Speakers' Contributions

# THE CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION IN PRACTICE

## FOCUS ON CRIMINAL JUSTICE IN THE EU

415DT106 Lisbon, 4-5 May 2015

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# The Charter of Fundamental Rights of the EU in Practice
## Focus on Criminal Justice in the EU

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- The role of the Charter within the EU legal framework and its relevance for the national legal order
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# The role of the Charter within the EU legal framework and its relevance for the national legal order

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Lisbon, 4 May 2015

## General framework for protection of rights and freedoms

- theory of multilevel constitutionalism – system of divided power
- every level of government = constitutional document guaranteeing rights and freedoms of an individual (“sword and shield” for an individual)
- two-tier system: national constitution (level of Member State) and the EU Charter of Fundamental Rights (EU level)
- three-tier system: local level (e.g. federal units, autonomous provinces), level of Member States, the EU level
- system of remedies corresponding to each level; resolutions of conflicts between levels of protection
- supervisory character of the European Convention on Human Rights over the domestic and EU level

# The EU Charter - legal status

- since Treaty of Lisbon - legally binding – art. 6 TEU
- limitations on the use of Charter
  - scope of applicability (EU + implementation of EU law by Member States) (Article 51 Section 1); no new competences (Art. 51 Section 2)
  - limitations on use of rights and freedoms (Art. 52 Section 1)
  - interpretation in accordance with the ECtHR (art. 52 Section 3) - but see also the practice of ECtHR quoting ECJ (e.g. *Schalk and Kopf v. Austria*)
  - interpretation in accordance with constitutional traditions of Member States (art. 52 Section 4)
- before the entry into force - use of the EU Charter as the point of reference in interpretation of the scope of fundamental rights (in numerous opinions of AG and the ECJ judgments)

# Interpretation of the EU Charter

- the EU Charter as primary law (compare: status of fundamental rights before entry into force of the Lisbon Treaty)
- duplication of certain rights in the Charter and in the Treaties (e.g. related to EU citizenship)
- status of explanations to the Charter
- status of the British-Polish Protocol to the Charter
- impact of the EU accession to the UN Covenant on Rights of Persons with Disabilites on the interpretation of the Charter
- current status of the EU accession to the ECHR (draft Association Agreement) – see Article 6.2 TEU

## Types of rights under the Charter – normative value

- directly enforceable rights and freedoms
- rights and freedoms referring to the EU law or domestic law – their interpretation depends on

  - national laws governing the use of rights (e.g. Art. 9 of the Charter), or

  - Community law and national laws and practices (e.g. Art. 27 of the Charter)
- principles („the Union recognizes and respects…")
- aspirational norms („Union policies shall ensure…")
- citizens' rights

## Different dimensions of the use of the Charter

- Control of legislation at the EU level and international treaties entered by the EU in light of the Charter
- use of certain Charter provisions for internal EU policies (e.g. non-discrimination policy, right to good administration)
- reference to the Charter by the EU courts – growing number of preliminary references
- the Commission acting as guardian of Treaties (article 7 of the TEU, e.g. actions with respect to Hungary)
- domestic use of the Charter – reference to the Charter by domestic courts when implementing the EU law

## Typical use of the Charter in case of violation at national level

1. Violation of fundamental rights by the Member State

2. Applicability of the EU law (when there is a fundamental rights' issue involving interpretation of EU legislation, e.g. national authority refers to the EU regulation)

3. Appeal against action by national authority to domestic court

4. Courts – preliminary reference to the Court of Justice of the European Union

5. Judgment of the CJ EU

6. Resolution of the case by domestic court as a follow up to judgment of the CJ EU

## Lack of jurisdiction of the CJ EU

- Case C-27/11, *Vinkov*, inadmissibility decision – case concerned the purely internal situation; violation of road traffic regulations; Bulgarian court referred to number of EU laws
- Case C-370/12, *Pringle v. Ireland* – challenge of the European Stability Mechanism in light of the effective judicial protection; jurisdiction of the CJ EU was not established
- BUT – obligation to grant to asylum-seeker at the border minimum conditions for reception, even if the state is not responsible for examination of the asylum application under the EU law – Case C-179/11, *GISTI*

# First case after Lisbon Treaty

- Case C-403/09 *PPU, Detiček*, 23.12.2009
- custody over child awarded to father by Italian court, following the divorce
- mother moved to Slovenia and settled there with the child; requested a provisional custody over child to be recognized by Slovenian court; claimed that circumstances changed
- father - wanted to enforce Italian decision
- ECJ - fundamental right of a child to have personal relationship and contacts with both parents
- compare - ECtHR - *Gluhakovic v. Croatia* (application 21188/09, judgment of 12 April 2011)

# C-617/10 Åkerberg Fransson

- Criminal proceedings concerning tax fraud, but previously Mr. Fransson was punished with tax fines
- Applicability of ne bis in idem principle (article 50 of the Charter)
- Is the Charter applicable? EU law requires to adopt measures necessary to collect VAT tax, but the EU law does not harmonize penalties and criminal proceedings. Are such administrative and criminal rules „implementation of EU law"?
- Para. 19: *„fundamental rights guaranteed in the legal order of the European Union are applicable in all situations governed by European Union law, but not outside such situations. In this respect the Court has already observed that it has no power to examine the compatibility with the Charter of national legislation lying outside the scope of European Union law. On the other hand, if such legislation falls within the scope of European Union law, the Court, when requested to give a preliminary ruling, must provide all the guidance as to interpretation needed in order for the national court to determine whether that legislation is compatible with the fundamental rights the observance of which the Court ensures"*

# Fransson - continued

- reference by the CJEU to the explanations to the EU Charter – „the requirement to respect fundamental rights defined in the context of the Union is only binding on the Member States when they act in the scope of Union law" (para. 20)
- Para. 21 – *„Since the fundamental rights guaranteed by the Charter must therefore be complied with where national legislation falls within the scope of European Union law, situations cannot exist which are covered in that way by European Union law without those fundamental rights being applicable. The applicability of European Union law entails applicability of the fundamental rights guaranteed by the Charter."*
- Effect: „scope of application of the EU law" equals „implementation of the EU law"
- National or EU standard of human rights protection?
  *„where a court of a Member State is called upon to review whether fundamental rights are complied with by a national provision or measure which, in a situation where action of the Member States is not entirely determined by European Union law, implements the latter for the purposes of Article 51(1) of the Charter, national authorities and courts remain free to apply national standards of protection of fundamental rights, provided that the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of European Union law are not thereby compromised"* (para. 29)

# C-399/11 Melloni

- Standards of fundamental rights' protection in case of transborder cooperation – national or EU standard?
- Mr. Melloni – prosecuted for bankruptcy fraud in Italy; Italy filed the European Arrest Warrant asking the Spanish authorities to surrender
- Opposition to the EAW proceedings in Spain – raising by Mr. Melloni that he was convicted in Italy in absentia
- Spanish courts: Audiencia Nacional allowed for the surrender, but Mr. Melloni applied to the Spanish Constitutional Court
- The Constitutional Court made a preliminary reference to CJEU, because the constitutional case-law even in case of conviction in absentia requires additional right to appeal in the issuing state before making a surrender – conlict with the EU law and the EAW Framework Decision – in particular art. 4 (a) (1)
- Answer: the state cannot make the surrender conditional upon other situations than those listed in art. 4(a) (1) of the EAW Framework Decision, namely (1) possession of information on a trial and voluntary waiver of the right to attend, and (2) representation by a lawyer
- But – is the EAW Framework Decision in compliance with fundamental rights?

# Melloni - continued

- CJEU – EU legislation is in compliance with the fundamental rights' standards envisaged in the Charter, it is also compliant with the case-law of the ECtHR
- But – is it possible for the Member State to allow for the higher standard of protection? Is it possible under Article 53 of the Charter?
- CJEU: such *„interpretation of Article 53 of the Charter would undermine the principle of the primacy of EU law inasmuch as it would allow a Member State to disapply EU legal rules which are fully in compliance with the Charter where they infringe the fundamental rights guaranteed by that State's constitution."*
- Possibility to make the surrender under the EAW subject to retrial in the issuing state (in case of conviction in absentia) would have a negative impact on effectiveness of the system and the principle of mutual trust
- Result – whenever the EU harmonizes a certain field, the Member State cannot create higher standards of protection?
- Judgment of the Spanish Constitutional Court of 13 February 2014, No. 26/2014

# Conclusions

- The EU Charter is a legally binding document and used often in practice of the CJEU
- The CJEU clarified the scope of applicability of the EU Charter vis-a-vis harmonization of the EU law by Member States (art. 51 of the Charter)
- The CJEU clarified the relationship between the national and the EU standards of fundamental rights' protection in case of implementation of the EU law

# Thank you for your attention


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# Overview of key rights in Titles I, II and III of the Charter: personal dignity, freedoms and equality

Dr Adam Bodnar

Lisbon, 4 May 2015

## Title 1 - Dignity

- Human dignity
- Right to life
- Right to integrity of a person
- Prohibition of torture
- Prohibition of slavery and compulsory labour
- Comments:
  - Similar catalogue as in the ECtHR
  - Innovative rights
  - Dignity as a separate source of rights
  - Scope of applicability of Title 1 rights

## Dignity as individual source of rights

- C-79/13, *Saciri and others*
- Applicability of the Council Directive 2003/9/EC on minimum standards of reception for asylum seekers
  - „the general scheme and purpose of Directive 2003/9 and the observance of fundamental rights, in particular the requirements of Article 1 of the Charter of Fundamental Rights of the European Union, under which human dignity must be respected and protected, preclude the asylum seeker from being deprived – even for a temporary period of time after the making of the application for asylum and before being actually transferred to the responsible Member State – of the protection of the minimum standards laid down by that directive" (para. 35)
- Case C-34/10, *Brüstle v. Greenpeace*, 18.10.2011 - patentability of human embryos created through therapeutic cloning
- C-364/13 *International Stem Cell Corporation v Comptroller General of Patents, Designs and Trade Marks* – what is human embryo?

## Degrading treatment in case of transfer of asylum seeker

- Case C-411/10 *N.S. v. Secretary of State* and case C-493/10 *M.E.*
- Regulation Dublin II – transfer of asylum seekers to responsible Member States
- Conditions for asylum seekers in Greece
- ECtHR judgment in *M.S.S. v. Belgium and Greece*
- Reliance by the CJEU on Article 4 of the Charter
- See also *Tarakhel v. Switzerland*, judgment of 4 November 2014, appl. No. 29217/12

## Asylum seekers – evaluation of sexual orientation threats

- C-199/12, C-200/12, C-201/12, *X., Y., Z. v. Minister voor Immigratie en Asiel*
- C-148/13, C-149/13, C-150/13, *A.B.C. v. Staatssecretaris van Veiligheid en Justitie*
- Minimum standards for granting the refugee status
- Problem: how to identify whether threat of repression due to sexual orientation upon return to home country is real?
- Use of Art. 1, 3 and 7 of the EU Charter
- Guidance by CJEU on criteria to be used by national authorities on methods to assess the credibility of the application
- Intervention in the case by the UN High Commissioner on Refugees

## Title II - Freedoms

- Personal liberty, privacy, protection of personal data, right to marry, freedom of conscience and religion, freedom of expression, freedom of assembly, property, freedom to choose occupation and conduct business
- Scope of rights – similar to the ECtHR and additional protocols
- Direct enforceability of majority of Title II rights
- Significant developments: privacy and economy oriented freedoms

## Right to privacy and agricultural subsidies

- Joined cases C-92/09 and C-93/09, *Volker und Markus Schecke, Eifert*, 9.10.2010
- publication of names of persons who obtained subsidies from European Agricultural Guarantee Fund and European Agricultural Fund for Rural Development
- reliance on the Charter - first judgment where it was the principal source of interpretation
- distinction between protection of personal data of natural persons and legal persons
- principle of proportionality as interpreted by the ECJ: appropriateness and necessity
- limitations on rights and freedoms - Article 52 Section 1 of the Charter
- Legislative actions after the judgment

## Intellectual property rights

- Case C-70/10, *Scarlet v. SABAM*, 24.11.2011
- Case C-360/10, *SABAM v. Netlog*, 16.2.2012.
- legal action to put an injunction on internet service providers and social networks as regards distribution of copyright protected material
- CJEU - installation of filtering system to prevent violation would violate:
  - ✦freedom to conduct business (Article 16 of the Charter)
  - ✦data protection of internet users and right to impart information with the use of internet
- importance of the case for public debate regarding non-ratification of the ACTA Agreement

## Digital Rights Ireland – limits on surveillance

- C-293/12, *Digital Rights Ireland*
- Directive 2006/24/EC on data retention
- Scope of data retention and right to privacy
- Use of communication data by different state agencies
- Limited control over the use of data, lack of supervision, too broad scope of data retained, transferability of data abroad
- Invalidity of the Directive – consequences for national legislation
- Discussions in the EU on mass surveillance of the EU citizens; resolutions of the European Parliament
- See also – use of CCTV cameras, C-212/13, *František Ryneš v Úřad pro ochranu osobních údajů*

## Right to be forgotten

- C-131/12, *Google Spain and M Costeja Gonzalez*
- Processing of personal data by internet search engines
- Right to be forgotten by the search engine: in certain circumstances right to be deleted from results of search engine indexing
- Right to privacy and protection of personal data (Art. 7 and 8 of the Charter) v. right to property and freedom to conduct business
- Interaction between the ECHR and CJEU
- Implementation of the judgment; report by the Google Advisory Committee

## Title III - Equality and non-discrimination

- Equality before the law, non-discrimination clause, equality between men and women, cultural and religious diversity, rights of the child, rights of the elderly, integration of persons with disabilities
- Scope of applicability of rights and the EU legislation
- Ratification by the EU of the UN Convention on Rights of Persons with Disabilities
- Distinction between „rights" and „principles"

## Non-discrimination principle and the EU Charter

- Article 21 of the Charter - non-discrimination principle
- Article 19 TFEU - legal competence to pass legislation in selected areas regarding anti-discrimination
- Case C-236/09, *Test-Achats*, 30.4.2011 - insurance premiums and discrimination due to sex
- C-144/04, *Mangold* and C-555/07, *Kücükdeveci* cases - non-discrimination due to age as a general principle of EU law
- however, lack of similar recongition in case C-147/08, *Jürgen Römer v. City of Hamburg*, 10.5.2011 (non-discrimination due to sexual orientation)
- see also C-391/09 *Wardyn* case and rights of persons belonging to national minorities

## Non-discrimination and EU legislation

- EU legislation strengthened by Article 21 of the Charter
  - Definition of disability – C-335/11, *Jette Ring*
  - Obesity as disability – C-354/13, *Kaltoft*
  - Reasonable accommodation – C-312/11, *Commission v. Italy*
  - Discrimination by association – C-303/06, C*oleman*
  - Retirement age for judges – C-286/12, *Commission v. Hungary*
  - Homophobic remarks made by the patron of football club – C-81/12, *Accept Romania*
  - Maximum age for recruitment of a police officer, C-416/13, *Vital Pérez v Ayuntamiento de Oviedo*
- Impact of the UN Convention on Rights of Persons with Disabilities on the scope of interpretation of the EU Charter (especially art. 21 and 26 of the Charter)

## Rights of the child (art. 24)

- Impact on legislation and policy making
  - Draft proposal of a directive on procedural safeguards for children suspected or accused in criminal proceedings
  - EU Strategy – Better Internet for Children
  - Research studies on human trafficking in human beings (including children) or on children migrants
- C-648/11, *MA and Others*
  - Examination of the application for asylum submitted by unaccompanied child: where the application was lodged and the child is present
- Judgment of the Czech Supreme Court of 22 May 2013: lack of interrogation of a daughter of a man convicted for murder in parental rights' proceedings: justified by art. 24 of the EU Charter

## Conclusions

- Growing use of the EU Charter of Fundamental Rights as a legislative and policy guidance as well as in the case-law
- Interaction with case-law of the European Court of Human Rights, but innovation in certain fields (especially right to privacy)
- Importance of the CJEU opinion No. 2/2013 on the EU accession to ECHR
- Joint handbooks prepared by EU Fundamental Rights Agency and the ECtHR (non-discrimination, asylum-seekers, personal data)

## Thank you for your attention

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# THE SCOPE OF APPLICATION AND INTERPRETATION OF THE EUCFR IN DOMESTIC LEGAL PROCEEDINGS

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**I – Brief Overview of Title VII of the EUCFR**

(1) Field of Application

(2) Scope and interpretation of rights and principles

(3) Level of protection

(4) Prohibition of abuse of rights

**II – Two Recurrent and Controversial Issues**

(1) When do national measures fall within the scope of EU Law (including the EUCFR)?

(2) The potential for vertical/horizontal effect of EUCFR provisions

## Field of Application: Art. 51 EUCFR

- The provisions of Charter bind EU institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity
- They also bind **the Member States but only when they are implementing Union law [most controversial aspect to be discussed later]**
- The Charter cannot justify any extension of the field of application of EU or the allocation of any new power/task for the EU [this is already made clear by Article 6 TEU]

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## Scope and interpretation of rights and principles: Article 52 EUCFR

- Contains no less than 7 paragraphs (with last one added in 2004)
- Among other things, this provisions makes clear that:

- EU FRts can be limited in accordance with traditional requirements;
- the EU must take into account the ECHR and case law of Strasbourg Court when interpreting and applying provisions of the EUCFR based on provisions of ECHR
- A distinction must be made between directly enforceable rights and non directly enforceable principles [to be discussed later on]
- The explanations drawn up as a way of providing guidance in the interpretation of this Charter shall be given due regard by EU courts & national courts

## Level of protection: Article 53 EUCFR

- Known as the anti-regression clause
- Explanations: EUCFR cannot undermine the level of protection afforded within their respective scope by EU law, national law and international law (in particular the ECHR)
- Controversial issue: Does Article 53 EU give MS the option to go further than the rights granted by EU law if their constitution requires so, and if needed, to give priority to their national law?
- See answer provided by CJEU in case of Melloni (C-399/11): In areas governed/regulated by EU law, the application of non-EU standards of protection of fundamental rights is only possible '*provided that the level of protection provided for by the CFR … and the primacy, unity and effectiveness of EU law are not … compromised.'*

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## Prohibition of abuse of rights: Article 54 EUCFR

- 'Nothing in this Charter shall be interpreted as implying any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms recognised in this Charter or at their limitation to a greater extent than is provided for herein.'
- Article 54 merely reproduces Article 17 of the ECHR.
- ECtHR has (rarely) relied on this provision to dismiss complaints it had received from applicants deemed to have promoted or engaged in actions aimed at the destruction of democratic and liberal constitutional orders

## II.1 SCOPE OF APPLICATION OF EUCFR

REMINDER: CHALLENGING EU & NATIONAL MEASURES ON EU FUNDAMENTAL RIGHTS GROUNDS **BEFORE LISBON**

### CHALLENGING EU MEASURES

OPTION 1: DIRECT ACTION

OPTION 2:PRELIMINARY REFERENCE

### CHALLENGING NATIONAL MEASURES

- MAIN ISSUE: DEMONSTRATE TO NATIONAL COURT THAT DISPUTE CONCERNS A NATIONAL MEASURE WHICH FALLS ***WITHIN*** SCOPE OF EU LAW
- IF ***OUTSIDE*** SCOPE OF EU LAW = LITIGANT ***CANNOT*** RELY ON EU FRTS BEFORE NATIONAL COURT: E.G. C-328/04 *VAJNAI* [2005]

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## SITUATION POST-LISBON

What is settled:

- ✓ IN SITUATIONS WHICH FALL **OUTSIDE** THE SCOPE OF EU LAW, COMPATIBILITY OF NATIONAL MEASURES WITH EU FUNDAMENTAL RIGHTS CANNOT BE EXAMINED BY NATIONAL COURTS
- ✓ NATIONAL AUTHORITIES ARE HOWEVER BOUND BY EU FUNDAMENTAL RIGHTS WHEN THEY **"IMPLEMENT"** EU LAW (SEE ARTICLE 51(1) EUCFR)

CONTROVERSIAL ISSUES:

① SHOULD THE NOTION OF "IMPLEMENTATION" BE RESTRICTIVELY INTERPRETED?

② SHOULD ART. 51(1) BE INTERPRETED AS PRECLUDING A PRIVATE PARTY FROM INVOKING THE CHARTER WHEN CHALLENGE IS DIRECTED AT A NATIONAL MEASURE DEROGATING FROM EU REQUIREMENTS?

③ SHOULD ART. 51(1) CFR BE INTERPRETED AS PRECLUDING A PRIVATE PARTY FROM INVOKING THE CHARTER IN THE CONTEXT OF A DISPUTE AGAINST ANOTHER PRIVATE PARTY?

④ SHOULD THE GENERAL PRINCIPLES OF EU LAW (ART. 6(3) TEU) BE SUBJECT TO ART. 51(1) CFR?

*Answer to first 2 Qs can be found in C-617/10 FRANSSON [2013]*

## KEY PARAGRAPHS IN CASE C–617/10 *FRANSSON* [2013]

- 17. […] THE CHARTER'S FIELD OF APPLICATION **SO FAR AS CONCERNS ACTION OF THE MEMBER STATES** IS DEFINED IN ARTICLE 51(1) THEREOF […]
- 18. THAT ARTICLE OF THE CHARTER THUS **CONFIRMS THE COURT'S CASE-LAW** RELATING TO THE EXTENT TO WHICH ACTIONS OF THE MEMBER STATES MUST COMPLY WITH THE REQUIREMENTS FLOWING FROM THE FUNDAMENTAL RIGHTS GUARANTEED IN THE LEGAL ORDER OF THE EUROPEAN UNION.
- 19. THE COURT'S SETTLED CASE-LAW INDEED STATES, IN ESSENCE, THAT THE FUNDAMENTAL RIGHTS GUARANTEED IN THE LEGAL ORDER OF THE EUROPEAN UNION **ARE APPLICABLE IN ALL SITUATIONS GOVERNED BY EUROPEAN UNION LAW** […]
- 21. SINCE THE FUNDAMENTAL RIGHTS GUARANTEED BY THE CHARTER MUST THEREFORE BE COMPLIED WITH WHERE NATIONAL LEGISLATION FALLS WITHIN THE SCOPE OF EUROPEAN UNION LAW, SITUATIONS CANNOT EXIST WHICH ARE COVERED IN THAT WAY BY EUROPEAN UNION LAW WITHOUT THOSE FUNDAMENTAL RIGHTS BEING APPLICABLE. **THE APPLICABILITY OF EUROPEAN UNION LAW ENTAILS APPLICABILITY OF THE FUNDAMENTAL RIGHTS GUARANTEED BY THE CHARTER.**
- 22.WHERE, ON THE OTHER HAND, A LEGAL SITUATION DOES NOT COME WITHIN THE SCOPE OF EUROPEAN UNION LAW, THE COURT DOES NOT HAVE JURISDICTION TO RULE ON IT AND ANY PROVISIONS OF THE CHARTER RELIED UPON CANNOT, OF THEMSELVES, FORM THE BASIS FOR SUCH JURISDICTION.

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## II-2. The potential for (vertical and/ or horizontal) direct effect of Charter provisions

Key EUCFR provision:

- Article 52(5) makes a distinction between rights/ freedoms and principles
- **Rights are directly enforceable**
- **Principles can be 'judicially cognisable' only** in the interpretation of EU acts which implement them and/or when EU courts have to rule on their legality

Problems:

(1)EUCFR does not spell out clearly which of its articles are rights and which are principles

(2)Notion of "judicially cognisable" is not particularly clear but suggests that **EUCFR principles** cannot be directly effective

**(3)EUCFR rights** can be directly effective but does Art. 51(1) preclude them from being directly effective in the context of national civil proceedings between private parties (see e.g. AG Trestenjak in *Dominguez*) whereas EU General Principles of Law can be invoked in a private dispute…

# Does EUCFR rights apply to private disputes?

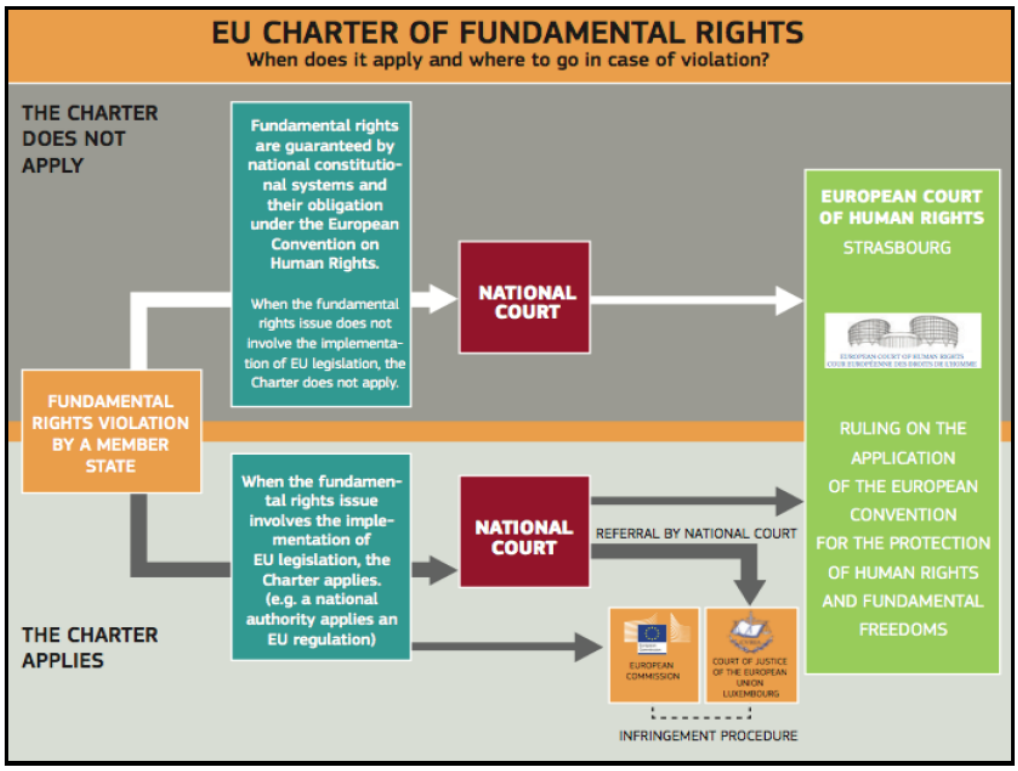
## EU case law

- Case C-282/10 *Dominguez* [2012]: Court avoided answering question of status of right to an annual period of paid leave (Art. 31 EUCFR) – is it a right or principle within meaning of Art. 52 CFR? – and its eventual horizontal direct effect
- Case C-176/12 *Association de Mediation Sociale* [2014]: Right of workers to information and consultation (Art. 27 EUCFR) **is not capable of being directly effective** in horizontal disputes as it lacks requisite clarity, precision and unconditionally to ground standalone claims

## UK case law:

- *Benkharbouche & Anor v Embassy of the Republic of Sudan* [2015] EWCA Civ 33:

- CoA: the right of access to justice contained in Article 47 of the Charter **is sufficiently precise to have horizontal direct effect** =
- Employment claims falling within scope of EU law can be brought by service staff of foreign embassies notwithstanding the restrictions laid down in UK State Immunity Act 1978



# Case of German Wine Ltd

## The national dispute:

German Wine Ltd is a winegrowers' cooperative. The labels on the necks of the bottles sold by German Wine bear the inscription: 'mild edition, easily digestible'.

The local authority responsible for supervising the marketing of alcoholic beverages objected to the use of the description 'easily digestible' on the ground that it is a 'health claim' within the meaning of EU Regulation No 1924/2006, which, pursuant to that regulation, is not permitted for alcoholic beverages.

German Wine Ltd brought an action before the relevant national court. Uncertain as to whether the prohibition of health claims in respect of wine is compatible with the fundamental rights of the freedom to choose an occupation and the freedom to conduct a business, in so far as producers or distributors of wine are prohibited from referring to their product as being easily digestible owing to its low acidity, even if that claim is correct, the national court decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

Is EU Regulation No 1924/2006, which prohibits a producer or distributor of wine from claiming that their wine is "easily digestible", even if that claim is inherently correct, compatible with Article 15(1) (freedom to choose an occupation) and Article 16 (freedom to conduct a business) of Fundamental Rights?

## Your task – Please answer the following questions:

- **Does the dispute fall within the scope of EU law?**

- **If the answer to the question above is in the affirmative, do you think that Articles 15 and 16 of the Charter should be interpreted as precluding the EU legislator from prohibiting a producer or marketer of wine from advertising a health claim of the kind at issue, even if that claim is correct?**

**Case of Mr Insouciant**

**The national dispute:**

Following alterations he made to his property, which is located in a landscape conservation are, without first obtaining landscape compatibility clearance, Mr Insouciant is ordered to restore his property to its former state by dismantling all work which had been carried out illegally in breach of the relevant national legislative provision.

Mr Insouciant decided to challenge that order before the competent national court on the ground that it is not compatible with the principle of proportionality, as a general principle of EU law as well as Article 17(1) of the EU Charter of Fundamental Rights, which provides as follows:

'Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law in so far as is necessary for the general interest.'

Uncertain as to whether the existence of multiple EU legal texts regulating the protection of the environment (e.g. Directive 2003/4/EC 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC; Directive 2011/92/EU of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment; etc.) brings this dispute within the scope of EU law, the national court decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Does Article 17 of the Charter preclude the application of a provision of national law such as the one at issue under which a landscape compatibility clearance may not be issued by way of retrospective regularisation in any cases where human activity has resulted in an increase in floor area and volume, regardless of whether a specific appraisal has been undertaken as to whether the activity in question is compatible with the features of the landscape of the particular site which merit protection?'

**Your task – Please answer the following questions:**

- **Does the dispute fall within the scope of EU law?**

- **If the answer to the question above is in the affirmative, do you think that Article 17 of the Charter and/or the principle of proportionality should be interpreted as precluding a provision of national legislation such as the one at issue in the main proceedings?**

**Case of Joe Drunk v. Head of administrative penalty cases in the 'traffic police' department**

**The national dispute:**

While carrying out a manoeuvre in reverse gear in a car park of the capital city, Mr Drunk collided with another vehicle owned by another resident of the capital city.

Following that accident, an administrative decision was taken in regard to Mr Drunk by which he was held liable for a 'minor traffic accident' and fined €20, and four points were deducted from his driving licence.

Mr Drunk lodged an appeal against that decision before the District Court, which dismissed the appeal by an order declaring it inadmissible on the ground that the Law on road traffic precludes any judicial review of a decision imposing a financial penalty of less than €50, and that the deduction of points from a driving licence is open to challenge only if it also imposes a financial penalty in excess of €50.

Mr Drunk then challenged the District Court's order before the relevant national appeal court and argued that the provisions of EU law in the area of freedom, security and justice which lay down, in particular, the principle of mutual recognition of judgments and judicial decisions, and those in the area of transport, preclude the non-recognition in national law of a right of appeal against such decisions on the deduction of points from driving licences.

Mr Drunk further argued that the relevant provisions of national law infringe the right to an effective remedy enshrined in Articles 47 and 48 of the Charter and in Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 ('the ECHR').

**Your task – Please answer the following questions:**

- **Does this dispute fall within the scope of EU Law?**

- **If the answer to the question above is in the affirmative, does EU law (including Article 47 of the Charter) preclude national legislation which does not recognise a right of appeal against decisions imposing penalties for what are described as 'minor' breaches of the road traffic regulations, even where those decisions not only impose a small financial penalty but also result in the deduction of points from a driving licence?**

- **Should the dispute fall within the scope of EU law, can the claimant also rely upon Article 6 of the ECHR?**

Case of Mr Forgotten

**National dispute:**

Mr Forgotten, unhappy with the fact that Google made it easy to find articles mentioning his name in connection with a real-estate auction, which was organised many years ago to recover his social security debts, lodged a complaint against the US Company before the court of an EU Member State.

In his complaint, Mr Forgotten argued that the national legislation on data protection, which itself merely transposed EU Directive 95/46 on the protection of individuals with regard to the processing of personal data, had to be reinterpreted in light of Articles 7 and 8 of the Charter to guarantee a right to require any operator of a search engine such as Google to remove from the list of results displayed following a search made on the basis of his name links to web pages published lawfully by third parties and containing true information relating to him, on the ground that that information may be prejudicial to him or that he wishes it to be 'forgotten' after a certain time.

For reference, Article 7 of the Charter guarantees the right to respect for private life, whilst Article 8 of the Charter expressly proclaims the right to the protection of personal data.

As for Directive 95/46, its Article 12 provides for an individual right to request the erasure and blocking of data 'in particulate because of the incomplete or inaccurate nature of the data', while its Article 14 provides for an individual right to object 'at any time on compelling legitimate grounds relating to his particular situation to the processing of data relating to him.'

**Your task – Please answer the following questions:**

- **Does this dispute fall within the scope of EU Law?**

- **If the answer to the question above is in the affirmative, should EU law be reinterpreted in the light of Articles 7 and 8 of the EU Charter so as to guarantee an individual right to request that his/her personal data be removed from accessibility via a search engine?**

**Case of Unhappy Workers' Trade Union v. Enterprise XPTO**

**The national dispute:**

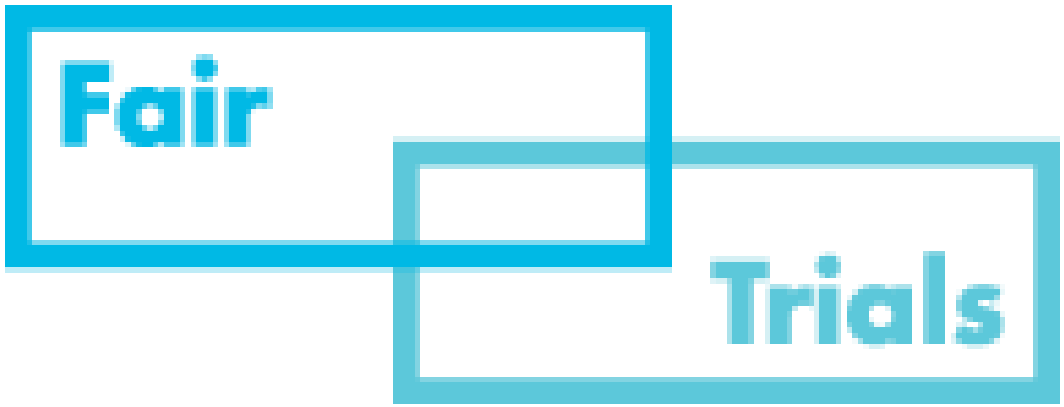
The Portuguese Budget Law for 2013 determined that in all public sector enterprises, that salaries above 1.500 € a month would be reduced by 10%, and such couldn't be derogated by any collective agreement. In the explanatory statement, it is stated that this wage reduction is imposed due to the need to reduce the public deficit arising from the requirements of the Treaty on Stability, Coordination, and Governance in the Economic Monetary Union (commonly referred to as "Budget Treaty").

Publicly owned Enterprise XPTO, proceeded to this wage reduction, in compliance with the so called Law. The Unhappy Workers' Trade Union brought an action before the Labour Court of Lisbon where it raises the issue concerning the incompatibility of this pay reduction with the Charter of Fundamental Rights of the European Union, notably, with the principles of equality and non-discrimination enshrined in articles 20 and 21 (since this reduction results in an unfavourable treatment between public sector workers and private sector workers), the right to collective bargaining enshrined in article 29 (such reduction can't be derogated by collective bargaining) and the right to fair and just working conditions enshrined in its article 31 (1) (such reduction, not foreseeable, may affect the confidence in the workers' income stability and their capability to meet their previously contracted financial obligations).

**Your task -Please answer the following questions:**

Does this dispute fall within the scope of the EU law?

-If the answer to the question is in the affirmative, do you think there is breach of articles 20, 21, 29 or 31 (1) of the European Charter of Fundamental Rights?




