ARTICLES

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# OVERCOMING CONFLICTS OF CRIMINAL JURISDICTION OF EU MEMBER STATES AND THE PRACTICE OF APPLYING THE PRINCIPLE OF MUTUAL RECOGNITION OF JUDICIAL DECISIONS

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**Abstract:** The article is devoted to the principle of mutual recognition of judicial decisions and overcoming conflicts of criminal jurisdiction of the EU member states. The union was created in 1977 and the states got together to overcome economic and other important issues of development. Moreover, the growth of terrorism clearly showed that the internal security of the EU member states should be ensured not only through measures taken at the national level. Certainly the existing diversity of legal systems of the EU countries, together with the European guarantees of freedom of movement, have inevitably led to a clash and conflict of criminal jurisdiction of the EU member states. The author analyses the steps and documents of the process of implementing the internal security (the Green Paper on Conflicts of Jurisdiction and the Principle of *ne bis in idem* in Criminal Proceedings, agreements and protocols) and also the latest tools for mutual recognition.

**Keywords:** criminal jurisdiction, European Union, member states of the EU, principle, principle of mutual recognition, judicial decision.

Article 82 of the Treaty on the Functioning of the European Union, as amended in Lisbon, states that "judicial 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 laws and regulations of the Member States."[1] At the same time, at the pan-European, supranational level measures are being taken to achieve: a) the establishment of rules and procedures to ensure the recognition throughout the Union of any form of sentences and court decisions; and b) the prevention and resolution of conflicts of jurisdiction between member states. Accordingly, it follows that at the present stage of development of the all-European criminal policy, these two areas are a priority.

*Overcoming conflicts of criminal jurisdiction of EU states.*

Creating by EU states a space of freedom, security and justice, with the inclusion of Schengen achievements based on the 1997 Treaty of Amsterdam, implied the abolition of border controls at internal borders and the pursuit of a common policy on asylum, immigration and the fight against transnational crime. At the same time, as noted by Z.A. Askerov and N.A. Safarov, "the growth of serious crime, and especially terrorism, clearly showed that the internal security of the EU member states cannot be ensured only through measures taken at the national level."[2] Indeed, it is easy to imagine a situation where, against the background of growing migration flows, several states at once, on the basis of their domestic legislation, claim criminal jurisdiction in connection with the crime, and show a reasonable interest in the suspect.

Under these conditions, it is obvious that the existing diversity of legal systems of the EU countries, together with the European guarantees of freedom of movement, inevitably led to a clash and conflict of criminal jurisdiction of the EU member states.

Meanwhile, parallel prosecution in countries that have the common ambitious goal of building a common space of freedom, security and justice is extremely undesirable for several reasons. First, it contradicts the very idea of good neighborly relations of the EU states, enshrined in the basic treaties of the European Union. Secondly, this situation is clearly not in the interests of the victims, since it creates an atmosphere of uncertainty in the outcome of the case. Finally, this situation undermines one of the fundamental tenets of criminal justice – *ne bis in idem*, according to which no one can be tried twice for the same crime.

It should be noted here that a clear regulation of the content and application of the principle of *ne bis in idem* in the law of the European Union at that time could help in solving the problem of competition of the criminal jurisdiction of states. Of course, we cannot say that this principle was not known to the European law – as a justification of legal certainty and legality of court decisions, it is enshrined in international legal standards for the protection of human rights, some Council of Europe conventions (as a case for

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[1] Treaty on the Functioning of the European Union. EU right, http://eulaw.ru/treaties/tfeu

[2] Askerov Z.A., Safarov N.A. The principle of mutual recognition of judicial decisions as the fundamental basis of the system of criminal law cooperation of the member states of the European Union, News of universities. Jurisprudence. 2011, no 4, www.center-bereg.ru/o1914.html

refusing to issue or provide legal assistance), is contained in the legislation of most states. Chapter 3 (arts. 55-58) of the Convention on the Application of the Schengen Agreement of 1990 (CISA)[1] is devoted to it, and it is believed that, unlike the traditional approach to the *ne bis in idem* as a principle of national law, it was the Schengen agreements that for the first time allowed to consider it in the context of transnational *ne bis in idem*, as an individual right *erga omnes*[2].

At the same time, after the integration of CISA into the primary law of the European Union, the question of the scope of the principle as applied to the space of freedom, security and justice remained unresolved.

In addition, the existence of a principal does not in itself prevent or resolve a conflict of jurisdiction. In terms of the legitimacy of the various jurisdictions of jurisdiction (territoriality, personal active or passive citizenship), the principle of *ne bis in idem* does not determine the priority of one or the other, therefore the privileged position will be on the side of the state that first decides to initiate criminal proceedings.

