

**The relationship between the
European Union and the Council of Europe
regarding the efficient implementation
of the principle of mutual recognition of criminal decisions*.**

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Introduction

Although geographically there is only one Europe, two major inter-european organisations have been created on our continent: the Council of Europe and the European Union. Despite their different objectives: protection of human rights for the former and establishment of a common market for the latter, they share common values and principles such as peace, democracy and freedom¹.

Both institutions, in pursuing their purposes had to deal with the problem of crime in its transnational dimension and the response to this challenge was the cooperation between state authorities, especially police and judicial authorities. In the first place, it was the Council of Europe that approached the subject of judicial cooperation in criminal matters. For the European Union this became an objective much later, with the Treaty of Maastricht. In the beginning, the legal instruments regulating judicial cooperation in criminal matters of the two institutions coincided in form and nature², in a way where it is possible to talk about convergence in their approaches. Later on, European Union law started to diverge from the Council of Europe law, as new instruments came into force, based on the principle of mutual recognition of criminal decisions, according to which a decision taken by a judicial authority in one Member State of the European Union is recognised and enforced by other Member States.

During the European Council of Tampere in 1999, mutual recognition was set to become the cornerstone of judicial co-operation in both civil and criminal matters within the European Union. The principle would apply at every stage of criminal proceedings, before, during and after the conviction and sentence. In a Communication of the Commission in 2000, the role

* Dated May 2008, this paper does not include the Lisbon Treaty.

¹ Preamble of the Treaty on the European Union, Statute of the Council of Europe.

² Traditional cooperation in criminal matters is based on a variety of international legal instruments, which are overwhelmingly characterised by the “request” principle; one sovereign state makes a request to another sovereign state, which then decides whether or not to comply with it. This traditional system is both slow and complex.

of mutual trust in the implementation of mutual recognition was acknowledged³ and the content of this trust was defined. In fact, mutual recognition cannot operate without a certain degree of mutual trust among Member-States regarding their legal systems. This trust is grounded on the shared commitment of all EU Member States to the principles of Freedom, Democracy and respect for Human Rights, Fundamental Freedoms and the Rule of Law and lies in a reasonable degree of approximation of criminal legislation⁴.

The success of the European Arrest Warrant marked the abandonment of traditional cooperation and encouraged the adoption of other legal instruments based on mutual recognition⁵, whereas the Council of Europe continues to follow the path of traditional cooperation.

The purpose of this paper is to examine how the work within the Council of Europe has contributed to the successful implementation of the principle of mutual recognition of criminal decisions, by enabling the establishment of mutual confidence among the Member States of the European Union through the experience acquired both in the fields of judicial cooperation in criminal matters and human rights protection. This mutual confidence, which refers to the quality of legal systems and the level of human rights protection, is the key to the success of mutual recognition, since the latter cannot function without it⁶.

For a better understanding of the relationship between the “big” and the “small” Europe⁷, we will divide our analysis into two parts relating to the impact of the Council’s work on the European Union. In the first place, will be studied how judicial cooperation under the Council of Europe has encouraged the development of mutual trust amongst Member States of the European Union. In the second place, the focus will be on the European Convention on Human Rights (EConvHR) contribution and its application by the European Court of Human Rights (ECHR) on the establishment of such trust.

³ *Communication from the Commission to the Council and the European Parliament on Mutual Recognition of Final Decisions in criminal matters*, COM(2000) 495 Final, p. 4, where we read: “Mutual trust is an important element, not only trust in the adequacy in one’s partners rules, but also trust that these rules are correctly applied”.

⁴ PITO, Emanuelle, «Mutual trust and enlargement », *La confiance mutuelle dans l’espace pénal européen*, Editions de l’Université de Bruxelles, 2005, p. 52.

⁵ The mutual recognition instruments already in force are: the European Arrest Warrant (Framework Decision 13/06/2002), the Orders Freezing Property or Evidence (Framework Decision 23/07/2003) and the Framework Decision 08/05/2003, on the application of the principle of mutual recognition to financial penalties. Negotiated but not yet in force are the Proposals for a Framework Decision on a European Evidence Warrant, on procedural safeguards and on taking account of convictions in the course of new criminal proceedings.

