UDC: 341.24 DOI: https://doi.org/10.56461/iup_rlrc.2022.3.ch7

Marina MATIĆ BOŠKOVIĆ[*]
Institute for Criminological and Sociological Research

OPEN BALKAN INITIATIVE – WHAT CAN WE LEARN FROM THE EU AREA OF FREEDOM, SECURITY AND JUSTICE?

Initiative for enhanced cooperation among Western Balkan states was proposed by leaders of Albania, North Macedonia and Serbia with the aim to establish free movement of goods, services, people and capital in line with the EU single market. Over the three-year period, between 2019-2021, a series of high-level meetings were organised to achieve an agreement on the legal framework for the Open Balkan Initiative. Four agreements were signed in December 2021 to enable the free movement of people/workers and goods, followed by additional agreements in June 2022. Successful implementation of the Open Balkan Initiative could be accompanied by several challenges that the EU faced when the Schengen Agreements were signed and entered into force. One of the biggest challenges for the open EU was the free movement of criminals and, therefore, the challenge of securing cross-border cooperation in criminal matters and increased security risks. In the article, the author will analyse lessons learnt from the EU and the reason for the establishment of the EU area of freedom, security and justice as a response to the risks raised with the free movement across the EU. The author will address the topics that need to be covered in future agreements within the Open Balkan Initiative to prevent the increase in cross-border criminal activities.

Keywords: open Balkan initiative, EU area of freedom, security and justice, free movement, security risks.

1. OPEN BALKAN INITIATIVE

The Open Balkan was initiated in 2019 by Albania, North Macedonia and Serbia as an economic project that should facilitate trade between members, remove barriers, allow the workforce to move and freely find employment, for the business investment to be made where it could bring the most results, and goods and services to cross borders without

* PhD, Research Associate, ORCID: 0000-0003-1359-0276 , e-mail: *m.m.boskovic@roldevelopmentlab.com.*

delays. Border controls between the three countries are scheduled to be removed by 2023.

Over the one-year period, from June 2021 until June 2022, the three countries signed three memorandums of understanding and ten interstate agreements with the aim of deepening their political and economic cooperation.[1]

Three memorandums signed in June 2021, namely the Memorandum on Cooperation in the Event of Catastrophe, Memorandum to Facilitate Trade, and Memorandum on Labour Licence, are the basis for the creation of free access to the labour market in the region and free movement of goods. If they are implemented, these proposals will enable citizens from all three countries to access employment opportunities across the region under the same conditions as domestic citizens. The same applies to the free movement of goods. Several interstate agreements were signed to enable the achievement of the goals set. With the aim to enable free access to the labour market, the three countries signed the Agreement on Conditions for Access to the Labour Market, Agreement on the Interconnection of Electronic Identification Schemes for Citizens of the Western Balkans, Agreement on Mutual Recognition of Academic Qualifications, and Agreement on Cooperation in the Field of Tax Administrations in the Western Balkans. The additional agreements were signed to ensure free movement of goods: Agreement on Cooperation in the Areas of Veterinary, Food and Feed Security and Phytosanitary Areas in the Western Balkans, Agreement on Mutual Recognition of Certificates of Authorized Economic Operators, and Agreement on Cooperation of the Accreditation Agencies.

One of the measures to facilitate the free movement area is establishing of separate lanes at the border crossings for citizens and goods coming from the Open Balkan participating countries where no checks will be conducted.

Considering that Open Balkan is a relatively new initiative and the focus of the discussion is on its possible economic and political impact, the author would like to emphasise the importance of security and justice. In the article, the author will analyse lessons learnt from the EU and the reasons for the establishment of the EU area of freedom, security and justice as a response to the risks raised with the free movement across the EU. The author will tackle the topics that need to be covered in future agreements within the Open Balkan Initiative to prevent the increase of cross-border crime.

2. LINKS BETWEEN THE OPEN BALKAN INITIATIVE AND THE EU FREE MOVEMENT RULES

The reason for comparing the Open Balkan Initiative with the EU experience is that the proclaimed description of the Open Balkan Initiative corresponds to the EU's four freedoms, *i.e.* freedom of movement of goods, services, capital and people. The goal behind the creation of the EU (EC) was economic integration that can take various forms and was developed gradually over time (Craig, 2002, p. 3). In 1986, thirty years after the establishment of the European Economic Community, the member states agreed on the Single European Act that enabled the establishment of the internal market and the four

[1] All agreements and memorandums are listed on the website of the Chamber of Commerce. Available at: https://pks.rs/open-balkan-sporazumi/potpisani-sporazumi (2. 10. 2022).

freedoms: free movement of goods, workers, establishment and the provision of services and capital. The basic economic aim of the four freedoms is the optimal allocation of resources within the EU. That is facilitated by allowing the factors of production to move to the area where they would be the most valued.