Some works dealing with conflicts of criminal jurisdiction of EU states indicate that it could be resolved with the help of the 1972 European Convention on the Transfer of Proceedings in Criminal Matters, namely Article 30, paragraph 1, which states: "Any Contracting State which, before the institution or in the course of proceedings for an offence which it considers to be neither of a political nature nor a purely military one, is aware of proceedings pending in another Contracting State against the same person in respect of the same offence shall consider whether it can either waive or suspend its own proceedings, or transfer them to the other State." However, it is more than forty years since the adoption of the Convention, it was signed by 17 member states of the organization, and it entered into force in only 11 countries.[3]

Given these circumstances, as well as the fact that international law is incomplete in terms of settling competition of jurisdictions, by the beginning of the third millennium, there was an urgent need for EU countries to supplement the existing mechanisms of international cooperation in this area with supranational tools at the European Union level.

In 2004, the Hague Programme for strengthening freedom, security and justice (p.3.3)[4] stated that in order to increase the efficiency of criminal prosecutions, while guaranteeing the proper administration of justice, states should consider the law on

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[1] Convention on the Application of the Schengen Agreement of June 14, 1985 between the Governments of the States of the Economic Union of Benelux, the Federal Republic of Germany and the French Republic on the gradual abolition of inspections at common borders (Schengen, June 19, 1990), http://base.garant.ru/2563295/11/

[2] Vervaele J.A.E. The transnational *ne bis in idem* principle in the EU: Mutual recognition and equivalent protection of human rights, *Utrecht Law Review*. 2005, vol. 1(2), p. 107.

[3] Panayides P. Conflicts of jurisdiction in criminal proceedings : analysis and possible improvements to the EU legal framework, *Revue internationale de droit penal*. 2006/1, vol. 77, p. 113–119.

[4] The Hague Programme: ten priorities for the next five years, http://europa.eu/scadplus/leg/en/ S22006.htm

conflicts of jurisdiction, to complete a comprehensive program of measures to implement the principle of mutual recognition of judicial decisions in criminal matters.

A year later, in 2005, the European Commission presented the Green Paper on Conflicts of Jurisdiction and the Principle of *ne bis in idem* in Criminal Proceedings.[1]

In its Green Paper, the Commission explains the need to use the principle of subsidiarity in resolving conflicts of criminal jurisdiction at Union level.

First, the general measures of the EU can significantly ease the position of the accused, reducing the burden of material costs for a lawyer, limiting the use of coercive measures to his person and property, reducing the level of moral and psychological discomfort. Secondly, the Union's general approach will help strengthen and complement the cornerstone principle of mutual recognition of court decisions. Thirdly, the measures taken at the European level regarding the resolution of conflicts of jurisdiction will increase the effectiveness of criminal prosecution and litigation. Such measures should include: the organization of appropriate information exchange so that the competent national authorities are aware of the relevant procedures and decisions on the jurisdiction of each other; and the provision of the opportunity to refrain from initiating criminal prosecution or to terminate it on the grounds that criminal proceedings have already been initiated in another member State.

The procedure itself for settling the conflict of jurisdiction, as proposed by the Commission, should include three steps:

Step 1: A state that is going to or has already initiated a criminal case in connection with the offence should identify and inform the competent authorities in other affected Member States about the possiblity of initiating criminal prosecution. The informed authorities of these countries will have a fixed period of time during which they can express their interest in criminal prosecution. If no interest has been expressed, the first state could continue the investigation.

Step 2: When two or more Member States have declared their legitimate interest in criminal prosecution, the second stage will include the duty to enter into discussions on preferential jurisdiction.

Step 3: Settlement of disputes or mediation. This phase aims to assist Member States in resolving real conflicts of jurisdiction through a dialogue with the participation of the mediator at EU level. This dispute resolution mechanism should be quick and flexible, and can be initiated on the request of any interested State or after a certain period of time. An obvious candidate for the role of mediator at this stage is Eurojust.

In case of failure to resolve the competition of jurisdiction in the first three stages, the Commission did not exclude the possibility of reviewing the dispute at a level other than Eurojust, a subsidiary body with additional competence and the possibility of making a binding decision for the parties. This is a possible or additional step envisaged in the document.

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[1] Green Paper on Conflicts of Jurisdiction and the Principle of ne bis in idem in Criminal Proceedings {SEC(2005) 1767}, COM(2005) 696 final, http://eur-lex.europa.eu/legal- content/EN/TXT/?uri= celex:52005DC0696

The Commission's Green Book formed the basis for the 2009 Framework Decision 2009/948 / JHA on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings.[1] The document states that the objective of this Framework decision is "to promote a closer cooperation between the competent authorities of two or more member States conducting criminal proceedings." (Clause 1, Article 1).

