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International Judicial Cooperation in Criminal Matters
—*the European Path as a Model?*

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作者資訊

ABSTRACT

Criminal prosecution is faced with completely new challenges in the age of globalisation and digitisation. To overcome national borders, new solutions must be found that are nonetheless compatible with the rule of law. The European Union has based its judicial cooperation in criminal law on the principle of 'mutual recognition'. It has already adopted numerous important legal acts implementing this principle. The article focuses in particular on the European Arrest Warrant, the European Investigation Order and, in the area of 'e-evidence', the planned European Production and Preservation Order. The author not only describes the essential contents and advantages of these innovations, but also points out the problems arising from them. As a result, he believes that the principle of mutual recognition has an undeniable potential for improving judicial cooperation in criminal matters also for non-EU Member States seeking to support each other by providing legal assistance. Nevertheless, mutual recognition must be limited - in particular by inserting an ordre public-proviso for cases of serious fundamental rights violations.

Keywords: European Union, Mutual Recognition, Judicial cooperation, European Arrest Warrant, European Investigation Order, E-evidence, Fundamental Rights

CONTENTS

I. THE PROBLEM OF JUDICIAL COOPERATION IN THE AGE OF GLOBALISATION AND DIGITISATION

In times of globalisation, state borders, which used to be a real barrier for both economic and personal freedom of movement, are becoming less and less important. This is certainly less noticeable in large countries such as China or Russia, where physical border crossing is not as commonplace as it is in Europe with its large number of small- to medium-sized countries. The merger of the European states to form an economic community in March 1957, which later developed into the European Union, whose goals go far beyond mere economic cooperation and today also include areas such as social, environmental and foreign policy, was from the outset driven by the desire to reduce the importance of national borders and achieve a high degree of integration. In the single market thus created, it was not only goods that were intended to be able to circulate freely, but also services, capital and – last but not least – natural and legal persons. This freedom of movement confers a benefit, for example, on workers who can take up jobs not only in their own country but also in any other Member State and who can even commute across the border on a daily basis. However, this freedom of movement also favours those who want to commit crimes or flee to another Member State after committing a crime in one Member State. This poses a very serious problem for those who are supposed to investigate crimes and trace, try and convict possible perpetrators – in other words, for the law enforcement authorities of the Member States. Their activities are still essentially limited by the state and are basically restricted to their own national territory. There is a particular need for international judicial cooperation in transnational law enforcement.

However, the fact that legal assistance is provided by way of extradition, transfer of data, transfer of seized property or other evidence, does not mean that a transnational prosecution will necessarily be successful. The question remains whether evidence coming from the requested state may be used at all in the state where the trial is being conducted. The problem results from the fact that the evidence is obtained in the requested state by the latter applying (exclusively) its own procedural rules. This can become highly problematic in terms of the rule of law if, for

example, there are significantly fewer or completely different guarantees for the accused abroad and a transfer of evidence creates a 'guarantee gap', thereby undermining rights to which the accused is actually entitled.

As already indicated, it may also be worthwhile from a non-European perspective to take a look at judicial cooperation between European states, which in its design is not least a reaction to the globalisation and digitisation of crime. This European path might certainly appear to be attractive from a legal policy point of view, but there are still considerable gaps related to the rule of law that need to be remedied. An exogenous view opens up an opportunity: it allows us to identify the merits and weaknesses of the EU model and to contrast it with an alternative model that incorporates its strengths and avoids its weaknesses.

II. International cooperation based on mutual recognition in an 'area of freedom, security and justice' – the European Union as an example

1. *The single judicial space as the basis for cooperation*

According to the Treaty on the Functioning of the European Union (TFEU), it is the Union´s objective to create an 'area of freedom, security and justice' (Art. 67 (1) TFEU). The territory of the Member States shall constitute one single judicial space, where judicial cooperation must be possible despite the continued existence of different substantive and procedural laws in the cooperating states. An end to this kind of pluralism in the EU is neither foreseeable nor is it intended, as demonstrated by the second half of the same Art. 67 (1) TFEU which says that 'the respect for … the different legal systems and traditions of the Member States' shall also be upheld within that single judicial space.

This is where the concept of mutual recognition comes into play: 'The Union shall endeavour to ensure a high level of security … through the mutual recognition of judgments in criminal matters …' (Art. 67 (3) TFEU) and 'Judicial cooperation in criminal matters in the Union shall be based on the principle of mutual recognition of judgments and judicial decisions …' (Art. 82 TFEU).

However, the idea of a single judicial space and – consequently – the application of 'mutual recognition' is not confined to criminal law but also extends to 'civil matters' (see para. 4 of Art. 67 TFEU and para. 1 of Art. 81 TFEU).

