – however, as will be seen below, national implementation choices reflecting a more restrictive approach regarding the grounds for refusal have not had an easy ride domestically, as has been demonstrated in the case of Germany.

### 5. Constitutional concerns in national constitutional courts

In the light of the challenges posed by the application of the mutual recognition principle in criminal matters to national constitutional provisions, intervention by national courts addressing these issues was only a matter of time. 2005 witnessed the first major decisions by national constitutional courts on the compatibility of legislation implementing the European Arrest Warrant with the national constitution. These cases cast light on the different tensions caused by mutual recognition when applied in the national constitutional framework and signify the resurfacing of the debate regarding primacy of European law (this time European Union, and not European Community law) over national constitutions.

An important case in this context has been the examination by the *Bundesverfassungsgericht* of the compatibility of the law implementing the European Arrest Warrant with the German Basic Law.<sup>84</sup> The case involved a European Arrest Warrant issued by Spain and requesting the surrender of Mamoun Darkazanli. Darkazanli, who had both German and Syrian citizenship, was prosecuted in Spain for being actively involved in the activities of Al-Qaeda. His extradition to Spain was approved by a lower German court. The defendant launched a constitutional complaint before the German constitutional court challenging these decisions on a wide range of constitutional grounds. These included claims *inter alia* that the European Arrest Warrant and the implementing legislation lacked democratic legitimacy, that the abolition of dual criminality would result in the application of foreign

82. Ibid. Art. 5(2) of the Greek Constitution prohibits the extradition of a foreigner who is persecuted for his/her actions to defend liberty.

83. On the Greek law see comments by Kaiafa-Gbandi, “The Law on the European Arrest Warrant and Terrorism and the declarations of faith to the Constitution” (in Greek), 17 *Poiniki Dikaiosyni* (2004), 836–839.

84. Judgment of 18 July 2005, 2 BvR 2236/04. The text of the judgment, (and a press release in English – press release No. 64/2005) can be found at [www.bundesverfassungsgericht.de](http://www.bundesverfassungsgericht.de)

law within the domestic legal order, and that the defendant's right to judicial review was breached.<sup>85</sup>

The Court accepted the complaint. However, rather than declaring that the Framework Decision itself was in breach of the German Constitution (which could take us back straight to the *Solange* debate and explicitly apply this to third pillar – EU – law), the Court took the view that it was the German implementing law that was at fault, as it did not transpose all the safeguards included in the European Arrest Warrant Framework Decision into national law. The implementing legislation was declared void and the complainant not surrendered.<sup>86</sup>

In reaching this decision, the Court focused predominantly on concepts of legitimacy, territory and citizenship and the protection of fundamental rights. A central concept was the special bond between the citizen and the State, and the legitimate expectations of citizens to be protected within the framework of their State of belonging. The Court examined in detail the issue of extradition of German citizens. Article 16(2) of the German Basic Law was amended in 2000 to provide with the possibility of an exception to the principle of non-extradition of German nationals “to a Member State of the European Union or to an international court of justice as long as (*soweit*) constitutional provisions are upheld”.<sup>87</sup> In examining this provision, the Court stressed the specific link between German citizens and the German legal order. Citizens must be protected, if they remain within the German territory, from uncertainty, and their trust in the German legal system has a high

85. For commentaries on the judgment see *inter alia*: Geyer, “The European Arrest Warrant in Germany. Constitutional Mistrust towards the Concept of Mutual Trust”, in Guild (Ed.), *Constitutional Challenges to the European Arrest Warrant* (Wolf Legal Publishers, 2006), pp. 101–124. Komarek, *European Constitutionalism and the European Arrest Warrant: Contrapunctual Principles in Democracy*, Jean Monnet Working Paper 10/05, [www.jeanmonnetprogram.org](http://www.jeanmonnetprogram.org); Mölders, “European Arrest Warrant is void – The Decision of the Federal Constitutional Court of 18 July 2005”, 7 *German Law Journal* (2005), 45–57, [www.germanlawjournal.com](http://www.germanlawjournal.com); Vogel, “Europäischer Haftbefehl und deutsches Verfassungsrecht”, 60 *JZ* (2005), 801–809; Wolf, “Demokratische Legitimation in der EU aus Sicht des Bundesverfassungsgerichts nach dem Urteil zum Europäischen Haftbefehlsgesetz”, 38 *Kritische Justiz* (2005), 350–358; Hinajeros Parga, 43 *CML Rev.* (2006) 583–595.

86. New legislation is in the process of being passed. See “Implementation of the European Arrest Warrant in accordance with constitutional requirements”, Press release, 24 Nov. 2005, [www.bundesregierung.de](http://www.bundesregierung.de). The Court declared illegal any extradition of Germans to other EU Member States until new legislation is passed. However, Germany continued to send European Arrest warrants to other Member States for execution. This caused the reaction of Spain, reverting to the traditional extradition procedure as regards German requests.

87. My translation. See also Geyer, *op. cit. supra* note 85, Komarek, *op. cit. supra* note 85, pp.15–16. The influence of the “Solange” reasoning of the Court with regard to the relationship between German Constitutional law and EU law is evident in the wording.

value. In implementing the European Arrest Warrant, the German Parliament did not take into account this special link between citizen and State, by not transposing in the national legislation the “territoriality” grounds for refusal enshrined in Article 4(7) of the Framework Decision. The implementing law constituted thus a breach of Article 16(2) of the Basic Law.