Thus, the provision of the Single European Act, and later, the provisions of the Treaty on Functioning of the EU (Article 26) on the free movement of goods ensure that goods can move freely, with the consequence that those most favoured by consumers will be most successful, irrespective of the country of origin. The same is true for the free movement of workers. Labour as a factor of production may be valued more highly in some areas than in others. The value of labour within the EU is maximised if workers can move to the area where they are the most valued. The same idea applies to the freedom of establishment.

An internal market was defined as an area without internal frontiers where a free movement of goods, persons, services and capital could take place.[2] The degree of realisation of an area without internal frontiers can be assessed on the basis of whether border controls apply to the movement of goods, people, services and capital. However, it is more difficult to determine how freely goods, people, and capital can move within the EU, even when border controls have been removed (Ehlermann, 1987, p. 371).

The EU used two different approaches to ensure the establishment of the internal market and the operation of four freedoms. EU prohibits national rules that hinder cross-border trade because they discriminate against goods or labour from other member states or render access to the market more difficult. This is reinforced through, what is known as, mutual recognition, which requires a member state to accept, subject to certain exceptions, goods that have been made in accordance with the regulatory rules of another member state (Armstrong, 2002, p. 233). Intentions of the Western Balkans leaders are similar to the EU approach as they should lead to the mutual recognition among member states of academic qualification, certificates of authorised economic operators and other documents relevant for free access to the labour market and free movement of goods.

The creation of a single market also requires positive integration. Barriers to integration may flow from diversity in national rules on matters such as health, safety, technical specification, consumer protection, etc. Many such barriers may only be overcome through harmonisation of diverse national laws through the EU directives. That is known as positive integration attained principally on the basis of Articles 114 and 115 of the Treaty on Functioning of the EU.

The Open Balkan and the general proposal are intended to go in the direction of the EU's four freedoms. However, the EU experience showed that their achievement takes time and effort to harmonise legislation and remove barriers to free movement beyond those represented in the border controls.

[2] More on the internal market: https://eur-lex.europa.eu/EN/legal-content/glossary/internal-market.html (2. 10. 2022).

3. CAN FREE MOVEMENT EXIST WITHOUT SECURITY AND JUSTICE?

Successful implementation of the Open Balkan initiative could be accompanied by several challenges related to security and justice. It could be expected that Western Balkan countries would face the same challenges as the EU countries had faced when the internal market was created, and borders were removed. Although some lessons could be learned from the EU, the security challenges are even greater in the Western Balkan region. Abolishing of border controls could lead to an increase in drug trafficking, human trafficking and various other criminal activities. The European Commission has already highlighted that the Western Balkan countries face challenges of a high level of corruption, organised crime and their officials often being engaged in acts of corruption with impunity. The removal of border controls could lead to an increase in crime.[3]

The authorities of the Western Balkan countries should not repeat the same experience the EU passed through because it had initially conceived the free movement as an exclusively economic process. During the process of economic integration, the EU neglected the relevance of security and criminal law (Garland, 1996, p. 448). For the establishment and functioning of the EU common market (Vukadinović, 2012, p. 28), it was necessary to gradually harmonise the economic policies of the member states, as well as to undertake the harmonisation of national and the adoption of European regulations. The founders of the European Communities underestimated the importance of criminal law for the implementation of the Community policies and rights (Vervaele, 2014, p. 11). However, it soon became apparent that it is not enough to harmonise the law of the common or internal market, but that it is also needed to protect the interests of the common market and the financial interests of the European Community. Initially, criminal law was not included in the jurisdiction of the European Community, as the predecessor of the European Union (Wasmeier, Thwaites, 2004, p. 613). Nevertheless, the development of the four freedoms, *i.e.* the free movement of goods, people, capital and services and the single market, created the need to protect the interests and goods of the European Union, as well as to, after the creation of a single Schengen area and the abolition of national borders, provide citizens with an adequate degree of security and protection. Due to the provisions of the 2007 Treaty of Lisbon, the EU citizens can expect the EU to provide freedom of movement accompanied by appropriate measures to prevent and fight crime (Article 3) and to ensure safety in the area of freedom, security and justice,[4] while applying standards of the rule of law and the protection of human rights, due to the inclusion of the European Charter of Fundamental Rights as a binding source of the EU law (Vervaele, 2013, p. 212).

---

[3] In its 2018 Communication on enlargement and the Western Balkans COM (2018) 65 final, the European Commission clearly acknowledged the serious rule of law situation in the region, stating that there were "clear elements of state capture, including links with organised crime and corruption at all levels of government and administration, as well as a strong entanglement of public and private interests".

[4] The area of freedom, security and justice incorporates three elements. The area of freedom includes free movement of people, goods, services and capital, while the area of security relates to the common policy against crime and the area of justice means equal access to justice for all EU citizens and judicial cooperation in civil and criminal matters. See: Harlin-Karnell, E. 2019. *The Constitutional Structure of Europe's Area of 'Freedom, Security and Justice' and the Right to Justification*. Hart Publishing.