2. *A closer look at mutual recognition*

In determining what is meant by 'mutual recognition' it is important to note that the provisions of the TFEU do not contain any legal definition. More useful, by contrast, is a definition given by the European Commission in 2000 in its *Communication to the Council and the European Parliament on Mutual Recognition of Final Decisions in Criminal Matters*:[1] 'Mutual recognition is a principle that is widely understood as being based on the thought that

[1] COM/2000/0495 final, p. 1 et seqq.

while another state may not deal with a certain matter in the same or even a similar way as one's own state, the results will be such that they are accepted as equivalent to decisions by one's own state. Mutual trust is an important element, not only trust in the adequacy of one's partners' rules, but also trust that these rules are correctly applied.'[2]

Based on this definition, the following three main features of mutual recognition can be highlighted:

(1) mutual trust in the *adequacy of the rules applied* in other Member States, even though they might – and most probably will – differ from the norms and regulations of one's own legal order when applied to a comparable internal case;

(2) mutual trust in the *correct application* of these rules in the other Member States by the courts and other law-executing bodies; and – as a consequence –

(3) *acceptance of the results* achieved in the other Member State on the basis of its laws and regulations as applied by its courts and other law-executing bodies without the result being checked against domestic laws and regulations.

Consequently, the Commission concluded: 'Based on this idea of equivalence and the trust it is based on, the results the other state has reached are allowed to take effect in one's own sphere of legal influence. On this basis, a decision taken by an authority in one state could be accepted as such in another state, even though a comparable authority may not even exist in that state, or could not take such decisions, or would have taken an entirely different decision in a comparable case.'[3]

The introduction of mutual trust is a huge step in fostering European integration. An almost natural and traditional mistrust of everything which is 'foreign' and 'unknown' is overcome and replaced by trust in other European legal systems. Such an inversion works only because it is prescribed by law for the good of the creation of a common European judicial space.

The method of mutual recognition in criminal matters, however, is nothing radically new to the EU. Originally, the principle was developed in another legal context, namely the establishment of the internal market. Goods were intended to circulate freely within the internal market without prior harmonisation, which was a complex and time-consuming task.[4] This idea of free circulation across national borders was subsequently transferred to the area of judicial cooperation in criminal matters.[5] In 1999, the European Council in Tampere politically declared

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2 COM/2000/0495 final, p. 4.

3 COM/2000/0495 final, p. 4.

4 See in detail H. Satzger, 'Gefahren für eine effektive Verteidigung im geplanten europäischen Verfahrensrecht – eine kritische Würdigung des Grünbuchs zum strafrechtlichen Schutz der finanziellen Interessen der Europäischen Gemeinschaften und zur Schaffung einer europäischen Staatsanwaltschaft', *Strafverteidiger*, 2003, p. 141; B. Hecker, *Europäisches Strafrecht*, 5th ed. (Springer, 2015) §12 para. 58; M. Fletcher and R. Lööf and B. Gilmore, *EU Criminal Law* (Edward Elgar, 2008), p. 109, 188 et seq.

5 Cf. H. Satzger, *International and European Criminal Law*, 2nd ed. (Beck / Hart, 2017), § 8 paras. 26 et seq.

the principal of mutual recognition to be the 'cornerstone' of judicial cooperation in civil and criminal law.[6] Eventually, with the entry into force of the Treaty of Lisbon in 2009, the principle was legally recognised and even incorporated into primary European law (Art. 82 (1) TFEU; cf. also Art. III-270 TCE[7]). By making use of its competence to enact rules for all Member States in Art. 82 (1) subpara. 2 (a) and (d) TFEU, the EU so far has adopted a considerable number of legal acts (framework decisions and directives) based on the principle of mutual recognition. Admittedly, the idea of mutual recognition has not been implemented in full, as complete and absolute recognition of each other's decisions would hardly be acceptable in and for all Member States. From the outset, there were exceptions which were expressly listed in the aforementioned individual legal acts as so-called 'grounds for refusal'.[8] However, beyond these written reasons, the Court of Justice of the European Union (CJEU) – at least in its originally very restrictive case law – was not prepared to accept any further and more general 'exceptions'. Rather, the CJEU followed a line of thought based on almost blind trust in the functioning of mutual recognition and the integrity of all Member States' legal systems within the EU. The Court even went as far as to not accept an unwritten ground for refusal based on human rights violations.[9]

III. Mutual recognition as a paradigm change in judicial assistance?

The question arises whether the European Union really invented the principle of 'mutual recognition'. In other words: Is the application of the principle to judicial assistance in criminal matters really a paradigm change or can we find similar tendencies elsewhere in judicial cooperation?