Such cooperation aims to:

– prevent of the situation when the same person is subject to parallel criminal proceedings in different participating States, which constitutes an infringement of the principle of *ne bis in idem*;

– avoid the adverse consequences arising from such a parallel criminal process.

To achieve this task, the Framework Decision regulates in detail:

a) the procedure for establishing contact between the competent authorities of the Member States, in order to confirm the existence of parallel criminal cases in relation to the facts related to the same person; b) organization of information exchange and direct consultations between the competent authorities of two or more Member States exercising parallel jurisdiction over the facts related to the same person in order to reach consensus on any effective solution aimed at avoiding negative consequences.

Each State determines in its structure the competent authority responsible for organizing communication and direct consultations with another participant, in the event that there are reasonable grounds to believe that parallel criminal prosecution is underway (Article 5). The minimum information provided in the order of exchange must contain (Article 8):

– the contact details of the competent authority;

– a description of the facts and circumstances that are the subject of the criminal proceedings concerned;

– all relevant details about the identity of the suspected or the accused person and the victims, if applicable;

– the stage that has been reached in the criminal proceedings;

– information about provisional detention or custody of the suspected or accused person.

In the event when the States fail to reach consensus on the acceptability of the jurisdiction of one of the parties in the consultation process, they can use Eurojust as a mediator for the negotiations (Article 12).

The document also notes that the Framework Decision is without prejudice the proceedings under the European Convention on the Transfer of Proceedings in Criminal Matters of 1972, as well as any other similar agreements concluded between the Member States.

The doctrinal assessment of the Framework Decision looks ambiguous: some experts note that the EU has become "the most advanced international organization in the area

[1] Council Framework Decision 2009/948/JHA of 30 November 2009 on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings, Official Journal of the European Union L 328/42, 15.12.2009, http://eur-lex.europa.eu/legal- content/EN/TXT/?uri=celex:52005DC0696

of settling the competition of jurisdictions"[1], and other authors argue that it does not contain solutions that can be universal and applicable in all EU countries[2].

The fact is that based on the provisions of the Framework Decision, the competent authorities of the State, informed about the proceedings in another State, must refrain from initiating or stop criminal prosecution, which is not always possible under domestic law. In some cases, the principle of legality, obliging the competent authorities to initiate criminal proceedings in relation to the crime committed, is contained in the constitutions of the States. Probably this is why, out of 28 Member States of the European Union, so far only 15 countries have implemented this act into their domestic legislation.

In 2014, the European Commission published a report on the implementation of provisions of the Framework Decision on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings[3].

The Commission expressed concern that a significant number of EU countries still do not apply the framework decision, thus depriving themselves of an important tool for resolving conflicts of jurisdiction, and called on all countries that have not yet done so to take immediate steps to implement it in full volume[4].

The principle of the mutual recognition of court decisions, which is a "process by which a decision taken by a judicial body of one State of the European Union is recognized and, if necessary, executed by another EU State, as if the decision was taken by the judicial authority of the latter State"[5]. The mutual recognition of court decisions is called «the cornerstone of judicial cooperation in civil and criminal matters within the Union."[6]

Indeed, this principle essentially changes the philosophy of judicial cooperation. Traditionally, the interaction of States in the criminal law field (in the form of legal assistance or extradition and transfer of prisoners) has been carried out on the basis of international treaties or within the framework of international organizations, for example, the Council of Europe. If assistance is needed, one of the parties to the contract addresses the other using special procedures and requests. Accordingly, the other party

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1 Prosecutorial Guidelines for Cases of Concurrent Jurisdiction , Making the Decision «Which Jurisdiction Should Prosecute?», International Association of Prosecutors, www.iap- association.org

2 Zinn A. Overcoming conflicts of criminal jurisdiction in the European Union: the present and the future, Eurasian advocacy, 2013, no 6 (7), http: //cyberleninka.ru/article/n/preodolenie-konfliktov-ugolovnoy-yurisdiktsii-v-evropeyskom- soyuze-nastoyaschee-i-buduschee

3 REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL on the implementation by the Member States of Framework Decision 2009/948/JHA of 30 November 2009 on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings, COM/2014/0313 final, http://eur-lex.europa.eu/legal- content/EN/TXT/?uri=celex:52014DC0313

4 Jurisdiction in criminal proceedings: prevention and settlement of conflicts. Summaries of EU legislation, http://eur-lex.europa.eu/legal- content/EN/TXT/?uri=URISERV%3Ajl0021

5 Recognition of decisions between EU countries, http://ec.europa.eu/justice/criminal/recognition-decision/index_en.htm

6 Elsen C. From Maastricht to the Hague: the Politics of Judicial and Police Cooperation, Era Forum, 2007, no 8, p. 13–26.

decides to what extent the received request complies with the provisions of the contract, whether there are reasons for refusing to execute the proceedings, etc. This mechanism is often complex, slow and takes a lot of time.

