

## PRECONDITIONS AND LIMITS OF MUTUAL RECOGNITION

MARKUS MÖSTL\*

### 1. Introduction

For a union of States which wants to be “united in diversity”,<sup>1</sup> i.e. which seeks to bind together 27 legal orders into one single market and one area of freedom, security and justice without destroying the pluralism of those 27 legal orders, the principle of mutual recognition<sup>2</sup> of different standards and decisions is and has to be a key concept and a vital rule of construction. Ever since the judgment

\* Lehrstuhl für Öffentliches Recht II, Universität Bayreuth

1. Motto of the EU, see <europa.eu/abc/symbols/motto/index\_en.htm>; Art. I-8 CT.

2. For outlines and analyses of the principle in the context of the internal market see Niehof, *Der Grundsatz der gegenseitigen Anerkennung im Gemeinschaftsrecht* (Berlin, 1989); Beyer, *Rechtsnormenerkennung im Binnenmarkt* (Berlin, 1998); Bernel, *Le principe d'équivalence ou de „reconnaissance mutuelle“ en droit communautaire* (Zürich, 1996); Götz, “Der Grundsatz der gegenseitigen Anerkennung im europäischen Binnenmarkt” in *Liber Amicorum Günther Jaennike zum 85. Geburtstag* (Berlin, 1998), pp. 763–791; Armstrong, “Mutual Recognition” in Bernard and Scott (Eds.), *The Law of the Single European Market* (Oxford, 2002), pp. 225–267; Michaels, *Anerkennungspflichten im Wirtschaftsverwaltungsrecht der Europäischen Gemeinschaft und der Bundesrepublik Deutschland* (Berlin, 2004); Schioppa (Ed.), *The principle of Mutual Recognition in the European Integration Process* (Houndmills, 2005); Kerber and van den Bergh, “Unmasking Mutual Recognition: Current Inconsistencies and Future Chances”, *Marburg Papers on Economics*, No. 11/2007, available at <www.uni-marburg.de/fb02/makro/forschung/gelbereihe/artikel/2007-11\_kerber.pdf>; Rivel, “Le principe de reconnaissance mutuelle dans le marché unique du XXIème siècle”, (2007) RMC, 518–525. For the application of the principle in special policy areas, e.g. food: Streinz, “Das Prinzip der gegenseitigen Anerkennung und seine Auswirkungen auf die nationalen Lebensmittelrechte”, (1993) ZLR, 3–60; Schroeder, “Gegenseitige Anerkennung im Lebensmittelsektor”, (2009) ZLR, 279–298; Driving Licences: Saurer, “Anerkennungsgrundsatz und Rechtsmissbrauch im europäischen Fahrerlaubnisrecht”, (2009) Jura, 260–264; In the field of Judicial Cooperation in Criminal Matters: Peers, “Mutual recognition and criminal law in the European Union: Has the Council got it wrong?”, 41 CML Rev. (2004), 5–36 Gleß, “Zum Prinzip der gegenseitigen Anerkennung”, 116 ZStW (2004), 352–367; Alegre and Leaf, “Mutual Recognition in European Judicial Cooperation: A Step Too Far Too Soon? Case Study – The European Arrest Warrant”, 10 ELJ (2004), 200–217; Mitsilegas, “The constitutional implications of mutual recognition in criminal matters in the EU”, 43 CML Rev. (2006), 1277–1311; Bantekas, “The principle of mutual recognition in EU criminal law”, 32 EL Rev. (2007), 365–385; Vernimmen-Van Tiggelen and Surano, *Analysis of the future of mutual recognition in criminal matters in the European Union* (Brussels, 2008), available at <ec.europa.eu/justice\_home/doc\_centre/criminal/recognition/docs/mutual\_recognition\_en.pdf>; Asp, “Basic Models of a European Penal Law: Mutual Recognition, Cooperation, Harmonisation” in 4. *Europäischer Juristentag* (Wien, 2008), pp. 259–273; Marin, “The European arrest

in *Cassis de Dijon*,<sup>3</sup> the idea that the Member States – even when no harmonization of standards has been achieved – have to admit goods/services/persons which are lawfully marketed/offered/employed in their country of origin to their own markets, unless restrictions can be justified, and that, in order to avoid double burdens, they cannot simply apply their own standards without taking account of (and in that sense: recognizing) the requirements and controls already fulfilled in the country of origin, has been firmly enshrined in the doctrine of fundamental freedoms.<sup>4</sup> Following this idea, the European legislature, too, has – in what came to be known as the “new approach”<sup>5</sup> – given up the goal of unrealistic full harmonization of standards, but has made the principle of mutual recognition (based only on minimum approximation) the key pillar of the construction of the internal market through secondary legislation.<sup>6</sup> More recently – in a remarkable shift continuing its history of success – the application of the principle of mutual recognition, first adopted in the internal market (“First Pillar” according to the pre-Lisbon terminology), has been extended to a quite different policy area, the “area of freedom, security and justice”, and here in particular also to judicial cooperation in criminal matters (“Third Pillar”).<sup>7</sup> Once again, as substantive harmonization seemed unachievable, the concept of mutual recognition was adopted instead.<sup>8</sup> The European Council called it the “cornerstone of judicial cooperation”<sup>9</sup> and is trying to establish the “free movement of judicial decisions” without or with only little harmonization of standards. The European Arrest Warrant (EAW) is the most prominent example of this approach.<sup>10</sup>

warrant and domestic legal orders. Tensions between mutual recognition and fundamental rights: The Italian case”, 15 MJ (2008), 473–492.

3. Case 120/78, *Rewe-Zentrale AG v. Bundesmonopolverwaltung für Branntwein*, [1979] ECR 649.

4. Michaels, op. cit. *supra* note 2, pp. 215–276; Götz, op. cit. *supra* note 2, 776–777; Möstl, “Wirtschaftsüberwachung von Dienstleistungen im Binnenmarkt”, (2006) DÖV, 281, at 282–283.

5. Barnard, *The substantive law of the EU* (Oxford, 2004), pp. 520 et seq.; Leible in Grabitz and Hilf, *Das Recht der Europäischen Union*, 39th ed. (Munich, 2009), Art. 28 EGV, para 26; Beyer, op. cit. *supra* note 2, pp. 73–79.

6. As such it is, even now in the 21st century, as important as ever; see Rivel, op. cit. *supra* note 2, 525.

7. See citations towards the end of note 2.

8. Mitsilegas, op. cit. *supra* note 2, 1278.

9. Conclusions 33, 35–37 of the Tampere European Council 1999.

10. Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedure between Member States 2002/584/JHA, O.J. 2002, L 190/1; Fichera, “The European Arrest Warrant and the Sovereign State: A Marriage of Convenience?”, 15 ELJ (2009), 70–97; Wouters and Naert, “Of Arrest Warrants and extradition deals”, 41 CML Rev. (2004), 909–935; Marin, op. cit. *supra* note 2; for recent developments in the Third Pillar (e.g. the

However important and inevitable the principle of mutual recognition is for a single market and an area of freedom, security and justice both founded on legal diversity, one must not mistake it as being an easy concept or a cheap alternative to harmonization.<sup>11</sup> Rather it is – as this article wishes to show – a quite demanding strategy of combining diversity and unity, which is acceptable only as long as it adheres to certain preconditions and is contained within certain limits. In particular, the application of the principle of mutual recognition must be seen as a difficult balancing act between the respect for freedoms and rights of the individual, on the one hand, and the legitimate pursuit of public interests on the other; and it is only if this balance is struck in a responsible manner that the principle works.

In order to understand this, one must bear in mind – beginning with the original context of mutual recognition: the internal market – that whenever a Member State, in order to enable the free movement of goods/services/people, has to recognize standards of another Member State, which are perhaps lower or at least different, this inevitably constitutes a loss of regulatory autonomy for the Member State to define the degree of protection of safety or other concerns of public interest within its territory.<sup>12</sup> The procurement of safety and public well-being, however, are aims from which all public authority derives its very justification. Bearing this in mind, the purpose of the internal market, however much it requires that the separation of markets be abolished, cannot be to render the ensuring of safety and other public interests altogether impossible.<sup>13</sup> A single market in which safety and public well-being are not protected and which gives one-sided preference to economic freedom over legitimate requirements of general interest, loses its legitimacy.<sup>14</sup> The decisive question we have to answer, is, therefore: to what extent do Member States – for the sake of trans-border freedom – have to accept inroads into their capability to ensure safety and public well-being, and if they have to accept those inroads, to what extent is the European legislature obliged to step in, in order to guarantee sufficient protection in their place at the Union level?

European evidence warrant); Mitsilegas, “The third wave of Third Pillar law”, 34 *EL Rev.* (2009), 523–560.

11. Kerber and van den Bergh, *op. cit. supra* note 2, 18; Barnard, *op. cit. supra* note 5, p. 508.

12. Kerber and van den Bergh, *op. cit. supra* note 2, 9–10; Armstrong, *op. cit. supra* note 2, p. 332.

13. Möstl, *op. cit. supra* note 4, 281; Hatje in Schwarze (Ed.), *EU-Kommentar*, 2nd ed. (Baden-Baden, 2009), Art. 14 EG, para 11.

14. As became apparent for instance during the very critical public discussion about the Commission’s proposal for a Services Directive; cf. Kerber and van den Bergh, *op. cit. supra* note 2, 2; Streinz, “Die Ausgestaltung der Dienstleistungs- und Niederlassungsfreiheit durch die Dienstleistungsrichtlinie” in Leible (Ed.), *Die Umsetzung der Dienstleistungsrichtlinie – Chancen und Risiken für Deutschland* (Jena, 2008), p. 95.

In the second, more recent context of mutual recognition, judicial cooperation in criminal matters, the problem of a fair balance between individual freedom and public interests arises the other way round.<sup>15</sup> Here, there is no fear that the powers of the States to ensure safety may be weakened; on the contrary, it is the very purpose of judicial cooperation in criminal matters to improve the efficiency of State action against crime, in particular by removing the restrictions traditionally imposed by the territorial limits of State powers. The problem lies with the freedoms and rights of the individual instead, because mutual recognition of judicial decisions in the context of cooperation in criminal matters inevitably means that the individual is subjected to disadvantageous or even coercive measures of a foreign State (e.g. an arrest warrant) issued under a legal system which he does not know, which he has not democratically legitimated and which may protect his fundamental rights in a different manner from what he is used to. Again we have to ask: to what extent can it – in the interest of trans-border safety – be justified to expose citizens to disadvantageous or coercive acts of foreign States without there being at least some minimum approximation of standards as to the protection of the rights and freedoms of citizens?

This article tries to answer these questions in two steps: the first part will attempt to outline the necessary preconditions and limitations of the principle of mutual recognition in a systematic manner. The second part will look at some recent case law, in which the ECJ was faced with the questions outlined above, in order to see whether the Court has struck a fair balance between individual rights and public interests, on which any successful application of the concept of mutual recognition intrinsically relies.