1. Judicial assistance was always based on the fundamental idea of mutuality. It would be unthinkable without a strong confidence in the equivalent nature of each other's legal system. Despite the well-established requirement of double criminality in traditional judicial justice, in terms of extradition, the basis and degree of the underlying suspicion that a person in fact committed an offence according to the law of the requesting state is and was not to be put into question by the authorities of the requested state. Therefore, mutual recognition of the existence of a sufficient degree of suspicion has always been a basic element in the traditional system. A further development in the same direction can be observed in the jurisprudence of the German Constitutional Court (*Bundesverfassungsgericht*) when it respected lower standards of

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6 Cf. the conclusions: http://www.europarl.europa.eu/summits/tam_en.htm (accessed on 3 February 2020), nos. 33 et seq.

7 Treaty establishing a Constitution for Europe, OJC 310 of 16.12.2004, p. 1 et seq. (not adopted).

8 See e.g., Articles 3 and 4 of Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, OJEU No L 190 of 18/07/2002, p. 1 et seq.

9 See e.g., CJEU, judgment of 29.01.2013 - Case C-396/11 "Radu"; see also CJEU, judgment of 26.02.2013 - Case C-399/11 "Melloni".

fundamental rights protection in other countries. Trust in the 'rule of law' and the overall protection of human rights in the requesting state eventually provided the Bundesverfassungsgericht with the legitimacy to reduce its constitutional standard of protection to an absolute minimum.[10]

2. The US Supreme Court even invoked the so-called '*rule of non-inquiry*'[11] when two US citizens tried to prevent their extradition to Iraq by arguing that they would most likely be tortured there. The Supreme Court stated that it was 'for the political branches, not the judiciary, to assess practices in foreign countries and to determine national policy in light of those assessments'.[12] Under this rule, courts in the requested state neither examine whether the proceedings in the requesting state will be fair nor will they inquire into the procedures of treatment which await a surrendered person in the requesting state.[13]

These first examples in the traditional system show that a considerable degree of (mutual) recognition of foreign systems' standards and decisions already formed part of the classic regime of legal assistance.

3. Decades before the idea of mutual recognition was consolidated in the EU, the Nordic countries had given an even more striking example of far reaching judicial assistance. At the end of the 1950s and the beginning of the 1960s, Denmark, Finland, Iceland, Norway and Sweden established a *system of intra-Nordic extradition*.[14] It was not based on a treaty between these states creating legal obligations to extradite.[15] Rather, it relied on mutual trust, on the states' willingness to cooperate on a practical level and an essentially uniform domestic legislation on extradition. Therefore, there was no requirement of double criminality[16] and the penalty

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10 BVerfG of 20.12.2007, 2 BvR 1996/07, margin no. 19.

11 Cf. e.g., the US Supreme Court's decision in *Munaf v. Geren*, 553 U.S. 674 (2008); as to the historical background and the application of the 'rule of non-inquiry' cf. J. T. Parry, 'International Extradition, the Rule of Non-Inquiry and the Problem of Sovereignty', *Boston University Law Review* 90 (2010), 1973 et seq.

12 *Munaf v. Geren*, 553 U.S. 674, 701 (2008).

13 M. Murchison, 'Extradition's Paradox: Duty, Discretion, and Rights in the World of Non-Inquiry', *Stanford Journal of International Law* 43(2) (2007), p. 295, 300 with further indications as to relevant jurisprudence.

14 Cf. the Swedish Act No. 254, adopted on 5 June 1959, the Danish Act No. 27, adopted on 3 February 1960, the Finnish Act No. 270, adopted on 3 June 1960, the Norwegian Act No. 1, adopted on 3 March 1961 (No. 1) and the Icelandic Act No. 7, adopted on 14 March 1962 – all cited according to G. Mathisen, 'Nordic Cooperation and the European Arrest Warrant: Intra-Nordic Extradition, the Nordic Arrest Warrant and Beyond', *Nordic Journal of International Law* 79(1) (2010), p. 1, 5.

15 P. Asp, *Nordic Judicial Co-operation in Criminal Matters* (Iustus, 1998), p. 9.

16 This is in clear contrast to the reservations in relation to extra-Nordic extraditions made by the Nordic countries to the 1957 Council of Europe Convention on Extradition of 13 December 1957 (entry into force 18 April 1960), ETS No. 24; cf. G. Mathisen, fn. 14, p. 10.

threshold for an offence to be considered extraditable was very low.[17] Due to the absence of any obligation to extradite, the participating states were free to use the system in an extremely flexible manner, for example by non-extradition on the ground of lack of proportionality. As this Nordic system also implied the surrender of a state's own nationals to other Nordic countries and as it was based on direct communication between judicial authorities, some authors – quite understandably – suggested that the Nordic system was a source of inspiration for the Commission when drafting the Framework Decision on the European Arrest Warrant (EAW; more in detail infra, VI.1.).[18]

