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An evaluation of the EU Roadmap on criminal procedural rights from both a substantive and governance perspective

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Abstract

This thesis examines the key elements of the EU policy on criminal procedural safeguards as set out by the Roadmap on Criminal Procedural Rights. This is done from both a substantial and an instrumental perspective.

The thesis first outlines the developments prior to the Roadmap and identifies why agreement was never reached on an EU wide instrument. Subsequently the needs for EU involvement in this field are presented by pointing to the shortcomings in the various national legal systems as well as in the overarching 'Strasbourg' system.

The first and most important part of the thesis thoroughly analyses the content of the instruments contained in the Roadmap and makes a textual comparison with the ECHR in order to get an understanding of how the rights presented by the Roadmap can add to existing levels of safeguards.

The second part of the thesis examines what the value of the EU policy on procedural safeguards is for the successful application of 'mutual recognition' in criminal cooperation. The research outcomes are that the instruments as set out by the Roadmap have great potential under the current legal framework as introduced by the Lisbon Treaty and that the application of 'mutual recognition' can be enhanced by a strong set of EU wide safeguards. Condition for both these premises is that the ongoing implementation of the first two instruments and negotiations for the third instrument have to be taken seriously by the Member States and only a high level of safeguards will lead to defence rights at EU level that are not only more visible but also practical and effective. The outcome of the first two measures adopted in accordance with the Roadmap provides us with the hope that this high level of protection will also be achieved in the future instruments.

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I declare that, except where explicit reference is made to the contribution of others, that this dissertation is the result of my own work and has not been submitted for any other degree at the University of Glasgow or any other institution.

Auke Willems

Chapter 1. Introduction

1.1. Introduction

Ever since the introduction of the ‘Area of Freedom, Security and Justice’ (AFSJ),¹ initially governed by intergovernmental judicial cooperation and currently by mutual recognition, there have been concerns for the standard of procedural rights in criminal proceedings. However, setting an EU-wide minimum standard for procedural rights has proven a rather complicated matter. A first attempt to adopt a framework decision on procedural rights was made by the European Commission in 2004, but ultimately (in 2007) failed to reach the required consensus.² Just before the entry into force of the Lisbon Treaty the issue was taken up again by the Swedish Presidency and this time with more success; agreement was reached on a ‘Roadmap for the strengthening of procedural rights of suspected and accused persons in criminal proceedings’.³ This Roadmap provides for a step-by-step approach and meanwhile the first two goals, to adopt a directive on the right to interpretation and translation and on the right to information, have been achieved. A first response to this development should be optimistic after the difficulties the adoption of such an instrument has known, but at the same time this current EU programme on procedural rights raises several issues regarding its value and objectives. The overall aim of this dissertation is to critically scrutinize the substance of the Roadmap, in doing so a two-step approach towards the Roadmap will be taken; first and foremost from a substantive viewpoint and then from a governance/instrumental one.

The first part of the dissertation will form the core of this thesis and takes a substantive⁴ approach. It will assess the value and content of the Roadmap (the measures adopted accordingly) from a legal perspective. Even though it is to be warmly welcomed that procedural rights are an actual EU priority again, it is at the same time still uncertain how the legislative process will develop and whether the proposed instruments in reality will add value to the existing framework of procedural safeguards already in place. This existing framework consists mainly of the relevant provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), and therefore a comparative analysis with the new EU provisions will be essential. In order to get an accurate view of what these proposed rights actually add to current defence rights standards, it is important to get the aims

¹ For more on the AFSJ see chapter 1.2 below.

² A closer look at the background and reasons for this failure will be taken in chapter 3.1 below.

³ For a more exact analysis of the Roadmap see chapter 3.2 and 5 below.

⁴ Although the word ‘substantial’ might sound contradictory as it concerns procedural rights here, the aim is to look at the actual content of the Roadmap and therefore the substance of the various instruments.

underlying these ‘new’ EU criminal procedural safeguards right. It is therefore necessary to keep in mind that the Roadmap does not necessarily aim at setting new standards, but to make current standards more efficient and transparent by providing the tools that can ensure effective protection of the rights. It could be said that the Lisbon Treaty has provided a new window of opportunity in this respect, as it enables directives to be adopted in this field together with its strong enforcement mechanism.⁵ The Lisbon Treaty has not only amended the legal instruments to be adopted, but also enhanced the role of the European Court of Justice (ECJ) and finally formally recognised the EU Charter of Fundamental Rights. The improved jurisdiction of the ECJ will lead to case law on the rights of individuals in criminal proceedings and therefore has the potential to increase efficiency and transparency of procedural safeguards. The adoption of the Charter of Fundamental Rights, together with the option for the EU to accede to the ECHR, also raises questions on how this affects the enforcement of procedural safeguards. All these elements will be examined in order to answer questions as what rights are being introduced, why are these rights being introduced and how can they be enforced.

Next to a one-on-one comparison with the ECHR and a review of the relevant EU developments, the need for EU involvement in procedural rights will be underlined by pointing to the flaws in the current system and the bias in EU criminal justice matters towards prosecution facilitating measures and law enforcement. However, EU involvement in criminal procedural safeguards as such already implies that there is a need for action; if there was a sufficient basis for procedural rights protection why would the EU want to get involved?

Even though we are still waiting for the first measure to enter into force, this analysis will be fruitful in the quest for an overall evaluation of the Roadmap and the measures adopted accordingly.

After the substantial analysis the dissertation will look at the Roadmap from a more instrumental point of view, this merely to show there is another way of looking at the Roadmap and to present a complete and coherent picture. The current treaty basis for the directives adopted (or to be adopted) according to the Roadmap,⁶ takes an instrumental approach as it enables approximation ‘to the extent necessary to facilitate mutual recognition’. The principle of mutual recognition, being the ‘cornerstone’ principle in the AFSJ, in turn requires mutual trust and confidence between the Member States. Divergent standards for

⁵ For more on the effects of the Lisbon Treaty on European criminal justice matters see chapter 1.2 below.

⁶ Article 82(2)(b) TFEU, *infra* note 49.

procedural rights throughout the EU have been in the way of a full and successful application of mutual recognition ever since its introduction. Therefore the question whether the Roadmap is a direct result of the mutual recognition agenda is a legitimate one; at the same time it is a sceptical one as one could take the alternative stance that even if this is the case this does not matter, as long as rights standards improve. However, the governance perspective is important to get a full overview of the objectives and value of the Roadmap, as in the current legal framework mutual recognition forms the legal basis for criminal cooperation.

The question to answer in this light is; whether the Roadmap can overcome the difficulties the application of the principle of mutual recognition is facing. To answer this question the conclusion from the first part will form the core, as mutual trust can only increase if the Roadmap actually raises the standard of procedural guarantees. It has to be noted though that the instrumental perspective will have a secondary character and aims at supporting and completing the main perspective of this thesis, namely a substantial analysis of this new and ambitious piece of EU legislation.

These two themes should lead to answering the overall research question: does the Roadmap improve procedural safeguards and can it, in its current form, lead towards a better application of mutual recognition in the Area of Freedom, Security and Justice? It will be argued here that the added value of the Roadmap is to be found in the high standard of protection it aims at and more importantly; the high standard that has actually been achieved in the first two measures adopted accordingly. This together with the application of these rights in the context of EAW proceedings gives the Roadmap the potential to complement or even raise the Strasbourg standard. Also the nature of the legal instruments is important, as it opens up new enforcement mechanisms which have a greater potential than the *ex post* complaint procedure of the ECHR

At this stage it will be difficult to evaluate the actual effect of the Roadmap on mutual recognition (and therefore also mutual trust), as the first directive has not entered into force yet, and the future ECJ case law together with possible monitoring reports will really provide ground for such conclusions. A theoretical approach however will enable a provisional evaluation of this kind; this in turn can contribute to pointing to the importance of minimum defence rights in the EU context. From a more optimistic viewpoint the question can then be asked: is the Roadmap actually leading towards a criminal justice system with rights at the very heart of it?

1.2. Introducing the Area of Freedom, Security and Justice

EU Justice and Home Affairs law (JHA)⁷ has undergone an evolution, originating even before the Maastricht-era, from a dominantly intergovernmental approach to the application of the ‘Community’ method, under which full supranational disciplines now extend to cover EU criminal law.⁸ A historical study of this institutional development shows that four different phases can be distinguished. In the following analysis these different eras of EU involvement in crime control will be distinguished and its main characteristics will be underlined.⁹ This will provide us with an overview essential to understand how these developments have culminated into an EU policy on criminal procedural safeguards.

Trevi and Schengen (pre-1993)

Until the entry into force of the Maastricht Treaty (1993)¹⁰ cooperation in criminal law stood completely outside the Treaties. However, Member States have cooperated with each other in criminal matters for over half a century. This cooperation initially took place under the auspices of the Council of Europe, and then in 1975 the Trevi Group¹¹ took over the initiative. Trevi was founded by the European Council as a forum of officials from the national ministries of justice and home affairs. This intergovernmental network acted as a security forum initially focussed on countering terrorism, but its interest grew and later included a wide range of crime control matters. The group included the so called ‘friends of Trevi’, of which, amongst others, the US and Canada were ‘members’.¹² Trevi’s structure would eventually lay the ground for the organisational foundation of the Third Pillar, and its *acquis* were adopted becoming the Third Pillar *acquis*.¹³

Another pre-Maastricht development related to police and judicial cooperation took place. A

⁷ JHA law covers a range of policy fields such as asylum/immigration law and police cooperation, here will be focussed on the topic of this dissertation; cooperation in criminal matters.

⁸ However, qualifications such as a transitional period and differentiated integration have been made, on which more below.

⁹ For further analysis see E. Baker and C. Harding, ‘From Past Imperfect to Future Perfect? A Longitudinal Study of the Third Pillar’, 34(1) *European Law Review* (2009), 25-54; S. Peers, ‘EU Justice and Home Affairs Law’, in P. Craig and G. De Búrca (eds.), *The Evolution of EU Law* (Oxford, 2011), 269-297; D. Kostakopoulou, ‘Freedom, Security and Justice under the New Constitution’, in C. Barnard (ed.), *The Fundamentals of EU Law Revisited: Assessing the Impact of the Constitutional Debate* (Oxford, 2007), 153-191; For an earlier critical analysis see V. Mitsilegas, J. Monar and W. Rees, *The European Union and Internal Security. Guardian of the People?* (Basingstoke, 2003).

¹⁰ Treaty on European Union (Treaty of Maastricht), in force November 1993, (1992) OJ C191.

¹¹ Trevi stand for Terrorism, Radicalism, Extremism, Political Violence, however other derivations are sometimes given.

¹² For more on Trevi see M. Anderson, M. den Boer, P. Cullen, W. Gilmore, C. Raab and N. Walker (eds.), *Policing the European Union* (Oxford, 1995), 53-56.

¹³ See E. Denza, *The Intergovernmental Pillars of the European Union* (Oxford, 2002), 74-76.

small number of Member States initiated the Schengen process,¹⁴ which aimed at the abolition of internal border controls, starting with an Agreement in 1985 and accordingly a Convention implementing the Agreement.¹⁵ This approach proved more effective than the intergovernmental approach through which approval of the more reluctant Member States was required (such as the UK and Ireland).¹⁶

Maastricht (1993-1999)

It was against this background that a new phase in police and judicial cooperation occurred.¹⁷ This phase in evolution is described by Peers as formal intergovernmentalism.¹⁸ The Maastricht Treaty introduced a set of specific rules relating to JHA,¹⁹ however these rules established a purely intergovernmental process of decision-making by which the Council could adopt either Conventions or other acts. The introduction of the Third Pillar²⁰ was a clear first step towards formalisation of cooperation, but at the same time it also showed a reluctance to confer any 'real' power to the Community. This 'reluctant' intergovernmental approach ensured that a significant degree of control remained with the Member States. This was expressed in the dominance of the Council and the very limited role the other EC institutions played. The Commission was stripped of most of its First Pillar competences, the Court of Justice was not given any mandatory jurisdiction²¹ and the European Parliament had no decision-making authority.²² The downside to this approach in which Member States retained maximum control was the limited effectiveness of EU action.²³ Therefore cooperation within the Schengen framework showed more results during this period, as it involved a smaller number of Member States which had agreed on a more delineated area of

¹⁴ The five original signatories were Belgium, France, Luxembourg, the Netherlands and West-Germany.

¹⁵ (2000) OJ L239/1; See D. O'Keefe, 'The Schengen Convention: A Suitable Model for European Integration?', 11(1) *Yearbook of European Law* (1991), 185-219.

¹⁶ The implementing Convention was ratified in 1993, only three years after signature.

¹⁷ Together with the areas of visas/border control, asylum and immigration. For an analysis of these developments see Peers, *supra* note 9.

¹⁸ Peers, *ibid*, 270.

¹⁹ TEU, *supra* note 10, Title V, Articles K to K.9.

²⁰ The pillar structure introduced by Maastricht (which follows the metaphor of a Greek temple) set out a distinct institutional framework consisting of the Community treaties (First Pillar), Common Foreign and Security Policy (Second Pillar) and JHA law (Third Pillar).

²¹ As a 'compromise' to this lack of competence Member States agreed on a differentiated approach by which they could opt to give the Court of Justice jurisdiction over references from either all national courts, from final courts only, or from no national courts at all; See S. Peers, 'Who's Judging the Watchmen? The Judicial System of the Area of Freedom, Security and Justice', 18(1) *Yearbook of European Law* (2000), 337-413.

²² TEU, *supra* note 10, Title V, Articles K.3-K.6.

²³ As an illustration; of the eight policing and criminal law conventions agreed during this period, only six entered into force, ratification was slow as well as it took between four and eleven years to ratify these measures.

cooperation. The number of signatories increased²⁴ and its implementation was assured by the Executive Committee. However its limits became clear as well as there was no institutional framework in place to implement the full scope of the Convention.

Amsterdam (1999-2009)

The next significant reform of JHA law came with the Amsterdam Treaty;²⁵ these reforms were to be expected as the problems related to the previously described institutional framework were obvious. It was with Amsterdam that the term AFSJ was introduced, and was created to indicate the EU's 'legal space' for cooperation in police and criminal matters. Peers described this next phase as 'modified intergovernmentalism', referring to the still intergovernmental nature of the approach, but with some 'modest concessions to the community mode'.²⁶ The core of these reforms was formed by the transfer of the issues of immigration, asylum law and civil law to the First Pillar.²⁷ In addition some amendments were made to the remaining Third Pillar issues; criminal law and police cooperation. The Commission had gained competence as the right of initiative was now shared with Member States, and the European Parliament received consultation power over nearly every measure.²⁸ Rules regarding the jurisdiction of the Court of Justice were standardized, and the 'differentiated' approach continued its existence as Member States could opt for full jurisdiction over references, no jurisdiction at all or jurisdiction over references from the highest courts only.²⁹ The 'standard' rules applied not only to conventions but to nearly all (post-Amsterdam) Third Pillar Measures.³⁰

An important change was the revision of the legal instruments to be used in the Third Pillar.³¹ The convention and common position were retained, but two new types of instruments were introduced; the framework decision and the decision. Especially the framework decision was

²⁴ In the mid 1990's 13 of the, by then, 15 Member States had acceded to Schengen, the two exceptions being the UK and Ireland. Two non-EU Member States had also joined (Iceland and Norway), by means of a bilateral agreement.

²⁵ Treaty of Amsterdam, in force May 1999, (1997) OJ C340.

²⁶ Peers, supra note 9, 272.

²⁷ Even though these areas were part of the Community legal order now, a transitional period of five years applied to the application of traditional Community rules.

²⁸ Articles 34 and 37 former TEU.

²⁹ By the end of the Amsterdam-era 19 Member States had given the Court jurisdiction (all except the UK, Ireland and Denmark of the first 15 Member States and Poland, Estonia, Slovakia, Bulgaria and Malta of the 'later' Member States).

³⁰ The Court also gained jurisdiction over annulment actions and standard rules applied as regards jurisdiction over dispute settlement between Member States, or Member States and the Commission.