In a period when judicial and police cooperation in criminal matters within the European Communities was at a standstill, five member states[5] interested in closer cooperation signed the Schengen Agreements (Šegvić, 2011, p. 21), which includes the Schengen Agreement of June 14, 1985, on the gradual abolition of border controls and the Convention on Implementation of the Schengen Agreement (CISA) of June 19, 1990, which entered into force on March 26, 1995. These agreements were concluded outside the institutional framework of the European Communities and have an intergovernmental character. However, the Convention on the Implementation of the Schengen Agreement contains provisions dedicated to police and judicial cooperation in criminal matters in response to the removal of internal border controls and increased security risks.[6] The Schengen agreements contributed to the improvement of operational cooperation in police matters by introducing measures that allowed police officers to conduct cross-border surveillance[7] and the prosecution of criminals across the border into the territory of other signatory states.[8] In addition to the above, the Schengen agreements enabled the establishment of an information system with data on persons,[9] the cross-border application of the principle *ne bis in idem*,[10] the facilitation of extradition[11] and the transfer of execution of criminal judgments between the signatory states.[12] However, the Schengen Agreements became part of the institutional framework only with the entry into force of the Treaty of Amsterdam in 1997.

In addition to Schengen Agreements, an important step towards the creation of the area of freedom and security was the adoption of mutual recognition instruments that facilitate more efficient cooperation among police and judicial authorities of the EU member states. The abolition of borders enabled perpetrators to move across the EU without control or to avoid prosecution, while the police and the judicial authorities were bound by formal and non-efficient rules on cross-border cooperation. The mutual recognition instruments and the newly established institutional framework were taken as a response to these challenges. The first instrument was the European Arrest Warrant as a response to the terrorist attack on the towers in New York in 2001 (Fichera, 2011, p. 73). The adoption of the European Arrest Warrant represents realisation of the Conclusions adopted at the Council in Tampere, namely their point 35, which provided for the abolition of formal procedures for extradition between the member states.

---

[5] These states are France, Belgium, Luxemburg, Germany and the Netherlands.

[6] Article 9 of the Schengen Agreement states that all signature states will improve cooperation between tax and police bodies in the fight against crime, especially against illegal trade of drugs and arms, illegal entry and stay of people and tax and customs fraud and smuggling. To achieve the goal, the signature states will, in line with national legislation, improve the exchange of information relevant to other parties in the fight against crime.

[7] Article 40 of the Convention on Implementation of Schengen Agreement (CISA) (EU) of June 14, 1985.

[8] Article 41 of the Convention on Implementation of Schengen Agreement (CISA) (EU) of June 14, 1985.

[9] Articles 92 and 94 of the Convention on Implementation of Schengen Agreement (CISA) (EU) of June 14, 1985.

[10] Article 54 of the Convention on Implementation of Schengen Agreement (CISA) (EU) of June 14, 1985.

[11] Article 59 of the Convention on Implementation of Schengen Agreement (CISA) (EU) of June 14, 1985.

[12] Article 67 of the Convention on Implementation of Schengen Agreement (CISA) (EU) of June 14, 1985.

4. MUTUAL RECOGNITION AND POLICE AND JUDICIAL COOPERATION AS THE MAIN PILLARS OF THE AREA OF FREEDOM, SECURITY AND JUSTICE

Mutual recognition in the context of criminal cooperation was mentioned for the first time at the European Council in Cardiff in 1998.[13] The Council in the Conclusions of the Presidency, in point 39, emphasised the importance of effective judicial cooperation as part of the fight against cross-border crime. Following the Council Conclusions, the Vienna Action Plan OJ C 19/1 from 1999 stated that within a period of two years after the entry into force of the Treaty of Amsterdam, a process should be initiated that would facilitate the mutual recognition of decisions and the enforcement of judgments in criminal matters.

The success of mutual recognition lies in the fact that, instead of embarking on a visible attempt to harmonise national criminal laws, the EU member states could promote judicial cooperation by not having to change their criminal laws but by simply agreeing to accept judicial decisions originating from other member states (Mitsilegas, 2006, p. 279). The initiative on the application of the mechanisms for mutual recognition in the field of criminal law was placed forward by the United Kingdom, which pointed to the significant differences between the legal systems of the member states (Willems, 2021, p. 48). The moment in which the idea of applying mutual recognition in criminal matters was proposed was also important. The proposal came after the *Corpus Juris,* an ambitious project on harmonisation of criminal law, was rejected in 1997 (Spencer, 1999, p. 355).

At the European Summit in Tampere in 1999, mutual recognition was formally approved, and it was concluded that it should become the cornerstone of judicial cooperation in civil and criminal matters. In the Conclusions from the Tampere Summit, in points 36 and 37, it was emphasised that mutual recognition would also apply to the decisions from the pre-trial phase of the criminal procedure, especially to those related to securing evidence and freezing assets.

