

# Is the EU Ready for Automatic Mutual Recognition ... in the Fight Against Crime?

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## ABSTRACT

The article examines the prospects for automatic mutual recognition of judicial decisions in EU criminal matters, focusing on freezing and confiscation orders. It outlines the legal basis for mutual recognition under the Lisbon Treaty, contrasts it with harmonisation, and reviews existing instruments and their shortcomings. Drawing lessons from the European Arrest Warrant, the authors argue that mutual recognition can enhance efficiency while preserving legal diversity, provided fundamental rights and proportionality are safeguarded. They conclude that no Member State should become a safe haven for criminals exploiting free movement to shield unlawfully gained assets.

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Today, crime pays! This is a familiar statement. Assets of criminals remain sheltered and their value is significant at both European and international levels.<sup>1</sup> The capacity for criminals to enjoy the fruits of their criminal endeavours has the following three immediate economic consequences. First, crime does pay. Second, criminal activities will continue to perpetuate, as criminals are able to invest in the future by having the means to corrupt others and inspire those keen to emulate their well-rewarded achievements. Third, as criminals seek to launder the fruits of their activities and reinvest in the regular economy, they create market distortions, for they are unfair competitors not having borne the initial costs of doing business.

In order to fight crime efficiently, to deter from criminal activities, one must ensure that crime does not pay. Although this has been a constant preoccupation of the EU (part I), recent developments in EU law-making and practice indicate that the momentum has grown, creating the opportunity for automatic mutual recognition to become a reality in criminal matters (part II).

## I. Mutual Recognition in European Union Law

The principle of mutual recognition is captured in one clause in the U.S. Constitution<sup>2</sup>. The full faith and credit clause includes strong but simple language capturing the level of trust that federated states place in each other's legal and administrative systems. The rationale for this provision has been subsequently clarified by case law interpretation that regards it as a "nationally unifying force" within the United States.<sup>3</sup> Although mutual recognition in the United States concerned primarily judicial decisions and records, it has been extended to public acts over time.

Unfortunately, the EU treaties do not contain such a clause. Instead, the Lisbon Treaty contains language that envisages mutual recognition on a case-by-case basis as may be agreed in the future by the European Union institutions. A future treaty will hopefully include simple yet commanding as well as straightforward and all-encompassing language.

In the civil law context, Art. 81 Paragraph 1 of the consolidated Treaty on the Functioning of the European Union (TFEU), after entry into force of the Lisbon Treaty, provides the legal basis for mutual recognition of judicial decisions as the foundation for judicial cooperation in civil law cases with cross-border implications, including taking measures for the approximation of legislation. In accordance with the ordinary legislative procedure, Art. 81-2 empowers the European Parliament and the Council to take certain measures to promote this objective (eight types of measures are listed). Pursuant to Art. 81-3, the Council, acting in accordance with a special legislative procedure, may also adopt a decision covering aspects related to mutual recognition in the area of family law.

In the criminal law context, the Lisbon Treaty provided the first legal basis for mutual recognition. As a result of its entry into force, Art. 82 Paragraph 1 of the TFEU states *that*

[j]udicial cooperation in criminal matters in the Union shall be based on the principle of mutual recognition of judgments and judicial decisions and shall include the approximation of the law and regulations of the Member States."<sup>4</sup>

Although mutual recognition is thus extended to criminal law matters, Arts. 82-2 and 82-3 provide for limitations and exemptions to the benefit of Member States.

Art. 81 leaves a greater margin for the EU to act unimpeded than does Art. 82. Thus, one can conclude that mutual recognition in civil matters, at least in some civil matters, was more of a priority than in criminal

matters. This intent is reflected in debates at the European Commission and the European Parliament on the Lisbon Treaty at the time of its conclusion.<sup>5</sup>

It is generally accepted that mutual recognition provides a powerful means of improving judicial cooperation, especially in criminal matters.<sup>6</sup> This has drawn international attention; new standards have been developed under the auspices of various international organizations.<sup>7</sup> The United Nations and the Council of Europe have played a leading role in defining international multilateral instruments setting up basic standards in the field of mutual recognition and judicial cooperation in criminal matters.<sup>8</sup>

Building on these efforts, the EU has gone much further.

Since the entry into force of the Lisbon Treaty, significant steps have been taken towards a unified European prosecution, although there is still a long way to go for this to fully materialize.<sup>9</sup> To date, the most effective mutual recognition instrument in criminal matters in the EU is the European Arrest Warrant (EAW).<sup>10</sup> Its success is due to at least four factors. First, the grounds for refusal to enforce a EAW are very limited. Second, the EAW clearly replaces traditional extradition procedures, thus becoming the only available instrument. Third, the case law of the ECJ has clarified aspects of the EAW, thus facilitating its implementation and contributing to legal certainty. Fourth, constitutional changes possibly required by such new instruments are possible. Since the EAW deals with the *ne bis in idem*, territoriality, and double criminality principles, lessons learned from its implementation are useful in the preparation of any new mutual recognition instruments in criminal matters.