³¹ Article 34 former TEU.

significant as it resembled the directive; it binds Member States as to the result achieved, but reserves the choice of form and method to the national level. However a crucial difference with the directive is that it cannot have direct effect, although the Court of Justice ruled in a later phase that even though a framework decision does not have direct effect, it may very well have indirect effect.³² Decisions were to be used for purposes other than approximation of national law, and direct effect was also ruled out. Especially the framework decision was an appealing and efficiency increasing instrument as national parliaments did not have to ratify these instruments for them to take effect. In line with these new instruments the adoption of conventions steadily declined, with the last convention adopted in 2003.³³ The last significant amendment brought about by the Amsterdam Treaty was the absorption of the Schengen infrastructure and *acquis* into the EU and EC legal frameworks.³⁴ In order to accommodate the discrepancy between EU Member States and Schengen participants a special status was granted to the UK and Ireland³⁵ to protect their right not to be bound by the Schengen *acquis*.³⁶ But outside this exception the prior Schengen measures together with future measures were incorporated into the EC and EU legal order.

Even though the Amsterdam Treaty instituted institutional and legal changes, and moved JHA law away from traditional intergovernmentalism, this progress was made against a high price. The previous 'relatively simple'³⁷ division between the Pillars was now replaced with a system of overlap and ambiguity, which threatened the consistency of the EU's legal order.³⁸

Finally, another important development took place just after the entry into force of the Amsterdam Treaty. The Council started adopting multi-year programmes setting out the

³² ECJ 16 June 2005, Case C-105/03, *Criminal Proceedings against Maria Pupino* (2005), ECR I-5285; See M. Fletcher, 'Extending "Indirect Effect" to the Third Pillar: The Significance of Pupino', 30(6) *European Law Review* (2005), 862-877; S. Peers, 'Salvation Outside the Church: Judicial Protection in the Third Pillar after the *Pupino* and *Segi* Judgements', 44(4) *Common Market Law Review* (2007), 883-929.

³³ Even though the Amsterdam Treaty tried to simplify the ratification of conventions, by allowing them to enter into force if a majority of Member States had ratified them (only for these ratifying Member States), it still took between three and seven years for the Conventions and Protocols which were signed after the Amsterdam Treaty to enter into force.

³⁴ On this integration process see N. Bracke, 'The Amsterdam Treaty Framework with Special Reference to the Incorporation of the Schengen Acquis', in P. Cullen and S. Jund (eds.), *Criminal Justice Cooperation in the European Union after Tampere* (Cologne, 2002), 23-34; D. Thym, 'Schengen Law: A Challenge for Legal Accountability in the European Union', 8(2) *European Law Journal* (2002), 218-245.

³⁵ Next to this special status on Schengen, the UK and Ireland (together with Denmark) were given a general competence to opt out of all the Title IV legislation together with an option to opt in at any stage.

³⁶ Protocols under B on the 'Schengen Acquis', Annexed to the Treaty of Amsterdam.

³⁷ Baker and Harding, *supra* note 9, 31.

³⁸ J. Monar, 'Justice and Home Affairs in the Treaty of Amsterdam: Reform at the Price of Fragmentation', 23(4) *European Law Review* (1998), 320-335, at 334.

political direction for the development of JHA law and policy. The first of these programmes was the Tampere Programme,³⁹ adopted at the Tampere Council meeting in 1999 on the creation of an AFSJ in the EU. The Programme was hailed as an ambitious and striving programme with the aim of taking forward the newly created AFSJ agenda, and put forward ten priority areas for action.⁴⁰ It furthermore introduced the principle of mutual recognition as the new methodology for criminal law cooperation, and was to become the ‘cornerstone principle’ in EU criminal justice cooperation.⁴¹

The Tampere Programme was succeeded by the Hague Programme⁴² in 2005.⁴³ The Hague Programme turned out to be less ambitious than Tampere and focussed mainly on operational cooperation in criminal matters and on security issues more generally.

The latest and current Stockholm Programme,⁴⁴ adopted in 2009 and setting the agenda for the period 2010-2014, seems to have returned to a more balanced and cohesive approach. Putting into practice the new legal framework as created by the Lisbon Treaty the Programme focusses ‘on the interests and needs of citizens’ and articulates a commitment to centre its activities on ‘citizens’ and ‘other persons for whom the EU has a responsibility’;⁴⁵ its title does therefore not surprise: ‘an open and secure Europe serving and protecting the citizens’. The Programme underlines what its six thematic priorities are: promoting citizenship and fundamental rights; a Europe of law and justice; a Europe that protects; access to Europe in a globalised world; a Europe of responsibility, solidarity and partnership in migration and asylum matters; and the role of Europe in a globalised world- the external dimension. A section on which ‘tools’ are important for the Programme’s successful implementation follows the list of priorities, however according to Fletcher, ‘some of the tools might be better described as objectives’, as mutual trust and increased coherence can hardly be described as ‘tools’, but rather as targets.⁴⁶ This citizen-centred approach has led to an active policy on

³⁹ Tampere European Council (15-16 October 1999), *Presidency Conclusions*, available at http://www.europarl.europa.eu/summits/tam_en.htm (accessed on 16 August 2012).

⁴⁰ Areas such as terrorism, migration, organised crime, the guarantee of an effective European area of criminal justice and a commitment to uphold fundamental rights within the AFSJ were those relating to criminal law.

⁴¹ For more on the principle of mutual recognition see chapter 6 below.

⁴² (2005) OJ C53/01; see also the action plan implementing the Hague Programme, (2005) OJ C198/01.

⁴³ On the implementation of the Hague Programme see J. De Zwaan and F. Goudappel (eds.), *Freedom, Security and Justice in the European Union: Implementation of the Hague Programme* (The Hague, 2006).

⁴⁴ See (2010) OJ C115/1; for the action plan implementing the Programme see COM (2010) 171 final, 20 April 2010 Brussels.

⁴⁵ Stockholm Programme, *supra* note 44, point 1.1.

⁴⁶ M. Fletcher, ‘EU Criminal Justice: Beyond Lisbon’, in C. Eckes and T. Konstadinides (eds.), *Crime Within the Area of Freedom, Security and Justice* (Cambridge, 2011), 10-42, at 14.

criminal procedural rights and takes the form of the Roadmap on procedural rights, which is currently being implemented. However it remains to be seen whether the political agenda set in the Stockholm Programme really leads to an improved ‘rights’ situation for citizens. In this thesis the position of suspected and accused persons post Lisbon and Stockholm will be reviewed.

It should furthermore be noted that the Amsterdam Treaty was eventually amended by the Nice Treaty, which entered into force in February 2003. However its changes were most obvious as regards immigration and asylum law. Except for a more active role played by the Court, there was no amendment made affecting the powers of either the Parliament or the Commission regarding AFSJ matters.

*Lisbon (2009-present)*⁴⁷

The Treaty of Lisbon formally abolishes the pillar structure of the EU as created by the Maastricht Treaty, and puts an end to the inconvenient dual Treaty coverage of AFSJ policy fields as created by the Amsterdam Treaty by grouping provisions concerning the AFSJ together.⁴⁸ The Lisbon Treaty amends both the Treaty on the European Union and the Treaty establishing the European Community; the EC Treaty is renamed the Treaty on the Functioning of the European Union (TFEU).⁴⁹ Relevant for our purposes is the new Title V (TFEU): ‘Area of Freedom, Security and Justice’, and especially Chapter 4 on ‘Judicial Cooperation in Criminal Matters’.

Arguably the biggest changes brought about by the Lisbon Treaty concern the field of judicial cooperation in criminal matters. Here follows a summary of the amendments brought about by Lisbon regarding decision-making and the institutional framework.

⁴⁷ For a full account of the Lisbon Treaty see, for instance, P. Craig, ‘The Treaty of Lisbon, Process, Architecture and Substance’, 33(2) *European Law Review* (2008), 137-166; P. Craig, *The Lisbon Treaty: Law, Politics and Treaty Reform* (Oxford, 2010); for more specifically on criminal matters see Fletcher, *ibid*; S. Peers, ‘EU Criminal Law and the Treaty of Lisbon’, 33(4) *European Law Review* (2008), 507-529; C. Ladenburger, ‘Police and Criminal Law in the Treaty of Lisbon- A New Dimension for the Community Method’, 4 *European Constitutional Law Review* (2008), 20-40; A. Hinarejos, ‘The Lisbon Treaty Versus Standing Still: A View From the Third Pillar’, 5 *European Constitutional Law Review* (2009), 99-116; J. Piris, *The Lisbon Treaty: A Legal and Political Analysis* (Cambridge, 2010), 167-203; and more broadly the impact on JHA matters see S. Carrera and F. Geyer, ‘The Reform Treaty and Justice and Home Affairs: Implications for the Common Area of Freedom, Security and Justice’, Policy Brief No. 141, *Centre for European Policy Studies* (2007).

⁴⁸ E. Sanfrutos Cano, ‘The End of the Pillars? A Single EU Legal Order after Lisbon’, in C. Murphy and P. Green (eds.), *Law and Outsiders: Norms, Processes and ‘Othering’ in the Twenty-first Century* (Oxford, 2011), 67-87.

⁴⁹ The Treaty was signed at Lisbon, 13 December 2007, 2007/C306/01. For the consolidated version of the treaties as amended by the Lisbon Treaty see (2010) OJ C83/1.

Next to the abolition of the pillar structure, the (intergovernmental) requirement for unanimity is also replaced by a more modern standard.⁵⁰ Instead Lisbon introduced, in most policy areas,⁵¹ the so called ‘ordinary legislative procedure’. This procedure, also known as the ‘co-decision procedure’ provides for the shared decision-making power between the European Parliament and the Council for a regulation, directive or decision on a proposal from the Commission (or as will be seen below a group of Member States) and requires a qualified majority in the Council.⁵² The application of the ‘co-decision procedure’ does not only mean that the EU legislates in criminal justice matters by the same processes as it does for everything else, it also entails the use of the same instruments. These instruments are now regulations, directives, decisions, recommendations and opinions.

Furthermore the Lisbon Treaty enhanced the role of the European Court of Justice (ECJ). Whereas the Court’s jurisdiction was significantly limited pre-Lisbon, the Court now has full jurisdiction in all JHA areas. This full ‘judicial control’ also benefits from the infringement proceedings the Commission can initiate against recalcitrant Member States which fail to implement EU criminal law measures,⁵³ and entails jurisdiction for the Commission over actions against EU institutions for compensation for damages.⁵⁴

Lastly but not less important, the Lisbon Treaty also makes significant amendments to the EU involvement in fundamental rights. Article 6 TEU incorporates the Charter of Fundamental Rights into the EU legal framework and provides the legal basis for EU accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). The Lisbon Treaty, together with the Stockholm Programme, aims at improving the rights situation in the EU by introducing new ways of enforcing them. By making the EU Charter on Fundamental Rights (finally) enforceable, EU institutions, Union bodies, offices and agencies together with Member States when implementing EU law are under an obligation to ensure that fundamental rights are respected in all areas of EU involvement.⁵⁵ Whether the EU will accede to the ECHR remains to be seen, however if this does happen it

⁵⁰ S. Peers, ‘Finally ‘Fit for Purposes’? The Treaty of Lisbon and the End of the Third Pillar Legal Order’, 27(1) *Yearbook of European Law* (2008), 47-64.

⁵¹ The only competence areas where unanimity is still required involve the establishment of a European Public Prosecutor (Article 86(1) TFEU), the establishment of new crimes for which there should be harmonization (Article 83(1) TFEU), and operational cooperation (Articles 86(3) and 89 TFEU).

⁵² Articles 289 and 294 TFEU.

⁵³ Articles 258-260 TFEU.

⁵⁴ Article 268 TFEU.

⁵⁵ Provisions of the Charter which are relevant for our purposes here are Articles 47 (on the right to an effective remedy and to a fair trial) and 48 (on the presumption of innocence and right of defence), for more on these provisions see chapter 3.3 below.

will mean that the EU is directly responsible for human rights violations,⁵⁶ and will lead to an AFSJ in which the safeguards of the ECHR are directly enforceable as complaints may be lodged against the EU itself.

These amendments taken together lead to the application of the full Community method in this area and are therefore a positive step towards an AFSJ that is being taken seriously.⁵⁷

However, if it was not for the qualifications made to these ‘Community amendments’. The first limitation is the possibility for a group of Member States to counter a proposal made by the Commission.⁵⁸ This can seriously undermine proposals made by the Commission.⁵⁹ Next, the jurisdiction of the ECJ is also limited by a five-year transitional period regarding Third Pillar measures adopted before the entry into force of the Lisbon Treaty.⁶⁰ This means that until 14 December 2014 the pre-Lisbon rules that limited the Court’s jurisdiction remain in force. It is until a pre-existing instrument is amended or replaced within that five-year period that the Court’s full jurisdiction will apply. Furthermore, a so called ‘emergency-break’⁶¹ procedure allows any Member State to halt a proposed measure on the grounds that the measure ‘would affect fundamental aspects of its criminal justice system’, and refer the proposal to the European Council. The European Council has four months to refer the draft back to the Council of Ministers. This ‘brake’ can be pulled during negotiations for both substantive⁶² and procedural⁶³ approximating measures. Where there is still no agreement on the referral back, the remaining Member States (a minimum of nine) can proceed with the proposal under enhanced cooperation.⁶⁴ This mechanism is not available for measures implementing the principle of mutual recognition. This procedure is a reminiscent of concerns for sovereignty and the fear for loss of national legal identities.

⁵⁶ Note that the Stockholm Programme has prioritised accession, calling on the Commission to submit a proposal on this accession as a matter of urgency, *supra* note 44, point 2.1.

⁵⁷ This also stems from the priority given to the AFSJ objective on the list of EU objectives in Article 3(2) TEU and its recognition as an area of shared competence between Member States and the EU in Article 4(2)(j) TFEU.

⁵⁸ Article 76 TFEU.

⁵⁹ As will be seen later, this provision was applied several times in the early phase of the Lisbon Treaty, see for instance the Member States’ initiatives for Directives on the Rights to Interpretation and Translation in Criminal Proceedings (2010) OJ C69/01; on a European Protection Order (2010) OJ C69/02; and for a European Investigation Order (2010) OJ C165/02.

⁶⁰ Article 10 of the Transitional Protocol (No. 36) attached to the TFEU.

⁶¹ For a more detailed description of this procedure see Peers, *supra* note 47, 516-520.

⁶² Article 83(3) TFEU.

⁶³ Article 82(3) TFEU.

⁶⁴ Articles 20(2) TEU and 329(1) TFEU.

A further constraint on the application of the Community method is the continuation of the opt-outs provided for the 'JHA sceptical' Member States.⁶⁵ The UK, Ireland and Denmark have secured significant opt-outs from criminal law and policing measures. No new or amending provision in criminal justice matters will apply to the UK or Ireland, unless they have decided otherwise, they can thus decide on each separate measure whether to opt-in or not.⁶⁶ If their opt-out from an amending measure would result in the measure becoming inoperable for other Member States, the existing measure would no longer be binding on them. Even though these opt-outs lead to legal fragmentation and an immensely complicated system, the alternative would have been worse as development would have taken place outside the EU legal framework without participation of all Member States. Regarding the focus here; defence rights, the situation can be rather unsatisfactory as the UK and Ireland could opt out of measures concerning suspects' rights, but into the mutual recognition measures which they aim to legitimize or counterbalance.

Significant improvements have also been made regarding the methodologies and competences in the field. The pre-Lisbon regime was rather vague and unclear in establishing EU competence over matters of criminal justice in Articles 29 and 31(1)(e) former TEU. These two provisions have led to a number of competence debates⁶⁷ and in some cases even to the adoption of legislation on rather ambiguous grounds. The Lisbon Treaty aims at clarifying this situation and leaving no question marks regarding the EU competence in the field; Article 4(2)(j) TFEU lists AFSJ as one of the areas in which the EU shares competence with the Member States. Even though it can be noted that this was *de facto* already the case, according to Fletcher 'its inclusion might be said to entail a *conceptual promotion* in that it is explicitly recognised as being on par with such areas of established EC competence as 'the internal market', 'environment' and 'transport'.⁶⁸

The more specific legal competences of the EU in AFSJ matters are centred on the two main, and sometimes competing, methodologies of mutual recognition and approximation/harmonization of laws. The principle of mutual recognition has been described as the automatic recognition and enforcement by courts of two different jurisdictions of each other's rulings, thus without any examination of the factual basis upon which they were

⁶⁵ See S. Peers, 'In a World of Their Own? Justice and Home Affairs Opt-Outs and the Treaty of Lisbon', 10 *Cambridge Yearbook of European Legal Studies* (2008-09), 383-412; See also Fletcher, *supra* note 46, 26-28.