## 2. Systematic considerations

### 2.1. *Two fundamentally different contexts and forms of the principle of mutual recognition*

When assessing the scope and limits of mutual recognition one must first be aware of the fact that, under European law, this principle is not a homogeneous concept, but comes in two fundamentally different contexts and forms. As has already been touched upon in our introduction, it is, in particular, in the context

15. Cf. Mitsilegas, *EU Criminal Law* (Oxford, 2009), p. 115, at pp. 123–125; Möstl, “Rechtsgrundlagen und Rechtsbestand der Europäischen Sicherheitspolitik”, 3 *EuR Beiheft* (2009) 33, at 36–38, 46–47; Walker, “In search of the Area of Freedom, Security and Justice: A Constitutional Odyssey” in Walker (Ed.), *Europe’s Area of Freedom, Security and Justice* (Oxford, 2004), p. 3, at p. 26; Fichera, *supra* note 10, 86.

of the internal market (former “First Pillar”) on the one hand and the Area of Freedom, Security and Justice (former “Third Pillar”) on the other hand, that the principle of mutual recognition serves different purposes, causes different problems and, hence, has to take different forms. This fundamental difference is often overlooked or not sufficiently stressed; analogies between the two are drawn too quickly.<sup>16</sup> Only on the basis of a clear distinction, however, can an assessment of the scope of mutual recognition succeed.

In the context of the internal market, the principle of mutual recognition typically means that the individual can take with him advantageous standards of his home country into the host country and is freed from the double burden of having to comply fully with the standards of both home and host country. Mutual recognition thus serves to facilitate the exercise of the fundamental freedoms (free trans-border movement); it supports freedom.

In the context of the area of freedom, security and justice, however, where the free movement not of individuals, but of judicial decisions is at stake, things are the other way round. State powers (and not people) are to be freed from their traditional territorial restrictions; the individuals are to be subjected to (typically) disadvantageous or even coercive measures of a foreign country (arrest warrant, evidence warrant, etc.), which interfere with their rights and liberties.<sup>17</sup> Mutual recognition thus threatens freedom.<sup>18</sup>

From the point of view of the individual and his freedoms, therefore, the concept of mutual recognition is clearly much more problematic in the context of the “Third” than in the context of the “First Pillar” and must – as a result – also be bound to stricter conditions and limits. The individual does not need to justify the exercise of his freedoms (even if it may result in a conflict with the public interest); it is, on the contrary, up to the State and all public authority to offer sufficient justification to restrictions of freedom, which are carried

16. Möstl, op. cit. *supra* note 15, 46–47; Mitsilegas, op. cit. *supra* note 2, 1280–81; Mitsilegas, op. cit. *supra* note 15, pp. 123–125; Satzger, *Internationales und Europäisches Strafrecht*, 2nd ed. (Baden-Baden, 2008), § 9, para 24; Nettesheim, “Grundrechtskonzeptionen des EuGH im Raum der Freiheit, der Sicherheit und des Rechts”, (2009) *EuR*, 24, at 26 et seq., 40.

17. Böse, “Die polizeiliche und justizielle Zusammenarbeit in Strafsachen im Entwurf eines Vertrages über eine Verfassung für Europa” in Schwarze (Ed.), *Der Verfassungsentwurf des Europäischen Konvents* (Baden-Baden, 2004), p. 151, at p. 154; Satzger, op. cit. *supra* note 16, p. 152; Nettesheim, op. cit. *supra* note 16, 26.

18. This is, at least, typically the case. In the context of the area of freedom, security and justice there is one main important exception which is about avoiding double burdens (and thus facilitating free movement) instead of being subjected to foreign measures interfering with rights: the transnational application of the principle of *ne bis in idem* as stated in Art. 54 of the Schengen Convention, which can be seen as a kind of “other side of the coin” of mutual recognition in criminal law; see ECJ Joined Cases C-187/01 & C-385/01, *Gözütok and Brügger*, [2003] ECR I-1345; Mitsilegas, op. cit. *supra* note 15, pp. 143–153.

out in the public interest.<sup>19</sup> As a first preliminary result, it follows that, in the context of the internal market, it is restrictions of mutual recognition that need to be justified, whereas in the context of the area of freedom, security and justice, it is the very principle of mutual recognition itself which needs justification and a sufficient legal basis.

## 2.2. *The scope of mutual recognition under primary law*

This leads us to a first major practical distinction. In the context of the internal market, the principle of mutual recognition stems directly from primary law (in particular the fundamental freedoms).<sup>20</sup> It is, therefore, directly applicable, i.e. the individual can invoke it and Member States must justify deviations from it without any need for the principle to be set out and put into effect by secondary legislation. In the context of the area of freedom, security and justice, however, in which the principle itself (and not just deviations from it) is in need of justification, there can be no duty of mutual recognition arising directly from primary law; all primary law can do is to set out the aim of implementing mutual recognition through secondary legislation (e.g. Arts. 67(3), 81, 82 TFEU).<sup>21</sup> Any workable application of the principle, however, which – as we have to repeat – expands State powers beyond their territorial limits at the expense of people’s rights and liberties, always requires that the principle has been formally put into effect by special secondary legislation deciding on its exact scope and limits, thus giving it a clear legal basis. A bold guarantee of mutual recognition directly under primary law would inevitably constitute a serious risk for people’s rights and liberties and – contrary to the idea of fundamental rights and freedoms – shift the burden of justification from the State to the individual.

The fact that, in the internal market, the principle of mutual recognition is directly applicable with no need for secondary legislation setting out its exact conditions and limits, bears an important consequence. The difficult task, which is intrinsic to any successful application of the principle of mutual recognition, of reaching a fair balance between ensuring trans-border freedom and respect for legitimate objectives of public interest, is not necessarily

19. Isensee, “Staat und Verfassung” in Isensee and Kirchhof, *Handbuch des Staatsrechts II*, 3rd ed. (Heidelberg, 2004), § 15, paras. 174–75.; Ehlers (Ed.), *European Fundamental Rights and Freedoms* (Berlin, 2007), pp. 51 et seq., 213 et seq., 391 et seq.

20. See *supra* note 4.

21. Ex Arts. 61 and 65 EC, and ex Art. 31 TEU. See Möstl, *supra* note 15, 40; see also Müller-Graff, “Der Raum der Freiheit, der Sicherheit und des Rechts – Der primärrechtliche Rahmen” in Müller-Graff (Ed.), *Der Raum der Freiheit, der Sicherheit und des Rechts* (Baden-Baden, 2005), pp. 11, 19, 21 et seq.

resolved by the European legislature. Rather, it is ultimately up to the ECJ (i.e. the jurisdiction) to find an answer to the – politically highly sensitive<sup>22</sup> – question how far the regulatory autonomy of the Member States to pursue legitimate aims of public interest may be restricted for the sake of the functioning of the internal market. How is the balance to be struck?

On the one hand, Member States must accept that duties of mutual recognition as arising from the fundamental freedoms will inevitably constitute some loss of regulatory autonomy for them.<sup>23</sup> Refusal of mutual recognition may, admittedly, be justified under certain conditions,<sup>24</sup> however the test of justification is a European one; it is European law (and not the Member State) which decides on the amount of autonomy that is left. In particular, the Member State may only invoke those grounds of justification that are recognized as being legitimate under European law;<sup>25</sup> the Member States, thus, are no longer free to define the public interest. In addition, they have to face the test of proportionality;<sup>26</sup> as a result, their ability to pursue aims of public interest is restricted to means that seem acceptable in a single market.

On the other hand, European law has to accept and has always accepted that, as long as the European legislature has not resumed responsibility and – through harmonization – provided for a sufficient degree of protection for legitimate objectives of public interest at the European level, the responsibility to decide upon the appropriate level of protection within their territory must, in principle, remain with the Member States.<sup>27</sup> The very fact that in its jurisdiction on “mandatory” or “overriding requirements” as developed since *Cassis de Dijon*, the ECJ has been ready to accept unwritten reasons of justification for interferences with fundamental freedoms beyond what is laid down explicitly in the treaties,<sup>28</sup> can only be interpreted as an expression of deep respect for exactly that original responsibility of the Member States. Also when we look at the application of the principle more closely, mutual recognition – under primary law – is neither automatic nor unconditional,<sup>29</sup> but always linked to

22. Weiler, “Mutual recognition, functional equivalence and harmonization in the evolution of the European Common Market” in Schioppa, op. cit. *supra* note 2, p. 25, at p. 48.

23. See already *supra* note 12.

24. See next paragraph.

25. This is the case even for the unwritten “mandatory requirements” as developed in *Cassis de Dijon*, see Barnard, op. cit. *supra* note 5, pp. 108–112.

26. See, *inter alia*, Case C-19/92, *Kraus*, [1993] ECR I-1663, para 32; Case C-424/97, *Haim*, [2000] ECR I-5123, para 57.

27. See, *inter alia*, Case C-110/05, *Commission v. Italy*, judgment of 10 Feb. 2009, paras. 61, 65; Case C-254/05, *Commission v. Belgium*, judgment of 7 June 2007, para 35.

28. Ehlers in Ehlers, op. cit. *supra* note 19, § 7, para 89.

29. Mattera, “The principle of mutual recognition and respect for national, regional and local identities and traditions” in Schioppa, op. cit. *supra* note 2, p. 1, at p. 17; Kerber and van den Bergh, op. cit. *supra* note 2, 7.

the requirement that the standards/measures of the country of origin, in order to have to be recognized by the country of destination, must be functionally equivalent (i.e. ensuring a comparable level of protection) to those of the country of destination; the latter retains the right to examine and put into question whether this is really the case.<sup>30</sup> In doing so, the Member States are, of course, not absolutely free: the standards, in order to have to be recognized, must only be equivalent, and not identical; the level of protection must only be comparable, i.e. a certain margin of difference will have to be accepted.<sup>31</sup> Otherwise, however, the Member States retain their power to decide at least upon the relevant level (if not the exact methods) of protection they want to provide for certain objectives of public interest; if the differences in protection become too great, mutual recognition can be refused.<sup>32</sup> Only the European legislature – by stepping in, i.e. by resuming political responsibility and providing for sufficient protection at the European level – has the right to deprive the Member States of that original power. The judiciary (applying primary law), however, which has no mandate to make a political decision on the right level of protection, must respect it, i.e. may modify it in the light of the fundamental freedoms, but must not take it away altogether.