# The Charter
# in criminal practice

**Academy of European Law, Lisbon 4 May 2015**

# Overview

**Contents**

- The Charter in cross-border cases
  - Charter as exception to mutual recognition
  - *Ne bis in idem* (one isolated issue)
  - Charter and conflicts with national constitutions
- The Charter in domestic cases
  - Charter and the Roadmap Directives
  - Charter as a minimum standard vis-à-vis constitutions
  - Possibility of EU law leading the ECHR in this area

# Overview

**Approach**

- Fair Trials works mostly with defence lawyers
- Legal Experts Advisory Panel: 140 lawyers, 28 EU States
- This audience is mostly prosecutors & judges
- So, I will outline
  - Charter issues of interest to LEAP
  - Arguments you can expect to receive from LEAP
  - Questions we think judges should refer to CJEU (**Q**)

# The Charter in cross-border cases

**Charter as exception to mutual recognition**

- Important background: Opinion 2/13 re Accession to ECHR
- Comments on Justice & Home Affairs (paragraphs 192-195)
- « In so far as the ECHR would … require a Member State to check that another Member State has observed fundamental rights, even though EU law imposes an obligation of mutual trust between those Member States, accession is liable to upset the underlying balance of the EU and undermine the autonomy of EU law »
- Prof. Steve Peers: « we now have a moral duty to reject the EU's accession to the ECHR ». Bosh.

**Charter as exception to mutual recognition**

- But it is clear that the exception is there
  - Article 1(3) European Arrest Warrant « shall not have the effect of modifying the obligation to respect FRs » etc.
  - Case C-396/11 *Radu* judgment only case yet to ask whether this is a functional / descriptive provision, but the general issue did not genuinely arise on the facts
  - Judge Lars Bay Larsen, LEAP Conference, 2015: see recital 19 of Directive 2014/41/EU on European Investigation Order: « presumption of compliance … that presumption is rebuttable »

# The Charter in cross-border cases

**Specific Charter / mutual recognition issues**

- Article 4/19(2) (Article 3 ECHR)
  - *MSS v Belgium & Greece* and earlier ECtHR case-law
  - Case C-411/10 *NS*: MSs cannot transfer where « cannot be aware that systemic deficiencies in the asylum system of the responsible Member State amount to substantial grounds for believing [that there is an Article 3 risk] »
  - These cases are the closest guidance in terms of the operation of the EAW (parallels with Dublin system)

# The Charter in cross-border cases

**Specific Charter / mutual recognition issues**

- Article 4/19(2) (Article 3 ECHR)
  - French Court of Cassation decisions of 2007
    - EAWs issued in respect of refugees (Turkey, Iran)
    - Executing judge should have sought assurances
  - British courts (2013 onwards)
    - Refusals of EAWs based on Article 3 ECHR
    - ECtHR judgments against issuing state are decisive
    - Assurances required from issuing state
  - **Q** Approach to ECtHR pilot judgments, assurances etc.

# The Charter in cross-border cases

**Specific Charter / mutual recognition issues**

- Article 47/48 (fair trial & defence rights) & EAW
  - BE Court of Cassation (2013): upheld decision refusing EAW for risk of Charter breach in Spain (fact-specific)
  - IE Supreme Court (2014): risk of « flagrant denial of justice » (*Soering*) in Romania (conviction v Roma citizen)
  - Advocate-General Sharpston (CJEU)
    - « Flagrant denial » test « unduly stringent » (*Radu*)
    - Mutual recognition conditioned on compliance with Roadmap Directives by issuing JA (C-60/12 *Balaz*)
  - **Q ?** Dialogue of national courts more attractive right now

# The Charter in cross-border cases

**Specific Charter / mutual recognition issues**

- Article 49 (proportionality of sentences) & EAW
  - EAW handbook: consider Article 49 before issuing EAW
  - *Prosecutor v C* (Stuttgart regional court): Article 49(3) a general principle also binds the executing court
  - Polish court used this to prevent issue of EAW, despite legality rule (which is to be reformed as fo 07/2015)
  - Directive 2013/48/EU will increase role of issuing court, which can consider proportionality *at time of execution*
  - **Q** Does the Charter require issuing JA to reconsider EAW in light of new info received under new arrangements?

**Charter Article 50 *ne bis in idem*: transnational aspect**

- Article 54 CISA case-law on final disposal
- Things that do amount to case being 'finally disposed of'
  - Payment of fine which bars further prosecution (Cases C-187/01 and C-385/01 *Gözütok* and *Brügge*)
  - Final (trial) acquittal for lack of evidence (Case C-150/05 *Van Straaten*)
  - Decision of 'non-lieu' by pre-trial chamber (Case C-398/12 *M*)

**Charter Article 50 *ne bis in idem*: transnational aspect**

- Article 54 CISA case-law on final disposal
- Things that do amount to case being 'finally disposed of':
  - Imposition of a suspended sentence (Case C-288/05 *Kretzinger*)
  - Conviction in absentia, where person entitled to retrial (Case C-150/05 *Van Straaten*)
  - Acquittal due to statute of limitations (Case C-467/04 *Gasparini*)

**Charter Article 50 *ne bis in idem*: transnational aspect**

- Article 54 CISA case-law on final disposal
- Things that do not amount to case being 'finally disposed of':
  - Decision stopping case due to lis pendens in another MS (Case C-469/03 *Miraglia*)
  - Police suspension not precluding further prosecution (Case C-491/07 *Turansky*)
  - [Earlier decision finally convicting a person of facts linked to but not the same as those in issue in an EAW (Case C-261/09 *Mantello*)]

# The Charter in cross-border cases

**Charter Article 50 *ne bis in idem*: transnational aspect**

- Article 54 CISA case-law on final disposal
- Important – CJEU on the objective of Article 54 CISA:
  - « to ensure legal certainty through respect for decisions of public bodies which have become final » (Case C-129/14 PPU *Spasic*)
  - « ensure that a person whose trial has been finally disposed of is not prosecuted for the same acts in the territory of several Member States on account of his having exercised his right to freedom of movement » (Cases C-187/01 and C-385/01 *Gözütok* and *Brügge*)
- This has fundamental right status (Article 50 Charter)

# The Charter in cross-border cases

**Charter Article 50 *ne bis in idem*: transnational aspect**

- A forgotten issue: non-removal of EAW / Schengen alerts
- Context: European Arrest Warrant (all cases)
  - *Ne bis* refusal ground applied, person not extradited
  - But EAW / Schengen alerts remain in place
  - Defence lawyers advise: you risk arrest in other MSs
  - There is no mutual recognition of refusal decisions
- To enforce Charter right, X must take action before issuing JA
- Yet, X may lack standing to seek closure of case – must travel
- **Q** Does Charter oblige 'recognition' of *ne bis* EAW refusal (!?)

# The Charter in cross-border cases

**Charter and conflicts with national constitutions**

- Case C-399/11 *Melloni*
  - Criticised for establishing Charter as 'uniform standard'
  - If the Member States agree a full harmonisation at the minimum level prescribed by Charter, CJEU has no option
- Case C-169/13 PPU *Jeremy F*
  - Concerned ability to provide second instance remedy, as required by constitutional right to judicial protection
  - Permissible, as FD did not exclude this, provided that the time-limits are respected: margin for manœuvre
- EAW: proportionality checks in executing Member State?

# The Charter in domestic cases

**Charter in criminal procedure: the Roadmap Directives**

- General background
  - Roadmap for strenghtening procedural rights, 2009
  - Directive 2010/64/EU (interpretation & translation)
  - Directive 2012/13/EU (right to information / case file)
  - Directive 2013/48/EU (access to a lawyer)
  - Proposed directive on legal aid
  - Proposed directive on presumption of innocence
  - Proposed directive on safeguards for children

# The Charter in domestic cases

**Charter in criminal procedure: the Roadmap Directives**

- These measures mostly 'codify' ECtHR jurisprudence
- E.g. Article 7(1) of the Right to Information Directive
  - ECtHR re Article 5(4) ECHR « information … essential for the assessment of the lawfulness of a detention should be made available in an appropriate manner »
  - Directive: « Member States shall ensure that documents … essential to challenging effectively the lawfulness of the arrest or detention are made available »
- Charter right also interpreted in line with ECtHR case-law
- So is the Charter essentially decoractive in this context?

# The Charter in domestic cases

**Possible areas of Charter value-add**

- Invalidity
- Charter Article 48 = Article 6(3) ECHR (inc. legal assistance)
- Article 6(3)(c) *Salduz* case-law: only very limited possibility to derogate from access to a lawyer, for very important reasons
- This represents a minimum for interpretation of the Charter
- This approach is followed in the Access to a Lawyer Directive
- Proposed directive on safeguards for children
  - Derogation on proportionality grounds in minor cases
  - School of thought that this is incompatible with Charter

# The Charter in domestic cases

**Possible areas of Charter value-add**

- Direct applicability / invocability
- Provisions of the Roadmap Directives may have direct effect
- Provisions often called 'right to' + impose clear obligations
    - Article 7(1): lawyers in France, Spain, Luxembourg all very confident that this provision is directly effective
- But some are very broad e.g. obligations on Member States to ensure satisfactory quality in interpretation
- Charter rights, by contrast, are directly applicable and can be invoked by citizen within the scope of application of EU law
- This is useful: ECHR status differs (e.g. France / UK positions)

# The Charter in domestic cases

**Possible areas of Charter value-add**

- Help to resolve interpretation issues
- Example 1 – current case we are working on
  - Prosecution in Member State A, cross-border aspects
  - File contains file from Danish investigation (in Danish)
  - Directive 2010/64/EU (interpretation & translation)
    - Confers right to translation on suspects « who do not understand the language of the proceedings »
    - **Q** Does this provide basis to obtain translation into the court's language to enable lawyer to review it?
  - We say: Charter (Article 48) favours broad interpretation

# The Charter in domestic cases

**Possible areas of Charter value-add**

- Help to resolve interpretation issues
- Example 2 – Assange case
  - Limited access to documents (no copies, no notes)
  - Article 7(1) Directive 2012/13/EU (right to information) says docs must be 'made available'
  - See our opinion, in the materials in your folders
  - Charter, informed by ECtHR case-law, points to effective opportunity to discuss documents and frame arguments
- Again, can be a **Q** – better to get this now from CJEU than three years later from ECtHR

# The Charter in domestic cases

**Possible areas of Charter value-add**

- Remedies / judicial protection
- Roadmap Directive impose procedural obligations
- Remedies left to national autonomy
  - Interpretation & Translation Directive: no provision
  - Right to Information Directive: 'right to challenge'…
  - Access to a Lawyer Directive – most explicit remedies:

  « without prejudice to national laws regarding the admissibility of evidence … in the assessment of statements made or evidence obtained … the rights of the defence are respected » (*Salduz* points to exclusionary remedies)

# The Charter in domestic cases

**Possible areas of Charter value-add**

- Remedies / judicial protection
- Article 47 right to a fair trial / effective remedy
- Requires remedy for violation of Roadmap Directives
- Example: Interpretation & Translation Directive
  - Right to interpretation of sufficient quality
  - Very little provided on consequences of not providing it
  - Vania Costa Ramos (LEAP Advisory Board) re Portugal: failure to provide interpretation entails invalidity; quality issues to be regarded as an irregularity
- This could be quite controversial, far reaching …

# The Charter in domestic cases

**Charter and national law: minimum, not single standard**

- The Roadmap Directives are explicitly 'minimum rules'
- The *Melloni* paradigm does not apply
  - *Akerberg Fransson* para. 59: permissible to apply local fundamental rights standards on *ne bis in idem* despite these being above Article 50 of the Charter as Member States' action is not « fully determined » by EU law
  - Joined Cases C-57/09 and C-101/09 *B* and *D*: permissible to grant constitutional asylum to person who is excluded from asylum within the meaning of the EU asylum *acquis*
- Application of higher standardwill not impede cooperation – « unity » of EU law can still be preserved?

# The Charter in domestic cases

**EU law / Charter and the ECHR**

- Variant 1 (Article 52(3) Charter) EU law may go higher
- Example: access to the case file at the pre-trial stage
  - Under the ECHR
  - Article 5(4) applies only in judicial review of detention
  - Article 6(3) case-law recognises that the efficient conduct of an investigation may require secrecy.
  - Case-law seems to accept general (legal) bar on access to the file at early stages, justification need not be specific

# The Charter in domestic cases

**EU law / Charter and the ECHR**

- Variant 1 (Article 52(3) Charter) EU law may go higher
- Example: access to the case file at the pre-trial stage
  - Under Article 7 of the Directive
  - Article 7(1) probably applies just to judicial review
  - Article 7(2) / (3) sets out a right of access to the case file 'at the latest' before submission of the case to trial
  - Article 7(4) permits restriction on access to the file on specific grounds, in the specific case, judicially controlled

# The Charter in domestic cases

**EU law / Charter and the ECHR**

- Variant 2: EU law helps develop ECtHR case-law (*AT v Lux*)
- Example: prior conversation with police
  - Status quo ante in the ECtHR case-law
  - *Salduz v Turkey*: Access to lawyer 'as from first interrogation by police' – this is still being clarified
  - Directive 2013/48/EU on access to a lawyer
  - « Member States shall ensure that suspects / accused persons have the right to meet in private … with the lawyer … including prior to questioning » (Article 3(3)(a))

# The Charter in domestic cases

**EU law / Charter and the ECHR**

- Variant 2: EU law helps develop ECtHR case-law (*AT v Lux*)
- Example: prior conversation with police
  - Fair Trials intervention in *A.T. v Luxembourg*
  - ECtHR should take into account the provisions of the Directive as indication of consensus on minimum rules
  - A.T. v Luxembourg judgment (09.04.2015)
  - Refers explicitly to Directive as a basis for finding
  - Access to a lawyer requires prior opportunity for private consultation with lawyer prior to the first interrogation
- In future: **Q** to CJEU during national phase, not ECtHR *ex post*

# The Charter in domestic cases

**EU law / Charter and the ECHR**

- Variant 3: EU law delays implementation of ECHR standards
- Example: legal assistance during questioning
  - Status quo in Netherlands, pre-2014
  - General rule: no access to legal advice during the questioning – only beforehand (with some exceptions)
  - Courts will follow clear lines of ECtHR case-law
  - ECtHR case-law since *Salduz v Turkey*
  - *Navone v Monaco*: access should be provided during. Several other cases also confirmed this. Beyond doubt.

# The Charter in domestic cases

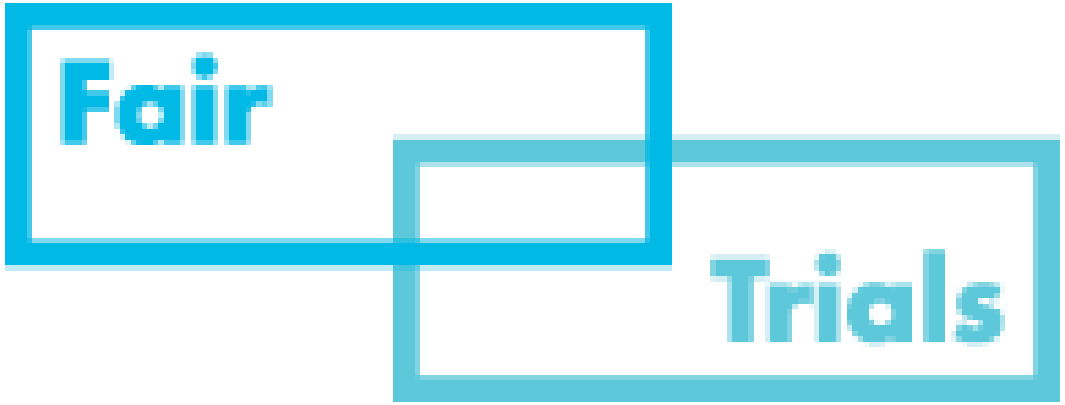
**EU law / Charter and the ECHR**

- Variant 3: EU law delays implementation of ECHR standards
- Example: legal assistance during questioning
  - Directive 2013/48/EU
  - Lawyer must have right to be present and to participate effectively in questioning (Article 3(3)(b))
  - 2014 case before Dutch Supreme Court
  - AG Spronken suggested it should follow ECHR / EU line
  - Court declined to do so, inviting legislator to take action
  - LEAP (NL): Need for transposition of Directive used as justification for not following clear ECtHR position…

# The Charter in domestic cases

**EU law / Charter and the ECHR**

- Conclusion:
- There are many unanswered questions!
- Seek guidance from CJEU on Directives / Charter – it will help




**Thanks!**

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# PROTECTING CRIMINAL DEFENCE RIGHTS THROUGH EU LAW: OPPORTUNITIES AND CHALLENGES

Alex Tinsley*

## ABSTRACT

*The article examines the concretisation of criminal defence rights under EU law through a set of Directives designed to strengthen procedural safeguards. The article reviews the origins of the new measures, designed to provide a stronger basis for judicial cooperation based on mutual trust. It examines the shortcomings of the existing system of protection of fair trial rights under the European Convention on Human Rights and considers whether, and how, EU law can improve the situation. The article recognises that the new measures, monitored and enforced by the European Commission, provide new possibilities for civil society organisations. However, it argues that the main opportunity is for enhanced protection of defence rights in the national courts. The measures themselves, the Charter of Fundamental Rights and the possibility to seek timely guidance from the Court of Justice of the EU constitute new tools which, if national courts can be persuaded to use them, could appreciably advance fair trial rights protection in the EU. The experiment will reveal the usefulness of EU law as a driver of fundamental rights compliance in the post-Lisbon era.*

**Keywords:** Access to documents essential to challenging detention; Criminal proceedings; Fair trial; Minimum standards; Roadmap on strengthening procedural rights

## 1. INTRODUCTION

'EU criminal law' now means something more concrete than it has so far. Having pressed ahead very fast with the programme of cross-border cooperation measures (primarily the European Arrest Warrant[1] ('EAW')), the Member States have, since

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1 Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (OJ 2002 L 190, p. 1).





2009, agreed common minimum rules governing procedural rights in a belated effort to ensure that standards in national criminal proceedings across the EU justify the mutual confidence on which these cooperation systems are based.

The product is a set of directives[2] adopted under the Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings[3] (the 'Roadmap'), regulating aspects of criminal procedure (the 'Roadmap Directives'). The aim of these measures is to concretise and facilitate compliance with human rights standards already well-established in the case-law of the European Court of Human Rights ('ECtHR') but which are not always complied with in practice. With the measures adopted under the Roadmap comes the application of the Charter of Fundamental Rights of the EU (the 'Charter'), hailed as an important new source of human rights protection but which, on its face, merely re-affirms existing rights. As the implementation deadlines arrive, this article asks the question: why should EU law make a difference, and what are the legal, institutional and practical challenges which must be met to ensure that it does?

The answer proposed here is that the Roadmap Directives represent a clearer, more enforceable framework for enforcing defence rights than the existing system. They allow for European Commission (the 'Commission') enforcement, which creates a whole new area of activity for civil society organisations committed to the protection of defence rights. The combination of the Roadmap Directives, the Charter and the involvement of the Court of Justice of the EU (the 'Court of Justice') also presents an opportunity to help shift responsibility for the protection of defence rights upstream from the ECtHR to the national courts. However, in order to make the most of the opportunity, the institutions of criminal justice must learn new skills and embrace EU law as part of the toolbox for criminal practice.

This article aims to foster discussion regarding these new activities. It identifies the key characteristics of the Roadmap Directives, underlining where appropriate the distinctions between these and earlier 'third-pillar' measures. Occasional reference is made to evidence supplied by criminal defence practitioners in the context of a series of experts' meetings held by Fair Trials International, to provide the reader with recognisable context. The article seeks to explore the advantages, legal and practical, of using EU law to tackle common problems, and the practicalities of involving the

2 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 (OJ 2010 L 280, p. 1); Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings (OJ 2012 L 215, p. 19); and 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 (OJ 2013 L 294, p. 1).

3 Resolution of the Council of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings (OJ 2009 C 295, p. 1).

Court of Justice in the process. Ultimately, ensuring that the eloquent statements of the Treaty of Lisbon acquire concrete meaning depends on the profession meeting these challenges.

## 2. BACKGROUND: WHY DID THE EU LEGISLATE IN CRIMINAL PROCEDURE?

### 2.1. MUTUAL RECOGNITION AND MUTUAL TRUST

The creation of an 'area of freedom, security and justice' envisaged by the Treaty on the Functioning of the European Union ('TFEU') began with the 'security' aspect. The flagship measure, the EAW, replaced extradition between governments with a simplified process of surrender between judicial authorities. One would 'issue' a judicial decision; the other would 'execute' it. Traditional aspects of extradition agreements were removed: nationals could no longer be protected from extradition, the requirement for dual criminality was removed, and tight time-frames were established. The approach was then followed to enable other cross-border activities such as the freezing of property and evidence,[4] confiscation,[5] and the transfer of prisoners without their consent.[6] In human rights terms, the legal foundations for these systems have been described in the recent *Jeremy F.* judgment of the Court of Justice: 'the principle of mutual recognition on which the [EAW] system is based is itself founded on the mutual confidence between the Member States that their national legal systems are capable of providing equivalent and effective protection of the fundamental rights recognised at European Union level, particularly in the Charter, so that it is therefore within the legal system of the issuing Member State that persons who are the subject of a[n EAW] can avail themselves of any remedies'.[7]

### 2.2. THE SHAKY FOUNDATIONS OF MUTUAL TRUST

#### *2.2.1. The fact of non-compliance with the ECHR*

In practice, however, confidence between Member States has been eroded by the perception that national systems are not always meeting the expectations placed upon

4 Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence (OJ 2003 L 196, p. 45).

5 Council Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders (OJ 2006 L 328, p. 59).

6 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 (OJ 2008 L 327, p. 27).

7 Case C-186/13 PPU *Jeremy F* [2013] ECR I-0000, paragraph 50.





them. An issue which has proved particularly thorny is the material conditions in which those extradited are detained pending trial or when serving a sentence. With the ECtHR issuing 'pilot judgments' against Member States finding that conditions in some of their prisons systematically breach Article 3 ECHR,[8] the presumption that those Member States will ensure respect for the rights of those surrendered becomes harder to sustain. The High Court in Northern Ireland, for instance, recently refused to execute an EAW issued by a Lithuanian judicial authority, finding it likely the person would be detained in inhuman or degrading conditions.[9] The detention issue is, however, symptomatic of a broader concern about the mutual recognition system, rooted in the fact that, in all areas, Member States' subscription to ECHR standards does not provide a sufficient guarantee that these will be respected. One commentator puts it more bluntly: mutual recognition is predicated on a fiction.[10]

#### *2.2.2. The challenges of the ECHR system*

The problem with the mutual recognition concept is that it assumes the full effectiveness of the ECHR system, in which the ECtHR is currently shouldering too much of the burden. The President of the ECtHR has recently reiterated that 'the Convention is a shared responsibility… the primary responsibility for securing the Convention rights and freedoms falls on the Contracting States themselves. This means in particular acting to prevent violations and establishing remedies to afford redress where breaches are committed'.[11] The ECtHR, as well as providing a subsidiary remedy when things go wrong individual cases, also plays a pedagogical function to assist in this process: its 'decisions remind governments about the need for changes to laws and procedures to avoid future violations… National legislators and courts must take into account the [ECHR] as interpreted by [the ECtHR] – even in judgments concerning violations that have occurred in other countries'.[12] The ECtHR undertakes various activities to assist Contracting States in meeting these responsibilities, such as translating key case-law into non-official languages and providing training to national judiciaries and bar associations.[13]

However, the Contracting States face real challenges in ensuring compliance within their domestic systems. The Council of Europe institutions have expressed

8 See *Orchowski v. Poland* App. No 17885/04 (Judgment of 22 August 2009); *Torregiani and Ors v. Italy* App. No 43517/09 (Judgment of 8 January 2013).

9 *Lithuania v Liam Campbell* [2013] NIQB 19. The Supreme Court of the United Kingdom refused permission to appeal on 31 July 2013.

10 N. Mole, Editorial, *European Human Rights Law Review* 4 (2012), p. 363.

11 Speech given by Sir Nicholas Bratza, President of the ECtHR, on the occasion of the opening of the judicial year, 27 January 2012.

12 Speech given by Mr Thomas Hammarberg, Council of Europe Commissioner for Human Rights on the occasion of the opening of the judicial year, 27 January 2012.

13 See the description of the translation work undertaken with the Human Rights Trust Fund (http://hub.coe.int/human-rights-trust-fund).

concern at the lack of regard being had to ECtHR case-law, for instance in the context of pre-trial decision-making by frontline judicial authorities in Poland.[14] In addition, it has been noted that, whilst dialogue between the ECtHR and national courts takes place informally and through decided cases, there is no 'formal, direct channel' through which national courts can seek the ECtHR's advice.[15] Finally, whilst the Contracting States may take seriously their obligations to keep national systems under review, the process of distilling clear principles from a nebulous, developing body of case-law, often concerning other countries, and reflecting these in national judicial systems presents its own challenges.

As a result, compliance with the ECHR is not optimal. A 2012 study revealed that Member States had, collectively, violated Articles 5 and 6 ECHR over 500 times in criminal cases in the preceding five years.[16] Recent examples include failures by EU Member States to provide free interpretation in criminal proceedings;[17] to provide sufficient access to documents to enable an effective challenge to pre-trial detention;[18] and to ensure respect for the right to be assisted by a lawyer,[19] in breach of well-established standards. And it is reasonable to suppose that the scale of the problem is, in reality, greater, with many violations going unchallenged and undetected. Indeed, one commentator, explaining why EU action became necessary to enhance respect for defence rights, notes the challenges faced by someone contemplating taking a case to the ECtHR if they are let down by a national system: they must find a lawyer willing to exhaust the local remedies and, within six months,[20] make the application to the ECtHR, possibly for no immediate fee. Then comes a long wait for an admissibility decision, a final decision, and finally implementation. If the person has a short to medium term prison sentence and will in any case be detained while the case is considered, they may understandably decide to take the injustice on the chin and move on, rather than seek an *ex-post* remedy from the ECtHR, with little prospect of significant compensation.[21]

### *2.2.3. Lack of agreement on fundamental rights*

The foundations of the mutual trust assumption have also been undermined by the lack of agreement on exactly what fundamental rights protection entails, as the

14 See *Kauczor v. Poland* App. No 45219/06 (Judgment of 3 February 2009), paragraphs 34 and 35.

15 Speech of Sir Nicholas Bratza, cited above note 10.

16 Fair Trials International, *Defence Rights in the EU*, 2012, paragraph 16. The figure combines the violations of each of the Member States, which are profiled individually in the Annex.

17 *Hovanesian v. Bulgaria* App. No 31814/03 (Judgment of 21 December 2010).

18 *Igna v. Romania* App. No 21249/05 (Judgment of 26 November 2013).

19 *Martin v. Estonia* App. No 35985/09 (Judgment of 30 May 2013).

20 At the time of writing; Protocol No. 15 to the ECHR, opened for signature on 24 June 2013, will reduce this period to four months upon its entry into force after ratification by the Parties to the ECHR.

21 C. Morgan, 'Where are we now with EU procedural rights?', *EHRLR 4* (2012), p. 427.





experience with the *Salduz*[22] case has showed. When the ECtHR decided, in 2008, that Article 6 ECHR required that access to a lawyer be provided as from the first interrogation by police, such that the rights of the defence would in principle be irretrievably prejudiced when incriminating statements made during police interrogation without access to a lawyer were used for a conviction, this caused waves of litigation within the Member States. In France, litigation before the French Constitutional Council and Court of Cassation led to urgent reforms of the system of *garde à vue* (police custody), where hitherto the lawyer had been excluded from initial police interviews.[23] The UK Supreme Court held that the Scottish system, permitting initial interrogation without a lawyer and subsequent reliance on the evidence, was incompatible with Article 6 ECHR.[24] The experience suggests that, in this context, Member States' different approaches to defence rights also amounted to variable levels of protection, inconsistently with the assumptions underlying the mutual recognition systems.

## 2.3. THE ROADMAP

The Member States, realising that mutual recognition needed stronger foundations, agreed through the Lisbon Treaty to confer upon the European Union the competence to legislate in relation to the rights of individuals in criminal proceedings.[25] The legal basis provides for regulation in the form of directive, a step up from the weaker form of law provided for under the former intergovernmental legal basis (the distinction is elaborated below). However, reflecting the mutual recognition context from which it originated, it provides for a limited form of approximation: 'minimum rules' which would 'take into account the differences between the legal traditions of the Member States.[26] The intention was thus to impose common basic standards whilst ensuring deference to the autonomous identities of national criminal justice systems. The Council of the European Union, on the eve of the Lisbon Treaty entering into force, issued the Roadmap, with a simple objective: 'For the purpose of enhancing mutual trust within the European Union, it is important that, complementary to the Convention, there exist European Union standards for the protection of procedural rights which are properly implemented and applied in the Member States.'[27]

22 *Salduz v. Turkey* App. No 36391/02 (Judgment of November 2008); see in particular paragraph 55.

23 Decision of the *Conseil Constitutionnel* of 30 July 2010 No 2010–14/22 QPC; Judgments of the Court of Cassation of 31 May 2011 (Nos 2673, 2674, 3107 et 3049); for a factual narrative of the events, see A. Dorange and S. Field, 'Reforming defence rights in French police custody: a coming together in Europe?', *International Journal of Evidence & Proof* 16 2 (153) of 1 April 2012.

24 *Cadder v Her Majesty's Lord Advocate (Scotland)* [2010] UKSC 43.

25 Article 82(2) of the Treaty on the Functioning of the European Union ('TFEU').

26 Article 82(2) TFEU.

27 Recital 8.

Of the programme of measures envisaged, three have been adopted to date: the 'Translation and Interpretation Directive',[28] requiring adequate language assistance at police stations and courts; the 'Right to Information Directive',[29] laying down rules as to the information which suspects must be provided upon arrest and charge and the provision of access to case-file documents; and the significant 'Access to a Lawyer Directive',[30] largely inspired by the *Salduz* judgment, spelling out the right to legal advice in criminal proceedings including before and during police questioning. Further measures on the presumption of innocence, legal aid and vulnerable suspects have recently been proposed by the Commission.[31]

In accordance with the Roadmap's stated objective, the Roadmap Directives seek to strengthen mutual trust. Each contains the same recital stating that 'although all the Member States are party to the ECHR, experience has shown that that alone does not always provide a sufficient degree of trust in the criminal justice systems of other Member States'.[32] The Roadmap Directives seek to achieve their aim primarily through clarification and reinforcement of the ECHR standards: 'the right to interpretation and translation for those who do not speak or understand the language of the proceedings is enshrined in Article 6 of the ECHR, as interpreted in the case-law of the [ECtHR]. This Directive facilitates the application of that right in practice';[33] 'the right to information about procedural rights, which is inferred from the case-law of the [ECtHR], should be explicitly established by this Directive'.[34] The simple question arises: if ECHR obligations do not suffice to inspire confidence in the underlying standards, why should reiterating those obligations as EU law provide any more reassurance? This question, the focus of this article, is explored below.

## 3. WHY SHOULD EU LAW MAKE A DIFFERENCE?

Whilst a sea-change should not be expected, the Roadmap Directives should be seen as an opportunity to increase compliance with basic defence rights because of the

28 Cited above, note 2.

29 Cited above, note 2.

30 Cited above, note 2.

31 Proposal for a directive of the European Parliament and of the Council on the strengthening of certain aspects of the presumption of innocence and of the right to be present at trial in criminal proceedings (COM(2013) 821 final); Proposal for a directive of the European Parliament and of the Council on provisional legal aid for suspects or accused persons deprived of liberty and legal aid in European arrest warrant proceedings (COM(2013) 824 final); Proposal for measures on special safeguards for children and vulnerable adults suspected or accused in criminal proceedings (COM(2013) 822 final).

32 See the Right to Information Directive, recital 7; the Interpretation and Translation Directive, recital 6; and the Access to a Lawyer Directive, recital 6.

33 Interpretation and Translation Directive, recital 14.

34 Right to Information Directive, recital 21.





process of their agreement, the possibilities for the Commission and civil society to assist the Member States in bringing national systems into compliance, and, above all, the possibility for individual defendants to invoke their EU law rights in national courts, and for those national courts to cooperate with the Court of Justice. Each aspect is discussed in overview below before a closer examination of a specific provision of the Right to Information Directive in section 4.

### 3.1. AGREEMENT AND IMPLEMENTATION

As mentioned above, the Roadmap Directives clarify and codify ECHR standards and lay down common rules to facilitate their application. It should be recognised that the process of agreement of the Roadmap Directives may of itself have helped to fashion a common understanding of international human rights norms, as it has in other areas of law. By way of example, in the asylum context, prior to the adoption of the Refugee Qualification Directive,[35] there were different approaches within the EU to the question whether non-state actors could be considered authors of 'persecution' within the meaning of the 1951 Convention relating to the Status of Refugees (the '1951 Convention'). For a minority of Member States, a person at risk of harm from non-state actors could only qualify as a refugee if the threat was wilfully tolerated or endorsed by the state; others, and the United Nations High Commissioner for Refugees, recognised that the inability of the state to provide protection would also provide grounds for protection.[36] In the Refugee Qualification Directive, setting common minimum standards regarding the interpretation of the 1951 Convention, the Member States agreed on the broader approach. The Roadmap Directives can, likewise, contribute to the development of a common understanding of certain basic defence rights, such as the right of access to documents for the purposes of challenging pre-trial detention (see part 4).

### 3.2. EUROPEAN COMMISSION MONITORING AND ENFORCEMENT

The Roadmap Directives also bring with them the potential for monitoring and enforcement by the Commission. This is a novelty in the area of criminal law. The existing EU crime and policing measures adopted prior to December 2009 fell outside the Commission's enforcement powers applicable under the Treaty on the European Community. Whilst the Treaty of Lisbon brought criminal law measures within the

35 Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (OJ 2004 L 304, p. 12), which, as of 21 December 2013, was abrogated by a recast directive.

36 United Nations High Commissioner for Refugees, *Asylum in the European Union: a study of the implementation of the Qualification Directive*, November 2007.

main treaty architecture, the Commission's powers remain as they were until December 2014 by virtue of transitional provisions.[37] Thus, in terms of criminal law, legislatures are still used to a certain margin of flexibility, safe from infringement actions in respect of non-compliant implementing laws. Indeed, the Commission has occasionally expressed its disappointment at the Member States' inclusion of provisions allowing refusals of EAWs on grounds not specified in the EAW Framework Decision,[38] yet it has been essentially powerless to take action. Detrimentally for the defence, this has meant that potentially useful measures such as the Framework Decision on the European Supervision Order[39] have simply not been implemented in many countries.[40] By contrast, the Commission will be able to monitor implementation of the Roadmap Directives knowing that it has greater coercive power at its disposal. Given the centrality of these measures to the mutual recognition system, it is to be expected that the possibility will be taken seriously.

Commission oversight should not, of course, be seen as a panacea. In some cases, identifying an infringement of a provision of EU law is a simple question of law: 'the letter provided to a person upon their arrest in this Member State does not include a reference to the right to remain silent, as required by the Right to Information Directive',[41] for instance. In relation to other requirements fixed by the Roadmap Directives, it may be less straightforward for the Commission to assess compliance at the coal face where the national legislation, on its face, complies with the directive. How is the Commission to determine, for instance, whether the Member States are ensuring that interpretation in police interviews is 'of a quality sufficient to ensure the fairness of proceedings', as required by Article 2(8) of the Interpretation and Translation Directive, with any degree of certainty?

Nevertheless, as with all EU legislation, the Commission must report on implementation of the Roadmap Directives,[42] and civil society organisations may be well placed to make the reporting exercise a useful one. The experience with the Commission's Green Paper on Detention[43] provides a model: whilst the Governments responded explaining how their laws satisfied international standards on detention, bar associations and civil society helped to complete the picture by supplying (at

37 Article 10(1) of Protocol 36 to the TFEU.

38 See, for example, COM(2006) 8 final, point 2.2.1.

39 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 (OJ 2009 L 294, p. 20).

40 An implementation from the Commission, expected in the final quarter of 2013, will provide more detail.

41 Reportedly the case in Lithuania in May 2013: Communiqué issued after the meeting 'Advancing Defence Rights in the EU', Lithuania, paragraph 29.

42 By 27 October 2013 (Interpretation and Translation Directive), 2 June 2014 (Right to Information Directive), and 27 November 2016 (Access to a Lawyer Directive).