This form of cooperation for the States of the European Union has ceased to correspond to the level of integration changes and exhausted itself in the situation of open borders. Z. Ascerov and N. Safarov emphasise that "despite the benefits of broad European cooperation in the fight against crime, protracted and heavy legal procedures applied at the level of the Council of Europe could not be considered as the most acceptable framework of interaction between the EU Member States."[1]

The idea of "mutual recognition" based on the prospects for creating a single legal space of the European Union, including in the field of criminal justice, radically changed the classic contract form and organization form of cooperation in the field of mutual legal assistance between States. This is confirmed by the statement at 2004 Brussels EU Summit. According to the statement, even if EU Member States represent different legal or judicial systems and traditions, they are able to form a "genuine European justice space"[2].

The European Union entered the third millennium under the slogan «to a free circulation of people shall correspond a free circulation of judicial decisions.»[3]

Initially, the principle of mutual recognition was known and applied to ensure the free movement of goods and product standards in the common market[4]. Gradually, it moved to the field of criminal proceedings. At the European Council meeting in Cardiff, 1998, the need to improve the effectiveness of legal cooperation in the context of combating transnational crime was emphasised and a request was made to the Council of the EU to determine the scope for expanding the mechanism of mutual recognition of court decisions of the Member States[5].

In October 1999, in Tampere, it was proclaimed that "enhanced 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

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1 Askerov Z.A., Safarov N.A. The principle of mutual recognition of judicial decisions as the fundamental basis of the system of criminal law cooperation of the Members States of the European Union , News of universities. Jurisprudence, 2011, no 4, www.center- bereg.ru/o1914.html

2 Brussels European Council 4/5 November 2004, Presidency Conclusions, Council of European Union, 14292/1/04 REV 1, Brussels, 8 December 2004, http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/82534.pdf

3 Recognition of decisions between EU countries, http://ec.europa.eu/justice/criminal/recognition-decision/index_en.htm

4 Vermeulen G. Approximation and mutual recognition of procedural safeguards of suspects and defendants in criminal proceedings throughout the European Union, EU and International Crime Control: Topical Issues, ed. by M. Cools, B. de Ruyver and Others. Antwerpen: Maklu, 2010, p. 47.

5 Asp P. Mutual Recognition and the Development of Criminal Law Cooperation Within the EU, *Harmonization of Criminal Law in Europe*, ed. by E.J. Husabo, A. Strandbakken, p. 23.

and criminal matters within the Union. The principle should apply both to judgements and to other decisions of judicial authorities[1]."

In order to implement the task of introducing the mechanism of mutual recognition of court decisions, on February 12, 2001, a programme of measures was adopted aimed at implementing the principle of mutual recognition of court decisions in criminal matters[2]. Later, the principle was reaffirmed in the Hague Programme on Strengthening the Area of Freedom, Security and Justice[3], and was enshrined in the Lisbon Treaty.

Thus, in the primary law of the EU, the principle of mutual recognition of court decisions is governed by Articles 82-83 of the Treaty on the Functioning of the European Union. According to Article 83, the Council and the European Parliament establish minimum rules through directives (until 2009 – framework solutions) to facilitate mutual recognition of court decisions. Taking into account the differences between legal systems and traditions of Member States these rules concern the following issues:

- the mutual admissibility of evidence between Member States;
- the rights of persons in criminal proceedings;
- the rights of victims of crime;
- other special aspects of the criminal process that the Council will preliminarily determine by decision.

The principle of mutual recognition is not absolute which allows the Member State to suspend the legislative procedure in the Council when, in its opinion, the draft directive can harm the fundamental aspects of its criminal justice system (Art.83 p.3).

It is thought that the principle of mutual recognition was originally developed as an alternative to the harmonization of criminal legislation. Relying on mutual recognition, the Member States could avoid a difficult process of harmonizing their national criminal laws[4]. At the same time, it is obvious that without the harmonization of the legal order, the introduction of this instrument de facto would be difficult. In the context of mutual recognition, harmonization seems necessary at three levels:

- reconciliation of offenses to abolish of the requirement of double criminalization;
- determining the scope of the mutual recognition tool;
- harmonization of procedural rules governing the recognition and execution of a court decision[5].

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1 Tampere European Council 15 and 16 October 1999. Presidency Conclusions, http://www.europarl.europa.eu/summits/tam_en.htm#b

2 Programme of measures to implement the principle of mutual recognition of decisions in criminal matters. 2001/C 12//02, Official Journal 12/10, 15.1.2001.

