



ARTICLES

TOWARDS EUROPEAN CRIMINAL PROCEDURAL LAW – FIRST PART

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TOWARDS EUROPEAN CRIMINAL PROCEDURAL LAW: AN INTRODUCTION

As European Union competences gradually increase, criminal law is one of the areas of EU law on which most attention is focused. At the heart of this field, criminal procedural law is made particularly interesting by its position at the intersection of two sectors that were traditionally excluded from the European Union's harmonisation competences: criminal law and procedural law. It also remains an area of significant discrepancies among the Member States. Still, the interest of national authorities in the practical advantages of cooperation in criminal matters continues to increase. Pragmatic considerations are powerful incentives to transcend the difficulties inherent in the development of EU competences in such a sensitive policy area, which is still perceived as an essential component of the core sovereign powers of the state.¹

Harmonisation and the "cross-fertilisation" of criminal procedural law is happening firstly through the influence of technical and institutional adjustments necessary to improve communication and cooperation between judicial authorities or to accommodate new actors such as the European Public Prosecutor's Office (EPPO). Such adjustments are increasingly accepted as the necessary conditions for useful cooperation mechanisms. Eurojust has registered approximately 17 per cent more requests for assistance every year.² Its operational capabilities are increased regularly in order to meet this growing demand. The resources allotted to the operational and financial support of Joint investigation teams by Eurojust are also being significantly expanded.³ Concurrently, there has also been progress in the establishment of common (or, in any case, compatible) procedural standards as a necessary complement in order to ensure the

¹ F.-X. ROUX-DEMARE, *L'inaboutissement des mécanismes de coopération opérationnelle*, in C. BILLET, A. TURMO (eds), *La coopération opérationnelle en droit pénal de l'Union européenne*, Bruxelles: Bruylant, 2019, p. 31 *et seq.*

² European Union Agency for Criminal Justice Cooperation, Eurojust Annual Report 2019, 16 April 2020, eurojust.europa.eu, p. 7.

³ Eurojust funding allocated to Joint investigation teams was increased to 1,44 million euro in 2019 and 1,95 million euro in 2020, *ibid.*, p. 14.



efficiency of these cooperation mechanisms. This has, of course, first involved judicial dialogue between the two European legal systems and their supreme courts, as well as across national legal systems. Within the EU, national implementation measures for the “procedural rights” directives⁴ have entered into force and, as a result of the ensuing preliminary references, the Court of Justice has started developing case law⁵ which is allowing it to construct its own interpretation of the standards set out in these instruments. The EU legislator has also turned its attention to other necessary additions to the existing judicial cooperation instruments, for instance regarding freezing and confiscation orders⁶ and evidence.⁷

Although the agenda set in the Tampere⁸ and Stockholm⁹ programmes remains the main source of inspiration for EU interventions in criminal procedural law, the changing political landscape has led to greater importance being given to topics such as terrorism, which has a significant influence on the way in which Member States perceive the functions of EU criminal procedural law.¹⁰ More importantly, the need to preserve the

⁴ 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; Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings; 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; Directive 2016/343/EU of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and the right to be present at the trial in criminal proceedings; Directive 2016/800/EU of the European Parliament and of the Council of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings; Directive 2016/1919/EU of the European Parliament and of the Council of 26 October 2016 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings.

⁵ See, *inter alia*, Court of Justice: judgment of 19 September 2019, case C-467/18, *Rayonna prokuratura Lom* (on Directive 2012/13, Directive 2013/48 and Directive 2016/343) and judgment of 14 May 2020, case C-615/18, *Staatsanwaltschaft Offenburg* (on Directive 2012/13).

⁶ Regulation (EU) 2018/1805 of the European Parliament and of the Council of 14 November 2018 on the mutual recognition of freezing orders and confiscation orders.

⁷ Commission Proposal for a Regulation of the European Parliament and the Council on European Production and Preservation Orders for electronic evidence in criminal matters, COM(2018) 225 final, and Commission Proposal for a Directive of the European Parliament and the Council laying down harmonised rules on the appointment of legal representatives for the purpose of gathering evidence in criminal proceedings, COM(2018) 226 final.

⁸ European Council, Presidency conclusions of 15-16 October 1999.

⁹ European Council, *The Stockholm Programme – An Open and Secure Europe Serving and Protecting Citizens*, 2 December 2009, p. 5.

