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Fundamental Rights

The Promotion of Fundamental Rights by the Union as a contribution to the European Legal Space (I): Mutual Recognition and Mutual Trust in the Establishment of the Area of Freedom, Security and Justice.

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The Promotion of Fundamental Rights by the Union as a Contribution to the European Legal Space (I): Mutual Recognition and Mutual Trust in the Establishment of the Area of Freedom, Security and Justice.

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This contribution to the 'Reflexive Governance in the Public Interest' (REFGOV) project seeks to clarify its potential contribution to the establishment of an area of freedom, security and justice between the Member States of the European Union. It explains why a form of permanent evaluation of the situation of fundamental rights in the Member States of the Union may be seen as a necessary component of this project of European integration, and how it might be conceived. It takes as a departure point the position of the national authorities upon whom an obligation of mutual cooperation is imposed. These authorities, in particular national courts as crucial actors in judicial cooperation in criminal matters based on mutual recognition, have to balance against one another two conceptions of relations between mutual trust and mutual recognition (1.). They are under a constitutional obligation to guarantee respect for fundamental rights, even at the cost of refusing to execute judgments given in another State.¹ However, the hesitations emerging from the European case-law make this a difficult task. It is the task of the Court of Justice of the European Communities to define how fundamental rights should be identified, where fundamental rights are relied upon in order to justify an exception to the obligations imposed on the Member States under Union law. However the jurisprudence of the European Court of Justice betrays a number of uncertainties, which render the task of the national courts particularly difficult in certain cases. Moreover, the European Court of Human Rights itself is only moving very cautiously towards incorporating in its case-law the concept of mutual trust established between States that have entered into certain cooperation agreements (2). These doubts expressed in the case-law define the framework within which the national courts are to confront the dilemma between a faithful implementation of Union law on the one hand, ensuring full respect of fundamental rights on the other hand, where these obligations appear to conflict with one another.

This study examines how this dilemma can be overcome without this resulting in a reduction in the level of protection of the individual's fundamental rights (3.). First, progress must be made in the approximation of the legal systems of the Member States and in the establishment of reliable evaluation mechanisms if mutual recognition is to be provided with the solid basis that it needs; at the same time, the principle of joint and several responsibility of the Member States of the European Union for respecting fundamental rights as they are enshrined in particular in the European Convention on Human Rights should come to replace a strictly individual responsibility of each State. These two ways in which the difficulties may be resolved which the national courts may experience in adequately fulfilling its role – that of ensuring respect for fundamental rights while loyally cooperating in the mechanism of mutual recognition – are complementary, however the sequencing is important : it would be unjustified – and could even result in a lowering of the level of protection of fundamental rights in the Union – to 'disconnect' the obligations of the Member States under their international commitments in the field of human rights, particularly under the European

¹ Article 6(2) EU.

Convention on Human Rights, before ensuring an adequate degree of approximation of national laws which ensure a protection of the fundamental rights which the principle of mutual recognition, the cornerstone of the establishment of an area of freedom, security and justice, could otherwise threaten.

1. The principle of mutual recognition and presumption of compatibility

a) *Mutual trust as a precondition of mutual recognition*

In the architecture of the area of freedom, security and justice, the concept of mutual trust fulfils two rhetorical functions that should be distinguished. Mutual trust sometimes appears – first of all – to be a *precondition* for establishing the area of freedom, security and justice on the principle of mutual recognition. In this perspective, mutual trust is not to be taken for granted: it has to be created. The desire to strengthen mutual trust (in order that the principle of mutual recognition can be founded thereon) may therefore justify an approximation and even harmonization of legislations as a measure accompanying mutual recognition. In this sense, mutual trust is a goal to be achieved by the Union legislature, which must create the conditions that favour the harmonious functioning of a system based on the mutual recognition of judicial decisions.

The work of harmonizing the procedural guarantees given to suspects in criminal proceedings in the Union adequately illustrates this first function of mutual trust. In February 2003, the Commission presented its *Green Paper on Procedural Safeguards for Suspects and Defendants in Criminal Proceedings throughout the European Union*². Article 31, a), EU, provides that common action on judicial cooperation in criminal matters shall include “facilitating and accelerating cooperation between competent ministries and judicial or equivalent authorities of the Member States in relation to proceedings and the enforcement of decisions”. Under Title I.7, “Enhancing mutual trust”, we read:

Mutual recognition rests on mutual trust and confidence between the Member States' legal systems. In order to ensure mutual trust, it is desirable for the Member States to confirm a standard set of procedural safeguards for suspects and defendants. The desired end result of this initiative is therefore to highlight the degree of harmonisation that will enhance mutual trust in practice. The Member States of the EU are all signatories of the principal treaty setting these standards, the European Convention on Human Rights, as are all the acceding states and candidate countries, so the mechanism for achieving mutual trust is already in place. The question is now one of developing practical tools for enhancing the visibility and efficiency of the operation of those standards at EU level. The purpose of this Green Paper is also to ensure that rights are not "theoretical or illusory" in the EU, but rather "practical and effective". Differences in the way human rights are translated into practice in national procedural rules do not necessarily disclose violations of the ECHR. However, divergent practices run the risk of hindering mutual trust and confidence which is the basis of mutual recognition. This observation justifies the EU taking action pursuant to Article 31(c) of the TEU. This should not necessarily take the form of intrusive action obliging Member States substantially to amend their codes of criminal procedure but rather as "European best practice" aimed at facilitating and rendering more efficient and visible the practical operation of these rights. It goes without saying that the outcome will in no case reduce the level of protection currently offered in the Member States.

² COM(2003)75 final of 19.2.2003.

In the Explanatory Memorandum of its proposal for a framework decision on certain procedural rights in criminal proceedings throughout the European Union³, the Commission replies in the following terms to the question of knowing whether the proposal respects the subsidiarity principle (par. 19):

The Commission considers first that in this area only action at the EU level can be effective in ensuring *common* standards. To date, the Member States have complied on a national basis with their fair trial obligations, deriving principally from the ECHR, and this has led to discrepancies in the levels of safeguards in operation in the different Member States. It has also led to speculation about standards in other Member States and on occasion, there have been accusations of deficiencies in the criminal justice system of one Member State in the press and media of another. This would be remedied by the adoption of common minimum standards. By definition, the standards can only be *common* if they are set by the Member States acting in concert, so it is not possible to achieve common standards and rely entirely on action at the national level.

In those texts, the assertion of the need to establish (“strengthen”⁴) mutual trust justifies the intervention of the Union legislature not only in order to ensure that minimum thresholds of protection of the individual’s rights are respected throughout the European Union, but also to make sure that there are no excessive differences between Union Member States in the way in which the requirements under Articles 5 and 6 of the European Convention on Human Rights are transposed. The fact that the instrument proposed is not entirely faithful to the declared intention⁵ should not prevent us from discerning the two principles on which the proposal is based: the European Convention on Human Rights, to which all the Member States are parties, certainly constitutes a common minimum threshold of protection, yet its demands are not forceful enough to create the necessary cement between Union Member States to justify mutual recognition; mutual trust between Member States could easily be breached, not only when a Member State violates this minimum standard which should be respected by all, but also when there are excessive differences between Member States. The need to strengthen mutual trust therefore justifies an approximation of the criminal law systems of the Member States on the basis of Article 31 EU.⁶ As Anne Weyembergh aptly

³ COM(2004)328 final of 28.4.2004.