There is another limit of mutual recognition under primary law. The fundamental freedoms, however much they inevitably entail inroads into regulatory autonomy of the States in trans-national cases, rest on the presumption that at least the power of the States to regulate purely internal matters has to be left absolutely intact – as, for instance, the case law on the admissibility of reverse discrimination makes very clear.<sup>33</sup> The principle of mutual recognition can, therefore, only be based on the fundamental freedoms, if the case involves a serious trans-border element, i.e. if the person asking for recognition has *effectively* exercised his rights of free movement and built up a sufficient territorial link to the country whose standard or measure he asks to be recognized. The principle of mutual recognition may, however, not be used in order to circumvent the rules of a country in cases which appear essentially internal in nature, i.e. in which no sufficient trans-border element can be found that could justify a departure from the rules of the country and an application of those of a different country instead.

30. Michaels, *op. cit. supra* note 2, pp. 274–276; Beyer, *op. cit. supra* note 2, pp. 60–62, at 68.

31. Reimer, “Das Anerkennungsprinzip im Europäischen Ertragsteuerrecht”, (2007) FR, 217, at 221–22.

32. Möstl, *op. cit. supra* note 4, 282–83.; Götz, *op. cit. supra* note 2, p. 766; von Borries and Petschke, “Gleichwertigkeitsklauseln als Instrument zur Gewährleistung des freien Warenverkehrs in der Europäischen Gemeinschaft”, (1996) DVBL, 1343, at 1345–46, 1349; more critical: Weiler, *op. cit. supra* note 22, p. 49.

33. See e.g. Case C-104/08, *Kurt*, Order of 19 June 2008, paras. 20–23.



There are two possible ways of taking account of the considerations as outlined so far. Firstly, the basic requirement that all applicability of the fundamental freedoms depends on the existence of a sufficient trans-border element,<sup>34</sup> must be taken seriously; it is not a pure technicality, but must be read in the light of respect owed to the legitimate autonomy of the Member States, as far as internal matters are concerned. Secondly, one can also fall back on the judicial doctrine that “Community law cannot be relied upon for abusive or fraudulent ends”.<sup>35</sup> This doctrine is not fully consolidated yet, but it is sufficiently clear to be able to form a workable limit in cases in which the trans-border element appears to have been created artificially (i.e. in a way incompatible with the real purpose of the fundamental freedom) in order to circumvent national legislation.

### 2.3. *The scope of mutual recognition under secondary law*

#### 2.3.1. *In the internal market*

The fact that, in the internal market, a minimum standard of mutual recognition arises directly from primary law, does not, of course, prevent the European legislature from facilitating mutual recognition through secondary legislation. Indeed, as was said in the introduction, mutual recognition has become the key element in completing the internal market through secondary law. The competence of the Union to legislate on mutual recognition can be based either on the general approximation-power of Article 114 TFEU (ex 95 EC) or on legislative powers related to a specific fundamental freedom (e.g. Art. 53 TFEU (ex 47 EC) on mutual recognition of diplomas) or a special policy area (like transport and traffic, e.g. Art. 91 TFEU (ex 71 EC)). It is now widely acknowledged<sup>36</sup> that rules on mutual recognition can be lawfully based on powers to harmonize/approximate national laws (which may seem paradoxical at first sight because mutual recognition, by definition, refers to different – i.e. not fully harmonized – national standards) – thus giving us a first hint that, under secondary law, mutual recognition is not to be misinterpreted as an alternative to approximation, but usually goes alongside with it.

34. Ehlers in Ehlers, op. cit. *supra* note 19, § 7, para 55.

35. See Cases C-367/96, *Kefalas*, [1998] ECR I-2843, para 20; C-373/97, *Diamantis*, [2000] ECR I-1705, para 33; C-255/02, *Halifax*, [2006] ECR I-1609, para 74 et seq.; C-196/04, *Cadbury Schweppes*, [2006] ECR I-7995, para 35. See also the summary by A.G. Maduro in Opinion of 28 Feb. 2008, paras. 43 et seq., in Case C-311/06, *Consiglio Nazionale degli Ingegneri*, judgment of 29 Jan. 2009, nyr; Englisch, “Verbot des Rechtsmissbrauchs – ein allgemeiner Rechtsgrundsatz des Gemeinschaftsrechts?”, (2001) *StuW*, 3–22; Schön, “Rechtsmissbrauch und Europäisches Steuerrecht” in *Festschrift für Wolfram Reiß* (Köln, 2008), pp. 571–596.

36. Herrfeld in Schwarze, op. cit. *supra* note 13, Art. 94, Rn. 48, 49; Michaels, op. cit. *supra* note 2, pp. 332–334.

The great advantage of secondary legislation, as compared to the duties arising directly from primary law, is that it can provide for automatic recognition, without leaving any discretion to refuse recognition under certain conditions,<sup>37</sup> the Member States lose their ability to decide upon the relevant level of protection in such a case.<sup>38</sup> The European legislature is, however, not obliged to go so far. In a more modest attempt, it can also provide for a system of mutual recognition which very much resembles the duties arising directly from the treaties (i.e. leaving some discretion to decide upon the level of protection and to refuse recognition in certain cases) – only slightly facilitating the functioning of mutual recognition by, for example, limiting the grounds for refusal or by improving the efficiency of recognition procedures.<sup>39</sup> The Union legislature can, finally, also opt for intermediate solutions, like establishing an absolute duty to recognize certain diplomas (with no discretion to refuse recognition on the basis of an assessment of their value) and at the same time flanking this duty with the right of Member States to impose compensatory measures (like additional training or tests) if the standards certified in the diploma of the country of origin are significantly lower than what is required in the country of destination.<sup>40</sup> It is obvious that the question of how conditional or automatic mutual recognition duties are under secondary legislation and, correspondingly, of how much autonomy the Member States retain or lose to decide upon the necessary level of protection, is closely linked to the degree of substantive approximation of standards which this legislation must try to achieve.

In practice, the European legislature thus enjoys a high degree of discretion as to whether it wants to achieve automatic mutual recognition (based on fairly demanding approximation) or only some weaker form of conditional recognition (requiring less approximation).<sup>41</sup> The principles of subsidiarity and proportionality (Art. 5 TEU (ex 5 EC)) do not restrict this discretion very much. One has to bear in mind that, compared to its theoretical counterpart of “full harmonization”, mutual recognition on the basis of (more or less demanding)

37. Case C-221/05, *Sam Mc Cauley Chemists*, judgment of 13 July 2006, para 25.

38. In its most extreme form, the Union legislature can even stipulate that certain administrative acts of Member States have trans-national, Union-wide effect – thus rendering formal recognition by another Member State superfluous altogether. Schroeder, op. cit. *supra* note 2, 287; Ruffert, “Der transnationale Verwaltungsakt”, 34 *Die Verwaltung* (2001), 453–485.

39. As for the Services Directive see Roth, “Die Dienstleistungsrichtlinie und der Verbraucherschutz”, 205; Streinz, “Die Ausgestaltung der Dienstleistungs- und Niederlassungsfreiheit durch die Dienstleistungsrichtlinie”, p. 95, at pp. 110 et. seq., both in Leible, op. cit. *supra* note 14.

40. See *infra* 3.1.; see e.g. Case C-274/05, *Commission v. Greece*, [2008] ECR I-7969, paras. 29, 31, 39

41. For those options see e.g. Case C-39/07, *Commission v. Spain*, [2008] ECR, I-3435, paras. 38–42.

minimum approximation is a fairly Member-State-friendly legislative technique of achieving the internal market anyway.<sup>42</sup> Within the possible forms of establishing strong or weak duties of mutual recognition, however, the Union legislature is not obliged by the principles of subsidiarity or proportionality<sup>43</sup> to opt for a weak form based only on little approximation. This is because the loss of regulatory autonomy that a strong form of mutual recognition based on substantial minimum harmonization inevitably entails, can usually be easily justified by the manifest advantages for the internal market achieved by absolute duties of recognition. It is thus, as becomes apparent, the fact that the impetus for subsidiarity is counterbalanced by the centralizing force of the fundamental freedoms, which leaves the Union legislature with a fairly broad discretion as to what form of mutual recognition it wishes to establish.

Whatever form of mutual recognition the Union legislature opts for, there is one limit to its legislative discretion which must be always respected. The imposition of mutual recognition duties, especially the more they are to be absolute and the more they go beyond what would follow already from primary law, is usually<sup>44</sup> not permissible without at least some (more or less demanding) form of minimum approximation of substantive standards, providing for a sufficient degree of security and public well-being on the Union level.<sup>45</sup> There are two reasons underlying this proposition. Firstly, it seems doubtful whether mutual recognition without any approximation can be lawfully based on a legislative competence providing for approximation.<sup>46</sup> Secondly, we must recall a systematic consideration: the pursuit of security and other legitimate aims of public interest, from which all public authority derives its very justification, must not become “homeless” in the internal market. The

42. Mattera, *op. cit. supra* note 29, p. 21; von Danwitz, *Verwaltungsrechtliches System und Europäische Integration* (Tübingen, 1996), pp. 410 et seq.; Langer, “Subsidiarität und Anerkennungsprinzip”, (1993) ZG, 193–211; Michaels, *op. cit. supra* note 2, 416.

43. Generally as for the scope and effectiveness of those principles: Leschke and Möstl, “Die Grundsätze der Subsidiarität und Verhältnismäßigkeit: Wirksame Kompetenzschränken der Europäischen Union” in Heinze and Kerber (Ed.), *Zentralität und Dezentralität von Regulierung in Europa* (Stuttgart, 2007), pp. 77–105.

44. Positive steps of approximation may – exceptionally – seem dispensable, if the Union legislature has verified that a sufficient degree of functional equivalence of standards already exists (so that no harmonization is necessary) and as long as it ensures (e.g. through the establishment of efficient monitoring) that this will also stay like that in the future. As for Art. 100b EEC (abolished by the Treaty of Amsterdam) see Matthies, “Zur Anerkennung gleichwertiger Regelungen im Binnenmarkt der EG” in *Festschrift für Ernst Steindorff* (Berlin, 1990), pp. 1287–1301; Beyer, *op. cit. supra* note 2.

45. Möstl, *op. cit. supra* note 4, 283–285, at 286–287; Niehof, *op. cit. supra* note 2, p. 128; Roth, *op. cit. supra* note 39, pp. 226–228, Streinz, *op. cit. supra* note 14, p. 112; Schroeder, *op. cit. supra* note 2, 284; Steindorff, *Grenzen der EG-Kompetenzen* (Heidelberg, 1990), p. 102; Ludwigs, *Rechtsangleichung nach Art. 94, 95 EG-Vertrag* (Baden-Baden, 2004), pp. 221–227.