3 The Hague Programme: ten priorities for the next five years, http://europa.eu/scadplus/leg/en/ S22006.htm

4 Ligeti K. Mutual recognition of financial penalties in the European Union, *Revue internationale de droit penal*, 2006/1, vol. 77, https://www.cairn.info/revue-internationale-de-droit-penal-2006-1-page-145.htm

5 Mitsilegas V. *EU Criminal Law*. Oxford and Portland, Oregon, 2009, p. 101.

According to Kimmo Nuothio, harmonization is a flexible concept that has different meanings. Probably the most typical meaning of harmonization is reducing differences between legal systems, through general policies and the introduction of common standards. Kimmo Nuothio also believes that Member States express attitude towards each other within the framework of the pan-European order through the recognition mechanism. In practice, this recognition means the internationalization of each other's rights as binding and directly applicable[1].

The Tampere concept of mutual recognition is a new legal phenomenon, in the sense that the recognition and enforcement of judgments pronounced by a competent authority of the EU Member State do not require the assessment of legitimacy by the authorities of another State. This assumes a priori that the criminal process in a foreign state is consistent with the principle of the rule of law, as it is understood and applied in the executing State[2].

Meanwhile, the automatic recognition of a foreign court's decision as equivalent to a decision of its own judicial structures requires from the participants of the Union a high degree of trust, the existence of which is highly questioned in the works of European skeptics[3]. According to Valsamis Mitsilegas, the measures introduced are inextricably linked to the exercise of state power, coupled with a lack of trust between the criminal justice systems of the Member States and the absence of any serious attempts to establish common understanding at the EU level[4], caused concern among European countries.

In the Communication on the mutual recognition of court decisions in criminal cases and the strengthening of mutual trust between Member States[5], submitted by the Commission in 2005 regarding the implementation of the Programme for the implementation of the principle, a special attention was paid to confidence-building measures.

The Commission stressed that building mutual trust is key to the successful implementation of the Programme. This applies both to legislative measures to ensure a high degree of protection of human rights, as well as related practical steps aimed at familiarizing practicing lawyers with the common European judicial culture.

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1 Nuotio K. On the Signifi cance of Criminal Law Justice for Europe, *Europe in Search of 'Meaning and Purpose', Publications of Faculty of Law*. Helsinki, 2004, pp. 173, 210.

2 Vermeulen G. Approximation and Mutual recognition of Procedural safeguards of Suspects and Defendants in Criminal proceedings throughout the European Union, *EU and International Crime Control: Topical Issues*, ed. by M. Cools, B. de Ruyver and others. Antwerpen: Maklu, 2010, p. 47.

3 Peers S. Mutual Recognition and Criminal Law in the European Union: Has the Council Got it Wrong, *Common Market Law Review*. 2004, vol. 41, no 1, p. 5–36.

4 Mitsilegas V. Trust-building Measures in the European Judicial Area in Criminal Matters: Issues of Competence, Legitimacy and Inter-institutional Balance, Security versus Freedom: a Challenge for Europe's Future. Ashgate Publishing, 2006, p. 280.

5 Communication on the mutual recognition of judicial decisions in criminal matters and the strengthening of mutual trust between Member States{SEC(2005)641}, COM(2005) 195 final, http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52005DC0195

Regarding building confidence through legislative measures, the Commission paid special attention to further convergence of substantive criminal law (questions of composition and sanctions), as well as harmonization of the criminal procedure law of States in terms of compliance with high standards of ensuring personal rights: presumption of innocence, prosecution in absentia, and general standards for evidence.

As regards the strengthening of mutual trust by practical flank measures, the Commission would like to strengthen monitoring mechanisms in order to correctly assess the practical needs of the justice system and identify potential barriers to the introduction of new tools. A special role is assigned to the European judicial network, which facilitates contacts at all levels of the judicial system of the Member States.

The idea of mutual recognition based on trust implies confidence in national justice systems[1] based on the rule of law and guarantees of human rights. On the one hand, this suggests that the legal protection of persons in the EU Member States is more or less equivalent, and on the other, there are exceptions. Therefore, some researchers argue that mutual recognition should not be unconditional. Some of them, for example, propose to combine its limits with the system of protection of human rights within the Council of Europe, in particular, the mechanism of the European Court of Human Rights. In the event of any violation of the basic rights granted to individuals, all States of the Union will be liable to the ECHR.

Therefore, in the context of enhancing the cooperation of Member States in criminal matters, it is recommended to strengthen the protection of fundamental rights in the ECHR. Otherwise, they predict a potential danger that the principle of mutual recognition may lead to a narrowing of international standards for the protection of human rights[2].