⁴ See the Preamble to the proposal for a framework decision, 5th and 7th recitals: “All Member States are parties to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). However experience has shown that, despite the need for such trust, there is not always sufficient trust in the criminal justice systems of other Member States and this notwithstanding the fact that they are all signatories to the ECHR. The rights proposed will operate so as to strengthen mutual trust and thereby enhance the operation of mutual recognition. (...)The principle of mutual recognition is based on a high level of trust between Member States. In order to enhance this trust, this Framework Decision provides certain safeguards to protect fundamental rights. These safeguards reflect the traditions of the Member States in following the provisions of the ECHR.”

⁵ In the Commission’s proposal, the Member States to which the framework decision is addressed may offer more favourable conditions to suspects; Article 17 (non-regression clause) provides, “Nothing in this Framework Decision shall be construed as limiting or derogating from any of the rights and procedural safeguards that may be ensured under the laws of any Member State and which provide a higher level of protection”. This obviously does not constitute a safeguard against potentially significant divergences between the levels of protection offered in different Member States.

⁶ In her Opinion delivered in the aforementioned *Pupino* case, Advocate General J. Kokott justified the reliance on this legal basis for the adoption of Council Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings in the following terms: “...common standards for the protection of victims when giving evidence in criminal proceedings may also encourage cooperation between judicial authorities, since they guarantee that that evidence is usable in all the Member States” (recital 51). See also the Communication from the Commission to the Council and the European Parliament on the mutual recognition of judicial decisions in criminal matters and the strengthening of mutual trust between Member States (COM(2005)195 final of 19.5.2005), in particular par. 3.1 on reinforcing mutual trust by legislative measures, where it says, “The first endeavours to apply the MR principle, in particular with the European arrest warrant, revealed a series of difficulties which could to some extent be resolved if the Union were to adopt harmonisation legislation [aimed at] ensuring that mutually recognised judgments meet high standards in terms of securing personal rights”.

pointed out⁷, mutual recognition is not a substitute for the approximation of legislations, but rather a goal to be achieved, to which the approximation of legislations constitutes the necessary complement⁸.

b) Mutual trust as presupposed by mutual recognition

Naturally there is an inherent risk in this first conception of mutual trust: the approximation of legislations seems to be a precondition for mutual recognition, which would have to be dependent on it. In order to overcome this risk, the Court of Justice puts forward another function of mutual trust, which is labelled as *axiomatic*. In this perspective, mutual trust is decreed: it amounts to a more or less absolute presumption, whereby cooperation – more particularly in the area of criminal justice – with any Member State of the Union that upholds the same values and is bound by the same international obligations, in particular under the European Convention on Human Rights, is justified and should only be refused in highly exceptional circumstances.

In the case that led to the *Gözütok and Brügge* judgment delivered by the Court of Justice of the European Communities on 11 February 2003⁹, two national courts in Germany and Belgium respectively asked the Court whether the *ne bis in idem* principle enshrined in Article 54 of the Convention implementing the Schengen Agreement of 14 June 1985 on the gradual abolition of checks at the common borders, of 19 June 1990 (Schengen Convention)¹⁰, also applied to procedures whereby further prosecution is barred once the accused has satisfied certain conditions. Article 54 of the CISA provides that a person whose trial has been finally disposed of in one Contracting Party “may not be prosecuted in another Contracting Party for the same 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 of the sentencing Contracting Party”. In this case, Mr. Gözütok, a Turkish national residing in the Netherlands and running a business in Germany, and Mr. Brügge, a German national, had respectively agreed to a settlement proposed by the Dutch Public Prosecutor and to a settlement proposed by the German Public Prosecutor. They had nevertheless been prosecuted for the same acts before a German court (Gözütok) and a Belgian court (Brügge), which referred questions for a preliminary ruling. Having regard to the fact that the procedure for discontinuing criminal proceedings through a settlement proposed by the Public Prosecutor involves “an authority required to play a part in the administration of criminal justice in the national legal system concerned” (recital 28), and penalizes the unlawful conduct which was allegedly committed by the accused, who is obliged to perform certain obligations such as, for example, the payment of a fine (recital 29), the Court answers yes to the question concerning the interpretation of Article 54 of the Convention Implementing the Schengen Agreement that was referred to it.

In the *Gözütok and Brügge* judgment, the Court inferred an obligation of mutual recognition of decisions definitively discontinuing prosecutions from the right not to be judged or

⁷ A. Weyembergh, *L'harmonisation des législations: condition de l'espace pénal européen et révélateur de ses tensions*, Institute of European Studies of the ULB, 2004, p. 339 : “...approximation is the very precondition of judicial cooperation in criminal matters and in particular of mutual recognition, despite the current tendency of calling this traditional function into question, given the recent development of the cooperation mechanisms which are designed to overcome the divergences between the domestic legal systems of the Member States. This development actually assigns a growing role to mutual trust. The realization and legitimacy of this trust, however, depends to a large extent on the approximation”.

⁸ For a recent example of this dialectic, see Council Framework Decision 2005/212/JHA of 24 February 2005 on confiscation of crime-related proceeds, instrumentalities and property, OJ L 68 of 15.3.2005, p. 49, where the Preamble (10th recital) says that it is “linked to a Danish draft Framework Decision on the mutual recognition within the European Union of decisions concerning the confiscation of proceeds from crime and asset-sharing, which is being submitted at the same time”.

⁹ Joined Cases C-197/01 and C-385/01, *Gözütok and Brügge*, judgment of 11 February 2003.

¹⁰ OJ L 239, 22.9.2000, p. 19.

punished twice for the same offence. This is not impeded by the absence of harmonization of the criminal law systems of the Member States with respect to procedures for the discontinuation of criminal proceedings. The mutual trust which such a harmonization would serve to strengthen is not a *precondition* of mutual recognition: the Court considers that the application of Article 54 of the Convention Implementing the Schengen Agreement (CISA) is not conditional upon the harmonization or approximation of the criminal law systems of the Member States (recital 32). The Court infers from this (recital 33 of the judgment):

In those circumstances, whether the *ne bis in idem* principle enshrined in Article 54 of the CISA is applied to procedures whereby further prosecution is barred (regardless of whether a court is involved) or to judicial decisions, there is a necessary implication that the Member States have mutual trust in their criminal justice systems and that each of them recognises the criminal law in force in the other Member States even when the outcome would be different if its own national law were applied.