46. Beyer, *op. cit. supra* note 2, pp. 86, 90

more the Union legislature, in order to complete the internal market, decides to withdraw regulatory autonomy from the Member States, depriving them of their original ability to guarantee security and public well-being themselves, the more the Union legislature must be ready to step in, resume political responsibility and provide for a sufficient level of protection at the Union level instead.<sup>47</sup> Article 114(3) TFEU (ex 95(3) EC) – obliging the Union legislature to aim to guarantee a high level of protection as far as health, safety and environmental and consumer protection is concerned – expresses this fundamental principle of the internal market in a manner which is both binding and can be generalized.<sup>48</sup> This provision makes it clear that internal market legislation is not a one-sided liberalizing exercise, but involves responsibilities and duties, too, in particular the readiness at European level to assume full responsibility for appropriately ensuring safety and public well-being to the extent that EU secondary legislation deprives Member States of their original power to decide upon the adequate level of protection within their territory.<sup>49</sup>

The fact that all imposition of mutual recognition by secondary law, which goes further than primary law, presupposes a sufficient approximation of standards to be provided for by the European legislature, has two important consequences. Firstly, we can note that all mutual recognition, however automatic and obligatory it may be, must never be “unconditional”, but depends on the precondition that sufficient approximation has been reached. Secondly, it follows that acts of Union legislation imposing mutual recognition duties usually pursue two different aims at the same time:<sup>50</sup> they seek to facilitate the free movement of goods, services, people (internal market objective) and – equally – they seek to offer an adequate level of protection, as far as safety or other requirements of public interest are concerned (substantive policy

47. Möstl, op. cit. *supra* note 4, 283–285.

48. Beyer, op. cit. *supra* note 2, pp. 181–196. Art. 53(2) TFEU (ex 47 [3]EC) is only a special expression of that principle and does not allow the conclusion that, outside this provision, no approximation/coordination is needed to achieve mutual recognition. See also Roth, op. cit. *supra* note 39, pp. 226–228; Müller-Graff in Streinz (Ed.), *EUV/EGV* (Munich, 2003), Art. 47 EGV, para 9; Pipkorn, Berdenhewer-Rating and Taschner in Groeben and Schwarze, *EU-/EG-Vertrag Kommentar*, 6th ed. (Baden-Baden, 2003) Art. 95 EGV, para 70; different opinion at: Randelzhofer and Forsthoff in Grabitz and Hilf, op. cit. *supra* note 5, Art. 47, Rn. 7; between the extremes: Schlag in Schwarze, op. cit. *supra* note 13, Art. 47, Rn. 2.

49. It is self-evident that the determination of what is a “high level of protection” under Art. 114(3) TFEU (ex 95 EC) itself involves a great amount of political discretion and may vary considerably according to the strictness of mutual recognition the Union legislature wants to impose. See Kahl in Callies and Ruffert (Eds.), *EUV/EGV*, 3rd ed. (Munich, 2007), Art. 95 EGV, para 27.

50. Möstl, “Grenzen der Rechtsangleichung im Binnenmarkt”, (2002) *EuR*, 317, at 326–327; as for the mutual recognition of driving licences: A.G. Bot in Joined Cases C-329/06 & 343/06, *Wiedemann*, [2008] ECR I-4635, Opinion of 14 Feb. 2008, para 43.

objective). It is important that the provisions of European legislation be read and interpreted in the light of both those aims, which are, in principle, of equal weight. The ECJ, at times, has the tendency to suppose that mutual recognition facilitating free movement is the main aim of European legislation so that all exceptions from it (even if they are permitted in the interest of safety or other legitimate policy goals) must be given a narrow meaning.<sup>51</sup> This approach seems one-sided. A well-balanced interpretation of secondary law must seek to give *effet utile* to both its aims, the internal market one and the substantive policy one.

It remains to be examined what role territorial aspects play in secondary legislation, in particular whether mutual recognition (as in the context of primary law) usually depends on a sufficient trans-border element. In principle, Union legislation providing for the approximation of standards throughout the Union has a perfect right to cover purely internal cases, too, so a trans-border element may not always be needed. On the other hand, however, we have seen that internal market legislation often does not manage to provide for automatic recognition on the basis of Union-wide standards, but opts for a model which is much closer to what would follow from primary law anyway. The more this is the case, i.e. the more the Member States retain the right to decide upon the necessary level of protection in their country and refuse recognition (or impose compensatory measures) in certain cases, the more important the territorial aspect becomes. As in the context of primary law, it is, therefore, justified in such cases, to let recognition depend on a sufficient trans-border element and to rule out the possibility to use mutual recognition-rules as a cheap means to circumvent national legislation.<sup>52</sup> Also, when Union legislation itself relies on territorial criteria and provides, for example, that only the country in which the applicant resides may issue a certain certificate or licence, such provisions must be taken seriously because – in the absence of full harmonization of standards – they do not just refer to the purely formal question of who is competent, but they are of material importance, as they determine the question of which country has the right to decide on the necessary level of protection. In such a case, when recognition by a different country is sought later on, it is absolutely justifiable to let recognition depend on a test of whether the applicant was, at the time, really a resident of the issuing State;<sup>53</sup> otherwise circumvention of national legislation would become too easy. Again there are two ways of ensuring that territorial aspects are taken into account properly: either

51. Case C-476/01, *Kapper*, [2004] ECR I-5205, paras. 70, 72; Saurer, op. cit. *supra* note 2, 261.

52. See *infra* 3.1. (recognition of diplomas).

53. See *infra* 3.2. (recognition of driving licences). It is, however, as we will see, a different question, who – the issuing State or the recipient State – has the right to carry out that test.

by interpreting the relevant Community legislation in a careful manner or by falling back on the doctrine that Community law cannot be relied on for abusive ends.<sup>54</sup>

### 2.3.2. *In the Area of Freedom, Security and Justice*

The principle of mutual recognition in the context of cooperation in criminal matters is much younger and less consolidated than it is in the internal market, and also the question of its preconditions and limits is much less resolved. The first judgments of the ECJ<sup>55</sup> and of national (constitutional) courts<sup>56</sup> have not developed a consistent line yet; what they make very clear, however, is that the question of preconditions and limits of mutual recognition in the context of criminal law is a particularly urgent and problematic one. Despite all uncertainties, we can try – in the light of what we have developed so far – to formulate a few basic guidelines.

What we have seen so far is that mutual recognition – even in the internal market – is never unconditional but always linked to a sufficient degree of functional equivalence, which the Member States (within certain limits) can either require unilaterally or which has to be guaranteed by the European legislature through approximation. What we have seen as well is that mutual recognition in the context of criminal law, which – unlike in the internal market – does not facilitate but restricts freedom, is a much more problematic concept than it is in the context of the internal market, and that – as a consequence – it must typically also be bound to stricter preconditions and limits. In particular, here, too, a sufficient degree of equivalence or approximation of standards is essential as a precondition for mutual recognition,<sup>57</sup> therefore, and as – this time – sufficient equivalence of fundamental right standards and not just of standards of protection for certain objectives of general interest is at stake, the question of how much equivalence or approximation is needed, will have to be taken even more seriously than was the case earlier on. It is a widespread concern that the criminal law systems of the Member States vary

54. See *supra* 2.2.

55. Leading case: Case C-303/05, *Advocaten voor de Wereld*, [2007] ECR I-3633.

56. For such decisions see Mitsilegas, *op. cit. supra* note 15, pp. 133–138; Mitsilegas, *op. cit. supra* note 2, 1277–1311; Fichera, *op. cit. supra* note 10, 70–97 (all of them in particular on Germany, Cyprus, Poland); Marin, *op. cit. supra* note 2, 473–492 (on Italy).

57. The Lisbon treaty is aware of that, allowing the possibility to “establish minimum rules” “to the extent necessary to facilitate mutual recognition” (Art. 82 [2] TFEU). Cf. also: Fichera, *op. cit. supra* note 10, 86, 96; Satzger, *op. cit. supra* note 16, § 9, para 37; Hecker, “Die Europäisierung der Inneren Sicherheit”, (2006) DÖV, 273, at 276; Möstl, *op. cit. supra* note 15, 47; Asp, *op. cit. supra* note 2, pp. 259–273; Nettesheim, *op. cit. supra* note 16, 40; Bantekas, *op. cit. supra* note 2, 366; Alegre and Leaf, *op. cit. supra* note 2, 201; Guild, “Crime and the EU’s constitutional future in an Area of Freedom, Security, and Justice”, 10 ELJ (2004), 218–234.

considerably and that – although all Member States are bound by the same minimum standards of the ECHR – this common standard is reached through very different techniques, so that the functional equivalence of particular features of the different criminal law systems is not always guaranteed.<sup>58</sup> Nevertheless, the Union tries to implement mutual recognition (even in a fairly automatic form) with no or only little approximation of standards.<sup>59</sup> And the ECJ, too, has claimed that nothing in the treaties makes mutual recognition (e.g. the EAW) conditional on harmonization, but that mutual recognition is built on a system of mutual trust instead.<sup>60</sup> In the light of what we have developed, it is highly questionable whether this proposition is correct. Even in the context of the internal market, as we have seen, mutual trust is not something that can be simply proclaimed or taken for granted, but it must be grounded on reliable procedures (individual assessment or general approximation) ensuring that a sufficient degree of equivalence really exists. Even more so in the context of criminal law, the presumption of mutual trust is not a self-sufficient condition for mutual recognition.<sup>61</sup> If the Union wants to make real progress

58. Cf.: Satzger, op. cit. *supra* note 16, § 9 Rn. 37; Satzger, “Das Strafrecht als Gegenstand europäischer Gesetzgebungstätigkeit”, (2008) *KritV*, 17, at 32 et seq.; Mitsilegas, op. cit. *supra* note 15, p. 125, Asp, op. cit. *supra* note 2, 272–73.; Marin, op. cit. *supra* note 2, 473–492; Fichera, op. cit. *supra* note 10, 86; Douglas-Scott, “The rule of law in the European Union – putting the security into the ‘area of freedom, security and justice’”, 29 *EL Rev.* (2004), 219, at 227.

59. Satzger, op. cit. *supra* note 16, § 9 Rn. 37. Mitsilegas, op. cit. *supra* note 15, p. 158; Marin, op. cit. *supra* note 2, 482 et seq.; Bantekas, op. cit. *supra* note 2, 366; An attempt to formulate minimum standards as for procedural rights for suspects and defendants (COM(2004)328 final) has failed (see Satzger, *ibid.*, § 9, Rn 37; Mitsilegas, *ibid.* pp. 103 et seq.; Satzger (2008), op. cit. *supra* note 58, 32).

60. *Advocaten voor de Wereld*, cited *supra* note 55, para 59. What is particularly misleading in this context, is that the ECJ – in saying that no harmonization is needed – draws analogies with its jurisdiction concerning the *ne bis in idem* principle of Art. 54 of the Schengen Convention (e.g. *Gözütük and Brügger*, cited *supra* note 18, para 32). As was said above in note 18, however, the principle of *ne bis in idem* is a unique exception in this context because (like in the internal market) mutual recognition here is advantageous for the person involved, as it prevents double burdens and thus facilitates free movement. In such an exceptional context, in which mutual recognition is only advantageous for the individual, it may be tolerable to say that mutual recognition does not depend on prior harmonization. When it comes to subjecting the individual to disadvantageous or coercive acts of other Member States and thus interfering with his rights and liberties, the question of whether harmonization is needed, arises, however, in a different context. Simple analogies are, therefore, out of place. If the ECJ draws them nevertheless, this only shows that the – often overlooked – fundamental difference between mutual recognition of advantageous or of disadvantageous decisions, as outlined in 2.1., was not sufficiently taken into account.