⁶⁶ As regards the Roadmap both Ireland and the UK have opted in to Measures A and B, but not to Measure C yet.

⁶⁷ For example the failed Framework Decision on Procedural Rights, as will be discussed in chapter 3.1 below.

⁶⁸ Fletcher, *supra* note 46, 33.

made.⁶⁹ The principle was first introduced in the EU criminal justice context by the European Council meeting in Tampere (1999), and since then a whole series of legislation has been adopted on this basis.⁷⁰ The Lisbon Treaty has now⁷¹ formally adopted this principle by establishing that ‘the Union shall endeavour to ensure a high level of security (...) through the mutual recognition of judgements in criminal matters and, if necessary through the approximation of criminal laws’. The Lisbon Treaty thus presents mutual recognition next to approximation as linked methodologies; however in practice these models of development of EU criminal law have shown a deep tension.⁷²

More helpful is the new Treaty’s approach on the more specific EU criminal law competences, as a clear distinction is made between criminal procedure and substantive criminal law. Both the new provisions each confer two separate powers: Article 82 concerns mutual recognition rules (par. 1), and procedural approximation in order to facilitate mutual recognition (par. 2)⁷³; and Article 83 confers the power to harmonise substantive criminal law in ten specified fields (par. 1), and secondly to adopt substantive criminal measures related to other Union policies.⁷⁴

Overall, it is clear that very significant changes have been made to the previous Treaty rules on EU criminal justice matters. Major amendments such as the shift to qualified majority voting and the co-decision procedure have brought improvement and clarification to the AFSJ legal framework. Despite the qualifications made to the full-community method, it can be said that the AFSJ post-Lisbon has become a principle area of EU competence.

⁶⁹ A more precise account of mutual recognition will be given in chapter 6 below.

⁷⁰ The first and most prime example being the Framework Decision on the European Arrest Warrant, (2002) OJ L190/1; hereafter EAW.

⁷¹ Article 67(3) TFEU.

⁷² For a more detailed look at the relation between these methodologies see chapter 6 below.

⁷³ The provision on which the measures contained in the Roadmap are based.

⁷⁴ For a more detailed analysis of these two articles see Peers, *supra* note 47, 508-515.

Chapter 2. The need for EU action on criminal procedural safeguards

2.1. Introduction

In this chapter the reasons for EU involvement in setting a common minimum standard for criminal procedural safeguards are examined. This will mainly be done by making use of the outcomes of several research projects that have been conducted on the state of procedural rights throughout the EU, together with an analysis of the shortcomings of the main source for the protection of human rights in criminal proceedings; the ECHR.

It is evident from the fact that the EU has got itself involved in criminal procedural safeguards that there is a need for action; if there already was a sufficient basis for the protection of defence rights in place, why even bother?

With the introduction of the concept of mutual recognition in the AFSJ, activity in the field of police and judicial cooperation has flourished, with numerous framework decisions, decisions and positions as a result.⁷⁵ In this effort at increasing efficiency, defence rights have been side-lined and the emphasis was clearly on fighting crime. Defence safeguards have been omitted from the specific instruments themselves⁷⁶ and the EU has also failed to provide protection through a separate framework.

2.2. Research conducted on the state of procedural safeguards throughout the EU

However the early efforts to adopt an EU-wide measure on safeguards never led to the conclusion of an instrument on defence rights,⁷⁷ research that has been done since this failure has pointed out the need for EU action as it showed how poor the provision of procedural rights is across the EU.⁷⁸ A study conducted on the existing level of defence rights in all EU Member States showed that certain fundamental procedural rights, such as the right to remain

⁷⁵ For more on mutual recognition see chapter 6 below.

⁷⁶ One rare example of defence protection can be found in Article 11(2) Framework Decision on the EAW, supra note 70, which provides for legal representation and interpretation and has created a mechanism for hearings before a judicial authority in the executing state.

⁷⁷ As will be seen in chapter 3.1 below.

⁷⁸ See in particular T. Spronken, G. Vermeulen, D. de Vocht and L. van Puyenbroeck, *EU Procedural Rights in Criminal Proceedings* (Maklu, Antwerp, 2009), funded and published by the Commission, 8 September 2009, available at <http://arno.unimaas.nl/show.cgi?fid=16315> (accessed on 12 August 2012); this was a follow-up to a previous study T. Spronken and M. Attinger, *Procedural Rights in Criminal Proceedings: Existing Level of Safeguards in the European Union*, funded and published by the Commission, 12 December 2005, available at <http://arno.unimaas.nl/show.cgi?fid=3891> (accessed on 12 August 2012); see also G. Vernimmen- van Tiggelen and L. Surano, *Analysis of the future of Mutual Recognition in Criminal Matters in the European Union* (Université Libre de Bruxelles, Brussels, 2008), available at http://ec.europa.eu/justice/doc_centre/criminal/recognition/docs/mutual_recognition_en.pdf (accessed on 15 August 2012).

silent, are not provided for in the legislation of all Member States.⁷⁹ Following on from this it was found that even if procedural safeguards are guaranteed by national law, their implementation quite often does not meet the Strasbourg standard.

Another project conducted on the state of procedural safeguards in the EU stressed that effective criminal defence not only requires adequate legal assistance, but also a legislative and procedural context, together with the organisational structures that enable and facilitate effective defence, being a crucial element of the right to a fair trial.⁸⁰ Thus a comprehensive approach by the EU is needed and five themes emerged that showed major deficiencies in the mechanisms and national judicial cultures that support effective criminal defence.⁸¹ As summarised by Spronken these five themes are: ‘first, legal assistance is in many countries problematic, especially with regard to access to legal assistance, the timeliness of the access and the quality of legal assistance.’⁸² ‘Secondly, legal aid ... is often ineffective due to slow, unclear and complicated application methods. In addition, availability, quality and independence of criminal defence lawyers in legal aid cases proved to be inadequate, *inter alia*, due to low remuneration provided for legal aid work.’⁸³ ‘Thirdly, interpretation and translation are not always guaranteed and, in particular, problems arise with regard to which documents are to be translated and how this is funded.’⁸⁴ ‘Fourthly, there is often a deficiency in the provision of adequate time and facilities, the needs and interests of the judicial authorities are paramount and do not take into account the needs of the suspect or accused.’⁸⁵ Lastly, ‘the excessive use of pre-trial detention that in itself implies major concerns for the adherence to the presumption of innocence but which also impacts on the defence strategy ..., being in custody limits the ability of suspects to prepare their defence.’⁸⁶

Not surprisingly these themes correspond to a large extent with the areas prioritised by the Roadmap. These projects show that deficiencies occur in practically all Member States and give a detailed account on which rights improvement is needed. The EU has made use of

⁷⁹ See the project by Spronken *et al.*, *ibid.*

⁸⁰ See ‘Effective Defence Rights in the EU and Access to Justice: Investigating and Promoting Best Practice’, a project which was conducted over a three year period closely analysing 9 jurisdictions, the results of which have been published in a book: E. Cape, Z. Namoradz, R. Smith and T. Spronken, *Effective Criminal Defence in Europe* (Antwerp, 2010).

⁸¹ *Ibid.*, 581-611.

⁸² T. Spronken, ‘EU Policy to Guarantee Procedural Rights in Criminal Proceedings: an Analysis of the First Steps and a Plea for a Holistic Approach’, 1(3) *European Criminal Law Review* (2011), 213-233, at 228.

⁸³ *Ibid.*, 228-229.

⁸⁴ *Ibid.*, 229.

⁸⁵ *Ibid.*

⁸⁶ *Ibid.*

these findings (some of the projects were funded by the Commission), and adopted its approach accordingly.

Another ‘right’ on which extensive research has been conducted and is also prioritised in the Roadmap is the right to information, or more specifically the so called ‘letter of rights’.⁸⁷ In the Commission Green Paper on procedural rights a letter of rights is considered as a short document to be given to suspects as early as possible, preferably at arrest, by which a suspect would be given information regarding his fundamental rights in writing in a language he understands. In a research project conducted by Spronken a broader definition is used to describe the letter of rights; ‘written information of the suspect’s procedural rights in a standardised form that is handed over to the suspect in the course of the criminal investigation or proceedings prior to an investigative act or hearing’.⁸⁸ The study revealed that in 17 Member States, suspects are informed of their rights by a standardised form. These ‘letters’ contained a variety of topics (as many as 12), however all contained information on legal assistance (not always on legal aid). Furthermore information on the right to silence, contact with trusted persons, translation and interpretation and consular assistance are dealt with in a considerable number of ‘letters’. Large differences occurred in how and in what kind of format the information is given. An aspect of significant importance is the language used in a letter of rights. Only a few Member States have the letter available in multiple languages,⁸⁹ ‘something which is obviously detrimental for the effectiveness’ of such a letter.⁹⁰ In many cases, the letters are full of formal and often legal language, in some cases even quoting lengthy legal provisions, which is difficult to understand for people who are not legally educated.⁹¹

In interviews with practitioners it turned out that the Member States who provided letters of rights often have a well-organised procedural framework in place to actually support the rights. However it also became clear that much of the effectiveness of a letter depends on the way it is brought into practice. The police play a key role in this, and they often consider the

⁸⁷ T. Spronken, *An EU-Wide Letter of Rights: Towards Best Practice* (Antwerp, 2010). This study developed a normative framework, based on the ECtHR case law, to establish standards and a legal basis for information that should be given to a suspect in the initial phase of police investigations

⁸⁸ *Ibid*, 7.

⁸⁹ England and Wales, Germany, Sweden and Belgium provide the letter in more than 40 different languages.

⁹⁰ Spronken, *supra* note 82, 224.

⁹¹ Examples of letters that provide information in a more understandable form can be found in Austria, Germany, Luxembourg and Spain. All letters can be found in Spronken, *supra* note 87.

letter to be a rather cumbersome formality that might interfere with the effectiveness of interrogation.⁹²

Here again, the EU has drafted the model letter contained in Measure B in accordance with the findings of this project. This piece of research showed how valuable EU action would be in this field, as standards diverge largely and ‘letters’ are often not drafted in a way that it effectively assists suspects or defendants in their defence.

The above short summary of the findings of these extensive projects into EU-wide standards shows the need for the EU to fill the breach. One of the main arguments of the Member States opposing the Framework Decision Procedural Rights was that no EU action was needed as all Member States were parties to the ECHR and were therefore bound by a sufficiently high level of protection.

In the following the ‘flaws’ in the Strasbourg enforcement-mechanism together with some other inefficiencies will be highlighted as evidence for the proposition that it is insufficient to rely on the ECHR alone.

2.3. The shortcomings of the Strasbourg system

In the past years the ECtHR has seen a steady increase in the number of applications, caused by the growing number of Member States as well as the frequent use of the individual complaint procedure. This has led to an enormous backlog which seriously undermines the effectiveness of the Court.⁹³ It has made it difficult for the Court to deal in a proper and timely manner with all complaints, and it can take years before a final decision has been made in any individual case.

A large number of violations in the current case law of the Court concerns ‘repetitive cases’, which are cases in which the Court decides on matters previously dealt with, but which

⁹² It also appeared from these interviews that the police often negatively impact the effectiveness of a letter, for example by dissuading a suspect to exercise his defence rights or not explaining them properly.

⁹³ As an illustration: on 31 December 2007 there were 79400 pending applications (before a judicial formation), on 31 December 2011 this has increased to 151600. For more statistical information on the ECtHR see <http://www.echr.coe.int/ECHR/EN/Header/Reports+and+Statistics/Statistics/Statistical+data/> (accessed on 17 August 2012).

remain troublesome as the Member States(s) involved have not yet taken the necessary steps to comply with the decision.⁹⁴

The occurrence of these repetitive cases shows that national systems are not always in accordance with the ECHR and also that judgements are not correctly executed by Member States.⁹⁵ This problem is however almost inherent in the nature of the Strasbourg case law; as rulings are always on the specific facts and circumstances of a particular case it is difficult to draw general conclusions from a case. It is very exceptional for the Court to declare a part of national law *as such* incompatible with the Convention, and thus the effects of a finding in an individual case in the national legal system rely largely on the interpretation of the national authorities, who are entitled to a wide ‘margin of appreciation’ in this interpretation. Taking all these difficulties into consideration Spronken’s conclusion on this matter seems fair:

‘the strengths of the Strasbourg complaint mechanism lies in doing justice to each individual case, but its weakness lies in the fact that it is hard to deduce general rules from its case law and that the Court has no powers to implement general implications of its judgements under national jurisdictions.’⁹⁶

From both the high number of applications the ECtHR receives and the regularity with which most Member States find themselves before the Court and the substantial amount of repetitive cases, one can easily conclude that the Strasbourg enforcement mechanism is not as effective as often thought. Especially because these statistics only tell part of the story; only some of those who believe their fundamental rights have been violated actually file an application in Strasbourg.⁹⁷ Even though the Council of Europe is aware of the challenges the Court is facing and aims at dealing with the backlog by means of a ‘priority policy’, and by streamlining procedures for the handling of inadmissible and repetitive cases,⁹⁸ it is doubtful

⁹⁴ An example of which can be found in the cases against a small group of States (for example Italy and Spain) who continuously violate the right of a suspect to be tried within a reasonable time, as assured by Article 6(1) ECHR.

⁹⁵ It should be noted that it is for the Member States to act on complaints of victims of Convention violations and to press for reparation of the consequences of the violation, see Article 46(1) ECHR.

⁹⁶ Spronken, *supra* note 82, 215.

⁹⁷ Reasons for this include: some may not know the Court; the procedure is complicated; not all lawyers know how to make an application; and financial reasons such as no available legal aid. See C. Morgan, ‘Proposal for a Framework Decision on Certain Procedural Rights Applying in Proceedings in Criminal Matters throughout the European Union’, in M. Leaf (ed.), *Cross-Border Crime: Defence Rights in a New Era of International Judicial Cooperation* (London, 2006), 93-102, at 101.

⁹⁸ The Member States have pledged to deal with the challenges the Court is facing at the Brighton Conference of 20 April 2012. See the ‘Brighton Declaration’, especially point 19 and 20, available at <http://www.coe.int/en/20120419-brighton-declaration/> (accessed on 16 August 2012).

whether the Court will be able to increase its efficiency in terms of ‘effective human rights protection’.

Chapter 3. EU involvement in criminal procedural safeguards

3.1. A first attempt for an EU instrument on procedural safeguards: the failed Framework Decision on Procedural Rights

The proposal for a Council Framework Decision on certain procedural rights in criminal proceedings throughout the EU (FDPR)⁹⁹ was the first EU attempt to adopt a measure on criminal procedural rights. Its objective was to assure a minimum standard of procedural safeguards throughout the EU. In this short evaluation of the attempt the two main reasons for its failure are presented; the slow and difficult negotiations and an alleged lack of EU competence to legislate in the field of criminal procedure.

*Negotiations and content of the proposal*¹⁰⁰

The Commission finally tabled its first proposal for a FDPR in 2004,¹⁰¹ after it circulated a Consultation Paper in February 2002 that outlined its first ‘ideas’ on common procedural safeguards and in which the Commission committed itself to approximation of individual procedural rights as ‘a necessary safeguard against measures of judicial cooperation that enhance the powers of police, prosecutors and judges’.¹⁰² A Green Paper on the outcome of these consultations followed and showed immediately that the Commission’s initial enthusiasm had to be tempered.¹⁰³

The process of negotiations can be described as cumbersome and slow, mainly due to the requirement of unanimity in the Council.¹⁰⁴ This difficult process can be illustrated by the different forms the proposal took throughout the negotiations, every subsequent proposal reducing the content of the first text further.¹⁰⁵ The initial text of the proposal put forward five fundamental guarantees, being: the right to legal advice; the right to interpretation and

⁹⁹ For the final text see Council doc. 10287/07, 5 June 2007 Brussels.

¹⁰⁰ For a more extensive analysis of the negotiations and content of the Proposal see M. Jimeno-Bulnes, ‘The Proposal for a Council Framework Decision on Certain Procedural Rights in Criminal Proceedings Throughout the European Union’, in E. Guild and F. Geyer (eds.), *Security versus Justice? Police and Judicial Cooperation in the European Union* (Aldershot, 2008), 171-202.