The Court deduces this broad interpretation of the wording of Article 54 of the CISA from the general framework in which this provision is incorporated, namely the enhancement of European integration through the creation and development within the Union of an area of freedom, security and justice (recitals 35 to 37). The Court points out that it would be paradoxical to reserve the obligation of mutual recognition of decisions definitively discontinuing prosecution solely for decisions taking the form of judgments – or judicial decisions – since such a restrictive interpretation would in fact mean that defendants who are guilty of more serious offences which in any case require the intervention of a court would enjoy a greater freedom of movement than is granted to perpetrators of minor offences, which respect to whom only the Public Prosecutor can decide to offer a settlement.

c) Mutual recognition and the exception of fundamental rights

Nevertheless, are we witnessing the superimposition of two antinomian notions of the function which the concept of “mutual trust” is called upon to fulfil in the area of freedom, security and justice of which mutual recognition is being presented since the European Council of Tampere of 15-16 October 1999 as the “cornerstone”¹¹? If the expression “superimposition” is appropriate, it is in any case an unmistakable sign of an inability to choose whether to give or to refuse trust. Rather the coexistence of mutual trust as a precondition of mutual recognition (and which should therefore be strengthened) and mutual trust as a necessary presupposition (and which would therefore be decreed) is a reflection of the fact that, although the authorities of each Member State have to presume that the other Member States observe the conditions – respect for fundamental rights – that are necessary for cooperation, this presumption cannot be absolute. Being neither entirely a condition to be met and to be “strengthened” nor simply a presupposition to be accepted without further scrutiny, mutual trust ultimately appears to be a normative principle, or a principle of interpretation of the obligations of Member States in the implementation of the instruments for the area of freedom, security and justice, playing an equivalent role to that of the principle of loyal cooperation: it does not impose any new obligations, but it is supposed to offer an indication of the spirit that should inspire the cooperation between the national authorities.

The dilemma facing the national court in the matter of mutual recognition is no less real. This dilemma is all the more appreciable when it comes to the enforcement of pre-trial orders where it is a matter of the court *anticipating* the risk that the judicial authority of the State that has issued a European arrest warrant or that has issued an order to freeze property or evidence in the context of criminal proceedings might fail to respect fundamental rights after

¹¹ See also the programme of measures to implement the principle of mutual recognition of judicial decisions in criminal matters (adopted by the Council on 30 November 2000), OJ C 12 of 15.1.2001, p. 14.

its decisions have been executed¹². Should confidence be had in the judicial authority of the issuing Member State in accordance with the obligation of mutual recognition? Which investigations need to be carried out before this confidence can be given? What presumption of compatibility of the procedure followed in the issuing State with fundamental rights should be allowed from the moment this State adheres to the values on which the European Union is founded? Respect for fundamental rights defines the limit to the obligation of mutual recognition. This, which already ensues from Article 6 §1 EU, is confirmed by the various instruments that are based on the mechanism of mutual recognition of judicial decisions in criminal matters¹³. However, this holds for the national court not only a right, namely to refuse mutual recognition where this would result in an infringement of fundamental rights, but also an obligation under international law, namely to comply with the State's international obligations in the area of human rights¹⁴. As was already pointed out, each Member State of the European Union may incur its individual responsibility under the European Convention on Human Rights if it establishes a relationship of cooperation with other Member States that makes it a party to infringements of fundamental rights committed in those other States¹⁵. Although the case-law of the European Court of Human Rights has not yet finished clarifying the conditions in which this responsibility is incurred, it is in any case clear that a Member

¹² See in this sense G. Stessens, "The Principle of Mutual Confidence between Judicial Authorities in the Area of Freedom, Justice and Security", in G. de Kerchove and A. Weyembergh (eds.), *L'espace pénal européen: enjeux et perspectives*, Institute of European Studies, ULB, pp. 93-103, here p. 94: "The recognition and enforcement of [pre-trial orders] requires an even greater degree of mutual confidence between judicial authorities than the mutual recognition and enforcement of final judgments as these pre-trial orders are by definition *ex parte* measures, issued in a proceedings in which the affected party did not have the opportunity to raise its arguments".

¹³ See in the Preamble to the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, OJ L 190 of 18.7.2002, p. 1, 12th recital, and Article 1, §3 ("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"); Article 1, second sentence, of Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence, OJ L 196 of 2.8.2003, p. 45 (this framework decision "shall not have the effect of amending the obligation to respect the fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty"), as well as, with regard to the *ne bis in idem* principle, the observance of which may constitute a ground for non-recognition or non-execution, Article 7 §1, c); 5th and 6th recitals of Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties (OJ L 76 of 22.3.2005, p. 16), as well as Articles 3 and 20 §3; 3rd recital and Article 1, §2, of the Council Framework Decision on the application of the principle of mutual recognition to confiscation orders (COPEN 135, doc. 14622/04, 17 December 2004; not yet published in the OJ).

¹⁴ The reasoning underlying the judgment given by the Belgian Court of Cassation on 8 December 2004 would not be acceptable on this point (see Cass. b., 8 December 2004, *J.T.*, 2005, p. 133, and comments of J. Castiaux and A. Weyembergh, "A propos de l'arrêt du 8 décembre 2004 de la Cour de cassation"). In this judgment, the Court of Cassation appears to construe that the withdrawal of the European Union Member States from the European Convention on Extradition follows from the transposition by those States of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, without verifying whether the forms have been adhered to as laid down by the European Convention on Extradition with regard to what constitutes more precisely a form of "separation" by States Parties that have chosen to arrange their mutual relations on the basis of a uniform legislation or on the basis of parallel domestic laws providing for the execution of arrest warrants issued by the other parties concerned. These forms are laid down in Article 28 §3 of the European Convention on Extradition, a provision to which we will return later on. No implicit withdrawal from the European Convention on Extradition of 1957 by the European Union Member States in their mutual relations can be inferred from the adoption of the Framework Decision of 13 June 2002 on the basis of Article 31 of the Treaty on European Union or from the transposition of this Framework Decision in the States concerned. See on this matter also the comments formulated by N. Angelet and A. Weerts on another judgment given by the Belgian Court of Cassation in a similar context, and which also raises the question of the relationship between the Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States and the earlier treaties concluded between European Union Member States (in this case, the Benelux Extradition Treaty of 27 June 1962, approved in Belgium by the Ratification Act of 1 June 1964, Mon. b., 24 October 1967): Cass. b. (vacation chamber), 24 August 2004, comments by N. Angelet and A. Weerts, "Les rapports entre instruments internationaux successifs portant sur une même matière", *J.T.*, 2005, p. 322.

¹⁵ For an attempt to systematize this case-law, see O. De Schutter, "L'espace de liberté, de sécurité et de justice et la responsabilité individuelle des Etats au regard de la Convention européenne des droits de l'homme", in G. de Kerchove and A. Weyembergh (eds.), *L'espace pénal européen: enjeux et perspectives*, op. cit., pp. 223-248.

State of the European Union cannot evade this responsibility under the pretext of the mutual trust which the Union Member States put in each other.

2. Difficulties in applying the principle

If the principles are simple – mutual recognition, save for the respect due to fundamental rights as recognized by Article 6 § 2 of the Treaty on European Union¹⁶ –, their application presents the national courts with theoretical and practical difficulties. The precise extent of the authorization given to Member States to refuse to cooperate remains a subject of debate. While acknowledging that it is legitimate for Member States to add to the grounds for refusal to execute a European arrest warrant the ground based on *ne bis in idem* before the International Criminal Court which the Framework Decision of 13 June 2002 does not explicitly provide for, as well as to expressly introduce grounds of refusal for violation of fundamental rights, the Commission points out, “However legitimate they may be (...), these grounds should be invoked only in exceptional circumstances within the Union”¹⁷. In principle, infringement of a safeguard contained in the national Constitution of each State cannot justify a refusal to execute a European arrest warrant¹⁸, unless this safeguard corresponds to a fundamental right recognized within the Union, that is to say, enshrined in the European Convention on Human Rights, or may be considered as resulting from the traditions common to the Member States. On the other hand, however, it is not necessary for such a fundamental right to be recognized by all the Member States for it to be deemed fit to figure among the general principles of Community law. During the proceedings of the Convention on the Future of Europe, the proposal to replace the present wording of Article 6 §2 of the Treaty on European Union, namely “constitutional traditions common to the Member States”, by the more restrictive formulation “constitutional traditions common to *all* Member States”, was turned down, and Article I-9 §3 of the Treaty establishing a Constitution for Europe maintained the present wording, with the resulting flexibility as well as difficulty of interpretation.

