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Recent Developments in Legal Assistance in Criminal Matters

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Abstract

The field of legal assistance in criminal matters is deeply influenced by, and intertwined with, international law. However, legal assistance in criminal matters, which accordingly has been traditionally ruled by conventional tools of mutual legal assistance, is beginning to change: Heretofore, legal assistance in criminal matters has been rendered in compliance with basic principles which reflect the international law parity of the interacting States while being open to modifications by way of bilateral or multilateral treaties between individual States. Now, far-reaching changes seem to be well underway: The European Union is gaining ground as a global player, aiming to implement an "Area of Freedom, Security and Justice". In order to reach this ambitious goal, a most important trend in criminal policy from a European perspective is to extend the principle of mutual recognition, which originally stems from the common market, to the area of criminal law. Taking an international perspective it is a remarkable evolution to see the European Union as an (arguably) idiosyncratic entity to commit its individual members to the fulfillment of obligations towards other non-Member States which the Member States themselves have not chosen. While both new approaches may be deemed more easily applicable beyond the realms of criminal law matters, namely in a commercial context, they indeed appear to be big steps in the sensitive area of criminal law which has traditionally been the sole responsibility of the sovereign State itself. Therefore the ongoing developments are bound to have international law repercussions. The following essay deals with these new developments in the field of legal assistance in criminal matters from a combined international and European perspective. We will be focusing specifically on the principle of mutual recognition since its implementation provides a litmus test for the state of procedural rights in the area of legal assistance in criminal law as well as its application within a reference-system previously governed by international law ultimately will modify international law. After describing foundational principles of legal assistance in criminal matters the ground will be prepared for further considerations by having a look at exemplary present application difficulties of mutual recognition, delve into the perspective of a rather radical simplification of transnational evidence gathering by application of the principle of mutual recognition. To give a complete picture we will examine the Intercontinental dynamics of legal assistance which has been put into effect under the rule of the European Union.

A. Introduction and Foundational Principles

Legal assistance law which traditionally encompasses extradition, assistance in the execution of foreign judgments and other assistance in criminal matters can be seen as a *measure* of the integration of international law in interstate relationships: According to general international law a sovereign State is not obligated to lend legal assistance. Neither is it reconcilable with its own sovereignty to impose on it the tolerance of sovereign acts of foreign States, e. g. the arrest of fugitives.[1] In principle States without further ado do not have self-interest in law enforcement with regard to violations of foreign penal laws. Hence, there is no acknowledged rule of international customary law, according to which States are required to extradite; instead of that, the granting of extradition is a right of the sovereign State.[2] Keeping this background in mind, classical legal assistance law in criminal matters is characterized by several material key principles, which relate to one foundational thought, namely the assumption that sovereign States are on par with each other. Those key principles are as follows: The principle of reciprocity, which states that the requested State is only prepared to comply with the request if it can (reasonably) expect that the requesting State complies with a request in analogous situations.[3] The ramifications of the principle of sovereignty on legal assistance manifest themselves probably most clearly in the principle of reciprocity. There seems to be a consensus that the principle of reciprocity emerges from the sphere of international politics.[4] Given the interstate equality, it would be a violation of the requested States' sovereign dignity if it were to assist another State unilaterally. The principle of double criminality is a rule that assistance in criminal matters depends on double criminality in terms of the act in question being punishable and prosecutable in both States involved.[5] Thus, the principle of double criminality allows States to deny assistance regarding acts which they have not criminalized, or at least not to the degree of severity as the requesting State. The principle of double criminality in its

1 Cf. e.g A. Verdross & B. Simma, *Universelles Völkerrecht*, 3rd ed.(1984), § 1020.

2 W. Wagner, 'Building an Internal Security Community', 40 *Journal of Peace Research* (2003) 6, 695, 702-703.

3 H. Van der Wilt, 'The principle of reciprocity' in: R. Blekxtoon & W. van Ballegooij (eds), *Handbook on the European Arrest Warrant* (2005), 71.

4 *Id.*, 71.

5 S. Alegre & M. Leaf, *European Arrest Warrant* (2003), 34; T. Hackner *et al.*, *Internationale Rechtshilfe in Strafsachen* (2003), para. 25.

effect primarily enables the requested State to uphold its decisions regarding the criminalization (only) of certain acts.[6] Those domestic crime-policy-decisions would be infringed upon if a State was obliged to extradite somebody whose acts are in accordance with the State's own national law to another State. As a consequence, the double criminality principle enables the individual to regulate his or her conduct (only) in accordance with the country of residence. The principle of specialty can be considered the third key principle. It states that judicial cooperation will only be granted regarding specific offences which have been clearly defined in the request for legal assistance. The person in question must not be prosecuted for any offence that was not included in the original request. Since the application of the principle of specialty requires a prognosis regarding the prospective acts of the requesting State, the requested State will demand a binding confirmation of the requesting State by verbal note that it will adhere to the principle of specialty in order to obtain a base for a prognosis.[7] The idea behind the specialty-principle is to prevent States from requesting a person for an (extraditable) offence and then, once the person has been transferred, prosecuting another offence for which extradition could not have been granted (for example because of the double criminality rule). Insofar, the principle of specialty safeguards the interests of the requested State and concurrently gives certainty to the person whose extradition is requested as to the charges which will effectively be held against him.[8]

After all, even a superficial look at the ideas behind legal-assistance-laws' key principles make it apparent that the conditions which derive from reciprocity, specialty and the double-criminality-rule are not focused exclusively and not even primarily on the protection of the interests of the accused. On the contrary, the focus lies first and foremost on the interests of the assisting State, mainly the safeguarding of its own sovereignty. Thus the requested State characteristically *in principle* has an open-ended discretion as to how and if it will carry out the request.[9] Accordingly, the extradition-

6 In this sense the principle of double criminality derives from the principle of reciprocity. The protective effect in regards to the rights of the accused is just an indirect result of the application of the dual-criminality principle and has entered into focus later on, cf. W. Schomburg *et al.*, *Internationale Rechtshilfe in Strafsachen*,, 4th. ed .(2006), § 3, para. 2.

7 Cf. Schomburg *et al.*, *supra* note 6, § 11, para. 9.

8 Cf. Alegre & Leaf, *supra* note 5, 47.

9 Cf. the example given by J. R. Spencer, 'The Green Paper on obtaining evidence from one Member State to another and securing its admissibility', 5 *Zeitschrift für Internationale Strafrechtsdogmatik* (2010) 9, 602.

procedure is split into a first phase wherein a court (e.g. the Higher Regional Court in Germany) proves the admissibility according to mere-judicial standards. But after that, the *granting* of extradition is proven by the executive; that means in principle the Ministry of Justice (cf. s. 74 German Law on International Judicial Assistance in Criminal Matters, IRG); which in its core-content remains open to foreign-policy-considerations.[10] Keeping this background in mind the basis of "classical legal assistance" is as *Spencer* had put it recently "a polite request: 'State B, please would you take this step for us? – if you can and when you can'".[11]

But despite all that, it may be underlined that aforementioned basic structures and foundational principles of legal assistance in criminal matters of course are open to modifications: Material principles as well as procedural aspects of legal assistance can be modified by bi- or multilateral treaties. Over the years a complex web of legal-assistance-treaties has developed.[12] The Council of Europe and later the European Union, especially, have been driving forces in the facilitation of treaties modifying the (traditionally international law inspired) appearance of legal assistance. Art. 4 of the EU Mutual Legal Assistance Convention of 2000 provides an example,[13] insofar as it changes the aforementioned open-ended discretion of the requested State to its mirror image: Now *in principle* the requested State *is obliged* to follow the specifications of the requesting State and it has to do so as soon as possible provided that the request is in line with the foundational principles of the requested States legislation.[14] Sure enough the matrix of bi- and multilateral agreements on legal assistance is enormously complex. Of course, its complexity ultimately only reflects the *individuality*, the still considerably differing crime-policy-stances of the Member States of the Council of Europe respectively (even) of the EU, which – from a "classical" international-law-perspective – appears to be no surprise given the State's sovereign dignity. In the end, this observation leads back to the

10 Cf. K. Ambos, *Internationales Strafrecht*, 2nd ed. (2006), § 10, para. 73. Although executive powers in fact are delegated to the Prosecution at the Higher Regional Courts (A. Sinn & L. Wörner, 'The European Arrest Warrant and its Implementation in Germany', 2 *Zeitschrift für Internationale Strafrechtsdogmatik* [2007] 5, 204, 210).

11 Spencer, *supra* note 9, 602.

12 Cf. (exemplarily) below at B.I.1.

13 Spencer, *supra* note 9, 602.

14 This provision is known as the *ordre public* caveat in international law and can be considered a fundamental principle by which collisions between differing legal systems can be solved.

observation that legal assistance in criminal matters in its nucleus remains rooted in international law.

However, at least in the EU more fundamental changes (compared with the piecemeal-approach of modifying treaties) seem to be underway: Even more profound than the partial addition to, or replacement of, "classical legal assistance law"[15] by way of international agreements, are the results of implementing the *principle of mutual recognition* in the field of legal assistance in the EU. Simplified, this principle, which has its origins in the Common Market, states that any decision of a Member State regarding criminal law which has come to pass in a rightful way has to be accepted as such in any other Member State, even if the decision in question is not in accordance with criminal law in the accepting State.[16] While both "traditional" mutual assistance and mutual recognition based legal assistance in criminal matters are about the same thing, namely bundling resources in criminal matters, there is a notable difference: with mutual recognition it is not as much a polite request but rather an order which is given to the assisting State. The assisting State is *in principle* obliged to carry out the order, possibly even in the manner in which the ordering State wants it done. In practice, however, the contrast occasionally may not be as evident since mutual-recognition as the case may be – depending on the content and scope of the grounds to refuse the execution of a mutual-recognition-instrument – may converge towards traditional mutual assistance.[17] Remarkably, mutual recognition instruments, e.g. the Framework Decision on the European Arrest Warrant, do not abandon any traditional prerequisites for – or hindrances to – mutual-assistance but let them resurface (at least partially) in the guise of (more or less far-reaching) grounds for refusal.[18] But despite this, due to the far reaching potentials of the *consistent* application of mutual recognition, the explicit

15 Cf. H. Satzger, *Internationales und Europäisches Strafrecht*, 4th ed.(2010), § 2, para. 5 ("*klassisches Rechtshilferecht*").