61. Cf. Asp, op. cit. *supra* note 2, 264; Marin, op. cit. *supra* note 2, 483; Fichera, op. cit. *supra* note 10, 86; Alegre and Leaf, op. cit. *supra* note 2, 216–17; Vernimmen-Van Tiggelen and Surano, op. cit. *supra* note 2, p. 20 (“Rather, mutual trust was simply assumed to exist...this trust is still not spontaneously felt and is by no means always evident in practice...”)

on mutual recognition, it must be ready to face the burdensome path of providing for sufficient approximation.<sup>62</sup> Without approximation, the Union can either install only very weak forms of mutual recognition with many exceptions, or it will force the Member States – as is already starting to be the case<sup>63</sup> – into claiming unilateral rights to make mutual recognition dependant on tests of functional equivalence, which may not have been intended by the EU legislation.

A second feature of mutual recognition in criminal law deserves to be mentioned. Although it may – as in the internal market – seem at first sight to be a particularly subsidiarity-friendly legislative technique,<sup>64</sup> subsidiarity and competential proportionality set much tighter limits on EU legislation in this area than was the case earlier on.<sup>65</sup> Mutual recognition depends, as we have seen, on a sufficient level of approximation. Approximation in an area which touches as much on sovereignty and the very core of a legal system as criminal law does, however, constitutes a particular danger for subsidiarity and national identity. The Lisbon Treaty recognizes that problem by not only reaffirming the principle of subsidiarity particularly in the context of the Area of Freedom, Security and Justice (Art. 69 TFEU), but also by making the approximation that is necessary to implement mutual recognition explicitly dependant on the obligation to take account of the different legal traditions of the Member States (Art. 82(2) TFEU). Subsidiarity and competential proportionality must, as a result, be taken particularly seriously; and all approximation in criminal matters should, as is suggested here, depend on a fairly strict test of whether the loss of autonomy and legal tradition it entails for the Member States is outweighed by a sufficient gain for the Area of Freedom, Security and Justice (i.e. for the improvement of the trans-border fight against crime).

What we have set out so far (both on the necessity of approximation and its competential limits) results in a demanding double-check: the establishment of mutual recognition presupposes – for fundamental rights reasons – a sufficient degree of approximation which – for subsidiarity reasons – is only permissible, if the loss of regulatory autonomy it entails is outweighed by a sufficient gain of trans-border security through mutual recognition. If mutual recognition is only achievable at the expense of either too big a loss of protection of rights and liberties of the individual or too big a loss for the autonomy

62. For the difficulties the EU is facing at the moment see Mitsilegas, *op. cit. supra* note 10, 545–548.

63. See Marin, *op. cit. supra* note 2, 473–492.

64. *German Federal Constitutional Court*, judgment of 18 July 2005, 2 BvR 2236/04, BVerfGE 113, 273, 299.

65. For the following considerations see Möstl, *op. cit. supra* note 15, 46–48; see also Herlin-Karnell, “Subsidiarity in the Area of EU Justice and Home Affairs Law – A Lost Case?”, 15 *ELJ* (2009), 351–361.



and legal identity of the Member States, the Union legislature must refrain from establishing it. What results, are competential limits on the Union legislature in the criminal law context which are considerably greater than those in the internal market context – a striking difference which results from the fact that in the internal market context, individual freedom (free movement)<sup>66</sup> acts as a centralizing force, counterbalancing subsidiarity, whereas here, in the criminal law context, freedom (fundamental rights and liberties)<sup>67</sup> joins up with subsidiarity to limit the powers of the EU legislature.

It remains to be seen whether what was said above about the prevention of abuse and the necessity of a sufficient trans-border element/territorial link in the context of the internal market, has a counterpart here, too. Again no clear doctrine has emerged yet. It would, however, seem abusive if a Member State tried to ask another Member State – e.g. by demanding recognition of an evidence warrant – to carry out an act on its behalf which the former State (for lack of a sufficient legal basis or for human rights reasons) would not even be allowed to carry out in its own territory, thereby attempting to circumvent its own standards; it is interesting that Union law itself has already taken up this idea.<sup>68</sup> Similarly, it may be a justifiable reason for a Member State to refuse recognition in cases in which the criminal offence in question is characterized by a dominant link to its own territory (for example because it was committed or/and has caused damage in its own territory); this, at least, was the main line of reasoning of the German constitutional court on the EAW,<sup>69</sup> and again it is interesting that Union law itself had already taken up that idea.<sup>70</sup>

It is an open question what role nationality has to play in all this. Whilst there can be no doubt that it is a legitimate aim for the Union legislature to try to oblige Member States to grant mutual recognition even when their own nationals are concerned (at least when sufficient approximation has been achieved), it is not so clear if Member States have the right, when the EU legislature has allowed a certain exception from mutual recognition, to treat nationals and citizens of other EU Member States differently (e.g. by granting

66. Which is the very purpose of establishing mutual recognition and making it as automatic as possible.

67. Which seeks approximation as a precondition for mutual recognition.

68. See Art. 7(b) of the Framework Decision 2008/978/JHA on the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters O.J. 2008, L 350/72; Satzger, op. cit. *supra* note 16, § 9 Rn 34; Mitsilegas, op. cit. *supra* note 10, 540. More generally as to this problem: Satzger, op. cit. *supra* note 58, 32–33.

69. *German Federal Constitutional Court*, judgment of 18 July 2005, 2 BvR 2236/04, BVerfGE 113, 273, 301–304.

70. Art. 4(7) of the Framework Decision on the European Arrest Warrant, cited *supra* note 10.

the exception to their nationals automatically whilst letting it depend on an individual assessment in other cases). From the point of view of national law, it seems natural to make differences and to grant a higher level of protection against foreign legal orders to nationals than to foreigners.<sup>71</sup> Recently, however, in *Wolzenburg*,<sup>72</sup> Advocate General Bot came to far-reaching conclusions: he argued that the aim of giving special protection to one's own citizens was no longer legitimate in an Area of Freedom, Security and Justice which is built on mutual trust and recognition and that the time had come to ask for equal treatment in judicial matters and to forbid differentiations as a breach of the principle of non-discrimination. Again, the question must be raised whether these conclusions have not been reached too hastily. To overcome the old system built on sovereignty and nationality and to provide for equal treatment based on mutual recognition in a Union-wide area of justice, is a task to be pursued through thorough steps of EU legislation which also provides for the necessary preconditions (i.e. sufficient approximation) without which mutual trust cannot exist. It is, however, not correct, whilst leaving the fundamental differences of the legal systems untouched, to take mutual trust simply for granted and to deny – as a matter of principle (i.e. of primary law) – the right of Member States to continue to try to protect their citizens within the limits of those exceptions from mutual recognition which secondary law explicitly allows. Once again we have to remember that mutual recognition which deprives citizens of rights they formerly had (here: the special protection as a national) cannot be boldly decreed by primary law but must be carefully provided for, step by step, by responsible legislation which guarantees a sufficient level of protection to the individual (see *supra* 2.2.). It is to be welcomed, therefore, that the ECJ, in its judgment, did not entirely follow the Advocate General's Opinion, but held that, although the principle of non-discrimination was applicable, different treatment of nationals of other Member States was – within certain limits – still objectively justified.<sup>73</sup>

71. Often this is reflected by explicit clauses in the national constitutions giving special protection to nationals (like Art. 16(2) of the German Basic Law on extradition). See also the decision of the *German Federal Constitutional Court*, judgment of 18 July 2005, 2 BvR 2236/04, BVerfGE 113, 273, which is all about the special duty to protect nationals against foreign legal orders as guaranteed by the Constitution.

72. Case C-123/08, *Dominic Wolzenburg*, judgment of 6 Oct. 2009, nyr, see Opinion of 24 March 2009 at paras. 128–142. The conclusions of A.G. Bot are in sharp contrast with the reasoning of the German constitutional court (cited *supra* note 71, especially pp. 298–299, at pp. 301–304) which explicitly asks the German legislature to make use of exceptions in the framework decision in order to protect German citizens and argues that the principle of non-discrimination does not fully apply in this context.

73. *Wolzenburg*, see previous note.

### 3. Recent case law of the ECJ

In its recent case law, the ECJ has increasingly been faced with the problem of having to decide on preconditions and limits of the principle of mutual recognition. In the light of the analysis so far, let us see how well the ECJ has coped with that problem and what form the jurisdictional doctrine on preconditions and limits of mutual recognition takes. We will do this by looking at three exemplary policy areas in which the problem arose.

#### 3.1. *Recognition of diplomas*

The first example concerns a classic problem of the internal market: the recognition of diplomas. More precisely, the decisions of the ECJ in question<sup>74</sup> deal with the interpretation of Directive 89/48/EEC of 21 December 1988 on a general system for the recognition of higher-education diplomas awarded on completion of professional education of at least three years' duration.<sup>75</sup> Although this Directive has been replaced by Directive 2005/36/EC of 7 September 2005 on the recognition of professional qualifications,<sup>76</sup> the judgments of the ECJ remain interesting as the new Directive essentially continues the regulatory framework of the old Directive.<sup>77</sup> The Directive obliges Member States to recognize diplomas and forbids them to refuse recognition on the grounds of an assessment of the standard of the diploma although no harmonization of standards been reached. Mutual recognition without substantive approximation, however, is, as was outlined above (2.3.1.), as a matter of principle, problematic. Nevertheless the regulatory framework of the Directive is unobjectionable.

Firstly, the Directive makes mutual recognition at least dependant on certain minimum criteria as to the establishment of higher education and the duration of the course;<sup>78</sup> in that sense the Directive is not completely without any approximating effect. Secondly, the Directive does not lead to automatic and unconditional recognition,<sup>79</sup> but allows the Member States, if standards as to duration or content differ too much, to impose compensatory measures

74. Case C-274/05, *Commission v. Greece*, [2008] ECR I-7969; Case C-286/06, *Commission v. Spain*, [2008] ECR I-8025; Case C-151/07, *Theologos-Grogirios Kathzithanakis*, judgment of 4 Dec. 2008, nyr; *Consiglio Nazionale degli Ingegneri*, *supra* note 35.

75. O.J. 1989, L 19/16.

76. O.J. 2005, L 255/22.

77. See Schlag in Schwarze, *op. cit. supra* note 13, Art. 47 EGV, Rn. 16 et seq.

78. Art. 1(a) of Directive 89/48/EEC. Similar: Art. 11 lit. (d), (e) and Art. 13(1) of Directive 2005/36/EC.

79. *Commission v. Greece*, cited *supra* note 74, para 39.