¹⁰¹ See COM (2004) 328 final, 28 March 2004 Brussels; on this first proposal see C. Brants, ‘Procedural Safeguards in the European Union: Too Little, Too Late?’, in J. Vervaele (ed.), *European Evidence Warrant* (Antwerp, 2005), 103-119.

¹⁰² The Consultation Paper was posted on the website of the Justice and Home Affairs Directorate-General (website no longer available), and a questionnaire was sent to the Member States.

¹⁰³ COM (2003) 75 final, 19 February 2003 Brussels.

¹⁰⁴ Under the Treaty Framework in place at the time unanimity was required by Article 34(2) TEU.

¹⁰⁵ ‘In the light of political realities’ this ‘watering down’ was already expected by Alegre at the adoption of the initial proposal, see S. Alegre, ‘EU Fair Trial Rights- Added Value or No Value?’, 154 *New Law Journal* (2004), 758-761, at 759.

translation; specific attention for persons who cannot understand the proceedings; communication and consular assistance; and the so called ‘letter of rights’. Even though these rights seem modest and basic in scope, some Member States feared the implications of these rights in their criminal justice systems.

Two opposing views on the need for approximation of procedural rights on EU level emerged; one defending the need for a binding set of minimum criminal procedural standards and another believing that the ECHR alone provides sufficient protection to ensure a high standard of criminal procedural rights, and therefore the proposed instrument would be superfluous;¹⁰⁶ the latter view in spite of the (political) priority given to the adoption of such an instrument by the Hague Programme (2005).¹⁰⁷

Negotiations nearly stalled during the UK Presidency (second half of 2005), and fruitless attempts to reach agreement were made by the subsequent Austrian and Finnish Presidencies. This difficult political landscape forced the German Presidency to draft a significantly ‘watered down’ version of the text, and a second text was proposed by the German Presidency which only included three rights and followed the ECHR more closely.¹⁰⁸ The ‘German text’ also excluded from the scope of the FDPR proceedings against suspected terrorists, as this was one of the concerns raised by the group of six. But in spite of these concessions agreement on the text has proven to be impossible,¹⁰⁹ even though subsequently another, even further ‘diminished’,¹¹⁰ text was proposed.¹¹¹ According to the Council of Europe the latest proposal was in such a state that it no longer believed that the text was compatible with the right to a fair trial as set out in the ECHR.¹¹² The group of six, led by the UK, did not seem to have a ‘sincere’ will to adopt the FDPR. Especially the British position was remarkable

¹⁰⁶ The former being supported by a majority of Member States, the later supported by six states: Cyprus, Czech Republic, Ireland, Slovakia and UK. These six states proposed a non-binding Resolution, see House of Lords European Union Committee, *Breaking the Deadlock: What Future for EU Procedural Rights?*, 2nd Report, session 2006-07, HL Paper 20; See also Council doc. 7349/07, 13 March 2007 Brussels.

¹⁰⁷ As envisaged in The Hague Programme, *supra* note 42, at par. 1 and 12; par. 3.3.1. (also 12) even sets the end of 2005 as the deadline for the adoption of the Framework Decision.

¹⁰⁸ Council doc. 16874/06, 22 December 2006 Brussels; later another similar but updated version of the text was issued by Germany.

¹⁰⁹ Even on the basis of ‘enhanced cooperation’ agreement was not possible, since there was not a qualified majority of Member States in favour of adopting the instrument.

¹¹⁰ As observed by Jimeno-Bulnes, *supra* note 100, 179, the final proposal reduced the original text ‘enormously in both its formal and its material content’.

¹¹¹ This was the ‘final’ proposal, see *supra* note 99.

¹¹² See S. Peers, ‘Rights for Criminal Suspects and EU Law’, *Statewatch Analysis* (2007), available at <http://www.statewatch.org/news/2007/apr/Statewatch-analysis-crim-proced.pdf> (accessed on 12 August 2012); According to the Council of Europe ‘the present draft was no longer *Strasbourg proof*’, Note from the Council of Europe to the Presidency, Council doc. 8200/07, 2 April 2007 Brussels.

because it was initially in favour of the instrument. A coherent reason has not been given for this ‘sudden’ change in position,¹¹³ it is believed though that the White Paper articulating the Government’s intention of ‘Rebalancing the criminal justice system in favour of the law-abiding majority’,¹¹⁴ played an important role as it was feared its impact would be minimised if it appeared alongside an instrument which gives ‘criminals’ more rights.¹¹⁵

However this short summary of events only partly explains the failure of the instrument,¹¹⁶ it does underline the difficulties adopting measures in the field of criminal procedure brings about. Reaching agreement on common definitions such as ‘criminal proceedings’, ‘arrested’ and ‘charged’ is far from straightforward given the diversity in criminal justice systems throughout the EU. As sharply observed by Mitsilegas ‘it appears that ... it has been easier for Member States to agree on a political declaration on the necessity of measures (in the Hague Programme) than reaching agreement on the substance of a number of complicated issues’.¹¹⁷

Legal basis

In reality the situation was even more complicated than described above, as Member States (the same group of six) and commentators pointed to an absence of legal grounds to adopt measures of this sort. Whereas the current legal regime enables the establishment of minimum criminal procedural rights,¹¹⁸ the pre-Lisbon Treaty Framework did not provide such clear legal basis.

Calls for a minimum defence rights standard became more apparent¹¹⁹ after the adoption of the Framework Decision on the EAW, which came short in protection of procedural safeguards.¹²⁰ Whereas the former Article 31(1)(b) TEU provided a clear legal basis for ‘facilitating extradition between Member States’, it did not provide a similar basis for procedural rights action. Therefore the Commission had to resort to a logic of implied competences in order to overcome this difficulty, and came up with former Article 31(1)(c)

¹¹³ See generally HOL European Union Committee, supra note 106.

¹¹⁴ Home Office, July 2006.

¹¹⁵ See J. Spencer, ‘EU Criminal Law- the Present and the Future?’, in A. Arnall, C. Barnard, M. Dougan and E. Spaventa (eds.), *A Constitutional Order of States? : Essays in EU Law in Honour of Alan Dashwood* (Oxford, 2011), 341-364, at 360.

¹¹⁶ The other major factor being a lack of EU competence, see the paragraph on ‘legal basis’ below.

¹¹⁷ V. Mitsilegas, *EU Criminal Law* (Oxford, 2009), 104.

¹¹⁸ Article 82(2)(b) TFEU, see chapter 1.2 above on Lisbon.

¹¹⁹ Commentators had earlier already pointed to an absence of minimum defence rights standards, see e.g. S. Peers, *EU Justice and Home Affairs Law* (Harlow, 2000), 187.

¹²⁰ See e.g. S. Alegre and M. Leaf, ‘Mutual Recognition in European Judicial Cooperation: A Step Too Far Too Soon? Case Study- the European Arrest Warrant’, 10(2) *European Law Journal* (2004), 200-217.

TEU as a legal basis. This provision enables common action to be taken on judicial cooperation in criminal matters ‘ensuring compatibility in rules applicable in the Member States, as may be necessary to improve such cooperation’. In the Commission’s view the proposal constitutes the ‘necessary complement’ to the mutual recognition measures that are designed to increase efficiency of prosecution.¹²¹ The Commission further argued that the proposal was necessary to ensure compatibility between the criminal justice systems of Member States and to build trust and promote mutual confidence across an EU in which: ‘not only the judicial authorities, but all actors in the criminal process see decisions of the judicial authorities of other Member States as equivalent to their own and do not call in question their judicial capacity and respect for fair trial rights’.¹²² Even though it is plausible that the proposal leads to an enhanced compatibility between (some aspects of) the various criminal justice systems, serious objections can be made against the proposed legal basis. Mitsilegas has clearly articulated two objections against the Commission’s logic.¹²³ Firstly, the pre-Lisbon Treaty Framework did not provide for an express legal basis for the adoption of criminal procedural measures. In an area ‘which is inextricably linked to State sovereignty’ an express legal basis seems necessary, and no Treaty provision reflected Member States’ will to legislate on criminal procedure.¹²⁴ Secondly, the link provided by the Commission of ‘mutual trust’ is ‘too indirect and subjective as a legitimate link’.¹²⁵ In the Commission’s view the trust the instrument may create will lead to compatibility, which ultimately has to lead to the improvement of judicial cooperation. Therefore it is not compatibility, but the trust it ‘may’ create that will improve compatibility. As trust is a fluent concept and its existence can hardly be measured it does seem that the Commission’s reasoning is farfetched and establishes too indirect and vague a link.

It should be noted though that only a small group of Member States challenged the instrument’s legal basis, a close look at the provisions (articles 29 and 31 TEU) shows that the question is merely one of interpretation. Morgan defended an alternative, more ‘progressive’ view, according to which ‘the word ‘necessary’ in Article 31(1)(c) should be interpreted as

¹²¹ COM (2004) 328 final, 28 April 2004 Brussels, para. 51.

¹²² *Ibid*, para. 28.

¹²³ See V. Mitsilegas, ‘Trust-Building Measures in the European Judicial Area in Criminal Matters: Issues of Competence, Legitimacy and Inter-institutional Balance’, in S. Carrera and T. Balzacq (eds.), *Security Versus Freedom? A Challenge for Europe’s Future* (Aldershot, 2006), 279-289; and V. Mitsilegas, ‘The Constitutional Implications of Mutual Recognition in Criminal Matters in the European Union’, 43(5) *Common Market Law Review* (2006), 1277-1311.

¹²⁴ *Ibid*, former, 282.

¹²⁵ *Ibid*, 283.

meaning that the measure should facilitate mutual recognition, and not simply the somewhat narrower judicial cooperation.’¹²⁶

Another view is presented by Loof; he agrees with the Commission that Article 31(1) TEU potentially provides a sufficient legal basis for limited EU action on common minimum procedural standards; however he finds the way in which the Commission then selects the rights to be included in the FDPR problematic.¹²⁷ If the justification for competence is based on the need for mutual trust ‘that justification must also constitute the limiting criterion to EU competence’.¹²⁸ Therefore a methodological constraint should have led to an empirical approach towards the selection of the substantive rights. In not doing this the Commission leaves itself open to criticism of not respecting the principle of subsidiarity.

However there are different views on the matter of competence, the Commission failed to convincingly and swiftly deal with the matter, which opened the opportunity for the group of sceptical Member States to challenge the legal basis. These legal objections combined with the political objections led to a failure to reach the required unanimity. According to the JHA Council ‘the dividing line was the question whether the Union was competent to legislate on purely domestic proceedings or whether the legislation should be devoted solely to cross-border cases’.¹²⁹

3.2. A new attempt: the Roadmap on Procedural Rights

Not long after the demise of the proposed FDPR the issue of procedural safeguards was picked up again by the Swedish Presidency (second half of 2009), as calls remained for EU action in this field. However, with the recent failure in mind a different approach was taken this time. In accordance with the complexity of the issues the JHA Council agreed on a Resolution in 2009, just before the entry into force of the Treaty of Lisbon, setting out a ‘Roadmap’ for the strengthening of procedural rights of suspected and accused persons in criminal proceedings.¹³⁰ The Roadmap identifies several areas for legislative priorities and introduces a step-by-step approach, meaning legislation for one area of rights at a time will be

¹²⁶ Morgan, *supra* note 97, 97-99.

¹²⁷ R. Loof, ‘Shooting from the Hip: Proposed Minimum Rights in Criminal Proceedings throughout the EU’, 12(3) *European Law Journal* (2006), 421-430.

¹²⁸ *Ibid*, 426.

¹²⁹ Press Release, Justice and Home Affairs Council, 12-13 June 2007, available at http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/jha/94682.pdf (accessed on 16 August 2012).

¹³⁰ ‘Resolution of the Council on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings’, (2009) OJ C295/01.

focused upon. The Resolution articulates a political commitment to take action on the priority areas; however the list is expressly ‘non-exhaustive’. The proposed new measures concern (a) translation and interpretation; (b) information on rights and charges; (c) legal advice and legal aid; (d) communication with relatives, employers and consular authorities; (e) special safeguards for suspected or accused persons who are vulnerable; and (f) a Green Paper on pre-trial detention. The Commission has responded to this last invitation and issued a Green Paper on pre-trial detention in June 2011.¹³¹ The rights in the Roadmap correspond to those proposed by the Commission earlier in 2004, this is remarkable seen the failure to reach agreement on these rights at the time.

The Roadmap was subsequently incorporated into the Stockholm programme, which sets out the EU Justice agenda for the period 2010-2014.¹³² In line with the non-exhaustive character of the Roadmap, the Stockholm programme invites the Commission to examine whether other issues (for instance the presumption of innocence), need to be addressed and what further elements of procedural safeguards need attention.¹³³ The ‘Action Plan Implementing the Stockholm Programme’,¹³⁴ sets out a detailed timetable for the adoption of the measures introduced in the Roadmap.¹³⁵ With the first proposal due for 2010 and the last for 2013, an ambitious plan is set out. However the target on a proposal on legal aid of 2011 has already been missed, as will be shown below.

The following section looks at the current status of each of the proposed measures and what progress has been made so far. Work on Measure A had already started in mid-2009. The Commission proposed a Framework Decision on the Right to Interpretation and Translation for Criminal Suspects,¹³⁶ and even reached agreement on this Proposal in October 2009.¹³⁷ However, the Framework Decision was not adopted in time before the entry into force of the Lisbon Treaty and therefore it had to be resubmitted under the new institutional framework.¹³⁸ A group of 13 Member States tabled an initiative¹³⁹ for a Directive,¹⁴⁰ based on the political

¹³¹ COM (2011) 327 final, 14 June 2011 Brussels.

¹³² (2010) OJ C115/01, point 2.4.

¹³³ *Ibid.*

¹³⁴ COM (2010) 171 final, 20 April 2010 Brussels.

¹³⁵ *Ibid.*, see annex at p. 14.

¹³⁶ COM (2009) 338 final, 8 July 2009 Brussels.

¹³⁷ For the agreed text see, Council doc. 14792/09, 23 October 2009 Brussels.

¹³⁸ For more on the changes brought about by the Lisbon Treaty see chapter 1.2 above.

¹³⁹ Article 76 TFEU enables a group of Member States (a minimum of a quarter of the Member States) to initiate criminal law measures.

¹⁴⁰ (2010) OJ C69/1.

agreement already reached on the Framework Decision.¹⁴¹ Subsequently a (slightly) more ambitious proposal was made by the Commission,¹⁴² but the Council and the European Parliament agreed on the former proposal in the spring of 2010. The Directive was formally adopted in October 2010,¹⁴³ and has to be implemented by the Member States before October 2013.¹⁴⁴

The Commission submitted its proposal for Measure B, on the right to information about rights, in July 2010.¹⁴⁵ The Council reached a general approach on this text in December 2010,¹⁴⁶ and tabled a Proposal for the Directive¹⁴⁷ on which negotiations with the European Parliament started in 2011. These talks have been successful, and this second measure was adopted in May 2012.¹⁴⁸ Member States have two years to implement these new rules into their national legal systems.¹⁴⁹

Council negotiations on Measure C have also started after the Commission presented its proposal on a Directive on the right of access to a lawyer and on the right to communicate upon arrest in June 2011.¹⁵⁰ However, contrary to what was aimed at in the Roadmap, it does not deal with the issue of legal aid. The two measures have been separated due to the political difficulties surrounding the issue of legal aid. It remains to be seen whether there is truly political will to achieve agreement on legal aid. The deadline of 2011 set out in the action plan implementing the Stockholm programme, for presenting a proposal on this matter, has thus not been made.¹⁵¹ The Council has in the meantime reached a general approach on the Directive on the right to access to a lawyer and to communicate upon arrest,¹⁵² and is currently presented by the Presidency to the European Parliament for further discussion. It is expected that this directive will be adopted in spring 2013. Concerning the right to legal aid a declaration has been included in the Council general approach that a proposal for ‘a legal

¹⁴¹ The content of the initiative was very much similar to the previously negotiated draft Framework Decision on the issue, the only difference being the legal nature; a Directive instead of a Framework Decision.

¹⁴² COM (2010) 82 final, 9 March 2010 Brussels.

¹⁴³ ‘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’, (2010) OJ L280/1.

¹⁴⁴ Member States have to ensure full compliance with the Directive by 27 October 2013, *ibid*, Article 10.

¹⁴⁵ COM (2010) 392/3, 20 July 2010 Brussels.