16 On mutual recognition cf. *inter alia Communication from the Commission to the Council and the European Parliament*, 26 July 2000, COM (2000) 495 final; V. Mitsilegas, *EU Criminal Law* (2009), 116, S. Peers, 'Mutual Recognition and Criminal Law in the European Union', 41 *Common Market Law Review* (2004) 5, 35; M. Böse, 'Das Prinzip der gegenseitigen Anerkennung in der transnationalen Strafrechtspflege der EU' in C. Momsen *et al.* (eds), *Fragmentarisches Strafrecht* (2003), 233.

17 K. Ambos, 'Transnationale Beweiserlangung', 5 *Zeitschrift für Internationale Strafrechtsdogmatik* (2010) 9, 557, 561.

18 Ambos, *supra* note 17, 560.

acknowledgement of the principle of mutual recognition by European primary-law constitutes a fundamental paradigm shift to keep in mind.[19] Since the Lisbon Treaty came into force in December 2009 this principle has been incorporated in Art. 82.1 Treaty on the Functioning of the European Union (TFEU)[20]. As it is well known the principle of mutual recognition has been widely criticized, since it cannot be transferred to criminal law without argument. To put it mildly, despite its acknowledgement by the TFEU, the precise functionality, legitimacy and the scope of the principle of mutual recognition (of judicial decisions) ultimately still appears unsettled. However, according to the will of the Council it still should act as the leading principle for judicial cooperation.[21] Notwithstanding remaining basic concerns about the applicability of mutual recognition to the realms of criminal law its relative success – highlighted most spectacularly by the implementation of the Framework Decision on the European Arrest Warrant (hereafter Arrest Warrant) – appears to be connected to the idiosyncratic international-law-character of the EU, i.e. the advanced development of its integration status which is significantly higher if compared to traditional structures of international law. With regard to the advancement of the EU which is acquiring a role that – by international law standards –, traditionally is associated with States it may be added that in recent times the EU has been party to several international agreements which influence its Member States by altering and modifying those international agreements on legal assistance in criminal matters which have been agreed upon beforehand with third parties. Remarkably, the Union acts with binding effect on its Member States in a field which traditionally is closely associated with inter*state* parity. This tendency can be seen very clearly in the recent agreements on mutual legal assistance between the EU and the United States of America (USA).[22] These agreements served to modify the already existing bilateral treaties between EU-Member States as e.g. Germany and the USA in the area of extradition and altered, for

19 Cf. Spencer, *supra* note 9, 602 and Ambos, *supra* note 17, 557.

20 *Treaty on the Functioning of the European Union*, 9 May 2008, OJ 2008, C115/47 [TFEU].

21 This is evidenced by the Council's *The Stockholm Programme – An open and secure Europe serving the citizen*, 2 December 2009, Council Document 17024/09, which shall be discussed in more detail in B. I.

22 *Agreement on Extradition between the European Union and the United States of America*, 25 June 2003, OJ 2003 L181/27 and *Agreement on Mutual Legal Assistance between the European Union and the United States of America*, 19 July 2003, OJ 2003 L181/34.

example, the bilateral treaty on mutual legal assistance between Germany and the USA by way of negotiation of a supplementary treaty even before the original treaty entered into force. This became a necessity, since the agreement between the EU and the USA in the area of other assistance[23] was on its way.[24]

The developments which have been alluded to are part of a complicated matrix. From these surrounding international regulations which have become increasingly complex, new and sometimes unforeseen problems arise. In order to adequately discuss those problems, we will begin with a short outline of the development of the international framework of legal assistance law, especially in context of the EU (see B. I.). Following this general outline, we will take a look at those new and complex problems which may arise *de lege lata et ferenda* on a national (see B. II.), European (see B. III.) and intercontinental (see B. IV.) level. The following text aims to shed light on these subjects.

B. Recent Developments

Legal assistance in criminal matters (also: judicial cooperation) as already mentioned above includes three areas: *extradition*, *assistance in the execution of foreign judgments* and *other assistance*. While legal assistance in accordance with the traditional mutual-assistance-approach will be rendered between States or – on the basis of the principle of mutual recognition of "judgments and [other] judicial decisions" (cf. Art. 82.1 TFEU) – between those (judicial) authorities which are issuing "decisions", the rendering of legal assistance (its framework-conditions) can be *arranged or provided for* on another level between several different players including the EU, the individual Member States of the EU and non-Member States. Judicial cooperation can therefore be facilitated amongst Member States of the EU (e.g. Germany and the Netherlands for instance by way of implementation of the Framework decision on the European Arrest Warrant), amongst the EU and non-Member States by way of treaty between the EU and said States with binding results for Member States (as

[23] I.e. mutual legal assistance, which does not fall in the areas of extradition or assistance in the execution of foreign judgements.

[24] This short outline of the influence of EU legislation in the area of already existing bilateral treaties shall suffice for now in order to not confuse the reader. We will delve deeper into this subject specifically regarding the already mentioned agreements in part B. IV.

is the case with the legal-assistance-relations between EU-member Germany and the USA) and between individually acting Member States of the EU and non-Member States (e. g. Germany and India)[25]. Due to the EU's desire to become a major global player and its explicitly stated intent to create an "Area of Freedom, Security and Justice" it has developed into a major force to account for the implementation of new procedures, treaties and laws regarding legal assistance in criminal matters. These developments appear to parallel the EU's progress from modest international law roots towards a sui-generis entity which might turn out to be influential e.g. with regard to the Mercosur-Union. Keeping this background in mind, we will first discuss the general outline of the international framework of legal assistance law, while focusing on new efforts on judicial cooperation originating in the EU. Our approach is based on the assumption that the complexities of international law can be more fully understood by keeping European developments firmly in sight.

I. Development of the Framework of Legal Assistance Law in the EU: from Schengen to the Stockholm Programme

As already mentioned, the fundamental difference between traditional legal assistance and "the European way" lies in the principle of mutual recognition applied within the Area of Freedom, Security and Justice (AFSJ). Legal assistance in an international context in the past was rendered in the form of mutual assistance based on aforementioned principles whereas in recent times in the EU the principle of mutual recognition provides the foundation for instruments of legal assistance, most notably the European Arrest Warrant. Before we delve deeper into the most recent developments regarding this subject however, a closer look in brief at the *development* of legal assistance in the EU, focusing on the Schengen Agreement, may round off the interim picture.

[25] Cf. Vertrag zwischen der Bundesrepublik Deutschland und der Republik Indien über die Auslieferung vom 27.06.2001 (*Agreement on Extradition between Germany and India*, 27 June 2001), BGBl. II 2003, 1634; BGBl. II 2004, 787.

1. The Schengen Agreement as Predecessor to Mutual Recognition

The system of mutual assistance instruments – as indicated – can be considered rather complex consisting mainly of the Council of Europe Convention on Mutual Assistance in Criminal Matters (1959), which is supplemented by its additional protocol from 1978 and the Convention on mutual assistance between the Member States of the EU from the 29 May 2000 with its additional protocol from 2001. Also the Benelux Treaty of 1962[26] and the Schengen Implementing Convention of 1990[27], which in accordance with its Art.48 serves to amend to the Council of Europe's Convention on Mutual Assistance in Criminal Matters (1959) with regard to assistance in criminal matters, deserve to be mentioned. Furthermore several bilateral treaties exist as well as the Nordic agreements.[28] The Schengen-*acquis* has meanwhile been integrated into the EU-framework by way of the Amsterdam treaty, which was signed on 2 October 1997 and has taken effect on 1 May 1999. Since then the acceptance of the Schengen regulations is a necessary prerequisite for all new member candidates in the EU. Regarding the Schengen Implementing Convention, it has to be mentioned that this agreement represented a significant step forward in the development of judicial cooperation from a perspective of efficiency. The grounds to refuse execution of a mutual assistance request were reduced.[29] Regarding search and seizure orders, only the requirements of double criminality and the *ordre public* were upheld as grounds for refusal according to Art. 51.[30] By way of converse argument this means that the presence of double incrimination is not required for all other (less invasive) investigation measures. From today's perspective, these developments spearheaded the trend towards mutual recognition which is now prevalent in the European Union and at the same time make it apparent that *in practice* the boundaries between mutual assistance and mutual recognition might be

26 *Benelux treaty concerning extradition and mutual assistance in criminal Matters*, 27 June 1962, 616 U.N.T.S., 8893.

27 OJ 2000 L239/1.

28 Cf. e.g. A. Lach, 'Transnational Gathering of Evidence in Criminal Cases in the EU de lege lata and de lege ferenda', 4 *eucrim* (2009) 3, 107.

29 L. Bachmaier Winter, 'European Investigation Order for Obtaining Evidence in the Criminal Proceedings', 5 *Zeitschrift für Internationale Strafrechtsdogmatik* (2010) 9, 580.

30 T. Hackner, 'Internationale Rechtshilfe in der Praxis von Schengen' in S. Breitenmoser *et al.* (eds), *Schengen in der Praxis* (2009), 277, 285.

blurry depending on the concrete formulation of the instrument in question.[31]

The practical importance of the legal-assistance-related articles of the Schengen Implementing Convention may have been diminished since the Convention on mutual assistance between the Member States of the EU has taken precedence according to its Art. 2.[32] However the relevance of the Schengen Implementing Convention still remains, which can in part be attributed to Art. 95 et seqq. Those articles regulate the search for persons, be it as witnesses (Art. 98) or in order to extradite them (Art. 95)[33]. Also Art.54 of the Schengen Implementing Convention is highly relevant,[34] since it serves as the foundation for an European *ne bis in idem*, which has also found its way to the rulings of the European Court of Justice (ECJ).[35] Two principles which have not been touched upon by the Schengen Implementing Convention are the already mentioned principle of double criminality (at least regarding the very sensitive aspect of search and seizure orders) and the principle of non-extradition of citizens of the requested State. This is interesting to note, since those principles have been hardly fought over in the discussion on the European Arrest Warrant.[36]

The most recent developments regarding the Schengen-*acquis*, *however*, are the joining of Switzerland which – as a non-EU-State – has acceded to Schengen according to the agreement from 26 October 2004[37]

31 Cf. *supra* note 17 et seqq.

32 Hackner, *supra* note 30, 285.

33 *Id.*, 295.

34 O. Lagodny, 'Die Grundlagen der internationalen Rechtshilfe im Rahmen von Schengen', in S. Breitenmoser *et al.* (eds), Schengen in der Praxis (2009) 259, 266. With regard to the interrelation with Art. 50 of the EU's Charta of Basic Rights cf. Satzger, *supra* note 15, § 10, para. 68.

