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

Annika Suominen
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
Annika Suominen

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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

Preface and acknowledgements ........................................... v
Abstract .............................................................................. vii
List of abbreviations .......................................................... xix

PART 1. INTRODUCTION

1. Introductory remarks ....................................................... 3

1.1. This subject of this book ................................................ 3
1.2. Systematisation in this book .......................................... 7
1.3. The aims of this book .................................................... 9
1.4. Limitations of this book ............................................... 10
1.5. Material and method ..................................................... 11

   EU law ............................................................................. 11
   National implementing legislation ..................................... 14
   Evaluation of implementation ............................................ 16
   Comparative aspects ....................................................... 17

2. Mutual recognition in EU law ........................................... 19

2.1. Introduction .................................................................. 19
2.2. Primary definitions ..................................................... 20
   2.2.1. Mutual recognition ................................................ 20
   2.2.2. Judicial decisions .................................................. 23
   2.2.3. Legal principles .................................................... 25
2.3. The background of mutual recognition ........................... 26
   2.3.1. Traditional cooperation in criminal matters and the former
          third pillar ............................................................... 26
          2.3.1.1. Traditional cooperation .................................... 26
          2.3.1.2. The former third pillar ................................... 30
          2.3.1.3. The Lisbon Treaty ......................................... 34
   2.3.2. Mutual recognition in the internal market ................. 38
   2.3.3. Nordic cooperation in criminal matters ....................... 41
2.4. Mutual recognition and its components in EU criminal law . . . 43
   2.4.1. The evolution of the principle .................................. 43
   2.4.2. The presumption of mutual trust .............................. 47
2.4.3. The connection between mutual recognition and harmonisation ........................................... 51
2.4.4. Mutual recognition today ........................................... 57

2.5. Distinct features of mutual recognition in criminal matters .......... 60
2.5.1. Compared with traditional cooperation ........................................... 60
2.5.2. Compared with the internal market ........................................... 62
2.5.3. Compared with the Nordic cooperation ........................................... 64

2.6. Conclusion and working definition ........................................... 66

3. Mutual recognition instruments ........................................... 69

3.1. Introduction ........................................... 69
3.2. The character of framework decisions ........................................... 69

3.2.1. The legal character of a framework decision ........................................... 69
3.2.2. The margin of discretion in implementation ........................................... 73

3.2.2.1. Former article 34(2)(b) TEU ........................................... 74
3.2.2.2. The result to be achieved in the framework decision ........................................... 75
3.2.2.3. Obligations under Union law ........................................... 76
3.2.2.4. Further interpretation by the ECJ in some situations ........................................... 77

3.2.3. Mandatory and optional grounds for refusal ........................................... 78

3.3. Surrender of persons ........................................... 79

3.3.1. The framework decision ........................................... 79
3.3.2. The Nordic Arrest Warrant ........................................... 81
3.3.3. The implementing acts ........................................... 83

3.3.3.1. Finland ........................................... 83
3.3.3.2. Sweden ........................................... 86
3.3.3.3. Denmark ........................................... 89

3.4. Freezing of property and evidence ........................................... 91

3.4.1. The framework decision ........................................... 91
3.4.2. The implementing acts ........................................... 93

3.4.2.1. Finland ........................................... 93
3.4.2.2. Sweden ........................................... 94
3.4.2.3. Denmark ........................................... 95

3.5. Financial penalties ........................................... 96

3.5.1. The framework decision ........................................... 96
3.5.2. The implementing acts ........................................... 98

3.5.2.1. Finland ........................................... 98
3.5.2.2. Sweden ........................................... 100
3.5.2.3. Denmark ........................................... 101

3.6. Confiscation of property ........................................... 102

3.6.1. The framework decision ........................................... 102
3.6.2. The implementing acts ........................................... 104

3.6.2.1. Finland ........................................... 104
3.6.2.2. Sweden ........................................ 105
3.6.2.3. Denmark ..................................... 105
3.7. Conclusion ........................................... 106