(adaptation period of up to three years or adaptation test).<sup>80</sup> The obligations imposed by the Directive thus do not deviate very far from what would already follow from primary law; the right of the Member States to decide autonomously on the appropriate level of qualification, as long as no harmonization of standards has been reached, remains – in essence – untouched.<sup>81</sup>

While the general approach of the Directive, as far as the necessary balance between freedom and the general interest is concerned, is, therefore, unobjectionable, it remains to be seen, to what territorial preconditions recognition under the Directive is linked. For secondary legislation which leaves the substantive differences between the Member States untouched and tries to establish a system of mutual recognition nevertheless, the need for a sufficient trans-border element as a precondition of recognition in order to prevent abusive circumvention of domestic legislation remains, as we have seen (2.3.1.), essential. It is exactly this requirement that the four decisions of the ECJ to be presented here are about.

Three of them<sup>82</sup> deal with the problem that recognition of diplomas awarded by a foreign Member State was sought although the education and training leading to that diploma had not been provided in that State, but – typically under some form of cooperation or franchise agreement with an establishment of higher education of that country – (almost) entirely in the territory of the very country in which recognition was now sought. In all three cases the ECJ found that, indeed, recognition had to be given (notwithstanding the right, if necessary, to impose compensation measures, of course). It is obvious that imposing such a far-reaching duty of recognition is in danger of making it all too easy for any applicant – without really having to “move” and build up a territorial link with a foreign country, but by essentially staying where he is (namely in his home country) – to nevertheless profit from the rules of a foreign country and thereby circumvent the rules of his own home country. Not all of the reasons given by the ECJ seem fully convincing, either. It appears, for example, oversimplified if the Court relies on the fact that the Directive does not explicitly impose any territorial criteria or restrictions as to the Member State in which the education is received;<sup>83</sup> on the contrary, one could have asked whether the need for a sufficient territorial link with the Member States

80. Art. 4(1) b of Directive 89/48/EEC; Art. 14 of Directive 2005/36/EC.

81. See 5th recital of the preamble of Directive 89/48/EEC and 11th recital of the preamble of Directive 2005/36/EC; see also *Consiglio Nazionale degli Ingegneri*, cited *supra* note 35, para 57.

82. Cases *Commission v. Greece*, *Commission v. Spain* and *Theologos-Grogirios Kathzithanakis*, cited *supra* note 74.

83. *Commission v. Greece*, cited *supra* note 74, para 28 (similar: A.G. Bot, Opinion of 19 April 2007 in the same case, para 34); *Commission v. Spain*, cited *supra* note 74, paras. 60–63; *Theologos-Grogirios Kathzithanakis*, cited *supra* note 74, para 30.

whose diploma is now to be recognized is not automatically inherent in any EC legislation which tries to implement mutual recognition on the basis of non-harmonized standards, so that it is exceptions from that presumption that have to be explicitly stated. Similarly, it seems slightly beside the point if the ECJ makes the bold statement that (as the fundamental freedoms guarantee exactly the right to do so) it cannot in itself be an abuse of the system of recognition laid down by the Directive if nationals of a Member State choose the Member State in which they wish to acquire their professional qualifications;<sup>84</sup> for it is exactly the question at stake whether the fundamental freedoms (which are, after all, rights of *free movement* and not rights of free choice between legal systems irrespective of any movement<sup>85</sup>) really give the right to choose the country in which one wants to acquire a diploma without being ready to “move” and build up a sufficient territorial link with it.

It is to be welcomed, therefore, that in a recent – slightly different – case (a decision of 19 January 2009)<sup>86</sup> the ECJ had the opportunity to clarify matters. In this case, an Italian, who had acquired a university diploma in Italy but not the necessary State exam to carry out his profession, had successfully sought and obtained recognition of his Italian degree in Spain thus giving him the right to exercise his profession in Spain. In a second step, he now asked the Italian State to recognize the Spanish “diploma” (i.e. the Spanish recognition decision “qualifying” him for the profession in Spain) to be recognized in Italy, too, enabling him to carry out the profession without the State exam usually required in Italy. The ECJ held that this was not possible under the Directive. In particular, the ECJ made it clear that the Directive applied only to diplomas attesting qualifications that were, at least in part, acquired “under the educational system” of the Member State issuing the certificate, i.e. not to mere recognition decisions of this State which do not provide evidence of any additional education or qualification, because otherwise the right of the home Member State to decide on the minimum level of qualification within its territory would be undermined.<sup>87</sup> From this reasoning, it becomes clear, why – in the first three cases – the ECJ had imposed recognition. For the ECJ it constitutes a sufficient territorial link to the Member State issuing the certificate whose recognition is now being sought that the education and qualification attested by the certificate falls (at least in part) within its educational system, i.e. can be attributed to its educational responsibility. In all three cases this was

84. *Commission v. Spain*, cited *supra* note 74, para 72; *Theologos-Grogirios Kathzithanakis*, cited *supra* note 74, para 32.

85. Cf. Schön, *op. cit. supra* note 35, pp. 580 et seq.

86. *Consiglio Nazionale degli Ingegneri*, cited *supra* note 35.

87. *Ibid.*, paras. 55–59. A similar consideration is now put forward in the 12th recital of the preamble of Directive 2005/36/EC.

indeed so, because at least either the exams were taken in the issuing Member State or the education and training was (although on the territory of a different Member State) provided for – through cooperation or franchise agreements – under the supervision and responsibility (and in that sense “under the educational system”) of that Member State.<sup>88</sup>

The reason why the sheer fact that professional training can be attributed to the educational system of a foreign Member State (with no need for the person to “move”) constitutes a sufficient link to that Member State, is probably, that the right of institutes of higher education to offer programmes of education also abroad (e.g. through cooperation or franchise agreements), just like – inversely – the right of students to enjoy educational programmes also of foreign institutes of higher education, is regarded, by the ECJ, as falling under the fundamental freedom to provide and receive services and, therefore fully in line with the purpose of the fundamental freedom rights (i.e. not abusive).<sup>89</sup> It is, in that sense, not the decision of the student to move to a different country, but the decision of that country to extend its educational system beyond its territory, which constitutes the sufficient territorial link. There can be no doubt that the fact that this should be sufficient, is a very freedom-friendly interpretation of the Directive, reducing the ability of the Member States to decide on internal matters (here: education provided in its own territory) to the very limit (one has to bear in mind that even the new Directive 2005/36/EC guarantees its system of recognition under the headline of “freedom of establishment” and not “free provision of services”<sup>90</sup>). One cannot deny, however, that the reasoning of the ECJ has a solid foundation in the purpose of the fundamental freedoms; in addition, the case law of the ECJ – however freedom-friendly it may be – does not lead to results which are unbearable for the Member States, because at least their ability to provide for an appropriate level of qualification within their territory by imposing adequate compensation measures (instead of refusing recognition), remains untouched. The ECJ has – thus – not struck an entirely one-sided balance between freedom rights and objectives of general interest to be provided for by the Member States.

One observation remains to be added. In the decision of 19 January 2009, the ECJ comes to its conclusions through an interpretation of the meaning of “diploma” as used by the Directive.<sup>91</sup> The Advocate General, however, had

88. See *Commission v. Greece*, cited *supra* note 74, para 40; *Theologos-Grogirios Kathzithanakis*, cited *supra* note 74, para 31. See also A.G. Maduro in *Consiglio Nazionale degli Ingegneri*, cited *supra* note 35, para 50.

89. See A.G. Maduro in *Consiglio Nazionale degli Ingegneri*, cited *supra* note 35, paras. 47, 50; A.G. Bot in *Commission v. Greece*, cited *supra* note 74, paras. 40–42.

90. Title III (and not title II) of the Directive.

91. *Consiglio Nazionale degli Ingegneri*, cited *supra* note 35, para 46.

suggested using a different means to arrive at the same result, namely relying on the concept of abuse instead, the meaning of which in the context of mutual recognition he then attempted to outline in a fairly abstract, fundamental manner.<sup>92</sup> In principle, there is no objection against the approach as chosen by the ECJ of including considerations of a necessary trans-border element into a (teleological) interpretation of the wording of the Directive rather than falling back onto the much more general concept of abuse.<sup>93</sup> What this approach may show, however, is a certain reluctance of the EJC to speak out on the conditions and limits of mutual recognition in an abstract manner; a more casuistic step-by-step approach not revealing too much of the underlying considerations is obviously preferred.

### 3.2. Recognition of driving licences

Our second example deals with the recognition of driving licences as regulated by Directive 91/439/EEC on driving licences.<sup>94</sup> Again, this Directive has been replaced by a new one (Directive 2006/126/EC on driving licences<sup>95</sup>), whose provisions will, however, only come into full effect in 2013.<sup>96</sup> The decisions of the ECJ on the old Directive, commented on here, remain interesting not only because of this transition period, but also because the new Directive – despite some interesting changes which we will come back to – builds on the old one. The Directives on driving licences serve two objectives, between which a balance has to be struck: to facilitate the free movement of persons and to improve road safety.<sup>97</sup> In the instance of mutual recognition of driving licences, striking a balance between individual freedoms and objectives of general interest is a particularly delicate matter, firstly because the objectives of general interest at stake – namely road safety and the protection of lives –

92. A.G. Maduro in *Consiglio Nazionale degli Ingegneri*, cited *supra* note 35, paras. 24–25, 38–64, with interesting statements on the necessity of an *effective* exercise of the freedom of movement of persons and on what this means (para 48).

93. Englisch, *op. cit. supra* note 35, 9.

94. O.J. 1991, L 237/1. The legislative powers on transport and traffic as conferred on the Community in Art.91 TFEU (ex 71 EC) belong to the concept of the internal market (see in the past the citation of Art. 80 EC in Art. 14(1) EC), but can also exceed it as for example the improvement of road safety, too, may be a self-sufficient reason to legislate, which does not necessarily depend on the promotion of the internal market (see Art. 91(1)(c) TFEU (ex 71(1)(c) EC)); see Jung in Callies and Ruffert, *op. cit. supra* note 49, Art. 70, para 2, Art. 71, para 27.

95. O.J. 2006, L 403/18.

96. For the complicated transition rules see Middeke, “Die Europäische Fahrerlaubnis – Fahren ohne Grenzen?” in *Festschrift für Hans-Werner Rengeling* (Köln, 2008), 321, at 336–338; Saurer, *op. cit. supra* note 2, 260 and 264.