This emphasis of the Court on the nation-State must be viewed in conjunction with its comments on mutual recognition in EU law. The Court stressed that co-operation in the third pillar is based on limited mutual recognition, which does not presuppose harmonization and can be seen as a means to preserve national identity and statehood.<sup>88</sup> Article 6(1) TEU, which emphasizes the respect by all EU Member States of fundamental rights, provides the foundation for mutual trust in this context. However, the national legislator continues to have a duty to react if the trust is breached. The Basic Law requires that in every individual case a concrete review of whether the rights of the defendant are respected should be made. The Court concluded that Articles 6 and 7 TEU (which proclaim respect for human rights by all EU Member States) do not justify the assumption that State law structures in EU Member States are materially synchronized and that review of individual cases is nugatory, adding that the effect of the strict principle of mutual recognition and the wide mutual trust connected thereto cannot limit the constitutional guarantee of fundamental rights.<sup>89</sup>

The Court thus rejected the automaticity introduced by mutual recognition with a minimum of formality on the basis of mutual trust. It did not take the existence of mutual trust for granted, but stressed the paramount importance of upholding national constitutional values and fundamental rights. The emphasis of the German Court in upholding national constitutional guarantees even in fields where the country has undertaken obligations under EU law is in sharp contrast with the ECJ approach in *Pupino*, where the Luxembourg court stressed the application of the principle of loyal co-operation in the third pillar.<sup>90</sup> The *Bundesfervassungsgericht* does not seem to exclude a clash with EU law in cases where the national constitutional framework concerning human rights and the rule of law is deemed to be threatened.<sup>91</sup>

88. Komarek places emphasis on the use of the word “limited”, and contrasts this to the ECJ ruling in *Gözutök* (p. 17). On the latter ruling see part 6 below.

89. See esp. para 118 of the judgment. See also Komarek, op. cit. *supra* note 85, pp.17–18; and Geyer, op. cit. *supra* note 85.

90. Case C-105/03, *Criminal Proceedings against Maria Pupino*, nyr. For a commentary see Fletcher, “Extending ‘indirect effect’ to the Third Pillar: The significance of *Pupino*”, 30 *EL Rev.* (2005), 862.

91. This point has been raised by a number of dissenting judges, in particular Judges Lübbe-Wolff and Gerhardt. The majority opinion has been criticized for being too ready to infringe EU law, and for disregarding developments in the ECJ.

The relationship between the European Arrest Warrant and national legislation implementing it on the one hand and constitutional bars to extradition of nationals on the other was also examined in judgments by the Polish Constitutional Tribunal<sup>92</sup> and the Supreme Court of Cyprus.<sup>93</sup> Unlike the *Bundesverfassungsgericht*, which examined the European Arrest Warrant in the light of the general framework of respect of national constitutional guarantees, the Polish and Cypriot courts adopted a somewhat narrower approach, by focusing primarily on the compatibility of the obligations their governments undertook under EU law with the specific constitutional provisions prohibiting the extradition of their nationals.<sup>94</sup> Both courts found that the surrender of citizens of their countries on the basis of legislation implementing the European Arrest Warrant clashed with their national Constitution, but the reasoning ascertaining this clash and the solutions offered are slightly different.

The Polish Court examined the compatibility between Article 607t(1) of the Polish Code of Criminal Procedure, implementing the European Arrest Warrant, with Article 55(1) of the Polish Constitution, which prohibits the extradition of Polish citizens. The Court viewed Article 55(1) as expressing a right for Polish citizens to be held criminally accountable before a Polish court. The provision is absolute, and surrender to another EU Member State on the basis of executing a European Arrest Warrant would be an infringement of this right.<sup>95</sup> Article 607t(1) of the Criminal Procedure Code therefore does not conform to the Polish Constitution. However, the Court did not declare the provision immediately void, but extended its validity for 18 months, until an appropriate solution was found by the legislature.

The Court's approach was markedly different to that of the *Bundesverfassungsgericht* as to the relationship between EU law and the domestic Constitution. The Polish Court attempted to accommodate to a great extent the EU requirements. It placed great emphasis on the obligation of national courts to interpret domestic law in a manner compatible with EU law – thus following the ECJ's approach in *Pupino* and extending "indirect effect" to third pillar measures. However, the Court noted that this interpretative obligation has its

92. Judgment of 27 April 2005, P 1/05. For commentaries, see Komarek, *op. cit. supra* note 85; Kowalik-Banczyk, "Should we Polish it up? The Polish Constitutional Tribunal and the Idea of Supremacy of EU Law", 6 *German Law Journal* (2005), 1355–1366, [www.germanlawjournal.com](http://www.germanlawjournal.com); and Leczykiewicz, 43 *CML Rev.* (2006), 1181–1191.

93. Decision of 7 Nov. 2005, Council document 14281/05, Brussels 11 Nov. 2005.

94. On this distinction regarding what he calls "lines of national constitutional resistance" to EU law, see Kumm, "The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe before and after the Constitutional Treaty", 11 *ELJ* (2005), 264.