PART 2. GROUNDS FOR REFUSAL

4. Impossible recognition .................................. 111
  4.1. Introduction ......................................... 111
  4.2. Insufficient information in the issued certificate .... 111
    4.2.1. Framework decisions ............................ 111
    4.2.2. The Nordic Arrest Warrant ..................... 112
    4.2.3. Implementing acts ................................ 112
      4.2.3.1. Finland .................................... 112
      4.2.3.2. Sweden ..................................... 113
      4.2.3.3. Denmark .................................... 115
  4.3. Non-existence of the requested object ............... 115
    4.3.1. The framework decisions ....................... 115
    4.3.2. The implementing legislation .................. 116
      4.3.2.1. Finland .................................... 116
      4.3.2.2. Sweden ..................................... 116
      4.3.2.3. Denmark .................................... 117
  4.4. Conflicting rights to the object requested ........ 117
    4.4.1. Framework decisions ............................ 117
    4.4.2. Implementing acts ................................ 118
      4.4.2.1. Finland .................................... 118
      4.4.2.2. Sweden ..................................... 118
      4.4.2.3. Denmark .................................... 118
  4.5. Concurrent requests .................................. 119
    4.5.1. Framework decisions ............................ 119
    4.5.2. The Nordic Arrest Warrant ..................... 119
    4.5.3. The implementing acts ........................... 120
      4.5.3.1. Finland .................................... 120
      4.5.3.2. Sweden ..................................... 121
      4.5.3.3. Denmark .................................... 122
  4.6. Conclusion ......................................... 122

5. The legal status of the person .......................... 127
  5.1. Introduction ......................................... 127
  5.2. The nationality of the person concerned ............ 127
    5.2.1. Introduction .................................... 127
    5.2.2. Framework decisions ............................ 129
<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>5.2.3.</td>
<td>The Nordic Arrest Warrant</td>
<td>131</td>
</tr>
<tr>
<td>5.2.4.</td>
<td>Implementing acts</td>
<td>131</td>
</tr>
<tr>
<td>5.2.4.1.</td>
<td>Finland</td>
<td>131</td>
</tr>
<tr>
<td>5.2.4.2.</td>
<td>Sweden</td>
<td>134</td>
</tr>
<tr>
<td>5.2.4.3.</td>
<td>Denmark</td>
<td>136</td>
</tr>
<tr>
<td>5.3.</td>
<td>The age of the person concerned</td>
<td>137</td>
</tr>
<tr>
<td>5.3.1.</td>
<td>Introduction</td>
<td>137</td>
</tr>
<tr>
<td>5.3.2.</td>
<td>The framework decisions</td>
<td>138</td>
</tr>
<tr>
<td>5.3.3.</td>
<td>The Nordic Arrest Warrant</td>
<td>138</td>
</tr>
<tr>
<td>5.3.4.</td>
<td>The implementing acts</td>
<td>138</td>
</tr>
<tr>
<td>5.3.4.1.</td>
<td>Finland</td>
<td>138</td>
</tr>
<tr>
<td>5.3.4.2.</td>
<td>Sweden</td>
<td>139</td>
</tr>
<tr>
<td>5.3.4.3.</td>
<td>Denmark</td>
<td>139</td>
</tr>
<tr>
<td>5.4.</td>
<td>Amnesty and pardon</td>
<td>140</td>
</tr>
<tr>
<td>5.4.1.</td>
<td>Introduction</td>
<td>140</td>
</tr>
<tr>
<td>5.4.2.</td>
<td>The framework decisions</td>
<td>141</td>
</tr>
<tr>
<td>5.4.3.</td>
<td>The Nordic Arrest Warrant</td>
<td>141</td>
</tr>
<tr>
<td>5.4.4.</td>
<td>The implementing acts</td>
<td>142</td>
</tr>
<tr>
<td>5.4.4.1.</td>
<td>Finland</td>
<td>142</td>
</tr>
<tr>
<td>5.4.4.2.</td>
<td>Sweden</td>
<td>142</td>
</tr>
<tr>
<td>5.4.4.3.</td>
<td>Denmark</td>
<td>143</td>
</tr>
<tr>
<td>5.5.</td>
<td>Privileges and immunities</td>
<td>144</td>
</tr>
<tr>
<td>5.5.1.</td>
<td>Introduction</td>
<td>144</td>
</tr>
<tr>
<td>5.5.2.</td>
<td>Framework decisions</td>
<td>147</td>
</tr>
<tr>
<td>5.5.3.</td>
<td>The Nordic Arrest Warrant</td>
<td>147</td>
</tr>
<tr>
<td>5.5.4.</td>
<td>The implementing acts</td>
<td>148</td>
</tr>
<tr>
<td>5.5.4.1.</td>
<td>Finland</td>
<td>148</td>
</tr>
<tr>
<td>5.5.4.2.</td>
<td>Sweden</td>
<td>149</td>
</tr>
<tr>
<td>5.5.4.3.</td>
<td>Denmark</td>
<td>151</td>
</tr>
<tr>
<td>5.6.</td>
<td>Conclusion</td>
<td>152</td>
</tr>
</tbody>
</table>