Other researchers write that differences in national legal systems of EU Member States should not affect the mechanism for the mutual recognition of judicial decisions. The meaning of the principle is limited to the recognition of official documents issued by the State. For example, several years ago, John Vervel noted that "mutual trust is associated with international or transnational comity. The executive authorities do not ask questions about the legal quality of the request or requirement of the issuing Member State. Legality and legitimacy are presupposed to exist ipso iure and are thereby removed from judicial control in another State."[3] A. Klip states: "Mutual recognition implies the existing differences, it allows them to coexist, but perceives them regardless of cooperation, which means

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[1] Many researchers note that the highest degree of trust, in particular during the execution of the European arrest warrant, is observed in the Nordic countries. See Strandbakken A. The Nordic Answer to the European Arrest Warrant: The Nordic Arrest Warrant, *Eucrim* 3–4/2007, p. 139–140; Tolttila K. The Nordic Arrest Warrant: What Makes for Even Higher Mutual Trust?, *NJECL* (2011) 4, p.368.

[2] Smeulers A. The position of the individual in international criminal cooperation, *European Evidence Warrant: Transnational Judicial Inquires in the EU*. J.A.E. Vervaele (eds.). Intersentia, Antwerp, 2005, p. 92–102.

[3] John A.E. Vervaele, European Criminal Law and General Principles of Union Law, *Research Papers in Law* 5/2005, College of Europe, European Legal Studies, p. 5–6, www.coleurop.be/content/studyprogrammes/law/studyprog/pdf/ResearchPaper_5_2005_Vervaele.pdf

unilaterally introducing a European legal standard for issuing a warrant, order or license. The executing State may use another definition of crime or imputation requirement. The body that has the right to make a decision or collect evidence may have a different status in this State. However, these differences should not stand in the way of recognition."[1]

One way or another, many researchers believe that unconditional execution of requests in the context of mutual recognition may jeopardize basic human rights. It is noted that "the application of the principle can be very problematic at the supranational level for all EU Member States, which form a wide variety of national judicial systems. For this reason, special attention should be focused on procedural safeguards for persons in criminal proceedings."[2]

For the practical implementation of the concept of mutual recognition of court decisions, it is necessary to consistently implement a number of legal measures covering various stages of the criminal process. For this purpose, standard acts are introduced within the European Union, giving the right to conduct individual proceedings – the European Warrants. Among there the following:

- European Arrest Warrant;
- Freezing Order;
- European Evidence Warrant;
- European Investigation Order.

In addition, through the framework decisions and directives of the Council of the EU, a procedure for the mutual recognition of sentences and rulings related to various penalties, detention, transfer of prisoners and others is introduced.

As it is known, the first legal instrument that was introduced in accordance with the principle of mutual recognition was the European Arrest Warrant (EAW). The introduction of this tool was made possible by the adoption by the EU Council of the Framework Decision 2002/584 / JHA on the European arrest warrant and the surrender procedures between Member States of 13 June 2002[3], which in fact opened a new era in the criminal law of the European Union.

The European arrest warrant is a court decision issued by a Member State for the purpose of detaining and transferring a wanted person to another State to carry out a criminal prosecution or to execute a sentence or security measure related to imprisonment. The purpose of the document is to simplify the mechanism for the extradition of persons who have committed particularly serious crimes on the territory of the EU Member States.

The framework decision states that the goal, set for the Union is to create a single space of freedom, security and justice, entails the abolition of extradition between

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[1] Klip A. *European Criminal Law*, Ius Communitatis II, Intersentia, Antwerp, 2009, p. 318–324; Craig P., de Búrca G. *EU Law, Text, Cases, and Materials*. 5th ed. OUP, Oxford, 2011, p. 332–333.

[2] Banach-Gutierrez J.B. Globalized criminal justice in the European Union context: how theory meets practice, New Journal of European Criminal Law, 2013, vol. 4, issue 1–2, p. 154–159, http://www.njecl.eu/pdf_file/ITS/NJECL_04_01_0154.pdf

[3] *Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA)*, Official Journal L 190, 18/07/2002. P. 0001–0020.

Member States and instead the establishment of a system of transfer of persons between judicial bodies. From the moment the introduction of the European arrest warrant within the EU the long, often politicized and not always effective enough procedure of extradition is being cancelled.

A single arrest warrant has replaced the extradition of criminals, enshrined in previous agreements in the area in question, that is a classic cooperative relationship has been replaced by the system of free movement of criminal judgments (including both final decisions and decisions taken before sentence). Now in case the judicial body of a Member State requires the transfer of a person, their decision must be recognized and performed automatically throughout the Union. According to paragraph 1 of Article 31 of Framework Decision in relations between the EU States from January 1, 2004, the following European conventions have ceased to operate: On Extradition 1957 and additional protocols; On the simplification and modernisation of methods of transmitting extradition requests 1989; On simplified extradition procedure between the Member States of the EU 1995; On extradition between Member States 1996, and in part the European Convention on the suppression of terrorism 1977 where it relates to extradition, as well as Convention on the Application of the Schengen Agreement 1990.