¹⁴⁶ Council doc. 17503/10, 6 December 2010 Brussels.

¹⁴⁷ Council doc. 16342/11, 11 November 2011 Brussels.

¹⁴⁸ ‘Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the Right to Information in Criminal Proceedings’ (2012) OJ L142/1.

¹⁴⁹ Member States have to comply with the Directive by 2 June 2014, *ibid*, Article 11(1).

¹⁵⁰ COM (2011) 326 final, 8 June 2011 Brussels.

¹⁵¹ See COM (2010) 171 final, 20 April 2010 Brussels, annex at p. 14.

¹⁵² Council doc. 10908/12, 8 June 2012 Brussels.

instrument' regarding legal aid will be presented in 2013.¹⁵³ At the time it is unsure what form this 'legal instrument' will take and it is feared that the political difficulties surrounding legal aid will lead the Commission to present a non-binding instrument (such as a resolution). According to the same timetable a Proposal on communication with relatives, employers and consular assistance is due for 2012 (Measure D), and has thus been combined with Measure C now.

A legislative proposal on special safeguards for suspected or accused persons who are vulnerable (Measure E) should be made during 2013, and an impact assessment is being carried out on this Measure. Furthermore the Green-Paper on what other rights ought to be covered (Measure F) is scheduled for 2014, and a Commission consultation process ended in November 2011.

Based on the first two proposals one can be positive and hopeful about the execution of the targets set in the Roadmap. But as these proposals regard relatively 'uncontroversial' topics, a more sceptical position can be taken after the failure to include the politically more difficult right to legal aid in Measure C.

A critical look at what these developments mean for the 'value' of the Roadmap will be taken later. First will be examined what the current level of safeguards throughout the EU is so subsequently the standard set (or aimed at) by the Roadmap can be tested against this.

¹⁵³ Ibid, declaration 3, especially France pushed for the inclusion of this target.

Chapter 4. The current regime of criminal procedural safeguards in the EU

4.1. Introduction

Criminal procedural safeguards, defence rights and fair trial rights are all terms used to describe the rights a suspect or accused has in ‘criminal proceedings’ in order to protect himself from abuse of government power. Their aim is to ensure a ‘fair trial’. The term ‘criminal proceedings’ is used here as encompassing all the activities of state agencies, from the police to the supreme courts, which take as starting point the suspicion that an offence has been committed. A criminal process proceeds through various stages, such as inquiry, investigation, charge, indictment, trial, judgement and appeal. There is mostly agreement on the core meaning of such proceedings; however there is great variety in the actual manner of execution. These differences involve the organization of authorities, distribution of powers between the different branches, the organization of the trial and the possibilities to appeal.

It is often argued that there are two main models of criminal procedure in the EU;¹⁵⁴ on the one side an accusatorial, adversarial tradition associated with the Anglo-Saxon common law jurisdictions, which features two distinct sides (parties) and a judge as neutral arbiter; and on the other side an inquisitorial tradition associated with the continental jurisdictions, where a judge plays a more active and central role.¹⁵⁵ However, jurisdictions that were regarded as having the same legal traditions have more recently developed in different ways and therefore a clear distinction is sometimes difficult to make.¹⁵⁶ These differences between common law and civil law jurisdictions complicate the interpretation of Article 6 ECHR- which provides a framework for fair trial rights throughout Europe; it is likely that the directives that will be adopted under the Roadmap will face similar problems.

¹⁵⁴ For a comparative examination of criminal justice systems see, for instance, M. Delmas-Marty and J. Spencer, *European Criminal Procedures* (Cambridge, 2002); and R. Vogler, *A World View of Criminal Justice* (Aldershot, 2005).

¹⁵⁵ There is disagreement in literature on whether socialist legal systems constitute a third distinct legal tradition in the EU, for a discussion of this issue see P. Reichel, *Comparative Criminal Justice Systems* (New Jersey, 2005), 123; for a brief examination of the three criminal justice systems see E. Cape, J. Hodgson, T. Prakken and T. Spronken (eds.), *Suspects in Europe: Procedural Rights at the Investigative Stage of the Criminal Process in the European Union* (Antwerp, 2007), 5-8.

¹⁵⁶ For a discussion on whether the various legal systems are diverging or converging, or even shift towards a new form of proceedings see, for example, J. Jackson, ‘The Effect of Human Rights on Criminal Evidentiary Processes: Towards Convergence, Divergence or Realignment?’, 68(5) *Modern Law Review* (2005), 737-764; See also S. Summers, *Fair Trials: The European Criminal Procedural Tradition and the European Court of Human Rights* (Oxford, 2007).

The idea to limit the abuse of government power by regulating ‘its exercise through procedures that are regular, impartial and that give affected persons a chance to be heard is an ancient insight of the law.’¹⁵⁷ The Magna Carta in 1215 already compelled the King to pledge that ‘to no one we will sell, to no one we will deny or delay right or justice’ and that ‘no free man shall be taken or imprisoned or disseised ... or outlawed or exiled or in any wise destroyed, nor will we go upon him, nor will we send upon him, unless by the lawful judgement of his peers, or by the law of the land’.¹⁵⁸ The right to fair trial is nowadays guaranteed by constitutions, criminal codes or common law in most countries.

Fair trial rights are part of the wider concept of ‘international human rights’¹⁵⁹ and therefore also guaranteed in international treaties such as the International Covenant on Civil and Political Rights (ICCPR)¹⁶⁰ which aspires to universal application, and regional treaties such as the ECHR and the American Convention on Human Rights (ACHR).¹⁶¹ Next to treaties there are also numerous declarations, resolutions and recommendations on human rights starting with the 1948 Universal Declaration on Human Rights (UDHR).¹⁶² These texts certainly have importance even though they are not legally binding. It is important to note however that this thesis is about the *law*, and therefore does not consider such instruments.

The main human rights instrument within the EU is the ECHR. Even though it is not EU legislation as such, all Member States are signatories to the Convention and therefore bound by its provisions.¹⁶³ As this thesis aims at examining the value of the Roadmap it is important to test the standard aimed at by the Roadmap against the current standard of defence rights in the EU (i.e. how does the Roadmap relate to the standard set by Article 6 ECHR?).

This chapter aims at providing an overview of the protection offered to suspects in criminal proceedings in the EU by analysing Article 6 ECHR. The structure of this chapter is the following; first an overview will be given of the aspects of Article 6 that have an overall impact on criminal proceedings, subsequently the specific rights enshrined in Article 6(3) ECHR that are not contained in the Roadmap will be presented with the purpose of giving a complete overview of the protection offered by the ECHR and to show that the Roadmap does

¹⁵⁷ M. Janis, R. Kay and A. Bradley, *European Human Rights Law* (Oxford, 2008), 719.

¹⁵⁸ As cited in *ibid*.

¹⁵⁹ For an account of these rights in an international context see C. Brants and S. Franken, ‘The Protection of Fundamental Human Rights in Criminal Process – General Report’, 5(2) *Utrecht Law Review* (2009), 7-65.

¹⁶⁰ See Article 14 ICCPR.

¹⁶¹ See Article 8 par. 2c-e ACHR.

¹⁶² See articles 10 and 11 UDHR

¹⁶³ According to Article 1 ECHR all ‘Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in ... this Convention’.

not offer an equally broad protection (yet?). The rights contained in Article 6 ECHR that are prioritised by the Roadmap are being treated in Chapter 5 and this chapter takes the form of a direct comparison.

After the analysis of Article 6 ECHR here, the by Lisbon formalised EU Charter will be reviewed in respect of procedural safeguards in order to see how (if) this instrument affects the developments started with the Roadmap.

4.2. The European Convention on Human Rights

For European States which are signatories to the ECHR¹⁶⁴ the Convention provides the major source of international fair trial rights. In particular Article 5 on the right to liberty and Article 6 on the right to fair trial are of importance for the protection of human rights in criminal proceedings.¹⁶⁵ Compliance with these norms by Member States is supervised by the European Court of Human Rights (ECtHR),¹⁶⁶ which has developed a significant body of case law on procedural rights. Actually, the rights provided for in Articles 5 and 6 have been the rights most commonly invoked in proceedings before the Strasbourg Court. The Court has stressed the importance of the right to a fair trial by stating that ‘the right to a fair trial holds so prominent a place in a democratic society that there can be no justification for interpreting Article 6(1) of the Convention restrictively’.¹⁶⁷ The great volume of applications together with the importance of the right shows the position of ‘pre-eminence’¹⁶⁸ the right to a fair trial has in the Convention.

An account will be given here of the protection offered by the ECHR for suspects and accused in criminal proceedings, along the lines of the Strasbourg jurisprudence. It has to be noted that all that can be done here is to highlight some of the leading cases, given the volume and extent of the case law.¹⁶⁹

¹⁶⁴ The ECHR is binding for all current 47 Member States; this includes all 27 EU Member States.

¹⁶⁵ Also important for the protection of human rights in criminal cases are: Article 3 (prohibiting torture), Article 8 (dealing with the right to privacy) and Article 10 (on the freedom of speech).

¹⁶⁶ An insight into the weaknesses of this enforcement mechanism was given in chapter 2.3 above.

¹⁶⁷ ECtHR 12 February 2004, *Perez v. France*, No. 47287/99, para. 64.

¹⁶⁸ D. Harris, M. O’Boyle and C. Warbrick, *Law of the European Convention on Human Rights* (Oxford, 2009), 201-202.

¹⁶⁹ For a more extensive analysis of the ECtHR jurisprudence see, for instance, S. Trechsel, *Human Rights in Criminal Proceedings* (Oxford, 2005); R. Reed and J. Murdoch, *Human Rights Law in Scotland* (West Sussex, 2011); A. Mowbray, *Cases, Materials and Commentary on the European Convention on Human Rights* (Oxford, 2012); Harris *et al.*, *ibid.*

Article 5 ECHR concerns pre-trial detention and bail, and requires that arrest and detention must be lawful and in accordance with a procedure prescribed by law. Furthermore it requires a ‘reasonable suspicion’ that the person has committed an offence (Art. 5(1)(c)) and that the person arrested must be informed ‘promptly, in a language which he understands, of the reasons for his arrest and of any charge against him’ (Art. 5(2)). A rule of *habeas corpus* applies (Art. 5(4)) and there is an entitlement to (conditional) ‘release pending trial’ and ‘trial within a reasonable time’ (Art. 5(3)).

The principal provision on defence rights is contained in Article 6 ECHR, on which the rest of this analysis (and later comparison) is focussed. In the first paragraph Article 6 mandates that everyone facing criminal conviction or a determination of civil rights is entitled to a ‘fair and public hearing within a reasonable time by an independent and impartial tribunal established by law’.¹⁷⁰ After these general fair trial guarantees, in Article 6(2) and 6(3), it specifies certain aspects of this right for those charged with a criminal offence. Article 6(3) makes provision for five guarantees which are the minimum rights an accused has in criminal proceedings; these are considered as specific aspects of a fair hearing.¹⁷¹ The Court has repeatedly confirmed that these rights must be ‘practical and effective’, not ‘theoretical and illusory’.¹⁷²

4.2.1. Procedural safeguards that have a general impact on criminal proceedings

*The right to be presumed innocent*¹⁷³

Article 6(2) provides that ‘everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law’. The Strasbourg Court has found that this presumption consists of three requirements.¹⁷⁴ At first judicial authorities must not presume that an accused has committed an offence, unless proven according to law. According to the Court, the presumption is violated if ‘without the accused having previously been proved guilty according to law and, notably, without his having had the opportunity of exercising his rights of defence, a judicial decision concerning him reflects an assumption that he is guilty’.¹⁷⁵ This can also occur without a formal finding, any reasoning suggesting that the

¹⁷⁰ For analysis of these guarantees see Trechsel, *ibid*, 45-149; Harris *et al.*, *supra* note 168, 201-299.

¹⁷¹ ECtHR 28 August 1991, *F.C.B. v. Italy*, No. 12151/86, para. 29.

¹⁷² ECtHR 9 October 1979, *Airey v. Ireland*, No. 6289/73, para. 24.

¹⁷³ For a complete account of this right see Trechsel, *supra* note 169, 153-191.

¹⁷⁴ ECtHR 6 December 1988, *Barbera, Messegue and Jabardo v. Spain*, Nos. 10588/83, 10589/83, 10590/83, para. 77.

¹⁷⁵ As summarised in E. Cape *et al.*, *supra* note 80, 27.

court regards an accused as guilty suffices.¹⁷⁶ The presumption of innocence applies during all stages of a criminal proceeding, ‘irrespective of the outcome of the prosecution’.¹⁷⁷ However, if the accused is subsequently found guilty the presumption ceases to apply during the remains of the proceedings.¹⁷⁸

Second, the presumption of innocence means that the burden of proof lies with the prosecution. Thus the prosecution must convince the court of the accused’s guilt; it is not for the accused to prove his own innocence. Following on from this; in case there is insufficient evidence, the accused must be acquitted, and any doubt should benefit the accused (*in dubio pro reo*).¹⁷⁹ The principle furthermore implies that a court’s verdict should be underpinned by evidence as presented in court, not on unfounded allegations or mere assumptions.¹⁸⁰

Third, the Court has said ‘that it is for the prosecution to inform the accused of the case that will be made against him, so that he may prepare and present his defence accordingly’.¹⁸¹

The privilege against self-incrimination¹⁸²

Often referred to as ‘the right to remain silent’ or the ‘*nemo tenetur* principle’, this right guarantees ‘not to be compelled to incriminate oneself, [and] to be protected against any pressure to make a statement’.¹⁸³ An explicit mention of this fundamental right is absent from the text of the ECHR. However the ECtHR has recognised that the right not to incriminate oneself and the right to silence are fundamental aspects of a fair trial as they are ‘generally recognised international standards which lie at the heart of the notion of a fair procedure under Article 6’.¹⁸⁴ The guarantee not only includes the right not to speak, but goes further and is not limited to verbal expression; this shows how ‘the right to silence’ and the ‘privilege against self-incrimination’ are two different things. The ratio of the safeguard can according to the Court, *inter alia*, be found ‘in the protection of the accused against improper compulsion by the authorities thereby contributing to the avoidance of miscarriages of justice

¹⁷⁶ ECtHR 21 February 1983, *Minelli v. Switzerland*, No. 8660/79, para. 37.

¹⁷⁷ *Ibid*, para. 30.

¹⁷⁸ ECtHR 5 July 2001, *Phillips v. the United Kingdom*, No. 41087/98, paras. 28-36.

¹⁷⁹ *Barbera, Messegue and Jabardo v. Spain*, para. 77.

¹⁸⁰ ECtHR 20 March 2001, *Telfner v. Austria*, No. 33501/96, para. 19.

¹⁸¹ *Barbera, Messegue and Jabardo v. Spain*, para. 77.

¹⁸² For a complete account of this right see Trechsel, *supra* note 169, 340-359.

¹⁸³ Trechsel, *ibid*, 341.

¹⁸⁴ As first recognised in ECtHR 25 February 1993, *Funke v. France*, No. 10828/84, paras. 41-44; see also ECtHR 17 December 1996, *Saunders v. the United Kingdom*, No. 19187/91, para. 68; ECtHR 8 February 1996, *John Murray v. the United Kingdom*, No. 18731/91, para. 45; and more recently confirmed in ECtHR 22 July 2008, *Getiren v. Turkey*, No. 10301/03, para. 123.

and to the fulfilment of the aims of Article 6¹⁸⁵ The three justifications given in this sentence reflect the central aim of the guarantee; proceedings which do not respect the guarantee are not fair. Furthermore the Court held that the guarantee is linked with the right to have access to a lawyer, it clarified that ‘early access to a lawyer is part of the procedural safeguards to which the court will have particular regard when examining whether a procedure has extinguished the very essence of the privilege against self-incrimination’.¹⁸⁶

The principle of equality of arms

The Court considers the principle of equality of arms to be a fundamental part of the wider concept of a fair trial. According to the principle both parties must be allowed a reasonable opportunity to present their case under equal conditions, i.e. conditions that do not place either party at a disadvantage in relation to his opponent.¹⁸⁷ Any limitations on the defence’s rights that lead to inequalities have to be sufficiently counterbalanced by procedures followed by the judicial authorities.¹⁸⁸ Examples of cases in which the Court examined the equality of arms requirement can be found in cases concerning ‘access to the case file or the disclosure of documents, the questioning of witnesses and experts, or the possibility of responding to, or challenging, depositions or observations made by the prosecution’.¹⁸⁹

4.2.2. Article 6(3) ECHR: specific defence rights- not contained in the Roadmap

The right to adequate time and facilities¹⁹⁰

Article 6(3)(b) provides that everyone charged with a criminal offence has the right to have ‘adequate time and facilities for the preparation of his defence’. The right to adequate time and facilities is closely linked with the other rights provided for by Article 6, and can be seen as a general provision to ‘guarantee not rights that are theoretical or illusory but rights that are practical and effective’.¹⁹¹

¹⁸⁵ *Funke v. France*, para. 44; *Saunders v. the United Kingdom*, para. 68; *John Murray v. the United Kingdom*, para. 45.