⁶ Program of measures to implement the principle of mutual recognition of decisions in criminal matters 2001/C 12/02

⁷ The Council of Europe counts 47 Member States, while the European Union counts 27.

I. The impact on mutual trust among Member States of the European Union of the Council of Europe framework on judicial cooperation in criminal matters .

The work within the Council of Europe regarding judicial cooperation in criminal matters contributed to the establishment of mutual trust between EU Member States. Such contribution is found not only in the Council's instruments for mutual recognition, but also in the general conventions that regulated judicial cooperation in criminal matters in the European continent. Therefore we will examine how both the general and the specific legal instruments adopted within the Council influenced the development of mutual trust within the European Union.

A. The influence on mutual trust of the general framework of judicial cooperation in criminal matters within the Council of Europe.

The Council of Europe is the first institution to develop judicial cooperation in criminal matters at a European level. The Council's conventions on extradition⁸ and on mutual legal assistance⁹ as well as their additional protocols¹⁰ are considered to have set the foundations for a European Criminal Area. Both have been ratified by all the Member States of the European Union. These first attempts towards organising a common set of practices and their limitations took place during Cold War, in an atmosphere of mistrust and with a very narrow perception of state sovereignty and criminal law.

These conventions, apart from offering to all Member-States a common ground to cooperate, they also gave them the opportunity to get to know and understand, to a certain extent, foreign legal systems, foreign legal practices and traditions. However, they demonstrated the limits of this type of intergovernmental action. Lengthy procedures, the necessity for contacts between authorities to be indirect through diplomatic channels and the constant concern of safeguarding internal criminal law and own jurisdiction are the

⁸ European Convention on Extradition, 13 December 1957

⁹ European Convention on Mutual Legal Assistance, 20 April 1959

¹⁰ Additional Protocol to the European Convention on Extradition, 15 October 1975, Second Additional Protocol to the European Convention on Extradition, 17 March 1978, Additional Protocol to the European Convention on Mutual Legal Assistance, 17 March 1978, Second Additional Protocol to the European Convention on Mutual Legal Assistance, 8 November 2001.

main problems encountered while applying the above instruments. Nevertheless, all the future efforts in this field were based on and inspired by them.

Indeed the European Union's conventions regulating the same subjects¹¹ were adopted with a view to supplement or facilitate cooperation already based on these instruments¹². The purpose of the European Union was to achieve a closer cooperation between its Member States by covering new circumstances, eliminating restrictive conditions and enforcing sacrifices of state sovereignty. Despite the European Union's ambitions, these conventions were ratified by a few Member States and have never entered into force. However, the mere fact that the European Union based its efforts on the work already done within the Council demonstrates the establishment of a complementarity relationship between the two European institutions that is visible even nowadays.

Furthermore, the abolition of the double criminality rule for a list of offences in the instruments of mutual recognition took place thanks to the work in the field of approximation of criminal legislations, which was undertaken by the Council of Europe. Conventions on terrorism, human trafficking, sexual abuse of children, child pornography, corruption, cybercrime, unlawful seizure of aircraft, hostage-taking, illicit trafficking in nuclear material or money laundering have been adopted within the framework of the Council¹³ by most of the EU Member States. The extent of this approximation has determined the drafting of the list of criminal categories for which double criminality is abolished and has contributed to the development of mutual trust, which is largely dependant on approximation or harmonisation of criminal legislations¹⁴. The entry of a convention into force not only approximates the legal orders that will use the same instrument, but also has consequences that are visible in other aspects of internal law which have to adapt to the European norm.

¹¹ The Convention on simplified extradition procedure between the Member States of the European Union of 10 march 1995, the Convention relating to extradition between the Member States of the European Union of 27 September 1996 as well as the Convention on Mutual Legal Assistance in Criminal Matters of 29 may 2000

¹² See the Preamble of each of these conventions.

