THE PRINCIPLE OF MUTUAL RECOGNITION IN COOPERATION IN CRIMINAL MATTERS

A study of the principle in four framework decisions and in the implementation legislation in the Nordic Member States

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PREFACE AND ACKNOWLEDGEMENTS

This book is based on my PhD thesis and it has been written during my time as a PhD researcher at the Faculty of Law, University of Bergen between autumn 2007 to autumn 2010. This thesis is a part of the project 'Rettsstatlege utfordringar ved internasjonalisering av strafferettspleia, med særleg fokus på europeisk integrasjon'. This project is financed by the Research Council of Norway (Norges forskningsråd) and the Faculty of Law in Bergen. I am thankful for the opportunity this project has presented to me, without which this thesis would not have been possible. The thesis was submitted in September 2010 and successfully defended in February 2011. Materials after this date have been taken into account in rewriting until May 2011.

My two supervisors, prof. Erling Johannes Husabø (Bergen) and prof. Dan Frände (Helsinki) have been extremely helpful and have offered tremendous support throughout this whole project. Samuli Miettinen has assisted in proof reading and making some substantive comments on the manuscript.

Several Nordic and European colleagues around have contributed to the writing of this book by stimulating and endless conversations. I wish to thank you all. Especially the Nordic criminal law academic field is very welcoming and the annual Nordic workshops in criminal law have also positively influenced this thesis.

I have also had the advantage of doing research abroad, which has been essential for this subject of study. Seminars organised by ECLAN have been indispensable for my research. I have also spent some time (not nearly enough) at the Max-Planck-Institut für ausländisches und internationales Strafrecht in Freiburg i. Br, which is one of the best places to be.

ABSTRACT

This book analyses mutual recognition in EU criminal law cooperation. Focus is on four framework decisions and their implementation in the Nordic Member States, Finland, Sweden and Denmark. The framework decisions studied are the European arrest warrant (EAW), the framework decision of freezing of evidence and assets (the FFWD), the framework decision on financial penalties (the FPFWD) and the framework decision on confiscation orders (the CFWD). This book therefore analyses mutual recognition as a form of cooperation in both EU law, the framework decisions and in national, implementing legislation. The Nordic Arrest Warrant (the NAW) is also included to represent the Nordic sectoral cooperation in criminal matters.

This book consists of three main parts. These are: *introduction*, *grounds for refusal* and *general observations*. In part one, introduction, some introductory remarks are firstly done in chapter 1. These also include comments on the material and method in this book. An introduction into mutual recognition follows thereafter. This chapter 2 lays down the setting of mutual recognition in EU criminal law. The background and components of mutual recognition guiding the cooperation between the Member States are analysed. This is followed by chapter 3 where a presentation of the framework decisions studied as well as their implementation into national legislation in the three Nordic Member States is made. An analysis of the scope of the four framework decisions is done. This is followed by presentation of the implementing national legislation in Finland, Sweden and Denmark.

The second part, grounds for refusal, analyses the grounds for refusal in the framework decisions and implementing legislation. This part has its own systematisation which means that the form of cooperation is not the decisive factor here. Each chapter starts with an introduction which is followed by the presentation of relevant provisions in the framework decisions and the implementing legislation. Each chapter also includes a conclusion, in which concluding remarks and reflections are made. The chapters concern the following grounds for refusal: chapter 4 deals with impossible recognition as a ground for refusal of recognition. This includes grounds such as insufficient information in the form or concurrent requests concerning the same person. Chapter 5 deals with the legal status of the person. These are grounds for refusal which are based

on the specific status of the person concerned. In this chapter grounds for refusal relating to among others the nationality of the person concerned and privileges and immunities will be analysed. Chapter 6 analyses jurisdictional limitations to recognition. These grounds for refusal are related to territory or jurisdiction of the executing state.

Chapter 7 deals with the double criminality requirement. The grounds for refusal and especially the partial abolition that the mutual recognition framework decisions introduced, is in focus in this chapter. Chapter 8 focuses upon the human rights provisions. Human rights protection and such grounds for refusal in cooperation are of special interest for all Nordic Member States. Chapter 9 analyses ne bis in idem in a wide sense. This chapter includes explicit ne bis in idem grounds for refusal relating to final judgments for the same act of other Member States but also includes grounds for refusal relating for example to ongoing prosecution. The final chapter in this part, chapter 10 deals with variable recognition. These are situations not of explicit grounds for refusal, but more of alternative solutions which make the recognition possible, but in a variable form.

The third part on general observations consists of five chapters. These chapters are based on the findings done in the previous parts in the book. Chapter 11 will analyse the reasons of the different grounds for refusal. This chapter has the grounds for refusal in the framework decisions as a starting point, but will not exclusively deal with only EU law. Chapter 12 focuses on the response of the Nordic Member States. This chapter will focus on the choices made in these states when implementing mutual recognition into national legislation and also include an analysis of each Nordic Member States which evaluates the system of mutual recognition in that state. In chapter 13 different aspects of mutual recognition will be analysed. These include the different purposes, functions and context of mutual recognition. Chapter 14 will constitute a theoretical analysis of mutual recognition as a legal principle. In addition to analysing the principle character of mutual recognition, also its position with regard to the levels of modern law will be examined. The last chapter 15 will gather some thoughts on the future of mutual recognition.

In this book mutual recognition itself will be analysed and not only the underlying legal constructions. For this reason, the focus is set on the grounds for refusal of mutual recognition. Through an analysis of the different grounds for refusal and their reasons, an understanding of the general aspects of mutual recognition is possible. An essential question for this book is therefore; to what extent mutual recognition is realised in cooperation in criminal matters in the EU. As mutual recognition is a legal principle of EU criminal law, this book also deals with mutual recognition as a traditional legal principle. Mutual recognition

is analysed from traditional legal theorists' points of view as well as analysed from the perspective of Tuori's levels of modern law.

The Lisbon Treaty brought with it significant changes for EU criminal law and also for the cooperation in criminal matters. The role of mutual recognition has been further enhanced, which is also analysed in this book. Nevertheless will the Lisbon Treaty not immediately change the content and form of the mutual recognition instruments and the conclusions and analysis made in this book will therefore also be applicable once mutual recognition is further evolved in the light of article 82(1) TFEU.

CONTENTS

LIST OF ABBREVIATIONS

COM	Commission of the European Union
Council	Council of the European Union
CFWD	Framework decision on confiscation orders
CISA	Convention implementing the Schengen Agreement
CMLRev	Common Market Law Review
CoE	Council of Europe
EAW	European Arrest Warrant (the framework decision)
ECJ	European Court of Justice
ECHR	Council of Europe's Convention on Human Rights
ECtHR	Council of Europe's Court of Human Rights
EC	European Communities
EEW	European Evidence Warrant
EJN	European Judicial Network
EP	European Parliament
EU	European Union
FPFWD	Framework decision on financial penalties
FWD	Framework decision
FFWD	Framework decision on freezing orders
GA	Goltdammer's Archiv für Strafrecht
JHA	Justice and Home Affairs
NAW	The Nordic Arrest Warrant
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
ZIS	Zeitschrift für Internationale Strafrechtsdogmatik (zis-online.com)
ZStW	Zeitschrift für die gesamte Strafrechtswissenschaft