35 Hackner, *supra* note 30, 297.

36 Lagodny, *supra* note 30, 269.

37 *Agreement between the European Union, the European Community and the Swiss Confederation on the Swiss Conferation's association with the implementation, application and development of the Schengen acquis*, 26 October 2004, OJ 2004 L370/78, L368/26; 2008 L53/1. This has lead to very close ties between Switzerland and the rest of the Schengen-states, since Switzerland has to follow along closely with new developments in the Schengen-area if it wants to be part of the *acquis*. Its only alternatives are acceptance and implementation of new legislation or the termination of the cooperation as a whole if it does not want to go along with new developments (Hackner, *supra* note 30, 283). While Switzerland can take part in the developmental stages of new legislation on an informal level, final acceptance of said legislation is the prerogative of the EU's structures and Member States (Cf. *id.*, 283): Regarding new developments, Switzerland has to notify the EU during a period of 30 days after

and the invention of the principle of availability which states that information which is relevant for criminal prosecution and available in any given State of the EU has to be made *also* available to any other Member State.[38] It has been incorporated into the Schengen-acquis indirectly by way of the Prüm Convention[39] which aims to simplify the exchange of information relevant to criminal prosecution such as DNA-profiles and fingerprints.[40] The mechanism introduced by the principle of availability has been criticized due to (its inherent potential for) the transfer of competence from judicial authorities to police authorities so that information which has been gained by following strict judicial control procedures eventually might be turned over to police authorities without further assessment by a judge.[41] In this regard there are obvious similarities to criticism towards the (mutual-recognition-based) European Investigation Order. Since this instrument will be discussed thoroughly further on in the text, we will refrain from delving deeper into the subject at this time. However, this clearly shows that the Schengen-*acquis* might be considered the testing ground for new concepts regarding legal assistance in criminal matters in the EU.

2. The Stockholm Programme and its Corresponding Action Plan

While the Schengen Agreement marks the very first beginning of the journey towards mutual recognition, the Stockholm Programme and its corresponding Action Plan can be considered the state-of-the-art agenda for

being informed by the Council of the acceptance of new Schengen-legislation, if it wants to implement this legislation. Afterwards, an adequate period will be granted in order to implement the Schengen-legislation. Until then, the Schengen-legislation has to be applied temporarily. If Switzerland does not act during those periods or if it notifies the EU of its non-acceptance, the Schengen-association will be terminated. Also, Switzerland is not bound to the ECJ's interpretation of EU-law, even if it is part of the Schengen-*acquis* (*Id.*, 283).

38 Cf. *The Hague Programme*, 3 March 2005, OJ 2005 C53/7.

39 *Convention between the Kingdom of Belgium, the Federal Republic of Germany, the Kingdom of Spain, the French Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands and the Republic of Austria on the stepping up of cross-border cooperation, particularly in combating terrorism, cross-border crime and illegal migration*, 27. May 2005, Council Document 10900/05 [Prüm Convention]. While the Prüm Convention was originally a multilateral treaty which had been signed only by some EU-Member States, it was intended from the beginning to incorporate the agreement into the Schengen-*acquis*, cf. Hackner, *supra* note 30, 299.

40 Hackner, *supra* note 30, 299.

41 *Id.*, 300.

the development of legal assistance in criminal matters on the basis of mutual recognition. According to the Council of the European Union's Stockholm Programme[42] the priorities regarding the improvement of legal assistance in criminal matters will lie in furthering mutual trust between the Member States in order to enable them to act in accordance with the principle of mutual recognition.

Remarkably, the protection of the rights of suspected and accused persons is seen as an essential pre-condition for the facilitation of further trust.[43] Consequentially, the rapid accession of the EU to the European Convention is regarded as one of the key steps[44] to further mutual trust. At the same time, regardless of tangible successes (or failures) with respect to the improvement of mutual trust, the creation of a mighty single mutual-recognition-based-instrument to supplement the complex system of mutual-assistance on evidence-gathering in cases with cross-border-dimensions is concretely envisioned.[45] This new system shall encompass as many types of evidence gathering as possible by replacing the existing instruments which are of a fragmentary nature. A detailed roadmap for the implementation of these tools can be found in the Commission's action plan for the realization of the Stockholm Programme.[46] The main waypoints in the area of criminal law are seen in preventing criminals to avoid arrest by exploiting judicial differences between Member States, the implementation of a complete system to obtain evidence and the creation of a European public prosecution department which will be founded on Eurojust. Focusing strictly on legal assistance in criminal matters the next steps shall be:

- A proposition on laws regarding a complete system for obtaining all kinds of evidence in criminal matters. This system shall be based on the principle of mutual recognition. The proposition itself shall be put forth by the Commission in 2011.
- A proposition on laws to create a common standard for securing the admissibility of evidence in criminal matters which also shall be put forth by the Commission in 2011.

42 *Stockholm Programme*, *supra* note 21.
43 *Id.*, 17.
44 *Id.*, 11-12.
45 *Id.*, 22.
46 *Action Plan Implementing the Stockholm Programme*, 20 April 2010, COM(2010) 171.

- Furthermore in 2011 a proposition on laws regarding the mutual recognition of fines, including fines for reckless conduct in traffic shall be put submitted by the Commission.
- A handbook on the execution of the treaties on legal assistance and extradition between the EU and the USA is envisaged for as early as 2010.

Those main waypoints will yet have to be reached but unsurprising in the face of the boldness of the action plan animated discussion has already been spawned regarding these plans, especially concerning the procurance of evidence and the admissibility of said evidence. Before we will explore this subject further however, a look at recent developments in those areas of judicial cooperation which have been examined before appears appropriate in order to remind us of the status quo and its problems.

II. Present Application Difficulties of Mutual Recognition

The European Arrest Warrant has proven to be a kind of acid test of mutual recognition. It, therefore, has been widely discussed[47] so that a short recapitulation will suffice before addressing specific recent German case law as an example for the transposition of the Framework Decision highlighting the challenges posed by the Arrest Warrant. The Arrest Warrant has been incorporated in part eight of the German IRG (*Gesetz über die internationale Rechtshilfe in Strafsachen* – Law on International Assistance in Criminal Matters) which is where most of the rules concerning judicial cooperation in criminal matters can be found. Less than one year later though, the Second Senate of the Federal Constitutional Court in the Darkanzali-Case declared the first European Arrest Warrant Act unconstitutional and void due to a violation of the *Right not to be extradited*;[48] also its accordance with the *Right of Recourse to Court*[49] was questionable.[50]

47 Cf. *inter alia* Alegre & Leaf, *supra* note 5; K. M. Böhm, 'Das neue Europäische Haftbefehlsgesetz', 59 *Neue Juristische Wochenschrift* (2006) 36, 2592; B. Schünemann, 'Die Entscheidung des Bundesverfassungsgerichts zum europäischen Haftbefehl', 25 *Strafverteidiger* (2005) 12, 681.

48 The Right not to be extradited can be found in the German constitution (*Grundgesetz*) in Art. 16 (2). It reads: "No German may be extradited to a foreign country. The law may provide otherwise for extraditions to a member state of the European Union or to an international court, provided that the rule of law is observed." available at http://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html (last visited 21 December 2010).

Even though the implementation of the Arrest Warrant intended to simplify judicial cooperation regarding the extradition and procedure of criminal trials, its effects can be exactly opposite as the following recent examples from German case law will show: both cases have been decided by the Higher Regional Court in Oldenburg[51] and discuss pre-trial confinement in order to prevent flight from German jurisdiction. In both cases the accused persons were Dutchmen who had their respective fixed abode in the Netherlands and were prosecuted for trafficking marijuana in large quantities. For persons without a fixed abode who can expect long-term imprisonment there is a knee-jerk reaction in German criminal jurisdiction to assume that they will flee without awaiting trial, so in most of these cases pre-trial confinement can be considered as given. However the issue of flight is comparatively smaller when a fixed abode is present. This line of thought is also valid in those cases where the accused have their residency in a Member State of the EU[52], because in principle they can be brought to trial via arrest and extradition thanks to the Arrest Warrant. Accordingly, it had to be expected that the accused in the cases discussed here would be granted bail and not be taken into custody. This, however, is not what transpired. The First Senate of the Higher Regional Court decided in both cases that there was a higher risk for the accused Dutchmen to flee their respective trials when compared to German citizens. The Court denied bail in both cases, arguing that the possibility of issuing an Arrest Warrant was irrelevant in these cases. This was based on the fact that it would be possible for the Netherlands to allow extradition for their citizens only on the condition that they would be brought back to the Netherlands to serve their sentence if they were convicted to prison (based on Art. 5 No. 3 FD 2002/584/JI, the Framework Decision on the European Arrest Warrant which has been incorporated in Art. 6 of the Dutch law on extradition, the Overleveringswet)[53]. Also another condition for extradition of the accused

49 The Right of Recourse to Court is found in the German constitution in Art. 19 (4) 1: "Should any person's rights be violated by public authority, he may have recourse to Court."

50 Cf. BVerfG, 18 July 2005, 2 BvR 2236/04, 58 *Neue Juristische Wochenschrift* (2005) 32, 2289.

51 OLG Oldenburg, 4 November 2009, 1 Ws 599/09 and OLG Oldenburg, 8 February 2010, 1 Ws 67/10. Both of these decisions are available in 30 *Strafverteidiger* (2010) 5, 254 with a comment by S. Kirsch.

52 OLG Naumburg, 10 October 1996, 1 Ws 101/96. This decision is available in 17 *Strafverteidiger* (1997) 3, 138. LG Offenburg, 15. December 2003, 3 Qs 114/03 is available in 24 *Strafverteidiger* (2004) 6, 326.

53 *Staatsblad* (2004), 195, quoted after S. Kirsch *supra* note 51, 257.