In Communication COM (2000) 495 from 2000 on mutual recognition of final decisions in criminal matters, the European Commission stated that mutual recognition is "a principle that is widely accepted and based on the view that even if another country does not regulate a certain issue in the same or similar way as their own state, the results are such that their decisions are accepted as equal to the decisions of their own state".

The principle of mutual recognition allows decisions to move freely from one country to another, avoiding the situation in which the national authorities of another member state present obstacles due to the cross-border element. In this way, mutual recognition opposes the argument of foreign decision; that is, it prevents the case from being rejected in another country only because of its foreign origin (Allegrezza, 2010, p. 572). The mutual recognition of court decisions in criminal matters represents the free movement of court decisions that have effect throughout the EU.

---

[13] European Council in Cardiff, 15-16 June 1998, Presidency Conclusions, para 39. H. Satzger, F. Zimmermann. 2008. From Traditional Models of Judicial Assistance to the Principle of Mutual Recognition: New Developments of the Actual Paradigm of European Cooperation in Penal Matters, In: C. Bassiouni, V. M. & H. Satzger (eds.), *European Cooperation in Penal Matters: issues and perspectives*, CEDAM, pp. 337–361.

Mutual recognition is a basic concept in the area of freedom, security and justice because it is the only way to overcome the difficulties that arise between different national justice systems. For the development of mutual recognition, it is necessary to have a high degree of mutual trust between the member states, which is based on strict compliance with the high standards of protection of individual rights in each of the member states (Ouwerkerk, 2011, p. 39). To ensure this, in 2003 the European Commission adopted the Green Book COM (2003) 75 on procedural measures for the protection of suspects and defendants in criminal proceedings in the European Union, on the basis of which legal acts were later adopted to protect the rights of suspects and defendants.

One should bear in mind that the principle of mutual recognition in criminal matters was introduced to avoid the necessity of harmonisation of criminal law in the European Union (Suominen, 2011, p. 51). Mutual recognition, on the one hand, enables efficient cooperation of judicial systems despite differences in substantive and procedural legislation, and on the other hand, ensures the preservation of the sovereignty of the member states in that area.

According to some authors, the principle of mutual recognition in criminal matters represents an alternative to harmonisation (Asp, 2005, p. 31). However, other authors, as well as its application in practice, have shown that mutual recognition and harmonisation should not be seen as alternatives, but as complementing each other (Bondt, Vermeulen, 2009, p. 94). As could be seen after the Cassis de Dijon case, the mutual recognition paved the way for the establishment of a single market (Murphy, 2011, p. 225). The application of mutual recognition to the field of criminal law resulted in the convergence of EU law and the law of member states.

The Western Balkan decision-makers should bear in mind that while they are negotiating and adopting inter-state agreement on mutual recognition, which should facilitate the free movement of people and goods, there is a need to establish a basis for the exchange of information on criminal records and mutual recognition of some judicial decisions (*i.e.* freezing of assets, arrest). Discussion should be guided by the lessons learnt from the EU, especially on the type of decisions that should be recognised and crimes to be covered by the mutual recognition instruments.

4.1. Application of mutual recognition

The concept of mutual recognition was defined in the EU policy documents, but the issue of its application was challenging for the member states. Point 33 of the Tampere Program states that mutual recognition should apply to judicial decisions. According to the Communication of the Commission on Mutual Recognition of Final Decisions in Criminal Matters, mutual recognition should apply to final decisions but also to procedural decisions. In the Communication, the Commission defines final decisions as all decisions which decide on the essence of the criminal case and against which no regular legal remedy is allowed, or legal remedy is allowed but does not have a suspensive effect.[14] Also, the Commission defines as a final decision any act that resolves a specific issue in a binding manner.

[14] Commission of the European Communities. 2000. Mutual Recognition of Final Decisions in Criminal Matters, Communication from the Commission to the Council and the European Parliament, COM (2000) 495 final, p. 5.

EU institutions, in their legal acts, often refer to mutual recognition as the basis of judicial cooperation in criminal matters. The same approach the European Council had in the Conclusions from Tampere,[15] and was as such stated in a great number of acts,[16] EU documents,[17] as well as in the decisions of the EU Court of Justice.[18]

Mutual recognition is applied at all stages of criminal proceedings, before and during the proceedings and after a conviction, but the mode of its application depends on the nature of the decision. The mechanism for mutual recognition contributes to legal certainty by ensuring that a decision adopted in one EU member state is not contested in another member state.[19]

In ideal conditions, mutual recognition should take place automatically, as opposed to international cooperation in criminal matters, which leaves room for the discretion of the national authorities whose cooperation is sought. The aim of mutual recognition is to remove the possibility of political influence and re-examination of the decision in a specific case. In the case of mutual recognition, it is necessary to determine whether the decision was made by an authority of another member state, but the content of the decision is not examined. It is also necessary to point out that although the authorities of one member state recognise the act of another member state, this decision is not based on the principle of reciprocity (Miettinen, 2013, p. 32).