¹⁸⁶ ECtHR 24 September 2009, *Pishchalnikov v. Russia*, No. 7025/04, para. 69.

¹⁸⁷ ECtHR 15 May 2005, *Öcalan v. Turkey*, No. 46221/99, para. 140.

¹⁸⁸ ECtHR 26 March 1996, *Doorson v. the Netherlands*, No. 20524/92, para. 72; ECtHR 23 April 1997, *Van Mechelen and others v. the Netherlands*, Nos. 21363/93, 21364/93, 21427/93, 22056/93, para. 54.

¹⁸⁹ *Cape et al.*, supra note 80, 31-32.

¹⁹⁰ See Trechsel, supra note 169, 208-241.

¹⁹¹ ECtHR 21 April 1998, *Daud v. Portugal*, No. 22600/93, paras. 36-43; ECtHR 7 October 2008, *Bogumil v. Portugal*, No. 35228/03, paras. 46-49.

The purpose of the right to adequate time is already given in the text itself: to allow for the preparation of the defence and to protect the accused against a hasty trial.¹⁹² The adequacy of the time allowed will depend on the circumstances of the case.¹⁹³ Relevant circumstances are the complexity of the case,¹⁹⁴ the stage of proceedings,¹⁹⁵ whether the accused is defending himself in person,¹⁹⁶ and the accused lawyer's workload.¹⁹⁷ Furthermore, if the nature of the accusation changes during proceedings, the defence must be allowed sufficient time to respond to these changes.¹⁹⁸ A breach of Article 6(3)(b) that results from too little time allowed for the defence may be rectified in appeal proceedings.¹⁹⁹ If one looks at the relevant case law a series of diverging decisions will be found. It is therefore difficult to draw general conclusions from these decisions. Examples include a judgement in which two weeks for the defence to examine a 17.000 page case file was insufficient,²⁰⁰ as was a few hours for a defendant who defended himself in a minor public order case.²⁰¹ However, a five days' notice of a prison disciplinary hearing was found 'adequate'.²⁰²

'Facilities' within the meaning of Article 6(3)(b) 'include the opportunity [for the accused] to acquaint himself, for the purposes of preparing his defence, with the results of investigations carried out throughout the proceedings'.²⁰³ According to Trechsel this is, in practice, by far the most important aspect of the 'facilities' available for the defence.²⁰⁴ This right is often seen as an element of the concept of 'equality of arms',²⁰⁵ the ratio behind it is the principle that the defence is ought to have the same information as the prosecution.

Next to knowledge of the grounds on which the accusation is based, Article 6(3)(b) also includes the accused's right of access to a lawyer at the pre-trial stage and later to the extent

¹⁹² ECtHR 9 July 1981, *Kröcher and Müller v. Switzerland*, No. 8463/78, para. 53.

¹⁹³ *Bogumil v. Portugal*, paras. 48-49.

¹⁹⁴ ECtHR 28 January 1983, *Albert and Le Compte v. Belgium*, Nos. 7299/75, 7496/76, para. 41.

¹⁹⁵ ECommHR 15 April 1975, *Herbert Huber v. Austria*, No. 5523/72.

¹⁹⁶ ECommHR 7 February 1967, *X v. Austria*, No. 2370/64.

¹⁹⁷ ECtHR 20 June 2002, *Berlinski v. Poland*, Nos. 27715/95, 30209/96.

¹⁹⁸ ECtHR 25 July 2000, *Mattoccia v. Italy*, No. 23969/94, para. 67.

¹⁹⁹ ECtHR 9 June 1998, *Twalib v. Greece*, No. 24294/94, paras. 40-42.

²⁰⁰ *Öcalan v. Turkey*, para. 147.

²⁰¹ ECtHR 15 November 2007, *Galstyan v. Armenia*, No. 26986/03, para. 87.

²⁰² ECtHR 28 June 1984, *Campbell and Fell v. the United Kingdom*, Nos. 7819/77, 7878/77, para. 98.

²⁰³ ECommHR 15 October 1980, *Guy Jaspers v. Belgium*, No. 8404/78, para. 56; ECtHR 18 March 1997, *Foucher v. France*, No. 22209/93, para. 27; *Jasper v. the United Kingdom*, paras. 55-57; ECtHR 16 February 2000, *Fitt v. the United Kingdom*, No. 29777/96, paras. 46-50; ECtHR 16 February 2000, *Rowe and Davis v. the United Kingdom*, No. 28901/95, paras. 46-50.

²⁰⁴ Trechsel, *supra* note 169, 222.

²⁰⁵ *Guy Jaspers v. Belgium*, para. 55.

necessary to prepare his defence.²⁰⁶ There is an overlap between paragraphs (b) and (c), which covers the right to legal assistance.²⁰⁷

However, there is no limited list of facilities which are covered by Article 6(3)(b).

Generally it can be said that the Court's case law has emphasised that a positive obligation rests on the authorities to ensure that rights guaranteed by Article 6 are practical and effective. Nevertheless, the Court has not clarified the exact meaning of *adequate* time and facilities.

The right to call and cross-examine witnesses²⁰⁸

Article 6(3)(d) provides that a person charged with a criminal offence has the right 'to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him'. The guarantee is part of the wider right to a fair trial, and will generally be looked at by the Court through Article 6(1).²⁰⁹ It holds the function of guaranteeing that the adversarial character of the proceedings is upheld by ensuring that the defence is given a fair chance to challenge the prosecutorial evidence and at the same time to present its own evidence.²¹⁰ This guarantee differs from the other provisions in Article 6(3) by that it is more detailed than some of the other rights.

This guarantee applies to the trial and appeal proceedings, but not to the pre-trial stage.²¹¹ The rights contained in Article (6)(3)(d) do not hold an absolute character, they can be subject to limitations.²¹² Any limitations must be consistent with the principle of 'equality of arms'.²¹³ It is for national courts to determine whether a witness should be called, an accused requesting to hear a witness needs to show the importance of the hearing.²¹⁴ It is then for the ECtHR to assess whether the proceedings as a whole were fair.²¹⁵ A decision to deny a witness to be heard should be adequately motivated.²¹⁶

²⁰⁶ *Campbell and Fell v. the United Kingdom*, paras. 97-99.

²⁰⁷ ECtHR 9 April 1984, *Goddi v. Italy*, No. 8966/80, para. 31.

²⁰⁸ See Trechsel, *supra* note 169, 291-326.

²⁰⁹ ECtHR 8 June 1976, *Engel and Others v. the Netherlands*, Nos. 5100/71, 5101/71, 5102/71, para. 91.

²¹⁰ According to the Court the guarantee constitutes an essential element of a fair trial and is closely linked with the principle of equality of arms and the right to adversarial proceedings, see *Barbera, Messegue and Jabardo v. Spain*, para. 78.

²¹¹ ECtHR 13 September 1985, *Can v. Austria*, No. 9300/81, para. 47.

²¹² ECtHR 29 April 2009, *Polyakov v. Russia*, No. 77018/01, para. 31.

²¹³ *Engel and Others v. the Netherlands*, para. 91.

²¹⁴ ECtHR 6 May 2004, *Perna v. Italy*, No. 48898/99, para. 29.

²¹⁵ *Ibid.*

²¹⁶ ECtHR 22 April 2000, *Vidal v. Belgium*, No. 12351/86, para. 34.

When evidence is utilised in court which has been produced during police or judicial investigation, the right of the accused to cross-examine ‘witnesses against him’ is in principle infringed. However, the Court has allowed the introduction of such evidence under certain circumstances, examples of which are the prevention of reprisals against witnesses,²¹⁷ and safeguarding police investigations.²¹⁸ In *Kostovski* the Court made clear that such evidence may be introduced ‘if the rights of the defence have been respected’, this is the case if a defendant is given ‘an adequate and proper opportunity to challenge and question a witness against him, either at the time the witness was making his statement or at some later stage of the proceedings’.²¹⁹ Even though the Court accepted the introduction of evidence coming from anonymous or non-appearing witnesses, even if it is ‘decisive evidence’, in later jurisprudence the Court stated that ‘a conviction should not either solely or to a decisive extent rely upon anonymous statements’ regardless of the measures taken to secure the rights of the defence.²²⁰ Thus the use of untested evidence can be justified by ‘counterbalancing’ procedures,²²¹ however if this evidence is the sole or decisive basis for conviction, article 6(3)(d) is violated.²²²

In case a conviction is not to a ‘decisive extent’ based upon evidence of non-appearing witnesses a balancing test still applies, to examine whether the ‘rights of the defence have been respected’. As stated by the Court in *Doorson* the test is whether ‘the handicaps under which the defence labours’ are ‘sufficiently counterbalanced by the procedures followed by the judicial authorities’.²²³

Regarding the calling of witnesses for the defence, it is for national courts ‘as a general rule to assess whether it is appropriate to call witnesses’.²²⁴ The ECtHR will only under exceptional circumstances assess a national court’s decision on the relevance of the proposed evidence.²²⁵

²¹⁷ *Van Mechelen and others v. the Netherlands*, paras. 56-62.

²¹⁸ *Ibid.*

²¹⁹ ECtHR 20 November 1989, *Kostovski v. the Netherlands*, No. 11454/85, paras. 41-44.

²²⁰ *Doorson v. the Netherlands*, para. 76; ECtHR 27 February 2001, *Luca v. Italy*, No. 33354/96, para. 40.

²²¹ Such measure can be the opportunity for the defence to question the witness or the use of other supporting evidence.

²²² ECtHR 20 January 2009, *Al-Khawaja and Tahery v. the United Kingdom*, Nos. 26766/05 and 22228/06, paras. 37-38.

²²³ *Doorson v. the Netherlands*, para. 76.

²²⁴ *Vidal v. Belgium*, para. 33.

²²⁵ An example of such an ‘exceptional case’ can be found in *Vidal v. Belgium*, where the Court found a breach of Article 6 as a Belgium court refused to hear four witnesses requested by the accused without giving any reason.

4.3. The EU Charter of Fundamental Rights

With the entry into force of the Lisbon Treaty the EU Charter of Fundamental Rights (hereafter CFR or Charter) has gained formal legal status. As stated by Article 6(1) TEU the Charter ‘shall have the same legal value as the Treaties’. Here we will have look at the actual value and relevant content of the CFR.²²⁶

The initiative for a Charter on fundamental rights was already taken in 1999 at the European Council meeting in Cologne.²²⁷ However, it has known a bit of a rocky road before it finally obtained legal status.²²⁸ The failed Constitutional Treaty sought to incorporate the Charter as an integral part of the Treaty. But because a number of Member States²²⁹ had doubts about whether the Charter should be integrated into the Treaty,²³⁰ it was decided in the IGC in June 2007, as a compromise, that the CFR would not become an integral part of the Treaty, but instead a reference to the Charter in Article 6 TEU would state that the Charter has the same value as ‘primary law’.²³¹ Both the Charter and Article 6 TEU stress that the CFR ‘shall not extend in any way the competences of the Union’. It is important to note that the ‘Charter addresses itself only to the EU institutions and to the legislation they adopt, and not to the Member States in national situations’.²³² The CFR thus has become legally binding upon EU institutions and Member States only when they are implementing EU law. This is nothing new in itself, as the ECJ had already stated as early as 1969 that ‘fundamental human rights [are] enshrined in the general principles of community law and protected by the Court’,²³³ and later that ‘respect for human rights is ... a condition of the lawfulness of Community acts’.²³⁴

²²⁶ For a more complete account of the Charter see, for instance, G. Di Federico (ed.), *The EU Charter of Fundamental Rights: From Declaration to Binding Instrument* (Dordrecht, 2011); G. De Búrca, ‘The Evolution of EU Human Rights Law’, in Craig and De Búrca, *supra* note 9, 465-497; H. Raulus, ‘Fundamental Rights in the Area of Freedom, Security and Justice’, in S. Wolff, F. Goudappel and J. de Zwaan (eds.), *Freedom, Security and Justice after Lisbon and Stockholm* (The Hague, 2011), 213-240.

²²⁷ See ‘European Council Decision on the Drawing up of a Charter of Fundamental Rights of the European Union’, in Annex IV to the Presidency Conclusions, 3 and 4 June 1999, available at http://ue.eu.int/ueDocs/cms_Data/docs/pressData/en/ec/kolnen.htm (accessed on 1 May 2012).

²²⁸ For an analysis of the origins of the Charter see Piris, *supra* note 47, 146-151.

²²⁹ For instance in the United Kingdom doubts were raised on some of the obligations, especially on social matters, contained in the Charter, the UK therefore requested that a protocol be annexed to the Treaties on the application of the Charter in the UK (later joined by Poland), see Protocol no. 30. In literature it is heavily debated whether this protocol constitutes an opt-out from the Charter, for this debate see Piris, *supra* note 47, 160-163.

²³⁰ Some Member States feared that the Charter could be construed as conferring additional competences on the EU to legislate on the issues covered by it.

²³¹ The version of the Charter referred to here is the one as agreed on in 2004, this is an amended version of the 2000 version, as contained in Part II of the failed Constitutional Treaty; for the CFR see (2004) OJ C303/01.

²³² Piris, *supra* note 47, 152.

²³³ ECJ 12 November 1969, Case 29/69, *Stauder* (1969), para. 7.

²³⁴ ECJ 28 March 1996, opinion 2/94, *Accession of the EC to the ECHR* (1996), ECR I-1759, paras. 33 and 34.

Furthermore the Charter aims at clarifying the tricky relationship between the ECHR, national constitutions and the Charter.²³⁵ Article 52(3) specifically deals with its relation with the ECHR and clearly intends to promote harmony between the provisions of the two documents, while not preventing the EU from developing more extensive protection than is provided for under the Convention.²³⁶ Although it does not deal with the specific relationship between the two European Courts, the provisions contained in Articles 52(3) and 53 CFR seem intended to promote deference from the ECJ to the case law of the ECtHR.

The Charter contains defence ‘rights’²³⁷ in Title VI ‘Justice’. It sets out the right to a fair trial,²³⁸ the presumption of innocence,²³⁹ the principle of legality and proportionality of penalties,²⁴⁰ and the right not to be punished twice for the same offence.²⁴¹ The benefits of the Charter are that the EU has set out in one place fundamental rights from which EU citizens can profit,²⁴² and giving the CFR the same legal value as the Treaties is a very powerful symbol and underlines that the EU is a Union based on the rule of law and takes rights seriously. At the same time ‘citizens might be under the illusion that the Charter will always be obligatory for their national authorities, even when the latter are not implementing EU law’.²⁴³ These high expectations cannot be met by the Charter and taken together with the factual legal situation pre-Charter,²⁴⁴ in which the ECJ already recognised fundamental rights as part of the EU *acquis*, the Charter seems to have at its most symbolic value. However, as noted by Advocate General Poiares Maduro the Charter ‘is not without effect as a criterion for

²³⁵ On this peculiar relationship see, for instance, G. Harpaz, ‘The European Court of Justice and its Relationship with the European Court of Human Rights: the Quest for Enhanced Reliance, Coherence and Legitimacy’, 46(1) *Common Market Law Review* (2009), 105-141; J. Callewaert, ‘The European Convention on Human Rights and European Union Law: A Long Way to Harmony’, 6(6) *European Human Rights Law Review* (2009), 768-783; M. Varju, ‘Human Rights Protection in ECHR and EU Law: A Claim of Non-divergence’, in C. Murphy and P. Green (eds.), *Law and Outsiders: Norms, Processes and ‘Othering’ in the Twenty-first Century* (Oxford, 2011), 113-139.

²³⁶ See also Article 6(3) TEU which states that ‘fundamental rights, as guaranteed by the [ECHR] and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union’s law’.