4. A trend comparable to the one in the EU states can also be found in the MERCOSUR states in Latin America. This abbreviation stands for the Spanish terminology for the 'Common Market of the South'. Argentina, Brazil, Paraguay, Uruguay, Venezuela (whose membership is, however, currently suspended) and (still in the process of accession) Bolivia[19] form an economic community with the further objective of creating a single market.[20] Of course, the MERCOSUR is – in contrast to the EU – no supranational organisation, but relies on intra-governmental cooperation. Its clear focus lies on economic matters; constant rivalries and political conflicts between the MERCOSUR members hinder further development.[21]

In 2010, MERCOSUR states concluded an international convention introducing the so-called *MERCOSUR Arrest Warrant* with many features quite similar to the EAW.[22] One important difference has to be mentioned, however: there is an explicit *ordre public* proviso (Art. 4 (2)) relating to the internal legal order of the state of execution. Thus, reasons of national sovereignty, security or public order, or other essential interests may be invoked to reject the execution of a MERCOSUR Arrest Warrant. In addition, another very interesting development can be observed: Brazil and Argentina have concluded and ratified a 'Treaty on the simplification of extradition'[23] with the EU Member States Spain and Portugal. In this way, the idea of mutual recognition is extended to non-members of the MERCOSUR, which, nevertheless, have close historical and cultural ties with Latin America. The agreement

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17 G. Mathisen, fn. 14, p. 10.

18 As for the EAW proposal, see COM (2001) 522 final of 2nd of 25 September 2001, p. 16; cf. especially G. Mathisen, fn. 14, p. 12.

19 https://www.mercosur.int/en/about-mercosur/mercosur-countries/ (accessed on 3 February 2020).

20 As to the foundation and backgrounds of the MERCOSUR, cf. e.g., A. Kullok, 'Mandado Mercosul de captura: novo instrumento, velho pensamento', *Revista Brasileira de Ciências Criminais*, 113 (2015), p. 441, 443 et seq.

21 The perhaps most striking event was the suspension of Venezuela's membership in December 2016 due to persistent disrespect of human rights.

22 For example facultative and obligatory reasons for non-execution, cf. A. Kullok, fn. 20, p. 455 et seq.

23 The official title of the Treaty is 'Acuerdo sobre simplificación de la extradición entre la República Argentina, la República Federativa del Brasil, el Reíno de España y la República Portuguesa', signed in Santiago de Compostela, on 3rd November 2010.

explicitly mentions the 'level of mutual trust' between the parties to the Treaty.[24]

5. On an *international level*, the International Criminal Court (ICC) in The Hague also cooperates with states that are party to the Rome Statue of the ICC, known as states parties. The latter have to arrest and surrender suspects to the ICC if the Court so orders. But there is an unconditional obligation of the states to cooperate with the Court in the Rome Statute, which all States Parties accepted.[25] Thus, this is no case of 'recognition', but the Rome Statue forms the basis of a jurisdictional system of its own, not comparable to judicial assistance between two separate jurisdictions as is the case in the EU. This fundamental difference explains why fundamental rights or *ordre public* provisos do not (have to) exist between States Parties and the ICC.

6. Taking into account the trends outside the EU, an interim conclusion may be drawn: Aspects of mutual recognition can already be discerned in the traditional system of judicial assistance in criminal matters; many of these aspects are also inherent to judicial assistance between jurisdictions outside the EU. The EU is therefore perhaps not the 'inventor' of the principle of mutual recognition. Nevertheless, within the framework of European integration it has developed a high degree of mutual recognition in many fields. The degree to which the EU realises the principle, however, is – if, for example, compared to the Nordic system of extradition – not an extreme one. The developments in the EU do not amount to a *revolution* but rather mark a considerable *evolution* of the traditional judicial assistance instruments.[26]

IV. Main forms of judicial cooperation in the European Union

In the following, a closer look at two very important legal acts of coining modern judicial cooperation within the EU – the Framework Decision on the European Arrest Warrant from 2002 on the one hand and the Directive on the European Investigation Order from 2014 on the other – shall demonstrate the functioning of mutual recognition. At the same time, problems and potential limitations related to the application of this principle shall be pointed out, particularly in the light of the current and remarkable problem of electronic evidence.

1. *The European Arrest Warrant as a prototype for the application of the 'mutual recognition' method*

(1) European Arrest Warrant vs. classical extradition – some important simplifications

The Framework Decision on the EAW is considered a prototype for subsequent instruments. Issuing an EAW in the requesting state obliges the authorities in the requested state to directly transfer the person named in the EAW. The EAW is thus recognised and executed in

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[24] Recital No. 2 of the Treaty.

[25] Article 86 Rome Statute - General obligation to cooperate: States Parties shall, in accordance with the provisions of this Statute, cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court.

[26] As states G. Mathisen, fn. 14, p. 2.

all Member States with the confidence that the underlying decision is correct. This abolishes the traditional extradition procedure between EU Member States that has often been criticised as being time-consuming and too complex: In the traditional system, in addition to the *judicial* review of the legal admissibility of the extradition, the extradition had to be approved by the executive, which was a purely discretionary decision. With the introduction of the EAW, extradition became a completely judicial procedure between the judicial authorities without any political element.