¹³ The European Convention on the suppression of terrorism, of 27 January 1977 and the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, of 8 November 1990 have been ratified by all European Union Member States. The Criminal Law Convention on Corruption of 27 January 1999 has been ratified by 22 European Union Member States, the Convention on Cybercrime, of 23 November 2001¹⁹⁹⁹ has been ratified by 15 European Union Member States, the Council of Europe Convention on the Prevention of Terrorism, of 16 may 2005 by 5 European Union Member States, the Council of Europe Convention on action against trafficking in human beings, of 16 may 2005 by 10 European Union Member States and the Council of Europe Convention on the protection of children against sexual exploitation and sexual abuse, of 25 October 2007 has not been ratified by any European Union Member States so far.

¹⁴ The link between approximation and mutual confidence appears in the *Green Paper from the Commission regarding Procedural Safeguards for suspects and defendants in criminal proceedings throughout the European Union* COM (2003) 75 Final, p. 4 and 9 as well as in the *Communication from the Commission to the Council and the European Parliament on Mutual recognition of final decisions in criminal matters* COM (2000) 495 Final, §11.

B. The influence on mutual trust of the mutual recognition instruments adopted within the Council of Europe

The idea of mutual recognition was introduced to the Council of Europe in the 1960's through the context of effectiveness of foreign decisions¹⁵. Among the conventions signed¹⁶, the most important one was the European Convention on the international validity of criminal judgements, of 28 May 1970.

Inspired by the Nordic legislation and by the Benelux Treaty of 26 September 1968¹⁷, the Convention on the international validity of criminal judgements is the first effort towards a generalised system of mutual recognition of criminal decisions. Attributing international validity on criminal judgements means organising their mutual recognition among Member States. It contains provisions regarding both the enforcement of criminal judgements¹⁸ and the principle of *res judicata*¹⁹ in its two forms, negative (*non bis in idem*)²⁰ and positive²¹. Moreover the convention aims at regulating the transfer of sentenced individuals, but the proposed procedure was lengthy and the transfer slow.

The outcome of these approaches was not very satisfactory. Ratifications were still limited because, besides being complex and difficult to apply, these conventions were affecting directly state sovereignty and implied a certain degree of approximation of criminal legislations, of criminal integration and of mutual trust in legal systems, since it is difficult

¹⁵ The European Convention on the punishment of road traffic offences and the European Convention on the supervision of conditionally sentenced or conditionally released offenders, were the first conventions in this field to be signed on 30 November 1964.

¹⁶ The European Convention on the transfer of proceedings in criminal matters, of 15 May 1972, the European Convention on the international effects of deprivation of the right to drive a motor vehicle, of 3 June 1976 or the Convention on the transfer of sentenced persons, of 21 March 1983, which completed the 1970 Convention on the international validity of criminal judgements regarding the question of the transfer of sentenced persons. The Convention on Laundering, Search, Seizure and Confiscation of the proceedings from crime, of 8 November 1990 contains provisions on the execution of a foreign decision of confiscation.

¹⁷ Explanatory Report for Convention on the international validity of criminal judgements

¹⁸ Articles 2-52

¹⁹ *Res judicata* or *res iudicata* is the latin term for a matter already judged and may refer to two things: in both civil law and common law legal systems, a case in which there has been a final judgement by a court of competent jurisdiction and is no longer subject to appeal; the term is also used to refer to the legal doctrine meant to bar or preclude continuous litigation involving the same cause of action between the same parties, which is different between the two legal systems.

²⁰ Articles 53-55

²¹ Articles 56-57

to recognise full effectiveness to judgements coming from a legal order without having any knowledge of how the foreign system works.

Even though the Council became conscious of the role that mutual confidence plays in the context of recognising foreign decisions and declared, for the first time, the existence of such confidence among its Member States²², the differences between legal systems in Europe as well as the lack of harmonisation and approximation, encouraged mutual mistrust rather than mutual trust among the Member States of the Council of Europe. Nevertheless, the impact of these conventions must not be overlooked. They triggered reflection regarding these matters, and became a valuable source for future efforts towards the same objectives which were undertaken by the European Community²³, whose most ambitious project in the field of criminal law was the Convention of Brussels of 13 November 1991 between the Member States of the European Community on the enforcement of foreign criminal sentences. However the result was the same; not enough ratifications, even though the procedure this time was less complex, less mandatory and with fewer breaches regarding criminal sovereignty than the Council's instrument²⁴.