Dutchmen would have to be met by German authorities in order to proceed, namely to accept the transformation of the German prison sentence to a sentence which is deemed acceptable under Dutch law.[54] It stands to reason that the Dutch sentence after transformation would not be as severe as the German sentence because the German stance on ownership, use and selling of marijuana is significantly stricter than the Dutch model. Since the accused can expect to serve a significantly reduced prison sentence in case of his extradition by the Netherlands due to the Dutch model, it would be in his best interests to flee to the Netherlands without awaiting trial in Germany. Firstly, it has to be noted that the Higher Regional Court's course of action arguably constitutes discrimination against a citizen of a Member State because of his citizenship, which is strictly forbidden according to Art. 18 TFEU.[55]

Secondly, and more relevant regarding the future direction of policy in the area of criminal law in the EU, are the following thoughts: the decisions of the Higher Regional Court lead one to believe that their main motivation does not lie in securing the realization of the criminal trial but rather in enforcing Germany's legal policy regarding "soft-drug" use. However this motivation is rejected by the Higher Regional Court in its second decision from 8 February 2010 where the Senate explicitly states:

> "The question which is discussed here is not about the enforcement of standards according to German criminal law but rather about securing the realization of the criminal trial."[56]

Yet, the impression remains that the Court acts against the legislators' intention to accept the Dutch practice with all its consequences. This intention which has been manifested in the signing and ratification of the European Convention on the Transfer of Sentenced Persons[57] includes necessarily the acceptance of results which may not always correspond with German legal policy in the field of criminal law. It appears to be inconsistent behavior on the part of Germany to act against its former statements, especially considering that these same models which have been

54 Based on Art. 11 of the *European Convention on the Transfer of Sentenced Persons*, 21 March 1983, ETS 112.

55 Cf. S. Kirsch *supra* note 51, 257.

56 OLG Oldenburg, 8 February 2010, 1 Ws 67/10, 30 *Strafverteidiger* (2010) 5, 255, 256. Translation by the authors.

57 Cf. *supra* note 54.

criticized by the Court have been incorporated in the German IRG as well.[58] The mentioned Higher-Regional-Court-decisions serve as a perfect example of why the (in)famously evoked "high degree of trust and solidarity"[59] within the EU is at least questionable and justify the Belgian scholar Klip's ironic remarks on the ubiquitous use of this slogan.[60]

> "It must be noted that there is a large gap between what the member states say and arrange officially and the actual performance. I suffice here with the example of the mutual confidence that all states have in each other. This confidence is so great that it must be ordained at regular intervals that there shall be mutual confidence. Despite this in mutual recognition all manner of old grounds for refusal are steadfastly adhered to."

It appears obvious that a most effective means to create trust would be the harmonization of differing Member States' laws and for the sake of completeness it may be noted that the Commission's action plan for the realization of the Stockholm Programme explicitly acknowledges that there is still a lot of work to do in the area of harmonizing European criminal law as illustrated in the following quote:

> "The administration of justice must not be impeded by unjustifiable differences between the member states' judicial systems: criminals should not be able to avoid prosecution and prison by crossing borders

58 Cf. S. Kirsch *supra* note 51, 258. As in the Netherlands, the extradition of German citizens is only admissible if the condition is met that they would be brought back to Germany to serve their sentence if they were convicted as according to their wish, cf. s. 80.1 IRG. Also, the transformation of a foreign sentence to a sentence according to German standards has been realized in s. 54 IRG.

59 Cf. the exemplarily vague reference to mutual trust in the ECJ's decision on the European Arrest Warrant: Case 303/05, *Advocaten voor de Wereld v. Leden van de Ministerraad*, [2007], para. 57: "With regard, first, to the choice of the 32 categories of offences listed in Article 2(2) of the Framework Decision, the Council was able to form the view, on the basis of the principle of mutual recognition and in the light of the high degree of trust and solidarity between the Member States, that, whether by reason of their inherent nature or by reason of the punishment incurred of a maximum of at least three years, the categories of offences in question feature among those the seriousness of which in terms of adversely affecting public order and public safety justifies dispensing with the verification of double criminality."

60 A. Klip, 'European Integration and Harmonisation and Criminal Law' in D. M. Curtin *et al.* (eds), *European Integration and Law* (2006), 137.

> and exploiting differences between national legal systems. A solid common European procedural base is needed."[61]

The effects of the remaining diversity of Member States' criminal law (and crime-policy-approaches) are perfectly illustrated in the case which has been presented here, as it would have been sensible to look for alternatives to provisional detention.[62] First steps to solve the problem – once more on the basis of mutual recognition – have been taken with the FD 2009/829/JHA on the application of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention.[63]

The problems of different treatment between residents and non-residents as they have surfaced in the cases which we have just discussed have also been foreseen by the Council of the European Union. This is evidenced in No. 5 of the reasons for adoption of FD 2009/829/JHA which states:

> "As regards the detention of persons subject to criminal proceedings, there is a risk of different treatment between those who are resident in the trial state and those who are not: a non-resident risks being remanded in custody pending trial even where, in similar circumstances, a resident would not. In a common European area of justice without internal borders, it is necessary to take action to ensure that a person subject to criminal proceedings who is not resident in the trial state is not treated any differently from a person subject to criminal proceedings who is so resident."[64]

In order to reach these goals the Framework Decision allows for several types of supervision measures which are specified in Art. 8 FD 2009/829/JI. Art.8.1 specifies those supervision measures which have to be monitored by each Member State as a minimum standard, e.g. an obligation for the supervised person to notify the authorities of any change of residence or an obligation not to enter certain places. Art. 8.2 names several other

61 *Action Plan Implementing the Stockholm Programme*, *supra* note 46, 5.

62 Cf. S. Kirsch *supra* note 14, 257, who points out that there is no reason which definitely prohibits the possibility of a Dutchmen appearing at his criminal trial in Germany.

63 Council Framework Decision 2009/829/JHA, 23 October 2009, OJ 2009 L294/20.

64 OJ 2009 L294/20.

supervision measures which can be monitored by the Member States if they so choose, as soon as they transpose the Framework Decision to national law, most notably the obligation to deposit bail. According to Art. 13 FD 2009/829/JI those supervision measures, if incompatible to the law of the executing State, may be adapted to the types of supervision measures which most closely resemble the supervision measure of the executing State in a comparable case while also corresponding to the originally intended supervision measure. For several offences which are listed in Art. 14 of the Framework Decision, the principle of double criminality is not deemed necessary, however Member States may for constitutional reasons "opt-out" of some or all of the offences listed. Art. 15 lists different reasons which might give grounds for the non-recognition of decisions on supervision measures, e. g. the *ne bis in idem* principle or the lack of criminal responsibility under the law of the executing State due to age.

III. Simplifying Legal Assistance by the Introduction of Mutual-Recognition-Based Tools?

Instead of a substantial step-by-step approximation of relevant Member State's laws the Union relies heavily on the fast-track of mutual recognition which recently has been expanded to the field of evidence-gathering by the Framework Decision on the European Evidence Warrant (hereafter Evidence Warrant).[65] However, the scope of the Evidence Warrant is rather limited as it only applies to pre-existing evidence, meaning "objects, documents and data" already in existence *in themselves* and *insofar* at hand (in the requested State).[66] Accordingly an Evidence Warrant allows for "measures, including search or seizure" provided[67] that the Warrant regards to an offence listed under Art. 14.2 FD – a mechanism similar to the Arrest Warrant. Pursuant to Art. 4.2 FD an Evidence Warrant should not be issued with regard to (the request of) interviews, bodily examinations, obtaining of real time information (as in case of intercepting communications) or communication data. Furthermore excluded is the request for an "analysis of existing objects, documents or data", which makes it apparent that the Evidence Warrant only aims at evidence-gathering that concerns objects/data which (at least in itself) are already at

65 Council Framework Decision 2008/978/JHA, 18 December 2008, OJ 2008 L350/72.

66 Cf. consideration 7, Art. 1 para. 1 Council Framework Decision 2008/978/JHA *supra* note 65.

67 Cf. Art. 11 para. 3 Council Framework Decision 2008/978/JHA *supra* note 65.

hand. The Evidence Warrant's concept therefore restricts the requesting State's authority to a somewhat accessory role with regard to investigations in the requested State. Hence the Evidence Warrant will arguably be no breakthrough improvement. As practitioners in order to obtain evidence from abroad in *most* cases anyway have to rely on the traditional instruments of *mutual legal assistance* (esp. the 1959 and 2000 Conventions on mutual assistance in criminal matters) they might decide to request *all* evidence through the traditional channel.[68] Nevertheless because of doubts concerning the applicability of the principle of mutual recognition to the gathering of evidence the approval-process was a lengthy one that took five years.[69] From the perspective of European-Union-crime-policy it may be emphasized that the Evidence Warrant from the beginning was perceived only as a "step towards a single mutual recognition instrument that would in due course replace all existing mutual recognition regime".[70]

1. Basic Doubts Concerning the Applicability of the Principle of Mutual Recognition to the Area of Evidence-Gathering

As has already been emphasized, European Law acknowledges the principle of mutual recognition as the foundation of legal cooperation in the European Union (Art. 82 TFEU). Nevertheless although mutual recognition *might* work reasonably well in certain areas of legal assistance, it will not necessarily work as well in others.[71] That those concerns are not ill-founded shows a comparison between the field of obtaining evidence and the area of extradition: Within the European Union traditional extradition law structures have been replaced by the EAW. The EAW was subject to constitutional concerns in several Member States and its implementation laws differ considerably. Nevertheless an Arrest Warrant in a way appears to be a "static" product of a certain national procedure;[72] its content and significance is quite obvious: an authority decides that a certain individual shall be put under arrest to ensure he will stand trial. In contrast, the significance of a certain act of evidence-collecting cannot be separated from

68 Bachmaier Winter, *supra* note 29, 583.
69 *Id.*, 581.
70 *Commission Proposal for the European Evidence Warrant for obtaining objects, documents and data for use in proceedings in criminal matters*, 14 November 2003, COM (2003) 688 final, 11.
71 Spencer, *supra* note 9, 603.
72 Cf. Ambos, *supra* note 17, 559.

the (possibilities of the) future use of the evidence within the trial-proceedings. If – because of those characteristics of evidence-gathering – evidence-warrants *could* not be compared to common-market products the applicability of mutual recognition to transnational evidence gathering becomes questionable: Why should an evidence-warrant issued in Member State X be recognized in Member State Y? The ready answer would be: Because there is an overwhelming trust between States X and Y! But this explanation only raises further questions since the *subject* of trust (which perfectly well might exist) seems to be the (quality of) Member State proceedings i.e. Member State proceedings *as a whole*. Mentioned problems are of course amplified by the diversity of Member State rules on collecting evidence[73] and admissibility; an instrument aimed at simplifying legal assistance with regard to the field of evidence gathering has to take into account that the facilitated obtaining of evidence would be completely senseless if the evidence turned out to be inadmissible (because of the circumstances of the taking of evidence). It may be emphasized that aforementioned concerns are not restricted to the ongoing academic discussion but have been most recently adopted by German Parliament.[74]

2. Further Steps ahead: Initiatives of the Commission and a Member State group

However, the Framework Decision on the Evidence Warrant eventually has been adopted in December 2008 and is to be implemented by the Member States until 19 January 2011. But, until now the Evidence Warrant is only in force in Denmark[75]; none have ever been issued, therefore there are no practical experiences concerning the application of mutual recognition in the field of evidence-gathering further steps could draw from.[76]

73 Spencer, *supra* note 9, 603.

74 German Parliament Decision of 7 October 2010, available at http://www.strafverteidiger-bayern.de/media/pdf/2010-10-07_Beschluss-BT_Europ-ischeErmittlungsanordnung.pdf (last visited 18 December 2010); cf. also BT-Drs. 17/3234, 4.