Traditionally, the requirement of double criminality presupposes that the conduct for which the extradition request is made must be punishable under the law of both the requesting and the requested state. This requirement gives the accused the opportunity to raise substantive objections against his or her extradition. At the same time, of course, from a practical point of view, it considerably impairs the efficiency of the extradition procedure. With regard to a catalogue of 32 areas of crime, some of which are only roughly delineated, the EAW effectively abolished double criminality, for example in the case of 'computer crime', 'counterfeiting', 'racism' or 'xenophobia'.

(2) Exceptions to mutual recognition in the Framework Decision – additional limitation by a European ordre public proviso?

The exceptions to mutual recognition contained in the EAW are not very numerous – and not all of them are mandatory. For example, an amnesty in the state of enforcement or the suspect's age-related lack of criminal liability under the law of the state of enforcement are mandatory obstacles to enforcement. Contrastingly, time limitation under the law of the state of enforcement is only an optional obstacle. The system itself is far from being consistent.

Especially in recent times, crises have emerged within the EU with regard to the rule of law in some Member States, such as Poland and Hungary. Indeed, although the Framework Decision itself mentions the importance of human rights by stating that the framework decision must not affect the obligation to respect fundamental and human rights of the individual,[27] it does not contain an explicit ground for refusal relating to a violation of fundamental or human rights. Accordingly, the CJEU initially took the view that those grounds which allowed the addressee of an EAW to reject its execution were conclusive – based on the idealistic, almost naïve idea that a significant gap in legal protection could not occur, since each Member State was a also a member of the European Convention on Human Rights and therefore respected the principles of the rule of law.

It can be observed that in 2016,[28] a certain departure from this jurisprudence took place: In preliminary ruling proceedings, the CJEU had to answer the question whether, if there were serious indications that prison conditions in the requesting Member State did not meet the

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[27] Article 1 (3) Framework Decision European Arrest Warrant.

[28] CJEU, judgment of 05.04.2016, joined Cases C-404/15 "Aranyosi" and C-659/15 PPU "Caldararu".

minimum standards prescribed by the ECHR, an EAW could be executed. The CJEU here ultimately argued with the existence of an 'exceptional situation'. If there is a real risk of inhuman or degrading treatment of the person to be surrendered as defined in the Charter of Fundamental Rights of the European Union (EUCFR), the Court considered the execution of an arrest warrant to have to be *postponed*. This is the first time that the Court of Justice deviated from its original severe line and recognised a limitation of the principle of mutual recognition on the basis of overriding aspects of European human rights protection.

This decision has, however, not remained an isolated case: The court made a similar ruling in connection with a person affected by a Polish EAW who – in view of the dubious and in Europe harshly criticised judicial reforms in Poland – invoked the independence of Polish judges.[29] The CJEU acknowledged that, notwithstanding an abstract criticism of the contested reforms, these circumstances are only relevant to the question of the enforceability of the EAW if the person can prove that he or she is *personally* threatened with an unfair trial *in the specific case* in Poland. If this proof is successful, the Court of Justice – for the first time ever – will have assumed an *obligation to refrain from executing* the EAW emanating from Poland as opposed to only postponing it, as was the consequence of the previous decision.

This is an important step taken by the Court of Justice towards a general limitation of the 'mutual recognition' principle, which has long been strongly demanded by a significant part of the scientific community.[30] However, this exception only concerns the respect of *fundamental European values*, in particular fundamental rights and human rights, and accordingly can be summarised under the heading 'European *ordre public*'. Strictly speaking, this is the logical consequence of the concept of mutual recognition, which – as seen above – is largely based on the principle of mutual trust in each other's legal systems. Therefore, if it is obvious in a specific case that results will be achieved in the other state that run counter to the fundamental values of the EU, the necessary basis of trust required for mutual recognition will no longer exist. This is precisely the content of the above-mentioned Article 1(3) of the Framework Decision; any other solution would blatantly contradict the fundamental and human rights protection offered and envisaged in the EU.[31]

2. *Transfer of evidence between Member States*

(1) The European Investigation Order – 'state of the art'

Another important aspect of 'mutual recognition' concerns the transfer of evidence between Member States. The European Investigation Order (EIO) is intended to solve the

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[29] CJEU, judgment of 25.07.2018, Case C-216/18 PPU "LM".

[30] See in particular European Criminal Policy Initiative (ECPI), A Manifesto on European Criminal Procedure Law, *Zeitschrift für Internationale Strafrechtsdogmatik (ZIS)* 2013, 412 et seq. (available online at www.zis-online.com; accessed on 3 February 2020).