95. English summary, para 4.

limits, and cannot worsen an individual's situation, especially in criminal matters.<sup>96</sup> The Court also stressed the importance of the European Arrest Warrant for the functioning of the administration of justice and for improving security. It should be given the highest priority by the Polish legislator: if action to remedy the clash between the Warrant and the national constitution is not taken, this will amount to an infringement of the constitutional obligations of Poland under international law but "could also lead to serious consequences on the basis of European Union law".<sup>97</sup> Emphasizing security over fundamental rights, and the need to observe Poland's obligations under EU law over the national constitution,<sup>98</sup> the Court appeared more EU-friendly than its German counterpart,<sup>99</sup> but left it to the legislature to find an appropriate solution.

The Cypriot Supreme Court also ruled that the national legislation implementing the European Arrest Warrant was contrary to the national Constitution, which prohibits the extradition of own nationals (Art. 11(2)). The Court based its reasoning to a great extent on the legal nature of the European Arrest Warrant, as a third pillar Framework Decision. Although Framework Decisions are binding, they do not have direct effect and are transposed in Member States only with the proper legal procedure. According to the Court, this had not happened in Cyprus, as the implementing legislation is contrary to the Constitution. The Court appears reluctant to explicitly state that the national Constitution has primacy over EU law, at least over Framework Decisions. The judgment implies that Framework Decisions are in a weaker constitutional position due to their lack of direct effect. Having said that, the Cypriot Court was at pains to stress its respect for the ECJ Pupino ruling<sup>100</sup> and referred in detail to judgments of other Supreme Courts, such as the Courts of Poland, Greece and Germany. The outcome of the case is that Cyprus will not be in a position to execute European Arrest Warrants against Cypriot nationals until its Constitution has been changed.

96. *Ibid*, para 8.

97. *Ibid*, para 17.

98. Kowalik-Banczyk argues that the Court implicitly accepted the primacy of EU law over national constitutional norms, *op. cit. supra* note 92, p. 1361.

99. The Polish Court accepted that "Poland and other Member States of the European Union are bound by the same structural principles attaining proper administration of justice and due process before an independent court, even in case if it is connected with Polish citizens' deprivation of guarantees...The care for fulfilment of a value, which is Poland's credibility in the international relations as a state which respects [the] fundamental rule *pacta sunt servanda*, speaks furthermore for this". Point 5.2, cited and translated in Komarek, *op. cit. supra* note 85, p. 14.

100. Stressing that the Court's case law could not have been different, since if EU Member States did not conform with their obligations stemming from the EU Treaty, this would collapse.

These cases highlight the constitutional concerns raised by the application of mutual recognition in criminal matters, as evidenced by the implementation of the European Arrest Warrant. They also bring back to the fore the debate over the primacy of European (this time Union not Community) law over national constitutional law. The approaches of the three Courts have been different, with the German Constitutional Court being the most reluctant to accept uncritically obligations imposed by the law of the European Union. However, all three Courts paid due attention to the provisions of their national constitutions and none of them ruled explicitly that EU law has primacy over national constitutional law. Whether this is ultimately due to the fact that the third pillar is viewed by these Courts as a “special case”, its legislation lacking legitimacy, democratic debate and/or direct effect – or whether constitutional sensitivities are more acute in cases involving criminal law enforcement and the protection of fundamental rights – remains to be seen (especially if the Constitutional Treaty, which “streamlines” the third pillar, comes into force).

## **6. Addressing constitutional concerns by harmonizing safeguards: The case of *ne bis in idem***

The principle of *ne bis in idem* – expressed as the prohibition of double jeopardy in common law jurisdictions – is a fundamental safeguard for the defendant in a number of EU Member States, justified on the basis of the need for legal certainty and equity/fairness for the individual concerned. While prevailing at national level, the scope of its application in transnational cases has been contested, and the issue of the extent to which a national legal order should respect the termination of a prosecution in another country debated.<sup>101</sup> However, the principle of *ne bis in idem* is enshrined in EU law, as a consequence of the incorporation of the Schengen acquis in EC and EU law by the Amsterdam Treaty. The Schengen Convention includes a number of provisions on the principle,<sup>102</sup> with Article 54 setting out the principle as follows:

“A person whose trial has been finally disposed of in one Contracting Party may not be prosecuted in another Contracting Party for the same

101. See *inter alia* Weyembergh, “Le Principe *Ne Bis In Idem*: Pierre d’achoppement de l’Espace Pénal Européen?”, (2004) CDE, 337–375; Van den Wyngaert and Stessens, “The international *Non Bis In Idem* principle: Resolving some of the unanswered questions”, 48 ICLQ, 779–804; and Van der Wilt, “The European Arrest Warrant and the Principle *Ne Bis in Idem*”, in Blekxtoon, op. cit. *supra* note 25, pp. 99–118.

102. Arts. 54–58

acts provided that, if a penalty has been imposed, it has been enforced, is actually in the process of being enforced or can no longer be enforced under the laws”.

The incorporation of the *ne bis in idem* principle in the Schengen Convention, and subsequently in EU law, is inextricably linked with rethinking territoriality in the European Union – and in particular the Schengen area. A person who is exercising free movement rights in a borderless area may not be penalized doubly by being subject to multiple prosecutions for the same acts as a result of him/her crossing borders. EU Member States must respect the outcome of proceedings in other Member States in this context in the conditions set out by the Schengen Convention. This represents thus another side of mutual recognition in criminal matters, the recognition of decisions finally disposing trials. This form of mutual recognition differs from the European Arrest Warrant and the other measures described above as it does not require the active enforcement of an order in the executing Member State by coercive means, but rather action stopping prosecution. In this manner, it constitutes a safeguard for the individual concerned and may have protective, and not enforcement consequences. As mentioned above, *ne bis in idem*, in one form or other, constitutes a ground for refusal to execute all the mutual recognition measures adopted by the Council thus far.