43 Strengthening mutual trust in the European judicial area – A Green Paper on the application of EU criminal justice legislation in the field of detention COM(2011) 0327 final.





times, strongly contrasting) information regarding the application of the legislation in practice.[44] A similar approach can be taken in respect of implementation of the Roadmap Directives. For instance, if the Member States provide the Commission with copies of the 'letter of rights' they supply to arrested persons as required by the Right to Information Directive, civil society may be able to complement the information by explaining, based on their field experience, what opportunities the person has to familiarise themselves with the content, the availability of translations and so on. Such activities represent a new facet to the practice of reporting to international monitoring bodies such as the United Nations High Commissioner for Human Rights, and present a real opportunity for the Commission to harness the field experience of civil society for the purposes of its own monitoring. There is clearly a case for the Commission establishing more formalised systems of civil society consultation in this area.

## 3.3. IMPLEMENTATION THROUGH NATIONAL COURTS

The possibility for top-down enforcement by the Commission is, however, ultimately limited. The key driver of EU law compliance is the national court. From the outset, the Court of Justice has favoured private enforcement of EU law by means of actions by individuals and has thus decentralised judicial power to the national courts. As judge of the European Union, every national judge is under a duty to protect the rights of the individual citizen under EU law, a duty which may extend to declining to apply national law.[45] The Roadmap Directives provide an opportunity to harness this mechanism in order to bolster respect for defence rights. The following paragraphs present the three main tools placed at the disposal of the national court by Roadmap Directives – the legal force of directives, the Charter, and the opportunity for dialogue with the Court of Justice – and then considers their potential impact.

### *3.3.1. New tools: Directives*

Despite establishing only minimum standards, the Roadmap Directives nevertheless bring with them potentially powerful legal effects hitherto largely irrelevant in ordinary criminal cases, namely: the requirement to interpret national law in conformity with the purpose of the directive;[46] the possibility, if a provision of a directive is sufficiently clear and precise and the implementation deadline has passed, for that provision to be invoked and applied directly in national law in disputes against

44 The responses are collated at http://ec.europa.eu/justice/newsroom/criminal/opinion/110614_en.htm.

45 See N. Fennelly, 'The National Judge as Judge of the European Union', in *The Court of Justice and the Construction of Europe: Analyses and Perspectives on Sixty Years of Case-law*, Asser: 2013, p. 61.

46 Case 14/83 *Von Colson* [1984] ECR 1891; Case C-106/89 *Marleasing* [1990] ECR I-4135.

the state;[47] and, where a provision has direct effect, the requirement to set aside provisions of national law which would, in the specific case, lead to a result contrary to the directive.[48]

This marks a significant shift from third-pillar to post-Lisbon law-making. Of course, the *Pupino*[49] case applied the so called 'duty of conforming interpretation' applicable under Community law to the intergovernmental framework, but since framework decisions could not entail direct effect,[50] ultimately national law would prevail if it was not susceptible to conforming interpretation.

The availability of stronger legal effects could entail real benefits in this context. For instance, the requirement in Article 4 of the Translation and Interpretation Directive to provide language assistance in criminal cases 'irrespective of the outcome of the case', should prevent any practice of charging defendants for court interpretation, to the extent that this continues.[51] Other provisions – such the requirement in the Right of Access to a Lawyer Directive for effective remedies in respect of breaches of the right of access to a lawyer, and the requirement in the Right to Information Directive for detained persons to be provided with access to documents essential to challenging their detention, discussed below – appear destined to have a more significant impact.

### *3.3.2. A new interlocutor: the Court of Justice*

In accordance with the TFEU, 'any court or tribunal' within all of the Member States to which the Roadmap Directives are addressed can make a reference to the Court of Justice for a preliminary ruling concerning their interpretation. Again, this contrasts with the position under the third pillar, where national courts can only make references concerning the interpretation of framework decisions if the Member State has 'accepted' the Court of Justice's jurisdiction,[52] which only a slight majority (18) have done. Further, the framework decisions concern mostly cross-border systems, meaning that the Court of Justice's main role so far has been focused on the interpretation of the EAW, which is not the 'bread and butter' of most criminal courts.[53] The Roadmap Directives, by contrast, regulate key aspects of ordinary

47 Case 148/78 *Pubblico Ministero v Ratti* [1979] ECR 1629.

48 Case C-462/99 Connect Austria [1999] ECR I-5197, paragraph 42.

49 C-105/03 *Criminal proceedings against Maria Pupino* [2005] ECR I-5285.

50 Article 34 of the Treaty on European Union, in the version in force before the entry into force of the Treaty of Lisbon.

51 *Hovanesian v. Bulgaria*, mentioned above No. 18, concerned such a practice. At the time of writing, less than half of the Member States had notified implementing measures to the Commission, the implementation deadline having passed.

52 Article 35(2) of the Treaty on European Union, in the version in force before the Treaty of Lisbon.

53 The exception is Council Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings (OJ 2001 L 82, p. 1), which the Court of Justice has had occasion to interpret five times. Needless to say, the rights of the defence are not the primary focus of these cases.





criminal cases. Bearing in mind the fact that the investigating magistrate, still responsible for a large portion of criminal proceedings in the EU, is competent to make references,[54] it can be concluded that the Roadmap has significantly expanded the possibility for dialogue with the Court of Justice on defence rights.

As and when issues arise regarding interpretation of the Roadmap Directives, national courts will be able to request the application of the urgent preliminary ruling procedure before the Court of Justice (the *Procédure préjudicielle d'urgence* or 'PPU'). The PPU, reserved for questions regarding the 'area of freedom, security and justice' such as the Roadmap Directives, simplifies proceedings to allow fewer written interventions and reduces deadlines significantly. As a result, in 2012, PPU procedures lasted on average just 1.9 months, as against 15.7 months in ordinary proceedings.[55] The procedure is designed for cases involving persons in custody, among others, but there must be a link between the legal issue referred and the continuation of custody. The *Jeremy F* case approved the use of the PPU on the basis that 'the resolution of the main proceedings *may have considerable influence on the length of that deprivation*'[56] (emphasis added), suggesting that the outcome of the reference need not necessarily be *determinative* of the detention. However, overburdening the PPU would reduce its effectiveness, and it remains to be seen how this criterion will be applied in other cases.

### *3.3.3. The Charter of Fundamental Rights*

It is becoming platitudinous to say that the Lisbon Treaty gave special prominence to the Charter. Article 6(1) of the Treaty on European Union provides the Charter has 'the same legal value as the Treaties'. In other words, it constitutes primary law. Article 51(1) of the Charter provides that the latter is addressed to the Member States 'only when they are implementing Union law'. According to the Court of Justice, this means simply that 'the applicability of EU law entails the applicability of the fundamental rights guaranteed by the Charter'.[57] It remains unclear where the precise bounds of this concept lie,[58] and there may well be cases where it is not clear whether a dispute falls within the scope of the Roadmap Directives. However, where the dispute is governed by the Roadmap Directives, the Charter will apply.

In terms of substance, the Charter does not, on its face, impose qualitatively different obligations upon the Member States. The Charter rights with equivalents in the ECHR have the same meaning and scope as ECHR rights.[59] According to the

54 The cases are discussed in *Guide to the Court of Justice of the EU*, October 2012, page 8 (available at: www.fairtrials.org/wp-content/uploads/2012/10/CJEU-Guide-final1.pdf).

55 Annual Report of the Court of Justice for 2012, introduction.

56 *Jeremy F.*, cited above note 6, paragraph 31.

57 Case C-617/10 *Akerberg Fransson* [2013] ECR I-0000,.

58 K. Lenaerts, 'Exploring the Limits of the EU Charter of Fundamental Rights', *European Constitutional Law Review* 3 (2012) p. 375.

59 Article 52(3).

Explanations to the Charter, due regard should be had in interpreting those rights to the case-law of the ECtHR.[60] Accordingly, Article 47, which protects the right to a fair trial, and Article 48, which protects the presumption of innocence, the right to be heard and the rights of the defence, have the same meaning as Article 6 ECHR. Equally, Article 6 of the Charter, which protects the right to liberty, has the same meaning as Article 5 ECHR. Indeed, in recent cases, the Court of Justice has interpreted Articles 6, 47 and 48 of the Charter in line with the corresponding case-law of the ECtHR.[61] However, this does not make the Charter superfluous. As explained below, protecting the same rights through EU law presents potential advantages.

### *3.3.4. Bringing rights home*[62]

The combination of the Roadmap Directives, Charter and Court of Justice creates an 'EU' system for the protection of defence rights, the defining feature of which is, theoretically, that it helps individual litigants uphold their rights during the currency of national criminal proceedings, shifting responsibility upstream from the ECtHR.

Most obviously, the Roadmap Directives, in edifying standards derived from ECtHR case-law as clear provisions of law which can be directly invoked in the national courts, facilitate reliance on and application of those standards. Lawyers need not put cumbersome volumes of ECtHR case-law, possibly un-translated, before busy criminal courts. Instead the Roadmap Directives, available in the Member State's own language, provide a simple framework. As and when issues arise which are not clear from the Roadmap Directives themselves, the process of dialogue with the Court of Justice enables the national court to obtain authoritative guidance, possibly at the first-instance level, at a stage much more useful to the individual whose rights are at stake.

A recent *Salduz*-related case can be used to illustrate the point. Whilst it follows clearly from the *Salduz* case-law that a conviction founded upon evidence obtained in breach of the right to a lawyer will be contrary to Article 6 ECHR, the question precisely how to avoid this (for instance, through prior exclusion of the evidence or through the court disregarding it when assessing the evidence) is a matter for the Contracting State. In the recent case of *Martin v. Estonia*,[63] the ECtHR considered proceedings in which a young man had, surprisingly, 'waived' his right to be assisted

60 Explanations relating to the Charter of Fundamental Rights (2007/C 303/02), (OJ 2007 C 303, p. 17).

61 Case C-399/11 *Melloni* [2012] ECR I-0000; *Jeremy F.*, cited above; Case C-396/11 *Radu* [2013] ECR I-0000 (though Advocate General Sharpston recommended a slight alteration of the ECtHR's established 'flagrancy' test for the purposes of the Charter in the latter case).

62 This expression accompanied the enactment of the (United Kingdom) Human Rights Act 1998, which, by section 2, required national courts to have regard to the ECHR and ECtHR case-law in disputes before them. The phrase is used thematically; no direct legal analogy is implied.

63 Cited above, No.20.





by the family-appointed lawyer and opted for a legal aid representative proposed by the police. Whilst this lawyer was acting, the suspect made admissions which he later retracted, stating he had been under coercion. The trial court nevertheless relied on these statements and convicted him. On appeal, the Court of Appeal excluded the pre-trial statements, but relied on the 'general knowledge' brought about as a result of those statements, and convicted him on the basis of other evidence. The ECtHR, having found that the purported 'waiver' had not been given freely and intelligently, found a breach of the right to be assisted by a lawyer of one's own choosing, and on this basis found a violation of the right to a fair trial: although the Court of Appeal had excluded the pre-trial statements, its decision and its reliance on the 'general knowledge' acquired through those statements nevertheless demonstrated that the consequences of the breach of the rights of defence had not been undone.[64]

It is helpful to consider this case under the hypothesis that the Access to a Lawyer Directive had been applicable. Article 3 of that directive establishes the right to be assisted by a lawyer at all questioning; Article 9 lays down provisions on 'waiver' of the right to a lawyer; and Article 12(2) provides that 'without prejudice to national rules and systems on the admissibility of evidence, Member States shall ensure that, in criminal proceedings, in the assessment of statements made by a suspect or accused person or of evidence obtained in breach of his right to a lawyer or in cases… the rights of the defence and the fairness of the proceedings are respected'. The latter provision, as a result of fraught negotiations, defers to national systems of remedies, which differ widely, but nevertheless requires that these apply in such a way as to respect the fairness of proceedings. In a fact-pattern like that of *Martin v. Estonia*, this provision, read in light of Articles 47 and 48 of the Charter, could have been invoked to argue for the trial court and Court of Appeal to take a tougher approach. Either court could have referred the matter to the Court of Justice for interpretation. Such a question would, no doubt, raise issues as to the extent of approximation envisaged by the provision. But practically speaking, the advantages of obtaining an interpretation at that stage – not four years later from the ECtHR, with the person imprisoned in the meantime – are self-evident.

Although the ECtHR case-law is the point of reference for such questions, it is also possible that the Court of Justice will be called upon to enter territory unexplored by the ECtHR. For example, there appears to be scope for further clarification of the extent to which the rights of the defence are prejudiced by the limitations placed on a lawyer's participation in police interviews. The ECtHR sees the right to a lawyer established by the *Salduz* case as an essential procedural guarantee to ensure the observance of the right against self-incrimination.[65] However, the extent to which the benefit of a lawyer is negated by restrictive rules on his participation in interviews is

64 Paragraph 96.

65 *Brusco v. France* App. No 1466/07 (Judgment of 14 October 2010); see *Martin v. Estonia*, cited above, paragraph 79.

not yet clear. Practice varies significantly across the Member States: some allow unfettered intervention, others allow intervention only in the form of objections to the formulation of questions, and others lack any clear guidelines at all.[66] Article 3 of the Access to a Lawyer Directive includes a specific provision entitling the lawyer to 'participate effectively' in police questioning. The interpretation of this provision, in light of Articles 47 and 48 of the Charter, could potentially contribute new elements to the *Salduz* case-law.

From an academic perspective, the advent of the Roadmap Directives could be seen as the seed for an authentic 'EU' contribution to international standards on fair trials, albeit essentially guided by ECHR principles. However, the addition of EU law into the mix entails more practical considerations for the criminal lawyer and courts, in particular the possible need to explore other areas of EU law. There will, for instance, clearly be a role for general principles of EU law such as the principle of effective judicial protection, according to which national courts must ensure that individuals have access to effective judicial remedies in order to vindicate rights guaranteed by EU law.[67]

Indeed, a key question for many practitioners is how breaches of the procedural guarantees provided by the Roadmap Directives should be remedied. One complaint raised by experts is that currently, procedural safeguards are of little value because their infringement does not sound in the substantive case.[68] The provisions of the Access to a Lawyer Directive requiring a substantive remedy in relation to a breach of the right reflect the strong line taken by the ECtHR in the *Salduz* case and subsequent case-law. For breaches of other requirements of the Roadmap Directives – such as the requirement to notify the right to silence, in writing, in simple and accessible language to any arrested person – the nature of the remedy required is left unclear. For the ECtHR, procedural failings can be 'compensated' later on to ensure overall fairness.[69] Precisely what duties national courts are under in order to ensure the full effectiveness of the rights protected by the Roadmap Directives will become apparent only if, and when, practitioners begin exploring these issues in court.

### *3.3.5. Adapting to the new conditions*

The above paragraphs have sought to demonstrate that with the Lisbon Treaty came a set of new obligations for the Member States, and new legal tools for the actors involved in criminal justice. It is plain that, in order for the change to lead to practical improvements in criminal proceedings, the professions concerned need to adapt. Indeed, experts have reported that, save for the limited number of lawyers working on

66 Communiqué issued after the meeting 'Advancing Defence Rights in the EU', Lithuania, May 2013.

67 See, for example Case C-69/10 *Diouf* [2011] ECR I-7151.

68 Ibid.

69 See Hodgson, 'Safeguarding suspects' rights in Europe: a comparative study', *New Criminal Law Review*, Vol 14 (2011) 4, p. 648.





cross-border cases, most criminal lawyers look to the criminal procedure code of their country for answers, and not far beyond.[70] The arrival of supranational regulation of suspects' rights, complete with the oversight of the Court of Justice, requires training and a cultural shift.

In particular, there appear to be significant challenges in encouraging dialogue with the Court of Justice. Criminal procedure rules are being revised so as to provide, explicitly, for the possibility for criminal courts to make references for preliminary rulings.[71] In addition, national doctrines and concepts such as the 'lawful judge'[72] (whereby a given legal issue must be decided by the appropriate judge) may help encourage issues of EU law to be put before the EU court for interpretation. However, in view of the culture of 'sovereignty' of criminal law, attitudes towards engagement with the Court of Justice, and EU law in general, may take time to adapt. The training programmes of the Academy of European Law and other institutions will help this transition.

In this regard, it is noteworthy that the Roadmap Directives require the Member States to provide training for prosecutors and judicial personnel, but not the defence, perhaps a reflection of the independence of the bars vis-à-vis state authorities which are bound by the directive. Fair Trials International's recent programme of EU criminal defence rights training for defence lawyers sought to help fill the gap, and national bars and lawyers' groupings have a significant role to play. For example, the 2013 class of the *Conférence* of the Paris Bar recently issued a set of template submissions invoking Article 7(1) of the Right to Information Directive (discussed below) in order to obtain access to case files from the outset of criminal proceedings,[73] illustrating the potential role of the defence in implementation of the Roadmap Directives. If the community can take up this challenge, respect for defence rights in the EU may be appreciably advanced.

## 4. A WORKING EXAMPLE

Among the provisions of the first two Roadmap Directives, there is a certain optimism surrounding Article 7(1) of the Right to Information Directive, which states that 'where a person is arrested and detained at any stage of the criminal proceedings, Member States shall ensure that documents related to the specific case in the possession of the competent authorities which are essential to challenging effectively, in

70 Communiqué issued after the meeting 'Advancing Defence Rights in the EU', Lithuania, Recommendations.

71 See, for instance, Part 75 of the Criminal Procedure Rules applicable in England and Wales, in force since 7 October 2013.

72 As expressed, for instance, in Article 101(1) of the *Grundgesetz*, the Basic Law of Germany, which is interpreted to mean that EU law issues are for the Court of Justice to interpret, in line with Article 267 TFEU.

73 The attempt is forward-looking both in terms of the interpretation argued for and of the fact of invoking the provision before the implementation deadline.

accordance with national law, the lawfulness of the arrest or detention, are made available to arrested persons or to their lawyers'. After presenting the issue this provision seeks to address, this section will present its value added focusing on the driving factors identified above: implementation, Commission and civil society involvement, and implementation through the national courts.[74]

## 4.1. ACCESS TO THE CASE-FILE: CLEAR PRINCIPLES, PATCHY COMPLIANCE

The provision is typical of the Roadmap context. In its case-law on Article 5(4) ECHR, which entitles a person to challenge their detention, the ECtHR has repeatedly stated that, in the criminal context, this challenge must provide guarantees of judicial procedure and, so far as possible, meet the basic requirements of a fair trial. These include equality of arms, which implies the disclosure of documents essential to challenging detention effectively.[75] Yet, compliance with this principle is patchy.[76] Although practitioners in various jurisdictions report problems,[77] for illustrative purposes particular focus is placed on Poland and Spain.

In Poland, the legislation so far provided that access to the file should be provided, but subject to a number of exceptions relating to the protection of the investigation.[78] Practitioners report that, in practice, these exceptions are applied routinely,[79] and a recent report confirms that statistically, access to the file is indeed often not provided.[80] Challenges to the use of these powers have found their way to the ECtHR, resulting in violations of Article 5(4) ECHR.[81] In Spain, while the case-file is, in principle, open to the parties, it can be declared secret one month at a time,[82] regarded by the courts as an exceptional power designed to protect the investigation.[83] Again, practitioners

74 For clarity, this section discusses Article 7(1) in relation to judicial challenges to detention only. The extent to which it may also require access to documents prior to police interrogation for arrested persons – the subject of the Paris Bar initiative mentioned above – is a question for another day.

75 See, for example, *Shishkov v. Bulgaria* App. No 38822/97 (Judgment of 9 January 2003).

76 See, for example, *Igna v. Romania*, cited above, and *X.Y. v Hungary* App. No 43888/08 (Judgment of 19 March 2013).

77 In Hungary, for Instance: see Communiqué issued after the meeting of the Local Expert Group (Hungary) on 21 February 2012, paragraph 7 (the document refers to the legislation applicable at the time).

78 Article 156(5a) of the Criminal Procedure Code of Poland.

79 Communiqué issued after the meeting 'Advancing Defence Rights in the EU' on 10 May 2013 in Lithuania, paragraph 43.

80 See *Abuse of pre-trial detention in Poland as a result of the limited access of suspects and defence lawyers to case-files*, Helsinki Foundation for Human Rights, November 2013, pages 7–10.

81 See, for example, *Dochnal v. Poland* App. No 31622/07 (Judgment of 18 September 2012).

82 Article 302, second paragraph of the *Ley de Enjuiciamiento Criminal 1882*.

83 Judgments of the Constitutional Court 13/1985 and 176/1988; Judgment of the Supreme Court 1073/2012.





report excessive use.[84] The case-law suggests that this practice has been challenged on the basis that it prejudiced the rights of the defence in the trial phase, on the basis of Article 24 of the Spanish Constitution and Article 6 ECHR – an argument which fails on the basis that the defence is able to comment on the evidence and prepare for trial when the file is unsealed.[85] It is unclear to what extent the issue has been explored through the prism of the right to an effective challenge to detention; certainly no admissible challenge has been brought before the ECtHR on the basis of Article 5(4) ECHR. How, then, can the Right to Information Directive help?

## 4.2. THE ACTUAL AND POTENTIAL IMPACT OF ARTICLE 7(1)

### *4.2.1. Agreement and implementation*

First, to the extent that problems with access to the case-file arise because of divergent approaches to pre-trial justice, the agreement of a common standard in Article 7(1), and legislative implementation thereof, may help. Indeed, in Poland, recent reforms[86] introduced amendments to the Code of Criminal Procedure requiring the prosecution to disclose such evidence as is referred to in its detention motion, a change timed to enter into force on the transposition deadline of the Right to Information Directive on 2 June 2014. In Spain, the picture appears less clear. The proposed recast of the criminal procedure law[87] envisages the *secreto de sumario* power being maintained,[88] with a requirement for detention orders issued in cases where the file is secret to include sufficient factual detail so as not to infringe defence rights.[89] Even if this reform is completed within the implementation deadline of the Right to Information Directive, it is clear that the disclosure of limited factual information, incomplete or heavily redacted documents or only a brief description of their content could, in any jurisdiction, raise an issue under Article 7(1).

### *4.2.2. Commission and civil society involvement*

While the legislation may be straightforward for the Commission to examine, practical issues of this sort may be more difficult for the Commission to monitor and discuss with the Member States. In this regard, it may be significantly assisted in this exercise by the 'shadow' reporting of civil society organisations. For instance, the

84 Communiqué issued after the meeting of the Local Expert Group (Spain), paragraphs 10–14.

85 See the Judgment of the Supreme Court cited above and *Vaquero Hernandez v. Spain* App. No 1883/03 (Judgment of 2 November 2010).

86 Act of 27 September 2013 (Dz. U. 2013 poz. 1282).

87 See the *Código Procesal Penal* (www.ub.edu/dpenal/cpp_codi_processal_penal_projecte.pdf), a draft procedure code put forward by the competent commission further to reform proposals of 2011.

88 Articles 135–138.

89 Article 201(2).

Helsinki Foundation for Human Rights in Poland recently published a thorough study the practice of disclosure of case materials in detention decisions, valuably complementing the legal picture.[90] This illustrates the potential benefit in the Commission enhancing and formalising consultation with organisations and lawyers' groups in the context of its monitoring processes.

#### *4.2.3. Implementation through the national courts*

Equally, practitioners may raise arguments before the national courts based on Article 7(1) of the Directive and, with that, the Charter of Fundamental Rights. Courts in both countries will now be able to refer such questions to the Court of Justice, a difference from the third-pillar situation (in Spain, only the court of final instance was able to make such a reference[91]). The defence may also encourage this, given that the reference might result in disclosure of the file – applying to the ECtHR under Article 5(4) would, by contrast, be of little use, as the decision would come years later, quite possibly after the criminal case was over. Indeed, should a reference be made, it would be expected to include a request for the urgent procedure on the basis that the Article 7(1) issue is crucial to the effective review of detention, albeit that the detention decision itself is a matter of national law.

In substance, one would of course expect an answer insisting on effective disclosure. Indeed, the ECtHR has found a Member State in violation of Article 5(4) ECHR for failing to disclose even sensitive evidence, insisting that disclosure must be provided, subject perhaps to unspecified 'special arrangements' being made for the disclosure of confidential evidence.[92] Even the Court of Justice's case-law on EU measures imposing asset-freezes suggests sensitive evidence should be disclosed in summary or outline even if reasons relating to national security prevent full disclosure,[93] and Article 7(1) relates to the deprivation of liberty of a person presumed innocent, which no doubt calls for a more robust approach. Whatever the answer, the national court would then have to give full effect to the ruling in the case at hand, interpreting national law in such a way as to guarantee effective access. This, theoretically, is what the Roadmap is all about: helping individuals secure their defence rights in the national proceedings, if necessary with some input from Luxembourg.

90 All of the communiqués referenced in this article have been forwarded to the Commission.

91 Information concerning the date of entry into force of the Treaty of Amsterdam, published in the Official Journal of the European Communities of 1 May 1999 (OJ 1999 L 114, p. 56): Spain accepted the jurisdiction of the Court of Justice under Article 35(2)(a).

92 *Dochnal v. Poland*, cited above, paragraph 88; *Kadi II*, paragraph 129.

93 Joined Cases C-584/10 P, C-539/10 P and C-595/10 P *Commission and others* v *Kadi* [2013] ECR I-0000, paragraphs 123–130.





## 5. CONCLUSION

The Roadmap, it will be recalled, is based on the need 'to facilitate mutual recognition of judicial decisions'. For those concerned less with resisting federalisation than with ensuring respect for fundamental rights, it is perhaps disappointing that there is no separate legal basis simply to ensure an area of justice as an end in itself, and not merely as a concomitant of security. However, for the criminal lawyer, it matters little where the Roadmap Directives come from. They are a new tool through which respect for individual citizens' defence rights may be moderately improved, if effective use can be made of them. This experiment, the first concrete application of the post-Lisbon legislative agenda in the area of defence rights, will be an interesting one to follow. It may provide a blueprint for EU intervention in other areas equally, if not more important, both to mutual trust and to the average citizen facing criminal charges. In particular, there is a growing consensus that the EU should set minimum standards to tackle Member States' excessive recourse to pre-trial detention,[94] recognised as one of the problems undermining the operation of the EAW[95] and, more straightforwardly, a phenomenon which leaves many people presumed innocent sitting in prison cells, often for years on end. The capacity of EU law to assist in remedying the ills of criminal justice is as yet untested and the first real indications will come with the implementation of the Roadmap.

94 See the joint letter of 10 September 2013 to Viviane Reding, Vice-President of the European Commission, signed by 22 non-governmental organisations. The Commission's Green Paper, mentioned earlier in this article, included specific questions on pre-trial detention.

95 Italy's grounds for refusing EAWs, for example, refer specifically to the pre-trial detention legislation of the issuing state, though the Court of Cassation has interpreted the provision broadly.

Cour de cassation

Dossier Mandat d'arrêt européen 2014/1013

Notice No. EXTRAD BR36.EU.144/14

Pourvoi en cassation contre l'arrêt du 25 juillet 2014 de la Cour d'appel de Bruxelles

**OBSERVATIONS**

**DE FAIR TRIALS INTERNATIONAL**

**SUR L'APPROCHE A L'ARTICLE 3 CEDH / ARTICLES 4 et 19, PARAGRAPHE 2 DE LA CHARTE**

**Introduction**

**A propos de Fair Trials International**

1. Fair Trials International (ci-après « **Fair Trials** ») est une association siégeant à Londres et à Bruxelles ayant pour but désintéressé la promotion du droit au procès équitable et des droits de l'homme dans le cadre de la justice pénale. Fair Trials est coordinatrice du Groupe consultatif d'experts juridiques (« Legal Experts Advisory Panel » ou « **LEAP** »), un réseau de 150 professionnels de la justice pénale ressortissants des 28 Etats membres de l'Union européenne.

2. Fair Trials possède une expertise particulière en matière de coopération judiciaire en matière pénale, notamment concernant la protection des droits fondamentaux dans l'application de la décision-cadre 2002/584/JAI sur la mandat d'arrêt européen (ci-après, la « **décision-cadre MAE** »), ayant contribué aux débats sur cette question au sein des instance européennes, publié plusieurs rapports et articles dans des revues de droit spécialisés, et animé des formations à ce sujet tant à son propre titre qu'en tant qu'expert pour l'Académie de droit européen.

**L'étendue de ce mémoire**

3. Sollicitée en tant qu'experte par les conseils de la partie requérante, Fair Trials s'est proposée de contribuer ce mémoire sur obligations des Etats membres en vertu de l'article 3 de la Convention européenne de sauvegarde des droits de l'homme (ci-après, la « **CEDH** ») et de la Charte des droits fondamentaux de l'Union européenne (ci-après, la « **Charte** ») lors de l'exécution d'un mandat d'arrêt européen (ci-après, un « **MAE** »). Fair Trials présente les observations suivantes à titre indépendant, dans le seul but de fournir des informations utiles à votre Cour.

4. Ce mémoire note d'abord l'acceptation générale des limites au principe de reconnaissance mutuelle (**A**), puis relève certaines décisions pertinentes émanant d'autres Etats-membres, dont notamment l'arrêt du 30 juillet 2014 de la High Court d'Angleterre refusant l'exécution d'un MAE roumain en vue de constations générales quant conditions carcérales en Roumanie, à la lumière de condamnations récentes de la Roumanie par la Cour européenne de droits de l'homme pour violation de l'article 3 CEDH (voir points 25 à 29 ci-dessous) (**B**). Il souligne ensuite certains doutes quant à l'application des principes dérivés du système commun européen d'asile dans le cadre du MAE (**C**), et rappelle la possibilité du préjudiciel à la Cour de justice de l'Union européenne (ci-après, la « **CJUE** ») (**D**).

**A. Considérations générales**

**(i) La banalité du refus d'un MAE au titre de la protection des droits fondamentaux**

5. Il est désormais acquis l'article 1, paragraphe 3 de la décision-cadre MAE, qui dispose que celle-ci « ne saurait avoir pour effet de modifier l'obligation de respecter les droits fondamentaux » oblige, dans certains cas, le refus d'exécution d'un MAE.

6. Cela apparait dès la transposition nationale. Dans son premier rapport sur la mise en œuvre de la décision-cadre MAE, la Commission note que les deux tiers des Etats-membres, à l'instar de la Belgique, ont choisi d'introduire dans leurs législations des motifs de refus de MAE pour violation des droits fondamentaux, reconnaissant qu'« une autorité judiciaire est toujours fondée à refuser l'exécution d'un [MAE] » à ce titre (document COM(2005) 0063 final).

7. Les jurisprudences nationales présentent divers exemples d'application de ces dispositions. Outre l'arrêt de votre Cour du 19 novembre 2013, nous noterons à la partie B certains exemples concernant en particulier les violations liées aux conditions de détention.

8. Le principe selon lequel l'application du principe de reconnaissance mutuelle doit être limité afin de garantir le respect des droits de l'homme est même si bien établi qu'il se voit exprimé dans la législation européenne.

9. En effet, la directive 2014/41/UE du Parlement européen et du Conseil du 3 avril 2014 sur la décision d'enquête européenne en matière pénale prévoit explicitement en son article 11, paragraphe 1, sous f) un motif de refus d'exécution lorsqu' « il existe des motifs sérieux de croire que l'exécution … serait incompatible avec les obligations de l'Etat d'exécution conformément à l'article 6 du traité sur l'Union européenne et à la Charte ». Le rapport du 27 février 2014 du Parlement européen, invitant la Commission à proposer une refonte de la décision-cadre MAE, propose également l'instauration d'un motif explicite de refus d'un MAE au même titre.

10. Nous le relevons afin de souligner que le refus d'exécution d'un MAE au motif de non-respect des droits de l'homme n'a rien de controversé. Il ne représente pas une atteinte à la coopération judiciaire, mais le simple maintien des conditions minimales sur lesquelles celles-ci se fonde.

**(ii) Appréciation du risque de traitements inhumains dans le cadre MAE**

11. Pour ce qui est du risque de violation des droits fondamentaux du aux conditions dans les prisons de l'Etat-membre d'émission, nous soulignons que si cette question se conjugue en général à l'aune de l'article 3 CEDH, dans le cadre de l'exécution d'un MAE la question relève, également, de l'interprétation de la Charte.

12. En effet, en vertu de l'article 51, paragraphe 1, de la Charte tel qu'interprété par la CJUE « l'applicabilité du droit de l'Union implique celle des droits fondamentaux garantis par la Charte » (arrêt Akerberg Fransson, C-617/10, ECLI:EU:C:2013:105, point 21). C'est bien le cas pour l'exécution d'un MAE (voir, à cet effet, arrêt Radu, C-396/11 ECLI:EU:C:2013:39, point 32).

13. Les disposition pertinentes de la Charte sont, bien sûr, son article 4 et l'article 19, paragraphe 2 qui dispose que « nul ne peut être … extradé vers un État où il existe un risque sérieux qu'il soit soumis … à la torture ou à d'autres peines ou traitements inhumains ou dégradants ».

14. Comme l'a relevé l'Avocat-général Sharpston, dans ses Conclusions du 18 octobre 2012 dans l'affaire Radu, C-396/11, ECLI:EU:C:2012:648 concernant la décision-cadre MAE, tant la Cour EDH que la CJUE ont reconnu que ces disposition peuvent faire obstacle au transfert d'une personne d'un Etat-membre à un autre en application du droit de l'Union lorsqu'il y a des « motifs sérieux et avérés de croire » qu'il existe un « risque réel » de violation (point 77), se référant à l'arrêt de la Cour EDH, arrêt du 21 janvier 2011, Req. 30696/09 M.S.S. c. Belgique et Grèce, et celui de la CJUE, *NS* et *ME*, affaires jointes C-411/10 et C-493/11, ECLI:EU:C:2011:865), tous les deux concernant l'application du Règlement 2003/343/CE di « Dublin » régissant le transfert de de demandeurs d'asile à l'Etat responsable.

15. Or, l'approche à l'appréciation du risque de violation des droits fondamentaux, notamment de la prohibition de traitements inhumains ou dégradants, dans le cadre de la décision-cadre MAE n'a pas fait l'objet de décision autoritaire de la CJUE. Dans la recherche de l'approche appropriée, nous estimons qu'il est utile de relever des décisions nationales d'autres juridictions, et de présenter certaines spécificités du cadre juridique qui s'opposent au simple transplant de l'approche dérivée du droit d'asile dans le contexte MAE.

**B. <u>Approches européennes à la non-exécution de MAE pour violation des droits fondamentaux, notamment en ce qui concerne les conditions de détention</u>**

16. Nous présenterons ici certains exemples de décisions de refus d'exécution de MAE pour non-respect des droits fondamentaux émanant d'autre Etats-membres. Ces décisions concernent principalement les conditions matérielles de détention dans le pays d'émission du MAE.

17. Fair Trials reconnaît d'emblée que ces décisions n'ont pas de valeur contraignante et que la protection des droits fondamentaux est assurée selon des modalités propres à chaque pays.

18. Toutefois, s'agissant de décisions émises par des juridictions européennes traitant des questions communes (l'application de la décision-cadre dans le respect de la CEDH), nous soutenons que rien ne fait obstacle à ce que votre Cour en tienne compte.

**Décisions des juridictions britanniques**

*Arrêt de la High Court (England & Wales) du 11 mars 2014 Badre v Court of Florence [2014] EWHC 614 (pièce 1)*

19. Par cet arrêt, la High Court refuse l'exécution d'un mandat d'arrêt européen émis par l'Italie au titre de l'article 3 CEDH, sur le fondement de l'arrêt « pilote » de la CEDH condamnant l'Italie pour la violation systémique de l'article 3 dans ses prisons en raison du surpeuplement carcéral (arrêt du 8 janvier 2013, Req. 43517/09 et autres, Torreggiani c. Italie).

20. La High Court précise que « dans le cas d'un Etat membre du Conseil de l'Europe, il existe une présomption, forte mais réfragable, qu'un tel Etat est à même de remplir ses obligations en vertu de la Convention. Afin de renverser la présomption, il sera souvent nécessaire de fournir des preuves émanant de plusieurs sources reconnues justifiant la non application de la présomption », point 41, notre traduction). En l'espèce, l'arrêt pilote de la Cour EDH constituait une preuve d'une violation systémique dont un risque de traitement inhumain ou dégradant pouvait se déduire, les garanties offertes par le gouvernement italien ne pouvant écarter cette conclusion vu le caractère conclusif de l'arrêt de la Cour EDH (point 54).