[31] See also Article 1 (3) of Framework Decision: "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 Treaty on European Union".

following problem: When evidence is gathered in the course of purely national criminal proceedings, this is regularly done in accordance with the procedural law of that Member State; if another Member State subsequently requests that evidence in order to use it in proceedings before the courts of the requesting state, the conditions for collecting evidence, which would have had to be met under the national law of the requesting state, cannot be met any more.[32] Individual rights are in danger of being disrespected in what could be called a transnational 'patchwork process'.

Since 2014, the *Directive regarding the European Investigation Order in criminal matters*[33] has been in force. It aims at establishing a uniform legal framework for the collection and transfer of evidence within the Union.[34] It does not only refer to the handing over of evidence that already exists in a Member State. Rather, as its name suggests, it also covers the ordering of measures to collect evidence, and this applies to virtually all types of evidence and ways of obtaining it.[35] The Directive strengthens the position of the requesting state in the spirit of mutual recognition.[36] This state sets the rules to determine *whether* such evidence can be adduced.[37] The issuing State must, however, examine restrictively in each individual case whether the proportionality of the measure is respected and whether the measure could be ordered under the same conditions in a comparable national case (Art. 6 (1) EIO-Directive). An order issued according to these rules must then be recognised by each Member State 'without any further formality' and enforced like a domestic order which does not have any cross-border dimension (Art. 9 (1) EIO-Directive).

Furthermore, in order to avoid problems when using evidence gathered in the executing state, the Directive provides that the issuing state may, in accordance with the principle of *forum regit actum* (Art. 9 (2) EIO-Directive), impose 'formalities and procedures'. The executing state has to follow these guidelines, unless fundamental principles of its own legal system prevent this.[38]

In return, the Directive provides grounds for refusing to execute an investigation order, such as immunities, national security interests or double jeopardy.[39] It is gratifying that – in contrast to the EAW – a clear and unambiguous ground for refusal is now explicitly included

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32 ECPI, fn. 30, p. 417; F. Zimmermann, *Strafgewaltkonflikte in der EU* (Nomos 2015), p. 66.

33 Directive 2014/41/EU, OJEU 2014 No. L 140/ 1 For the development see the evidence in Sieber/Satzger/v. Heintschel-Heinegg-Gleß, Europ. StR, § 38 fn. 128.

34 Böse, *Zeitschrift für Internationale Strafrechtsdogmatik (ZIS)* 2014, 152; Esser, in: von Heinrich u.a. (Ed.), FS Roxin, pp. 1497, 1508 et seqq.

35 Exception: Formation of joint investigation teams; see also Schuster, StV 2015, 393.

36 F. Zimmermann, *Zeitschrift für die gesamte Strafrechtswissenschaft*, 2015, p. 143, 147 et seqq.

37 F. Zimmermann, Criminal Violence Conflicts in the EU, p. 64 et seq; Vermeulen/De Bondt/Van Damme, EU cross-border gathering, p. 105.

38 Explanatory note on the interpretation of this provision F. Zimmermann, fn. 36, p. 150 et seqq; in general Gleß, *Zeitschrift für die gesamte Strafrechtswissenschaft,* 2013, p. 573, 592 et seqq.

39 Article 11 (1) of the Directive.

(article 11 (1) lit. f) for cases with indications that fundamental rights, in particular the rights enshrined in the Charter of Fundamental Rights, might be violated.[40]

(2) Electronic evidence – the European Production and Preservation Order: an innovative approach or a dangerous path?

Currently, the EU is focusing on the collection and transfer of electronic evidence ('e-evidence'). In response to the US Clarifying Lawful Overseas Use of Data Act (CLOUD Act) of 23 March 2018,[41] the European Commission proposed an alternative fast-track procedure in the form of the *European Production and Preservation Orders for e-evidence in criminal matters.*[42]

According to a draft regulation, data (except for real-time communication data) such as photos or electronic messages, regardless of where they are stored (on servers, in a cloud, etc.), should reach the issuing state more quickly and directly. It should be possible for the Member States' judicial authorities to address the orders directly to the service provider, which could also be a non-European company if it offers its services within the EU.

In contrast to the previous mutual recognition instruments, no second state judicial authority will be involved any more. It is intended that this will considerably speed up the procedure, which is felt to be essential due to the fact that data is volatile and can be deleted quickly at any time. It is stated in the draft that service providers must therefore react to such an order within the very short period of ten days, and in urgent cases as short as six hours.