75 Cf. Commission opinion 'Cross-border crime' of 24 August 2010 IP/10/1067 available at http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/1067&format=HTML&aged=0&language=DE&guiLanguage=en (last visited 18 December 2010).

76 Cf. BT-Drs. 17/660, 3.

a) The Green Paper

Notwithstanding in November 2009 the commission adopted the "Green Paper on obtaining evidence in criminal matters …"[77]. The basic idea behind that initiative is to replace the complex system of mutual legal assistance (concerning evidence-gathering) by a single tool based on the principle of mutual recognition. Instruments based on the principle of mutual assistance "may be regarded as slow and inefficient".

> "[T]he most effective solution to the above mentioned difficulties would seem to lie in the replacement of the existing legal regime on obtaining evidence in criminal matters by a single instrument based on the principle of mutual recognition and covering all types of evidence".[78]

The Green Paper appears rather sketchy what might be explained by the sensitiveness of the matter.[79] Member States' responses are differing; Germany especially has taken up a critical stance concerning the commission's initiative.[80] The German reply of February 2010 stresses that "obtaining evidence should be considered in the overall context of national law" thus adopting a core-concern regarding the application of mutual recognition to the area of evidence-gathering. The official statement underlines this point by exemplifying: "For instance, far-reaching investigatory powers may be counter-balanced by extensive rights to refuse testimony." Given the (still) "considerable differences" between Member States' "minimum standards for defendants in criminal proceedings" mutual-recognition instruments for obtaining up to-date evidence lack a

77 *Commission Green Paper on obtaining evidence in criminal matters from one Member State to another and securing its admissibility*, 11 November 2009, COM(2009), 624 final.

78 *Id.*, 4-5.

79 Critical S. Allegrezza, 'Critical Remarks on the Green Paper on Obtaining Evidence in Criminal Matters from one Member State to another and Securing its Admissibility', 5 *Zeitschrift für Internationale Strafrechtsdogmatik* (2010) 9, 569, 570: "skeletal text, partly confused, which treats roughly subtle issues that would deserve much greater attention and evaluation".

80 Cf. Replies of the Federal Republic of Germany to the questions under points 5.1 and 5.2 of the Green Paper of 26 February 2010, available at http://ec.europa.eu/justice/news/consulting_public/0004/national_governments/germany_en.pdf (last visited 17 December 2010).

sufficient basis since "minimum standards would […] be indispensable with a view to extending the principle of mutual recognition to broad areas of obtaining evidence". Remarkably this stance seems to question the precedence of mutual recognition over harmonization (at least where evidence-gathering is concerned): Since Art. 82.2 TFEU only provides for the adoption of minimum rules while explicitly taking into account the differences between Member States' legal systems and traditions the development might have reached a deadlock: on the one hand extending the principle of mutual recognition to the field of evidence gathering requires a sufficient degree of harmonization of Member States' rules of procedure – on the other hand Art 82.2 TFEU unequivocally acknowledges the differences which are effectively hindering mutual recognition.[81] But, of course, whether there is a deadlock depends on the degree of harmonization one deems necessary as sufficient basis for mutual recognition. The German position seems to be the most rigid in the EU.[82] Other Member States, for example Austria, France or the Netherlands are basically in favor of extending the principle of mutual recognition to the area of evidence gathering and moreover one has to bear in mind that an evidence gathering instrument based on the principle of mutual recognition could be adopted under the terms of the ordinary legislative procedure; strangely the emergency brake-procedure would only be available with regard to harmonizing measures which could effectively create the basis for mutual recognition.[83]

b) Draft Directive on the European Investigation Order in Criminal Matters (Investigation Order)

However, the discussion on the Green Paper might already be rather out of date since in April 2010 several Member States brought forward their own proposal for a directive regarding the European Investigation Order in criminal matters (Investigation Order hereafter)[84]. The initiative proposes an

81 In Art. 82.2 it says: "Such rules shall take into account the differences between the legal traditions and systems of the Member States."

82 This might be explained by the difficult implementation-history of the EAW and the skeptical Lisbon-Decision of the Federal Constitutional Court.

83 Cf. Art. 82.1, 2 and 3 TFEU; 16.3 TEU.

84 Initiative for a Directive of the European Parliament and of the Council regarding the European Investigation Order in criminal matters of 29 April 2010, Council Document 9145/10, Interinstitutional File 2010/0817 (COD).

instrument that (differing from the Evidence Warrant) would cover *any kind* of investigative measures (except the organizing of joint investigation teams and certain interceptions of communication; Art. 3 draft directive). The obvious main advantage of the Investigation Order coheres with the commission's concern expressed in the Green Paper that is to simplify the existing complicated system of legal assistance. But to what extent the adoption of the Investigation Order will turn out as an improvement of the difficult area of legal assistance of course depends on details of the directive (and its implementation laws). The Initiative seems (at least implicitly) to acknowledge fundamental difficulties: According to s. 6 of the preamble of the Investigation Order on the one hand "a new approach is needed, based on the principle of mutual recognition"; on the other hand "the flexibility of the traditional system of mutual legal assistance" is to be taken into account.[85]

It is not easy to tell what will happen in the near future. The German stance, especially, regarding the instruments mentioned before is very skeptical. However, it appears advantageous to concentrate on the Investigation Order. In its basic structure (as an evidence-gathering-instrument founded on the principle of mutual recognition) the Investigation Order parallels the Evidence Warrant; the inherent problems of applying mutual recognition to the field of evidence gathering become all the more apparent with regard to the Investigation order due to its wider scope. Indeed, the application range of the proposed instrument in terms of investigation-measures and procedures covered by an Investigation Order conceivable would be wide. Pursuant to Art. 3 of the draft, an Investigation Order would cover any kind of investigative measures (except the organizing of joint investigation teams and certain interceptions of communication; Art. 3 draft directive). Furthermore, pursuant to Art.4.b, the draft directive would cover any investigations with regard to any administrative offences. But e.g. German judges have expressed concerns that the implementation of the draft directive without limitations with respect to its applicability to mere administrative offences (in German: *Ordnungswidrigkeiten*) might bring forth surplus load.[86] Art. 2 of the draft directive deals with the practical important and sensitive aspect of the

85 *Id.*, 2.

86 Cf. *Stellungnahme des Deutschen Richterbundes zur belgischen Initiative für eine Richtlinie des Europäischen Parlaments und des Rates über die Europäische Ermittlungsanordnung in Strafsachen*, Ratsdok. 9145/10, no. 29/10 (2010) available at http://www.drb.de/cms/index.php?id=658 (last visited 18 December 2010).

competent authorities Member States can respectively are to designate for issuing and executing Investigation Orders. Where the execution authority is concerned the Member States have only a limited implementation margin insofar as the designated authority has to have the competence "to *undertake* the investigative measure mentioned in the Investigation Order in a similar national case".[87] In other words: police-authorities would be designated as executing authorities. Art.2.a) draft directive pertains to the *authorities competent to issue an Investigation Order*. It is identical to Art. 2.c) FD and hence raises identical questions. According to Art. 2.a)i draft directive, judges, courts and investigating magistrates can be designated as competent "issuing authorities"; in addition to that "public prosecutor[s] competent in the case concerned" are explicitly included. Art. 2.a)ii draft directive furthermore provides a sweeping clause that seems open to discussion: it allows for the designation of

> "any other judicial authority as defined by the issuing State and, in the specific case, acting in its capacity as an investigating authority in criminal proceedings with competence in the case concerned to order the gathering of evidence in accordance with national law".

The explanatory memorandum argues that the term "judicial authority" is not meant in *strictu sensu*[88], according to its interpretation even police authorities can be designated by Member States as issuing authorities provided that the authority in question "has the power to order the investigative measure concerned at national level".

Once more the problem of the diversity of Member States' criminal procedure rules on the preliminary proceedings appears: since police authorities in part have far reaching investigative powers (of their own) a single instrument aimed at *simplifying* transnational gathering can hardly exclude police bodies as competent issuing authorities. On the contrary, to be efficient an Investigation Order should include any authorities competent in the field of criminal prosecution.[89] But an approach of such broadness raises doubts. First of all, the TFEU differentiates between judicial and police cooperation. Hence it seems dubious whether a directive that covers the issuing of Investigation Orders by police authorities that – depending on

87 *Explanatory Memorandum*, 3 June 2010, Council Document 9288/10 ADD 1, Interinstitutional File 2010/0817 (COD), 5.

88 *Id.*, 4.

89 Cf. *Stellungnahme des Deutschen Richterbundes, supra* note 86.

the situation on the requested side[90] – as the case may be are executed by police authorities would find a sufficient basis in Art. 82.1 TFEU. Accordingly the commission in answer to the initiative has pointed out that it ought to be *clarified* that no regulation is planned that could be interpreted as covering police-cooperation.[91] In addition to similar doubts concerning the coverage of Art.82.1 TFEU, the inclusion of any public authorities beyond Member State courts and (investigation) judges obviously would put a particular burden on the (material) foundation of the proposed Investigation Order. Even under domestic circumstances e.g. German criminal procedure law bestows varying degrees of competence on judicial authorities on the one hand and other public authorities on the other hand like prosecutors and police bodies; there are certain investigative measures which only can be authorized by a judge. Others like searches can only be authorized by the prosecution or its investigating-officers in case of imminent danger. Any such differentiations reflect the assumption that judicial decisions are of superior quality compared to decisions by other public authorities. Hence it might be acceptable that the Investigation Order (as outlined above) effectively would force the executing party into blindly trusting in the soundness of the substantive grounds for the request provided that the request was issued by a judge/a court. That the same could be said with regard to police issued Investigation Orders seems doubtful given the fact that even in domestic cases governed exclusively by national law several restrictions are imposed on the police (and to a lesser degree on prosecutors) which do not apply for judicial decisions. Of course one might argue that because of the similar working methods and the common mission of crime fighting that a high degree of mutual trust exists especially between police officers of different Member State forces. But it seems open to discussion whether mutual trust between law enforcement personnel can provide a sufficient basis for mutual recognition.[92] For instance, the German Parliament has recently pointed out that mutual trust between Member States (authorities) does not provide for a sufficient basis with respect to mutual recognition in the area of criminal law; since mutual recognition in this field amounts to transnational restrictions which affect the citizen the *citizen's trust* in the European Union is required to allow for mutual recognition.[93]

90 Cf. Council Document of 4 October 2010, 13049/1/10.
91 Commission Comment of 24 August 2010, C(2010) 5789 final, 3.
92 Convincing Bachmaier Winter, *supra* note 29, 586.
93 Cf. *supra* note 74.