*Arrêt de la High Court (England & Wales) du 30 juillet 2014, Florea v Romania [2014] EWHC 2528 (pièce 2)*

21. Par cet arrêt, la High Court refuse l'exécution d'un MAE émis par la Roumanie au titre de l'article 3 CEDH. La personne était recherchée pour l'exécution d'une peine suite à une condamnation finale en son absence.

22. L'arrêt reprend les éléments essentiels de l'approche anglaise en vigueur, ancrée dans les décisions M.S.S. et NS : il existe une présomption que l'Etat membre d'émission respectera ses obligations en vertu de l'article 3 CEDH ; toutefois, s'il existe des raisons sérieuses de penser qu'il existe un risque de traitement contraire à cette norme, l'exécution du MAE ne peut être accordée (points 30-31). Il n'est pas nécessaire d'établir une violation systémique, mais des indications d'un problème perdurant peuvent donner lieu à l'existence de raisons sérieuses de craindre un traitement contraire à l'article 3 (point 31).

23. Elle note ensuite que si un arrêt « pilote » de la Cour EDH constitue une preuve solide d'un tel risque, l'absence d'un arrêt « pilote » ne signifie pas l'absence de risque, la juridiction d'exécution pouvant elle-même apprécier le risque de violation de l'article 3 (point 33).

24. L'arrêt avait déjà noté que le surpeuplement carcéral dans ses prisons roumaines avait donné lieu à de nombreuses condamnations devant la Cour EDH pour violation de l'article 3, la Cour EDH s'appuyant à cet égard sur les rapports critiques du Comité sur la prévention de la torture (ci-après, le « **CPT** ») de 1995 à 2006. La cour souligne certains arrêts particuliers de la Cour EDH, dont notamment l'arrêt du 24 juillet 2012, Req. 35972/05 Stanciu c. Roumanie qui avait constaté le surpeuplement de 16 établissements différents à travers la Roumanie, entrainant – sans que ne soit reprochable l'attitude des autorités roumaines – la violation de l'article 3 pour défaut d'espace personnel dans tous ces lieux (points 22 à 26).

25. Sur le fondement de ces informations, la cour conclut que l'exécution du MAE entrainerait la violation de l'article 3 CEDH (point 39). Elle accorde toutefois à l'autorité judiciaire roumaine un délai d'un mois pour fournir des garanties écartant le risque de violation, notamment concernant l'éventuel placement de l'intéressé dans un autre établissement (points 44 et 46).

*Arrêt de la High Court (Northern Ireland) du 22 février 2013 Lithuania v Liam Campbell [2013] NIQB 19 (pièce 3)*

26. Par cet arrêt, la High Court confirme la décision du juge de premier ressort refusant l'exécution d'un MAE émis par la Lituanie sur le fondement de l'article 3 CEDH. La décision en cause se fondait principalement sur l'existence d'un arrêt de la CEDH (arrêt du 18 novembre 2008, Req. 871/02 Savenkovas c. Lituanie) condamnant la Lituanie pour violation de l'article 3 pour une période d'incarcération – bien antérieure – à la maison d'arrêt de Lukiskes, une expertise se rapportant à une visite à cet établissement en 2010, ainsi des rapports du CPT, antérieurs de cinq ans. La Cour suprème, le 31 juillet 2013, a rejeté la demande de l'autorité lituanienne de faire appel contre cet arrêt.

27. Les membres du LEAP, notre réseau de professionnels de la justice pénale, nous informent que, depuis cet arrêt, les autorités lituaniennes donnent systématiquement des garanties que la personne sollicitée ne sera pas détenue à la maison d'arrêt de Lukiskes. Ceci pour réitérer l'observation faite au point 10 supra : le refus d'un MAE au titre de l'article 3 CEDH ne fait pas

tomber le système ; bien au contraire, il renforce la coopération en assurant qu'elle n'a pas lieu en violation des droits de l'homme, assurant la confiance en la lutte répressive.

*Décision de Westminster Magistrates Court du 1er mai 2014, High Court in Guadeloupe (France) v Richards (pièce 4)*

28. Cette décision de première instance, qui n'a pas fait l'objet d'appel, refuse l'exécution d'un mandat d'arrêt européen émis par une autorité judiciaire d'un département d'outre-mer de la France, la Guadeloupe, au titre de l'article 3 CEDH. La décision se fonde principalement sur l'existence de dix décisions de la Cour administrative d'appel de Bordeaux (juridiction d'appel pour les litiges outre-mer) concluant à la violation dudit article 3 dans les prisons guadeloupéennes. La plus récente de ces décisions datait de juillet 2012, soit presque deux ans avant ; aucun rapport à jour du CPT n'était disponible. L'arrêt se justifie en partie par le défaut de garanties de la part de l'autorité judiciaire émettrice du MAE.

**Décisions de la cour de cassation française**

*Arrêts de la Chambre criminelle No. 6596 du 21 novembre 2007 et No. 972 du 7 février 2007 (pièces 5 et 6)*

29. Bien qu'elles ne concernent pas les conditions matérielles de détention, nous relevons également ces arrêts de la Cour de cassation française relatifs à l'exécution de MAE décernés à l'encontre de personnes auxquelles avait été reconnu le statut de réfugié.

30. Par le premier arrêt, la Cour de cassation, au titre de l'article 3 CEDH entre autres, casse la décision de la chambre de l'instruction, qui, consciente que la personne recherchée bénéficiait du statut de réfugié, n'avait toutefois conditionné l'exécution du MAE à l'engagement des autorités émettrices de ne pas remettre la personne, à l'expiration des poursuites, au pays d'origine où elle soutenait encourir un risque de violation des droits de l'homme.

31. Par le deuxième arrêt, la Cour de cassation casse la décision de la chambre d'instruction qui, malgré l'argumentation du demandeur qui faisait valoir un risque de renvoi au pays d'origine après l'exécution de sa peine, n'avait pas fait usage de la faculté de demander des informations supplémentaires aux autorités émettrices quant au sort qui serait réservé à l'intéressé à l'issue de sa peine au regard notamment de l'article 3 CEDH.

**Arrêt de la Cour suprême irlandaise**

*Arrêt du 10 décembre 2013 Minister for Justice and Equality v Kelly aka Nolan [2013] IESC 54 (pièce*

32. Par cet arrêt, la Cour suprême d'Irlande refuse l'exécution d'un MAE décerné par le Royaume-Uni au motif d'une violation de l'article 5 CEDH (droit à la liberté). La personne recherchée avait été condamnée à une peine de réclusion à durée indéterminée en application d'un régime qui avait mené à la condamnation du Royaume-Uni par la Cour EDH pour la violation de cette disposition (arrêt du 18 septembre 2012, Req. 25119/09 et autres, Wells and Lee c. Royaume-Uni). La réforme de ce régime n'ayant pas d'effet rétroactif, de sorte que la personne recherchée y serait toujours soumise, la Cour s'est trouvée contrainte de conclure, à la lumière de la condamnation par la Cour EDH, que les droits de la personne recherchée seraient lésés par sa remise, les autorités britanniques ayant refusé de fournir des garanties contraires.

**Apport de ces décisions**

33. Ces décisions indiquent un mode d'appréciation du risque de violation des droits fondamentaux axé sur les arrêts de la Cour EDH condamnant l'Etat d'émission. De tels arrêts permettent le constat qu'une pratique ou un état d'affaires constituent une violation des droits fondamentaux, d'où peut se déduire un risque à l'intéressé en cas de sa remise.

34. Un arrêt « pilote » de la Cour EDH va, sans doute, établir un risque de violation et mener au refus d'exécution du MAE. Mais, comme dans l'exemple concernant le MAE roumain (points 21 à 25 supra), des arrêts « simples » de la Cour EDH condamnant l'Etat émetteur pour violation de l'article 3 CEDH peuvent également donner lieu à des constatations raisonnables quant à la situation générale et donc au risque de violation en cas de remise à cet Etat.

35. Une fois un tel doute établi, il s'ensuit logiquement qu'il incombe à l'Etat émetteur de fournir des informations et garanties supplémentaires, et à l'autorité d'exécution de décider si celles-ci suffisent à écarter le doute. C'est l'approche des juridictions anglaises, notamment dans l'arrêt concernant les conditions carcérales en Roumanie (points 21 à 25 supra), comparable à l'approche de la Cour de cassation française pour le risque d'éloignement ultérieur (points 29 à 31) et à celle de la Cour suprême irlandaise pour le risque de détention arbitraire (point 32).

**C. <u>Spécificités du contexte MAE qui font obstacle au simple transplant de principes dérivés du système commun européen d'asile</u>**

36. Les décisions nationales susdites s'inspirent, en général, des arrêts M.S.S. de la Cour EDH et NS de la CJUE. Nous ne saurions disputer la conclusion de l'Avocat-général Sharpston (point 14 supra), que les principes se dégageant de ceux-ci sont pertinents pour l'application du MAE. Il existe toutefois deux raisons pour lesquelles les critères établis dans le contexte du système commun européen d'asile ne peuvent être appliqués sans aucune modification dans ce cadre.

**(i) Absence d'harmonisation**

37. En premier lieu, le traitement des demandeurs d'asile, y compris ceux transférés à l'Etat-membre responsable en application du système « Dublin » en cause dans les arrêts M.S.S. et NS, fait l'objet d'une harmonisation par le biais de directives (à l'époque, il s'agissait de l'acquis première génération composé des directives 2003/9/CE dite « réception », 2004/83/CE dite « qualification » et 2005/85/CE dite « procédures », qui ont depuis fait l'objet de refontes).

38. Ces directives, visant à garantir la réception des demandeurs d'asile dans des conditions adéquates ainsi que d'assurer l'identification des personnes nécessitant une protection internationale contre le refoulement, protègent (en théorie) contre des violations de l'article 3 soulevées par les personnes s'opposant à leur transfert. La Cour EDH s'était justement fondée en partie sur ces directives pour déclarer irrecevable la première affaire concernant les transferts vers la Grèce (voir décision de recevabilité du 2 décembre 2008, K.R.S. c. Royaume-Uni, Req. 32733/08, partie « en droit », section B) édictant la présomption de respect de l'article 3 CEDH.

39. De même, la CJUE, dans son arrêt NS, confirme que c'est « l'examen des textes constituant le système européen commun d'asile » qui permet « de supposer que l'ensemble des États y participant … respectent les droits fondamentaux … et que les États membres peuvent s'accorder une confiance mutuelle à cet égard » (point 78). Elle érige le critère de « défaillances

systémiques » en vue d'éviter que la simple violation apparente desdites directives n'engage l'obligation de ne pas transférer la personne (points 84 à 86).

40. En somme : si le législateur a harmonisé les conditions de fond, la possible violation des droits fondamentaux se mesure à l'échelle de cette règlementation, et seule leur violation intégrale va justifier une crainte de violation des droits fondamentaux.[1]

41. Cette approche ne saurait s'appliquer au système du MAE, les conditions carcérales relevant entièrement de la compétence des Etats-membres.

42. Le législateur européen est certes mandaté en 2009, par la Résolution du Conseil du 30 novembre 2009 relative à la Feuille de route visant à renforcer les droits procéduraux des personnes poursuives dans le cadre de procédures pénales (JO C 295 du 4.12.2009, p. 1), à établir des normes minimales sur les garanties procédurales. Cela va mener à l'adoption des directives 2010/64/UE du 20 octobre 2010 sur la traduction et l'interprétation, 2012/13/UE du 22 mai 2012 sur le droit à l'information et 2013/48/UE du 22 octobre 2013 sur le droit d'accès à l'avocat, chacune visant à renforcer la confiance mutuelle en améliorant la protection des droits des personnes suspectées ou accusées en matière pénale.

43. Mais en matière de détention, la Feuille de route envisage seulement une consultation quant à l'opportunité d'une éventuelle législation en la matière. Aucune mesure n'est proposée.

44. C'est donc dans un domaine encore aucunement renforcé de la confiance mutuelle que s'inscrit la question du refus d'exécution d'un MAE sur la base de conditions de détention dans l'Etat-membre émetteur. Il s'ensuit que le contrôle de respect des droits fondamentaux par l'Etat d'exécution doit être d'autant plus scrupuleux.

**(ii) Indisponibilité des mêmes types de preuve**

45. En deuxième lieu, s'il n'y a aucun doute qu'il incombe, initialement, à la personne recherchée de démontrer que sa crainte est justifiée, l'approche à la preuve ne peut, elle non plus, être empruntée directement du cadre de l'asile.

46. Dans son arrêt NS, la CJEU enjoint les Etats-membres à vérifier le respect des droits de l'homme dans l'Etat responsable à la lumière de « rapports réguliers et concordants d'organisations non gouvernementales internationales » et d'autres éléments (voir points 90 et 91). Cette approche est logique dans son contexte : les problèmes de surcharge des systèmes d'asile relèvent principalement de quatre ou cinq Etats-membres à la frontière externe ; les grandes associations et les instances internationales, dès lors, concentrent leurs ressources sur ces « hot spot » et un amassement de rapports ainsi que leur renouvellement continu sont possibles.

47. Dans le système MAE, une telle accumulation d'informations d'actualité n'est pas envisageable, vu le nombre et la distribution géographique des prisons et le fait que le CPT doit visiter chacun des 47 pays du Conseil de l'Europe, impliquant forcément des délais de quelques ans. Dans ces conditions, il ne peut être attendu d'une personne recherchée qu'elle puisse nécessairement fournir un dossier lourd de rapports récents. D'où la valeur d'une approche concentrée sur les décisions de justice, en particulier ceux de la Cour EDH, concernant les conditions carcérales dans le pays d'émission du MAE.

[1] On peut comparer cela à l'approche de la CJUE dans son arrêt Melloni, C-399/11 ECLI:EU:C:2013:107, qui exclue l'application d'une norme constitutionnelle contre l'extradition en cas de condamnation par défaut, cet aspect faisant l'objet d'une harmonisation exhaustive par la décision-cadre 2009/299/JAI. L'harmonisation chasse la faculté d'appréciation générale de risque des droits fondamentaux.

**D. <u>Quant à un renvoi préjudiciel à la CJUE</u>**

48. Comme relevé plus haut, malgré les différences concrètes entre les systèmes d'asile et d'extradition, la CJUE n'a toujours pas été amenée à statuer sur l'application des principes de l'arrêt NS dans le cadre du MAE. En découle la possibilité d'une diversité d'approche nationales, une telle géométrie variable dans l'application de la décision-cadre MAE n'aidant nullement à l'atteinte des objectifs de celle-ci (voir, à cet égard, les Conclusions de l'Avocat-général Bot du 2 octobre 2012 dans l'affaire Melloni, C-399/11, ECLI:EU:C:2012:600, point 103).

49. En vertu de l'article 267 du Traité sur le fonctionnement de l'Union européenne, en cas de doute, il incombe à votre Cour, en tant qu'instance de dernier ressort, de saisir la CJUE à titre préjudiciel au sujet de l'interprétation de la Charte et de la décision-cadre MAE, notamment en ce qui concerne le critère juridique applicable et l'aménagement de la charge de la preuve dans le contexte juridique particulier de la décision-cadre MAE.

50. Nous soulignerons enfin que, dans le cas d'une personne détenue en vertu d'un MAE, votre Cour a la faculté de demander l'application de la procédure préjudicielle d'urgence prévue aux articles 107 à 114 du Règlement de procédure de la CJUE. Lors d'une application récente de ce dispositif (arrêt Jeremy F, C-168/03, ECLI:EU:C:2013:358), la CJUE avait répondu aux questions du conseil constitutionnel français sur la décision-cadre MAE en moins de deux mois.[2]

**Fair Trials International**
**Bruxelles, le 31 juillet 2014**
**Alex Tinsley, Law Reform Officer**

[2] Tout période de détention résultant de l'exécution d'un MAE étant, en tout état de cause, déductible de la peine à purger dans l'Etat d'émission en vertu de l'article 26, paragraphe 1 de la décision-cadre MAE.

FAIR TRIALS

## INTRODUCTION

1. This opinion is produced by Fair Trials in the context of pending criminal proceedings in the case of [---], which we understand to raise an issue as to the interpretation of Article 7(1) of Directive 2012/13/EU on the right to information in criminal proceedings (the '**Directive**'). As an expert on EU criminal justice issues, we provide this opinion as an independent entity with no interest in the outcome of the specific case.

### About Fair Trials

2. Fair Trials is an independent human rights organisation based in London and Brussels which works for respect for the right to a fair trial according to internationally-recognised standards of justice. It is the coordinator of the Legal Experts Advisory Panel ('**LEAP**'), a network of 130 criminal justice experts from all 28 Member States of the European Union.

3. Fair Trials works with LEAP to obtain current information on the protection of defence rights within the European Union. For instance, in 2013-14 LEAP 56 members from 25 countries met in six different meetings to discuss the situation of defence rights covered by the directives adopted under the EU Roadmap for strengthening procedural rights of suspects and accused persons in criminal proceedings[1] (the '**Roadmap**'), discussed further below, including the Directive and the specific question of access to the case-file.

4. Fair Trials also convenes regular roundtables of LEAP to discuss strategic priorities and issues of common concern, with access to the case-file identified as one of four key areas of focus. LEAP also provides knowledge on the implementation of the directives adopted under the Roadmap through roundtable meetings, questionnaire-based surveys and regular telephone calls.

### The issue

5. We understand this case to raise the question of the meaning of the requirement in Article 7(1) to 'make available' documents and, in particular, whether this should be interpreted as precluding the application of a rule whereby a person subject to an arrest warrant is refused both the right to take copies of evidence on which they intend to rely to challenge their detention and the ability for their lawyer to take notes when consulting such documents.

[1] Resolution of the Council of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings (OJ 2009 C 295, p. 1).

### Assumptions

6. We assume, for the purposes of this opinion, that the existence of an arrest warrant is sufficient to trigger the obligations of the Member State whose authorities issued that arrest warrant under Article 7(1), irrespective of whether the person is actually detained further to it.

7. We also assume that the person subject to that arrest warrant has full standing to avail themselves of any procedural rights available to persons detained in the ordinary course of criminal proceedings in that Member State, irrespective of where they are physically located.

### Content of this opinion

8. This opinion makes the following points:

   a. Article 7(1) of the Directive was adopted to facilitate compliance with the requirement arising under Article 5(4) of the European Convention on Human Rights ('**ECHR**') for access to the file to the extent necessary to ensure equality of arms in proceedings for challenging the lawfulness of detention.

   b. A review of the case-law of the European Court of Human Rights ('**ECtHR**') on Articles 5(4) and, by analogy, 6 of the ECHR shows that there is a certain flexibility within the ECHR as to how such access is provided, but that the modalities chosen must in any case enable an effective opportunity to prepare a challenge to the lawfulness of detention, a rule which may in certain cases be infringed by practical arrangements which limit the opportunity for lawyer and client to consult on the basis of the evidence in the file.

   c. Article 7(1) of the Directive, at least, reproduces this requirements. It also entails additional effects including (i) the requirements for legal certainty and clarity in implementation of directives, which means that practical restrictions upon this right should have a clear legal basis; (ii) national courts must do all that lies within their jurisdiction to give effect to the Directive; and (iii) the provision needs to be read together with the Charter of Fundamental Rights of the EU (the '**Charter**'), the requirements of which in this context are not clear.

   d. A review of some of the ways in which access to the case file is made available to suspects or their lawyers at the pre-trial stage in criminal cases in different Member States of the EU shows that there seem to be different views among the Member States as to the requirements of Article 7(1), and that there exist various practical ways of providing such access, some of which produce difficulties when it comes to challenging detention.

e. In the event of doubt as to the proper meaning of Article 7(1) and the extent to which it may prescribe certain minimal procedural modalities, a reference to the Court of Justice of the EU ('**CJEU**') is available (or, as the case may be, mandatory). A refusal to refer by a court of final must be adequately reasoned, in accordance with Article 6 ECHR.

## A. ARTICLE 7(1): OBJECT AND PURPOSE

9. Article 7(1) of the Right to Information Directive (the 'Directive') has not yet been interpreted by the CJEU. For the time being, we think it helpful to state what we understand to be its purpose.

10. Article 7(1) appears to be closely related to the requirement in the case-law of the ECHR based on Article 5(4) ECHR according to which the review of detention 'must provide guarantees of a judicial procedure. The proceedings must be adversarial and must always ensure "equality of arms" (...) Equality of arms is not ensured if counsel is denied access to those documents in the investigation file which are essential in order effectively to challenge the lawfulness of his client's detention' (*Schöps v. Germany* App. No 25116/94 (13 February 2001), paragraph 44).

11. The ECtHR also states: 'information which is essential for the assessment of the lawfulness of a detention should be *made available* in an appropriate manner to the suspect's lawyer' (our emphasis) (*Garcia Alva v. Germany* App. No 23541/94 (13 February 2001), paragraph 42).

12. Article 7(1) appears to replicate this, requiring Member States to 'ensure that documents (…) which are essential to challenging effectively, in accordance with national law, the lawfulness of the arrest or detention, are made available to arrested persons or to their lawyers'. The relationship between the rules is confirmed by recital 30, which specifies that such documents must be made available at the latest before the hearing envisaged by Article 5(4) ECHR.

13. That is consistent with the general objective of the Roadmap, which called for 'further action on the part of the European Union to ensure full implementation and respect of Convention standards, and, where appropriate, to ensure consistent application of the applicable standards and to raise existing standards' (recital 2).

14. Article 7(1) thus seems to be intended to protect the right to liberty by ensuring that sufficient access to evidence is provided to enable compliance with the equality of arms requirement inherent in Article 5(4) ECHR and, thereby, ensure effective judicial review of detention.

15. However, the specific meaning of the requirement to 'make available' documents is not clear. The expression does not appear elsewhere in Article 7 of the Directive, and appears to be a reference to the expression of the ECtHR reproduced above at paragraph 12. The Directive further states that 'the provisions of this Directive that correspond to rights guaranteed by the ECHR should be interpreted and implemented consistently with those rights, as interpreted in the case-law of the [ECtHR]'. Accordingly, it is necessary to examine the ECtHR case-law

## B. THE ECHR'S EQUALITY OF ARMS REQUIREMENT

### 1. The practical requirements of equality of arms under Article 5(4)

16. Most of the findings of violations of Article 5(4) ECHR concern cases in which substantive restrictions on access to the file are concerned. The case-law establishes that, although the efficient conduct of criminal investigations may imply that evidence be kept secret, this legitimate goal cannot be pursued at the expense of substantial restrictions on the rights of the defence, so the essential documents must be made available (*Chruscinski v. Poland* App. No 22755/04 (6 November 2007), paragraph 56). At this point, as access has been restricted outright, the question of modalities does not arise, so the ECtHR's analysis stops there.

17. However, in discussing the equality of arms requirement under Article 5(4), the ECtHR specifies that '[w]hile national law may satisfy this requirement in various ways, whatever method is chosen should ensure that the other party will be aware that observations have been filed and will have a *real opportunity to comment thereon*' (emphasis added) (*Lietzow v. Germany* App. No 24479/94) (13 February 2001). In so doing, it refers to the more general requirements of a fair trial Article 6 ECHR, which form the basis for the requirements of Article 5(4) ECHR. Accordingly, inferences can be drawn by analogy from that case-law concerning Article 6 where, by contrast, the question of modalities usually arises more clearly.

### 2. Modalities of access to the file and equality of arms under Article 6 ECHR

18. In relation to Article 6 ECHR, the ECtHR states clearly that 'unrestricted access to the case file and unrestricted use of any notes, including, if necessary, the possibility of obtaining copies of relevant documents, [are] important guarantees of a fair trial in criminal proceedings (*Dolenec v. Croatia* App. No 25282/06 (26 November 2009), paragraph 218). On that basis, the ECtHR finds restrictions upon the ability to take copies of documents to lead to an infringement of the requirement for an adversarial procedure (*Dolenec v. Croatia*, see paragraphs 215-218).

19. The case-law on Article 6 ECHR further shows that a person will not enjoy 'adequate time and facilities to prepare a defence', as protected by Article 6(3)(b) ECHR, if for practical reasons their ability to access the file and consult with their lawyers on that basis is restricted and undermines their ability to prepare for trial.

20. Thus in *Öcalan v. Turkey* App. No 46221/99 (12 May 2005), the ECtHR found that the inability of lawyers to obtain copies of the case file to pass to the client, with only the most limited

opportunity for the client to consult the documents and instruct his lawyers on this basis once the restriction was lifted, meant a violation of Article 6(3) arose (paragraphs 138-149). Conversely, where counsel has the opportunity to obtain copies and pass them to the client, the ECtHR finds no violation (*Kamasinski v. Austria* App. No 9783/82 (19 December 1989), paragraph 91).

21. Indeed, more broadly, the ECtHR finds that the right to a fair trial is denied in civil cases where authorities refuse to provide physical copies of documents (namely medical records) which are needed in order to form a view as to the merits of a potential civil claim (against the hospital concerned), as lawyers and client need to be able to consult upon the content effectively in order to assess the legal situation (*K.H. v. Slovakia* App. No 32881/04 (28 April 2009).

22. This approach, we suggest, reflects the assumption that, in order to be able to comment effectively upon the contents of the file, a person must have meaningful access to it and the ability to discuss it with their counsel. Practical restrictions (on time, ability to make copies etc.) may undermine this and lead to an infringement of the requirement for equality of arms.

**a. Appropriate conclusions concerning Article 5(4) equality of arms**

23. Of course, though the ECtHR states that the proceedings under Article 5(4) need not possess all the guarantees of a criminal trial, such a procedure 'should in principle also meet, to the largest extent possible under the circumstances of an ongoing investigation, the basic requirements of a fair trial' (*Schöps v. Germany*, cited above, paragraph 44).

24. The analysis as to whether a proceeding for the review of the lawfulness of detention is fair thus proceeds on much the same basis as the assessment whether there were sufficient time and facilities to prepare a trial defence. For instance:

    a. In *Shulenkov v. Russia* App. No 38031/04 (17 June 2010), the ECtHR found a violation of Article 5(4) due to the practicalities, noting that a last-minute replacement lawyer 'did not have time to travel to Moscow to take instructions from the applicant or discuss the matter with him' but that the domestic court 'did not consider the possibility of adjourning the hearing with a view to (…) [the lawyer] sufficient time and facilities *to confer with the applicant and to study the case file*' (paragraph 53) (our emphasis).

    b. In *Černák v. Slovakia* App. No 36997/08 (17 December 2013), an extradition case, the Court noted that 'the applicant's lawyers were summoned to the remand hearing only a few hours before that hearing, despite there being a considerable distance between their chambers and the court, and that at that hearing, they were served with a copy of the EAW and allowed to inspect the case file and to consult with the applicant for about twenty minutes. The Court is of the view that the *time and facilities* thus available to them for the preparation of the applicant's case were considerably limited' (paragraph 80).

    c. The questions communicated to the respondent Government in *Apostu v. Romania* App. No 22765/12 (communicated 18 December 2012) ask whether the requirement for a detainee and his lawyer to consult through a glass partition, limiting their ability to discuss confidential documents, infringed the applicant's right under Article 5(4) ECHR, showing that practical restrictions can raise an issue under that provision.

25. Accordingly, the requirement for equality of arms under Article 5(4) ECHR should be approached on the same basis as Article 6 ECHR: it matters not how access to the file is organised, provided that there is at least be an effective opportunity for counsel and client to discuss the content in order to be able to make submissions regarding detention. Practical limitations relating to the making of copies and ability to make notes may infringe this requirement.

## C. EU LAW OBLIGATIONS FLOWING FROM ARTICLE 7(1) OF THE DIRECTIVE

26. Article 7(1) of the Directive, as discussed above in paragraphs 11-14, seeks to ensure compliance with the requirements that exist in the Article 5(4) case-law. As a minimum, it must therefore be taken to require that the arrested person has an effective opportunity to consult the contents of the case file and confer with his/her lawyers on that basis. However, it is worth considering the additional characteristics of Article 7(1) as a provision of EU law.

27. Under Article 288 TFEU, a directive is binding as to the result to be achieved but leaves the Member State the choice of methods to achieve it. And indeed, beyond the requirement to 'make available' documents, Article 7(1) does not prescribe a particular method for making documents available. In addition, directives adopted under Article 82(2) TFEU (such as the Directive) do not 'harmonise' criminal justice systems: they impose only 'minimum rules' and respect the legal traditions of the Member States.

28. In principle, therefore, the modalities for access to the file fall to the Member State to decide. However, this is subject to (1) the requirement for legal certainty in implementation; (2) the requirement to ensure the effectiveness of the provision in question; (3) overriding requirements of the Charter which have not yet been explored in this context.

### 1. Legal certainty and precision in implementation of Directives

29. The CJEU has stated that 'each Member State should implement the directives in question in a way which fully meets the requirements of clarity and certainty (…) *Mere administrative practices, which by their nature can be changed as and when the authorities please and which are*

*not publicized widely enough cannot in these circumstances be regarded as a proper fulfilment of the obligation* imposed by article 189 [now 288 TFEU] on Member States to which the directives are addressed' (our emphasis) (Case 102/79 *Commission v. Belgium*).

30. Within the framework of Article 7 of the Directive, Article 7(1) is subject to no derogation, reflecting the irreducible nature of the requirement for disclosure under Article 5(4) ECHR (see, in this regard, *Dochnal v. Poland*, where the ECtHR found that even documents relating to national security could not be withheld at the expense of this requirement). This makes it clear that a practical restriction on the consultation of such documents impinges upon the enjoyment of an irreducible aspect of a fundamental right, and such restrictions should therefore be clearly provided in law and not left to prosecutorial discretion.

**2. Requirement to ensure the full effect of Article 7(1)**

31. Secondly, even if Article 7(1) simply restates the equality of arms rule in Article 5(4) ECHR, this comes with the added injunctive force of a provision of EU law. The CJEU states that 'EU law requires national courts to do whatever lies within their jurisdiction, taking the whole body of domestic law into consideration and applying the interpretative methods recognised by domestic law, with a view to ensuring that the directive in question is fully effective and achieving an outcome consistent with the objective pursued by it' (Case C-69/10 *Diouf*). Accordingly, provisions of national law relating to access to materials, and any other general powers of the court, should be interpreted in such a way as to ensure that the person subject to the arrest warrant has an effective opportunity to prepare a challenge to the lawfulness of detention.

32. In addition, even if the national law appears to achieve the aims of the Directive, it falls to the court having jurisdiction to ensure the benefit of the Directive is enjoyed by the person concerned. 'The adoption of national measures correctly implementing a directive does not exhaust the effects of the directive. Member States remain bound actually to ensure full application of the directive even after the adoption of those measures. Individuals are therefore entitled to rely before national courts, against the State, on the provisions of a directive which appear, so far as their subject-matter is concerned, to be unconditional and sufficiently precise whenever the full application of the directive is not in fact secured [including] where the national measures correctly implementing the directive are not being applied in such a way as to achieve the result sought by it' (Case C-62/00 *Marks & Spencer*, paragraph 27). Article 7(1) is clear, precise and unconditional and appears specifically intended to confer an enforceable right upon the person concerned. Accordingly, it falls to the national court to ensure, in the specific case, that the practical arrangements adopted further to the relevant national law ensure a sufficient opportunity to prepare a case to challenge the arrest warrant.

**3. The right to an adversarial proceeding under Article 47 of the Charter**

33. Thirdly, it should be observed that the Article 7(1) should be read together with the Charter of Fundamental Rights of the EU, in particular Article 6 (right to liberty) and Article 47 (right to an effective remedy). The latter provision incorporates the right to an adversarial proceeding, requiring that 'the parties to a case must have the right to examine all the documents or observations submitted to the court for the purpose of influencing its decision, and to comment on them' (Case C-300/11 *ZZ*, paragraph 55). The *ZZ* case effectively established that principles developed by the ECtHR under Article 5(4) ECHR applied to decisions excluding an EU citizen from a Member State, but the CJEU has not had occasion to comment upon the application of those principles in the criminal justice context when a person presumed innocent is deprived of liberty. As explained below, the disparity in practices in the EU suggest that the requirements of the right to an adversarial proceeding in this context require further clarification..

## D. SYSTEMS OF ACCESS TO THE FILE IN THE EU

34. A study which Fair Trials has been undertaking through consultation with LEAP shows how systems of pre-trial disclosure operate in other EU Member States. Some Member States appear not to have sufficiently complied with the substantive right of access conferred by Article 7(1), allowing access to the file itself to be restricted in order to protect the effectiveness of the investigation:

    a. In **Estonia**, the law specifically implementing the Directive permits the prosecutor to withhold access to documents which are essential for challenging detention. Thus, irrespective of modalities, in some cases there will simply be no access to the file. Estonian lawyers consider this contrary to the Directive.

    b. In **Bulgaria**, too, access is provided only at the conclusion of the pre-trial investigation, and prior to then the possibility to challenge detention is undermined. Earlier access may be provided but only on a sporadic basis by informal agreement with the prosecutor but this is not subject to specific requirements and may take the form of ad-hoc arrangements close to the hearing which do not provide an effective opportunity to prepare a challenge to detention.

    c. In **Portugal**, if no order has been issued to protect the secrecy of the investigation, copies of the file can be obtained at the pre-trial stage. However, if such an order has been issued, copies can be requested but may not always be granted. Only after the completion of the pre-trial investigation is full consultation of the case file provided, with the lawyer

able to make copies and take scans. This, ultimately, can mean that in some cases it becomes difficult effectively to challenge detention at the pre-trial stage.

d. In **Lithuania**, the law enables the prosecutor to withhold access to the file, but also to grant access but restrict the ability to make photocopies. Consultation takes place at the prosecutor's office and copies are made there if allowed. Certain documents, including as to the private lives of participants in the proceedings, cannot be copied. However, in any case, the law entitles the lawyer to take notes, with the exception only of documents considered a state secret.

35. However, the enquiry reveals more examples of practices enabling relatively free access to documents, with the possibility to access physical evidence in the form of copies or scans:

a. In **Romania**, consultation of the criminal case file is governed by Article 94 of the new Code of Criminal Proceedings, which entered into force in February 2014. This entitles the lawyer of the person subject to criminal proceedings (inculpat) to consult the file and to take photocopies. If the person is deprived of liberty, there is a right to consult the whole file. A formal document issued by the prosecutor's office in March 2014 explained how prosecutors would be approaching this provision, stating that photocopies would be provided but that specific information, such as the personal data of third parties, might be redacted on a case by case basis in order to protect those data from circulation in the public domain. The result is that a person detained pre-trial is – if not immediately, due to delays in obtaining copies, then reasonably soon thereafter – able to consult the full file and retain possession of a copy of it.

b. In **Germany**, pursuant to Article 147 of the Criminal Procedure Code (which is federal law applicable in all the Länders), defence counsel has the right to inspect the case file. While restrictions apply to the right in order to protect the purpose of the investigation, where a person is deprived of liberty, 'information of relevance for the assessment of the lawfulness of such deprivation of liberty shall be made available to defence counsel in suitable form; to this extent, as a rule, inspection of the files shall be granted'. The LEAP Advisory Board member for Germany explains that, in cases involving lower volumes of information, a copy of the original file is made available, or the original file is made available to the lawyer who may make a copy for his client. In cases involving a larger volume of information, a CD/DVD with an electronic version of the file is made available. As a result, there is not a major issue challenging detention effectively. Another LEAP Member has, in fact, given the example of the courts ordering the authorities to provide a personal computer, at the state's expense, to enable a detained client to consult vast amounts of electronic evidence in order to prepare for trial, showing the extent to which courts are prepared to use their jurisdiction to ensure practical, effective access.

c. In the **United Kingdom (UK)** (which is bound by the Directive), pre-trial disclosure is regulated by Part 10 of the Criminal Procedure Rules 2013, which provides that at the first court hearing the prosecution must provide 'initial details of the prosecution case', which include a summary of the evidence and any statement or document on which the prosecution case will be based. Such disclosure is provided in the form of a copy of the evidence, though there is a move towards digitalisation. If a copy cannot be supplied, the defence must be allowed to inspect the original. This disclosure is provided to the lawyer at court, or if no lawyer is present the prosecution would be under a duty to give the papers to the accused directly. As proceedings progress, the Criminal Justice and Procedure Act 1996 provides that, on an ongoing basis, any evidence which could assist the case of the accused or undermine the prosecution case must be disclosed, in which case, the same modalities apply.

d. In **Austria**, at the police station, the lawyer may consult the file and take pictures or copies, if the facilities are available. Thereafter, the file is accessed at the public prosecutor's office on the same basis. The request to consult the file is made in writing to the prosecutor, ordering copies there and then as the case may be. There is no legal basis for consultation only, without the right to take pictures or copies. The copies, when provided, can either be provided in paper or as data on a disc, depending on the facilities available to the particular prosecutor's office. There is a cost associated with copies (per file for electronic ones, or per page for hard copies, making the former cheaper). The right of access to the file applies to both defendants and their lawyers.

e. In **the Netherlands**, access is provided to the file within three days of arrest. At this stage, this is usually a paper copy of the file. Electronic files are then supplied later. This is currently organised through a CD, with an online system being piloted. The lawyer retains the file and is free to provide a copy to his client any time. Consequently, this aspect does not produce a difficulty in challenging detention.