When applying procedures for mutual recognition, only the minimum of the necessary formalities is required. However, the application in practice is more demanding. When the decision is written in a language that is not the official language of the requested country or institution, it must be translated into the language of that country. In addition, it is necessary to check whether the decision originates from the authority that is competent to make such decisions. If a member state decides to limit the scope of mutual recognition, the confirmation procedure should include a step that reviews whether the decision was made within the competence of the institution. With each additional step for which verification is foreseen before the decision is recognised in the executing Member State, the validation procedure becomes more complicated and longer, thus reducing the efficiency as one of the main advantages of mutual recognition.[20]

[15] Para. 35 of Conclusions, 1999. Presidency Conclusions, European Council Tampere October 15-16, 1999.

[16] For example: para. 6 of the Framework Decision of the Council 2002/584/JHA of June 13th, 2002 on European Arrest Warrant; para. 1 of the Framework decision of the Council 2003/577/JHA of July 22nd, 2003 on the execution in the European Union of orders freezing property or evidence, OJ L 195/45 of August 2nd, 2003.

[17] See: Commission of the European Communities (1999): 'Mutual recognition in the context of the follow-up to the Action Plan for the Single Market', communication from the Commission to the Council and the European Parliament, COM(1999) 299 final, p. 2; Commission of the European Communities (2000): 'Mutual Recognition of Final Decisions in Criminal Matters', communication from the Commission to the Council and the European Parliament, COM(1999) 495 final, p. 3; Programme of Measures to Implement the Principle of Mutual Recognition of Decisions in Criminal Matters, *Official Journal of the European Communities*, C 12/10 of January 15th, 2001.

[18] See: CJEU decision 2007. Decision of May 3, 2022. C-303/05, *Advocaten voor de Wereld VZW v Leden van de Ministerraad*, ECLI:EU:C:2007:261, para. 4. CJEU decision 2008. Decision of December 1, 2008. C-388/08, PPU Criminal proceedings against Artur Leymann and Aleksei Pustovarov, ECLI:EU:C:2008:669, para 49.

[19] Para. 5. of the Introduction of Programme of measures to implement the principal of mutual recognition of decisions in criminal matters (EU) OJ C 12/10 of January 15, 2001.

[20] Commission of the European Communities. 2000. Mutual Recognition of Final Decisions in Criminal Matters, communication from the Commission to the Council and the European Parliament, COM (1999) 495 final, p. 17.

Over the years, a set of mutual recognition instruments was created, which led to the coordination of national criminal justice systems. The mutual recognition of court decisions[21] is also met with considerable resistance in the member states, so for now there is no single act that would regulate this issue and that would embrace all judicial decisions in criminal matters, but the EU applied a selective approach and a number of instruments were adopted. As a consequence, this area is regulated in a patchy manner (the European arrest warrant, the European investigation order, the European freezing order). The only general document that stands out is the Program of 24 measures for the implementation of decisions on mutual recognition in criminal matters.[22] The Program refers to the basic procedural and substantive rules that must be considered when assessing whether a court decision of one member state can be accepted in another member state. Furthermore, the Program included provisions on principles such as *ne bis in idem*, rules on obtaining evidence and individualisation of criminal sanctions, rules on confiscation of the property of the perpetrator of a criminal offence, etc.

The purpose of all these measures and instruments is to improve the efficiency and duration of judicial cooperation, to improve the principle of mutual recognition between the judicial systems of member states, as well as to facilitate cross-border investigations and indictments by establishing direct contact between judges and prosecutors of member states.

From the above, it can be concluded that mutual recognition is limited to the recognition of formal acts in specific areas. Also, the obligation to recognise a certain act does not mean the harmonisation of substantive criminal law (Fichera, 2011, p. 48). This position was confirmed by the EU Court of Justice in case number 303/05 *Advocaten voor de Wereld*,[23] where is stated that nothing in Articles 31 and 34 of Chapter VI of the EU Treaty, which are listed as the legal basis of the Framework Decision, does not condition the application of the European arrest warrant on the previous harmonization of criminal law in the member states.

In addition, mutual recognition does not depend on the harmonisation of procedural rules. Mutual recognition can be understood as a harmonised system of providing and requesting mutual assistance (Klip, 2012, p. 363). In the *Advocaten voor de Wereld* case, the Court of Justice stated in point 29 that, with regard to the application of the European Arrest Warrant, mutual recognition requires harmonisation of the laws and regulations of the Member States with regard to judicial cooperation in criminal matters.