97. Case C-321/07, *Schwarz*, judgment of 19 Feb. 2009, para 90, see also A.G. Bot, Opinion of 6 Nov. 2008, paras. 40, 82 and recital 2 of the preamble of Directive 2006/126/EC.

are very important ones, and secondly because, here, the European legislature (unlike in the case of diplomas as treated just now) attempts to install a system of automatic recognition (without any formality or discretion<sup>98</sup>) which, of course, entails much greater duties to provide for sufficient minimum approximation on substantive standards guaranteeing an appropriate level of road safety throughout the Union.

A problem which arose in Germany, and which has caused much sensation, is that, if someone's driving licence has been withdrawn because he/she was driving under the influence of alcohol or drugs, Germany asks for a fairly demanding medical/psychological test before a new driving licence can be issued. Some neighbouring States – without breach of Community law – do not require such a strict test, which, of course, has made it tempting for Germans finding it difficult to pass the medical/psychological test and to regain their licence in Germany to try to obtain a new driving licence in such a neighbouring country instead in order to have it recognized in Germany later. What has made this a lot easier is that, although the Directive makes the issue of a driving licence explicitly dependant on residence in the issuing State (Art. 7(1) (b)), some of those States – in breach of Community law – either did not bother to ask for residence or even issued driving licences in full knowledge that the applicants were living in Germany.<sup>99</sup> As a result, between July 2004 and November 2006, nearly 4 500 people resident in Germany whose driving licence had been withdrawn managed to obtain their driving licence abroad<sup>100</sup> – a phenomenon called “driving-licence tourism”.<sup>101</sup>

The ECJ, initially, did not do much to stop this development, but – in three leading cases – focused on the *effet utile* of mutual recognition instead.<sup>102</sup> In particular, the ECJ regarded mutual recognition with its facilitating effects on free movement as the “linchpin” of the system installed by the Directive and, therefore, as a general principle of the Directive, so that all derogations and exceptions from it must be given a strict and narrow interpretation<sup>103</sup> (in particular the exception laid down in Art. 8(4) of the Directive, according to which a Member State may refuse to recognize the validity of a driving licence issued by another Member State to a person who is, in the former Member State's

98. Kapper, cited *supra* note 51, para 45.

99. See Wiedemann and Funk, cited *supra* note 50; and Joined Cases C-334-336/06, *Zerche and others*, [2008] ECR I-4691.

100. BT-Drs. 16/3855, pp. 1–2; see Saurer, op. cit. *supra* note 2, 260, footnote 1.

101. See e.g. Mosbacher, “Die Strafbarkeit von ‘Führerscheintourismus’ nach neuem Recht”, (2009) NJW, 801–805; Scholz, “Das Ende des sog. ‚Führerscheintourismus‘ in der Europäischen Union”, (2009) EuR, 275–281.

102. Kapper, cited *supra* note 51; Case C-227/05, *Halbritter*, Order of 6 April 2006; Case C-340/05, *Kremer*, Order of 28 Sept. 2006; see summary at Saurer, op. cit. *supra* note 2, 261.

103. E.g. case Kapper, cited *supra* note 51, paras. 70, 72, 77.



territory, the subject of a measure of restriction, suspension, withdrawal or cancellation of the right to drive).

Two main results<sup>104</sup> have been derived from this presumption. Firstly that a Member State which has withdrawn a driving licence may – despite Article 8(4) – not withhold recognition of a driving licence obtained in another Member State indefinitely, but must recognize driving licences which were issued by that State, after a temporary ban on obtaining a new licence had expired, even if the requirements for regaining the driving licence in that State are lower than the standards of the State whose recognition is being sought (i.e. even if in the other Member State no medical/psychological test of a similar strictness is required). Secondly, because recognition is automatic and it is the sole responsibility of the issuing State to examine the preconditions for obtaining a driving licence, a Member State may not refuse the recognition of a driving licence issued by another State on the grounds that, according to information available in the first Member State, the holder of the licence had, at the time when the licence was issued, not taken residence in the issuing State.

The reasoning of the ECJ in the cases cited above is not free from doubt and objections. Firstly, the dogmatic starting-point, that all exceptions from mutual recognition must be given a narrow meaning, seems a rather one-sided approach, if one bears in mind the fact that the Directive has not only one but two objectives of equal weight (facilitating free movement through mutual recognition and, at the same time, providing for road safety) between which (as the Court has – more recently – even been ready to admit<sup>105</sup>) a “balance” has to be struck (see already *supra* 2.3.1.). Secondly, one may ask, whether – according to the logic of mutual recognition – not only the decision of a competent Member State to issue a driving licence, but – reversely – also the decision of a competent Member State to *withdraw* a driving licence (including the conditions as to when and how the withdrawal can be reversed, such as temporary bans, medical tests etc.) may deserve some recognition by other Member States.<sup>106</sup> Thirdly, in the absence of full harmonization, territorial requirements, e.g. that only the country of residence may issue a licence, are of great importance, because they decide on the question which Member State has the right to determine the level of protection (here: road safety) in a manner binding also for other Member States through duties of recognition (see *supra* 2.3.1.); the strict obedience to such rules is a necessary precondition for mutual trust on which any system of mutual recognition is built. In the light of those propositions it seems doubtful whether the ECJ’s idea that examining

104. See also the summary in *Wiedemann and Funk*, cited *supra* note 50, paras. 54, 55.

105. *Schwarz*, cited *supra* note 97; see also A.G. Bot in *Wiedemann and Funk*, cited *supra* note 150, para 43.

106. See A.G. Bot in *Wiedemann and Funk*, *ibid.*, para 83.

the necessary conditions of residence is the sole responsibility of only one State (the issuing Member State) and that the true country of residence should not, even in obvious cases of abuse, possess the unilateral right to refuse recognition, can really be justified.<sup>107</sup> It is interesting that the new Directive 2006/126/EC takes account of all three objections by firstly putting a greater general emphasis on restrictions of mutual recognition in the interest of road safety,<sup>108</sup> secondly stating explicitly that Member States shall refuse to issue a driving licence if the licence has been withdrawn by another Member State, and that otherwise recognition of such a licence can lawfully be refused,<sup>109</sup> and thirdly providing that a Member State has the right to withdraw a licence if it is established that the licence has been issued without the necessary requirements having been met.<sup>110</sup> The practical effects of the initial case law of the ECJ, as outlined above, were problematic, too. Not only did it not stop driving-licence tourism, but it also led to growing uncertainty in the German judiciary and numerous referrals to the ECJ for preliminary rulings.<sup>111</sup>

As a result of those referrals, the ECJ has recently had the opportunity – without having to break completely with the main lines of its jurisdiction – to make a number of important clarifications. In a first set of judgments of 26 June 2008, the Court made clear that, indeed – at least in obvious cases, i.e. when it is apparent from entries in the driving licence itself or from other incontestable information provided by the issuing Member State that the necessary residence condition was not fulfilled – recognition may be lawfully refused.<sup>112</sup> In a second decision of 3 July 2008, the Court clarified that recognition may – indefinitely, i.e. even after a temporary ban on obtaining a new licence has expired – be refused if a new licence was already issued during the time the temporary ban was still running.<sup>113</sup> In a third decision of 20 November 2008, the Court held that a Member State may refuse recognition of a new driving licence, if this licence was obtained in another Member State whilst the first Member State – following a traffic offence committed on its territory and a provisional suspension of the old licence – was carrying out a procedure against

107. See *Wiedemann and Funk* (cited *supra* note 50) and *Zerche and others*, cited *supra* note 99, which eventually did allow an exception in cases of obvious abuse (in particular *Wiedemann and Funk*, *ibid.*, paras. 68–71 on the importance of the residence condition). See also A.G. Bot in *Schwarz*, cited *supra* note 97, para 81.

108. Saurer, *op. cit. supra* note 2, 263–64.

109. Art. 11(4) of the Directive

110. Art. 7(5) phrase 5 of the Directive.

111. Saurer, *op. cit. supra* note 2, 261–62.

112. *Wiedemann and Funk* (cited *supra* note 50) and *Zerche and others*, cited *supra* note 99. On those decisions: Saurer, *op. cit. supra* note 2, 262–63.

113. Case C-225/07, *Möginger*, Order of 3 July 2008; on this case: Scholz, *op. cit. supra* note 101, 275–281. See also cases *Wiedemann and Funk*, cited *supra* note 50, para 65.

the holder of the licence testing his fitness and eventually leading to the final withdrawal of the old driving licence; this is because obliging a Member State to recognize the new licence in such a case would be tantamount to giving an incentive to anyone who has committed an offence and against whom a procedure of withdrawal has been opened, to go to a different country as quickly as possible to obtain a new licence and thus evade the withdrawal; such behaviour would finally destroy the trust on which the system of mutual recognition is built.<sup>114</sup> And in a fourth decision of 19 February 2009 the Court made clear, that – in order not to circumvent a withdrawal decision and not to compromise road safety – when a Member State has withdrawn a driving licence because of drunken driving, and as long as the fitness of the driver has not been established again (either by the Member State in question or any other Member State after the temporary ban on obtaining a new licence), the driver may not rely on a second old licence (and ask for its recognition) which was issued by a another country long before its accession to the EU and which the driver has kept over the years.<sup>115</sup>

The recent case law of the ECJ has certainly managed to clarify some misunderstandings and to put a limit on some extreme forms of “driving-licence tourism”; equally, it clearly shows a growing willingness of the Court to give an appropriate weight also to interests of road safety (with which objectives of free movements have to be balanced) and to avoid incentives to circumvent domestic standards.<sup>116</sup> On the other hand, one must be clear that the Court has by no means reversed the basic lines of its case law on mutual recognition of driving licences.<sup>117</sup> In particular, the Court has not given up the idea that exceptions from mutual recognition must, as a matter of principle, be given a narrow meaning, but has – which amounts to much less – only said that that they must not be read in a way which deprives them of any meaning.<sup>118</sup> The decisions of 26 June 2008<sup>119</sup> in particular show clearly that the Court had no intention of going as far as it could. The Advocate General, in those cases, had – admittedly on the basis of a line of argumentation in which various considerations (importance of road safety, recognition also of withdrawal decisions, prevention of fraud and abuse) are linked in a somewhat imprecise

114. Case C-1/07, *Weber*, judgment of 20 Nov. 2008, especially paras. 35–39.

115. *Schwarz*, cited *supra* note 97, especially paras. 88–96.

116. Most clearly *ibid.*, para 90; *Weber*, cited *supra* note 114, para 39 and in *Schwarz*, *ibid.*, para 96.

117. The most recent decision of the ECJ on driving licence tourism, Case C-445/08, *Kurt Wierer*, Order of 9 July 2009 makes this very clear. In this decision, the ECJ holds that the mere fact that the issuing Member State admits that the residence condition was not verified, is not sufficient ground for refusal of recognition.

118. *Möginger*, cited *supra* note 113, para 42; *Weber*, cited *supra* note 114, para 37.