In December 2001, the EU Member States approved a list of 32 extradition offenses, punishable by imprisonment for at least three years, and for which the European arrest warrant can be applied[1]. Among them there are: terrorism; human trafficking; illicit trafficking of narcotic drugs and psychotropic substances; corruption; arms trade; fraud; counterfeiting; cybercrime; racism and xenophobia; laundering of proceeds of crime; crimes within the jurisdiction of the International Criminal Court and many others. At the same time, the EU Council may at any time decide to supplement the list contained in the document with other categories of crimes.

Non-execution of the European arrest warrant is permitted in exceptional cases provided for in Articles 3 and 4 of the Framework Decision. At the same time, all grounds for refusal are conditionally divided into mandatory and optional[2]. Amnesty, age restrictions, and adherence to the *non bis in idem* principle are the mandatory grounds. The use of optional grounds involves the study and evaluation of the relevant circumstances, followed by an alternative.

The person's citizenship of the issuing party can no longer be the grounds for refusal – what matters for the execution of the European order is not the national citizenship, but the Union citizenship. The judiciary (in accordance with Article 6 of the Framework Decision, the States themselves determine the circle of competent authorities authorized to issue and execute the European arrest warrant: these can be the courts, the bodies of the preliminary investigation or the prosecutor's office) may challenge the procedural

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[1] Milinchuk V.V. New international cooperation in the field of criminal procedure: the concept of transnational justice, *State and law*, 2004, no 1, p. 90.

[2] Plachta M. European Arrest Warrant: Revolution in Extradition, *International Criminal Law Review*, 2003, vol. 11, no 2, p.186–187.

aspects of the extradition request, however, they cannot call into question the grounds for arrest contained in the warrant[1]. In addition, the principle of double criminalization of a crime under the law of the issuing Member State and the executing State, as the main requirement for extradition, has been abolished (paragraph 2 of Article 2).

Of particular importance are the provisions of the Framework Decision concerning the decision on extradition in the presence of conflicts of criminal jurisdiction. The judicial authority shall take into account all the circumstances of the case, including: the relative severeness of the crimes and the place of their commission, the dates when the European arrest warrants are issued, the purpose of issuing a warrant, and the court performing the warrant may request the opinion of Eurojust.

P.N. Biryukov notes that the introduction of the European order procedure gave rise to many procedural difficulties, including non-compliance with rules regarding the standard order form, poor translation quality, failure to meet the deadline for the transfer of the original decision, sending requests through the Schengen Information System and other problems including those ones with the conflict of jurisdictions of the States and the competing queries[2].

The Framework Decision on the introduction of the European arrest warrant entered into force in most EU countries since January 1, 2004, and since April 2005, it has been in effect on the territory of all EU Members[3]. According to the press service of the European Commission, as a result of the introduction of the "Eurowarrant", the duration of the extradition process of suspected criminals was reduced on average in the EU to 45 days, and in cases where the detainee does not object to extradition, to 18 days.

Despite the exceptional importance of introducing a single European arrest warrant to strengthen law and order in the European Union, the procedures for making the necessary changes to the national legislation of the Member States were not always introduced smoothly and seamlessly as they affected the constitutional norms of the States concerning the non-issuance of their own citizens. Apart from that the mechanism for implementing the European order is still being corrected and modernized, allowing the State authorities to avoid its execution[4].

Meanwhile, since the Framework Decision entered into force, the number of annually issued single orders has increased several times, the growth of the total number of orders is in part already inflationary – The European Commission notes that this tool should

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[1] H. Grabbe. Internal Security of the European Union: Laying a New Foundation, *Europe after September 11, 2001*. Moscow, 2002, p. 106.

[2] Biryukov P.N. On the problems of applying in the EU the "Structural Solution on the European arrest warrant„, *International legal readings,* ed. P.N. Biryukov. Voronezh, 2006, vol. 5. p. 143–145.

[3] The last of the EU Member States to complete all the necessary procedures for the introduction of the Eurowarrant was Italy in April 2005.

[4] Shamsutdinova R.R. *The space of freedom, security and justice of the European Union: the formation, development and main forms of cooperation of the Member States*: Diss. ... Cand. legal sciences. Kazan: Kazan State University, 2009, p. 9.

be used only when it comes to really serious offenses. To achieve this judicial authorities in Member States issuing the European Arrest Warrant shall use the proportionality test taking into account the seriousness of the crime, the penalties and the costs associated with the execution of the warrant[1].