Those first approaches towards a system of mutual recognition of foreign decisions in Europe failed because of the lack of mutual trust among European States regarding each other's legal system. Nevertheless a valuable experience was acquired; it became clear that, highlighting within the European Union the work already accomplished inside the Council of Europe facilitated negotiations on the legal aspects and helped promote confidence amongst Member States which were given a second chance to re-discuss the same topics in a more confined circle. If the first negotiation in the Council of Europe was characterised by mistrust since new elements were being brought up for the first time between a large number of Member States, a second negotiation between fewer partners, with more common objectives and interests, has more chances to reach a consensus. These conclusions were to be put into practice in the following years and together with important evolutions that took place within the European Union, such as the adoption of the principle of mutual recognition in the internal market²⁵, the entry into force of the Amsterdam Treaty, as well as

²² In the Preamble of the European Convention on the transfer of proceedings in criminal matters, of 15 May 1972, we read: "Considering it useful to this end to ensure, in a spirit of mutual confidence, the organisation of criminal proceedings on the international level, in particular, by avoiding the disadvantages resulting from conflicts of competence", while in the Explanatory Report, §39, we read: "The recognition of a foreign judgment presupposes a certain degree of confidence in foreign justice. Such confidence exists among the member States of the Council of Europe but is, at the present time, hardly equally apparent in wider international relations between States".

²³ On 1987, two conventions regarding the recognition of effectiveness to foreign decisions were signed within the European Community: the Convention on double jeopardy and the Agreement on the application among European Community Member States of the Council of Europe's Convention on the transfer of sentenced persons

²⁴ A. Weyembergh, « La reconnaissance des décisions judiciaires pénales entre les Etats membres de l'Union européenne : mise en perspective », *La reconnaissance mutuelle des décisions judiciaire pénales dans l'Union européenne*, Editions de l'Université de Bruxelles, 2001, p. 33 and seq.

²⁵ According to the principle of mutual recognition as it is applied in the internal market, a product lawfully marketed in one Member State should be allowed to be marketed in any other Member

the elimination of border controls, opened the path towards a closer cooperation and towards mutual recognition in criminal matters.

The adoption of the principle of mutual recognition and the instruments in force marked the divergence from the law of the Council of Europe since these instruments were adopted in order not to supplement or facilitate the existing framework of judicial cooperation within the Council of Europe, but in order to replace the Council's instruments among the Member States of the European Union²⁶.

II. The role of the European Convention on Human Rights on the establishment of mutual trust among EU Member-States.

The work undertaken in the field of judicial cooperation in criminal matters has contributed to the enhancement of mutual trust by means of horizontal relationships between Member States. On the contrary, in the field of Human Rights protection, mutual trust is built vertically by means of interpretation and application of decisions arising from a judicial body that controls human rights violations²⁷. Within the Council of Europe, this kind of control is assigned to the ECHR.

The mission of such an institution which has the power to condemn Member States on the grounds of Human Rights violations is the best evidence of the existence of a certain degree of mutual trust among these States that have accepted this kind of intervention on their legal orders²⁸. This is particularly important with respect to the possibility of exercising an interstate recourse, which can be considered as a very serious interference in another State's affairs.

Furthermore, the Court's rich case law has played a vital role in forging this trust among Member States. This case law has formed the concept of the "European public order" which is structured in the affirmation by the ECHR of values that are common to all European people. Such values as the ideals and values of a democratic society, human dignity, the rule of law, as well as non discrimination, can be found in the Convention's Preamble. In this way the Convention becomes an instrument at the service of this public order for the protection

State even when it does not fully comply with the technical rules of the Member State of destination. The later may refuse the marketing of a product in its current form only where it can show that this is strictly necessary for the protection of public safety, health or environment. The principle was drawn by the decision of the ECJ, of 20 February 1979, on the REWE case known as "Cassis de Dijon".