The EU has less successfully put in place other instruments to fight against crime by allowing the freezing and confiscation of criminal assets and by inviting Member States to work together to ensure that the assets transferred or located in another Member State are not sheltered from freezing or confiscation.

These instruments stem from the Presidency Conclusions of the Tampere European Council of 15 and 16 October 1999:

“[e]nhanced mutual recognition of judicial decisions and judgements and the necessary approximation of legislation would facilitate co-operation between authorities and the judicial protection of individual rights. The European Council therefore endorses the principle of mutual recognition which, in its view, should become the cornerstone of judicial co-operation in both civil and criminal matters within the Union. The principle should apply both to judgments and to other decisions of judicial authorities.”<sup>11</sup>

They thus imply both an approximation of legislation and mutual recognition.

Prior to 2014, in the area of freezing and confiscation of criminal assets – at the EU level and in addition to existing international arrangements – two types of instruments were adopted and are, at least partially, still currently in force.

The first instrument focuses on substantial rules for the confiscation of criminal assets. Council Framework Decision 2001/500/JHA of 26 June 2001 on “money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime”<sup>12</sup> and Council Framework Decision 2005/212/JHA of 24 February 2005 on “confiscation of crime-related proceeds, instrumentalities and property”<sup>13</sup> epitomize this approach.<sup>14</sup>

The second instrument focuses on procedures for the mutual recognition of decisions from one Member State in another Member State on the freezing and confiscation of criminal assets. It translates into EU law as Council Framework Decision 2003/577/JHA of 22 July 2003 on “the execution in the European Union of

orders freezing property or evidence”<sup>15</sup> and Council Framework Decision 2006/783/JHA of 6 October 2006 on “the application of the principle of mutual recognition to confiscation orders.”<sup>16</sup>

Following the observation that these and other instruments were ineffective<sup>17</sup> and the amounts of criminal assets recovered unsatisfactory,<sup>18</sup> the European Commission, on 12 March 2012, adopted a proposal for a Directive<sup>19</sup> (“2012 Proposal”) to harmonize substantial rules on the confiscation of criminal assets in the EU, including value-based confiscation, extended confiscation, third party confiscation, and the possibility for confiscation orders to be issued without a criminal conviction in specific cases. The 2012 proposal was finally adopted in 2014 as Directive 2014/42/EU.<sup>20</sup> The harmonization embedded in the directive aims at creating a coherent body of substantial rules that should, in turn, enhance mutual trust and effective cross-border cooperation.

## II. Perspectives on the Stakes of Current Law-Making with regard to Mutual Recognition

The Commission Impact Assessment accompanying the 2012 Proposal<sup>21</sup> identified that the preferred policy option for the Commission to pursue is the harmonization of substantial rules coupled with an additional instrument on mutual recognition, in order to achieve maximum effectiveness. In a 1999 discussion paper on mutual recognition of judicial decisions and judgments in criminal matters, the UK Delegation to the K.4 Committee had already highlighted the risk that the harmonization of substantial rules alone might prove insufficient. In particular, it noted that:

“[...] however, experience has shown that approximation is time consuming and sometimes difficult to negotiate. Full harmonisation of all criminal offences is not a realistic prospect; moreover, differences in criminal procedures will continue to impede judicial cooperation. Member States will continue to have different systems of criminal law for the foreseeable future. Even if laws were fully aligned, lack of mutual recognition would still imply the need to check facts and satisfy legal conditions before co-operation could be provided. In order to remove unnecessary procedural hurdles and formalities, work on approximation must be accompanied by progress towards mutual recognition. Mutual recognition can sometimes provide a shorter route to improving cooperation, without fully aligning legislation.”<sup>22</sup>

Indeed, during the negotiations on the draft directive, the Council called on the Commission to present an additional proposal on mutual recognition to amend Framework Decisions 2003/577/JHA and 2006/783/JHA.

The directive that aims at harmonizing substantial rules on the freezing and confiscation of criminal assets in the EU was finally adopted in 2014.<sup>23</sup> It is clear from its final wording that the text falls short of its original harmonization objectives. Indeed and understandably, EU states are reluctant to extensively harmonize areas that pertain to their core legal structures and sometimes even impact their constitutional principles. After all, it was not so long ago that “confiscation” was used as a tool to arbitrarily deprive people of their assets in some countries. Leaders remember this. So does the public. Everyone is aware of the potential for abuse. A general reluctance that results from the implementation of the European Arrest Warrant can also be noticed. Although the European Arrest Warrant is generally seen as a useful and effective tool, its use by some countries to prosecute minor offences, some of which were committed more than 20 or 30 years ago, has undermined confidence in the system. When using new effective legal tools, including those for the freezing and confiscation of unlawfully gained assets, countries must regularly keep in mind, the basic trust-generating principles captured in the protection of fundamental rights as well as the proportionality

principles. This means that the measure undertaken be proportionate to the objective sought, taking the following into consideration:

- (i) The nature and impact of the measure in comparison to the offence committed and the time of its commission;
- ii) The importance of a specific case in comparison to other cases (the idea being to prioritize the fight against terrorism, organized crime, drug trafficking, sex offences, and human trafficking by placing them at the top of the list);
- iii) The cost-benefit ratio of enforcing a measure in the legal system (the idea being that resources are finite and that there must be a proportionate and rational use of resources).

In fact, harmonization is not always the better route. Harmonization can undermine the fabric of society. The EU is rich because of its diversity and this diversity should remain and even prosper within EU borders. Harmonization has its limits and often causes frustration among populations that have very different social, economical, and legal backgrounds, values, and cultures.

This is where the conceptual discussion on whether mutual recognition might be a preferred alternative to harmonization comes into play. Mutual recognition in this context is the following principle: if a judicial decision is made anywhere in the EU, it can be executed anywhere in the EU. Obviously, mutual recognition can increase the efficiency of harmonization tools such as the 2014 Directive. Where rules are similar, they are better understood and the execution of decisions implementing them consequently easier to enforce.

As a stand-alone measure, however, mutual recognition also provides for a solution that avoids having to harmonize too intensely, thus preserving diverse legal cultures whilst ensuring that justice systems can remain effective within the framework of an area in which assets and criminals can move freely.

### III. Mutual Recognition Ensures Diversity whilst Promoting Trust

Mutual recognition ensures diversity and respect for each Member State's regulations and choices. Although the argument for limiting harmonization is based on the need to respect and preserve different legal systems, the same argument can be used to promote mutual recognition. There should be no excuse today for not executing in Member State B a judicial decision from Member State A that seeks to freeze or confiscate unlawfully gained assets. If a person goes to Member State A to commit an unlawful act, in doing so, he or she must be subjected to the consequences of his or her act in such Member State A, based on Member State A's legal system – however different it may be from that of other Member States or even of Member State B.

In other words, if a judicial decision is rendered in a Member State against such person and he or she, using the freedoms afforded by the EU treaties, has taken refuge in another Member State with his or her illegally gained assets, that other Member State holds a duty to automatically execute the decision rendered in the first Member State. It thereby signals understanding that the freedom afforded by the EU treaties have as their logical consequence the need to ensure that justice systems are not abused and respects the legal differences that it may have with the first Member State.

This duty should always be balanced with the duty to protect and uphold fundamental rights, including:

- Respect for the principle of legality;

- The right to a fair trial;
- The availability of effective legal remedies;
- Effective judicial review mechanisms;
- The protection of *bona fide* third parties;
- The right of access to justice;
- The right of defence;
- The right to a fair and public hearing within a reasonable time;
- The right to be informed on how to exercise other rights;
- The proportionality principle.

No Member State should become a safe haven for those who wilfully perpetrate unlawful acts in other Member States and abuse the freedoms afforded by the EU treaties in the process. Mutual recognition of judicial decisions is an essential component of the freedoms afforded by the EU treaties. Without it, the EU will always be as much an area of freedom for citizens as for criminals.