²³⁷ A clear distinction has been made between ‘rights’ and ‘principles’, see Article 52(5) CFR; rights are directly enforceable in court, while principles define more general objectives which should be aimed at by the EU.

²³⁸ Article 47 CFR.

²³⁹ Article 48 CFR.

²⁴⁰ Article 49 CFR.

²⁴¹ Article 50 CFR.

²⁴² Article 6(3) TEU also states that ‘fundamental rights, as guaranteed by the [ECHR] and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union’s law’.

²⁴³ Piris, *supra* note 47, 159.

²⁴⁴ As observed by A. Klip, *European Criminal Law: An Integrative Approach* (Antwerp, 2012), 231; ‘the added value of the Charter initially seemed to be limited, because it does not offer many more or different rights over and above those already protected under the ECHR’. However on a positive note he also notices that: ‘already in the first cases, the Court demonstrates the will to present the Charter as the standard for Union law’.

the interpretation of the instruments protecting the rights mentioned in Article 6(2) EU'.²⁴⁵ The Charter as such will not have a direct effect on criminal proceedings throughout the EU, what it could help assure is that, at least the rights set out in Title VI, are being respected in future AFSJ legislation and thus could indirectly have a positive effect on criminal procedural rights in the EU. Much of the value of the Charter will depend on the way the ECJ interprets the Charter and applies its provisions when reviewing the legality of EU instruments and their implementation. In the first years since the Charter is binding the ECJ has referred to the Charter on 'many occasions'.²⁴⁶

Article 6(2) furthermore opens the way for EU accession to the ECHR. This has been a long debated issue and it is to be welcomed that clarity has (finally) been given by the Lisbon Treaty.²⁴⁷ The procedure for accession prescribes that consent of the EP is required,²⁴⁸ together with unanimity in the Council and approval by each Member State.²⁴⁹ EU accession to the ECHR²⁵⁰ can be warmly welcomed as it will further strengthen the protection of fundamental rights and freedoms within the EU, 'by increasing the uniformity of such protection through a fuller integration of the two European systems, while preserving the specific features of both'.²⁵¹ When this happens it will mean that EU institutions will be accountable to the ECtHR in respect of matters falling within the scope of the ECHR in the same way as Member States are currently bound regarding national matters. Thus, EU institutions will be directly subject to the ECHR, and the ECJ can apply the ECHR as if EU law and EU law must be interpreted in accordance with the ECHR.

²⁴⁵ Opinion of Advocate General Póitres Maduro of 9 September 2008, Case C-465/07, *M. Elgafaji, N. Elgafaji v. Staatssecretaris van Justitie* (2009), ECR I-921, point 21.

²⁴⁶ For an overview of these cases see S. Douglas-Scott, 'The European Union and Human Rights After the Treaty of Lisbon', 11(4) *Human Rights Law Review* (2011), 645-682.

²⁴⁷ On this thirty year road see P. Craig and G. De Búrca, *EU Law* (Oxford, 2011), 399-406.

²⁴⁸ Article 218(6)(a)(ii) TFEU.

²⁴⁹ Article 218(8) 2nd sub para. TFEU.

²⁵⁰ Talks on EU accession have started in July 2010, this complicated process is expected to take several years.

²⁵¹ Piris, *supra* note 47, 164.

Chapter 5. The EU programme on criminal procedural safeguards - A legal analysis of the Roadmap and a comparison with the ECHR

5.1. Introduction

Because of the before mentioned reasons; the lack of an EU-wide standard for criminal procedural safeguards and the overloaded Strasbourg-machinery, it is to be congratulated that the EU has committed itself to set a common standard for procedural rights. The main questions remains whether the (proposed) instruments will provide added value in making defence rights standards more concrete and effective and how they will survive the political pressures. The measures that have already been adopted and the measures that have been proposed offer the opportunity to closely scrutinize these instruments in order to evaluate their contribution to fair trial rights.²⁵² Each section will start with an overview of the standard already set by Article 6 ECHR, what follows is a legal analysis of the provisions contained in the directives and proposal, and ultimately a close comparison between these two standards, in order to test the value of the Roadmap against the standard of the ECHR.

5.2. Measure A-The Right to Interpretation and Translation

The Directive on Interpretation and Translation²⁵³ is the first EU instrument aimed at improving rights for suspects in criminal proceedings and the first directive to be adopted by the Council acting by qualified majority together with the European Parliament (co-decision procedure). Often observed in literature was that the right to interpretation and translation constituted the least controversial one of the rights discussed in the Council,²⁵⁴ and thus appeared first on the agenda. This right is also safeguarded by the ECHR and first will be examined what protection in this context is being offered by the Convention, subsequently the thesis continues with the new Directive and will test its standard against that of the ECHR.

5.2.1. The right to translation and interpretation as safeguarded by the ECHR²⁵⁵

Article 6(3)(e) provides that everyone charged with a criminal offence has the right to have the ‘free assistance of an interpreter if he cannot understand or speak the language used in

²⁵² See also J. Blackstock, ‘Procedural Safeguards in the European Union: a Road Well Travelled?’, 2(1) *European Criminal Law Review* (2012), 20-35; J. Spencer, ‘EU Fair Trial Rights- Progress at Last’, 1(4) *New Journal of European Criminal Law* (2010), 447-457.

²⁵³ For the Directive see (2010) OJ L280/1; for more on its negotiations and adoption see chapter 3.2 above.

²⁵⁴ See, for instance, V. Bazzocchi, ‘The European Charter of Fundamental Rights and the Area of Freedom, Security and Justice’, in Di Federico, *supra* note 226, 177-197, at 187.

²⁵⁵ See Trechsel, *supra* note 169, 327-339.

court'. The ratio behind this right is that an accused who does not speak the language used in the proceedings is clearly disadvantaged.²⁵⁶ Everyone involved in the proceedings benefits from this right as it is 'an essential prerequisite for the proper functioning of the administration of justice'.²⁵⁷ The right commences as soon as the suspected or accused person receives 'official notification' of a criminal investigation and is therefore 'substantially affected',²⁵⁸ and continues to subsist until the proceedings are concluded, including sentencing and appeal procedures.²⁵⁹ The right covers not only (oral) interpretation (as stated in the provision), but also translation of documents.²⁶⁰ However, a written translation of every document used in the process is not required, only translation has to be provided necessary to allow the accused 'to have knowledge of the case against him and to defend himself, notably by being able to put before the court his version of events'.²⁶¹ This may also require the state to ensure a sufficient quality of the interpretation provided; a state does not exempt itself from its obligation by merely appointing and paying for an interpreter.²⁶² The Court has furthermore clarified that 'free' implies a 'once and for all exemption or exoneration'.²⁶³ The Court has swiftly declined the suggestion that an accused could be made to pay for interpretation if ultimately convicted as this would limit the benefit of the safeguard, depriving it of its value 'for it would leave in existence the disadvantages that an accused who does not understand or speak the language used in court suffers as compared with an accused who is familiar with that language',²⁶⁴ 'a disadvantage the provision sought to attenuate'.²⁶⁵

The Court has also clarified that an active approach is expected from the judicial authorities, they are required to investigate whether the accused does need interpretation. In *Cuscani* the Court found a violation of the provision, even though the accused's council did not request for interpretation, in spite of his client's lack of sufficient knowledge of English. The Court found violations of both Articles 6(1) and 6(3)(e), and held that the 'ultimate guardian of the fairness

²⁵⁶ ECtHR 19 December 1989, *Kamasinski v. Austria*, No. 9783/82, para. 79; and ECtHR 18 October 2006, *Hermi v. Italy*, No. 18114/02, para. 68.

²⁵⁷ Trechsel, supra note 169, 328.

²⁵⁸ ECtHR 27 February 1980, *Deweert v. Belgium*, No. 6903/75, para. 46.

²⁵⁹ *Phillips v. the United Kingdom*, para. 39.

²⁶⁰ ECtHR 28 November 1978, *Luedicke, Belkacem and Koç v. Germany*, Nos. 6210/73, 6877/75, 7132/75, para. 48; *Hermi v. Italy*, para. 69.

²⁶¹ *Kamasinski v. Austria*, para. 74.

²⁶² *Ibid.*

²⁶³ *Luedicke, Belkacem and Koç v. Germany*, para. 40.

²⁶⁴ *Ibid.*, paras. 42-48; See also ECtHR 21 February 1984, *Öztürk v. Germany*, No. 8544/79, paras. 57-58.

²⁶⁵ Reed *et al.*, supra note 169, 708

of the proceedings was the trial judge who had been clearly apprised of the real difficulties which the absence of interpretation might create for the applicant'.²⁶⁶

5.2.2. Content of Measure A

In the preamble of the Directive it is stressed, more generally, why there is a need for EU action in this area: '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', and 'Strengthening mutual trust requires a more consistent implementation of the rights and guarantees set out in Article 6 of the ECHR. It also requires, by means of this Directive and other measures, further development within the Union of the Minimum standards set out in the ECHR and the Charter.'²⁶⁷

The Directive will apply to 'criminal proceedings' (not further defined) as well as 'proceedings for the execution of a European Arrest Warrant'.²⁶⁸ The rights set out by the Directive apply from the moment that a person is made aware of being a suspect of having committed an offence until the final determination of the proceedings, including possible sentencing and appeal.²⁶⁹ However, it does not apply to 'minor offences' imposed by an authority other than a criminal court, unless those sanctions are appealed to a criminal court.²⁷⁰ It is furthermore made clear that the Directive does not affect national law concerning the presence of counsel during proceedings, or concerning the right of access to documents during criminal proceedings.²⁷¹

The substantive right to interpretation will apply 'during criminal proceedings before investigative and judicial authorities, including during police questioning, all court hearings and any necessary interim hearings'.²⁷² It will also apply to communications with legal counsel in direct connection with 'any questioning or hearing during the proceedings or with the lodging of an appeal or other procedural applications'.²⁷³ The right extends to 'appropriate

²⁶⁶ ECtHR 24 September 2002, *Cuscani v. the United Kingdom*, No. 32771/96, paras. 38-40.

²⁶⁷ Recitals 6 and 7 of the Directive, *supra* note 253. All the following references in this subsection are to the text of the Directive, unless otherwise mentioned.

²⁶⁸ Articles 1(1), 2(7) and 3(6).

²⁶⁹ Article 1(2).

²⁷⁰ Article 1(3). According to Blackstock it is not yet clear what the reach of this potentially important provision will be, see *supra* note 252, 25.

²⁷¹ Article 1(4).

²⁷² Article 2(1).

²⁷³ Article 2(2).

assistance for persons with hearing or speech impediments'.²⁷⁴ It is also required for Member States to have in place a system to verify the need for assistance,²⁷⁵ and for a decision finding that there is no need for interpretation to be challengeable.²⁷⁶ Technology such as videoconferencing, telephone or internet communication may be used, 'unless the physical presence of the interpreter is required in order to safeguard the fairness of the proceedings'.²⁷⁷ This possibility should only be used as a last resort as it is imaginable how it can be difficult to assure a high standard without an interpreter physically present.

At the end of the provision more generally is safeguarded that the interpretation must be 'of a quality sufficient to safeguard the fairness of the proceedings',²⁷⁸ and especially regarding the use of technology this fairness requirement has to be closely watched.

As for the substantive right to translation, the right requires the written translation, into a language the suspected or accused persons understand, of 'all documents which are essential to ensure that they are able to exercise their right of defence and to safeguard the fairness of the proceedings'.²⁷⁹ 'Essential' in this context includes decisions depriving a person of his liberty, any charge or indictment and any judgement,²⁸⁰ and only as far as documents are relevant for the person to have knowledge of the case against him.²⁸¹ In other cases, decisions on translation shall be taken by the competent (national) authorities, but the person (or his counsel) has the right to 'submit a reasoned request' for further translations.²⁸² Also here a system must be in place to challenge a decision not to allow a document to be translated.²⁸³ It is presumed here that a suspect has knowledge about any further documents of relevance, and/or that the translation provided is not accurate. For an effectuation of these rights assistance of a counsel, who has access to the case file is essential. Whether access to counsel and legal aid will be assured depends on the progress of the other measures (especially Measure C on access to a lawyer and legal aid).

As an exception to these general rules an 'oral translation or oral summary of essential documents may be provided instead of a written translation on condition that such oral

²⁷⁴ Article 2(3).

²⁷⁵ Article 2(4).

²⁷⁶ Article 2(5); Together with the obligation for a review of the quality of the interpretation.

²⁷⁷ Article 2(6).

²⁷⁸ Article 2(8).

²⁷⁹ Article 3(1).

²⁸⁰ Article 3(2).

²⁸¹ Article 3(4).

²⁸² Article 3(3).

²⁸³ Article 3(5); Together with the obligation for a review of the quality of the translation.

translation or oral summary does not prejudice the fairness of the proceedings'.²⁸⁴ It is important that this exception will not be taken lightly as it can cause difficulties for a defence if (especially long) texts are not provided in written form. Furthermore suspects may waive their right to translation (not their right to interpretation) at any time, if they 'have received prior legal advice or have otherwise obtained full knowledge of the consequences of such a waiver, and that the waiver was unequivocal and given voluntarily'.²⁸⁵ A general right to a high quality of translation 'to safeguard the fairness of the proceedings' also appears at the end of this provision.²⁸⁶

The Directive assures that Member States will bear the costs of interpretation and translation, 'irrespective of the outcome of the proceedings'.²⁸⁷ Article 5 reiterates the requirement for 'high quality' of both services: 'concrete measures' shall be taken to give full effect to Articles 2(8) and 3(9). In accordance, Member States must 'endeavour' to establish a register of qualified and independent interpreters and translators, which shall be made, 'where appropriate', available to counsel and relevant authorities.²⁸⁸ It is unclear when this would be inappropriate, 'as verifying whether the interpreter is registered would be the best mechanism of ascertaining their quality'.²⁸⁹ Regrettably this provision is not mandatory; however it provides the basis (and possibly an incentive) for Member States to build a register which will complement the effective implementation of the Directive. Member States furthermore have to train legal professionals (such as judges, prosecutors and other judicial staff) in the process of communicating with interpreters as to ensure efficient and effective communication.²⁹⁰ This is an important provision in the Directive and much can be expected from the training of professionals as they ultimately have to deal with the Directive in practice and this provides a strong mechanism of improving the judicial proceedings.²⁹¹ In line with this attempt to 'improve' proceedings and practice in respect of the rights to interpretation and translation, Member States are also required to keep record of cases where any of these rights have been applied, or where translation rights were waived.²⁹²

²⁸⁴ Article 3(7).

²⁸⁵ Article 3(8).

²⁸⁶ Article 3(9).

²⁸⁷ Article 4.

²⁸⁸ Article 5(2).

²⁸⁹ Blackstock, *supra* note 252, 26.

²⁹⁰ Article 6.

²⁹¹ According to Blackstock, Barrister herself: 'Since training the professionals is the best mechanism of improving legal process, this is a strong article', *supra* note 252, 26.

²⁹² Article 7.

The Directive contains a non-derogation clause stating that nothing in the Directive ‘shall be construed as limiting or derogating’ from ECHR rules, the Charter or international or national law which provides a higher level of protection.²⁹³

5.2.3. Textual comparison with the ECHR

Having seen how the right to interpretation and translation is set out by both instruments, the thesis turns to the comparative discussion of the provisions of the Directive and those of Article 6(3)(e). It is no surprise that there are many similarities between these provisions as the EU negotiators have modelled the Directive on the case law of the ECtHR. However, the advantage the drafters of the Directive had is that they can make use of the knowledge gained over the years in the application of this right, and can further develop and clarify the doctrine. The ratio behind the right is equal as both instruments aim at creating equal rights for those we do and do not understand the language used in a legal system.

Scope of application of the right to translation and interpretation

	Directive 2010/64/EU	ECHR Article 6(3)(e)
Entitlement to claim the right	‘persons who do not speak or understand the language of the criminal proceedings’, Articles 2(1) and 3(1).	Those ‘who cannot understand or speak the language used’, <i>Kamasinski v. Austria</i> , para. 74.
Temporal scope (commencement of the right)	‘official notification or otherwise’, Article 1(2).	‘Official notification’, and/or ‘substantially affected’, <i>Deweert v. Belgium</i> , para. 46.
Temporal scope (termination of the right)	‘final determination’ of the proceedings, Article 1(2), including sentencing and appeal(s).	Entirety of the proceedings, including sentencing matters, <i>Phillips v. the United Kingdom</i> , para. 39.
Costs	‘Member States shall meet the costs of interpretation and translation ... irrespective of the outcome of the	‘free assistance’, Article 6(3)(e). See also <i>Luedicke, Belkacem and Koç v. Germany</i> , para. 40.