What seems to be an innovative way to use electronic evidence for criminal prosecution is nothing less than a fundamental paradigm shift in which the baby is thrown out with the bath water. Judicial cooperation in criminal matters becomes a forced cooperation between a private company and a judicial authority. Judicial protection in the executing state is eliminated – an up-to-now essential pillar of the architecture of cooperation based on mutual recognition.[43] Rather, private companies are supposed to monitor the protection of fundamental rights – a task they are not able (and supposedly not willing) to fulfil. The significant flaw in the whole construction, however, lies in the fact that the fundament of trust which mutual recognition is based on is originally conceived as a relation of trust between two states or state authorities. It may well be doubted whether this is really a sufficient basis for supporting the far-reaching effects of mutual recognition as practiced in the EU. Trust in a private sector company operating with the aim of maximising its own profits can by no means constitute a sufficient basis for transnational criminal prosecution with adequate protection of fundamental rights for the prosecuted person.[44]

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40 For further details, see F. Zimmermann, fn. 36, p. 157 et seq.

41 H.R.4943.

42 Proposal for a Regulation of the European Parliament and of the Council on European Production and Preservation Orders for electronic evidence in criminal matters COM/2018/225 final - 2018/0108 (COD).

43 As correctly states *Mitsilegas*, Maastricht Journal of European and Comparative Law, 2018, 263 et seqq.

44 See also *Mitsilegas*, Maastricht Journal of European and Comparative Law, 2018, 263 et seqq.

V. MUTUAL RECOGNITION: POTENTIALLY EFFICIENT BUT – SO FAR – INCOMPLETE

The advantages of applying mutual recognition to judicial assistance in criminal law matters are obvious: the national legal systems do not have to be transformed in the sense that harmonising substantive or procedural law is, as such, a formal precondition for mutual recognition. Mutual recognition nevertheless provides for speedy procedures with a minimum of formal prerequisites. Thus, it seems to be a most efficient instrument in order to create an area of freedom, security and justice, as envisaged by article 67 TFEU.

Nevertheless, if national substantive criminal laws and criminal procedures in the relevant states remain different to a considerable extent, an overhasty application of the principle of mutual recognition to criminal law matters may create inacceptable risks and disadvantages, especially to the person prosecuted. The *rights of the defence are endangered* and there is a considerable risk that they become legally and factually ineffective. The unwanted consequence is that the fundamentally *important right to a fair trial could potentially be sacrificed for the sake of a more effective procedure.*

The 'European Criminal Policy Initiative', a European academic research group, counters this risk in its "Manifesto on European Criminal Procedure Law" by formulating the following demand:

'The Union legislator must primarily respond to this danger [of losing fundamental rights in transnational proceedings] by creating a general level of protection in respect of the most important suspects' rights which clearly exceeds the minimum rules of the European Convention on Human Rights.'[45]

By introducing additional instruments of harmonisation in relation to substantive and procedural law, differences between the national jurisdictions within the EU could be reduced. EU instruments based on mutual recognition – as any legal act of the Union – must furthermore meet the European proportionality test. And as cross-border proceedings usually affect the prosecuted person's rights in a more intensive manner than purely national ones, European instruments should provide for 'compensatory rules' (minimum harmonisation of the defendant's rights, specific grounds for refusal to be used in the executing state, and a European *ordre public* clause for extreme violations of fundamental rights).[46]

Thankfully, the European legislator has finally taken action – albeit much too late: EU legislation eventually started introducing elements of both an increase in harmonising legislation and additional measures to compensate the loss of fairness in cross-border prosecutions and trials which result from the application of the mutual recognition method. The important step towards limiting mutual recognition by generally introducing or applying a European *ordre public* clause has still not been fully completed. The 'new approach' of the CJEU in its *Aranyosi* judgment[47] and subsequent jurisprudence (and a similar tendency in

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[45] See ECPI, fn. 30, p. 430 et seq.

[46] See ECPI, fn. 30, p. 431 et seq.

[47] CJEU, judgment of 05.04., Joined Cases C□404/15 "Aranyosi" and C□659/15 PPU "Caldararu";

rulings of the highest national courts[48]) could – if upheld and generalised – result in the much-needed fundamental rights proviso.[49]

VI. THE EUROPEAN PATH – NOT IDEAL BUT VIABLE

The model of judicial cooperation on the basis of mutual recognition may be attractive also for states outside the EU seeking effective and modern intranational law enforcement. However, experience with the European model shows that cooperation must never be based on blind trust because individual rights will be ignored all too easily. Unexpected legal reforms, deteriorating political situations or constitutional crises in other Member States may at any time call in question or even terminate trust in the legal system of another Member State.

A system of mutual trust is therefore incomplete as long as no additional normative corrective measure – a strict *ordre public* proviso, which serves in particular as a means of protecting fundamental and human rights – is available. The cases of European mutual recognition have shown that such a rule-of-law proviso is necessary in order to not sacrifice individual rights for the sake of effective prosecution. In particular, the e-evidence initiative shows that mutual recognition can also reach its limits when evidence is digitised. In any case, a privatisation of mutual trust can never be the basis for prosecution under the rule of law.