In spite of – or perhaps because of – its potential positive consequences for the defendant, the principle of *ne bis in idem* has been notoriously difficult to define, and to define in the same manner in the various national legal orders and international instruments.<sup>103</sup> Particular difficulties were presented regarding the definition of *idem*, i.e. whether the principle applies to the “same acts”, or to the “same offences”, and the definition of *bis*: whether the principle is limited to judicial decisions determining the substance of a person’s guilt or innocence, or whether it has a broader application to include cases where a prosecution is terminated on procedural grounds (e.g. if dropped by a Public Prosecutor in cases such as plea bargaining, or application of the statute of limitations). In the light of the incorporation of the principle in EU law, its interpretation by the Court of Justice was only a matter of time.

The first judgment that the Court gave on the matter was on the *Gözütök* and *Brügge* case in 2003.<sup>104</sup> The cases involved the termination of prosecutions by the Public Prosecutor (in the Netherlands and Germany respectively) following out-of-court settlements with the defendants, with the

103. See in particular Weyembergh, and van den Wyngaert and Stessens, both cited *supra* note 101.

104. Joined cases C-187/01 & C-385/01, [2003] ECR I-1345.



Luxembourg court asked to determine whether such termination was capable of triggering the application of the *ne bis in idem* principle as defined in the Schengen Convention.<sup>105</sup> In a seminal ruling, the Court answered in the affirmative to apply the principle in such cases, which involve the discontinuation of prosecution by a Public Prosecutor – without the involvement of a court – once the accused has fulfilled certain obligations. The Court adopted a purposive interpretation of Article 54 of the Schengen Convention and stressed its objective to ensure that no one is prosecuted on the same facts in several Member States on account of his having exercised his right to freedom of movement.<sup>106</sup> A broad interpretation of the *ne bis in idem* safeguard has thus been linked to the abolition of borders and the exercise of free movement rights.<sup>107</sup>

In addition to the interpretation of *ne bis in idem*, the *Gözütök* and *Brügge* case is seminal in expressing the Court's attitude towards mutual recognition and harmonization in criminal matters. In answering some Member States' claims, the Court, stated that nowhere in the EU Treaty or the Schengen Convention "is the application of Article 54 of the Convention made conditional upon harmonization, or at least approximation, of the criminal laws of the Member States relating to procedures whereby further prosecution is barred".<sup>108</sup> In a bold statement, the Court added that in those circumstances, "there is a necessary implication that the Member States have mutual trust in their criminal justice systems and that each of them recognizes the criminal law in force in the other Member States even when the outcome would be different if its own national law were applied".<sup>109</sup> The Court thus seems to have taken for granted that a high level of trust between Member States exists, which leads to outright mutual recognition, without the need for harmonization – in fact, *ne bis in idem* as expressed in Article 54 of the Schengen

105. For comments on the case, see *inter alia*: case note by Vervaele, 41 CML Rev. (2004), 795–812; Fletcher, "Some Developments to the *ne bis in idem* Principle in the European Union: *Criminal Proceedings Against Huseyn Gözutök and Klaus Brügge*", 66 MLR (2003), 769–780; Thwaites, "Mutual trust in Criminal Matters: the European Court of Justice gives its first interpretation of a provision of the Convention implementing the Schengen Agreement", 4 *German Law Journal* (2003), 253–262, [www.germanlawjournal.com](http://www.germanlawjournal.com)

106. See paras. 35–38.

107. The Court repeated this in *Miraglia* [2005] ECR I-2009, para. 32, *nyr*, and *van Esbroek* para.33

108. Para 32.

109. Para 33. See also the Opinion of A.G. Ruiz-Jarabo Colomer, delivered on 19 Sept. 2002, paras.119–124, and para 55, where the A.G. states that "the construction of a Europe without borders, with its corollary of the approximation of the various national legal systems, including the criminal systems, presupposes that the States involved will be guided by the same values."

Convention exists and can apply only if there is trust between Member States.<sup>110</sup>

The emphasis on the existence of mutual trust – at least as a necessary implication of the *ne bis in idem* principle – was reiterated by the Court in the recent *Van Esbroek* ruling.<sup>111</sup> In another very important ruling, the Court again interpreted the *ne bis in idem* broadly, by accepting that the relevant criterion for applying Article 54 of the Schengen Convention is “the identity of the material acts, understood as the existence of a set of facts which are linked together, irrespective of their legal classification given to them or the legal interest protected”.<sup>112</sup> In reaching this conclusion, the Court evoked both the existence of mutual trust and the lack of EU-wide harmonization. The Court noted that, because of mutual trust, the possibility of divergent legal classifications of the same acts in two different States or varying criteria protecting legal interests across Member States cannot stop the application of Article 54 of the Schengen Convention.<sup>113</sup> At the same time, because there is no harmonization of national criminal laws, a criterion interpreting *ne bis in idem* based on the legal classification of the acts or on the protected legal interest “might create as many barriers to freedom of movement within the Schengen territory as there are penal systems in the Contracting States”.<sup>114</sup>