Art. 5 draft proposal deals with "content and form of" an Investigation Order. With regard to the substantial reason for its decision to issue an Investigation Order the issuing authority is (only) to supply a "summary of facts"[94] and will *certify the accuracy of the Investigation Order's content* (Art. 5 No. 1 draft proposal which parallels Art. 6 FD). On closer inspection, however, it seems dubious whether Art. 82.1 TFEU (the principle of mutual recognition) could provide a sufficient basis for the outlined procedure. Reference objects of the principle of mutual recognition acknowledged in Art.82 TFEU are "judgments and judicial *decisions*". With respect to this the FD on the Arrest Warrant questionnaire requests issuing authorities to indicate the "Decision on which the warrant is based"[95] thus (at least formally) differentiating between a judicial decision (as a subject of recognition) and the warrant as the instrument/medium by which the recognition procedure is to be facilitated. The Investigation Order questionnaire in contrast does not refer to a "decision" which could be regarded as the subject matter of a mutual recognition process. Hence, if for instance a public prosecutor would fill in an investigation order and certify its content it seems open to question whether *that* act qualifies as a "judicial *decision*" whether the Investigation Order *in itself* can be a "decision" in terms of Art.82.1 TFEU. Remarkably the issuing of an Investigation Order *does not even seem to require a declaration* that the requested investigation-measure could be authorized domestically by the issuing authority. But, given that the principle of mutual recognition implies the existence of a judgment or a judicial decision that *in its content* could be "recognized" a judicial decision seems to *be bound to have* a content that exceeds that of a mere request. *If* an Investigation Order (an Evidence Warrant) would require a judicial decision on the (domestic) admissibility of the desired measure, it (arguably) would carry a statement, a declaration which in its content (in principle) appears to be open to recognition to application abroad. But if – in contrast – (lacking any such declaration) the communicative content of an Investigation Order due to the lack of any such declarations at a closer look boils down to a mere request addressed to a foreign authority to do this or

94 *Initiative for a Directive of the European Parliament and of the Council regarding the European Investigation Order in criminal matters*, 29 April 2010, Council Document 9145/10, Interinstitutional File 2010/0817 (COD), Annex A lit F.

95 Council Framework Decision 2002/584/JHA, 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, OJ 2002 L190/14, Annex, lit. b ("Decision on which the warrant is based: […] Arrest warrant or judicial decision having the same effect […] Enforceable judgement").

that arguably there would be no subject to recognition[96]. A mere request could only be denied or complied with, ultimately mutual assistance-style.

Furthermore, it might turn out to be problematic that an Investigation Order (as well as an Evidence Warrant) would provide the executing authority only with a "summary of the facts" regarding the substantive reasons for the request. Of course, one might bring forward that there simply is no need for further information since the executing authority is to act on the basis of trust in the substance of the order. However, (in domestic cases) e.g. the German Federal Constitutional Court stresses that authorities competent to order e.g. searches are to evaluate the reasons for the requested measure thoroughly. Hence, (domestically) an investigating judge cannot simply adopt the position of the prosecution office or the police. On the contrary, he is obliged to decide on his own responsibility e.g. on the lawfulness of a search.[97] Of course, the problem is intrinsically tied to the mutual recognition foundation of the Investigation Order. Inevitably mutual recognition tends to equalize differentiations with regard to (domestic) competences.[98] Keeping this in mind it is difficult to imagine how the (in this example German) legislator (beside his unwillingness to implement mutual recognition based evidence gathering instruments) *could* implement the Investigation Order's or the Evidence Warrant's mechanism in a manner consistent with the role of the investigating judge as outlined above.

Art. 8 of the draft directive – on the basis of the principle of mutual recognition – *obliges* the execution authority to recognize and execute Investigation Orders "without any former formality" unless grounds for non-execution respectively for non-recognition are invoked. However, depending on the content and application range of the grounds to refuse the execution of a request a mutual recognition instrument (as the proposed Investigation Order) converges toward traditional mutual assistance instruments.[99] As mentioned previously mutual legal assistance is rendered on the provision of the non-existence of "traditional" hindrances; mutual recognition instruments do not effectively abandon any such hindrances but

96 Cf. *Stellungnahme des Deutschen Richterbundes*, *supra* note 86.

97 Most recently BVerfG, 31 August 2010, 2 BvR 223/10, para. 24.

98 Cf. H. Ahlbrecht, 'Der Rahmenbeschluss-Entwurf der Europäischen Beweisanordnung', 26 *Neue Zeitschrift für Strafrecht* (2006) 2, 70, 72 with regard to the EEW.

99 Ambos, *supra* note 17, 561.

lets them resurface in the guise of (more or less far-reaching) grounds for refusal.[100]

With regard to this, the proposed Investigation Order provides for "grounds for non-recognition or non-execution" which appear to be limited (Art. 10 Investigation Order). Firstly, the requested State can refuse execution in case of hindering immunities or privileges (in terms of Art. 10.1 a) draft directive). Requested authorities furthermore could invoke national-security-reasons for not executing an Investigation Order (Art. 10.1 b) draft directive). Art. 10.1 d) draft directive deals with Investigation Orders that are not being issued within criminal proceedings. Thus the requested authority may refuse the execution provided that the Investigation Order derives from foreign proceedings regarding (only) administrative offences and the requested investigative measure would not be authorized in a similar national case.[101] As already mentioned there are some doubts about the broadness of the application range of the proposed instruments in terms of the types of procedures covered. Since in cases of only administrative proceedings regarding administrative offences (compared to criminal proceedings) the proportionality of many investigative measures *per se* appears dubious, one may wonder whether a restriction of Art. 4 b)/c) draft proposal by way of a *de minimis* rule would be more appropriate.[102] By comparison with the draft proposal the FD offers more grounds for non-recognition, including *inter alia* the infringement of *ne bis in idem*, the lacking of double criminality (provided the Evidence Warrant refers to a search or seizure with regard to an offence not listed in Art. 14.2 FD)[103] and the *manifest incorrectness* of the request (Art. 13.1 h FD).

However, Art. 10.1 c) draft directive deserves a closer look since it might turn out a kind of back-door allowing requested authorities to avoid execution in several cases. In conjunction with Art.9, the mentioned ground for non-execution addresses the problem that the exact type of the requested measure is not regulated in the requested Member State or could not be authorized in a domestic case. Conceivably, those situations would not be uncommon given the diversity of Member States' procedural law. However, that the requested measure is not regulated in the requested State does not pose automatic grounds for refusal.[104] In such cases pursuant to Art. 9 the

100 Ambos, *supra* note 17, 560.
101 Bachmaier Winter, *supra* note 29, 583.
102 Cf. *Stellungnahme des Deutschen Richterbundes*, *supra* note 86.
103 Cf. Art. 13.1 b Council Framework Decision 2002/584/JHA, *supra* note 95.
104 Bachmaier Winter, *supra* note 29, 583.

requested authority is to take recourse to an investigative measure other than that provided for in the Investigation Order. Recognition or execution of the Investigation Order may only be refused if there is no other investigative measure available which will make it possible to achieve a similar result (Art. 10.1 c Investigation Order). The same procedure applies, if the measure indicated in the Investigation Order exists, yet is limited to a category of offences which do not include the offence stated in the request (Art. 9.1 b, 10.1 c Investigation Order). Arts 9 and 10 Investigation Order thus appear to provide Member States with an implementation margin that remarkably covers the traditional dual criminality requirement. If, provided there is no other investigative measure available which will make it possible to achieve a similar result–, a request can be refused pursuant to Art. 10.1 b) Investigation Order because the measure in question *is only regulated with regard to more serious crimes*, it all the more should be possible to reject a request that refers to a measure that could under no circumstances be applied within domestic proceedings because *the stated offence does not exist*.[105]

On the other hand one might argue that there is no need for an extensive use of the implementation margins since – unlike extradition/surrendering – not all kinds of investigative measures do intensively infringe fundamental rights of the persons concerned.[106] Member States therefore might resort to a compromise solution which seems to be in accordance with the implementation margin offered by Art. 9 and 10 Investigation Order: The dual criminality standard could be disregarded with respect to measures of only limited intrusiveness. In the case of investigation measures that restrict fundamental rights (in an intensive way) like searches or confiscation measures a dual criminality standard appears necessary: at least in these cases mutual recognition lacks a sufficient basis since the issuing and executing a State's rules regarding the requested investigation-measure (obviously) are completely disharmonic if a measure that restricts fundamental rights is lawful in the issuing State but not provided for (and therefore disproportional) in the requested State.[107] A related situation occurs when the requested measure is provided for in the stated offence but its execution would not be necessary or proportional due to the circumstances of the case. Under such circumstances the proposed Investigation Order appears not to allow for a refusal of the request.

105 Bachmaier Winter, *supra* note 29, 585.
106 Ambos, *supra* note 17, 560.
107 Convincing Bachmaier Winter, *supra* note 29, 585.