The recognition of a court decision of one member state in another member state results in a court decision with an extraterritorial effect (Nikolaidis, 2007, p. 682). The cross-border effect of such a decision limits the sovereignty of the member state that executes the decision, and therefore an additional element of mutual recognition is necessary, which is mutual trust between the member states and their institutions (Mitsilegas, 2009, p. 119).

---

[21] It would be more accurate to use the term judicial decisions since, in some countries, decisions that are subject to mutual recognition are adopted by a public prosecutor.

[22] Programme of measures to implement the principle of mutual recognition of decisions in criminal matters. 2001. OJ C 12/02. Available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2001:012:0010:0022:EN:PDF (2. 10. 2022).

[23] CJEU decision 2007. Decision of May 3, 2022. C-303/05, *Advocaten voor de Wereld VZW v Leden van de Ministerraad*, ECLI:EU:C:2007:261.

4.2. Mutual trust as an element of mutual recognition

Understanding the concept of mutual trust is important for the Western Balkans authorities if they are interested in the successes of the Open Balkan Initiative. In the EU, the existence of mutual trust was considered a prerequisite from the very beginning of the development of the principle of mutual recognition in criminal matters. Although in the Tampere Program from 1999, mutual trust was not explicitly stated in the context of mutual recognition, the European Commission expressed already in the 2000 Communication the position that mutual trust is an important element of mutual recognition. The European Commission emphasised that mutual trust includes not only trust in the regulations of another member state, but also trust that the regulations will be adequately applied.[24] Already the following year, the Program of Measures for the Implementation of the Principle of Mutual Recognition explicitly states in the introductory part that the application of the principle of mutual recognition in criminal matters is based on the assumption that member states have mutual trust in their criminal justice systems. [25]

The direct link between mutual recognition and mutual trust is essential for the implementation of mutual recognition instruments and EU policy in the criminal law field. The rationale for mutual trust is based on the common values on which the EU is based, which are stated in Article 2 of the Treaty of Lisbon, namely the respect for human dignity, freedom, democracy, equality, the rule of law and the respect for human rights, including the rights of minorities. This formalistic approach to mutual trust does not take into account differences in the level of protection of human rights in EU member states, nor does it answer the question of whether mutual trust is the result of cooperation and integration or a prerequisite for such cooperation.

The assumption of mutual trust first introduced by the Program of Measures remained the central point and standard of mutual recognition. The European Commission, in its Communication from 2004, indicates that greater mutual trust between member states is necessary for the development of mutual recognition.[26]

Relatively shortly after the introduction of mutual recognition in criminal matters, it became clear that mutual trust cannot be implied, especially considering that fundamental rights are not equally protected in all EU member states. To overcome the identified challenge, the European Commission published the Judicial Agenda for 2020: Strengthening trust, mobility and growth within the EU.[27] The rule of law is the main point of the European Commission's view on the future of the area of freedom, security and justice, which is why in 2014, it adopted the Communication on the rule of law, which emphasises that the rule of law is a key element for the development of the area of freedom, security and justice.

---

[24] Commission of the European Communities. 2000. Mutual Recognition of Final Decisions in Criminal Matters, Communication from the Commission to the Council and the European Parliament, COM (2000) 495 final.

[25] Introduction of Programme of measures to implement the principal of mutual recognition of decisions in criminal matters (EU) OJ C 12/10 of January 15, 2001.

[26] COM (2004) 401 final.

[27] COM (2014) 158 final.

Having in mind that Western Balkan countries are having challenges related to the rule of law, there is an imminent risk in the project for the establishment of the area of freedom and security in these countries.

4.3. Institutional framework for police and judicial cooperation

The need for closer police cooperation within the EC was triggered by the terrorist attacks which took place in the '70s of the XX century,[28] when the Trevi group was established (Mitsilegas, Monar, Rees, 2003, p. 22). The jurisdiction of the Trevi group was broadened to other crimes, such as illegal migration, drug trafficking and international crime (Baker, Harding, 2009, p. 29), but the Trevi group presented initial structure which aim was practical cooperation and exchange of information. The creation of an internal market and the removal of borders provided an incentive for the development of Europol in 1999, but only as an international organisation, not as an EU body.

The first attempt to coordinate the EU activities in the field of judicial cooperation in criminal matters was the establishment of the European Judicial Network in 1998 by Joint Action 98/428/JHA, which consisted of national contact points that provided legal and practical information to local judicial bodies in other countries to prepare a complete request for cooperation. Although the European Judicial Network was the first structured mechanism of judicial cooperation in the European Union that became operational, the idea of creating Eurojust persisted because it was necessary to establish effective cooperation at the level of the European Union.