In interpreting mutual recognition as regards *ne bis in idem*, the Court follows a similar logic to the Council when agreeing the mutual recognition Framework Decisions. The redefinition of territoriality in the European Union is key to both approaches. On the one hand, there should be no barriers to movement in a borderless European Union. On the other, given the lack of harmonization of standards across the EU, facilitation of movement must take place on the basis of mutual trust. The main difference (besides the fact that in the one case standards were set by the Council and in the other they were set by the ECJ) has been that while measures such as the European Arrest Warrant involve enforcement and coercion, *ne bis in idem* – especially with its broad interpretation by the Luxembourg Court – acts as a

110. Flore notes that this is a *renversement* of perspective and mutual recognition is established by its effects. Flore, “La Notion de Confiance Mutuelle: l’ ‘Alpha’ ou l’ ‘Omega’ d’une Justice Pénale Européenne?”, in de Kerchove and Weyembergh, op. cit. *supra* note 7, p. 19.

111. Case C-436/04, para 30.

112. The Court also expressly stated that *ne bis in idem* is a fundamental principle of Community law – para 40.

113. Paras. 31 and 32.

114. Para 35. See also the Opinion of A.G. Ruiz-Jarabo Colomer, of 20 Oct. 2005, who rejected the legal classification criterion as inconsistent with free movement. He noted that, in a drug trafficking case, it is ironic to speak of “import” and “export” (between different Schengen countries) in a territory which is subject to one legal order, which has precisely as its aim by its nature the abolition of borders for goods as well as persons – para 52.

safeguard for the individual. Perhaps this is why reactions as to the impact of the *ne bis in idem* rulings have been more muted. However, if the Court follows the same approach to *ne bis in idem* – with a maximum trust emphasis – to future cases involving the European Arrest Warrant,<sup>115</sup> the outcome may not be satisfactory for those advocating an emphasis on the protection of national constitutional principles and values.

Moreover, the Court's approach does not address the fact that national approaches to the scope and extent of *ne bis in idem* vary considerably – and may also differ from the Court's interpretation of *ne bis in idem*.<sup>116</sup> The Court assumes mutual trust, but the automatic acceptance of the principle, as interpreted by Luxembourg, may have a significant impact on national legal systems and cultures – for example in cases where the Court's approach in *Gözütök* (barring prosecutions) clashes with national rules requiring a substantive determination of innocence or guilt. While the substance of the ECJ rulings in *Gözütök* and *van Esbroek* is welcome in enhancing the protection of the individual in the area of freedom, security and justice, the pre-supposition of mutual trust does little to establish a common understanding – if not harmonization – of *ne bis in idem*. This may create the danger of double standards – and perhaps reverse discrimination – between those exercising free movement rights and those subject to a purely domestic legal framework. Efforts at harmonization have been recently taking place in the EU, after an initiative by the Greek government,<sup>117</sup> but negotiations have shown clearly how difficult it is to reach agreement on this fundamental principle.<sup>118</sup> Negotiations have been suspended,<sup>119</sup> but the Commission has re-

115. The Belgian *Cour d'Arbitrage* has made a reference for a preliminary ruling to the ECJ asking whether the Council chose the correct legal basis for the adoption of the European Arrest Warrant Framework Decision and whether the abolition of dual criminality therein violates fundamental rights and the principles of legal certainty, equality and non-discrimination. *Cour d'Arbitrage*, case no 124/2005, 13 July 2005. Case C-303/05, *Advocaten voor de wereld*, pending.

116. A prime example is the UK Criminal Justice Act 2003, which permits re-opening of a trial in a number of cases, even against persons who have formerly been acquitted (section 75).

117. *Initiative of the Hellenic Republic for the adoption of a Framework Decision of the Council on the application of the "ne bis in idem" principle*, Council doc. 6356/03, Brussels 13 Feb. 2003.

118. Unsurprisingly, the debate centred on the concepts of *bis* and *idem*. See Council document 16258/03, Brussels 20 Jan. 2004. See also the exchange of letters between the House of Lords European Union Committee (letter of 21 May 2004) and the Home Office (letter of 10 June 2004). At odds with the ECJ approach in *Gözütök*, the UK Government makes clear that the definition of a "final decision" needs to include some reference to the substantive determination of guilt or innocence.

119. See Conclusions of Justice and Home Affairs Council of 19 Dec. 2004, document 11161/04, p. 15.

cently published a Green Paper on *ne bis in idem* and the related issue of conflicts of jurisdiction.<sup>120</sup> In looking for solutions, the focus should be on reaching a common understanding. Brushing aside difficulties to harmonize – which are inextricably linked with divergences in national traditions – and assuming maximum mutual trust instead may create more problems than it actually solves.