36. On the basis of the above, we would suggest that it is clear that there is a lack of agreement, at least between the Member States' legislative authorities, as to the precise requirements of Article 7(1) of the Directive. This is presumably why the Roadmap sought to 'ensure full implementation and respect of Convention standards, and, *where appropriate, to ensure consistent application of the applicable standards*' (recital 2).

**E. REFERENCE TO THE COURT OF JUSTICE OF THE EU**

37. To the extent that the Court has doubt as to the proper interpretation of Article 7(1) of the Directive and, in particular, the concept of documents being 'made available' to arrested persons or their lawyers, we would underline that there is the possibility (and potentially the obligation) to make a reference for a preliminary ruling to the CJEU. For convenience, we summarise key relevant principles:

    a. Further to Article 267 TFEU, the CJEU has jurisdiction to give preliminary rulings concerning issues of EU law. Any court or tribunal *may*, if it considers that a decision on the question is necessary to enable it to give judgment, request the CJEU to give a ruling. Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal *shall* bring the matter before the [CJEU] (our emphasis).

    b. The facility to refer a question belongs to any court or tribunal which considers that the interpretation of a question of EU law is necessary to enable it to give judgment. Thus, the *Amstgericht Laufen*, a first-instance court in Germany, has referred questions concerning the Directive and Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings, seeking a ruling as to whether those measures are to be interpreted as precluding certain national procedural rules relating to the calculation of time limits and the submission of appeal documentation (Case C-216/14 *Covaci*, reference for a preliminary ruling lodged on 30 April 2014, OJ 2014 C 253, p. 17).

    c. The obligation to make a reference which applies to courts of final instance is subject to the rule that a question need not be referred if it is *acte clair*, the conditions for which were specified in the CILFIT case. In particular –

        i. 'the correct application of community law may be so obvious as to leave no scope for any reasonable doubt as to the manner in which the question raised is to be resolved. Before it comes to the conclusion that such is the case, the national court or tribunal must be convinced that the matter is equally obvious to the courts of the other member states and to the [CJEU]. Only if those conditions are satisfied, may the national court or tribunal refrain from submitting the question to the court of justice and take upon itself the responsibility for resolving it' (Case 283/81 *CILFIT*, paragraph 16). Whilst this obligation does not require the national court to consider the position of administrative authorities in other states, we would suggest that the variety of approaches discussed in Part D above, unlikely to be inconsistent with national jurisprudences, show there is no consensus on the requirements of Article 7(1).

        ii. It is necessary to bear in mind the characteristics of EU law, including, inter alia, the fact that provisions of EU law must be interpreted in light of EU law as a whole, regard being had to the objectives thereof and to its state of evolution at the material time (CILFIT, paragraph 20). We would point out that the relationship between Article 7(1), Article 5(4) ECHR, and broader fundamental rights and principles of EU law is an incidence of the 'complex and evolving' relationship between the EU and the ECHR (*European Human Rights Law Review*, 2012 4 363) and for that reason alone cannot be considered acte clair.

38. We would further highlight the fact that Article 6 ECHR imposes obligations upon courts which are requested to make a reference for a preliminary ruling to the CJEU. The principles were summarised in *Vergauwen and Others v. Belgium* App. No 4823/04 (admissibility decision of 10 April 2012), paragraphs 89 and 90). In particular:

    a. Article 6(1) requires domestic courts to give reasons, in light of the applicable law, for any decision refusing to refer a question for a preliminary ruling;

    b. In the specific context of the third paragraph of Article 267 TFEU, national courts against whose decisions there is no judicial remedy under national law, and which refuse to request a preliminary ruling from the CJEU on a question raised before them concerning the interpretation of EU law, are required to give reasons for such refusal in light of the exceptions provided in the case-law of the CJEU.

39. In *Dhahbi v. Italy* App. No 17120/09 (Judgment of 8 April 2014), the ECtHR found a violation of Article 6(1) on this basis, noting that the Italian Court of Cassation, which had refused to make a preliminary reference to the CJEU in a particular case, was the court of last instance but provided no reasons for its refusal to refer.

**CONCLUSION**

40. Fair Trials hopes that the observations in this opinion are of assistance to the court and will be happy to clarify any of the information if requried.

**Fair Trials**

**February 2015**

Directive 2012/13/EU on the right to information in criminal proceedings

Article 7

1. Where a person is arrested and detained at any stage of the criminal proceedings, Member States shall ensure that documents related to the specific case in the possession of the competent authorities which are essential to challenging effectively, in accordance with national law, the lawfulness of the arrest or detention, are made available to arrested persons or to their lawyers.

2. Member States shall ensure that access is granted at least to all material evidence in the possession of the competent authorities, whether for or against suspects or accused persons, to those persons or their lawyers in order to safeguard the fairness of the proceedings and to prepare the defence.

3. Without prejudice to paragraph 1, access to the materials referred to in paragraph 2 shall be granted in due time to allow the effective exercise of the rights of the defence and at the latest upon submission of the merits of the accusation to the judgment of a court. Where further material evidence comes into the possession of the competent authorities, access shall be granted to it in due time to allow for it to be considered.

4. By way of derogation from paragraphs 2 and 3, provided that this does not prejudice the right to a fair trial, access to certain materials may be refused if such access may lead to a serious threat to the life or the fundamental rights of another person or if such refusal is strictly necessary to safeguard an important public interest, such as in cases where access could prejudice an ongoing investigation or seriously harm the national security of the Member State in which the criminal proceedings are instituted. Member States shall ensure that, in accordance with procedures in national law, a decision to refuse access to certain materials in accordance with this paragraph is taken by a judicial authority or is at least subject to judicial review.

5. Access, as referred to in this Article, shall be provided free of charge.

## CASES AND MATERIALS FOR THE WORKING GROUPS OF 5 MAY 2015

Prof. dr. Marc de Werd - European law professor at Maastricht University and judge in the Amsterdam Court of Appeal (The Netherlands)

## CASE 1. THE PRINCIPLE OF LEGALITY IN EU LAW AND IN THE ECHR

(Articles 49.1 Charter and 7 ECRM)

***THE CASE OF "LAWYERS FOR THE WORLD"*** *- The idea behind the Framework Decision on the European Arrest Warrant is to simplify the system for the surrender of suspects or convicted persons in one member State when they are sought by the authorities of another. In order to do that, certain offenses are listed in the Framework Decision that give rise to surrender on the basis of a European arrest warrant without verification of the "double criminality" of the act. This new extradition tool was negotiated and adopted in the aftermath of the 9/11 attacks and was a further step in the integration of criminal matters within the EU. Heavily applauded by some and harshly criticized by others, the EAW was particularly controversial due to its partial abolishment of the double criminality requirement with respect to 32 enumerated crimes.*

*A Belgian association of lawyers "Advocaten voor de Wereld" (Lawyers for the World) brought an action before the Belgian Arbitragehof/Cour d'Arbitrage (Court of Arbitration) seeking the annulment of the Belgian law transposing the provisions of the Framework Decision on the European arrest warrant and the surrender procedures between Member States. Under the prior extradition regime, the double criminality requirement allowed states to refuse extradition whenever the accused party's conduct did not constitute an offense under the criminal laws of both the executing and requesting states. This requirement is substantially curtailed under the new EAW regime. Indeed, for the 32 listed offenses, the double criminality requirement can no longer be verified. This controversial issue became one of the crucial elements under discussion in the Advocaten voor de wereld judgment.*

*The Belgian Court referred to the Court of Justice for a preliminary ruling several questions concerning the validity of the Framework Decision. The questions concerned inter alia the infringement of the principle of legality and non-discrimination because Article 2(2) of the Framework Decision contains a list of more than 30 offences in respect of which the usual condition of double criminality is dispensed with if those offences are punishable in the issuing Member State by a custodial sentence or a detention order for a maximum period of at least three years.*

*The Court of Justice recalled the principle of the legality of criminal offences and penalties (nullum crimen, nulla poena sine lege), which is one of the general legal principles underlying various international treaties, in particular the European Convention for the Protection of Human Rights and Fundamental Freedoms.*

## DISCUSSION

1. What does the principle nullum crimen, nulla poena sine lege imply?
2. When is this condition fulfilled in EU law?
3. Which were the Court's findings concerning nullum crimen, nulla poena sine lege?
4. Discuss if you know of any provision in your national law that might not meet the criteria of EU and Convention law.

## MATERIALS

- Michiel Luchtman, Towards a Transnational Application of the Legality Principle in the EU's Area of Freedom, Security and Justice?
- Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA).
- Opinion of Advocate General Ruiz-Jarabo Colomer delivered on 12 September 2006 Case C-303/05, Advocaten voor de Wereld VZW v Leden van de Ministerraad.
- Judgment of the CJEU (Grand Chamber) delivered on 3 May 2007 - Case C-303/05, Advocaten voor de Wereld VZW v Leden van de Ministerraad,
- Judgment of the ECtHR (Grand Chamber) delivered on 21 October 2013 - case of Del Rio Prada v. Spain

# Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA)

CHAPTER 1 (GENERAL PRINCIPLES)

Article 2 Scope of the European arrest warrant

1. A European arrest warrant may be issued for acts punishable by the law of the issuing Member State by a custodial sentence or a detention order for a maximum period of at least 12 months or, where a sentence has been passed or a detention order has been made, for sentences of at least four months.
2. The following offences, if they are punishable in the issuing Member State by a custodial sentence or a detention order for a maximum period of at least three years and as they are defined by the law of the issuing Member State, shall, under the terms of this Framework Decision and without verification of the double criminality of the act, give rise to surrender pursuant to a European arrest warrant:

- participation in a criminal organisation,
- terrorism,
- trafficking in human beings,
- sexual exploitation of children and child pornography,
- illicit trafficking in narcotic drugs and psychotropic substances,
- illicit trafficking in weapons, munitions and explosives,
- corruption,
- fraud, including that affecting the financial interests of the European Communities within the meaning of the Convention of 26 July 1995 on the protection of the European Communities' financial interests,
- laundering of the proceeds of crime,
- counterfeiting currency, including of the euro,
- computer-related crime,
- environmental crime, including illicit trafficking in endangered animal species and in endangered plant species and varieties,
- facilitation of unauthorised entry and residence,
- murder, grievous bodily injury,
- illicit trade in human organs and tissue,
- kidnapping, illegal restraint and hostage-taking,
- racism and xenophobia,
- organised or armed robbery,
- illicit trafficking in cultural goods, including antiques and works of art,
- swindling,
- racketeering and extortion,
- counterfeiting and piracy of products,
- forgery of administrative documents and trafficking therein,
- forgery of means of payment,
- illicit trafficking in hormonal substances and other growth promoters,
- illicit trafficking in nuclear or radioactive materials,
- trafficking in stolen vehicles,
- rape,
- arson,
- crimes within the jurisdiction of the International Criminal Court,
- unlawful seizure of aircraft/ships,
- sabotage.

## Judgment of the Court (Grand Chamber) In Case C-303/05, Advocaten voor de Wereld VZW v Leden van de Ministerraad, 3 May 2007

The principle of the legality of criminal offences and penalties

48 According to Advocaten voor de Wereld, the list of more than 30 offences in respect of which the traditional condition of double criminality is henceforth abandoned if those offences are punishable in the issuing Member State by a custodial sentence or detention order for a maximum period of at last three years is so vague and imprecise that it breaches, or at the very least is capable of breaching, the principle of legality in criminal matters. The offences set out in that list are not accompanied by their legal definition but constitute very vaguely defined categories of undesirable conduct. A person deprived of his liberty on foot of a European arrest warrant without verification of double criminality does not benefit from the guarantee that criminal legislation must satisfy conditions as to precision, clarity and predictability allowing each person to know, at the time when an act is committed, whether that act does or does not constitute an offence, by contrast to those who are deprived of their liberty otherwise than pursuant to a European arrest warrant.

49 The principle of the legality of criminal offences and penalties (nullum crimen, nulla poena sine lege), which is one of the general legal principles underlying the constitutional traditions common to the Member States, has also been enshrined in various international treaties, in particular in Article 7(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (see in this regard, inter alia, Joined Cases C-74/95 and C-129/95 X [1996] ECR I‑6609, paragraph 25, and Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P Dansk Rørindustri and Others v Commission [2005] ECR I‑5425, paragraphs 215 to 219).

50 This principle implies that legislation must define clearly offences and the penalties which they attract. That condition is met in the case where the individual concerned is in a position, on the basis of the wording of the relevant provision and with the help of the interpretative assistance given by the courts, to know which acts or omissions will make him criminally liable (see, inter alia, European Court of Human Rights judgment of 22 June 2000 in Coëme and Others v Belgium, Reports 2000-VII, § 145).

51 In accordance with Article 2(2) of the Framework Decision, the offences listed in that provision give rise to surrender pursuant to a European arrest warrant, without verification of the double criminality of the act, ‘if they are punishable in the issuing Member State by a custodial sentence or a detention order for a maximum period of at least three years and as they are defined by the law of the issuing Member State’.

52 Consequently, even if the Member States reproduce word-for-word the list of the categories of offences set out in Article 2(2) of the Framework Decision for the purposes of its implementation, the actual definition of those offences and the penalties applicable are those which follow from the law of ‘the issuing Member State’. The Framework Decision does not seek to harmonise the criminal offences in question in respect of their constituent elements or of the penalties which they attract.

53 Accordingly, while Article 2(2) of the Framework Decision dispenses with verification of double criminality for the categories of offences mentioned therein, the definition of those offences and of the penalties applicable continue to be matters determined by the law of the issuing Member State, which, as is, moreover, stated in Article 1(3) of the Framework Decision, must respect fundamental rights and fundamental legal principles as enshrined in Article 6 EU, and, consequently, the principle of the legality of criminal offences and penalties.

54 It follows that, in so far as it dispenses with verification of the requirement of double criminality in respect of the offences listed in that provision, Article 2(2) of the Framework Decision is not invalid on the ground that it infringes the principle of the legality of criminal offences and penalties.

## European Court of Human Rights case of Del Rio Prada v. Spain (Grand Chamber)

Article 7 of the European Convention on Human Rights:

> *"1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.*
> *2. This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations."*

The Court's assessment

1. Principles established by the Court's case-law
*(a) Nullum crimen, nulla poena sine lege*
77. The guarantee enshrined in Article 7, which is an essential element of the rule of law, occupies a prominent place in the Convention system of protection, as is underlined by the fact that no derogation from it is permissible under Article 15 even in time of war or other public emergency threatening the life of the nation. It should be construed and applied, as follows from its object and purpose, in such a way as to provide effective safeguards against arbitrary prosecution, conviction and punishment (see S.W. v. the United Kingdom and C.R. v. the United Kingdom, 22 November 1995, § 34, Series A no. 335-B, and § 32, Series A no. 335-C, respectively, and Kafkaris, cited above, § 137).
78. Article 7 of the Convention is not confined to prohibiting the retrospective application of the criminal law to an accused's disadvantage (concerning the retrospective application of a penalty, see Welch v. the United Kingdom, 9 February 1995, § 36, Series A no. 307‑A; Jamil v. France, 8 June 1995, § 35, Series A no. 317‑B; Ecer and Zeyrek v. Turkey, nos. 29295/95 and 29363/95, § 36, ECHR 2001‑II; and Mihai Toma v. Romania, no. 1051/06, §§ 26-31, 24 January 2012). It also embodies, more generally, the principle that only the law can define a crime and prescribe a penalty (nullum crimen, nulla poena sine lege) (see Kokkinakis v. Greece, 25 May 1993, § 52, Series A no. 260-A). While it prohibits in particular extending the scope of existing offences to acts which previously were not criminal offences, it also lays down the principle that the criminal law must not be extensively construed to an accused's detriment, for instance by analogy (see Coëme and Others v. Belgium, nos. 32492/96, 32547/96, 32548/96, 33209/96 and 33210/96, § 145, ECHR 2000-VII; for an example of the application of a penalty by analogy, see Başkaya and Okçuoğlu v. Turkey [GC], nos. 23536/94 and 24408/94, §§ 42‑43, ECHR 1999‑IV).
79. It follows that offences and the relevant penalties must be clearly defined by law. This requirement is satisfied where the individual can know from the wording of the relevant provision, if need be with the assistance of the courts' interpretation of it and after taking appropriate legal advice, what acts and omissions will make him criminally liable and what penalty he faces on that account (see Cantoni v. France, 15 November 1996, § 29, Reports of Judgments and Decisions 1996‑V, and Kafkaris, cited above, § 140).
80. The Court must therefore verify that at the time when an accused person performed the act which led to his being prosecuted and convicted there was in force a legal provision which made that act punishable, and that the punishment imposed did not exceed the limits fixed by that provision (see Coëme and Others, cited above, § 145, and Achour v. France [GC], no. 67335/01, § 43, ECHR 2006‑IV).
(-)
*(c) Foreseeability of criminal law*
91. When speaking of "law" Article 7 alludes to the very same concept as that to which the Convention refers elsewhere when using that term, a concept which comprises statutory law

as well as case-law and implies qualitative requirements, notably those of accessibility and foreseeability (see Kokkinakis, cited above, §§ 40-41; Cantoni, cited above, § 29; Coëme and Others, cited above, § 145; and E.K. v. Turkey, no. 28496/95, § 51, 7 February 2002). These qualitative requirements must be satisfied as regards both the definition of an offence and the penalty the offence carries.

92. It is a logical consequence of the principle that laws must be of general application that the wording of statutes is not always precise. One of the standard techniques of regulation by rules is to use general categorisations as opposed to exhaustive lists. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice (see Kokkinakis, cited above, § 40, and Cantoni, cited above, § 31). However clearly drafted a legal provision may be, in any system of law, including criminal law, there is an inevitable element of judicial interpretation. There will always be a need for elucidation of doubtful points and for adaptation to changing circumstances. Again, whilst certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances (see Kafkaris, cited above, § 141).

93. The role of adjudication vested in the courts is precisely to dissipate such interpretational doubts as remain (ibid.). The progressive development of the criminal law through judicial law-making is a well-entrenched and necessary part of legal tradition in the Convention States (see Kruslin v. France, 24 April 1990, § 29, Series A no. 176‑A). Article 7 of the Convention cannot be read as outlawing the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen (see S.W. and C.R. v. the United Kingdom, cited above, § 36 and § 34 respectively; Streletz, Kessler and Krenz, cited above, § 50; K.-H.W. v. Germany [GC], no. 37201/97, § 85, ECHR 2001-II (extracts); Korbely v. Hungary [GC], no. 9174/02, § 71, ECHR 2008; and Kononov v. Latvia [GC], no. 36376/04, § 185, ECHR 2010). The lack of an accessible and reasonably foreseeable judicial interpretation can even lead to a finding of a violation of the accused's Article 7 rights (see, concerning the constituent elements of the offence, Pessino v. France, no. 40403/02, §§ 35-36, 10 October 2006, and Dragotoniu and Militaru-Pidhorni v. Romania, nos. 77193/01 and 77196/01, §§ 43-44, 24 May 2007; as regards the penalty, see Alimuçaj v. Albania, no. 20134/05, §§ 154-162, 7 February 2012). Were that not the case, the object and the purpose of this provision – namely that no one should be subjected to arbitrary prosecution, conviction or punishment – would be defeated.

## ARTICLE 49 EU CHARTER

Principles of legality and proportionality of criminal offences and penalties

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national law or international law at the time when it was committed. Nor shall a heavier penalty be imposed than that which was applicable at the time the criminal offence was committed. If, subsequent to the commission of a criminal offence, the law provides for a lighter penalty, that penalty shall be applicable.

## CASE 2. HIGHER NATIONAL STANDARDS AND EU LAW

***THE CASE OF MELLONI*** *- Mr Melloni was convicted in absentia to a ten-year sentence for bankruptcy fraud by Italian courts. On 8 June 2004, the Italian authorities issued an EAW for his surrender.*
*Mr Melloni was apprehended by the Spanish police in 2008. By order of 12 September 2008, the Audiencia Nacional decided to surrender the convict to the Italian authorities without imposing the condition of a retrial.*
*Then, Mr Melloni filed a constitutional petition before the SCC, claiming that his right to a fair trial had been violated. Confronted with these facts, the SCC realised that if it decided to simply uphold its previous case law, the Spanish Constitution would clearly be in conflict with Article 4a(1) FD as amended in 2009. Thus, the SCC decided to reconsider the implications of its doctrine in relation to EU law.*
*By order of 9 June 2011 (ATC 86/2011), the SCC sent its preliminary reference to the CJEU. The order contained three questions:*

*(i) whether Article 4a(1) FD must be interpreted as prohibiting Member States from making the execution of an EAW subject to the possibility of retrial in cases where a conviction has been rendered in absentia;*
*(ii) whether Article 4a(1) FD is valid in light of Articles 47 and 48 of the EU Charter of Fundamental Rights; and*
*(iii) (whether, under Article 53 of the Charter, it can grant a higher level of protection than that provided for under EU law.*

*In its judgment of 26 February 2013, the CJEU responded to the first two questions in the affirmative.*

### DISCUSSION

- Discuss if Article 53 of the Charter allows national authorities to apply higher standards of protection of fundamental rights.
- Discuss if, and to what extend, your national constitutional or criminal law offers more protection than the EU Charter (text) and ECHR (text)

### MATERIALS

- Case C-399/11, Stefano Melloni v Ministerio Fiscal (Spain)
- Vanessa Franssen, March 10, 2014, Melloni as a Wake-up Call – Setting Limits to Higher National Standards of Fundamental Rights' Protection, European Law Blog
- Mario García, March 17, 2014, STC 26/2014: The Spanish Constitutional Court Modifies its case law in response to the CJEU's Melloni judgment, European Law Blog

**JUDGMENT OF THE COURT (Grand Chamber) in Case C-399/11, 6 February 2013 - REQUEST for a preliminary ruling under Article 267 TFEU from the Tribunal Constitucional (Spain), made by decision of 9 June 2011, received at the Court on 28 July 2011, in the proceedings Stefano Melloni v Ministerio Fiscal**

(Police and judicial cooperation in criminal matters – European arrest warrant – Surrender procedures between Member States – Decisions rendered at the end of proceedings in which the person concerned has not appeared in person – Execution of a sentence pronounced in absentia – Possibility of review of the judgment)

**(-) The third question**

55 By its third question, the national court asks, in essence, whether Article 53 of the Charter must be interpreted as allowing the executing Member State to make the surrender of a person convicted in absentia conditional upon the conviction being open to review in the issuing Member State, in order to avoid an adverse effect on the right to a fair trial and the rights of the defence guaranteed by its constitution.

56 The interpretation envisaged by the national court at the outset is that Article 53 of the Charter gives general authorisation to a Member State to apply the standard of protection of fundamental rights guaranteed by its constitution when that standard is higher than that deriving from the Charter and, where necessary, to give it priority over the application of provisions of EU law. Such an interpretation would, in particular, allow a Member State to make the execution of a European arrest warrant issued for the purposes of executing a sentence rendered in absentia subject to conditions intended to avoid an interpretation which restricts or adversely affects fundamental rights recognised by its constitution, even though the application of such conditions is not allowed under Article 4a(1) of Framework Decision 2002/584.

57 Such an interpretation of Article 53 of the Charter cannot be accepted.

58 That interpretation of Article 53 of the Charter would undermine the principle of the primacy of EU law inasmuch as it would allow a Member State to disapply EU legal rules which are fully in compliance with the Charter where they infringe the fundamental rights guaranteed by that State's constitution.

59 It is settled case-law that, by virtue of the principle of primacy of EU law, which is an essential feature of the EU legal order (see Opinion 1/91 [1991] ECR I‑6079, paragraph 21, and Opinion 1/09 [2011] ECR I‑1137, paragraph 65), rules of national law, even of a constitutional order, cannot be allowed to undermine the effectiveness of EU law on the territory of that State (see, to that effect, inter alia, Case 11/70 Internationale Handelsgesellschaft [1970] ECR 1125, paragraph 3, and Case C-409/06 Winner Wetten [2010] ECR I‑8015, paragraph 61).

60 It is true that Article 53 of the Charter confirms that, where an EU legal act calls for national implementing measures, national authorities and courts remain free to apply national standards of protection of fundamental rights, provided that the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of EU law are not thereby compromised.

61 However, as is apparent from paragraph 40 of this judgment, Article 4a(1) of Framework Decision 2002/584 does not allow Member States to refuse to execute a European arrest warrant when the person concerned is in one of the situations provided for therein.

62 It should also be borne in mind that the adoption of Framework Decision 2009/299, which inserted that provision into Framework Decision 2002/584, is intended to remedy the difficulties associated with the mutual recognition of decisions rendered in the absence of the person concerned at his trial arising from the differences as among the Member States in the protection of fundamental rights. That framework decision effects a harmonisation of the conditions of execution of a European arrest warrant in the event of a conviction rendered in

absentia, which reflects the consensus reached by all the Member States regarding the scope to be given under EU law to the procedural rights enjoyed by persons convicted in absentia who are the subject of a European arrest warrant.

63 Consequently, allowing a Member State to avail itself of Article 53 of the Charter to make the surrender of a person convicted in absentia conditional upon the conviction being open to review in the issuing Member State, a possibility not provided for under Framework Decision 2009/299, in order to avoid an adverse effect on the right to a fair trial and the rights of the defence guaranteed by the constitution of the executing Member State, by casting doubt on the uniformity of the standard of protection of fundamental rights as defined in that framework decision, would undermine the principles of mutual trust and recognition which that decision purports to uphold and would, therefore, compromise the efficacy of that framework decision.

64 In the light of the foregoing considerations, the answer to the third question is that Article 53 of the Charter must be interpreted as not allowing a Member State to make the surrender of a person convicted in absentia conditional upon the conviction being open to review in the issuing Member State, in order to avoid an adverse effect on the right to a fair trial and the rights of the defence guaranteed by its constitution.

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# Towards a Transnational Application of the Legality Principle in the EU's Area of Freedom, Security and Justice?

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## 1. Introduction: choice of forum as a test case

In their introductory remarks to this special issue of the *Utrecht Law Review*, Gless and Vervaele conclude that a new path must be taken which puts the individual as a rights bearer at the centre.[1] We need – as they call it – 'aspirational principles' for transnational criminal justice, in order to provide guidance to lawmakers, courts, et cetera. Yet they also point to the fact that existing principles of criminal justice, including human rights standards, are not specifically designed to deal with problems of *transnational* crime.

The gap between the current practice and the expressed aspirations offers food for thought. For instance, when speaking of guidance, in what direction should that guidance go? Towards the individual as a rights bearer in transnational relationships? If so, what would be the theoretical basis for such a redefined position of the individual? Could that be the concept of national citizenship? Or the individual being a human being as such? Or a cosmopolitan à la Kant? And can we redefine the legal position of the individual without simultaneously redefining his duties and the 'common good' (the fight against transnational crime for instance)? Should nation states therefore transfer a part of their *ius puniendi* to the international level (the UN, Council of Europe, European Union) for that purpose? Last but not least, how 'solid' will the legal ground for any 'aspirational' answer to the previous questions be, where legal practice sometimes does not point in that direction and may even run counter to it? Can we then realistically expect nation states to make a turn, also considering that this will require a certain level of mutual trust in each other's legal systems and a further loss of national sovereignty? What story needs to be told in order to convince them to do this?

The project of the University of Basel aligns remarkably well with my own research project on the choice of forum in the European Union's area of freedom, security and justice (AFSJ).[2] The existing European framework for the decision on which state investigates, prosecutes and tries cases of transnational crime is very fragmented and depends heavily on soft law and executive practice.[3] The pitfalls of that system are well documented. Overlapping jurisdictional claims of the Member States cause

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1 S. Gless & J. Vervaele, 'Law Should Govern: Aspiring General Principles for Transnational Criminal Justice', 2013 *Utrecht Law Review* 9, no. 4, pp. 1-10. See also A. Eser et al. (eds.), *The individual as subject of international cooperation in criminal matters*, 2002, in particular pp. 697 et seq.

2 M. Luchtman (ed.), *Choice of forum in cooperation against EU financial crime – Freedom, security and justice & the protection of specific EU-interests*, 2013.

3 See, in greater detail, ibid., pp. 4-9.





problems for individuals, lead to an inefficient use of investigative resources or to negative conflicts of jurisdiction, for instance in cases of fraud against the EU's financial interests (including VAT fraud). Although this does not mean that the European Union is not concerned with these issues,[4] it does show how difficult it is, even in the setting of the European Union, to reconcile interests of crime control with those of the European citizens in transnational relationships.

The European Union, with its unique institutional features – including the ambitions with respect to the free movement of EU citizens in the AFSJ (Article 3(2) TEU), the presence of powerful supranational bodies, a binding Charter of Fundamental Rights (CFR), enforceable free movement rights and an enhanced framework for dealing with problems of transnational crime (where the unanimity rule no longer applies) –, offers an ideal testing ground for the concept of principles of transnational criminal law. The genealogy of a transnational *ne bis in idem* guarantee (as well as the problems related to it) is an important illustration of this.[5] Yet I think the debate could – and should – be extended to other fundamental rights too. More in particular, I wish to examine the current system of forum choice in light of the legality principle under its substantive and procedural criminal law heading.[6] If the European Union truly wishes to promote the free movement of its citizens, should European law not offer European citizens (and state authorities) a more detailed – and hence more foreseeable and accessible – framework for choice of forum than it does now, in order to protect individuals against arbitrary investigation, prosecution, conviction and punishment? If so, what elements should such a system contain? What would be its limits? What lessons can be learned from this for the debate on principles of transnational criminal law in general?

In this article, I will defend the position that Gless and Vervaele are right, to the extent that it is indeed time to introduce the European citizen as an autonomous actor in the transnational setting of the AFSJ. In order to substantiate this position, I will use the key concepts of the legality principle as an analytical framework for assessing the state of affairs with respect to choice of forum in the European Union (Section 4). Second, I will assess whether the principle also provides a normative yardstick for the European legislator (Section 5). Should the latter be the case, then that legislator would be forced to intervene in issues related to forum choice. In Section 6, I will transpose the consequences of my findings into a more concrete, general outline for a European system of forum choice. I conclude with some final observations (Section 7). Yet before we come to all that, the next two sections first introduce the current EU system for forum choice (Section 2) and the problems it causes for European citizens (Section 3).

Two final remarks remain. First, European citizenship is a key concept in this contribution. Although European citizens may both commit crimes, as well as be the victims thereof, this contribution focuses mainly on the position of European citizens as suspects. Second, the reader will have noted that I announced that I would introduce the *European citizen* as a full actor at the transnational level. European citizenship is granted only to nationals of EU Member States. That means that the status of other individuals is left undiscussed here. I wish to stress that this is a direct result of the current EU institutional setting (for which it is rightly and widely criticized),[7] and nothing more.

## 2. Discretionary powers in choice of forum: a necessity or an option?

If we were to describe the efforts of the European Union to deal with transnational cooperation and coordination, we could say that the European system hinges upon three axes: 1) the harmonisation of criminal law (Article 83 TFEU) and procedure (Article 82 TFEU) in order to widen jurisdictional bases for certain types of (serious) crime through extraterritorial jurisdiction and to create a level playing field; 2) institution building, in order to facilitate the EU system of indirect enforcement and loyal cooperation through the creation of networks and European agencies (in particular Eurojust; Article 85 TFEU)

4 See, for instance, the Green Paper on conflicts of jurisdiction and the principle of *ne bis in idem* in criminal proceedings, COM(2005) 696, p. 2.

5 See the contribution by Vervaele in this special issue: J. Vervaele, '*Ne Bis In Idem*: Towards a Transnational Constitutional Principle in the EU?', 2013 *Utrecht Law Review* 9, no. 4, pp. 211-229.

6 For further explanations, see Section 2, infra.

7 See, for instance, U. Beck & E. Grande, *Cosmopolitan Europe*, 2007; É. Balibar, *We, the people of Europe? Reflections on transnational citizenship*, 2004; S. Benhabib, *The rights of others – Aliens, residents and citizens*, 2006.

and, possibly, to replace it in part by a system of direct enforcement (the European Public Prosecutor; Article 86 TFEU), as well as 3) increased transnational operational cooperation, on the basis of the concept of mutual recognition.

This system is essentially operated through the national authorities of the Member States, without formal procedures or much substantive guidance by the European level.[8] National authorities therefore retain, like in international criminal law, the final say on whether or not to commence prosecutions, to transfer proceedings to other states, or to halt proceedings, for instance because of parallel proceedings in another Member State or a third country. No European institution, not even Eurojust, is in the position to force Member State authorities to commence or to stall proceedings, for instance because the common European interest so requires. The fragmented European framework, and the degree of executive discretion it leaves to national authorities, leads to the situation where choices of forum are made in a *black box*, in which *insiders* take decisions, which may also affect the legal position of *outsiders*, i.e., actors in criminal justice not involved in the forum choice (defendants, courts, European institutions, victims). Choices to be made in this regard by the insiders include the decision on who to contact, the stage at which to seek cooperation (e.g., a transfer of the investigation, of the prosecution, of the trial or the execution of the sanctions), the channels for communication with those authorities (liaison officers, one's own network, OLAF, Eurojust, EJN), the instruments to be used (e.g., the transfer of proceedings or extradition), the criteria to be applied and procedures to be followed, et cetera.

Fearful of new bureaucracies and more red tape, national prosecutors are generally hesitant to intervene in this status quo.[9] Many national governments come to the same conclusion, concerned as they are with a further loss of national sovereignty and/or being aware of the exceptional difficulties of designing a framework for forum choice that reduces executive discretion. They will point to the fact that, like in international criminal law, the lack of a regulatory framework, and the discretion resulting therefrom, are to be taken for granted in a transnational context. Because a reduction of discretion will also mean a further loss of influence on their criminal justice systems, at the very least Member States need some sort of reassurance that their interests are being looked after by others. It requires a high degree of mutual trust.

At the same time, the ambitions put forward in the European Treaties,[10] the much heard rhetoric that criminals should not profit from free movement,[11] the introduction of mutual recognition as the dominant concept for cooperation and the advanced institutional framework provided for by the Treaties, and Articles 67 et seq. TFEU in particular, also cast doubt on the foregoing position. Is discretion in choice of forum really still a *necessity* or has it become an *option*, among other options? Does this system adequately protect all the interests involved or primarily the interests of Member States? In the latter case, how does the assumption, common in international public law, that the interests of national citizens are adequately protected by their governments – represented in the Council – relate to the concept of EU citizenship? And who guards the interests of the EU itself, not only those interests concerned with the fight against crime,[12] but also those concerned with the rule of law (cf. Article 6 TEU)?[13] Finally, and arguably most importantly at this stage, are these questions to be decided upon by the legislator alone and the Council in particular?