¹⁰ President of France Emmanuel Macron stated in a speech on his “Initiative for Europe” on 26 September 2017 that he wanted the European Public Prosecutor’s competences to be expanded to include terrorism. As part of the preparation of the Leaders’ meeting in Salzburg on 9-20 September 2018, the Commission presented a Communication proposing the same: Communication COM(2018) 641 final of 12

rule of law across the Member States has become a major political and legal priority for all EU institutions after the constitutional reforms introduced in certain States. President von der Leyen's mission letter to the new Commissioner for Justice, Didier Reynders, places upholding the rule of law as his first priority.¹¹ The limits of mutual recognition, which had been perceived as a useful tool to achieve the goals set in Tampere, are fast becoming apparent. Criminal procedural law cannot function at an EU level if national authorities do not trust that their counterparts in other Member States do not operate under the same standards of judicial independence and impartiality. The urgent need to find solutions in order to preserve judicial cooperation in criminal matters is apparent in the growing case law of the Court of Justice, which is being asked to monitor compliance with such basic guarantees in national judicial systems at the same time as it tries to maintain trust in the existing mechanisms.

This Special Section is the result of a conference held at the University of Nantes on 6 and 7 February 2020, titled *Towards European Criminal Procedural Law*. It is structured around two main themes. The first is related to the systemic requirements for a European law of criminal procedure and focuses on the gradual construction of EU and European Convention standards, especially related to fundamental rights and the rule of law, which create the conditions for European criminal procedural law. Julia Burchett's *Article* examines the Court of Justice's case law on judicial independence and its impact on judicial cooperation in criminal matters. In his *Article*, Tony Marguery analyses the case law on mutual trust and mutual recognition as revealing the development of European values through demands related to the individual treatment of litigants as well as to the overall structure and functioning of national judicial systems. Konstantinos Zoumpoulakis focuses on the concept of minimum rules as a feature of EU criminal procedural law and argues that the balance between the goals of police and judicial cooperation versus the discretion of Member States must be redefined. Ariadna Ochnio argues in favour of a new definition of the concept of "judicial authority" within European arrest warrant proceedings in view of the inadequacies of the current system under which national authorities must undertake a case-by-case review of their counterparts' compliance with standards related to fundamental rights and the rule of law. In their *Article*, Joost Nan and Sjarai Lestrade examine the potential for a recognition of a right to claim innocence in EU law and argue that it would facilitate both horizontal judicial cooperation and the oversight by the Court of Justice. The last *Article* presents the evolving case law of the Court of Justice and the European Court of Human Rights on *ne bis in*

September 2018 from the Commission, *A Europe that protects: an initiative to extend the competences of the European Public Prosecutor's Office to cross-border terrorist crimes*.

¹¹ U. VON DER LEYEN, Mission Letter to the new Commissioner for Justice, 1 December 2019, ec.europa.eu, p. 4.

idem as an illustration of the difficult path towards common standards for fundamental rights in criminal procedure.

The second part of this Special Section explores different instruments and rules which contribute to the emergence of criminal procedure as a specific field of EU law. Three *Articles* examine the future European Public Prosecutor's Office. Louise Seiler presents a detailed criticism of the procedural guarantees offered to the defence within the EPPO Regulation and presents a number of possible improvements. Ana Laura Claes, Anne Werding and Vanessa Franssen make a case for the compatibility of the structure set out in the Regulation with the *juge d'instruction* (investigative judge), a central feature of criminal procedure in Belgium, France and Luxembourg. Maria Ludwiczack Glassey presents a comparative perspective, analysing the construction of the EPPO through a Swiss lens, establishing parallels with the Office of the Attorney General of Switzerland created in 2011. The next three *Articles* examine the specific issues related to data protection and digital services. Maxime Lassalle's *Article* establishes the inadequacies of EU standards related to data protection in the field of criminal procedural law, despite the legal basis in the Treaty and the Court of Justice's ambitious case law. H el ene Christodoulou, Laetitia Gaurier and Alice Mornet defend a somewhat favourable analysis of the "E-evidence" proposal, explaining its potential and advantages over the current situation and mutual recognition. Marine Corhay presents a more critical view of the same, focusing on the risks resulting from direct cooperation between judicial authorities and online service providers. The last three *Articles* offer perspectives on the emergence of EU criminal procedural law as a phenomenon whose impact reaches areas beyond criminal policy within the European Union. Fr ed erique Mich ea and Laurent Rousvoal show how the European Travel Information and Authorisation System, although not strictly within the realm of criminal law, in fact has an impact on national criminal procedural law. Chlo e Bri ere examines the extraterritorial impact of EU criminal procedural law with a particular focus on the negotiations for new international agreements in which the European Commission is playing an important role. Last, Annegret Engel's paper explains the current state of EU-UK relations in the area of criminal procedure and tries to predict the forms of cooperation that could follow.

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