#### **7. Addressing constitutional concerns by harmonizing safeguards: The rights of the defendant**

The adoption of the EAW and the related human rights and constitutional concerns led to calls for measures enhancing the protection of the defendant after he or she has been surrendered to the issuing Member State. Rather than creating a level-playing field by minimum harmonization *ex ante* of the systems leading to decisions subject to mutual recognition, the aim here is to provide safeguards by harmonizing standards *ex post*. This “*ex post*” harmonization is expressed by the adoption of minimum standards governing the treatment of persons once mutual recognition has occurred, the main focus being the rights of the defendant once (s)he has been surrendered to the Member State issuing a European Arrest Warrant. The Commission started work on such proposals in 2002, with its consultation continuing to mid-2003.<sup>121</sup> With noticeable delay, the Commission finally tabled at the end of April 2004 a draft Framework Decision “on certain procedural rights in criminal proceedings throughout the European Union”.<sup>122</sup> The proposal aims at minimum standards and contains provisions on the right to legal advice, the right to translation and interpretation, the right to communication and specific attention and the duty to inform a suspect of his rights in writing through a common EU “Letter of Rights”.

Although modest in its scope and aiming at minimum standards, the proposal has been quite controversial. A number of Member States fear that the proposal has potentially far-reaching implications for the integrity of their domestic criminal justice systems. This is also linked with a reluctance to accept that the European Union has competence in this matter and to bring issues of defence rights within the framework of Union law. Member States have voiced concerns regarding both the existence and extent of EU compe-

120. COM(2005)696 final, Brussels 23 Dec. 2005 and SEC(2005)1767.

121. See Morgan, “Proposal for a Framework Decision on procedural safeguards for suspects and defendants in criminal proceedings throughout the European Union”, 4 *ERA-Forum* (2003), 91.

122. COM(2004)328 final.

tence in the field, and in the negotiations of each individual article.<sup>123</sup> In the light of decision-making by unanimity, the result has been a very slow pace of negotiations. In fact, although the adoption of the proposal was a priority under the Hague Programme, negotiations nearly stalled during the UK Presidency (in the second half of 2005), which led the Austrian Presidency to relaunch a consultation with Member States addressing fundamental issues such as the scope of the proposal (would it apply to terrorist offences?), its relationship with the ECHR and the contested issue of the legal basis.<sup>124</sup> It appears that in this case it has been easier for Member States to agree on a political declaration on the necessity of measures (in the Hague Programme) than reaching agreement on the substance of a number of complicated issues that have arisen in negotiations to a proposal on which the Commission has – at least in the early stages – invested considerably.

The issue of the appropriateness of the legal basis is inextricably linked with the constitutional question of whether, at this stage of European integration, Member States have conferred on the EU competence to legislate in the field of rights of the defence and criminal procedure.<sup>125</sup> The proposed legal basis is Article 31(1)(c) TEU, which enables common action to be taken on judicial cooperation in criminal matters “ensuring compatibility in rules applicable in the Member States, as may be necessary to improve such co-operation”. The Commission defends this choice by stating that the proposal constitutes the “necessary complement” to the mutual recognition measures that are designed to increase efficiency of prosecution.<sup>126</sup> It has argued that the proposal is necessary to ensure compatibility between the criminal justice systems of Member States and to build trust and promote mutual confidence across the EU whereby: “not only the judicial authorities, but all actors in the criminal process see decisions of the judicial authorities of other Member States as equivalent to their own and do not call in question their judicial capacity and respect for fair trial rights”.<sup>127</sup>

The proposal may indeed contribute towards enhancing compatibility between some aspects of the criminal justice systems of Member States, potentially leading to improvements in the situation of defendants in Member States. However, serious objections can be raised against the view advocating the existence of EU competence to adopt this measure in its present

123. See Council doc. 12353/05.

124. Council document 7527/06, Brussels 27 March 2006.

125. On this debate, see the views expressed in House of Lords European Union Committee, *Procedural Rights in Criminal Proceedings*, 1st Report, session 2004–05, paras. 29–41.

126. Commission, *op. cit.*, para.51.

127. Commission, *op. cit.*, ., para. 28.

form.<sup>128</sup> The main constitutional objection is that the *Treaty contains at present no express legal basis for the adoption of criminal procedure measures*. An express legal basis would seem necessary to enable the EU to act in an area so inextricably linked with national sovereignty. No current Treaty provision can be interpreted as reflecting Member States' will to confer to the EU competence to legislate on criminal procedure at the time of the Nice Treaty. The existence of an express – but limited – legal basis for EU criminal procedure measures regarding the rights of the individual exists in the Constitutional Treaty strengthens this view.<sup>129</sup> The need for the insertion of such a provision in the Constitutional Treaty results from the lack of an express provision conferring clear-cut competence to the EU in this field at present.<sup>130</sup>

A further argument that can be added is that the *achievement of "mutual trust" is too indirect and subjective as a legitimating link*. The Commission justifies the proposal as necessary to introduce rules which will lead to compatibility which lead to trust which in turn leads to the improvement of judicial co-operation. So it is not compatibility *as such* that will improve co-operation, but the trust it may create. However, the concept of trust is inherently subjective and it is questionable whether such a subjective frame of mind should be set as a goal of a legal measure. How will "trust" be achieved and measured? Is the existence of legal rules *per se* in foreign countries sufficient to increase public trust, especially in the face of hostile press coverage and the deeply ingrained belief in the superiority of one's domestic criminal justice system? These are open questions, which may point to the fact that the concept of "mutual trust" is too subjective in this context, and thus not necessarily amenable to judicial review. This would however run counter to settled ECJ case law on the first pillar, according to which the choice of legal basis for a measure may not depend simply on an institution's conviction as to the object pursued, but must be based on objective factors which are amenable to judicial review.<sup>131</sup> It may also contradict the ECJ assertion in the *ne bis in idem* cases that mutual trust in Member States' criminal justice systems already exists.<sup>132</sup>

128. For details, see Mitsilegas, *op. cit. supra* note 13.

129. Art. III-270(2)(b).

130. This view was also echoed by the Convention on the Future of Europe: in its final Report, Working Group X on "Freedom, Security and Justice" highlighted the need for clearer identification of Union competence in the fields of substantive and procedural criminal law and noted that, in the field of procedural approximation, "at present, Article 31 TEU does not reflect sufficiently this point and is too vague on concrete possibilities for such approximation" pp. 8 and 11 respectively.