The European Council in Tampere represents a turning point in the development of the EU bodies in the field of cooperation in criminal matters because the Conclusions overlooked the establishment of these bodies and their role. Given that these bodies were created within the framework of the third pillar of the EU, they were the result of the compromise of the member states and their willingness to leave part of the jurisdiction in criminal matters to the European Union. Thus, in a relatively short period, bodies were established, the competencies of which partially overlap and their roles and positions are not regulated in detail in legal acts. An example is represented by the European Judicial Network, as a network of contact persons, and Eurojust, as a transitional solution between a purely national public prosecutor system and the EU public prosecutor (Peers, 2011, p. 855). The gradual evolution of EU bodies in the field of police and judicial cooperation in criminal matters lead to the establishment of Eurojust, which has the task of coordinating the activities of national investigative bodies, OLAF, which can conduct administrative investigations, and the European Public Prosecutor Office, which has shared jurisdiction with the national public prosecutor's offices (Matić Bošković, 2022, p. 105).

---

[28] The proposal to establish the Trevi Group was made by the United Kingdom in the face of problems and terrorist attacks by the Irish Republican Army, which was responsible for bombings in London, Birmingham, and other cities during the first half of the seventies in the last century. The initiative was supported by other EU member states that were facing similar problems of political violence. Germany, for instance, in that period had problems with the Baader Meinhof Group or Red Army Faction, while Italy faced violence caused by the Red Brigades.

The European integration in criminal matters has been improved in recent decades by the establishment of the EU bodies and organisations responsible for police and judicial cooperation in the field of criminal law. In the European Union, there are now two groups of actors: one is the national police and judicial institutions of the member states, and the other is the bodies of the European Union. Some of the EU bodies for police and judicial cooperation, such as the European Police Office (Europol) and the European Union Agency for Criminal Justice Cooperation (Eurojust), were established under the third pillar, while others have a hybrid status based on the Community law, such as the European Anti-fraud Office (OLAF) and the European Public Prosecutor's Office (EPPO). The establishment of these bodies was accompanied by discussions on their powers and different views on these bodies as centralised EU agencies, on the one hand, and as a form of intergovernmental cooperation, which has had an impact on the development of EU criminal law, on the other.

5. CONCLUSION

Although Open Balkan is a relatively new initiative, over three years, the three Western Balkan countries signed a significant number of instruments (memorandums and inter-state agreements) with the aim to facilitate free trade and free access to the labour market. Without going into a discussion on the economic implications of the signed agreements and the need to harmonise legislation that regulates trade, there is a need to highlight the security issues. The announced removal of the borders between the three Western Balkan countries increases the risk of free movement of crime and offenders, including of committing cross-border crimes or hiding criminals in another member country where the legislation is milder. While the removal of the borders will facilitate the movement of crime, the cooperation between police and judiciary will be bound by rules on legal cooperation in criminal matters that are formalistic and relatively slow.

To overcome these challenges, the Western Balkan authorities should learn from the EU experiences in establishing the internal market and the area of freedom, security and justice. The adoption of the mutual recognition agreement in the area of trade and commerce should be accompanied by the adoption of mutual recognition instruments in criminal law that should enable the exchange of information and more efficient investigations and prosecutions. The creation of an institutional structure should follow the adoption of legislative instruments. The creation of the regional police bodies is not visible, but at least the contact points and the channels for direct communication between police and judiciary should be provided. However, the mutual recognition instruments and enhanced cooperation in the EU are based on mutual trust and the common rule of law values, while the Western Balkan countries are still facing various challenges when it comes to the achievement of the rule of law standards. These challenges could jeopardise the whole Open Balkan initiative and bring additional risks to the fight against organised crime and corruption in the Western Balkan countries.

LIST OF REFERENCES

Literature

Allegrezza, S. 2010. Critical remarks on the green paper on obtaining evidence in criminal matters from one Member State to another and securing its admissibility. *Zeitschrift fur Internationale Strafrechtsdogmatik*, 2010(9), pp. 569-579.

Armstrong, K. A. 2002. Mutual recognition. In: Barnard C. & Scott J. (eds.), *The law of the single European market: unpacking the premises*. Oxford: Hart Publishing, pp. 225–268.

Asp, P. 2005. Mutual recognition and the development of criminal law cooperation within the EU. In: Husabø E. J. & Strandbakken A. (eds.), *Harmonization of criminal law in Europe*. Antwerpen: Intersentia, pp. 23-40.

Baker, E. & Harding, C. 2009. From Past Imperfect to Future Perfect? A longitudinal Study of the Third Pillar. *European Law Review,* 34(1), pp. 25-54.

Bondt, W. & Vermeulen, G. 2009. Esperanto for EU crime statistics: towards common EU offence definitions in an EU-level offence classification system. In: Cools M. *et al* (eds.), *Readings on criminal justice, criminal law & policing*. Antwerpen: Maklu, pp. 87-124.

Craig, P. 2002. The Evolution of the Sigle Market. In: Bernard, C. & Scott. J. (eds.), *The Law of the Single European Market.* Oxford: Hart Publishing, pp. 1-40.