Equally significant is the *Omega Spielhallen- und Automatenaufstellungs GmbH* judgment of 14 October 2004¹⁹. In this case, the Court of Justice was faced with a situation where the German authorities claimed to justify a restriction on the freedom to provide services by the respect due to their conception of the requirements for protecting human dignity. While taking care to point out that “the concept of ‘public policy’ in the Community context, particularly as justification for a derogation from the fundamental principle of the freedom to provide services, must be interpreted strictly, so that its scope cannot be determined unilaterally by each Member State without any control by the Community institutions” (recital 30), the Court adds, in accordance with its settled case-law, that “the specific circumstances which may justify recourse to the concept of public policy may vary from one country to another and from one era to another. The competent national authorities must therefore be allowed a margin of discretion within the limits imposed by the Treaty” (recital 31). In principle, the respect for human dignity constitutes an admissible ground for restricting fundamental freedoms recognized by the Treaty of Rome, naturally not because this value is enshrined in

¹⁶ In the wording of this provision, “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”.

¹⁷ 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(2004) of XXX, p. 5.

¹⁸ The transposition by Ireland of the Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States is highly debatable on this point, as the Commission pointed out in the annex to its report based on Article 34 of this instrument (pp. 5-6).

¹⁹ Case C-36/02, *Omega Spielhallen- und Automatenaufstellungs-GmbH*, judgment of 14 October 2004.

German basic law, but because the principle of respect for human dignity is a principle common to the Member States: “The Community legal order undeniably strives to ensure respect for human dignity as a general principle of law. There can therefore be no doubt that the objective of protecting human dignity is compatible with Community law, it being immaterial in that respect that, in Germany, the principle of respect for human dignity has a particular status as an independent fundamental right” (recital 34). However, complete uniformity of approach by all the Member States is not required:

It is not indispensable (...) for the restrictive measure issued by the authorities of a Member State to correspond to a conception shared by all Member States as regards the precise way in which the fundamental right or legitimate interest in question is to be protected. (...) the need for, and proportionality of, the provisions adopted are not excluded merely because one Member State has chosen a system of protection different from that adopted by another State (recitals 37 and 38).

Along the same lines, it should be pointed out that the 6th recital of Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties asserts that this instrument “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”. Certainly, as in the *Omega* case, it is not the constitutional rules as such which, being in force in the executing State, would justify this State refusing to recognize and execute a decision imposing a financial penalty: those constitutional rules can only be relied upon to oppose the recognition and execution of such a decision insofar as they are a translation of fundamental rights figuring among the general principles of Community law; the safeguards in question may be attached to both the European Convention on Human Rights and the constitutional tradition common to the Member States²⁰. Nevertheless, the wording adopted in the Preamble causes some ambiguity, since it suggests that a State can draw arguments from its own domestic rules to refuse to cooperate in the execution of a judicial decision delivered in another Member State, whereas such an obligation of execution is central to the concept of mutual recognition, including there where the legal system of the executing State would have led to a different outcome (such as an acquittal). It is tempting to compare the conception of fundamental rights adopted in the *Omega* judgment or that which appears to underlie the aforementioned recital of the Framework Decision on the application of the principle of mutual recognition to financial penalties – a conception where fundamental rights, from the moment they are recognized as figuring among the general principles of Community law, may nevertheless be defined in various ways in the legal systems of the different Member States, and continue to be invoked against other Member States in the context of judicial cooperation in criminal matters – with the already famous dictum appearing in recital 33 of the *Gözütok and Brügge* judgment, where the Court of Justice links the concept of mutual trust of Member States in each other’s criminal justice systems with the fact that “each of them recognises the criminal law in force in the other Member States even when the outcome would be different if its own national law were applied”.

So the difficulty is theoretical: the limits within which the national judicial authorities of the Member States may rely upon fundamental rights to refuse mutual recognition are not defined all that clearly. But the difficulty is also practical: from both a psychological and political point of view, it may be very difficult for a court in a Member State to express its distrust of the safeguards offered in another Member State. The setting up of objective and impartial mechanisms to evaluate the judicial systems in the different Member States, going

²⁰ Article 20 §3 of Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties specifies, “Each Member State may, where the certificate referred to in Article 4 gives rise to an issue that fundamental rights or fundamental legal principles as enshrined in Article 6 of the Treaty may have been infringed, oppose the recognition and the execution of decisions”.

beyond a mere verification of the correct and timely transposition of the instruments adopted by the Union, should not only make it possible to strengthen mutual trust between the judicial authorities of the different Member States, but also make it easier for the judicial authorities of the executing State to assess the conditions in which justice is administered in the issuing State, which could, where appropriate, justify a refusal to cooperate if those conditions are found to be unsatisfactory. The purpose of this evaluation is, firstly, to prevent the judicial authorities of a particular Member State from being tempted to infer from the fact that there are differences between their own judicial traditions and those of another Member State that there are certain deficiencies in the latter State that form an obstacle to mutual recognition; secondly, the idea is to objectivize the assessment of certain real deficiencies which, in accordance with Article 6 §2 of the Treaty on European Union and the translation thereof by the instruments adopted under Title VI of the said Treaty that are based on the principle of mutual recognition, do indeed justify a refusal of mutual recognition²¹.

3. Two complementary ways to resolve the dilemma

Although they are real, those difficulties can only be temporary. Two ways to resolve the dilemma present themselves, and they are complementary rather than competing. The strengthening of mutual trust by the adoption of instruments aimed at approximating the criminal law systems, notably in the area of criminal procedure (for example in order to offer procedural guarantees to defendants²², to strengthen the principle of the presumption of innocence or conditions governing the admissibility of evidence in criminal proceedings²³), on the one hand, and by measures to stimulate the establishment of a judicial culture common to the criminal justice systems of the Member States and the setting up of mechanisms to evaluate the criminal justice systems on the other should progressively clarify the requirements connected with fundamental rights, failure to respect which may justify a refusal of mutual recognition, and make it easier for the judicial authorities of each Member State to take these requirements into account. This is the first way, which is currently being followed and which the European Commission has announced it intends to elaborate further in the future.