131. See *inter alia* Case C-300/89, *Commission v. Council* [1991], ECR I-2867 (Titanium Dioxide).

132. See part 6 above.

It remains to be seen whether these constitutional objections will be overtaken and agreement on this measure will eventually be reached. The constitutional difficulties encountered demonstrate that perhaps the European Arrest Warrant was indeed “ahead of its time” in the present stage of European integration in criminal matters.<sup>133</sup> While the need to remedy the challenges that such a measure may pose to fundamental rights is uncontested, the limits of the EU to act in the area of defendant’s rights in the current state of Union law may hamper progress in that respect. Ironically, it may be that ECJ efforts to enhance the application of protective measures in third pillar law, as evidenced in *Pupino*, jeopardize at the political level agreement on further third pillar measures, especially those granting rights. *Pupino* stretched the limits of the interpretative obligation of national courts, with the judgment effectively amending the Italian Code of Criminal Procedure. After *Pupino*, Member States may be reluctant to adopt measures which, by entering the Union legal order, will be subject to autonomous interpretation by the ECJ – which could challenge the relevant national standards. The situation may become more complex in the light of the Commission’s intention to work towards the creation of a “permanent back-up for mutual recognition” covering measures such as the presumption of innocence and decisions in absentia.<sup>134</sup> These may be welcome steps towards greater coherence in EU criminal law, but they will certainly not be devoid of constitutional questions regarding EU competence and the relationship between European Union and national constitutional law.

## 8. Addressing constitutional concerns by evaluation

Calls for the establishment of mechanisms for the evaluation of the implementation of EU criminal law by Member States are not new,<sup>135</sup> but have been growing recently.<sup>136</sup> In particular regarding mutual recognition, it is felt

133. Alegre and Leaf, *op. cit. supra* note 26.

134. See Communication “on the mutual recognition of judicial decisions in criminal matters and the strengthening of mutual trust between Member States”, COM(2005)195 final, 19.5.2005, p. 6.

135. See e.g. the evaluation mechanism for implementation by candidate countries of the EU JHA acquis (Joint Action 98/429/JHA, O.J. 1998, L 191/8), the evaluation mechanism for implementation of international undertakings in the field of organized crime (Joint Action 97/827/JHA, O.J. 1997, L 344/7), and the evaluation of Member States’ legal systems and their implementation in the fight against terrorism (Decision 2002/996/JHA, O.J. 2002, L 349/1).

136. This is the case in particular regarding the third pillar, where the Commission currently does not have the power to institute infringement proceedings for mis- or non-imple-

that evaluation would enhance the trust in Member States' criminal justice systems.<sup>137</sup> But evaluation is also prominent in the Constitutional Treaty, which contains a specific provision calling for "objective and impartial evaluation" of the implementation of EU Justice and Home Affairs policies by Member States – evaluations conducted by Member States in collaboration with the Commission.<sup>138</sup> On the other hand, a recent Commission proposal for a Regulation establishing an EU Fundamental Rights Agency calls for the Agency to have a role in data collection and analysis.<sup>139</sup>

The objective and impartial evaluation of the implementation of EU JHA legislation, especially in areas related to the rights of the individual, is unobjectionable in principle. However, its exact parameters are still highly contested, given the legal and constitutional limits of the current state of EU law.<sup>140</sup> It is not clear *who will evaluate* – the Commission (and to what extent should it have such role in third pillar matters), Member States in the form of peer review, and/or the Fundamental Rights Agency.<sup>141</sup> The *method of evaluation* is also unclear – will it take the form of peer review by Member States, will the Commission, Agencies or independent experts be involved. will the results be made public, and is the goal a "naming and shaming" exercise. The same can be said about the *impact of the evaluation*. The type of sanctions involved for non-compliance needs to be discussed. Similarly, the relationship between the Commission's power to institute infringement proceedings with different forms of evaluation, such as peer review or evaluation by agencies<sup>142</sup> is unclear, as is the relationship between a negative evaluation and the triggering of the mechanism of Article 7 TEU.<sup>143</sup> Finally,

mentation of Union law by Member States. For recent proposals see Commission Communication on the "evaluation of EU policies on freedom, security and justice", COM(2006)332 final, 28.6.2006.

137. The Commission defence rights proposal contained an evaluation clause, but this was deleted by Member States in negotiations.

138. Art. III-260.

139. COM(2005)280, Art. 4(1)(a). The Agency would also cover third pillar matters – see accompanying Decision. For a discussion of the Agency's potential, see House of Lords EU Committee, *Human Rights Protection in Europe: the Fundamental Rights Agency*, 29<sup>th</sup> Report, session 2005–06, HL Paper 155.