Understood correctly, mutual recognition is not a ready-made concept but a highly flexible tool, which can be used in many ways and which is theoretically applicable to many states and organisations worldwide, at least if the necessary degree of mutual trust exists or can reasonably be created on a legal and factual basis. Mutual recognition as a model for international cooperation is therefore only of limited value in itself, but can be transformed into a modern, effective instrument based on the rule of law, if restrictions implemented to protect individual fundamental rights are also taken seriously. ♣

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for further details see e.g., H. Satzger, 'Grund- und menschenrechtliche Grenzen für die Vollstreckung eines Europäischen Haftbefehls? – „Verfassungsgerichtliche Identitätskontrolle" durch das BVerfG vs. Vollstreckungsaufschub bei „außergewöhnlichen Umständen" nach dem EuGH', *Neue Zeitschrift für Strafrecht* 2016, p. 514 et seq.

48 BVerfG, Decision of 15th December 2015, 2 BvR 2735/14 = *Neue Juristische Wochenschrift* 2016, p. 1149; in this respect see also H. Satzger, fn. 5, § 5 para. 23 et seq.

49 Cf. furthermore the analysis of recent jurisprudence in H. Satzger, 'Mutual Recognition in Times of Crisis', *European Criminal Law Review,* 8 (2018), p. 317, 323 et seq.

The Future of Constitutional Law
—*A German Perspective*

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作者資訊

ABSTRACT

While the German constitution – the Basic Law – can look back on an impressive success story, German constitutional law today faces a number of serious challenges. These challenges – and also future prospects – are described in the following article. Relevant topics are the increasing fragmentation and polarisation of politics challenging parliamentary democracy, the progressive centralisation of decision-making questioning federalism in Germany, the ambivalent tendency towards direct horizontal effects of fundamental rights and the crisis of the binding force of law in the European Union and in the global community.

Keywords: German Constitutional Law, Basic Law, Parliamentary Democracy, Federalism, Fundamental Rights, European Integration

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The Future of Contract Law

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ABSTRACT

Modern contract law is marked by differentiation between types of contract. In the United Kingdom, housing contracts, employment contracts and particularly consumer contracts are now governed by specialist regimes. Many of the consumer measures derive from European Union legislation but UK consumer protection often goes further and the measures are expected to survive Brexit. We can expect more differentiation with further legislation to deal with new issues. The same is probably the case in almost all jurisdictions.

The general law of contract is thus effectively confined to contracts between businesses and between private individuals. But on many key issues the national laws of contract differ markedly, especially as between civil law countries and traditional common law jurisdictions such as England and Wales, Hong Kong and Singapore. Now that both digital products and services are being supplied on an international basis and now that small businesses and consumers make transnational contracts, the question arises whether we can expect further attempts to reduce the costs of transnational contracting, for example by more harmonisation measures; by the expansion or revision of the Vienna Convention on the International Sale of

Goods or the adoption of other "optional instruments"; or by "soft law" principles encouraging a gradual convergence. In Europe convergence is happening, but only between "like-minded" systems; on the key issues the English common law remains quite different. This is because typically English law is dealing with high value contracts made by sophisticated players, often operating in volatile markets. These parties can be expected to look after their own interests. Other jurisdictions deal more with small businesses making low value contracts, when more protective rules are appropriate. Thus we can expect continued divergence. Jurisdictions thinking of modernising their law should consider what type of case their law will most often have to handle.

Keywords: Contracts, Transnational Contracts, Harmonisation, Optional Instruments, Convergence

CONTENTS

It is a great honour to be asked to contribute to the 300th issue of the Taiwan Law Review, and to be given the opportunity to speculate on the future of contract law. I will consider two issues: increasing differentiation between types of contract and differences between laws of contract.

I. DIFFERENTIATION INTO SEPARATE LAWS OF CONTRACT

Every field of law is dynamic, and this is no less true of contract law than of other areas of law. We can see this if we look back at developments over the last half century. At least in my jurisdiction, England and Wales, we have seen enormous changes. Perhaps the most striking change is the differentiation between different types of contract. Although in principle all contracts are still governed by the same general legal rules, we have developed almost separate regimes for, for example, residential tenancies, employment contracts and consumer contracts. In some cases it is the courts which have developed rules applicable to only one type of contract, for example the term now implied into contracts of employment that the employer

Commercial Law in an Age of Automation: Upstream Planning to Forestall Downstream Transaction Costs

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ABSTRACT

This article examines commercial law in transition as data analytics allows many evaluative and transactional processes to be automated. Based on research and interviews conducted in four financial centers, the article posits that both lawyers and financial professionals will engage more in more abstract, preparatory activity to construct the logical cores for algorithmically automated processes and spend less time performing the processes themselves. This move upstream away from direct contact with underlying data and clients will nudge the "liberal professions" toward the rational organizing principles of industry in general.

Keywords: Commercial Law, Fintech, Legaltech, Regtech, Data Analytics, Automation, Artificial Intelligence