Within the context of the nation state, the legality principle in substantive and procedural criminal law offers an excellent starting point for an analysis of executive discretion. Brought back to its essence, that principle stipulates that certain issues may only be dealt with by a competent lawmaker. By doing so, effective safeguards can be provided against *arbitrary* prosecution, conviction and punishment.[14]

8 An important exception being the Eurojust Guidelines of 2003, discussed by Herrnfeld and Luchtman in Luchtman (ed.), supra note 2.
9 See M. Wade, *EuroNEEDs – Evaluating the need for and the needs of a European Criminal Justice System – Preliminary report*, 2011.
10 See Section 3, infra.
11 Cf. the Report on the implementation since 2007 of the European arrest warrant, COM(2011) 175, p. 3, 10, or <http://ec.europa.eu/justice/criminal/criminal-law-policy/>: 'To prevent criminals from misusing those EU countries with the most lenient legal systems and "safe havens" from appearing, a certain approximation of national laws can be necessary.'
12 Cf. the Communication on the protection of the financial interests of the European Union by criminal law and by administrative investigations, COM(2011) 292.
13 See also U. Sieber, 'Die Zukunft des Europäischen Strafrechts – Ein neuer Ansatz zu den Zielen und Modellen des europäischen Strafrechtssystems', 2009 *Zeitschrift fur die Gesamte Strafrechtswissenschaft*, no. 1, pp. 1-67.
14 Cf. with respect to Art. 7 ECHR, ECtHR 17 September 2009, *Scoppola v Italy* (*No. 2)*, appl. no. 10249/03, Para. 92.





The principle not only influences the criminalisation of conduct as such, but also regulates the actions of state organs – the police, the prosecution services, the judiciary – in response to crime; it not only prescribes that only a legitimate lawmaker may define criminal *offences* and sanctions, but also holds that subsequent *criminal charges* may only be brought before a 'tribunal established by law'. Where a person is consequently found guilty according to the law and sanctions are imposed, deprivations of liberty or property must have a legal basis too. The legality principle thus deeply influences the content and shape of every Member State's jurisdiction to *prescribe* norms (*offences*) to its citizens, as well as their jurisdiction to *adjudicate* and *enforce* (violations of) these norms by their judicial and executive bodies.

The question is to what extent choice of forum is a matter of which the legality principle stipulates that it should be dealt with by law, and if so, which law (national or European). Here, we not only come across the complex situation that this question is already difficult to answer within the context of one particular nation state, we must also bear in mind that the guarantees just discussed may not be applicable outside that particular context, because they were not designed for it and there is no authoritative legal source (as yet) that provides otherwise. For the sake of the argument, I do not wish to automatically accept the latter argument. The main reason for that is that the rationale of the principle – offering effective safeguards against *arbitrary* prosecution, conviction and punishment – may call upon the European legislator to deal with choice of forum. We therefore need to explore, first, if and to what extent choice of forum leads to arbitrary interferences with a person's legal position.[15] When doing so, we also have to keep in mind that in the context of public international law the position of the individual as an autonomous legal actor vis-à-vis states is complicated. As a general rule, his interests in interstate relationships are traditionally presumed to be taken care of by his state of nationality or residence. Why, then, is this different in European law?[16] I will elaborate on this point first.

## 3. The position of the individual: the case for EU citizenship

The position of the European citizen is certainly one of the hot topics in European criminal law today. Article 3(2) TEU holds that the Union *shall* offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to, inter alia, the prevention and combating of crime. The Stockholm Programme solemnly dedicates itself to an open and secure Europe serving and protecting citizens.[17] Still, the potential of European citizenship for the further development of the AFSJ is as important as it is unclear. This for instance concerns the relevance of the concept for both transnational relationships, as well as purely internal situations.[18] It also holds true for the scope of the rights of European citizens in relation to criminal proceedings, as well as their duties.[19]

One of the core duties of those moving over European territory will undoubtedly be to respect the laws of the host state. Indeed, 'since a Union citizen now has, in every Member State, largely the same rights as those of that State's nationals, it is fair that he should also be subject to the same obligations in criminal matters. That means that if he commits an offence in the host Member State, he should be prosecuted and tried there before the courts of that State, in the same way as nationals of the State in question, and that he should serve his sentence there, unless its execution in his own State is likely to increase his chances of reintegration.'[20]

15 O. Lagodny, *Emphielt es sich, eine europäische Gerichtskompetenz für Strafgewaltskonflikte vorzusehen? Gutachten im Auftrag des Bundesministeriums der Justiz*, 2001, pp. 99 et seq., chooses a comparable approach.
16 Cf. A. Klip, *European criminal law – An integrative approach*, 2012, pp. 470-472.
17 The 'Stockholm Programme – An open and secure Europe serving and protecting the citizens', Brussels, 2 December 2009, *Council Document* 17024/09.
18 On that, see also E. Muir & A.P. van der Mei, 'The "EU Citizenship Dimension" of the Area of Freedom, Security and Justice', in Luchtman (ed.), supra note 2, pp. 123-142. In this contribution, I will disregard the relevance of EU citizenship for internal situations.
19 The European Union has recently started to enact legislation that strives to harmonise procedural safeguards for suspects and victims; cf. Resolution of the Council of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings, OJ C 295, 4.12.2009, p. 1, and the legislation resulting from it.
20 AG Bot, Case C-123/08, *Wolzenburg*, [2009] ECR I-9621, Opinion, Para. 142.

This duty is of course inextricably linked to free movement rights given to EU citizens and economic actors.[21] Those rights give (economically active) EU citizens (and others) the right to 'vote with their feet';[22] when providing (or seeking), for instance, cross-border services. Individuals seeking access to the markets of other Member States may not, as a rule, be confronted with obstacles that limit market access (unless the host state has good reasons for that). This effectively leads to a rule of mutual recognition; the host state is obliged to recognize the effects given to a particular occurrence by the legal system of the home state and should in principle not impose its own standards as well.[23] The latter would lead to what European lawyers call a *double (or multiple) regulatory burden*. The Court of Justice's case law has made clear that these burdens hamper further European integration and must be approached with caution.

There are no indications that this prohibition of 'mere obstacles' – applicable to freedom of goods and services for instance – also applies to the free movement of EU citizens, as provided for in Article 21 TFEU (and Article 45 CFR).[24] Still, its reasoning helps to demonstrate that European citizens, when confronted with concurring and sometimes conflicting claims of criminal law jurisdiction by several Member States for the same of related offences, face duties which de facto exceed the duty to respect the laws of their host state. Conflicts of jurisdiction lead to the situation where citizens may have to defend themselves in several Member States at once. The difficulties this causes, particularly the risk of being confronted with diverging or conflicting criminal law systems and the risk of *ne bis in idem* situations,[25] are generally recognized as problematic.[26] These types of problems certainly qualify as a *double (or multiple) regulatory burden*.

A second category of problems, partly overlapping with the possibility of double burdens, is related to problems of foreseeability and accessibility, because individuals are not always able to establish either the link of their actions to a particular state (*jurisdiction to prescribe*),[27] or the competence of a particular Member State to prosecute and try the case (*jurisdiction to adjudicate*). Similar concerns exist with respect to the jurisdiction to enforce, particularly where European warrants are issued on the basis of extraterritorial jurisdiction, as is well illustrated by the *Darkanzanli* case of the German Constitutional Court.[28] Extraterritorial claims of jurisdiction, and conflicts resulting therefrom, will therefore hamper or even eliminate free movement, as the EU citizen will have to stand trial in a state other than that of his choice.

Why is this problematic? Obviously, in criminal law, the argument that EU citizens are deprived of or limited in their rights to 'vote with their feet' sounds awkward, at least when understood as some sort of right to choose the legal order that is most beneficial to them. That argument would at best facilitate forum shopping; it would make no sense to facilitate the European citizen in his assessment of where the circumstances to commit crimes, given the differences between legal systems, are most lenient to him.

The problem, therefore, lies somewhere else. The Treaty of Lisbon does not only offer its citizens an area in which they are allowed to move freely (the AFSJ as a territorial unity), it has also expanded a framework (the AFSJ as a policy area) which makes it increasingly difficult to attribute interferences with a person's legal position to a single Member State. In criminal law, these interferences may take the form of serious deprivations of liberty or property.[29] Mutual recognition instruments have the potential

21 The well-known traditional four freedoms are for workers, goods, services, capital. Free movement for EU citizens (Art. 21 TFEU) is often referred to as the fifth freedom.

22 Cf. M. Poiares Maduro, 'So close and yet so far: the paradoxes of mutual recognition', in S.K. Schmidt (ed.), *Mutual recognition as a New Mode of Governance*, 2008, p. 150.

23 Cf. J. Pelkmans, 'Mutual recognition in goods', in Schmidt (ed.), supra note 22, pp. 33 et seq.

24 Muir & Van der Mei, supra note 18, p. 128.

25 Art. 54 CISA will not always prevent this: see Art. 55 CISA.

26 See, among many others, Sieber, supra note 13; A. Biehler et al. (eds.), *Freiburg Proposal on Concurrent Jurisdictions and the Prohibition of Multiple Prosecutions in the European Union*, 2003; M. Böse & F. Meyer, 'Die Beschränkung nationaler Strafgewalten als Möglichkeit zur Vermeidung von Jurisdiktionskonflikten in der Europäischen Union', 2011 *ZIS*, no. 5, pp. 336-344; A. Sinn (ed.), *Jurisdiktionskonflikte bei grenzüberschreidender Kriminalität – Ein Rechtsvergleich zum Internationalen Strafrecht*, 2012, pp. 576 et seq.

27 Well-known examples are the application of the passive personality principle, the principle of subsidiary jurisdiction and sometimes even the territoriality principle (at least where the territory is defined as the state where the harmful consequences of an individual's actions were felt); cf. Luchtman (ed.), supra note 2, p. 22, with further references.

28 *Bundesverfassungsgericht*, 18 July 2005, 2 BvR 2236/04, accessible via <www.bundesverfassungsgericht.de>.

29 S. Lavanex, 'Mutual recognition and the monopoly of force: limits of the single market analogy', in Schmidt (ed.), supra note 22, pp. 98-99, points out that the concept of mutual recognition in the AFSJ produces different effects than the one of the internal market.





of widening the reach of these powers far beyond the Member States' borders. This framework was created, because the opening of the internal borders made the Member States jointly responsible for fighting crime.[30] Yet the overlap of competences and the intensified cooperation it has produced seriously complicates the position of the individual. These complications are difficult to attribute to one particular Member State. The problems related to conflicts of jurisdiction are, by their very definition, the result of the coordinated or uncoordinated efforts of *several* Member States, which are accountable only for their own authorities.

The free movement analogy therefore first and foremost illustrates that the position of the individual is seriously thwarted in this 'inter-state field of force'. Extraterritorial claims of jurisdiction, and the conflicts of jurisdiction resulting therefrom, are actively promoted, also by the European Union, in order to prevent criminals from escaping justice. Yet by doing so, the current EU approach seems to lose the concept of citizenship out of sight. An orientation on the laws of the host state will teach the individual nothing with regard to the *additional* consequences his actions may have, through extraterritorial claims of jurisdiction, under the laws of other EU Member States. This is at odds with the concept of citizenship, if understood to imply membership of a social and political entity in which the individual has associated himself with his fellow citizens through some sort of mutual agreement,[31] while simultaneously guarding his autonomy and freedom through protection by fundamental rights and political representation.[32] Accessible and foreseeable laws are a vital instrument for this, particularly with respect to criminal law.

The issue is therefore whether this particular, 'classic' concept of citizenship also fits the European context. I think it does, and should, but with some modifications. The concept of European citizenship, in combination with the goals of Article 3(2) TEU and the framework of Articles 67 et seq. TFEU could be constructed in a 'cosmopolitan fashion'.[33] Based on the findings of, inter alia, Ulrich Beck and Edgar Grande the European Union is then perceived as both the expression, as well as the instrument of the horizontal integration of modern-day societies.[34] Beck's and Grande's analyses show that European citizenship is not likely to – and should not – replace national citizenship (a 'federalist approach'). Yet its scope will neither depend solely on a positive decision by EU Member States to grant their nationals certain well-defined rights within the common European area (an 'intergovernmentalist approach'). Rather, their observations with respect to the gradual horizontal integration of EU Member States' societies and their finding that '[e]ver more individuals are producing internationally, working internationally, loving internationally, marrying internationally, living, travelling, consuming and cooking internationally'[35] logically imply that EU citizens should not merely be 'defined' as legal subjects – as bearers of rights and duties – exclusively by their membership of the state of nationality. Those individuals unite multiple memberships in them, including membership of the European Union, which they – within the limits set by the common good, of course – may form and shape according to their own preferences, in particular by exercising their free movement rights.[36] Should conflicts between the rights and duties of these different memberships occur, they will have to be solved.[37]

The cosmopolitan concept of EU citizenship, in conjunction with the enhanced framework to protect the common, European good (Articles 67 et seq. TFEU),[38] could then be perceived as referring to

30 Cf. AG Bot, Case C-123/08, *Wolzenburg*, [2009] ECR I-9621, Opinion, Paras. 104-105.

31 In the national context often referred to as a '*contrat social*', a term which will be controversial in the EU setting; on this, see also R. Lööf, '54 CISA and the Principles of *ne bis in idem*', 2007 *European Journal of Crime, Criminal Law and Criminal Justice* 15, no. 3-4, pp. 324-325.

32 Cf. Willem Pompe Instituut, *Gedachten van Willem Pompe over de mens in het strafrecht,* 2008, p. 13.

33 See Luchtman (ed.), supra note 2, pp. 14-19.

34 Beck & Grande, supra note 7; see also G. Delanty, 'The Idea of a Cosmopolitan Europe – On the cultural significance of Europeanization', 2005 *International Review of Sociology* 15, no. 3, pp. 405-421.

35 Beck & Grande, supra note 34, p. 36.

36 Beck & Grande, supra note 34, p. 35. Or as Delanty, supra note 34, p. 417, puts it, 'European identity is a form of post-national self-understanding that expresses itself within, as much as beyond, national identities'. See also Benhabib, supra note 7, pp. 148-149; Balibar, supra note 7, p. 162; or the term 'nested citizenship' by P. Kivisto & T. Faist, *Citizenship – Discourse, Theory, and Transnational Prospects*, 2007, pp. 122 et seq.

37 Those conflict rules are evolving as we speak. The Court of Justice has held, for instance, that 'citizenship of the Union is intended to be the fundamental status of nationals of the Member States' and that 'Article 20 TFEU precludes national measures which have the effect of depriving citizens of the Union of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union', ECJ 8 March 2011, Case C-34/09, *Ruiz Zambrano*, Paras. 41 and 42.

38 On that, see Section 5, infra.

free movement as a powerful instrument to challenge the existing state-centred cooperation structures and to protect the autonomy of the individual citizen vis-à-vis the joint European Member States. Free movement implies that the legal order of reference for EU citizens is the legal order to which that citizen has subjected himself, except perhaps in cases of an *abuse* of free movement rights. The result of this is that other Member States, i.e. other states than the state of stay, should in principle refrain from exercising jurisdiction (and, by doing so, limiting free movement), *unless* they have good reason to do so. Limitations on free movement must therefore serve a legitimate goal, be proportionate to that goal and must respect fundamental rights,[39] including the legality principle in criminal law.[40]

In addition, free movement should have an active and a passive connotation; its redefined, transnational notion of personal autonomy must not be limited to cases of active movement by citizens, it should also protect those who did not move, but are confronted with the consequences of free movement by others.[41] That, too, is a direct consequence of the EU's ambitions to promote horizontal integration through free movement (Article 3(2) TEU).

As a result, I propose that limitations on the autonomy of EU citizens, through limitations on their free movement by national criminal justice systems (the double burden), meet the well-known standards of accessibility or foreseeability (at least where the legality principle is in play) *and* that those guarantees, where applicable, be interpreted in light of the goals of Article 3(2) TEU.

## 4. The principle of legality as a tool for analysis

Our finding that Charter guarantees need to be interpreted in light of Article 3(2) TEU does in itself not solve the question of whether conflicts of jurisdiction are actually covered by those guarantees. Certainly, choices of forum, and conflicts of jurisdiction in particular, may cause problems of foreseeability and accessibility, as we have seen. But are these problems a concern in terms of the legality principle? We therefore need to explore to what extent these conflicts: a) relate to a state's jurisdiction to prescribe norms and, possibly, to the substantive legality principle of Articles 7 ECHR and 49 CFR; b) its jurisdiction to adjudicate those offences (Articles 47 CFR and 6 ECHR: 'a tribunal (previously) established by law'); as well as c) what could be learned from this.

### *4.1. Jurisdiction to prescribe*

Whether the guarantees of the principle of *nullum crimen, nulla poena sine lege*, including *lex certa* (Articles 7 ECHR and 49 CFR), apply to the laws on jurisdiction is controversial.[42] A much heard position, at least on the Continent, is that there is indeed a nexus between these guarantees and the rules on jurisdiction.[43] These guarantees do not apply directly, but without a clear and accessible link to a criminal law system, one does not have a chance to become acquainted with its offences and penalties either.[44] That means that the requirements of accessibility and foreseeability (German: *Erkennbarkeit*; Dutch: *kenbaarheid*) are also of relevance for rules of jurisdiction. However, most authors are satisfied that the thresholds of these requirements are met, once the individual could have known that his actions are *criminal* (*somewhere*), for instance through the application of the requirement of double criminality. They therefore deny their relevance with respect to the issue of *which particular state* ultimately prosecutes the offender.[45]

39 Cf. ECJ 18 June 1991, Case C-260/89 *E.R.T.*, [1991] ECR I-2925.

40 Cf. ECJ 4 June 2002, Case C-483/99, *Commission/France*, ECR I-4781, Para. 50, with respect to free movement and capital and the principle of legal certainty: limitations on free capital must pass the rule of reason test, including standards of legal certainty. The problem in our case – extraterritorial jurisdiction and conflicts – is of course that the traditional four freedoms may not be applicable, while the fifth freedom is still evolving (supra note 24). To that extent, the position defended is (far) more ambitious than the status quo and the reference to the aforementioned case is only by analogy. I think that it is warranted in light of the goals the EU has set for itself and the problems that currently exist for European citizens (and, thus, for the European Union).

41 For instance, through a claim of jurisdiction on the basis of the passive personality principle.

42 See Luchtman (ed.), supra note 2, pp. 121-128.

43 See also European Committee on Crime Problems, *Extraterritorial criminal jurisdiction*, Strasbourg: Council of Europe 1990, pp. 22-25.

44 Most notably by G.A.M. Strijards, *Internationaal strafrecht, strafrechtsmacht – Algemeen deel*, 1984, pp. 43-47; see also K. Ambos, *Internationales Strafrecht*, 2006, pp. 5-6.

45 Minority positions are taken by Strijards, supra note 44, and D. Oehler, *Internationales Strafrecht: Geltungsbereich des Strafrechts, internationales Rechtshilferecht, Recht der Gemeinschaften, Völkerstrafrecht*, 1983.





In light of my findings in the previous section, I wonder if this conclusion is also worth following in the specific context of the AFSJ. After all, any orientation on the legal order of the state of stay (for instance, the state of residence) will teach an individual nothing as to the additional consequences his actions may have under the criminal laws of other Member States. Yet it is precisely this double burden which complicates the legal position of the European citizen and interferes with the goal of free movement. Particularly where these specific consequences cannot reasonably be foreseen at the time of action, they will catch that citizen by surprise. That citizen is then confronted with the consequences brought forward by a legal system which he did not choose, possibly does not know and could in any event not foresee. He may also be confronted with diverging or even contradictory national rules on offences and sanctions, and with the possibility of multiple prosecutions. From a European citizen's perspective an element of arbitrariness may indeed creep into the system, which is closely connected to the guarantees of Articles 7 ECHR and 49 CFR.

In light of this finding, three observations need to be made with respect to the current EU approach, as well as its alternatives:

*1. Fragmented harmonisation of criminal law jurisdiction*. The efforts of the European Union are currently geared towards the extension of the jurisdictional bases beyond the national territory for serious, cross-border crimes. They are limited to the scope of Articles 83 and 325 TFEU. Other areas of criminal law remain in the hands of the nation states. That means that not only the 'real crooks', but also all EU citizens who 'are producing internationally, working internationally, loving internationally, marrying internationally, living, travelling, consuming and cooking internationally'[46] are left to the discretion of national authorities. The current situation does not prevent these citizens from being confronted with a double burden, the scope of which they could not have predicted at the time of their actions. This may happen, either because they themselves crossed the internal borders, or because they were confronted with the actions of others. As long as EU law is silent on this matter, technically, there is no link with the EU legal order or the Charter (cf. Article 51(1) CFR), even though the EU promotes free movement.

One problem that is particularly urgent is the problem of the 'true' or 'actual' conflicts of jurisdiction, i.e., those types of conflict where a certain type of behaviour is not a criminal offence in the state of stay, but does constitute an offence in another state claiming extraterritorial jurisdiction over it. In those cases, the Member State where the actions took place is at most excused from its duty to provide cooperation. Obviously, these situations interfere with free movement as it is defined here.

*2. The foreseeability of the double burden*. In those cases where European laws do interfere with national law, our analysis reveals other problems. The network approach of the European Union – wide jurisdictional bases and enhanced cooperation – aims to prevent impunity, yet is not concerned with double burdens and related problems of foreseeability and accessibility. A recent directive on human trafficking, for instance, seems to encourage the use of the passive personality principle, rather than to discourage it.[47] To that extent, the European legislator clearly goes in another direction than advocated here. As soon as the *criminality* of behaviour is foreseeable (which will be so in cases of (minimum) harmonisation),[48] the double burden is apparently not regarded as a problem in terms of substantive legality.

The cogency of this approach depends, in my view, on the perspective one takes. If one agrees that the European Union should grant, in principle, its citizens the right to subject themselves to the legal order of their choice and that limitations to this (caused by extraterritorial jurisdiction) must meet certain standards, then that legal order will principally determine the consequences of their actions. This is then the expression of the autonomous position of the EU citizen vis-à-vis the Member States. Although this rule is not absolute, it does influence the concept of foreseeability. At the least, the full potential of the consequences of one's actions, brought forward by the criminal laws of the joint Member States, should be foreseeable at the time of action, and not only those of his state of stay. If this turns out to be unachievable, those consequences should be mitigated. At present, only Articles 54-58 CISA offer

46 Supra note 35.

47 See Arts. 9 and 10 of Directive 2011/36/EU, OJ L 101, 15.4.2011, p. 1; Luchtman (ed.), supra note 2, pp. 3-4.

48 Assuming, of course, that all Member States correctly transpose European *norms* into national *offences*.

some degree of protection, in cases of consecutive proceedings. Yet there are certainly other examples of how to do this, for instance by applying the *lex mitior*, by a ranking of jurisdictional principles or by enhancing the procedural position of the defendant.[49] These solutions are however not explored, let alone enacted into law. That means that the legal position of the defendant is seriously flawed, compared to domestic criminal proceedings.

*3. The quest for viable alternatives.* Assuming that the guarantees of Article 49 CFR indeed cast their shadow on the laws of jurisdiction and that certain jurisdictional criteria – for instance the passive personality principle, the principle of subsidiary jurisdiction, or, sometimes, even the territoriality principle[50] – are problematic in terms of their capacity to show the citizen the full range of the possible consequences of his actions, what should be the consequence of this? Should the laws of that particular state remain inapplicable? Some have argued that these types of problems could lead to a successful plea of *error iuris*/*error facti*.[51] That might be a reasonable solution. Yet it also has a few downfalls. One might expect that the more the legal orders of the European Member States become intertwined and the more the European Union continues to promote the establishment of extraterritorial jurisdiction, the more this leads to a need for these types of exceptions.

Ultimately, I think, the situation calls for a more substantial solution. Successful pleas with respect to *error iuris* or *error facti* must remain a means of last resort, now that they could harm the legitimate interests of victims, other States or the European Union. This applies in particular where the state of the *locus delicti*, although competent, does not take further action.[52] The question therefore arises as to what the European Union and its Member States should do to prevent problems like these. Once again, with EU law being silent, these issues are currently left to the national level and seem to be ignored there, leaving the European citizen in a particularly complicated position.

### *4.2. Jurisdiction to adjudicate and to enforce*

In criminal law, a state's jurisdiction to adjudicate is usually dependent on that state's jurisdiction to prescribe.[53] The same holds true for the jurisdiction to enforce. This means that the national laws on jurisdiction not only have a substantive law, but also a procedural law dimension.[54] They also define the ground rules for case allocation over the European territory in the pre-trial, as well as the trial stage. With respect to the jurisdiction to adjudicate, the legality principle plays an important role too. The principle *nullum judicium sine lege* is dealt with, in particular, by the requirements of Article 6 ECHR that tribunals be independent, impartial and 'established by law'. The latter requirement (or: *previously* established by law, in Article 47 CFR) aims to ensure that 'the judicial organization in a democratic society [does] not depend on the discretion of the executive, but that it [is] regulated by law emanating from Parliament.'[55] Its rationale lies in the separation of powers, as well as the rule of law.[56]

With regard to forum choice in the European Union, once again, the challenges and problems do not so much lie in the court organisations of the Member States per se, but in the interplay between these systems, which may result in negative or positive conflicts of jurisdiction. Interpreting the requirement of a 'tribunal established by law' in light of the goals of Article 3(2) TEU draws our attention to three issues of particular interest:[57]

49 Cf. the proposals in Section 6, infra.
50 Supra note 27.
51 On this, see also H. Scholten, *Das Erfordernis der Tatortstrafbarkeit in § 7 StGB*, 1995, pp. 97 et seq.; Strijards, supra note 44, pp. 47-49; Ambos, supra note 44, p. 4; M. Böse, 'Die Stellung des sog. Internationalen Strafrechts im Deliktsaufbau und ihre Konsequenzen für den Tatbestandsirrtum', in R. Bloy et al. (eds.), *Gerechte Strafe und legitimes Strafrecht – Festschrift für Manfred Maiwald zum 75. Geburtstag*, 2009.
52 This is why Böse & Meyer, supra note 26, pp. 336-344, suggest, with reference to the principle of non-discrimination, that the latter state should protect those interests.
53 Cf. European Committee on Crime Problems, supra note 43, p. 20.
54 Cf. M. Böse, 'Choice of forum and jurisdiction', in Luchtman (ed.), supra note 2, pp. 79-81.
55 Cf. ECtHR, 12 July 2007, *Jorgic v Germany*, appl. no. 74613/01, Para. 64; ECtHR 22 June 2000, *Coëme et al. v Belgium*, appl. nos. 32492/96, 32547/96, 32548/96, 33209/96 & 33210/96, Para. 98.
56 Cf. ECtHR, 12 July 2007, *Jorgic v Germany*, appl. no. 74613/01, Para. 64.
57 See also M. Panzavolta, 'Choice of Forum and the Lawful Judge Concept', in Luchtman (ed.), supra note 2, pp. 143-166.





*1. The quest for reasonableness.* First of all, the requirement of a 'tribunal established by law', in addition to being a human right, is also a fundamental principle of judicial administration. It is not so much geared towards offering the individual the utmost certainty (*lex certa*), but rather to warding off extraneous factors influencing the proper administration of justice. There is no such thing as a right for the defendant to choose his own court, or to have proceedings against him combined.[58] Whereas Articles 7 ECHR and 49 CFR guarantee that the law (and the law alone) may only address its subjects through 'clearly defined' offences (*lex certa*), its procedural counterpart therefore sets a lower standard in terms of the *ex ante* accessibility and foreseeability of court competence for individuals.[59] In that respect, one could say that this guarantee has relatively little to offer to individuals; once a court has a solid legal basis, which defines its territorial and material competence, 'Strasbourg' (and presumably 'Luxembourg' too)[60] will only apply a marginal test of the reasonableness of the forum choice.

However, it is *because* there is a legislative framework in place that abuses of power may be *presumed* to be unlikely and a marginal test of the decision suffices. As 'criminal charges' (defined autonomously)[61] may only be brought before a properly established court (with sufficiently clear competences *ratione materiae*, *personae*, *territoriae*), legislators are effectively forced to roll out the overall design of their judicial system in advance, in order to avoid conflicts of jurisdiction. The more concerned the legislator is with avoiding and solving these conflicts, the stricter its laws will be, and the more solid ground there is for testing the reasonableness of forum choices.[62] The Strasbourg Court has repeatedly held that legislation, once in place, must also be observed, in order to fulfil the requirement of a 'tribunal established by law'. Deviations from statutory law will therefore constitute an infringement of this requirement.[63]

The premise that the overall judicial organisation will prevent abuses by the executive (or the judiciary) is put into question where a legislator fails to design the basic scheme for assuring reasonableness, either through substantive criteria and/or proper procedures. Overlapping court competences in the European Union are for instance not encroached in a pyramidal system, which will ultimately – at the latest at the start of the trial – force authorities to settle their conflicts,[64] but stand next to each other, without guarantees of reducing the double burden for citizens (at least until the first set of proceedings is concluded).[65]

In addition, we face the dilemma that, on the one hand, mutual differences in legal systems may themselves become a relevant factor in forum choice, which could be perceived as a challenge to the integrity of those systems instead of their guaranteeing justice (forum shopping) and therefore also a danger to the proper operation of the principle of mutual recognition, whereas, on the other hand, the element of arbitrariness that thus creeps into the system is difficult to pinpoint, because the yardstick to assess these choices remains vague and open to many interpretations. The absence of a framework for dealing with forum choices thus leads to the situation where forum decisions may very well be 'lawful' (because of the competence of the courts under national law), but their reasonableness is, at times, questionable and depends entirely on the integrity of the person who operates the system.

In my opinion, the requirement of a 'tribunal established by law' defines as the overarching challenge for the European Union the design of a statutory system that supports a workable concept of

58 Cf. EComHR, 10 October 1990, *G. v Switzerland*, appl. no. 16875/90 (competence *ratione loci*); EComHR, 2 December 1992, *Kübli v Switzerland*, appl.no. 17495/90 (competence *ratione materiae*).
59 Cf. Luchtman (ed.), supra note 2, pp. 30-31.
60 This is confirmed by cases of the Court of Justice in competition law; see ECJ 11 November 1981, Case 60/81, *IBM v Commission*, [1981] ECR 2639, Paras. 18-21, and CFI 8 March 2007, Cases T-339/04 and T-340/04, *France Télécom v Commission*, [2007] ECR II-521, Paras. 77-91, discussed by M. de Visser, *Network-based governance in EC law – The example of EC competition and EC communications law*, 2009, pp. 295-301; S. Brammer, *Co-operation Between National Competition Agencies in the Enforcement of EC Competition Law*, 2008. See also J.F.H. Inghelram, *Legal and institutional aspects of the European Anti-Fraud Office (OLAF)*, 2011, pp. 203 et seq.
61 Cf. ECtHR 21 February 1984, *Öztürk v Germany*, appl. no. 8544/79; see also ECJ 5 June 2012, Case C-489/10, *Łukasz Marcin Bonda*, discussed by A. De Moor-van Vugt, 'Administrative sanctions in EU law', 2012 *Review of European Administrative Law*, no. 1, pp. 5-41.
62 Incidentally, Lagodny, supra note 15, pp. 104-105, rightfully points to the fact that in national law these criteria may well be of a purely 'formal' nature, for instance the place where proceedings were first started. Applying these criteria to the transnational setting would mean that they also determine the competent legal order.
63 Cf. M. Kuijer, *The blindfold of Lady Justice – Judicial independence and impartiality in light of the requirements of article 6 ECHR*, 2004, pp. 190-191, with references to the Strasbourg case law.
64 Cf. Lagodny, supra note 15, pp. 99-100.
65 Art. 54 CISA. Exceptions are possible, however, see Art. 55 CISA.

'reasonableness'.[66] That system should reduce the double burden on European citizens as far as possible, protect the common interest and avoid arbitrariness in the way forum choices are made, forum shopping in particular. This, therefore, is my first point: 'reasonableness' should be interpreted in light of the goals that the EU has set for itself and should ensure the proper administration of justice in light of all the interests involved; those of the Member States, those of the EU and those of its citizens.

*2. The need to break open national law*. My second point concerns the need to 'break open' national criminal law systems. It is not that difficult to identify factors which currently lead to a certain degree of legal protectionism or to preferential treatment for national citizens or national perspectives above the interests of those of other European Member States, citizens or the EU itself. We see traces of this, for instance, in the limited powers of Eurojust members who are not always given the power to operate without consulting their superiors at home;[67] in the fact that Member States sometimes exclude cooperation, *ipso iure*, in cases where national interests are involved; in their preference to exert jurisdictional control over their nationals (instead of their residents) when they travel abroad; or in their reluctance to assume responsibility for EU citizens from other states, for instance at the stage of the execution of sanctions.

Clearly, this attitude is not only explained by the desire simply to retain as much power at the national level as possible. The German Constitutional Court, for instance, has consistently linked it to considerations of *national* democracy.[68] At the same time, this position seems to take it for granted that non-nationals, or nationals crossing the internal borders, are a lesser concern and that the interests of national criminal justice take precedence over other interests *qualitate qua*.[69] In light of the concept of European citizenship, I find this difficult to accept.[70] What is particularly problematic is that national laws sometimes even block the application of a test of reasonableness. Although this is, in my opinion, clearly not in the interest of a proper administration of justice, seen from an EU perspective, we may doubt whether the requirement of a 'tribunal established by law' prohibits this. The term 'law' refers to statutory legislation, not to constitutional law.[71] This means, in my opinion, that the final word remains with the national legislators, unless the European legislator intervenes.

*3. The need to coordinate national legal systems*. Even where national law does not openly protect national interests, interests other than national interests may not always be accounted for, also where the actors involved are fully aware of the European dimension of their tasks and cases. Conflicts of jurisdiction are by their very definition a problem that is caused by the interplay between multiple legal orders. Still, there is no overarching framework for forum choice at present. My third point is that even where national systems do not pose statutory impediments to European coordination, 'reasonableness' as such will remain an empty phrase without intervention at the European level. The European legislator must not only undertake action to break open national systems, it must simultaneously unfold a general perspective on 'reasonableness'. Without providing guidance on the substantive criteria, on the procedures and on the organisational framework, including supervision, national authorities will continue to have insufficient materials to work with.[72]

66 Cf. T. Vander Beken et al., *Finding the best place for prosecution – European study on jurisdiction criteria*, 2002; T. Vander Beken et al., 'Kriterien für die jeweils "beste" Strafgewalt in Europa', 2002 *NStZ*, no. 12, pp. 624-628; and Lagodny, supra note 15, who refers to a *Qualitätsprinzip*.

67 I must admit that this statement may be challenged. It depends on the view one takes on Eurojust's tasks. Those who submit that Eurojust (unlike the EPPO for instance) is there to assist national investigations will object to this statement. Yet those who are of the opinion that the coordination of criminal proceedings is something more than that, also in light of preventing negative conflicts, will find this statement presumably less difficult to accept.

68 Supra note 28. See also M. Bovens et al. (eds.), *The real world of EU accountability – What deficit?*, 2010, pp. 188-191, with respect to that court's Lisbon ruling.

69 The German Constitutional Court's *Darkanzanli* ruling, supra note 28, is a good example of this; see in particular Paras. 85 and 86, where a difference is made between acts with *maßgeblicher Inlandsbezug* and acts with *maßgeblicher Auslandsbezug*. A similar reasoning can be found in B. Schünemann (ed.), *Ein Gesamtkonzept fur die europaische Strafrechtspflege – A programme for European Criminal Justice*, 2006, pp. 95 et seq.

70 Cf. Bovens et al. (eds.), supra note 68, p. 190: 'The point the *Bundesverfassungsgericht* missed, it simply cannot reach any of what happens at the collective supranational level, and nor can any of the national parliaments. In effect, this kind of purely intergovernmentalist attitude is the equivalent of the ostrich with its head in the sand, choosing to ignore the realities around it that it does not wish to see or engage with.'

71 S. Trechsel, *Human Rights in Criminal Proceedings*, 2005, pp. 50-51.

72 Cf. De Visser, supra note 60, pp. 293-294.





Of course, it is one thing to emphasise the need for substantive criteria, but quite another to define criteria which are precise enough to offer clarity to the authorities and the possibility of control for others. The original ambitions of the 2009 Framework Decision on conflicts of jurisdiction were mitigated precisely as a result of this.[73] On another occasion,[74] I have argued that the Swiss system of intercantonal case allocation is interesting in this respect, because it 'reverses' the approach: instead of enumerating a non-exhaustive list of (positive or negative) factors for forum choice, like in the Eurojust Guidelines of 2003,[75] it combines a system of statutory case allocation, with room for deviations from that system, provided that a series of goals is achieved, at all times.[76] Forum choices must in any case take account of the interests of the place where most of the damaging effects of criminal conduct were felt; those of the suspect (and his counsel) to effectively defend himself; those of the courts, which must be put in the position to obtain, as far as possible, a complete overview of both the person of the accused and his actions; and those of the speedy and efficient administration of justice.[77] These criteria put the burden on the authorities, to the extent that they – when asked by a relevant 'accountability forum' – have to show how these criteria have been met.[78] On the other hand, these criteria also show that these forums should not 'second guess' the forum choice: their task is to test the reasonableness of these decisions.