140. For details, see Mitsilegas, *op. cit. supra* note 13.

141. EU Member States have been participating in peer review exercised within the framework of their membership in bodies such as the OECD, and the Financial Action Task Force. On this form of evaluation in the context of compliance with money laundering measures, see Levi and Gilmore, "Terrorist finance, money laundering and the rise and rise of mutual evaluation: A new paradigm of crime control?" *A European Journal of Law Reform* (2002), 341–368; on different forms and criteria of evaluation see also Vogel, "Evaluation von Kriminaljustizsystemen", (2004) *JZ*, 487–494.

142. E.g. will a positive assessment of implementation preclude such proceedings?

143. The EU Network of Independent Experts on Fundamental Rights has recently pro-



the issue of *what will be the object of the evaluation exercise* is not clear. It may be difficult to distinguish between the evaluation of the implementation of a specific EU measure (such as the defence rights proposal) and the evaluation of a Member State's criminal justice/human rights protection system as a whole. The existence of EU competence to embark on such a far-reaching evaluation is questionable. The Commission's recent Communication on mutual recognition however seems to envisage a broader evaluation.<sup>144</sup>

### 9. Conclusion – the need for a democratic debate on EU criminal law

The application of the principle of mutual recognition in criminal matters in the European Union has led to a rethinking of national sovereignty, and national and EU constitutional principles. Mutual recognition in this context is based on a rethinking of territoriality: linked with the fundamental objective of the abolition of borders in the European Union, in particular within the Schengen area, the new territoriality views the Union as a single “area”, where facilitation of free movement must be the primary aim. However, in criminal matters, this aim has not been achieved by attempting to create common rules and standards underpinning free movement. Rather, the emphasis has been placed at the national level: equating people with court decisions, the logic of this system dictates that it is *national* judicial decisions, and consequently national legal and constitutional systems, that must move freely with the minimum of formality and be respected by other national jurisdictions in the EU. The latter is one “area”, but with no coherent “system” – it is national systems that must be recognized. This “extraterritoriality” of the national, based on mutual trust, has however been accompanied by very limited efforts to create a common understanding, and a level playing field, between these systems.

The operation of mutual recognition in this manner in the field of criminal law, closely linked with State sovereignty and legitimacy, the protection of fundamental rights and the rule of law, inevitably has significant constitutional implications both for national legal systems and for EU law as such. At the national level, courts and citizens are asked to embark on a “journey into the unknown” and to recognize with the minimum of formality (and be

posed to combine the evaluation mechanism of Art. III-260 of the Constitution with improving the mechanism of Art. 7 TEU – *Report on the situation of fundamental rights in the EU in 2004*, p. 31.

144. “a more general evaluation of the conditions in which judgments are produced in order to ensure that they meet high quality standards enabling mutual trust between judicial systems to be reinforced” providing “a fully comprehensive view of national systems” COM(2005)195 final, pp. 8, 9.

subject to) decisions emanating from the system of any given Member State, even in cases where the behaviour at stake is not an offence in the legal system of the executing State. This raises serious concerns of legality and legitimacy – citizens must accept completely “external” standards, standards that were not the product of an open, democratic debate which would delimit the fundamental rules regulating the relationship between the individual and the State in criminal matters. This way of proceeding does little favours for trust between national systems, but also for trust of citizens in their own national polity.

Similar issues of legitimacy and democratic deficit arise at the level of the European Union. With mutual recognition, Member States in the Council (and with the given lack of any substantial influence by the European Parliament which is currently merely consulted in criminal matters) agree on procedure and not on the substance of EU criminal law. They agree to extend the enforcement of national decisions in criminal matters, reproducing thus to a great extent their national systems, but no debate has taken place on the direction and aims of EU criminal law – rendering EU action in the field far from coherent. This lack of coherence is visible when one tries to address the inevitable effects of mutual recognition in nationals and the EU legal order. Attempts to remedy shortcomings, especially in the area of fundamental rights protection, and to enhance trust, stumble upon EU constitutional limitations. Attempts to circumvent such limitations, by law-making or by judicial activism, may also have the effect of further alienating citizens from the EU project.

The Constitutional Treaty, if ratified, will bring about some changes in this context. The democratic deficit at EU level may be addressed by granting the European Parliament co-decision powers, while agreement on controversial measures (such as the defence rights proposal) may be easier under qualified majority voting. The Constitutional Treaty would make the adoption of such measure less complicated, as it includes a new competence for the EU to adopt measures in the field of criminal procedure, including on the rights of the defendant. However, it must be stressed that this competence has been conferred specifically in order to promote mutual recognition. Mutual recognition has a prominent place in the EU’s constitutional future in criminal matters,<sup>145</sup> at the expense of harmonization of criminal law, where the Union’s powers appear to have shrunk somewhat.<sup>146</sup> It remains to be seen

145. Art. III-270(1) confirms that judicial co-operation in criminal matters in the Union will be based on the principle of mutual recognition.

146. See Art. III-271, which exhaustively lays down the areas of EU action regarding the

whether constitutionalizing mutual recognition at the EU level would have any effect on the way the principle operates in practice, especially when interpreted by the ECJ in the light of the Charter of Fundamental Rights. Until then, an open, democratic debate on the future direction of EU criminal law, focusing on common principles and understanding across the EU is essential.

definition of criminal offences, but leaves the door open for the addition of new areas of crime decided unanimously by the Council and after the consent of the European Parliament.