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1. *Estimating Illicit Financial Flows Resulting from Drug Trafficking and other Transnational Organized Crimes*, Research Report, United Nations Office on Drugs and Crime, Vienna, October 2011, 140 p.; available at [http://www.unodc.org/documents/data-and-analysis/Studies/Illicit\\_financial\\_flows\\_2011\\_web.pdf](http://www.unodc.org/documents/data-and-analysis/Studies/Illicit_financial_flows_2011_web.pdf)↵
  2. Article 4, Section 1 of the U.S. Constitution, 1787 (so-called Full Faith and Credit Clause): "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."↵
  3. See, e.g., Werner Miguel Kühn Baca, "The Principle of Mutual Recognition of Judicial Decisions in EU Law in the Light of the 'Full Faith and Credit' Clause of the US Constitution," *Boletín Mexicano de Derecho Comparado*, vol. XLVII, No. 140, May-August 2014, pp. 464-468.↵
  4. Treaty on the Functioning of the European Union (TFEU), consolidated version as amended by the Lisbon Treaty of 13 December 2007, O.J. C 326, 26.10.2012, p. 79.↵
  5. See, e.g., Communication from the Commission to the Council – Reforming Europe for the 21st Century, Brussels, 10.07.2007, COM(2007) 412 final, p. 6 (where only judicial cooperation in criminal matters, as opposed to civil matters, is mentioned among the contemplated reforms); Report on the Treaty of Lisbon, doc. 2007/2286(INI), Committee on Constitutional Affairs, European Parliament, 29.01.2008, Document session A6-0013/2008, Rapporteurs: Richard Corbett and Íñigo Méndez de Vigo, sections 9.1(3) and 9.1(4) p. 41.↵
  6. See inter alia *Comparative Law Study of the Implementation of Mutual Recognition of Orders to Freeze and Confiscate Criminal Assets in the European Union*, General Report, study conducted by DBB Law Firm for the European Commission (DG Justice), Brussels, November 2013, p. 32; available at [www.criminalassets.eu](http://www.criminalassets.eu)↵
  7. *Ibid.*, pp. 27-39.↵
  8. For the United Nations: UN Convention against Transnational Organized Crime, adopted by UNGA Resolution 55/25 of 15 November 2000 and the Protocols thereto; UN Model Treaty on Mutual Assistance in Criminal Matters, adopted by UNGA Resolution 45/117 of 14 December 1990, subsequently modified. For the Council of Europe: European Convention on Mutual Assistance in Criminal Matters, No. 30, 24 April 1959; Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, No. 141, 8 November 1990; Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism, No. 198, 16 May 2005 (*inter alia*).↵
  9. Jean Arthuis, conclusive statement to the seminary "Quel avenir pour la coopération judiciaire pénale en Europe?" organized by PRESAJE, France-Amériques and the French Association of Doctors in Law, Paris, 13 October 2014, *verbatim*, p. 23.↵
  10. Established by Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, 2002/584/JHA, O.J. L 190, 18.07.2002, pp. 1-20. The EAW came into effect on 1 January 2004.↵
  11. [http://www.europarl.europa.eu/summits/tam\\_en.htm](http://www.europarl.europa.eu/summits/tam_en.htm)↵
  12. O.J. L 182, 05.07.2001, pp. 1-2; available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32001F0500:EN:HTML>↵
  13. O.J. L 68, 15.03.2005, pp. 49-51; available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2005:068:0049:0051:EN:PDF>↵
  14. Mention should also be made of the Joint Action of 3 December 1998 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds from crime (98/699/JHA); O.J. L 333, 09.12.1998, p. 1; available in its consolidated version at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CONSLEG:1998F0699:20010705:EN:PDF>↵
  15. O.J. L 196, 02.08.2003, p. 45.↵
  16. O.J. L 328, 24.11.2006, p. 59.↵

17. See, in particular, the European Commission's implementation reports on Framework Decisions 2005/212/JHA on extended confiscation and 2003/577/JHA on the mutual recognition of freezing orders under COM(2007) 805 and COM(2008) 885; available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2007:0805:FIN:EN:PDF> and <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0885:FIN:EN:PDF> See also Report from the Commission based on Article 14 of the Council Framework Decision 2003/577/JHA of 22.07.2003 on the execution in the European Union of orders freezing property or evidence, COM(2008) 885 final, 22.12.2008; available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52008DC0885&from=EN>
18. Commission Staff Working Paper, impact assessment, 12.03.2012, document SWD(2012) 31 final, paragraph 4.1.; available at: [http://www.parlament.gv.at/PAKT/EU/XXIV/EU/07/57/EU\\_75735/imfname\\_10022180.pdf](http://www.parlament.gv.at/PAKT/EU/XXIV/EU/07/57/EU_75735/imfname_10022180.pdf)
19. COM(2012) 085, inter-institutional code 2012/0036 (COD) ; available at : <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2012:0085:FIN:EN:PDF>
20. Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union, O.J. L 127, vol. 57, 29.4.2014, pp. 39-50. See at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L:2014:127:FULL&from=EN>
21. SWD(2012) 31 final, 12.03.2012; available at [http://ec.europa.eu/dgs/home-affairs/e-library/documents/policies/organized-crime-and-human-trafficking/confiscation-and-asset-recovery/index\\_en.htm](http://ec.europa.eu/dgs/home-affairs/e-library/documents/policies/organized-crime-and-human-trafficking/confiscation-and-asset-recovery/index_en.htm)
22. See "Mutual Recognition of judicial decisions and judgments in criminal matters," Note from the UK Delegation to the (then) K.4 Committee, Council doc. 7090/99, Brussels, Crimorg 35 Justpen 18, Limite, Brussels, 29.03.1999, especially par. 9 ; See reference at: <http://www.publications.parliament.uk/pa/ld199899/ldselect/lddeucom/62/6203.htm> and <http://www.publications.parliament.uk/pa/ld199899/ldselect/lddeucom/62/6204.htm> On 2 December 2014, the UK adopted The Criminal Justice and Data Protection (Protocol No. 36) Regulations 2014 (2014 No. 3141, Statutory Instruments, criminal law, data protection) transposing Directives 2003/577/JHA and 2006/783/JHA.
23. See note 20.

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