In addition, one of the problems with the application of the European Arrest Warrant is the inadequate provision of a fair trial and violation of other procedural rights of suspects and the accused of committing a crime. The European Commission announced this in its Report on the implementation of the Framework Decision on the European arrest warrant issued in 2011[2].

To ensure fair trial guarantees, the Commission recommended setting minimum standards for the protection of the rights of suspects and the accused at the EU level, ensuring:

1. the right to interpretation and translation during criminal proceedings;
2. the right of the suspect to be informed of his rights;
3. the right to legal aid and access to a lawyer;
4. the detainee's right to communicate with family members, employers or consular services;
5. presumption of innocence[3].

Each of these measures will be applied in relation to detainees, helping to ensure respect for their fundamental rights.

Further work to ensure the proper functioning of the European wararnt, in the opinion of the Commission, is closely related to the development of confidence-building measures between Member States and the introduction of new tools that promote the full use of opportunities of the European arrest warrant.

In general, based on the official information provided by the European Commission, measures taken in the context of the implementation of the principle of mutual recognition in the field of criminal justice can be divided into several main areas:

• transfer of convicted persons to serve the sentence in the State

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[1] European Arrest Warrant, http://ec.europa.eu/justice/criminal/recognition-decision/european-arrest-warrant/index_en.htm

[2] Report from the Commission to the European Parliament and the Council of 11 April 2011 on the implementation since 2007 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States [COM(2011) 175 final], http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52011DC0175

[3] Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings, Official Journal L 280 of 26.10.2010, p. 1–7. Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings, Official Journal L 142 of 1.6.2012, p. 1–10. Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty, Official Journal L 294 of 6.11.2013, p. 1–12.

- citizenship;
- extradition for criminal prosecution or implementation of
- the sentence;
- conducting investigative measures and collecting evidence;
- conducting confiscations and arrests of property, financial penalties.

In order to regulate all these procedural issues, the Council of the EU, together with the European Parliament, adopted numerous framework decisions and directives[1]. These are: Framework Decision of July 22, 2003 on the execution of orders freezing property or evidence, the purpose of which is to prevent destroying, changing or relocating the property or evidence[2]; Framework Decision of December 18, 2008 on the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters[3], the main purpose of which is to simplify and speed up the process of collecting and transferring evidence in criminal cases with the transboundary element, as well as the harmonization of evidence transfer rules in the European Union[4]; Framework Decision of November 27, 2008 on the application of the principle of mutual recognition to judgements in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union[5], the main purpose of which was to establish rules according to which each Member State would recognize the power of the sentence and execute punishments in order to assist the social rehabilitation of convicted persons[6]; Framework Decision of November 27, 2008 on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions[7]; Framework Decision Council of October 23, 2009 on the application, between Member States of the European Union, of the

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1 The author left outside the study a review of the content of EU legal acts regulating certain legal proceedings in the aspect of mutual recognition.

2 Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence, Official Journal of the European Union L 196/45.

3 Council Framework Decision 2008/978/JHA of 18 December 2008 on the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters, Official Journal of the European Union L 350/72.

4 Biryukov P.N. European Evidence Order, *Russian Law Journal,* 2010, no 1, p. 34–40.

5 Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union, Official Journal of the European Union, L 327.

6 Panyushkina O.V. On the mutual recognition of sentences with a view to the execution of sentences between the Member States of the European Union, *Bulletin of Voronezh State University,* Series "Law", 2010, no 1, p. 525.

7 Council Framework Decision 2008/947/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions, Official Journal of the European Union L 337/102.

principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention[1].

One of the latest tools for mutual recognition has become the European investigation order introduced under the Directive of April 3, 2014 on the introduction of the European investigation order in criminal matters[2], the purpose of which is to conduct separate investigative actions and evidence collection in the issuing State.

Thus, supranational instruments for resolving conflicts of criminal jurisdiction by the Member States of the European Union, by introducing the principle of mutual recognition of judicial decisions, conceptually changed the traditional views on the possibility of organized cooperation of States in the field of criminal justice. It can be stated that the principle of mutual recognition of court decisions is firmly entrenched in the field of joint criminal law policy and judicial cooperation between the States of the European Union. Moreover, while at the first stage of its implementation the States were adapting to its mechanism for a rather long period, over time more and more often they began to come up with initiatives themselves to introduce one or another new form of criminal procedure, which indicates the continuous improvement of the launched process. It seems that the mechanisms existing in the European Union in this area may, within certain limits, serve as a model for other international organizations aimed at strengthening integration processes.

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[1] Council Framework Decision 2009/829/JHA of 23 October 2009 on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention, Official Journal of the European Union, L 294.

[2] Directive 2014/41 /EU of the European Parliament and the Council regarding the European Investigation Order in criminal matters. URL: http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%209288%202010%20ADD%201

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