²¹ Since a separate chapter of this paper is devoted to the question of evaluation (see hereunder, 4.), this matter will not be discussed in detail here. It should be noted, however, that in its Communication to the Council and the European Parliament on the mutual recognition of judicial decisions in criminal matters and the strengthening of mutual trust between Member States (COM(2005) 195 final of 19.5.2005), the European Commission emphasizes that the purpose of setting up mechanisms to evaluate the criminal justice systems – which is one of the objectives it has set itself in this Communication, in accordance with the mandate given by the European Council in the Hague programme of 4 and 5 November 2004 – is to “undertake 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, without which MR will not be able to work, depends on broader-based and longer-term action. The Hague Programme states as a matter of principle that “mutual confidence [must] be based on the certainty that all European citizens have access to a judicial system meeting high standards of quality” and calls for “a system providing for objective and impartial evaluation of the implementation of EU policies in the field of justice, while fully respecting the independence of the judiciary” to be established. In the context of boosting mutual trust by the certainty that judicial systems producing judgments that are eligible for Union-wide enforcement meet high quality standards, this evaluation must provide a fully comprehensive view of national systems” (par. 31). The qualities which such an evaluation mechanism must have in order to adequately fulfil the functions that are assigned to it are set out in detail in: EU Network of Independent Experts on Fundamental Rights, Report on the Situation of Fundamental Rights in the European Union in 2004, May 2005, pp. 32-34 (available at http://www.europa.eu.int/comm/justice_home/cfr_cdf/index_en.htm).

²² See Proposal for a Council Framework Decision on certain procedural rights in criminal proceedings throughout the European Union, COM (2004) 328 final of 29 April 2004.

²³ See the announcement of the presentation of a proposal for a Framework Decision on the presumption of innocence and minimum standards on the gathering of evidence made in the Communication from the Commission to the Council and the European Parliament on the mutual recognition of judicial decisions in criminal matters and the strengthening of mutual trust between Member States (COM(2005) 195 final of 19.5.2005).

The other way consists in progressively replacing the systematic verification by the judicial authorities of each Member State of the European Union of the respect for fundamental rights in each issuing Member State by a joint and several responsibility of the Member States and of the Union when mechanisms of judicial cooperation in criminal matters lead to infringements of fundamental rights. That is indeed the perspective. It will bring about a changeover from the paradigm of interstate cooperation to that of cooperation between different entities within the same State, which at the international level will have to answer for the conduct of all those entities without being able to hide behind the autonomy that may be granted to them. Certainly, as has been pointed out, the clauses regarding fundamental rights in the instruments based on the principle of mutual recognition of judicial decisions in criminal matters does not simply establish a right for the judicial authorities of the executing Member State: like Article 6 §2 of the Treaty on European Union itself, those clauses are actually the expression of an obligation under international law incumbent on the Member States of the Union, which must observe the international obligations they assumed in the area of human rights at the moment when powers were transferred to the European Union²⁴. It would of course not be acceptable from the point of view of international public law that the progress made in the integration process within the European Union should result in diminishing the degree of compliance by the European Union Member States with their international obligations. In the present framework of the European Convention on Human Rights, each State must in principle verify that the judicial decisions which it recognizes for the purpose of contributing to their execution respect fundamental rights²⁵. Indisputable from the legal viewpoint, this is also a desirable solution in terms of respect for fundamental rights since it constitutes a powerful incentive for all Member States to increase their respect for fundamental rights – at the risk, if infringements are committed, of not seeing their decisions recognized in the other Member States. Nevertheless, this situation, however obvious and desirable it may seem to us today, is not necessarily set to persist. It may even be a good idea to already start thinking about a different approach, based on an automatic mutual recognition of judicial decisions in criminal matters, without verifying respect for fundamental rights, but instead with assignment of joint and several responsibility to Member States and the European Union when judicial cooperation in criminal matters leads to infringements of fundamental rights.

The case-law of the European Court shows the first signs of a trend in this direction. In the case of *Lindberg v. Sweden*,²⁶ the applicant, residing in Sweden, complained that the Swedish courts had agreed to enforce a judgment given against him by the Norwegian courts for defamation without having reviewed the merits of this decision, in particular in terms of its compatibility with the requirements of freedom of expression²⁷. He also alleged that he had

²⁴ See Eur. Ct. HR (GC), *Matthews v. United Kingdom*, judgment of 18 February 1999 (application n° 24833/94), § 32 (“The Convention does not exclude the transfer of competences to international organisations provided that Convention rights continue to be “secured”. Member States’ responsibility therefore continues even after such a transfer”). For a discussion of this judgment and references to the case-law of the European Court of Human Rights on this issue, see O. De Schutter and O. L’Hoest, “La Cour européenne des droits de l’homme juge du droit communautaire: Gibraltar, l’Union européenne et la Convention européenne des droits de l’homme”, *Cahiers de droit européen*, N° 1-2, 2000, pp. 141-214; also T. King, “Ensuring human rights review of intergovernmental acts in Europe”, 25 *E.L.Rev.* 79-88 (2000).

²⁵ For references, see O. De Schutter, “L’espace de liberté, de sécurité et de justice et la responsabilité individuelle des Etats au regard de la Convention européenne des droits de l’homme”, in G. de Kerchove and A. Weyembergh (eds.), *L’espace pénal européen: enjeux et perspectives*, op. cit., pp. 223-248.

²⁶ Eur. Ct. HR (1st Section), *Lindberg v. Sweden* (application n° 48198/99), decision of 15 January 2004

²⁷ The applicant’s allegation that the judgment given against him constituted a violation of the freedom of expression guaranteed by Article 10 of the European Convention on Human Rights is not entirely implausible. In a judgment of 20 May 1999, the European Court of Human Rights, sitting as a Grand Chamber, held by thirteen votes to four that there had been a breach of Article 10 of the ECHR by the press agency and the former editor of the local newspaper in which Mr Lindberg had published his account of the way in which the hunting of seals was carried on following a stay of several weeks on board a ship, the *Harmoni*, as an inspector for the Norwegian Ministry of Fisheries: see Eur. Ct. HR (GC), *Bladet Tromsø and Stensaas v. Norway*, judgment of 10 May 1999 (application no. 21980/93), ECHR 1999-III. The application which Mr Lindberg himself had lodged with the European Commission of Human Rights following his own conviction for defamation was declared inadmissible

been the victim of a violation of Article 13 of the European Convention on Human Rights, which guarantees the right to an effective remedy when the rights and freedoms enshrined in the Convention have been violated, bearing in mind the fairly limited scope of the review carried out by the Swedish courts of the decision delivered by the Norwegian court, which the plaintiffs in the defamation proceedings had requested to be recognized with a view to its enforcement. Although particularly prudent, the reply of the Court in effect approves the approach adopted by the Swedish courts which, without carrying out a full review of the compatibility of the adopted solution with the requirements of freedom of expression, actually assumed that the solution adopted by the Norwegian courts respected those requirements²⁸. The Court recalls that, in accordance with its case-law, the States Parties to the European Convention on Human Rights must refuse to enforce a judicial decision delivered by a court of a State that is not a party to the Convention if this decision constitutes a “flagrant denial of justice”.²⁹ Furthermore, without asserting that a similar criterion is necessary where the enforcement of a judicial decision delivered by a State Party to the Convention is concerned³⁰ and the alleged violation is the result of this decision rather than of a denial of justice³¹, the European Court of Human Rights considers that the review carried out by the Swedish courts on the basis of Sweden’s conception of international public order is sufficient:

In the particular circumstances it suffices to note that the Swedish courts found that the requested enforcement (in respect of the award of compensation and costs made in the Norwegian judgment) was neither prevented by Swedish public order or any other obstacles under Swedish law. The Court (...) does not find that there were any compelling reasons against enforcement. That being so, the Court is clearly satisfied that the Swedish courts reviewed the substance of the applicant’s complaint against

because the six-month time limit set by Article 26 §1 of the Convention (now Article 35 §1) had been exceeded: see European Commission of Human Rights, *Lindberg v. Norway* (application n° 26604/94), decision of 26 February 1997.