²⁶ See for ex. Art. 31 of the Council Framework Decision of 13 June 2002, on the European Arrest Warrant and the surrender procedures between Member States (2002/584/JHA)

²⁷ See, WEYEMBERGH, Anne and KHABIRPOUR Sarah, "Quelle confiance mutuelle ailleurs?", in *La confiance mutuelle dans l'espace pénal européen*, Editions de l'Université de Bruxelles, 2005, p. 249.

²⁸ All the Member States of the European Union have ratified the European Convention on Human Rights and have accepted the individual recourse to the European Court of Human Rights.

of individuals with the mission to ensure the observance of the engagements undertaken by the High Contracting Parties²⁹.

Moreover, the Court's case law has contributed to the establishment of common minimum standards regarding Human Rights protection in the field of judicial cooperation in criminal matters. Decisions based on articles 5 and 6 of the Convention have created proximity of the concepts of legality and due process among all Member States. National judges are becoming accustomed to the Court's precepts and national case law and practices are constantly adapting to them.

Mutual recognition instruments in force contain explicit references to the Convention or to its *acquis* demonstrating in this manner their respect for Human Rights³⁰. Nevertheless, the influence in the field of Human Rights Protection is much deeper as membership in the Council of Europe acts as a sort of prior requirement to membership in the European Union. Actually, this was the procedure that was followed regarding all candidate States. The political criteria required to enter the European Union coincide with the values defended by the ECHR and the Convention³¹, which have also inspired the Charter of Fundamental Rights of the European Union, signed on 7 December 2000 in Nice. The entire control system established by the Convention has been implemented in the legal order of the European Union through article 6§2 TEU³². The presumption that, mutual trust among Member States of the European Union exists because of their parallel membership on the Council, which is an institution that promotes the respect and the protection of Human Rights, is also admitted by the Court's case law, which is favourable into recognizing the possibility of fewer controls regarding the respect and the protection of Human Rights in the context of cooperation among States signatories to the EConvHR³³. However, this

²⁹ *Loizidou v. Turkey*, n° 15318/89, ECHR, 23 march 1995, § 93.

³⁰ See Council Framework Decision of 13 June 2002, on the European Arrest Warrant and the surrender procedures between Member States (2002/584/JHA), Paragraphs 10, 12, 13, 14 of the Preamble and Art 1§3, Council Framework Decision of 22 July 2003, on the execution in the European Union of orders freezing property or evidence (2003/577/JHA),), Paragraph 6 of the Preamble and Art 1, Council Framework Decision of 24 February 2005, on the application of the principle of mutual recognition to financial penalties (2005/214/JHA), Paragraphs 5, 6 of the Preamble and Art. 3.

³¹ In the Conclusions of the European Council of Copenhagen, on 21-22 June 1993, we read among others that: "Membership requires that the candidate country has achieved stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities"

³² "The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member-States, as general principles of Community law".

³³ *L. Iruretagoyena c. France*, n° 32829/96, Commiss. Europ. DH, 12 January 1998, *Lindberg v. Sweden*, n° 48198/99, ECHR, 15 January 2004. In these cases the quality of Contracting State justifies the presumption that this state respects the human rights and observes the principles of the Convention. In the first of these cases, the Court explicitly refers to the quality of Spain as a European Union Member State that respects the rule of law and whose judicial authority ensures the respect of human rights and fundamental liberties. On the contrary such presumption does not exist in case of cooperation with a third state not signatory to the EConvHR. See for ex., *Pellegrini v. Italy*, n° 30882/96, ECHR 20 July 2001, *Drozd et Janousek c. France et Espagne*,

presumption is not irrefutable³⁴ and certainly cannot be sufficient in the context of mutual recognition.

The particularity of judicial cooperation in the framework of mutual recognition is that with the suppression of the dual criminality and the Human Rights Clause there is a danger for violations of Human Rights of the individuals implicated in the relative proceedings. Therefore mutual confidence in that all Member States respect their Human Rights obligations must reflect to reality and should not be based on fiction. In the field of Human

larger within the European Union. This discrepancy can be explained by the difference regarding the institutional structure and the political objectives of the European Union. The