A final remark on the procedural aspects: substantive criteria need to be backed by procedures for two reasons.[79] In the first place, procedures are necessary to guarantee that all interests are indeed taken into consideration *before* the decision is taken. In that regard, we may notice that the position of the defendant,[80] as well as that of the European institutions, is virtually non-existent at present. In the second place, forum choices – although perhaps not causing any *direct* changes in legal position – certainly determine the future scope of rights and duties of all actors involved. They determine the applicable legal regime, as well as the scope of the double burden. These consequences are often irrevocable. This is why, as a matter of procedural fairness,[81] forum choices need to be accounted for by the decision makers to a 'forum' (political or legal) with the power a) to extract information from them, b) to engage in a debate with them regarding their performance, and, possibly, c) to create non-trivial consequences.[82]

At present, there is no such forum; or rather: there is no coordination between the many forums available. On the one hand, it is doubtful if forum choices will become a real issue before national courts. The task of those courts is after all to establish their own competence, not the reasonableness of the outcome of the deliberations between the prosecution services. On the other hand, technically speaking, forum choice is in many aspects not a matter for European law. The European framework is fragmented. That implies, once again, that our primary point of reference for assessing legality – the Charter of Fundamental Rights – is only applicable where there is secondary EU legislation in place that needs implementation or – possibly – where national law interferes with the Treaty freedoms (cf. Article 51(1) CFR). Moreover, even in those rare instances where European laws do provide for rules on choice of forum, the question is who is in the position to steer and supervise the complex interplay of legal orders. At present, the competences of Eurojust, as well as the Court of Justice, are

73 Cf. H.H. Herrnfeld, 'Mechanisms for Settling Conflicts of Jurisdiction', in Luchtman (ed.), supra note 2, pp. 189-190. Compare also the original proposal for a Council Framework Decision on prevention and settlement of conflicts of jurisdiction in criminal proceedings, *Council Document* 5208/09 of 20 January 2009, with the final text, published in OJ L 328, 15.12.2009, p. 42.

74 M. Luchtman, 'Choice of Forum in an Area of Freedom, Security and Justice', 2011 *Utrecht Law Review*, no. 1, pp. 74-101.

75 Luchtman (ed.), supra note 2, pp. 34-36.

76 On that system, see P. Guidon & F. Bänziger, 'Die aktuelle Rechtsprechung des Bundesstrafgerichts zum interkantonalen Gerichtsstand in Strafsachen', 2007 *Jusletter*, 21 May; E. Schweri & F. Bänziger, *Interkantonale Gerichtsstandsbestimmung in Strafsachen*, 2004; M. Waiblinger, 'Die Bestimmung des Gerichtsstandes bei Mehrheit von strafbaren Handlungen oder von Beteiligten', 1943 *ZStr*, pp. 81 et seq.

77 Cf. *Bundesstrafgericht*, 21 October 2004, no. BK_G 127/04, to be found at <http://www.bstger.ch/>.

78 Cf. the proposals by Vander Beken et al., 'Kriterien für die jeweils "beste" Strafgewalt in Europa', 2002 *NStZ* no. 12, 2002, p. 626; and particularly Lagodny, supra note 15, pp. 106 et seq.

79 Cf. Vander Beken et al., *Finding the best place for prosecution – European study on jurisdiction criteria*, 2002, pp. 16-17; A.H.J. Swart, *Een ware Europese rechtsruime: wederzijdse erkenning van strafrechtelijke beslissingen in de Europese Unie*, 2001, p. 16.

80 Cf. the contributions by A.A. Franken, 'The Perspective of the Defence Lawyer: Choice of Forum and the Proper Administration of Justice', p. 109-113, and J.M. Sjöcrona, 'The perspective of the Criminal Defence Lawyer: Choice of Forum, a Legal Vaccum in the EU', p. 113-122, in Luchtman (ed.), supra note 2. In some instances, there is a duty to inform the defendant at most; see for instance Art. 17 of the 1972 Convention on the transfer of proceedings.

81 I therefore oppose the idea that 'the allocation of cases is hence not a question of transferring competence but merely one of dividing work', De Visser, supra note 60, p. 298. A similar line of reasoning is found in Recital 4 of the Preamble to the 2009 Framework Decision.

82 Cf. Bovens et al. (eds.), supra note 68, p. 176; M. Bovens, *The quest for responsibility – Accountability and citizenship in complex organisations*, 1998.

limited.[83] Eurojust itself does not take decisions on choice of forum; these decisions are ultimately taken by national authorities. The Court's competences under Article 263 TFEU are therefore not in range.[84] Simultaneously, that Court has no competences over the 'operational' activities of the authorities of the Member States (Article 276 TFEU).

All of these factors easily lead to the situation that no one is really responsible for the problems faced by European citizens at the interface of multiple European criminal justice systems or for the negative conflicts that hamper the EU's financial interests. To that extent, practice in choice of forum shows a clear accountability gap: the powers of national authorities are limited, and the same goes for those of the European institutions. This is a fine example of the *problem of many hands*, where many are competent, and, thus, no one is accountable, particularly not for those interests that supersede or compete with the national perspective.[85]

## 5. Old wine in new bottles – The principle of legality as a normative benchmark?

It is one thing to interpret the legality principle in light of the goals of Article 3(2) TEU, but quite another to use that redefined concept of legality as a normative, 'court-enforceable' benchmark for the status quo.[86] It would mean that in cases of, for instance, negative integration, interferences with the Treaty freedoms are assessed in light of these redefined Charter rights. That, in turn, could lead to the inapplicability of national law. The interpretation of secondary EU legislation in light of these redefined guarantees could cause similar problems for the European Union and its Member States. Under both scenarios, Member States would have to rely on the European Union and on better-placed Member States to protect their interests. In other words, it would need a high degree of mutual trust and coordination and, almost by definition, intervention by the European Union. After all, where Charter guarantees become genuine '*Abwehrrechte*' in transnational relationships, the European legislator will be forced to intervene in order to protect and preserve the common interest, defined by the Treaties, and to ensure free movement '*in conjunction with* appropriate measures with respect to (…) the prevention and combating of crime' (Article 3(2) TEU). The autonomous position of European citizens vis-à-vis the cooperating Member *States* would thus be supplemented by political representation at the European level. To that extent, free movement rights, redefined human rights guarantees and political representation at the European level could interlock and lead to an 'activation of European citizenship'. It would be a powerful answer to the criticism that citizens are offered a fair amount of fine things by the EU, without being in the position to decide over them autonomously,[87] and that the focus has traditionally been on protecting the citizen against crime, rather than on also offering him protection against the state in its fight against crime.[88]

The question is therefore when may measures be considered to be 'appropriate' as referred to in Article 3(2) TEU, and who determines this. The obvious answer would be that this is, in principle, the legislator. There are good examples of how the European legislator indeed actively balances crime control against legal protection, and thus promotes the protection of fundamental rights. For instance, the very existence of Articles 54-58 CISA allowed the Court to gradually develop the *ne bis in idem* principle. It rejected in *Brügge and Gözütok* the objections of some Member States that out-of-court settlements be kept out of the scope of Article 54 CISA by pointing to the subsequent legislative developments which

83 Incidentally, there are arrangements for the accountability of Eurojust, but these concern the overall functioning of the agency, not its operational activities; see M. Busuioc, *The Accountability of European Agencies – Legal Provisions and Ongoing Practices*, 2010; M. Groenleer, *The autonomy of European Union Agencies*, 2009, pp. 309-342.

84 Cf. Art. 263(2) TFEU (annulment action by a Member State, which is problematic in light of Art. 276 TFEU) and Art. 263(4) TFEU (annulment by an individual). In the latter case, we would have to ask ourselves whether these types of decisions bring about changes in the legal position of the individual. Cases from the area of competition law are reason enough for serious doubt in that regard; supra note 60.

85 Cf. Groenleer, supra note 83, pp. 103-104; Busuioc, supra note 83, p. 8; Bovens *et al.* (eds.), supra note 68, pp. 44-46, 192-193; C. Harlow & R. Rawlings, 'Promoting Accountability in Multilevel Governance: A Network Approach', 2007 *European Law Journal* 2007, pp. 542-562; Y. Papadopoulos, 'Problems of democratic accountability in network and multilevel governance', 2007 *European Law Journal*, no. 4, pp. 473-476; Bovens, supra note 82, pp. 45-52.

86 That is also why the case law of the Court of Justice with respect to *ne bis in idem* is as progressive as it is controversial; see Vervaele, supra note 5; Luchtman (ed.), supra note 2, pp. 38-41.

87 Cf. J. Monar, 'The Area of Freedom, Security and Justice', in A. Von Bogdandy & J. Bast (eds.), *Principles of European constitutional law*, 2011, p. 579.

88 Cf. Swart, supra note 79, pp. 7 et seq.





the Member States themselves had set in motion. That means that the positive influence of the Court's case law on the reduction of the double burden on European citizens (the *ne bis in idem* guarantee) is to a significant effect the result of prior legislative intervention. Put differently, the free movement argument of the Court might have led to different solutions[89] had the Member States themselves not agreed to an ambitious internationalised *ne bis in idem* guarantee.[90]

What we do not know as yet is whether the ambitions of the Lisbon Treaties – including the goal of, inter alia, Article 3(2) TEU; the binding Charter; the provisions on citizenship; the enhanced EU powers in criminal justice (Articles 67 et seq. TFEU) – lead to an even higher standard, which does not take the legislative state of the art as its point of reference for the interpretation of fundamental rights, but the institutional setting of the European Union. That would mean that whether measures to combat crime are 'appropriate' as in Article 3(2) TEU must be determined with reference to the institutional duty of the EU to take all involved interests into account, in combination with the scope of its *institutional potential* – its powers of legislative intervention – to resolve these issues.[91] It would imply a normative yardstick for assessing the current legislative affairs, which is also binding on the European legislator.

Obviously, that approach also creates new problems. It leads to a series of interesting questions. For instance, what should we think of the current framework for choice of forum, where legislation is fragmented and, on occasion, points in the opposite direction than advocated here? The Preamble to the 2009 Framework decision on conflicts of jurisdiction for instance reveals that its focus is not on reasonable forum choices, but on '*any effective solution* aimed at avoiding the adverse consequences arising from parallel proceedings and avoiding waste of time and resources of the competent authorities concerned [emphasis added, ML],' without defining what these adverse consequences may be. Would such a framework pass the test of, for instance, Article 47 CFR?

The added value of interpreting Charter rights in light of the goals of Article 3(2) is clearly that it not only comprises questions of vertical integration (top-down; bottom-up), but also includes the horizontal integration of the legal orders of the Member States and the delusion of responsibilities resulting from it, including mutual recognition. In a system based on the indirect enforcement of EU law and loyal cooperation, this is a crucial point. Arguably, it is also in line with the '*effet utile* approach' of the Luxembourg Court or the 'living instrument approach' of the Strasbourg Court. Fundamental rights need to be adaptable to changing circumstances and must be interpreted in light of the goals they aim to achieve, i.e., the protection of the individual against all *arbitrary* governmental power, irrespective of the national or European source of these powers, or the type of power (executive, judicial *or* legislative).

However, simultaneously there is a considerable number of weighty counterarguments for constructing these redefined guarantees as 'court-enforceable' (or: directly applicable) rights. At least three interrelated arguments should be mentioned:

*1. What is the scope of the institutional competences of the European Union?*[92] A first objection is that the scope of the institutional competences of the European Union may not be as evident as suggested here. It is one thing to assess the legality of a specific legislative measure in light of those competences, but quite another to determine the scope of the latter *in abstracto*. The European Union does not have the *Kompetenz-Kompetenz*. Criminal justice is still the domain of the Member States.[93] The policy area called the AFSJ does not deal with forum choice as such. Instead, it contains a series of provisions on interrelated issues, such as preventing and solving conflicts of jurisdiction, mutual recognition, the harmonisation of certain types of substantive criminal law and parts of criminal procedure, Eurojust and the EPPO. The precise scope of the powers of the European Union depends on the complex interplay between

89 Cf. M. Luchtman, 'Transnational law enforcement in the European Union and the *ne bis in idem* principle', 2011 *Review of European Administrative Law*, no. 2, pp. 15-17, 20-22.

90 Cf. the reverse situation in ECJ 21 September 1999, Case C-378/97, *Wijsenbeek*, [1999] ECR I-6207, Paras. 40, 44, where the Court refused to disconnect free movement rights from accompanying legislative measures.

91 In a similar fashion, AG Sharpston in her opinion to ECJ 8 March 2011, Case C-34/ 09, *Ruiz Zambrano*, Opinion, Paras. 166-170; see also Muir & Van der Mei, supra note 18, pp. 135-138.

92 On the phenomenon of competence creep and its problems, see S. Prechal, 'Competence creep and general principles of law', 2010 *Review of European Administrative Law*, no. 1, pp. 5-22.

93 ECJ 18 April 2011, Case C-61/11 PPU, *Hassen El Dridi*, Para. 53.

these provisions, which, incidentally, also has to take into account another principle of constitutional importance: the principle of subsidiarity. By its very definition, this seems to be a task for the European legislator, not the judiciary.

*2. Gradual integration*. Europeanisation is a gradual process, not one that is superimposed on the Member States with a 'big bang'. There are ample references in EU law that confirm this, for instance the Preamble to the Charter ('ever closer union'). Interpreting the redefined Charter rights as enforceable rights could lead to negative or positive conflicts of jurisdiction without there being a legislative framework in place to deal with them. Obviously, there is a real risk of 'implosion': guaranteeing rights in these circumstances can harm the common good and, ultimately, European citizens too. It could conflict with the duties resting upon states (and the European Union?) to protect their citizens against violations of their human rights. This stresses the need for gradual integration, in which Charter rights gradually adapt to legislative developments and thus may prevent the legislator (and other actors) from moving backwards, but do not push any of those actors forward.

*3. Methodological considerations*. We also have to take account of what may be called methodological considerations.[94] First and foremost, there is uncertainty as to a series of questions with respect to the legality principle in the internal legal orders. For instance, we do not know what the Strasbourg Court thinks of the relationship between the laws on jurisdiction and the substantive legality principle of Article 7 ECHR (or, for that matter, Article 49 CFR). Is that principle directly applicable to jurisdictional rules? Or does it merely cast its shadow? Alternatively, are jurisdictional rules a matter for procedural criminal law? What does this mean in terms of their accessibility and foreseeability?

It may well be that the uncertainty surrounding the conceptual scope of these guarantees in the national context alone will *a fortiori* hamper their application in transnational constellations. Member States may disagree on their scope and there is as yet no sign of convergence, for instance through the case law of the Strasbourg or Luxembourg Courts. Indeed, one could then conclude that the fundamental rights discussed here are simply not designed for transnational application, and therefore need positive confirmation by the legislator to confirm that application.

The foregoing arguments reveal two problems: first, there is the problem with respect to the conceptual scope of the guarantees, particularly as far as Article 49 CFR is concerned; second, there is the issue of enforceability. With regard to the first problem, indeed, rules on jurisdiction and the substantive legality principle do not seem to go well together.[95] Still, the scope of a Member State's *jurisdiction to prescribe* may be fully unknown to the European citizen at the time of action and, as a consequence, so too will the joint consequences his actions may entail. Although this situation in my opinion is certainly capable of producing arbitrary results from the perspective of the European citizen, it is doubtful whether it is covered by existing 'hard law' fundamental rights guarantees.

With respect to Articles 47 CFR, the problem is somewhat different in my opinion. In light of its *rationes*, there is nothing that prevents these guarantees from being applied in a horizontal, transnational context. Yet the aforementioned arguments do prevent these guarantees from being 'court enforceable', directly applicable safeguards where legislation is absent, even though this may cause problems with respect to the foreseeability of the *jurisdiction to adjudicate* and *enforce* of the Member States involved.

This finding does not however mean that these guarantees are not relevant to the European legislator in another way. Charter rights also have a guiding function; they should influence the direction of the EU's criminal justice policies.[96] The interpretation of these guarantees in light of the goal of Article 3(2) TEU then means that the legislator is obliged by the Treaties to take into account in its legislative agenda and legislative proposals all the interests concerned (those of the Member States, the EU and EU citizens)

94 See also T.P. Marguery, 'The protection of fundamental rights in European criminal law after Lisbon: What role for the Charter of Fundamental Rights?', 2012 *European Law Review*, no. 4, p. 449, who discusses the relevance of Art. 52(5) Charter, which differentiates between rights and principles.

95 See Section 4.1.

96 Gless & Vervaele, supra note 1, speak of 'aspirational principles'; see also Lagodny, supra note 15, pp. 62 et seq., with respect to German law.





and, when doing so, must reconcile these interests to the extent that the adverse consequences from forum choice – in particular: the double burden and problems related to the accessibility and foreseeability of extraterritorial jurisdiction to prescribe, enforce and adjudicate – are mitigated in full, or – and only where the latter is not possible – to the largest extent possible. For that, it should use the full potential of the powers granted to it by the Treaties. What this means for choice of forum is discussed in the next section.

## 6. The EU framework for choice of forum *de lege ferenda* – Recommendations[97]

In this section, a general outline for a model on forum choice is presented. I will introduce its different elements by pointing first to its underlying general observations and consequently to the different elements of the proposal with respect to its impact on the jurisdiction to enforce, investigate and adjudicate.

### *6.1. General observations*

The specific recommendations of Sub-sections 6.2-6.4 are based on the following general observations:

*1. The need for a horizontal statutory framework at the European level*. Choice of forum is a matter that affects all areas of crime, as well as all forms of interstate cooperation. In its 2000 Communication on mutual recognition, the Commission already envisaged that positive conflicts of jurisdiction could harm the operation of mutual recognition. To that, I would like to add that these instruments serve as their mutual alternatives. Prosecutors therefore usually have the choice between, for instance, extradition or transfer of proceedings. This harms the position of the individual, because safeguards and procedures can be played off against each other.

Efforts to coordinate positive and negative conflicts of jurisdiction are limited mostly to *ne bis in idem* situations, as well as serious cross-border crime. That means that in all other cases where EU citizens are 'producing internationally, working internationally, loving internationally, marrying internationally, living, travelling, consuming and cooking internationally',[98] problems of foreseeability and double burdens remain unsolved. They are considered a matter for national law (cf. Article 51(1) CFR). This fails to do justice to the horizontal aspects of Europeanisation. The goal of Article 3(2) TEU offers *all* citizens an area of freedom, security and justice.

Choice of forum should therefore be dealt with in a horizontal regulation, taking priority over all other forms of international cooperation, applicable to all sorts of crime, both inside and outside the premises of Eurojust,[99] and with a broader scope than *ne bis in idem* situations. It should also include forum choice in cases involving multiple defendants and multiple offences. Existing regulations on cooperation, as well as the competences of Eurojust, should be adapted to this regulation. Deviations are possible where the circumstances so require, for instance in the case of the establishment of the European prosecutor.[100]

*2. Choice of forum in an integrated legal order*. Choice of forum takes place within a legal and political entity, where the European Union and its Member States 'share' territory, citizens and national *ius puniendi*. National criminal justice systems need the EU to deal with problems that have become too big to solve individually; the EU needs national criminal justice systems to achieve its goals. Unlike the United States, there is no doctrine of double sovereignty, nor can we say that there is one single legal order. The nation state plays an essential role in the EU system of indirect enforcement, but must cooperate loyally with the EU and other states. Mutual differences and conflicts of jurisdiction will always exist in such a system.

97 See also Sinn (ed.), supra note 26, pp. 597-616; Biehler et al. (eds.), supra note 26; Schünemann (ed.), supra note 69; VanderBeken et al., supra note 66; Lagodny, supra note 15.

98 Supra note 35.

99 Cf. H.H. Herrnfeld, 'Die Rolle von Eurojust bei der Beilegung von Jurisdiktionskonflikten', in Sinn (ed.), supra note 26, p. 159.

100 See also J. Vervaele, 'European Territoriality and Jurisdiction: the Protection of the EU's Financial Interests in Its Horizontal and Vertical (EPPO) Dimension', in Luchtman (ed.), supra note 2, and the relevant provisions in the Model rules for the procedure of the EPPO, <http://www.eppo-project.eu/>, in particular rule 64.

Their inevitability does not mean that these problems do not deserve attention. In line with the principle of loyal cooperation, choice of forum presupposes a strong network approach, a further strengthening of European institutions and an effective system for sharing information (where necessary in addition to existing arrangements). However, it seems to me that having it both ways is not possible: where mutual cooperation and coordination is fostered and strongly stimulated, any national *Alleingang* or failed coordination should not come at the expense of the interests of the European Union or the European citizen.[101]

The interests of the European citizen should be protected in particular against the coordinated or uncoordinated efforts of the European Member States to fight crime where they produce arbitrary interferences with that citizen's legal position vis-à-vis those states. The term 'arbitrary' thereby refers to its meaning under both substantive, as well as procedural law. Any system for forum choice should preferably allow citizens to assess the full scope of the potential burden placed on them by the joint Member States and ultimately achieve the elimination of that burden,[102] as well as excluding the possibility of any actor being able to supersede its own interests above the proper administration of justice. I propose to approach this problem like a twofold test of proportionality: the longer multiple prosecutions run in parallel (or even consecutively), the greater the need for their justification;[103] and the same goes for the burden put on the European citizen by a legal system other than the one he has subjected himself to.

*3. A European system of forum choice with respect to the jurisdiction to enforce and adjudicate*. Preference should be given to a European system that regulates forum choice by coordinating the Member States' jurisdiction to enforce and adjudicate, rather than their jurisdiction to prescribe.[104] That system should aim to ensure the proper administration of justice in the European area, by assigning the power to investigate, prosecute and try offences to a particular Member State (or Member States), while equally preventing other states from exercising their powers *after* the forum choice.

It is highly doubtful whether any set of predetermined criteria or any ranking with respect to jurisdiction (for instance, priority for the territoriality principle) or the proper administration of justice (for instance, the availability of evidence or the suspect) will be able to achieve reasonable results *per se*. Without a sufficiently strong common frame of reference on a whole range of issues of both substantive criminal law and procedure (and thus interference with national criminal law),[105] the integrity of any statutory criterion (or set of criteria) is easily put into question in a specific case.[106] Such a system will therefore need considerable room for deviations, which would in turn further affect the integrity and validity of what is then nothing more than a statutory *assumption*. Such a frame of reference is developing only gradually (and is therefore not in place at this time) and has to take into account the limits of the institutional powers of the European Union to deal with criminal law in general. What is more is that even sophisticated systems like the Swiss are still in need of deviations from statutory criteria, although substantive criminal law and procedure are fully harmonised.

Instead, it is proposed here to force Member States to coordinate their efforts, thus emphasising their joint responsibility for law enforcement in the European Union, and to take into account all interests involved.[107] That system does not designate *ex ante* the 'best placed' Member State by fixed statutory criteria, but instead aims to achieve that:

101 Cf. Luchtman, supra note 89, pp. 18-20.
102 Cf. the Green Paper on conflicts of jurisdiction and the principle of *ne bis in idem* in criminal proceedings, COM(2005) 696, pp. 2, 7; Lagodny, supra note 15.
103 Cf. Sinn (ed.), supra note 26, pp. 598, 600; Lagodny, supra note 15, pp. 99 et seq.; Schünemann (ed.), supra note 69, pp. 5 et seq., referring to a concept of *transnationale Verfahrenskonzentration*.
104 Cf. Herrnfeld, supra note 73, pp. 192-194.
105 One can think of questions related to preparation and attempt, *concursus idealis* and *realis*, complicity, et cetera; see Luchtman, supra note 74, p. 100.
106 To that extent, I agree with Schünemann (ed.), supra note 69, p. 107. That proposal, too, admits that any statutory system will continue to need room for deviations; see Art. 2(3) and the explanations thereon, p. 8.
107 Cf. C. Deboyser, 'Eurojust's Role in the Matter of Choice of Forum', in Luchtman (ed.), supra note 2, pp. 107-108; Herrnfeld, supra note 99, pp. 147-148; V. Mitsilegas, *EU criminal law*, 2009, pp. 155-156.





a) Member States are, *in principle*, prevented from commencing prosecution in cases where the actions of the individual did not constitute an offence in the *state of stay* (Section 6.2, no. 2, infra);[108]
b) Member States concentrate proceedings for the same acts in one state, at the latest at the start of the trial, applying the laws and procedures of that state (Section 6.4, no. 2, infra);
c) multiple proceedings for different acts against the same offender are preferably concentrated in one state, also under the laws and procedures of that state (ibidem); and
d) Member States find the *best* place for prosecution in light of all the parameters defined by the legislator (ibidem).

*4. The position of the European institutions*. In addition to European statutory regulations, forum choices require a role for European institutions, too. Although forum choice as such remains a matter for the national authorities (within the framework set by the European Union), conflicts of jurisdiction need to be solved. Eurojust should be given the task of designating the competent Member State(s), when so asked by prosecuting authorities, the defendant or European institutions. That also means that its powers *ratione materiae* have to be widened and that its political and judicial accountability with respect to its operational activities and policies becomes a bigger issue of concern than it is now.

In those instances where Eurojust has taken the decision on forum choice, the question arises as to who should supervise those decisions. It is at present uncertain whether EU courts are competent to exert control over (the legality and reasonableness of) those types of decisions. The key issue will be whether such a decision produces legal effects vis-à-vis third parties, i.e., whether it is of direct and individual concern to them (cf. Article 263(1 and 4) TFEU). That *could* be the case where Eurojust is given the power to *force* Member States to initiate investigations, in order to prevent negative conflicts of jurisdiction.[109] In those instances, forum choices can arguably be said to have binding, irrevocable consequences, because they determine the competent legal order, as well as the scope of rights and duties of the actors involved.[110]

Should decisions by Eurojust not produce legal effects as meant in Article 263 TFEU, then this is because the legal consequences of that decision are technically still determined by national law and not by European bodies.[111] An important argument for this is that, ultimately, it will be the national authorities that will decide on prosecution (Article 85 (1)(a) TFEU).[112] In those cases, the relationship between the national courts and Eurojust may become a concern. National courts may then be asked by the defendant to assess whether they are really best placed for trial.[113] The obvious question is how this test relates to the decision of Eurojust, which is a European agency.[114] In my opinion, any decision of a national court that it is not best placed does not by itself affect the decision of Eurojust. That system would therefore not contravene the institutional set-up of the European Union. Yet, obviously, as soon as the national court of the forum thinks that it is not best placed, it has to refer the case back to Eurojust for a new decision.

The downfalls of the latter scenario are clear, but also the direct result of the institutional design of the European Union, which cannot be easily altered. Theoretically, the situation could occur where all involved national courts think another of them is best placed for trial. Negative conflicts and lasting

108 The state of stay means the state where the person was present at the time of the offence.
109 Cf. Herrnfeld, supra note 73, p. 203; Sinn (ed.), supra note 26, pp. 613-614. The situation in criminal law seems to differ from competition law to the extent that in competition law, supra note 60, case allocation takes place in a single European (albeit largely decentralised) system of competition law.
110 Lagodny, supra note 15, pp. 34-40, 64-100, has argued that the opening of a criminal investigation is in itself an interference with the constitutional rights of the person concerned, the *allgemeines Persönlichkeitsrecht* in particular. He limits his analysis, however, to German constitutional law and does not seek a common European standard in this regard; see however Inghelram, supra note 60, pp. 208-214.
111 Incidentally, Art. 263(5) TFEU seems to be a basis for a further reduction of judicial review in the case of agencies. Cf. J. Schwarze, 'Artikel 231 EGV', in J. Schwarze et al. (eds.), *EU-Kommentar*, 2009, p. 1794.
112 Cf. the system of the 1972 Convention on transfers of proceedings, which does not oblige the requested state to take the case to trial. This is why the right of prosecution and of enforcement sometimes reverts to the requesting state; see, in particular, Art. 21(2)(d) of that Convention.
113 Obviously, courts and authorities from other Member States, cooperating loyally, then have the task of providing the relevant information, when so asked.
114 Cf. Inghelram, supra note 60, pp. 226-230, 265-267.

double burdens for the defendant would then be the result. Forum choices under court supervision at the European level are therefore to be preferred above the national level.[115]

Finally, it should be emphasised that it is not proposed here to assign Eurojust the task of making forum choices as such. Eurojust should deal with *conflicts* of jurisdiction.[116] Not all forum choices will therefore be taken by European institutions. Still, they should be subject to court supervision. It seems to me that where forum choices are made in agreement between national authorities, the national court of the trial state must have the power to test if it is best placed for trial, on its own motion or at the request of the defendant.[117] Courts, European institutions and authorities from other Member States, cooperating loyally, have the task of providing the relevant information. As soon as the designated trial court considers another state to be best placed, it has to refer the case to Eurojust for a decision on the matter.

With respect to the jurisdiction to prescribe, adjudicate and enforce, that system would bring along a series of consequences which are presented in the following sections.

### *6.2. Jurisdiction to prescribe*

*1.* The system proposed here leaves the jurisdiction to prescribe relatively unaffected.[118] This is not only because the substantive legality principle is insufficiently authoritative with respect to criminal law jurisdiction, but also because the problems with respect to the foreseeability of the double burden are almost mitigated in full by the measures that tackle the double burden as such. Of course, there may still be reason for the European Union to intervene in the Member States' jurisdiction to prescribe, including jurisdiction. In order to prevent negative conflicts of jurisdiction, the EU may for instance set further jurisdictional standards for Member States on the basis of Article 83 or perhaps Article 325 TFEU.

*2.* There is one issue that is so closely related to questions of national criminal policy that I choose to discuss it in this section. With criminal law still being a matter for the Member States, conflicts of prescriptive jurisdiction in a range of areas – euthanasia, (soft) drugs, et cetera – remain a real possibility.[119] Member States still disagree thoroughly on the criminality of such behaviour, but they have also 'agreed to disagree' and to mutually recognise these differences. Present mechanisms and studies for dealing with conflicts tend to overlook this problem. Those mechanisms therefore accept that the 'most repressive system' is able to continue its proceedings. Other Member States are at most discharged, but not prohibited, from their duty to cooperate under mutual recognition schemes. Yet the double burden on the European citizen remains.

I propose to 'recalibrate' the notion of personal autonomy in light of the goals of Article 3(2) TEU. This means that EU Member States need to accept that EU citizens, in principle, determine autonomously which legal order is their order of reference (by their movement or non-movement). In order to assess the *criminality* of their actions, the laws of the legal order of stay are decisive. That does not mean that, in the absence of an offence in the state of stay, other Member States are precluded from establishing (extraterritorial) prescriptive jurisdiction; rather, it means that – as far as the AFSJ is concerned – they cannot prosecute and try those offences (not even in cases where the alleged offender shows up on their territory voluntarily) or use mutual recognition instruments for those purposes.[120]

Obviously, there is a danger of the abuse of free movement, particularly where a particular Member State is chosen as the centre of activity, but the (foreseeable and harmful) consequences of those activities are felt mostly or exclusively elsewhere. The restriction on the Member States to investigate, prosecute

115 This, incidentally, seems to be the *communis opinio*; see inter alia Sinn (ed.), supra note 26; Biehler et al. (eds.), supra note 26; Schünemann (ed.), supra note 69; VanderBeken et al., supra note 66.
116 Cf. Herrnfeld, supra note 99, p. 160.
117 Other ideas, like supervision by a network of national courts (or perhaps even Ombudsmen) are not mature enough yet; on that, see Harlow & Rawlings, supra note 85, pp. 542-562.
118 Cf. Panzavolta, supra note 57, pp. 162-164.
119 See also C. Ryngaert, *Jurisdiction in International Law*, 2008, pp. 160 et seq., with respect to international law.
120 See also the discussion by H. Fuchs, 'Zuständigkeitsordnung und materielles Strafrecht', of the model proposed in Schünemann (ed.), supra note 69, pp. 113-114.





and try offences is therefore lifted where an abuse of free movement is established. The final word on this should be in the hands of the national court of adjudication (which of course can, and sometimes must, pose preliminary questions to the Luxembourg Court).

### *6.3. Jurisdiction to enforce*

*1. Jurisdiction to enforce and the investigative stage.* The competences and powers of national authorities remain dependent on the jurisdiction and criminality of behaviour under the laws of their state (except for their activities under international/European cooperation schemes). Conducting acts of investigation in another Member State without an explicit basis remains unlawful.

Parallel proceedings in the early stages of the proceedings should not be prevented too readily. They emphasise the joint responsibility of all relevant authorities to fight crime. During the investigative phase, efforts should not only be geared towards finding the truth, but also towards finding the best forum for trial. Although authorities should strive for a forum choice as soon as possible, limitations during the investigative stage, therefore, cannot be too strict.

*2. Transnational cooperation and forum choice*. Instruments for cooperation should facilitate the process of finding the best forum, not vice versa.[121] Instead of constituting limitations to a forum choice, the relevant European instruments on mutual recognition should be revised in light of their capabilities to facilitate the needs of the best forum. Grounds for refusal that allow for the preferential treatment of national interests above other interests are unacceptable.

*3. Role and position of Eurojust*. Should conflicts between authorities occur, Eurojust may be asked to intervene in the early stages of the investigation by any of those authorities.

European institutions – the Commission in particular – should have the right to ask Eurojust to initiate proceedings or to intervene in pending procedures in order to ensure that EU interests are taken care of. The central position Eurojust thus achieves in the development of an 'EU prosecutorial policy' allows it to integrate the concerns of European institutions into the overall picture.[122] Eurojust should therefore be given the power to take over the initiative, as well as to order national authorities to initiate the necessary investigations (and, possibly, to ask others to refrain from doing so). Although the final decision remains with Eurojust, it should respond to such a request by European institutions in due time.

*4. The position of the defendant*. During the investigative stage, the defendant may be faced with a double burden. Although it is not generally unreasonable to accept this in the early stages, efforts should ultimately be geared towards designating the best forum for trial. In that regard, supervision should not be completely given away during the investigative stage. Particularly, three types of cases call for remedies:

a. *Ne bis in idem situations*. The defendant must have a legal remedy available at the national level to address a clear *bis in idem* situation, as defined by Article 50 CFR.
b. *Length of the investigations*. The efforts of the investigative authorities should be geared toward concentrating proceedings in one state. The situation may occur where investigations last beyond what may be deemed reasonable. In those situations, the defendant should be able to ask Eurojust to make a decision on the best forum (and to force other states to refrain from further actions).[123] The case law of the European Court of Human Rights with respect to the right to be tried within a reasonable time (Articles 5(3) and 6 ECHR) could be used as an inspiration in that regard. Eurojust is under a duty to respond to such a request.
c. *Prima facie cases of abuse*. Where forum choices will clearly lead to arbitrary results, i.e. where it is abundantly clear that authorities continue parallel investigations without there being a need to do so or that forum choices are made for other goals than mentioned in the next section, the defendant may

121 Cf. Lagodny, supra note 15, pp. 112-113.
122 On this, see also Groenleer, supra note 83, pp. 318-319.
123 In addition, that agency could also be given the power to dismiss the joint investigations altogether.

ask Eurojust to designate the best forum, and to stop parallel investigations by other states. Eurojust is under a duty to respond.

### *6.4. Jurisdiction to adjudicate*

*1. Jurisdiction to adjudicate and the stage of prosecution and trial*. Like in the investigative stage, a Member State's prescriptive jurisdiction will continue to determine the scope of its jurisdiction to adjudicate. Yet with the investigation concluded and the joint prosecution authorities having gathered enough evidence to bring the case to trial and to designate the best forum for prosecution, the interests of the defendant require that a forum choice be made, at the latest during the stage of the formal indictment.