²⁸ Since the Lugano Convention of 1988 on jurisdiction and the enforcement of judgments in civil and commercial matters was not yet in force between Norway and Sweden at the time of the facts, the terms and conditions of the requested enforcement were defined by Act 1977:595 on the recognition and enforcement of judicial decisions delivered by the Nordic countries in private law. According to Article 8 §1 no. 6 of this law, judicial decisions that are manifestly incompatible with Swedish public order do not qualify for recognition or enforcement in Sweden. In the *Lindberg* case, the Swedish Supreme Court, in its judgment of 16 December 1998, considered, “As regards the question whether there are obstacles to enforcement of the City Court’s judgment in view of public order considerations it should be underlined that, generally speaking, only in exceptional cases can there be question of refusing enforcement of a judgment on such grounds ... This applies especially when there is question of enforcement of a judgment delivered in another Nordic country”.

²⁹ Eur. Ct. HR, *Drozd and Janousek v. France and Spain*, judgment of 26 June 1992, Series A n°240, § 110. It is significant that, in its *Lindberg* decision of 15 January 2004, the European Court of Human Rights compares this case-law with the *Pellegrini v. Italy* judgment (application no. 30882/96) delivered by a Chamber composed in the 2nd Section of the Court on 20 July 2001, in which, with regard to the enforcement authorized by the Italian courts of a decision recognizing the annulment of a marriage (preventing a divorce settlement that would better protect the rights of the applicant spouse) given by the Vatican courts in breach of the rules of fair trial, the Court defined its role as verifying “whether the Italian courts, before authorising enforcement of the decision annulling the marriage, duly satisfied themselves that the relevant proceedings fulfilled the guarantees of Article 6”. In its *Lindberg* decision of 15 January 2004, the European Court of Human Rights reaffirmed the criterion of “flagrant denial of justice” adopted in *Drozd and Janousek*, and cited in support of its *Pellegrini* judgment, “even though no express mention was made of the said criterion in that judgment”. This – which actually constitutes a change in case-law deliberately adopted by the Court – clearly shows a concern to develop its case-law in such a way as not to create too many obstacles to interstate cooperation.

³⁰ In the judgment which it adopted on 16 December 1998 in the *Lindberg* case, the Swedish Supreme Court considered, “In the relations among the Convention States themselves it should normally suffice for the authority in the country of execution to pursue a rather summary assessment in verifying whether the judgment is in conformity with the Convention. However, should there, for example on a claim by a party, emerge circumstances that would make it questionable whether the judgment fulfils the requirements in the Convention, a closer scrutiny must be carried out”.

³¹ In its *Lindberg* decision, the Court “does not deem it necessary for the purposes of its examination of the present case to determine the general issue concerning what standard should apply where the enforcing State as well as the State whose court gave the contested decision is a Contracting Party to the Convention and where the subject-matter is one of substance (i.e., here, the freedom of expression) rather than procedure”.

the requested enforcement of the Norwegian judgment, to a sufficient degree to provide him an effective remedy for the purposes of Article 13 of the Convention.

Mr Lindberg also contended that, by refusing to carry out their review with regard to the right to freedom of expression, the Swedish courts were a party to the violation of that freedom by the Norwegian courts, and consequently asked the Court to conclude that there had also been a violation of Article 10 of the Convention. Despite its brevity, the Court's response to this second claim of the applicant shows that it does not hesitate to review the compatibility of the final outcome with the requirements of the Convention: the claim that Article 10 of the Convention had been violated was declared inadmissible since it was manifestly ill-founded, but not because, *ratione personae*, the application had on this point to be directed against Norway whose courts had pronounced the conviction for defamation, rather than against Sweden whose courts had authorized the enforcement of the judgment.

The *Lindberg* decision is admittedly not very explicit on the question of mutual trust which the States Parties to the European Convention on Human Rights may place in each other. However, it does not seem to rule out the establishment between those States of a form of mutual recognition of judicial decisions, with only minor verification of the compatibility of the decision to be enforced with the requirements of the Convention. A trend in the European case-law in that direction might be encouraged by the emerging conventional practice within the Council of Europe of taking into consideration the specific features of the forms of cooperation instituted between Member States within the European Union. In accordance with the precedent set by Article 28 §3 of the European Convention on Extradition of 13 December 1957³², three major conventions opened for signature on 16 May 2005 at the Third Summit of Heads of State and Government of the Council of Europe contain a so-called "disconnection clause", excluding the relations among Member States of the European Union and relations between Member States and the European Community from the rules laid down in those instruments. For example, Article 40 §3 of the Council of Europe Convention on Action against Trafficking in Human Beings³³ provides:

Without prejudice to the object and purpose of the present Convention and without prejudice to its full application with other Parties, Parties which are members of the European Union shall, in their mutual relations, apply Community and European Union rules in so far as there are Community or European Union rules governing the particular subject concerned and applicable to the specific case.

At the adoption of the Convention by the Committee of Ministers of the Council of Europe on 3 May 2005, the European Community and the Member States of the European Union made

³² European Convention on Extradition, done in Paris on 13 December 1957, ETS n°24 (entry into force on 18 April 1960). Article 28 of this Convention is devoted to the relations between the Convention and bilateral agreements. Article 28 § 3 provides, "Where, as between two or more Contracting Parties, extradition takes place on the basis of a uniform law, the Parties shall be free to regulate their mutual relations in respect of extradition exclusively in accordance with such a system notwithstanding the provisions of this Convention. The same principle shall apply as between two or more Contracting Parties each of which has in force a law providing for the execution in its territory of warrants of arrest issued in the territory of the other Party or Parties. Contracting Parties which exclude or may in the future exclude the application of this Convention as between themselves in accordance with this paragraph shall notify the Secretary General of the Council of Europe accordingly. The Secretary General shall inform the other Contracting Parties of any notification received in accordance with this paragraph". The explanatory report on the Convention points out that this paragraph 3 "allows Parties which have an extradition system based on uniform laws, i.e. the Scandinavian countries, or Parties with a system based on reciprocity, i.e. Ireland and the United Kingdom, to regulate their mutual relations on the sole basis of that system. This provision had to be adopted because the countries do not regulate their relations in the matter of extradition on the basis of international agreements, but did so or do so by agreeing to adopt uniform or reciprocal domestic laws".

³³ CETS n° 197. See also, for similar clauses, Article 26 §3 of the Council of Europe Convention on the Prevention of Terrorism (CETS n° 196) and Article 52 §4 of the Council of Europe Convention on laundering, search, seizure and confiscation of the proceeds from crime and on the financing of terrorism (CETS n° 198).

the following declaration, which forms part of the “context” of the Convention within the meaning of Article 31 §2 (b) of the Vienna Convention on the Law of Treaties and should therefore guide the interpretation thereof³⁴:

The European Community/European Union and its member states reaffirm that their objective in requesting the inclusion of a “disconnection clause” is to take account of the institutional structure of the Union when acceding to international conventions, in particular in case of transfer of sovereign powers from the member states to the Community.

This clause is not aimed at reducing the rights or increasing the obligations of a non-European Union party vis-à-vis the European Community/European Union and its member states, inasmuch as the latter are also parties to this convention.