Furthermore, the requested authority will not even have the necessary information for a proper examination of the proportionality of the measure in question since the intended standard form does only contain an obligation for the requesting authority to procure merely a "[s]ummary of facts and description of circumstances in which the offence(s) underlying the Investigation Order has (have) been committed".[108] The executing authority is bound to trust the assessment of the requesting authority.[109] Certainly one might point out that this kind of trust is what mutual recognition is about. But on the other hand both case groups appear similar: in the first case group (covered by Art. 9 and 10 Investigation Order) the national legislator deems the investigation of a certain type of conduct disproportional and therefore does not provide authorities with (certain) investigation-measures; in the second case group (which is arguably not covered by Art. 9 and 10 Investigation Order) a certain technique is generally provided for, but given the circumstances of the case might by flagrantly un-proportional. Regardless the pivotal importance of the principle of proportionality especially in search cases[110] according to the Investigation Order proposal the executing authority will not (and could not) examine the proportionality of the requested measure. The person concerned on his part can challenge "the substantive reasons for issuing the Investigation Order […] only in an action brought before a court of the issuing state" (Art. 13 Investigation Order).[111]

As already suggested, before *any* instrument on transnational evidence-*gathering* – irrespective of its foundation (mutual legal assistance or mutual recognition) – has to deal with the problem of the *admissibility* of the obtained evidence.[112] Any transnational gathering of evidence on the simplifying basis of mutual recognition would obviously be pointless if obtained evidence would turn out to be inadmissible in the requesting State. Art. 8.2 draft directive tackles this problem on the basis of the *forum-regit-actum*-principle: As a rule "[t]he executing authority shall comply with the formalities and procedures expressly indicated by the issuing authority […] provided that such formalities and procedures are not contrary to the fundamental principles of law of the executing State". Remarkably with regard to the crucial question of ensuring the admissibility of evidence

108 Cf. Annex A of the proposition.
109 Bachmaier Winter, *supra* note 29, 586.
110 Cf. L. Meyer-Goßner, *Strafprozessordnung*, 53rd ed. (2010), s. 102, para. 15a.
111 Cf. *supra* note 118.
112 Cf. *supra* note 73.

obtained abroad the proposal adopts a model well-known from mutual legal assistance instruments. Art. 8.2 Investigation Order appears to be modeled closely on Art. 4.1 of the EU-Convention on Mutual Assistance in Criminal Matters of May 2000. Once more the obstacles become apparent that hamper the application of the mutual recognition principle to the little harmonic environment of evidence law. These limitations would affect the practicability of the proposed instrument since the executing authority – regardless the shift from mutual assistance to mutual recognition - still is compelled to apply foreign procedural rules. Art. 8.2. Investigation Order at least allows for the requesting authority to "expressly indicate" the relevant regulations but this provision as well does not constitute an alteration from the EU Convention on Mutual Assistance.[113]

This remarkable continuity obviously stems from a lack of harmonization of procedural law in the EU-Member States: the best way to make sure that evidence gathered abroad will be domestically admissible would be the harmonization of the relevant procedural regimes. But it needs not emphasizing that, this goal is not realistic.[114] Certainly an alternative to the *forum-regit-actum* approach (and rather radical) solution could be reached by way of combining the *locus-regit-actum* rule with the principle of mutual recognition. Evidence would be obtained according to the relevant laws of the executing State; the courts of the requesting authority's State would admit the obtained evidence provided only that it had been gathered in accordance with the relevant regulations of the executing State.[115]

One might bring forward in favor of this approach that notwithstanding the differences of Member State's procedural laws within the EU all Member States at least are bound by the ECHR.[116] But, the initiative arguably rightly refrains from mentioned radical approach since a *locus-regit-actum* rule concerning the gathering of evidence in combination with the facilitation of unlimited admissibility on the basis of mutual recognition could only amount to a *de facto* total harmonization of Member

113 Convincing Ambos, *supra* note 17, 561.

114 Bachmaier Winter, *supra* note 29, 587.

115 Cf. *id.*, 587 with reference to the accordant legislation of the Spanish Supreme Court. Noteworthy German Courts do not (principally) exclude any evidence that have been obtained abroad in ways inconsistent with domestic procedure law. Instead a "*Beweiswürdigungslösung*' is preferred. This means that the circumstances of the evidence-gathering will be taken into account (*only*) with regard to the weighing of evidence. Cf. B. Roger, 'Europäisierung des Strafverfahrens', 157 *Goltdammer's Archiv für Strafrecht* (2010) 1, 28.

116 Cf. Ambos, *supra* note 17, 562.

States admissibility rules which would not (even) be covered by Art. 82.2 TFEU.[117] Mutual recognition therefore effectively would level Member States differing admissibility regimes thus infringing the principle of subsidiarity (Art. 5.3 TEU) as well as the limitations established by Art. 82.2 TFEU as "differences between the legal traditions and systems of the Member States" would not be taken into account but ignored.

Further, different problems are likely to arise if requests were directed at States that domestically make generous use of the principle of opportunity by States that tend to adhere to the principle of legality. From a Spanish perspective *Bachmaier Winter* exemplifies insofar with regard to the Spanish and Dutch laws on minor drug offences: it often occurs that Spanish investigation judges (up till now on the basis of mutual assistance) request Dutch authorities to gather evidence related to drug offences which would not be prosecuted in the Netherlands. In modern practice the State applying the opportunity principle will refuse the execution of the request.[118] Tendencies to extend the principle of opportunity are driven not least by economic considerations; hence a State that applies the principle of opportunity to certain offences (considered domestically as less serious) will not allocate the resources to the investigation of those offences which would be required in case of the consistent application of the legality-principle. Such *domestic* crime/politics decisions (of the requested State) would be undermined if its authorities were *obliged* to investigate any (minor) crimes (which domestically would be dealt with on the basis of the principle of opportunity) provided by a foreign request by way of an Investigation Order.

Art. 13 draft directive (as well as Art. 18.2 FD) allows for legal remedies, yet the "substantive reasons for issuing the Investigation Order can be challenged [by interested parties] only in an action brought before a court of the issuing State". While this burden put to the suspect is merely a consequence of the application of the principal of mutual recognition it nevertheless emphasizes that it should be the mutual trust of the citizens (and not that of brother authorities) providing a sufficient basis for mutual recognition of investigating measures. Furthermore, one has to consider that in cases where interested parties may have good reason to contest the substantive reasons for a certain measure (e.g. for the search of a building) given by an authority of member State X as well as the way of its execution

117 Cf. *Stellungnahme des Deutschen Richterbundes*, *supra* note 86.

118 Bachmaier Winter, *supra* note 29, 585.

by an authority of member State Y the Investigation Order (and Evidence Warrant) would create a division of remedies. The interested party (who might be a citizen of a third State) would have to challenge the given reasons for the measure before a court of State X and the circumstances of its execution before a court of the State Y. Only time will tell if the European Court for Human Rights will assess the legal remedies which the FD and the draft proposal allow for as "effective" ones in terms of Art. 13 European Convention on Human Rights. Similar doubts arise with regard to Art. 6 ECHR since the draft proposal as well as previous EU instruments are aimed unilaterally at further strengthening the efficiency of criminal prosecutions. Undeniably *any* attempt at the strengthening of the prosecution tends to endanger the balance between prosecution and defense. Needless to say the *defense* is not provided with complementary tools regarding evidence-gathering in trans-national cases. Conceivably Strasbourg will have to decide whether the Human Rights guarantee of the equality of arms is infringed.

Of course one might argue in favor of the initiatives that the idea of the draft directive as well as of the FD is (merely) the simplification and therefore improvement of legal assistance with regard to criminal matters within the EU. Yet, arguably this would amount to an artificial restriction of one's perspective. Indeed there is widespread criticism (which by far is not restricted to academic circles) that the EU crime policy overemphasizes the efficiency of prosecutions. For instance the FD on certain procedural rights has still not been approved[119] and the German Parliament has argued out that further extensions of the principle of mutual recognition without implementing the Council's "Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings"[120] could only undermine the mutual trust which has been established so far and thus turn out to be simply counterproductive.[121]

IV. Intercontinental European Union Acts

In regards to an intercontinental perspective on legal assistance related developments affecting the framework of international law it may be noted

119 Bachmaier Winter, *supra* note 29, 587.

120 Resolution of the Council of 30 November 2009 on a Roadmap for Strengthening Procedural Rights for Suspected or Accused Persons in Criminal Proceedings, OJ 2009 C295/01.

121 Cf. above *supra* note 74.

that recent intercontinental instruments of course are not based on the principle of mutual recognition but on the international agreements regarding mutual legal assistance. Nevertheless, they appear as signs of shifting international law paradigms.

1. Mutual Legal Assistance between the EU and the USA

The most far-reaching developments have taken place in the area of legal assistance between the EU and its member States and the USA. Just like individual member States, the EU itself has acquired an ability to enter international treaties due to its status as an international legal personality, *cf*. Art 47 TEU. While the EU is not considered a State (thus lacking an entitlement to examine its own jurisdiction), it has at least the status of an international organization.[122] Accordingly the entering of international treaties is valid as long as the EU acts in accordance with those areas in which it has been given competence.[123] The hitherto existing jurisprudence, which acknowledged the existence of so-called implicit competences to enact treaties,[124] has been recorded in Arts 3.2 and 216.1 TEU.[125] Therefore the EU now has been given competence in those cases in which a treaty is necessary to realize goals which have been mentioned in the EU's primary legislation. This goes also for those cases in which the treaty in question has been envisioned for the future in binding EU legislation or in cases in which existing legislation could be hindered or altered if the treaty in question would not be entered.[126] Art. 218 TEU specifies the procedure which has to be followed in these cases. Since the institutions of the EU are bound to act in accordance with international treaties due to Art. 216.2 TEU, those international treaties which have been entered take precedence to the EU's secondary legislation. Also it has to be noted that directly applicable clauses can deliver direct legal effects to EU citizens.[127] However the EU's primary legislation takes precedence to international treaties. This follows from Art. 218.11 TFEU which enables the ECJ to decide in an opinion if prospective international treaties are reconcilable with the EU's primary legislation.[128]

122 Cf. W. Frenz, Handbuch Europarecht (2010), Volume 5, Chapter 1 § 2, para. 42.
123 Cf. *Id.*, Chapter 1 § 2, para. 39.
124 Cf. ECJ Case 22/70, *Commission v Council*, Slg. 1971, 263.
125 Critical R. Streinz *et al.*, Der Vertrag von Lissabon zur Reform der EU, 3rd ed. (2010), 133 as the TFEU exceeds the existing jurisprudence.
126 Frenz, *supra* note 122, Chapter 6 § 2, para. 602.
127 Cf. *id.*, Chapter 6 § 2, para. 598.
128 Cf. *id.*, Chapter 1 § 2, para. 45.