6. Jurisdictional limitations | 159 |
| 6.1. Introduction | 159 |
| 6.2. Territorial and jurisdictional grounds for refusal | 160 |
| 6.2.1. Framework decisions | 160 |
| 6.2.2. The Nordic Arrest Warrant | 161 |
| 6.2.3. Implementing acts | 161 |
| 6.2.3.1. Acts committed in Finland and acts under Finnish jurisdiction | 161 |
| 6.2.3.2. Acts committed in Sweden and acts under Swedish jurisdiction | 163 |
6.2.3.3. Acts committed in Denmark and acts under Danish jurisdiction ........................................ 164
6.3. Extraterritorial jurisdiction ......................................................... 165
   6.3.1. Framework decisions ......................................................... 165
   6.3.2. Implementing acts ............................................................ 166
      6.3.2.1. Finland ................................................................. 166
      6.3.2.2. Sweden ................................................................. 167
      6.3.2.3. Denmark ............................................................... 167
6.4. Conclusion .................................................................................. 168

7. The requirement of double criminality ........................................ 171
   7.1. Introduction ............................................................................. 171
   7.2. The framework decisions ......................................................... 174
   7.3. The Nordic Arrest Warrant ...................................................... 181
   7.4. The implementing acts ............................................................ 182
      7.4.1. Finland ................................................................. 182
      7.4.2. Sweden ................................................................. 186
      7.4.3. Denmark ............................................................... 188
   7.5. Conclusion ............................................................................... 190

8. Human rights provisions .............................................................. 197
   8.1. Introduction ............................................................................. 197
   8.2. The framework decisions ......................................................... 201
   8.3. The Nordic Arrest Warrant ...................................................... 204
   8.4. The implementing acts ............................................................ 205
      8.4.1. Finland ................................................................. 205
      8.4.2. Sweden ................................................................. 211
      8.4.3. Denmark ............................................................... 214
   8.5. Conclusion ............................................................................... 218

9. Ne bis in idem in a wide sense ...................................................... 223
   9.1. Introduction ............................................................................. 223
   9.2. Explicit ne bis in idem provisions ............................................. 226
      9.2.1. The framework decisions ................................................... 226
      9.2.2. The Nordic Arrest Warrant ............................................... 229
      9.2.3. The implementing acts ....................................................... 229
         9.2.3.1. Finland ................................................................. 229
         9.2.3.2. Sweden ................................................................. 231
         9.2.3.3. Denmark ............................................................... 232
   9.3. Decision on non-prosecution or to halt proceedings .................. 235
      9.3.1. Framework decisions ......................................................... 235
PART 3. GENERAL OBSERVATIONS