The disconnection clause is necessary for those parts of the convention which fall within the competence of the Community/Union, in order to indicate that European Union member states cannot invoke and apply the rights and obligations deriving from the Convention directly among themselves (or between themselves and the European Community/Union). This does not detract from the fact that the Convention applies fully between the European Community/European Union and its member states on the one hand, and the other Parties to the Convention, on the other; the Community and the European Union member states will be bound by the Convention and will apply it like any party to the convention, if necessary, through Community/Union legislation. They will thus guarantee the full respect of the convention's provisions vis-à-vis non-European Union parties.

The principle of such a disconnection clause is that the objectives of the instrument in which it is incorporated are fully maintained, but that as far as the Member States of the European Union and the European Community/Union are concerned, the obligations which this instrument enjoins on its Parties may be fulfilled by the Member States or by the Union depending on how their respective powers evolve as legislation is adopted by the Union. In principle, from the viewpoint of the beneficiaries of the instrument concerned, such as victims of terrorism or of trafficking in human beings, this should make no difference: the disconnection clause does not affect the scope of the obligations assumed, but only the details of implementation of those obligations. It does not set out to introduce an exception to the obligations laid down by the instrument in which it is incorporated, but to meet the necessities of integration within the European Union while taking account of the evolutionary nature of the division of powers between the Member States and the Community/Union.

If we seek to transpose the idea behind the adoption of such disconnection clauses to the question of the mutual recognition of judicial decisions in criminal matters, we face the difficulty that in this case the imposition on each individual State of the obligation in question (not to grant recognition or to enforce a judicial decision delivered in another State that infringes human rights) does indeed constitute for the holder of the rights in question an additional safeguard, which would not be respected to the same degree if we were to consider that the Member States of the European Union would assume this obligation jointly with the European Union, depending on how the mechanisms of judicial cooperation in criminal matters evolve within the Union³⁵. In other words, the separation of the States as

³⁴ See paragraphs 375 and 376 of the Explanatory Report on the Council of Europe Convention on Action against Trafficking in Human Beings.

³⁵ Another difficulty is that, given the institution by the European Convention on Human Rights of a system of collective safeguard of human rights on the Continent, which translates the possibility of an interstate remedy (Article 33 of the Convention) assuming that each State Party has an interest in all the other Parties respecting the Convention and enabling each State Party to demand this respect, it is hard to dissociate the application of the European Convention on Human Rights in the mutual relations of the Member States of the Union from its application vis-à-vis other Parties to the Convention that are not Member States of the European Union. The system of Article 31 §4 of the Vienna Convention on the Law of Treaties of 23 May 1969, which governs the application of successive treaties on the same subject matter when the Parties to the earlier treaty are not all

such constitutes a safeguard for the individual concerned. This is in particular the case with the European Convention on Human Rights: just as Mr Lindberg had to be protected against the enforcement in Sweden of a judicial decision delivered by the Norwegian courts which violates his right to freedom of expression, should not every individual be entitled to some assurance that other Member States of the European Union will not cooperate in the enforcement of a judicial decision that has been delivered in breach of his fundamental rights?

For that reason, if this phenomenon of “disconnection” by Member States and the Union in the context of international obligations becomes more pronounced, its extension will have to be made subject to compliance with two conditions if mutual recognition is to be facilitated.

Firstly, in exchange for the option that is given to each Member State to recognize judicial decisions delivered by the courts of another Member State without verifying case by case the compatibility thereof with fundamental rights, the Member States of the Union must accept a joint and several responsibility if their cooperation (or failure to cooperate) results in breaches of fundamental rights³⁶. The current case-law of the European Court of Human Rights suggests that, if breaches of the Convention committed by a State are actually the result of a failure by another State to cooperate, the former State to which the request is addressed could limit the extent of its responsibility to the actions performed by its institutions. However, this limitation is all the more unacceptable since, traditionally, an individual whose rights have been infringed by the deficiencies in this interstate cooperation and who does not fall under the jurisdiction of the second State cannot seek to call upon the latter’s responsibility. In the case of *Calabro v. Italy and Germany*, the applicant had been trapped in a simulated sale of drugs in Italy as a result of a joint operation mounted by the Italian and the German police. In the subsequent criminal proceedings before the Italian courts, the German undercover police officer who made the simulated purchase that led to the arrest of Mr Calabro could not be heard as a witness, despite the fact that Article 6 §3, d) of the European Convention on Human Rights grants the defendant the right to “to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him”. The German authorities, although they had been requested in accordance with orders issued by the Italian courts to summon the undercover officer to appear in court under the provisions of Articles 8 et seq. of the European Convention on Mutual Assistance in Criminal Matters, claimed that this officer “could not be found”. The Court considered that the Italian authorities could not be held responsible for this situation:

The Court considers that it was not for the Italian authorities to make enquiries to establish the whereabouts of a person residing on the territory of a foreign State. By making an order for Jürgen’s attendance and issuing an international request for evidence on commission, the Criminal Court and the Court of Appeal used the means at their disposal under domestic law to secure the presence of the witness concerned. Moreover, they had no alternative but to rely on the information received from qualified sources based in Germany, and in particular the Wiesbaden district judge and the BKA [*Bundeskriminalamt* – German Criminal Investigation Department]. Under these circumstances, the Italian authorities cannot be accused of a lack of diligence engaging their responsibility before the Convention institutions.

Parties to the later treaty – amounting to authorization of a form of “disconnection” since in the relations between the Parties to the two treaties, the earlier treaty will only apply insofar as its provisions are compatible with the later treaty –, will therefore be difficult to apply: each of the States Parties to the European Convention on Human Rights has an interest in all the other States complying with the obligations contained in the Convention, which cannot be equated with a network of bilateral commitments.

³⁶ See in this respect Eur. Ct. HR (GC), *Matthews v. United Kingdom*, judgment of 18 February 1999, §33 (where the Court asserts, “The United Kingdom, together with all the other parties to the Maastricht Treaty, is responsible *ratione materiae* (...) for the consequences of that Treaty”).

This position is not unusual in the case-law of the European Court of Human Rights³⁷. It is found in situations where, for example, the alleged violation of the “reasonable time” requirement for a hearing provided in Article 6 §1 of the European Convention on Human Rights is the result of the combined action of several States³⁸ – or of the combined action of the national courts of a State Party to the Convention and the Court of Justice of the European Communities referred to for a preliminary ruling³⁹.

What the examples cited above indicate is the fact that individually assessing the responsibility of each State Party to the European Convention on Human Rights if the alleged violation is attributable to their combined action, in particular as part of mechanisms of interstate cooperation set up between those States, could in fact result in limiting the scope of the rights granted to the individual. On the contrary, the assertion of a joint and several responsibility of the States that form part of such a cooperation mechanism may strengthen those rights and make it easier to attribute to those States – or to one particular State, or at least to their combined action – the resulting implications for the individual. Passing from the paradigm of interstate cooperation (involving the individual responsibility of each State) to that of cooperation between different bodies within the same State (involving a joint and several responsibility of those bodies) does not mean restricting the scope of the individual’s rights or the possibility for the individual to demand a safeguard of those rights, but rather aligning the system of responsibilities with the nature of the actions that lie at the source of the alleged violation and with the identity of the authors of that violation, which even though they turn out to be authorities of several States should actually be treated as if they were authorities of one single Party to the Convention.