Ehlermann, C. D. 1987. The Internal Market Following the Single European Act. *Common Market Law Review,* 24(3), pp. 361-409. https://doi.org/10.54648/COLA1987020

Fichera, M. 2011. *The implementation of the European Arrest Warrant in the European Union: law, policy and practice*. Antwerpen: Interesntia.

Garland, D. 1996. The Limits of the Sovereign State, Strategies of Crime Control in Contemporary Society. *The British Journal of Criminology,* 36(4), pp. 445-471. https://doi.org/10.1093/oxfordjournals.bjc.a014105

Klip, A. 2012. *European Criminal Law, – An integrative Approach*, 2nd ed. Cambridge–Antwerp–Portland: Intersentia.

Matić Bošković, M. 2022. *Krivično procesno pravo EU.* Beograd: Institut za kriminološka i sociološka istraživanja.

Miettinen, S. 2013. *Criminal law and policy in the European Union*, Oxon: Routledge. https://doi.org/10.4324/9780203077337

Mitsilegas, V, Monar, J. & Rees, W. 2003. *European Union and Internal Security: Guardians of the Treaties.* Basingstoke: Palgrave Macmillan. https://doi.org/10.1057/9780230504387

Mitsilegas, V. 2006. Trust-building measures in the European judicial area in criminal matters: issues of competence, legitimacy and inter-institutional balance. In: Balzaq T. & Carrera S (eds.), *Security versus freedom? A challenge for Europe's future.* Aldershot: Ashgate, pp. 279-289.

Mitsilegas, V. 2009. *EU Criminal Law*. Oxford: Hart Publishing.

Murphy, C. C. 2011. The European evidence warrant: mutual recognition and mutual (dis)trust? In: Eckes C. & Konstadinides T. (eds.), *Crime within the area of freedom, security and justice: a European public order*, Cambridge: Cambridge University Press, pp. 224-248. https://doi.org/10.1017/CBO9780511751219.009

Nikolaidis, K. 2007. Trusting the Poles? Constructing Europe through Mutual Recognition. *Journal of European Public Policy,* 14(5), pp. 682-698. ttps://doi.org/10.1080/13501760701427847
Ouwerkerk, J. 2011. Mutual trust in the area of criminal law, In: Battjes, H, Brouwer, E, De Morree, P. & Ouwerkerk, J. (eds.), *The principle of mutual trust in European Asylum, Migration and Criminal Law – Reconciling Trust and Fundamental Rights*. Utrecht: Forum, pp. 38-47.
Peers, S. 2011. *EU Justice and Home Affairs Law*. Oxford: Oxford University Press.
Spencer, J. 1999. The Corpus Juris Project: Has it a Future? *Cambridge Yearbook of Criminal Law,* 1999(2), pp. 355-372. https://doi.org/10.5235/152888712802815815
Souminen, A. 2011. *The Principle of Mutual Recognition in Cooperation in Criminal Matters*. Antwerpen: Intersentia.
Šegvić, S. 2011. Šengenski režim upravljanja vanjskim granicama EU. *Zbornik radova Pravnog fakulteta u Splitu,* 48(1), pp. 11-31.
Vervaele, J. A. E. 2013. Ne bis in idem: Towards the transitional Constitutional Principle in the EU? *Utrecht Law Review*, 9(4), pp. 211–229. https://doi.org/10.18352/ulr.251
Vervaele, J. A. E. 2014. *European Criminal Justice in the Post-Lisbon Area of Freedom, Security and Justice*. Trento: Universita degli Studi di Trento.
Vukadinović, R. 2012. *Uvod u institucije i pravo Evropske uniji.* Kragujevac: Udruženje za evropsko pravo.
Wasmeier, M. & Thwaites, N. 2004. The Battle of the Pillars: Does European Community have the Power to Approximate National Criminal Laws? *European Law Review,* 29(5), pp. 613-635.
Willems, A. 2021. *The Principle of Mutual Trust in EU Criminal Law*. Oxford: Hart Publishing. https://doi.org/10.5040/9781509924578

Legal sources and case law

CJEU decision 2007. Decision of May 3, 2022. C-303/05, *Advocaten voor de Wereld VZW v Leden van de Ministerraad*, ECLI:EU:C:2007:261.
CJEU decision 2008. Decision of December 1, 2008. C-388/08, *PPU Criminal proceedings against Artur Leymann and Aleksei Pustovarov,* ECLI:EU:C:2008:669.
Commission of the European Communities. 2000. Mutual Recognition of Final Decisions in Criminal Matters, Communication from the Commission to the Council and the European Parliament, COM (2000) 495 final.
Convention on Implementation of Schengen Agreement (CISA) (EU) of June 14, 1985.
European Council in *Cardiff*, June 15-16, 1998, Presidency Conclusions.
Introduction of Programme of measures to implement the principal of mutual recognition of decisions in criminal matters (EU) OJ C 12/10 of January 15, 2001.