TOWARDS EUROPEAN CRIMINAL PROCEDURAL LAW

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

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1 F.-X. ROUX-DEMAIRE, 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.
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” directives have entered into force and, as a result of the ensuing preliminary references, the Court of Justice has started developing case law 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 orders and evidence.

Although the agenda set in the Tampere and Stockholm 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. More importantly, the need to preserve the

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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. 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
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. Hélène 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. Frédérique Michéa 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. Chloé Brière 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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