11. The reasons for the different grounds for refusal .......................... 281
   11.1. Introduction ........................................................................... 281
   11.2. Prerequisites for recognition .................................................. 281
   11.3. Outcomes of mutual recognition ............................................. 282
   11.4. Respect for established principles of international law ............... 284
   11.5. Respect for the core of state sovereignty ................................. 286
   11.6. Concluding remarks ............................................................... 291

12. The choices of implementation ....................................................... 293
   12.1. Introduction ........................................................................... 293
   12.2. General tendencies in the Nordic Member States ....................... 294
       12.2.1. Finland ........................................................................... 294
       12.2.2. Sweden .......................................................................... 295
       12.2.3. Denmark ......................................................................... 297
   12.3. Techniques of implementation ................................................. 299
       12.3.1. Transformation ................................................................. 299
       12.3.2. Incorporation .................................................................. 301
       12.3.3. Terminological choices ...................................................... 302
   12.4. Not implementing optional grounds for refusal ......................... 303
   12.5. Implementing optional grounds for refusal ................................. 304
       12.5.1. As mandatory for judicial authorities ................................. 304
       12.5.2. As optional for judicial authorities .................................... 306
   12.6. Implementing or applying other grounds for refusal .................... 307
   12.7. Not implementing mandatory grounds for refusal ..................... 311
   12.8. Concluding remarks ............................................................... 311

13. General aspects of mutual recognition ............................................ 313
   13.1. Introduction ........................................................................... 313
   13.2. Different objectives of mutual recognition ................................. 313
   13.3. Functions of mutual recognition .............................................. 320
13.4. The multilevel character of mutual recognition ........................................ 325
13.5. Degrees of mutual recognition .............................................................. 327
13.6. Limits of mutual recognition .................................................................. 330
13.7. Concluding remarks .............................................................................. 332

14. Mutual recognition as a legal principle ...................................................... 333
14.1. Introduction .............................................................................................. 333
14.2. The analysis of mutual recognition as a legal principle ......................... 334
   14.2.1. The establishment ............................................................................. 334
   14.2.2. The character .................................................................................. 336
   14.2.3. Validity ......................................................................................... 343
   14.2.4. Applicability .................................................................................. 345
   14.2.5. The function .................................................................................. 347
   14.2.6. A principle or a policy? ................................................................. 350
14.3. The levels of law and mutual recognition ................................................ 353
14.4. Concluding remarks .............................................................................. 359

15. The future of mutual recognition ............................................................... 361

Bibliography .................................................................................................... 367
# LIST OF ABBREVIATIONS

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>COM</td>
<td>Commission of the European Union</td>
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<tr>
<td>Council</td>
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<td>CFWD</td>
<td>Framework decision on confiscation orders</td>
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<td>CISA</td>
<td>Convention implementing the Schengen Agreement</td>
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<td>CMLRev</td>
<td>Common Market Law Review</td>
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<td>CoE</td>
<td>Council of Europe</td>
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<td>EAW</td>
<td>European Arrest Warrant (the framework decision)</td>
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<td>ECJ</td>
<td>European Court of Justice</td>
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<td>ECHR</td>
<td>Council of Europe's Convention on Human Rights</td>
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<td>Council of Europe's Court of Human Rights</td>
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<td>EC</td>
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<td>EEW</td>
<td>European Evidence Warrant</td>
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<td>EJN</td>
<td>European Judicial Network</td>
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<td>EP</td>
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<td>GA</td>
<td>Goltdammer’s Archiv für Strafrecht</td>
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<td>Justice and Home Affairs</td>
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<td>TEU</td>
<td>Treaty on European Union</td>
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<td>TFEU</td>
<td>Treaty on the Functioning of the European Union</td>
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<tr>
<td>ZIS</td>
<td>Zeitschrift für Internationale Strafrechtsdogmatik (zis-online.com)</td>
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<tr>
<td>ZStW</td>
<td>Zeitschrift für die gesamte Strafrechtswissenschaft</td>
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</tbody>
</table>