This also leads to the conclusion that EU primary legislation is the measure in those cases in which the Union acts based on intercontinental law.[129] These developments consist of the signing of two agreements, namely on the area of extradition[130] and the area of other assistance.[131] In Germany, those agreements have been implemented by the signing of three treaties.[132]

The agreements between the EU and the USA came to pass in reaction to the terrorist attacks of 9/11. Like most Member States, Germany has declared that certain constitutional requirements have to be guaranteed in order to bind Germany to the agreement.[133] The object of the agreements is to simplify the practices in extradition and mutual legal assistance in criminal matters by establishing singular rules in order to better fight terrorism and organized crime.[134] The agreement on extradition consists of 22 articles and regulates only parts of the area of extradition by adding to bilateral treaties already in existence. But, as it consists of rules which stray from rules in already existing bilateral treaties, the agreement between the EU and the USA on extradition remarkably takes precedence over rules agreed on by (traditional) way of bilateral agreement.[135] The mutual-legal-assistance-agreement encompasses 18 articles and aims to simplify several

129 Cf. *id.*, Chapter 1 § 2, para. 46.

130 *Agreement on Extradition between the European Union and the United States of America*, 25 June 2003, OJ 2003 L 181/27.

131 *Agreement on Mutual Legal Assistance between the European Union and the United States of America*, 25 June 2003, OJ 2003 L 181/34.

132 *Treaty between the Federal Republic of Germany and the United States of America on Mutual Legal Assistance in Criminal Matters*, 14 October 2003, BGBl. II 2007, 1620; *Second Supplementary Treaty to the Treaty between the Federal Republic of Germany and the United States of America Concerning Extradition*, signed on 18 April 2006, BGBl. II 2007, 1634; *Supplementary Treaty to the Treaty between the Federal Republic of Germany and the United States of America on Mutual Legal Assistance in Criminal Matters*, 18 April 2006, BGBl. II 2007, 1637. The treaty on mutual legal assistance and its supplemental treaty entered into force on 18 October 2009. The agreements between the EU and the USA as well as the Second Supplementary Treaty have entered into force on 1 February 2010, cf. D. Brodowski, 'Strafrechtsrelevante Entwicklungen in der Europäischen Union', 5 *Zeitschrift für Internationale Strafrechtsdogmatik* (2010) 5, 376, 385.

133 According to Art. 24.5 TEU in the consolidated version after the Treaty of Nice which reads: "No agreement shall be binding on a Member State whose representative in the Council states that it has to comply with the requirements of its own constitutional procedure; the other members of the Council may agree that the agreement shall nevertheless apply provisionally."

134 BT-Drs. 16/4377, 74.

135 BT-Drs. 16/4377, 70.

areas of mutual legal assistance, e.g. in the areas of identification of bank information, video conferencing regarding testimony and joint investigative teams. Just like the agreement on extradition, it also aims at adding to already existing regulations and takes precedence in case of normative collisions.[136]

a) Extradition

The area of extradition between Germany and the USA is governed by the bilateral Treaty between the Federal Republic of Germany and the United States of America Concerning Extradition from 20 June 1978 which has entered into force on 29 August 1980.[137] This treaty has been adapted by the Supplementary Treaty to the Treaty between the Federal Republic of Germany and the United States of America Concerning Extradition which has been signed on 21 October 1986 and has entered into force on 11 March 1993.[138] The Second Supplementary Treaty dating from 18 April 2006 serves to harmonize the bilateral extradition treaty with the regulations of the EU-USA agreement on extradition. The changes which have been made by the Second Supplementary Treaty are strictly oriented on the regulations laid down in the EU-USA agreement on extradition which do not leave much room for differing bilateral rules between the different Member States and the USA. Therefore we now have two instruments of international law which are both to be followed. However regulations of the EU-USA agreement have been incorporated into the bilateral treaty by way of the Second Supplementary Treaty in order to prevent fuzziness in everyday application of these instruments.[139]

Of special interest are Arts 1 and 5 of the Second Supplementary Treaty. Art. 1 deals with cases in which the person to be extradited is threatened by the possibility of capital punishment in the USA. Art. 1 of the Second Supplementary Treaty changes Art. 12 of the original Treaty on extradition insofar as Germany may grant extradition on the condition that the death penalty will not be imposed or that it will not be carried out. If the USA does not accept these conditions, the request for extradition may be denied. In this regard, the wording of Art. 1 of the Second Supplementary

136 BT-Drs. 16/4377, 74.
137 BGBl. II 1980, 646, 1300.
138 BGBl. II 1988, 1086; BGBl. II 1993, 846.
139 BT-Drs. 16/4377, 62.

Treaty is nearly identical to Art. 13 of the EU-USA agreement.[140] Art. 5 concerns the collision of requests for extradition by several States. Art. 5 clarifies that the request for surrender pursuant to the Arrest Warrant is treated as a competing request for extradition and does not deserve special treatment.[141]

b) Other Assistance

The bilateral treaty on mutual legal assistance between Germany and the USA dating from 14 October 2003 only has been signed after considerable negotiation. Since the agreement between the EU and the USA was on its way, the Supplementary Treaty on Mutual Legal Assistance between Germany and the USA has been negotiated even before the original treaty entered into force. The Supplementary Treaty aims at incorporating the changes made by the EU-USA agreement in the bilateral treaty between Germany and the USA, thereby giving way to a consolidated version of the original bilateral treaty. By this treaty, dating from 18 April 2006, the regulations contained in the Arts 4 to 12 of the agreement between the EU and the USA, which have not been included in the original treaty, will become part of the treaty on mutual legal assistance between Germany and the USA. According to Art. 3.2 a) of the EU-US agreement, every Member State has to acknowledge in a written instrument between itself and the USA the application of its bilateral mutual legal assistance treaty in force with the United States of America. By the signing of the supplemental treaty, this demand has been met.[142]

The treaty starts out with regulations on foundational matters, namely the obligation of both parties involved to lend mutual assistance[143] (Art. 1), the establishing of Central Authorities to make and receive requests[144] (Art.2) and the establishment of the right to refuse requests due to the *ordre public* principle (Art. 3). Arts 4 to 13 deal with the different shapes of legal assistance, while Arts 14 to 16 deal mainly with confidentiality issues and

140 BT-Drs. 16/4377, 62.

141 Cf. BT-Drs. 16/4377, 63.

142 BT-Drs. 16/4377, 74.

143 Art. 1 also defines what is included as assistance and defines competent authorities which can request legal assistance.

144 For the United States, Central Authority is in principle the Attorney General or a person which has been assigned by him with this task. For Germany, Central Authority is in principle the Federal Ministry of Justice. In case of urgency requests may be communicated between other authorities.

the protection of sensitive data. Arts 17 to 26 describe technicalities in the way in which legal assistance will be granted, e.g. contents and form of requests and expenses.[145]

As in the area of extradition, there is a possibility to deal with differing views on capital punishment. While this area is explicitly dealt with in Art. 1 of the Second Supplementary Treaty on extradition, in the area of other assistance this problem can be solved by utilizing the *ordre public* rule in Art. 3 thereby denying legal assistance. Another possibility would be to grant legal assistance according to Art. 15.1 on the condition that the death penalty will not be imposed or that it will not be carried out.[146]

2. Mutual Legal Assistance between the EU and Japan

Another noteworthy development is the signing of the Agreement between the European Union and Japan on Mutual Legal Assistance in Criminal Matters.[147]

The agreement consists of 31 articles. Arts 1 to 3 regulate foundational matters like the object and purpose of the agreement as well as the scope of mutual legal assistance. According to Art. 1.2 the agreement does not apply to extradition, transfer of proceedings in criminal matters and enforcement of sentences except in case of freezing or seizure and confiscation of proceeds or instrumentalities which is dealt with in Art. 25. Arts 4 to 6 deal with establishing central authorities and the communication between them as well as establishing the authorities competent to originate requests. Arts 7 to 10 describe technicalities in the way in which legal assistance will be granted, e.g. concerning contents and form of requests, the language to be used and the execution of requests in general. Art. 11 deals with the grounds for refusal of a request while Art. 13 puts limitations on the use of testimony, statements, items or information. Arts 14 to 22 deal mainly with different shapes of legal assistance while Arts 23 and 24 regulate safe conduct for those who have to appear before the competent authorities in the requesting State and the temporary transfer of persons in custody. The remaining articles regulate matters like relation to other instruments, territorial application and entry into force and application of the

145 BT-Drs. 16/4377, 52.

146 Cf. BT-Drs. 16/4377, 54.

147 *Agreement between the European Union and Japan on Mutual Legal Assistance in Criminal Matters*, 30 November 2009, OJ 2010 L 39/20.

agreement. The Agreement which is based on Art. 82.1 TFEU has not entered into force yet, since it depends on the assent of the European Parliament according to Art. 218.6 a) TFEU. As soon as the agreement enters into force, it will become directly enforceable law in the EU and the Member States according to Art. 216.2 TFEU, since it does not require ratification in the Member States. From a German viewpoint this would mean that the Agreement would take precedence in comparison to the IRG. If this meets constitutional demands after the Lisbon-ruling by the Federal Constitutional Court may be doubted.[148]

V. Conclusion

After all, the most vivid playground in legal assistance in criminal matters appears to be the furthering of mutual recognition most recently evidenced by the ongoing discussion surrounding the proposal of a European Investigation Order. However even in the utilization of established instruments there are still challenges to be met; as the examples from German case law regarding the Arrest Warrant suggest, mutual trust does not seem to be a dependable reality yet. Notwithstanding, the Council's Stockholm Programme and its corresponding action plan amongst other things aim to further mutual trust, remarkably, by way of creating new tools of legal assistance with focus on the gathering of evidence in criminal cases. However this might be compared to putting the cart in front of the horse, since it seems to be that trust constitutes a prerequisite for mutual recognition (not the other way round). Keeping this dynamic in mind, it appears to be of special interest not the least from an international law perspective that the capacity (and legitimacy) of the principle of mutual recognition – despite its relative success at least in terms of the growing numbers of instruments based on it – still do not seem to be clear. On the contrary any input from a principle-led perspective on the possible potential of "trust" (which arguably does not go without saying!) for the furthering of inter-State respectively inter-authority relations and the (ever increasing) integration status of the European Union appears to be of mutual interest – from the international law perspective as well as the practical view on the diverse problems of galloping Europeanization. Recent developments and problems of legal assistance in criminal matters cannot be explained nor fully understood from a traditional international law perspective. This

[148] Brodowski, *supra* note 132, 386.

proves the assumption that international law doctrine can only benefit from taking into close account and evaluating the repercussions from the furthering of the principle of mutual recognition in the realms of criminal law.