*2. Substantive criteria: both rule and principle based*.[124] Forum choices should always lead to a Member State having jurisdiction to deal with the offence and should be guided by the following two rules:

*a.* a single competent Member State must be designated in case of simultaneous investigations for the same acts (as defined by the case law of the Court of Justice on Article 54 CISA);[125]
*b.* a single competent Member State must be designated in cases of simultaneous investigations for different acts by the same defendant, unless deviations from this rule are necessary in light of the legitimate interests of the Member States involved or of the European Union.

These rules do not yet determine the competent forum with sufficient precision. They reduce the double burden on the defendant beyond the scope of traditional *ne bis in idem* guarantees, but will not always prevent forum shopping by the authorities (or the defendant). That is why they need to be accompanied by a set of principle-based criteria in order to guarantee that the outcome of the decision-making process leads to the *best forum* available (among other *competent* forums). This, too, essentially boils down to a test of reasonableness. The Swiss example provides an excellent point of reference in this respect. Forum choices must in any case take account of:

*i.* the interests of the place where most of the damaging effects of criminal conduct were felt (including the interests of the victim(s));
*ii.* those of the suspect and his counsel to effectively defend himself (including language problems he may experience);
*iii.* those of the courts, which must be put in the position to obtain, as far as possible, a complete overview of both the person of the accused and his actions; and
*iv.* those of the speedy and efficient administration of justice.[126]

These 'principle-based' criteria apply to both types of legal rules introduced above. They will force the authorities, when so asked, to justify their decision in light of other available options. Obviously, the problems related to multiple prosecutions in different Member States for different offences by the same alleged offender need to be balanced against the other principles at stake and justified in light of the absence of reasonable alternatives that do justice to these principles too.

*3. Court supervision*. The aforementioned criteria (rules and principles) put the *burden of proof* on the authorities, to the extent that these authorities – when asked by a relevant national court, Eurojust or possibly the Court of Justice – will have to show how these criteria have been met and why alternative choices were rejected. The presence of an accountability forum is vital for the operation of the system and the protection of the interests of the defendant in particular.[127] It is the task of the national prosecutors

124 See, however, also the reservations with respect to such a list of criteria by Herrnfeld, supra note 73, pp. 192-194.
125 The question arises whether deviations from this system are necessary for the protection of vital interests of Member States. That could mean that, *in addition to* the system described here, another state would have the power to investigate, prosecute and try offences. I prefer the solution proposed by Sinn et al. to integrate vital state interests in the system, *without* banning the prohibition on the double burden; Sinn (ed.), supra note 26, pp. 604, 611. Obviously, there is a need for control by the Court of Justice, which may be asked to provide guidance on such a provision.
126 Supra Section 4.2. Interests related to the re-integration of the convicted offender could play a role, yet for that the European Union has set in place a new system of mutual recognition in the stage of the execution of sanctions.
127 It is thinkable to grant the victim a similar position like the defendant. I will leave that issue open here.





(or Eurojust) to search for the best forum, during the early stages of the investigation, and to justify their decision, when asked.

The task of accountability forums is to test the reasonableness of that decision; they should not 'second-guess' the forum choice, nor prelude to the substantive merits of the case.[128] Whether this will be the national court or the Court of Justice depends on the actor involved (Eurojust or not) and the scope of Eurojust's powers. The position of the courts can be complicated. One may wonder whether it will always be possible to separate forum choice issues from the merits of a case.[129] In my opinion, we have to take into account that the courts will be asked to perform this task only at the end of the investigation. They can rely on the case file of the authorities and the submissions of the defendant. The standard of a test of reasonableness emphasises the administrative law-like character of the test. Should a court conclude that it is not the best forum, it has to refer the case (back) to Eurojust.

## 7. Final observations

The Treaty of Lisbon formulates ambitious goals for the European Union. Among other things, the EU shall offer its citizens an area of freedom, security and justice, in which the free movement of citizens is guaranteed in combination with appropriate measures with respect to crime control (Article 3(2) TEU). This wording – which explicitly establishes a relationship between citizenship, free movement and a common area of justice – raises certain expectations. Still, the promotion of free movement introduces conflicts of jurisdiction. EU law encourages those conflicts further by obliging Member States to establish extraterritorial jurisdiction, in order to prevent negative conflicts. These types of conflict harm the interests of the European Union, as well as the position of the EU citizen.

This contribution analysed this problem in light of the legality principle, a cornerstone of every criminal law system. Its central argument was that with the transfer of powers from the national to the European level and the increased horizontal intertwinement of national criminal justice systems, it is also increasingly difficult to protect EU citizens against *arbitrary* investigation, prosecution, conviction and punishment in Europe's area of freedom, security and justice. Unilateral action by individual states easily hampers the goal put forward in Article 3(2) TEU. I therefore suggested to interpret the Charter rights in light of this goal, in order to activate the concept of European citizenship. A redefined notion of autonomy for European citizens means that it is in principle up to every citizen to subject himself to the legal order of his own choice, unless the common good limits this position. Those limitations, however, will have to pass the thresholds of the redefined legality principle. That will force the European Union to lay out the general outline of a system for choice of forum. This is how free movement and political representation at European level connect.

The question is to which extent this provides us with a court-enforceable yardstick for forum choices. I think there is reason for serious doubt in this respect.[130] Against this background, I would like to make a few final observations on the present legislative agenda of the European Union. It was noted above that one sometimes cannot escape the impression that citizens are offered a fair amount of fine things by the EU, without being in a position to decide over them autonomously.[131] Balibar has discussed what could be the added value of democracy at the European level, in addition to the national level. He proposes that the EU should identify 'worksites of democracy' in order to add substance to abstract deliberations on European democracy in general.[132] One of those worksites, according to him, is the 'question of justice'.[133] To that extent, the efforts of the European Union in the field of procedural safeguards are certainly a true test case.[134]

128 There is one exception to this test of reasonableness. Where a situation as in Section 6.2, under 2, occurs (abuse of free movement), courts should exercise a full review.
129 Cf. ECJ 11 November 1981, Case 60/81, *IBM v Commission*, [1981] ECR 2639, Para. 20.
130 Section 5.
131 Supra note 87.
132 Balibar, supra note 36, p. 162.
133 Balibar, supra note 36, p. 162, p. 173: '[S]ince Hegel we know or ought to know that one of the symbolic keys of belonging to the community is the possibility of being judged as a criminal even while remaining a citizen, or the possibility for the criminal to recognize himself in the instance that judges him.'
134 Supra note 19.

This is not the place to pass judgment on those initiatives. Yet I do wonder whether the focus of the EU should not be wider than the current ambitions of the Stockholm Programme. That programme is almost silent on choice of forum. In Section 6 of this contribution, I sketched the general outline of a system that, in my opinion, would meet the standards of the recalibrated Charter rights. Yet, in the final analysis, the question remains who is to take the next step in this dossier, now that the European legislator remains silent, at least for the time being.[135] The main point for now is that the European legislator cannot discharge itself from the tasks and duties introduced by the Treaties. That legislator should consider itself obliged to reconcile all interests involved to the extent that the adverse consequences of forum choices are mitigated in full, or – and only where the latter is not possible – to the largest extent possible. Charter rights that are interpreted in light of Article 3(2) TEU offer an important source of inspiration and guidance in this respect, which also goes far beyond, for instance, the ambitions of the European Commission put forward in its Strategy for the effective implementation of the Charter of Fundamental Rights by the European Union.[136] It is up to all actors involved in European criminal justice to remind the European and national legislators that more work is to be done.

I wish to make a few final observations with respect to the situation outside the EU. The concept of European citizenship is, I believe, an essential building block for a transnational application of fundamental rights in the EU. We should however note that using the concept of citizenship in this way is both a step forward as well as a retrograde step. It is a step forward because the redefined notion of autonomy will also protect the EU citizen in transnational cases. Yet it is also a retrograde step, because it leans heavily on the notion of citizenship, thereby excluding third country nationals. By contrast, the European Convention on Human Rights offers protection to all those present on the territory of the Member States (Article 1 ECHR).[137] There is no corresponding provision (except perhaps Articles 45 and 50 CFR) in Union law. For that, we will need to change the Treaties.

Outside the specific context of the European Union, the question therefore remains what should be the theoretical basis for introducing the individual as a full actor on the transnational level. There are a few paths worth exploring. Existing human rights treaties offer the advantage of taking the individual, and not the citizen, as their *protégée*, but their territorial and functional scope is, in principle, limited. We will have to see in what direction developments go.[138] Another path, i.e., the concept of cosmopolitanism, is even more controversial in the context of public international law than it is in the European Union.[139] It might be useful as a theoretical concept and offer a new narrative, but it will ultimately need support by a legal framework. Yet the third option, national citizenship, has certain inherent pitfalls too. The ban on the extradition of nationals, common to many national constitutions, will for instance offer national citizens protection in cases of transnational criminal justice, but it will occasionally also block a truly transnational approach towards a proper administration of justice. I doubt whether it will be possible to grant rights to the individual without facing these questions too. In order to achieve that, Member States will have to reach consensus on a series of incredibly difficult questions, including the design of a mechanism that ensures mutual respect for the agreements they have made. There certainly are best practices for this, also in the context of public international law.[140] However, they are rare and show how cumbersome the path is. This is precisely why the European Union is so interesting as an example. It is one of the few entities that has expressly formulated as its ambition to address issues like these. Despite of all its problems and pitfalls, we might indeed say that it is a unique cosmopolitan project. ¶

135 Obviously, proposals on the EPPO could trigger a debate. If so, it is to be hoped that it is not limited to the scope of Art. 86 TFEU.

136 COM(2010) 573 final.

137 To that extent, that Convention might also be qualified as 'cosmopolitan', cf. A. Stone Sweet, 'A Cosmopolitan Legal Order: Constitutional Pluralism and Rights Adjudication in Europe', 2012 *Global Constitutionalism*, no. 1, pp. 53-90.

138 We might point to ECtHR 7 January 2010, *Rantsev v Russia and Cyprus*, appl. no. 25965/04, Para. 289, in which the Strasbourg Court, very cautiously, seems to expand the concept of 'positive obligations' to cases of international cooperation (in cases of human trafficking). That certainly is a new development and one of particular interest to us.

139 See for instance the debate between Benhabib and Waldron in Benhabib, supra note 7.

140 See for instance the treaties of the Council of Europe on the recognition of the validity of judgments in criminal matters, including *ne bis in idem* rules; on that see also Vervaele, supra note 5 (who also points out that the scope of these treaties are often limited by declarations, reservations, their optional wording, etc.).

# *Prologue*

# *The EU's Accession to the European Convention on Human Rights—A Matter of Coherence and Consistency*

JÖRG POLAKIEWICZ*

THE LISBON TREATY, with its two complementary achievements of a legally-binding EU Charter of Fundamental Rights and a commitment by the EU to accede to the ECHR, marked a major step forward towards a stronger and more coherent system of fundamental rights protection. However, while the Charter deployed its legal effects immediately upon entry into force of the Lisbon Treaty on 1 December 2009, EU accession is still far from being completed.

Despite being an obligation under Article 6 (2) TEU, the merits and rationale for EU accession have been the object of much debate. After protracted negotiations, which lasted more than three years, the draft accession agreement was referred to the CJEU. It was encouraging to witness that during the pleadings on 5 and 6 May 2014, the representatives of the three EU institutions, as well as all intervening member states, argued that the draft accession agreement was in conformity with the requirements of EU law. Advocate General Kokott's comprehensive view of 13 June 2014 considered the agreement to be compatible on condition that some—mostly technical—adjustments are made. However, the CJEU concluded on 18 December 2014 that the accession agreement was not compatible with EU law.[1] While some amendments, required by the CJEU, are rather technical in nature and may be acceptable, others concern central issues such as the need to coordinate the EU Charter with the ECHR, EU legislation in the area of justice and home affairs (JHA) or the EU's common foreign and security policy (CFSP).

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[1] CJEU, Opinion 2/13 (Full Court) (18 December 2014).



## THE NEED FOR COHERENCE AND CONSISTENCY IN FUNDAMENTAL RIGHTS PROTECTION

EU accession to the ECHR will enhance consistency in the protection of human rights all over Europe, fostering a harmonious development of the relevant case-law of the ECtHR and the CJEU. Citizens and judicial authorities are confronted with different legally-binding texts to be applied simultaneously, to some extent with different standards, structures, terminology and qualifications:

— their own domestic law, including, in most cases, the national constitution's fundamental rights catalogue;
— the ECHR and its protocols;
— the EU law, in particular the EU Charter of Fundamental Rights.

How to best describe the resulting complexity? At the opening of the judicial year on 31 January 2014 in Strasbourg, the President of the German Federal Constitutional Court, Andreas Voßkuhle, compared the delicate balance between the various institutions to a mobile—a kinetic sculpture consisting of an ensemble of balanced parts that move but are connected by strings or wire.[2] Another metaphor uses the musical counterpoint, the relationship between voices that are interdependent harmonically and yet are independent in rhythm and contour.[3] In any case, the idea of a Kelsian-type hierarchical pyramid is generally rejected.

Clarity about the applicable standards and their coherence is crucial, in particular for domestic courts and other judicial authorities that play a central role, not only as 'Union courts of ordinary jurisdiction', but also as 'Convention courts of ordinary jurisdiction'. There is certainly a high degree of consensus among European and national constitutional and supreme courts. To give just one example, on 19 February 2013, the ECtHR and the German Federal Constitutional Court recognised simultaneously, albeit with a different reasoning, adoption rights of same-sex couples. At the same time, the large degree of overlap between the various legal instruments may occasionally generate competition, sometimes even tensions, between their respective ultimate interpreters. Different approaches can be mutually enriching as long as the various actors base their interaction on a set of shared principles.

The EU Charter already contains safeguards to ensure that its rights should be interpreted consistently with the ECHR. Article 52 (3) seeks to ensure the necessary consistency between the Charter and the ECHR by establishing the rule that, insofar as the rights in the Charter correspond to rights guaranteed under the ECHR, the meaning and scope of those rights, including authorised limitations,

[2] A Voßkuhle 'Pyramid or Mobile?'—Human Rights Protection by the European Constitutional Courts' Opening of the Judicial Year 2014 at the European Court of Human Rights Strasbourg, 31 January 2014, available at http://www.echr.coe.int/Documents/Speech_20140131_Vosskuhle_ENG.pdf.

[3] MP Maduro 'Contrapunctual Law: Europe's Constitutional Pluralism in Action' in N Walker (ed) *Sovereignty in Transition* (Oxford, Hart, 2003) 501–37.

should be the same as those laid down by the ECHR. Article 53 provides that nothing in the Charter may be interpreted as restricting or adversely affecting the human rights and fundamental freedoms recognised in international agreements, such as, in particular, the ECHR, and national constitutions.

In Opinion 2/13, the CJEU confirms its previous case-law insisting that 'the unity, primacy and effectiveness of EU law' must not be affected by EU accession. The CJEU extends to the ECHR its long-standing principle that the primacy of EU law prevents member states from having higher or even different human rights standards where EU law has fully harmonised the matters concerned. In 2013, in *Melloni*, the CJEU had ruled that once the EU has adopted a common fundamental rights standard, EU member states are no longer entitled to apply higher standards, even when provided for in national constitutions.[4] According to the CJEU, as Article 53 ECHR allows Contracting Parties to the ECHR to apply higher standards of protection than those guaranteed by the ECHR,

> that provision should be coordinated with Article 53 of the Charter … so that the power granted to member states by Article 53 of the ECHR is limited—with respect to the rights recognised by the Charter that correspond to those guaranteed by the ECHR—to that which is necessary to ensure that the level of protection provided for by the Charter and the primacy, unity and effectiveness of EU law are not compromised.[5]

Human rights are based on universal values transcending the various domestic legal orders. In Europe, that idea has found expression in the ECHR and in the setting-up of the ECtHR as an independent international supervisory body. The ECHR and Union law are based on the same values and principles. More fundamentally, the very utility of using the 'high' and 'low', maximal and minimal, nomenclature can be questioned in the context of human rights protection.[6] Human rights entail choices as to the appropriate balance between the interests of individuals against those of other individuals or the community. The quantification of levels of protection based on generally worded provisions of fundamental rights catalogues often proves difficult. Ronald Dworkin observed pertinently that 'it is very difficult to think of liberty as a commodity.'[7]

A 'race to the top', seeking ever higher standards makes little sense in cases of competing human-rights interests which must be reconciled, such as freedom of expression versus privacy or the right to property versus the right to strike. In such multipolar relations, extending the protection of one right or attaching more weight to it, will inevitably have the consequence of restricting the right of others.

[4] C-399/11 *Stefano Melloni v Ministerio Fiscal* (26 February 2013). See also C-206/13 *Cruciano Siragusa v Regione Sicilia—Soprintendenza Beni Culturali e Ambientali di Palermo* (6 March 2013).

[5] CJEU (n 1) para 189.

[6] JH H Weiler 'Fundamental Rights and Fundamental Boundaries: On Standards and Values in the Protection of Human Rights' (1995), reprinted in JHH Weiler *The Constitution of Europe: do the New Clothes Have an Emperor? and other essays on European integration* (Cambridge, Cambridge University Press, 1999) 107–16.

[7] R Dworkin *Taking Rights Seriously* (Cambridge, MA, Harvard University Press 1977) 270.



Where competing rights are at stake, the aim should be to strike a balance, trying to reconcile competing rights, so that the limitation on the one right is equal to the limitation on the other, taking into account the circumstances of each case.

A major goal pursued by accession is to close existing gaps in judicial protection by giving European citizens the same protection vis-a-vis acts of the Union as they presently enjoy vis-a-vis all EU member states. In that context, the CJEU's objection regarding JHA's matters appears problematic. The CJEU argues that the ECtHR's external scrutiny would be incompatible with the obligation of mutual trust between EU member states and accession thus liable to upset the underlying balance of the EU and to undermine the autonomy of EU law.[8] This reasoning seems questionable even from a purely EU law perspective.[9] While the 'values' of the EU include human rights and the rule of law, there is no mention of the primacy of EU law, of mutual trust in JHA matters, or of preventing any international court from exercising jurisdiction over EU-related matters. Under the EU treaties, mutual recognition is merely a 'principle' to be used to facilitate judicial cooperation among EU member states. It should not be weighed against, or, even worse, used to escape compliance with legal obligations to respect fundamental rights under EU primary law.

Respect for fundamental rights constitutes a key component of the area of freedom, security and justice, as explicitly foreseen by Article 67 (1) TFEU. It is noteworthy that the EU's own Fundamental Rights Agency advocates the use of fundamental rights-based refusal grounds in EU legislation providing for mutual recognition.[10] More significantly, in a recent JHA legal instrument, Directive 2014/41/EU on the European Investigation Order, non-compliance with fundamental rights was explicitly provided for as a refusal ground.

In the *NS* case, the CJEU itself was prepared to give precedence to fundamental rights over the obligations of member states to comply with the provisions of the Dublin II Regulation regarding the return of asylum seekers to their first country of entry into the EU. The CJEU recognised that member states must not return asylum seekers when systemic deficiencies in the asylum procedure and in the reception conditions of the country to which they would be returned result in a real risk of asylum seekers being subjected to inhuman or degrading treatment within the meaning of Article 4 of the Charter.[11] As the ECtHR Grand chamber judgment in *MSS v Greece and Belgium* 11 months earlier,[12] the CJEU found that there existed such systemic flaws in Greece.

[8] CJEU (n 1) para 194.

[9] See J Polakiewicz 'EU law and the ECHR: Will the European Union's accession square the circle?' (2013) 592 *European Human Rights Law Review* 602–05.

[10] Opinion of the European Union Agency for Fundamental Rights on the draft Directive regarding the European Investigation Order (February 2011) http://fra.europa.eu/sites/default/files/fra_uploads/1490-FRA-Opinion-EIO-Directive-15022011.pdf.

[11] Joined cases C-411/10 and C-493/10 *NS* (21 December 2011) para 94.

[12] Application no 30696/09, judgment of 21 January 2011.

For national constitutional and supreme courts, it is normal practice to review whether the unfettered application of ordinary legislation violates fundamental rights in individual cases. The UK Supreme Court, for example, held that surrender under a European Arrest Warrant may be refused if it constitutes a disproportionate interference with the mother and her children's rights under Article 8 ECHR. Depending on the circumstances of the case, the best interests of the child may, in a particular case, outweigh the very high public interest in surrender, in particular if the alleged offences are not particularly serious compared to the damage that would be caused to the children.[13] Why should this principle not apply in the EU's legal order?

EU member states are not immune from being found in violation of even the core human rights such as Article 3 ECHR, the prohibition of torture and inhuman and degrading treatment and punishment. A recent illustration of the different approaches of the two European courts is the ECtHR's *Tarakhel* judgment,[14] whose individualised assessment of the applicants' situation contrasts with the CJEU's defence of the Dublin system in the *Abdullahi* judgment.[15] These judgments show at the same time that even without accession JHA issues are already before the ECtHR. The challenge to the conception of mutual trust in JHA matters could hardly become more severe than it already is. Rather on the contrary, accession and a strong co-respondent mechanism provide the possibility for comprehensive external scrutiny of the JHA system as a whole, with the active participation of protagonists from both the supranational and the national levels, thereby enhancing both trust in the various mutual recognition systems and human rights protection for the individuals concerned. Exempting JHA matters from the scope of external control would be a curtailment of existing ECHR jurisdiction in one of the core areas where effective fundamental rights protection is most important.[16]

## RECENT CJEU CASE LAW: TOWARDS A MERELY RESIDUAL ROLE OF THE ECHR?

In the past, the CJEU had explicitly recognised 'the special significance' of the ECHR as interpreted by the ECtHR.[17] Following the entry into force of the EU Charter, the use of human rights law in general and ECHR case law in particular has become more occasional and selective.

[13] *F-K v Polish Judicial Authority* [2012] UKSC 25; for extradition cases see *Norris v Government of the United States of America* (No 2) [2010] UKSC 9; *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4.

[14] *Tarakhel v Switzerland*, no 29217/12, judgment of 4 November 2014.

[15] Case C-394/12 *Shamso Abdullahi v Bundesasylamt* (10 December 2013).

[16] S Peers 'The CJEU and the EU's accession to the ECHR: a clear and present danger to human rights protection' Blog on EU Law Analysis, available at http://eulawanalysis.blogspot.fr/2014/12/the-cjeu-and-eus-accession-to-echr.html, accessed on 15 January 2015.

[17] Case C–305/05 *Ordre des barreaux francophones et germanophone and Others* [2007] ECR I–5305, para 29 and case-law cited, notably Case C-29/69 Stauder [1969] ECR 419; Case C-274/99 *Connolly v Commission* [2001] ECR I-1611; Joined Cases C-402/05 P and C-415/05 P *Kadi v Council* [2008] ECR I-6351, para 283.



In 2012, Professor Gráinne de Búrca conducted an analysis of all cases in which the CJEU and General Court—previously the Court of First Instance—had referred to the Charter since it has had binding effect.[18] During the period in question (December 2009 until 31 December 2012), the CJEU referred to the EU Charter in at least 122 cases. Out of those 122 cases, the CJEU referred to the ECHR in only 18 cases (with 10 of these involving mention or discussion of ECHR case law, the other 8 merely mentioning an ECHR provision). In none of the 122 cases was any other source of human rights jurisprudence or interpretation referred to, with the exception of a mention in a group of cases of the Refugee Convention and in one case of the Convention on the Rights of the Child. The Advocate General referred to the ECHR in 34 of these 122 cases and to the case law of the Strasbourg Court in 19 of the 122 cases, almost twice as many times as the Court. Professor Gráinne de Búrca also noted a trend towards dispensing with the need for an Advocate General's Opinion in 24 of the 122 cases. The General Court made references to the EU Charter in at least 37 cases. In 15 of these, the Court referred to a provision of the ECHR, and in 6 to case law of the ECtHR.

The research conducted by Professor Gráinne de Búrca confirms a trend in the CJEU's case law to interpret the provisions of the Charter in isolation from the jurisprudence emerging from other human rights instruments. The CJEU draws only sporadically on international human rights sources, insisting that it remains the final and authoritative arbiter of their meaning and impact within the EU. The emerging pattern seems to suggest a kind of division of labour, with the ECHR having only residual application where EU law applies. The mere existence of two different texts to be interpreted by two distinct Courts operating in very different contexts is not conducive to legal certainty. It might ultimately lead to the existence of two sets of human or fundamental rights standards in a Europe where membership in the EU and the Council of Europe increasingly overlaps.

Referring to the EU Charter, the then President of the European Court of Human Rights, Luzius Wildhaber, had declared on 7 March 2000 before the Committee of Ministers of the Council of Europe that the main concern was

> to avoid a situation in which there are alternative, competing and potentially conflicting systems of human rights protection both within the Union and in the greater Europe. The duplication of protection systems runs the risk of weakening the overall protection offered and undermining legal certainty in this field.

The Committee of Ministers, on which all EU countries are represented, accepted this position unreservedly.[19] This is precisely why the Laeken Declaration (2001) and the subsequent EU Convention (2001–2003) and Intergovernmental Conferences (2003 and 2007) had established a *junktim* between the incorporation of the EU Charter into the Treaties and accession of the EU to the ECHR.

[18] G De Búrca 'After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator?' (2013) 20 *Maastricht Journal of European and Comparative Law* 168 et seq.

[19] See Committee of Ministers' reply to Parliamentary Assembly Recommendation 1439 (2000), adopted on 31 May 2000 at the 711th meeting of the Ministers' Deputies 21 HRLJ 188 (2000).

## THE AUTONOMY OF EU LAW

In Opinion 2/13, the CJEU justifies its most important objections by reference to the autonomy of the EU's legal system. It is precisely respect for this autonomy and the role of the CJEU that have been advocated by the EU throughout the accession negotiations. The negotiators have taken those concerns seriously and have not spared any efforts in striking a fair balance between the respect for the autonomy of EU law and effective external scrutiny by the ECtHR, the declared objective of the whole exercise.

The concern that the ECtHR should not itself pronounce on the division of competences between the Union and its member states has surfaced on several occasions during the negotiations. It explains, for example, some of the complex wording used in respect of the co-respondent mechanism. The introduction of this mechanism is necessary because the legal systems of the EU and its member states do not merely overlap, they are intrinsically intertwined. Directly applicable Union law is primarily implemented, applied and enforced by national authorities.

With the accession of the EU, the unique situation arises that the Contracting Party enacting a legal act and the Contracting Party implementing that act may not be the same. It is necessary to provide for 'mechanisms necessary to ensure that … individual applications are correctly addressed to Member States and/or the Union, as appropriate.'[20] The co-respondent mechanism enables the EU to defend the compatibility with the ECHR of the arraigned legislative act. Any judgments in which a violation of ECHR rights has been found, will legally bind the co-respondents jointly and in solidarity, thus avoiding gaps in participation, accountability and enforceability.

The concern to preventthe ECtHR from pronouncing on the distribution of competences between the EU and its member states found expression in the rule that the EU cannot be forced to join the proceedings as a co-respondent. Article 3 (2) of the draft accession agreement states that the EU 'may become a co-respondent if it appears that such allegation calls into question the compatibility with the Convention of a provision of EU law.' This will typically be the case where an EU law provision leaves no discretion to a member state as to its implementation at the national level. The draft accession agreement specifies that the ECtHR may invite the EU to become co-respondent and the application of the mechanism will in any case require a decision by the ECtHR. The latter will, however, exercise only a plausibility control when assessing whether the conditions for the co-respondent mechanism are fulfilled (see Article 3 (5) of the draft accession agreement).

Where the finding of a violation arises, Article 3 (7) of the draft accession agreement foresees, in principle, joint responsibility of the respondent and the co-respondent. In this way, the ECtHR will not decide on the apportionment of responsibility as between the respondent and co-respondent, a decision which

[20] Article 1 (b) of Protocol No 8 to the Treaty on the Functioning of the European Union therefore required the accession agreement.



could require a rather detailed analysis of EU law and its application as well as of the division of competences between the EU and its member states, in particular when the breach derives from an omission.

Questions of attribution and responsibility are particularly complex in the context of the EU's common foreign and security policy (CFSP). Uniquely situated between intergovernmentalism and supranationality, this policy field enjoys a special status within EU law. With the exception of targeted sanctions (Article 275 (2) TFEU), the CJEU has no competence in this area. The draft accession agreement, on the other hand, does not exclude it from the jurisdiction of the ECtHR. In Opinion 2/13, the CJEU requires amendments that would curtail the role of the ECtHR to rule on acts adopted in the context of the CFSP (or amendments to EU treaties extending the CJEU's jurisdiction to this policy field). This point goes to the very heart of the compromise reached in the current version of the draft accession agreement. Creating an exception for CFSP matters in the draft accession agreement is difficult to reconcile with the idea of comprehensive and effective supervision by the ECtHR and the principle that the EU should accede to the ECHR on an equal footing with the other Contracting Parties.

When it comes to judicial protection, it must be recalled that legislative measures taken in the CFSP framework will only exceptionally affect the rights of individuals personally, directly and immediately in such a way that they can claim to be 'victims' of ECHR violation within the meaning of Article 34 ECHR. Concrete measures involving the use of force or detentions will typically be taken by the member states and consequently be subject to judicial review before national courts and ultimately, now, before the ECtHR. The attribution of responsibility in this context was one of the central issues in the negotiations. In its current practice, the ECtHR determines the responsibility for extraterritorial acts in the light of ECHR criteria, in particular the notion of effective control over territory and individuals (see among others *Al-Skeini*, *Al-Jedda, Behrami, Issa, Ilaşcu*, *Saramati* cases).[21]

However, in none of the cases so far decided by the ECtHR, has there been a specific rule on attribution of such acts or measures to either the international organisation concerned or its members. The draft accession agreement contains such a rule in Article 1 (4) providing that if an organ of a member state causes a breach of an ECHR obligation when implementing EU law, including with regard to matters related to the CFSP, the act will be attributed to that state. This rule is qualified in two respects. Firstly, it does not preclude the EU from being responsible as a co-respondent for an alleged violation of the ECHR. Secondly, acts, measures and omissions of the EU institutions, bodies, offices or agencies, or of persons acting on their behalf remain attributable to the EU in whichever context they occur, including with regard to matters related to the EU CFSP. Accepting an

[21] For full references of these cases see the ECtHR's factsheet 'Extra-territorial jurisdiction of States Parties to the European Convention on Human Rights', available at http://www.echr.coe.int/Documents/FS_Extra-territorial_jurisdiction_ENG.pdf (last accessed on 15 January 2015).

independent judicial control based on human rights will be a major achievement providing the Union's action with added legitimacy. Europeans, with their long tradition in human rights protection, are well placed to set an example for the international community.

## THE CJEU'S MONOPOLY OF ULTIMATE INTERPRETATION OF EU LAW

In the debate on EU accession to the ECHR, it has been suggested that setting up a sequence of appeals from the CJEU to the ECtHR would leave the CJEU subordinate to a Council of Europe body. This argument overlooks the fact that the Strasbourg Court is no higher court than, for instance, the UK's Supreme Court or Germany's Federal Constitutional Court. It is simply a 'more specialised' court, responsible under the ECHR for '[ensuring] the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto' (Article 19 ECHR). No one can claim that the German Federal Constitutional Court or the British Supreme Court neglect fundamental rights in their rulings. Like the CJEU, they have an excellent record and reputation. Nevertheless, the existence of European supervision, operating outside the national systems whose legal measures it examines, gives citizens a guarantee that their rights will be effectively protected.

Even after accession, the EU institutions, including the CJEU and the General Court, will be primarily responsible for ensuring that the rights enshrined in the ECHR are respected. The ECtHR would not be able to annul legislative acts or other measures taken by the EU, nor would it annul the CJEU's judgments. Its jurisdiction would be limited to cases raising issues involving the protection of fundamental and human rights. As for the other Contracting Parties, supervision by the ECtHR will remain subsidiary in character—a fact reflected, in particular, in the recognition of margins of appreciation.

From the intergovernmental conferences on the future of the ECtHR, held in İzmir (2011) and Brighton (2012), a clear message emerged inviting the ECtHR to show self-restraint over issues best dealt with by national courts and tribunals and democratically elected legislatures in the member states. The ECtHR should resist the 'spider's web temptation', the temptation of pretending to build, on the basis of the ECHR, a complete legal system where the national legal orders and, in the future, the EU's supranational legal order could feel 'trapped' or 'cornered'.[22] The subsidiarity principle and the margin of appreciation doctrine will in future be included in the Convention's preamble.[23]

[22] P Cruz Villalón 'Rights in Europe—The Crowded House' King's College London—Working Paper 01/2012, available at http://www.kcl.ac.uk/law/research/centres/european/research/CELWPEL-012012FINAL.pdf (accessed on 15 Janua 2015) 9–10.

[23] Article 1 of Protocol No 15 amending the Convention for the Protection of Human Rights and Fundamental Freedoms.



Sometimes described as being 'slippery and elusive as an eel', the margin of appreciation doctrine has been consistently applied by the ECtHR for more than 40 years. And yet, the ECtHR faces a continuous challenge to come up with meaningful tests for Convention compatibility, in particular as regards the proportionality of restrictions and the weighing of competing rights against each other. Such tests are taken up by national constitutional and supreme courts not because of hierarchical superiority but because of their persuasive authority.

The ECHR is an international instrument providing for the effective protection of a given number of rights, not a legal order in the same sense as that of the member states or the EU. A major challenge for the ECtHR is to define minimum standards while respecting the plurality of national and supranational fundamental rights provisions. When developing the ECHR standards further, the ECtHR increases the level of acceptance by demonstrating respect for national diversity. Such an approach is particularly warranted in cases raising sensitive moral or ethical issues on which no European consensus has been reached.

While it is certain that the ECtHR will continue to allow margins of appreciation also in respect of the EU and its supranational legal order, some—including a former ECtHR judge—have suggested that the ECtHR might endorse a wider margin of appreciation where the EU is concerned than the one given in relation to individual states, since an EU legal act already represents the product of harmonising European cooperation between 28 EU member states, (ie a majority of member states of the Council of Europe) and the legal act's human rights compliance will usually have been verified beforehand as well as by the other European Courts in Luxembourg.[24] Existing ECtHR case law provides ample evidence that it uses the margin of appreciation doctrine in such a way as to not unduly encroach upon the objectives of European integration (for example in *Michaud v France*).[25]

It is, however, significant that during the negotiations on EU accession, there has been no attempt to codify the so-called *Bosphorus* presumption in whatever form in the accession agreement. Recognising that the EU guarantees a level of fundamental rights protection equivalent to that of the ECHR, the ECtHR held in *Bosphorus* that ECHR compliance can be presumed when a state merely implements EU law, unless, in the circumstances of a particular case, it can be demonstrated that the protection of ECHR rights was 'manifestly deficient'.[26] This presumption acknowledges the fact that the EU is currently not bound by the ECHR. In the event of accession, it loses not only its raison d'être, it would also result in a double standard incompatible with the idea of equal footing. Why should the CJEU be allowed to hide behind the *Bosphorus* veil when all the national constitutional and supreme courts are subject to the full control of the ECtHR?

[24] L Garlicki 'The Relationship between the European Court of Justice and the European Court of Human Rights: The Strasbourg Perspective' in J Iliopoulos-Strangas & H Bauer (eds) *La nouvelle Union européenne* (Athens, Sakkoulas; Berlin, Berliner Wissenschafts-Verlag; Bruxelles, Bruylant, 2006) 127.

[25] *Michaud v France*, no 12323/11, judgment of 6 December 2012.

[26] *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Şirketi v Ireland*, no 45036/98, Grand Chamber judgment of 30 June 2005.

## CONCLUDING REMARKS

The European project will only remain credible if it rests on mutual respect and trust, good will and cooperation. For a mobile to work, the different parts of the system, not only the two European courts, but also the constitutional and supreme courts, have to go about their task with sensitivity in order to preserve the overall balance. All this requires not only sincere dialogue and willingness to engage substantially and transparently with the arguments used by 'other' courts, but also the recognition of certain common (minimum) standards which transcend both national and supranational legal orders.

I remain convinced that EU accession to the ECHR will eventually put in place the missing link in Europe's system of fundamental rights protection, guaranteeing consistency between the approaches of the EU and the Council of Europe. Only the combination of making the EU Charter legally binding and acceding to the ECHR can ultimately ensure effective protection for individuals, legal certainty and coherence in fundamental rights protection all over Europe.