We clearly see what form the proposed change of paradigm could take on, for example in connection with the assessment of the responsibilities in regard to Article 5 of the European Convention on Human Rights linked to the issuing and execution of a European arrest warrant. This provision applies fully to the implementation of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States⁴⁰ as regards in particular the actual conditions of arrest and the duration of detention. In particular, the person being arrested must be informed as soon as possible and in a language he or she understands of the reasons for his arrest: in this respect, account should be taken in the interpretation of Article 11 of the Framework Decision (rights of a requested person) of the requirements of Article 5 § 2 of the European Convention on Human Rights. The information appearing on the form sent to the executing State must be sufficiently complete in terms of the description of the circumstances in which the offence or

³⁷ In an inadmissibility decision of 9 March 1999, the European Court of Human Rights considered, in a case where the applicant had been convicted in the first instance on the basis of statements made by a Turkish national, a drug trafficker who agreed to cooperate with the judicial authorities, but who could not be found to testify in appeal proceedings following the first conviction of the applicant – since the international requests for evidence on commission issued to the Turkish authorities were unsuccessful – that “it was not up to the Italian authorities to make enquiries to establish the whereabouts of a person residing on the territory of a foreign State. By making an order for the attendance of M.S. and issuing an international request for evidence on commission, the Court of Appeal used the means at its disposal under domestic law to secure the presence of the witness concerned. On the other hand, the Court of Appeal had no alternative but to rely on the information received from a qualified source based in Turkey, in particular the Interpol section in Ankara. Under these circumstances, the Italian authorities cannot be accused of a lack of diligence engaging their responsibility before the Convention institutions” (Eur. Ct. HR (2nd Section), *Kostu v. Italy* (application n° 33399/96), decision of 9 March 1999).

³⁸ Eur. Ct. HR, *Karalyos and Huber v. Hungary and Greece* (application n° 75116/01), judgment of 6 April 2004

³⁹ Eur. Ct. HR, *Pafitis and others v. Greece*, judgment of 26 February 1998, § 95 (While the reference to the Court of Justice of the European Communities for a preliminary ruling led to the proceedings in the actions being stayed for a period of two years, seven months and nine days, the Court nevertheless considered it could not take this period into consideration “in its assessment of the length of each particular set of proceedings: even though it may at first sight appear relatively long, to take it into account would adversely affect the system instituted by Article 177 of the EEC Treaty [now Article 234 EC] and work against the aim pursued in substance in that Article”).

⁴⁰ 2002/584/JHA, OJ L 190 of 18.7.2002

offences with which the requested person is being charged were committed as well as in terms of the legal classification of the offence. The authorities of the issuing State and of the executing State must be held jointly responsible for complying with the conditions of arrest laid down in Article 5 § 2 of the Convention. It would not be acceptable for either the executing State or the issuing State to cite breaches attributed to the other State in order to avoid being held responsible for violating this provision, nor would it be desirable that the right to identify and penalize the alleged violation be subject to the exact determination of the respective responsibilities of each of the States concerned. Similarly, the proposed change of paradigm would have a major impact on the respect for Article 5 § 3 of the European Convention on Human Rights. This provision only contains a requirement of detention for a reasonable time in the case of preventive detention of a person suspected of having committed an offence⁴¹. It is therefore not applicable to detention which, with a view to surrendering a person with respect to whom a European arrest warrant has been issued, is an instance of deprivation of liberty referred to in Article 5 § 1 f) applicable in case of extradition⁴². However, if we are to consider that the actions of the authorities of the Member States of the European Union must be treated as those of the authorities of a single State from the moment those actions fall within the scope of judicial cooperation in criminal matters based on automatic mutual recognition, should we not consider detention of a requested person in the executing Member State with a view to his surrender as coming under Article 5 § 3 of the Convention?

The extension of the mechanism of “disconnection”, as we see it instituted in the three conventions adopted by the Council of Europe on 16 March 2005 in order to favour automatic mutual recognition without re-examination of the appraisal by the executing State of the respect for fundamental rights by the issuing State, should also be subject to a second condition. It requires that, first of all, all the Member States of the European Union between which the principle of mutual recognition is to be implemented agree to safeguard fundamental rights at a high level and to perform a continuous evaluation of the respect for those fundamental rights, in particular as concerns the operation of the criminal justice system. If those guarantees are defined in instruments that operate a harmonization or approximation of the criminal law systems, and if this evaluation is effective, the overall level of respect for fundamental rights will be improved rather than threatened by the progress of mutual recognition as measures are adopted to strengthen the mutual trust which this mechanism calls for. It is in this sense that, far from competing with each other, the two ways in which the difficulties may be resolved which the national courts may experience in adequately fulfilling its role – that of ensuring respect for fundamental rights while loyally cooperating in the mechanism of mutual recognition – are complementary. Progress must be

⁴¹ Article 5 § 3 of the Convention only refers to the hypothesis of detention referred to in Article 5 § 1, c): see Eur. Ct. HR, *De Wilde, Ooms and Versyp v. Belgium*, judgment of 18 June 1971, Series A n°12, § 71. For a recent confirmation of the Court’s position, see *Raf v. Spain*, judgment of 17 June 2003, application n°53652/00, §§ 62-66.

⁴² While the arrest of an individual with a view to his surrender to the authorities of a Member State issuing a European arrest warrant may be construed as a restriction of the fundamental right to freedom of the individual, the authorization to deprive a person’s liberty under Article 5 § 1, f), should however continue to be interpreted strictly. Therefore, if the detention is based on the objective of surrendering a person with respect to whom a European arrest warrant has been issued, “the detention of a person with a view to his surrender can only be justified from the viewpoint of Article 5 § 1 *insofar as it is linked to the surrender procedure*” (see, *mutatis mutandis*, Eur. Commiss. HR, application n°6871/75, *Caprino v. United Kingdom*, decision of 3 March 1978, YB ECHR, 21, p. 285, here pp. 295-296 (and DR, 12, p. 14)); and if the procedure is not conducted with the required diligence, the detention ceases to be justified by the end – the surrender of the person in pursuance of a European arrest warrant – that justifies it. In exceptional circumstances, in particular where the authorities of the issuing State fail to supply with due diligence the information requested, a long time may elapse between the arrest of a person and the decision to execute a European arrest warrant preceding the surrender. In such cases, the necessity of detention and its duration will have to be reviewed. If we adhere to a strict interpretation of Article 5 § 1 of the Convention, detention will not longer be considered justified if there are ways to prevent the risk of escape by means that are less restrictive of a person’s liberty, or if, in the event that there are no real chances that the person concerned will be surrendered within a reasonable time, it no longer meets the purpose of Article 5 § 1 f) and is therefore no longer justifiable from the viewpoint of this provision, or also if it appears to be far too long compared to what seems reasonably justified by the procedures required for surrender.

made in the approximation of the legal systems of the Member States and in the establishment of reliable evaluation mechanisms if mutual recognition is to be provided with the solid basis that it needs; at the same time, the principle of joint and several responsibility of the Member States of the European Union for respecting fundamental rights as they are enshrined in particular in the European Convention on Human Rights should come to replace a strictly individual responsibility of each State. However, this second way – that of “disconnection” – cannot come before the first, since it is rather meant to mark the completion of that process.