119. *Wiedemann and Funk*, cited *supra* note 50, and *Zerche and others*, cited *supra* note 99.

manner – suggested that a Member State which has withdrawn a driving licence because of driving under the influence of alcohol or drugs should have the general right to refuse recognition to driving licences issued by other Member States if those States have not carried out tests which are equivalent (i.e. offer a comparable level of protection) to those which the first Member State requires – a suggestion which would have tackled the very root of all driving-licence tourism.<sup>120</sup> The Court did not follow that suggestion, but held – in a much more modest manner and without giving very detailed reasons – that recognition could only be refused of driving licences which from their very entries made clear that the necessary residence condition (whose importance the Court stresses) was not fulfilled. Again it becomes apparent that the Court is reluctant to express broad abstract views on preconditions and limits of mutual recognition or to develop a consistent doctrine of abuse in this context,<sup>121</sup> on the contrary, the Court prefers, where it seems unavoidable, to admit such restrictions in a casuistic step-by-step approach.

### 3.3. *The European arrest warrant*

Our last example of recent case law on mutual recognition deals with the European arrest warrant as established by the Framework Decision 2002/584/JHA on the European arrest warrant and the surrender procedure between Member States.<sup>122</sup> Apart from one recent judgment of the ECJ concerning the conditions of surrender for the purpose of the execution of a custodial sentence, which is to be welcomed as it focuses on the chances of reintegrating into society and thereby makes surrender depend on the rights and interests of the requested person,<sup>123</sup> there is above all one leading case (*Advocaten voor de Wereld* of 3 May 2007)<sup>124</sup> which goes right into the heart of the main problem of mutual recognition in the context of the Third Pillar as outlined above (2.3.2.): the limits of mutual recognition without approximation. The Framework Decision abandoned the traditional requirement of double criminality for a list of more than 30 offences, provided that the offence is punishable in the issuing State by a custodial sentence or a detention order for a maximum period of at least three years (Art. 2(2) of the FD). It is commonly felt that, at least as for some groups of offences included in the list, – for lack

120. A.G. Bot, Opinion of 14 Feb. 2008, especially paras. 4, 112.

121. Saurer, op. cit. *supra* note 2, 263; Scholz, op. cit. *supra* note 101, 279–80.

122. See *supra* note 10.

123. Case C-66/08, *Szymon Kozłowski*, [2008] ECR I-6041; see on this decision Böhm, “Die Kozłowski-Entscheidung des EuGH und ihre Auswirkungen auf das deutsche Auslieferungsrecht”, (2008) NJW, 3183–3185; see also *Wolzenburg*, cited *supra* note 72.

124. *Advocaten voor de Wereld*, cited *supra* note 55.

of harmonization – there are serious discrepancies between the Member States as to what acts are regarded as punishable and what acts are not, so that it is absolutely conceivable and by no means theoretical that, under the Framework Decision, a suspect can or even must be surrendered even though the offence is not punishable in the surrendering State.<sup>125</sup> This, of course raises concerns of legality, especially the question of whether, in such a case, surrender is compatible with the principle of *nullum crimen sine lege*. It is exactly this question with which the ECJ was faced.

The answer the ECJ gave appears somewhat ambiguous. The Court starts off by stressing the relevance and validity of the rule of law and of fundamental rights in EU law and, in particular, also of the principle of legality and *nullum crimen sine lege*;<sup>126</sup> (this is to be welcomed and shows that the Court is, in principle, aware of the special importance of a sufficient protection of fundamental rights in the context of the Third Pillar). The ensuing application of these principles to the case,<sup>127</sup> however, – disappointingly – then turns out to be rather formalistic and a bit trapped in the “mutual recognition without harmonization” logic without realizing that the interesting question at stake here is precisely to what extent this logic can be justifiable.<sup>128</sup> The Court basically argues, that the Framework Decision itself neither creates nor harmonizes criminal offences but relies – for the purposes of surrender without double criminality – on the criminal offences as defined in the law of the issuing State; it is, therefore, for the issuing State (and not for the Union) to make sure that the principle of *nullum crimen sine lege* is respected; as long as the criminal offence is laid down in the law of the issuing Member State in a sufficiently clear manner before the offence is committed, there is no breach of *nullum crimen sine lege*.

It is doubtful whether these arguments have fully grasped the problem. It must be born in mind that *nullum crimen sine lege*, in its traditional meaning, is not a purely technical point only requiring that a criminal offence must be defined by some legal order somewhere in the world. Rather the material protection it traditionally offers to the suspect is directed to one specific legal

125. Douglas-Scott, op. cit. *supra* note 58, 225; Fichera, op. cit. *supra* note 10, at 86; Mitsilegas, op. cit. *supra* note 15, p. 102; Schilling, “Europäischer Haftbefehl und Europäisches Verfassungsrecht” in Lagodny, Wiederin and Winkler (Eds.), *Probleme des Rahmenbeschlusses am Beispiel des Europäischen Haftbefehls* (Graz, 2007), p. 95, at pp. 106–108.

126. *Advocaten voor de Wereld*, cited *supra* note 55, paras. 44–46, 49; see also Nettesheim, op. cit. *supra* note 16, 41.

127. *Advocaten voor de Wereld*, *ibid.*, paras. 50–54.

128. Cf. the critical remarks of Fichera, op. cit. *supra* note 10, 85–87; Nettesheim, op. cit. *supra* note 16, 41–42.; Satzger, op. cit. *supra* note 16, § 9, para 32; more positive: Mitsilegas, op. cit. *supra* note 16, pp. 140–142.

order, namely *his* legal order, the legal order of *his* State:<sup>129</sup> what the principle thus means is that the criminal offence must have been defined by a legal order which the suspected person can be expected to know and by a legislature which he, too, has typically been able to legitimate through democratic election. In the light of this tradition, one must ask to what extent it can really be justified to subject a suspect to the decisions of a (foreign) legal order which he cannot seriously be expected to foresee and which he certainly has not democratically legitimated.<sup>130</sup> And if it is to be justified after all, must not at least some additional precondition be fulfilled, which – despite what has been said – makes subjection to a foreign legal order appear tolerable? Such an additional condition could either be that, despite some differences, at least a sufficient degree of minimum approximation as to the definition of crimes has been reached which – throughout the Union – forms a reliable basis for surrender without any formal test of double criminality.<sup>131</sup> This, however, is a possibility which the Court explicitly rules out by stressing that the application of the European arrest warrant, according to the Treaty, does not depend on harmonization (see *supra* 2.3.2.).

An alternative additional criterion could be, that in order to be justifiably surrendered to a country without a test of double criminality, the offence one is suspected of must have a sufficient territorial link to that country (e.g. must have been committed in that country, because if one acts in another country one can also be expected to respect the law of that country).<sup>132</sup> This, however, is a possibility which the Court does not even take into account. It is interesting that, by contrast, the German constitutional court bases its decision on the European arrest warrant on exactly this territorial criterion, making the justifiability of surrender dependant on the question to what degree the offence has a dominant connecting factor to the issuing or to the executing State.<sup>133</sup> This approach seems, in principle, consistent, because – as we have seen before – the less mutual recognition is based on approximation of standards the more important territorial criteria are bound to become. One can certainly argue about whether the restrictions as imposed by the German constitutional court are the right solution. What should be equally clear, however, is that it is deplorable that the ECJ has missed the opportunity to decide on the limits of mutual

129. See Fichera, *op. cit. supra* note 10, 86.

130. See *German Federal Constitutional Court*, judgment of 18 July 2005, 2 BvR 2236/04, BVerfGE 113, 273, 302–303.

131. Fichera, *op. cit. supra* note 10, 86.

132. Schilling, *op. cit. supra* note 125, p. 109; *German Federal Constitutional Court*, judgment of 18 July 2005, 2 BvR 2236/04, BVerfGE 113, 273, 303.

133. *German Federal Constitutional Court*, judgment of 18 July 2005, 2 BvR 2236/04, BVerfGE 113, 273, 301–4, 308–9.

recognition without harmonization in a convincing and authoritative manner at the European level.

It must be stated, therefore, that the ECJ has not developed sufficient guidelines as to preconditions and limits of mutual recognition in the context of the Third Pillar yet, although precisely this question of preconditions and limits is even more important here than in the First Pillar, as the rights and liberties of the individual are at stake (see *supra* 2.3.1.). The question of limits is essentially left to the Member States, which have to decide to what extent they want to make use of exceptions of mutual recognition that the Framework Decision fortunately – and in order to address constitutional worries<sup>134</sup> – allows, and to national constitutional courts which tell the national legislature to what extent such exceptions must be used.<sup>135</sup> In the interest of European law it would be preferable by far if the ECJ tackled the problem of preconditions and limits of mutual recognition rather than leaving this question to the unilateral decisions of Member States. Because of the lack of clear guidelines from the ECJ, it is – in any case – not surprising that the Member States remain cautious and that the abolition of double criminality, which is, in principle, certainly desirable in a Union-wide area of security and justice, has recently, in the context of other legislative projects, become difficult to implement.<sup>136</sup>

#### 4. Conclusion

The principle of mutual recognition is a vital characteristic of European law. It is, however, a demanding concept requiring a difficult balance to be struck between freedoms of the individual and legitimate objectives of public interest; it is, therefore, necessarily bound to certain preconditions and limits. In particular, any application of the principle presupposes a sufficient degree of functional equivalence or approximation of standards. In addition, the more mutual recognition remains based on legal diversity, the more important territorial requirements (sufficient trans-border element or territorial link, residence etc.) become for its application and as a criterion for possible abuse. All this is already the case in the initial context, in which the principle has been applied, namely in the internal market, where mutual recognition means being able to take advantageous standards and decisions from the home to the host

134. Mitsilegas, *op. cit. supra* note 15, p. 127.

135. *German Federal Constitutional Court*, judgment of 18 July 2005, 2 BvR 2236/04, BVerfGE 113, 273 on Art. 4(7) of the framework decision.

136. Mitsilegas, *op. cit. supra* note 10, at 540–541 on German reservations against the abolition of double criminality in the context of the European evidence warrant; see also at 547 *et seq.* on growing caution of the Member States in general.

country and where it thus facilitates freedom. All this is even more the case in the context of its new field of application, the Area of Freedom, Security and Justice, where mutual recognition, by contrast, means being subjected to disadvantageous decisions of foreign legal orders, where not the individual, but State powers are to be freed from territorial limits and where – hence – the rights and liberties of the individual need to be protected. The recent case law of the ECJ shows, at least in the context of the internal market, a growing willingness to reflect on the necessary preconditions and limits of mutual recognition, although this happens in a casuistic step-by-step approach and with some reluctance to develop a clear doctrine. In the more problematic context of cooperation in criminal matters, however, the ECJ has so far missed the opportunity to give sufficient guidelines as to preconditions and limits of mutual recognition. It remains to be hoped that this will change and that the question will not be left to national (constitutional) courts.