²⁹³ Article 8.

	proceedings’, Article 4.	
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Figure 1.

The scope of application of the right as safeguarded by both instruments is ‘practically identical’.²⁹⁴ The right applies in both cases to those who do not understand or speak the language used in court. The ECtHR has made clear though that this does not mean a defendant can select the language used in court; he cannot successfully request on using his own language if he is conversant in several languages, including the one utilised in court.²⁹⁵

The Directive has set the same timeframe for application of the right as developed by the ECtHR; namely from the moment a suspect/accused receives ‘official notification’ of the criminal investigation (thus from the moment he is ‘substantially affected), and continues until the proceedings are concluded (including sentencing and appeal proceedings).

The Directive does furthermore confirm that the right is free and ensures that Member States bear the cost of interpretation and translation, regardless of the outcome of the proceedings.

Substantial right to translation and interpretation

	Directive 2010/64/EU	ECHR Article 6(3)(e)
Interpretation	‘during criminal proceedings before investigative and judicial authorities’, this includes police questioning and all court hearings, Article 2(1). And also communication with counsel, Article 2(2).	At trial, during pre-trial and (possibly) in order to allow communication with counsel, as implicit in <i>Lagerblom v. Sweden</i> .
Translation	‘all documents which are essential to ensure that [suspects] are able to exercise	‘those documents necessary to allow the accused to defend himself’, <i>Kamasinski</i>

²⁹⁴ S. Summers, ‘Comparison of the Provisions of the EU and those of the ECHR on the Procedural Rights of Suspects’, Presentation given at the UKAEL Law Workshop, University of Glasgow, 13 May 2011.

²⁹⁵ ECtHR 25 November 1997, *Zana v. Turkey*, No. 18954/91.

	their right of defence and to safeguard the fairness of the proceedings', Article 3(1).	v. <i>Austria</i> , para. 74.
Waiver	Only the right to translation can be waived, under the condition that it was unequivocal and voluntary, Article 3(8).	Not clarified by the Court, see <i>Cuscani v. the United Kingdom</i> , paras. 38-40.

Figure 2.

As also guaranteed by the ECHR, the Directive's right to interpretation applies both at trial and during pre-trial, and clarifies that it allows for communication with counsel. The ECtHR has implicitly confirmed this right in *Lagerblom*, where the Finnish defendant complained about his appointed Counsel's inability to speak Finnish; however the Court held that the defendant did speak sufficient Swedish. The confirmation by the Directive is valuable and leaves no doubt to the matter.

The inclusion of the right to translation in the Directive can also be seen as a welcome clarification, this because the right is not explicitly stated in Article 6(3)(e). The Strasbourg Court has recognised this right, but now the EU aims at turning this doctrine developed by the Court into legislation.

Another possible improvement can be found in the use of the term 'essential'. The ECtHR has held in *Kamasinski* that Article 6(3)(e) does cover a right to translation of 'necessary' documents, it is not further specified what this exactly means. The Directive assures that Member States have to provide suspects with a translation of all documents that are essential to exercise the right of defence. What this term exactly entails has to be decided the ECJ in its future case law, but the Directive provides the Court with a terminological guideline.

Progress has also been made by the Directive on the matter of waiver. The Directive forbids waiver of the right to interpretation and clarifies the circumstances regarding waiver of the right to translation. The ECtHR does probably hold a similar position, as can be inferred from *Cuscani*, in which the Court found a violation of Article 6(3)(e) even though the accused's barrister had explicitly 'waived' their right to interpretation because they could manage without. The Court here required an 'active' approach by the judge, as he is the ultimate guardian of fairness to ensure that absence of an interpreter would not comprise the fairness of

the proceedings. As mentioned before, the Directive does, regrettably, not contain a binding provision on national courts' obligations to ensure effective translation.²⁹⁶

The main difference between the Directive and Article 6(3)(e) is the fact that the Directive applies to proceedings for the execution of a EAW.²⁹⁷ Article 6 ECHR (as a whole) does not apply to proceedings concerning extradition because the person concerned is not 'charged under the jurisdiction of the state from which he or she is to be extradited'.²⁹⁸ This 'lack' of protection for persons subjected to a EAW will be erased step-by-step if the measures proposed by the Roadmap will all apply to EAW proceedings.

Thus the Directive on Interpretation and Translation makes a number of significant improvements to the existing ECHR safeguards. These improvements can be found in the textual inclusion of the right to translation, the use of the term 'essential' in relation to what documents have to be translated and the circumstances under which this right can be waived, and adding a right to interpretation as regards communication with counsel. Another big improvement can be found in the Directive's application to the EAW. The fact that these provisions are contained in a directive means that the Commission has available the 'ordinary' EU enforcement tools on infringement,²⁹⁹ and thus ensures that Member States will comply with these standards that have the potential to not only meet the Strasbourg standard, but possibly to even surpass it.

5.3. Measure B- The Right to Information about Rights and to Information about the Charges

Final agreement on the second measure was reached in May 2012.³⁰⁰ This Directive contains two distinct parts. The first part contains the right to information about rights, the needs for which have been demonstrated by recent research.³⁰¹ The second part concerns information about the actual charge and access to the case file. A heavily debated aspect of the negotiations was how this information should be provided given the variation in approach

²⁹⁶ Article 6 on 'training' is useful, but worded non-binding.

²⁹⁷ Article 1. It also goes beyond the protection set out in the EAW Framework Decision OJ L190/1 (2002), as it refers only generally to the right to be assisted by an interpreter in accordance with national law (Article 11(2)), and to a right to information about the contents of the Warrant (Article 11(1)), without explicitly requiring a translation of the Warrant.

²⁹⁸ ECtHR 6 February 2003, *Mamatkulov and Abdurasulovic v. Turkey*, Nos. 46827/99 and 46951/99, para. 80.

²⁹⁹ More on this in the general conclusion on the Roadmap in chapter 5.5 below.

³⁰⁰ For the Directive see (2012) OJ L142/1; for more on its negotiations and adoption see chapter 3.2 above.

³⁰¹ Spronken, *supra* note 87.

amongst Member States.³⁰² For instance the right to silence, generally considered as one of the most fundamental rights to ensure a fair trial, was not contained in the first Commission Proposal. After heavy criticism from the European Parliament and civil rights groups this right was eventually added to the proposal.³⁰³ Before this thesis turns to the Directive an overview will be given of how the right to information is safeguarded in the ECHR, so we can later test the new EU instrument against this standard.

5.3.1. The right to information as safeguarded by the ECHR³⁰⁴

Article 6(3)(a) provides that everyone charged with a criminal offence is to be ‘informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him’. Article 5(2) provides a similarly worded guarantee for persons detained pending trial. Although both provisions provide an individual with a claim to receive information on why judicial action has been taken against him, the purpose of the two provisions is essentially different. Whereas Article 5(2) enables an arrested person to challenge his detention, Article 6(3)(a) is intended to give the accused the information essential to answer the charge against him.

The rationale of Article 6(3)(a) is to ensure a suspect can fully understand the allegations with a view to preparing an adequate defence.³⁰⁵ The adequacy of this information should be tested not only against paragraph (1)’s general right to a fair hearing, but also against paragraph (3)(b)’s guarantee of adequate time and facilities. The accused should be given details of the offence(s), victim, locus and dates; the judicial authorities can be required to take additional measures in order to ensure an accused effectively understands the information.³⁰⁶

Prosecuting authorities are required to actively inform the suspect of this information and bring it to the attention of the defence, this requirement ‘cannot be complied with passively by making information available without bringing this to the attention of the defence’.³⁰⁷

There are no specific requirements regarding form, but as the purpose of the right is to enable the accused to prepare his defence, the information provided must be sufficiently detailed to

³⁰² See Proposal for a Directive of the European Parliament and of the Council on the Right to Information in Criminal Proceedings: *State of Play*, Council doc. 15618/10, 29 October 2010 Brussels; and Outstanding Issues and Consolidated Text, Council doc. 12163/11, 1 July 2011 Brussels.

³⁰³ See Draft Report of Committee on Civil Liberties, Justice and Home Affairs, 20 December 2010 Brussels, 2010/0215 (COD).

³⁰⁴ See Trechsel, *supra* note 169, 192-207.

³⁰⁵ *Mattoccia v. Italy*, para. 60.

³⁰⁶ ECtHR 19 December 1989, *Brozicek v. Italy*, No. 10964/84, paras. 41-42.

³⁰⁷ *Mattoccia v. Italy*, paras. 58-72 at para. 65.

achieve this goal. The information can be provided orally,³⁰⁸ however in case an accused does not understand the language a suspect should in principle be provided with a written indictment.³⁰⁹

Next to the requirement to be informed of the nature and cause of the accusations a second element to the right to information is recognised in the Strasbourg case law. This concerns the right to be informed of the defence rights available in the Convention, however this particular aspect of the right is not explicitly mentioned in the ECHR. In this case law the Court required judicial authorities to take positive measures to ensure effective compliance with Article 6.³¹⁰ This is furthermore specified in the *Padalov* and *Talat Tunc* cases, in which the Court required an active approach by authorities and required them to inform the accused of their specific right to legal aid.³¹¹ In *Panovits* the Court clarified further that judicial authorities have a positive obligation to provide the accused with information on the right to legal assistance and legal aid, whenever these rights have arisen.³¹² The Court went on and held that authorities must take all steps, within reasonable limits, to make the accused aware of his defence rights and understands, as far as possible, the implications of his conduct under questioning.³¹³ Concerning the so-called ‘letter of rights’³¹⁴ the Court found that it is not sufficient information as such.

A third element of the right to information that has been established in the ECtHR case law is access to the evidence on which the accusations are based. All material evidence, for and against the accused, should be disclosed to the defence,³¹⁵ and both parties must be given the opportunity to have disclosed and comment upon the observations and evidence of the other party.³¹⁶ In *Natunen* the Court held that these obligations ‘include the opportunity to acquaint himself [the defendant], for the purposes of preparing his defence, with the results of investigations carried out throughout the proceedings’.³¹⁷ However, the right to full disclosure

³⁰⁸ ECtHR 25 March 1999, *Pélissier and Sassi v. France*, No. 25444/94, para. 53.

³⁰⁹ *Kamasinski v. Austria*, para. 79.

³¹⁰ ECtHR 13 May 1980, *Artico v. Italy*, No. 6694/74, para. 36; ECtHR 30 January 2001, *Vaudelle v. France*, No. 35683/97, paras. 52, 59 and 60.

³¹¹ ECtHR 10 August 2006, *Padalov v. Bulgaria*, No. 54784/00; ECtHR 27 March 2007, *Talat Tunc v. Turkey*, No. 32432/96.

³¹² ECtHR 11 December 2008, *Panovits v. Cyprus*, No. 4268/04, paras. 72-73.

³¹³ *Ibid*, paras. 67-68.

³¹⁴ On which more in the context of the Roadmap see chapter 2.2 above.

³¹⁵ ECtHR 16 December 1992, *Edwards v. the United Kingdom*, No. 13071/87, para. 36.

³¹⁶ ECtHR 28 August 1991, *Brandstetter v. Austria*, Nos. 11170/84, 12876/87, 13468/87, para. 66; *Jasper v. the United Kingdom*, para. 51; ECtHR 6 September 2005, *Salov v. Ukraine*, No. 65518/01, para. 87.

³¹⁷ ECtHR 31 March 2009, *Natunen v. Finland*, No. 21022/04, para. 42; See also *Galstyan v. Armenia*, para. 84.

is not absolute and can be subject to limitations ‘in pursuit of a legitimate aim such as the protection of national security or of vulnerable witnesses or sources of information ... [any] such restriction on the rights of the defence should however, be strictly proportionate and counterbalanced by procedural safeguards adequate to compensate for the handicap imposed on the defence’.³¹⁸ Even though the Court recognises that for a criminal investigation to be conducted efficiently information obtained can ‘be kept secret in order to prevent suspects from tampering with evidence and undermining the course of justice ... this legitimate goal cannot be pursued at the expense of substantial restrictions on the defence. Therefore, 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.’³¹⁹ It is not developed in the Court’s jurisprudence when exactly material evidence should be disclosed.

5.3.2. Content of Measure B

The preamble contains the same references as Measure A to the ECHR and the Charter, and also stresses the need to enhance mutual trust through setting common minimum rules. This proposed measure has the same scope as the Directive on interpretation and translation and contains the same exclusion of minor offences.³²⁰ Furthermore the Proposal contains an identical non-derogation clause as in Measure A,³²¹ and a similar vague training provision for professionals.³²²

As to the substance, it is first ensured that all suspects and accused are provided ‘promptly with information concerning at least the following procedural rights as they apply under national law’: access to a lawyer, legal advice free of charge, information about the accusation (with reference to the definition in Article 6), interpretation and translation and the right to silence.³²³ ‘This information shall be provided either orally or in writing and in simple and accessible language, taking into account any particular need of vulnerable suspected or

³¹⁸ *Jasper v. the United Kingdom*, para. 43; *Edwards v. the United Kingdom*, para. 39; ECtHR 24 June 2003, *Dowsett v. the United Kingdom*, No. 39482/98, para. 42.

³¹⁹ ECtHR 13 February 2001, *Garcia Alva v. Germany*, No. 23541/94, paras. 41-42; ECtHR 9 July 2009, *Mooren v. Germany*, No. 11364/03, paras. 121-124.

³²⁰ Article 2, *supra* note 300. All the following references in this subsection are to the text of the Directive, unless otherwise mentioned.

³²¹ Article 10.

³²² Article 9.

³²³ Article 3(1).

accused persons.’³²⁴ It is subsequently set out that a suspect must be ‘provided promptly with a written Letter of Rights’, which they shall be given an opportunity to read and be allowed to keep throughout detention,³²⁵ stating the rights assured above. The letter is furthermore required to contain information (as under national law) on: access to the materials in the case, the right to inform consular authorities and a third person, access to urgent medical assistance, how long the deprivation of liberty can last,³²⁶ and the right to challenge detention.³²⁷ Here also, this must be drafted in simple and accessible language; for this purpose an indicative model letter is annexed.³²⁸ The letter must be drafted in a language which the person understands, where this is not available the information shall be given orally in a language he understands, in this case a letter in a language he understands shall still be given ‘without undue delay’.³²⁹ The same right as described here applies in European Arrest Warrant cases.³³⁰

Concerning the substance of the second right contained in the Directive; the right to information about the accusation, it is set out that ‘information about the criminal act [a person] is suspected of having committed’ shall be ‘provided promptly and in such detail as is necessary to safeguard the fairness of the criminal proceedings and effectively exercise the person’s right of defence’.³³¹ A suspect should be informed of the reasons for arrest including the criminal act he is suspected of having committed at initial detention.³³² Member States are furthermore required to, ‘at the latest upon submission of the merits of the accusation to a court’; provide detailed information concerning the accusation, ‘including the nature and legal classification of the offence, as well as the nature of participation by the accused person’.³³³ When changes are made to the information, to suspect should be promptly informed of these ‘where this is necessary to safeguard the fairness of the proceedings’.³³⁴ In addition it is provided that a suspect should have free access to materials.³³⁵ An arrested or detained person should be able to obtain the relevant documents related to the case which are

³²⁴ Article 3(2).

³²⁵ Article 4(1).

³²⁶ Article 4(2).

³²⁷ Article 4(3).

³²⁸ Article 4(4); see also Annex I.

³²⁹ Article 4(5).

³³⁰ Article 5; an indicative letter for this purpose is contained in Annex II.

³³¹ Article 6(1).

³³² Article 6(2).

³³³ Article 6(3).

³³⁴ Article 6(4).

³³⁵ Article 7(5).

in the possession of the prosecuting authorities; relevant documents are those ‘essential to effectively challenge’ the detention ‘according to national law’.³³⁶ More generally it is stated that Member States shall provide access to all material evidence in the possession of the competent authorities ‘for or against the suspected or accused person’, with the purpose of safeguarding ‘the fairness of the proceedings and to prepare the defence’.³³⁷ Access to these materials shall be granted at ‘the latest upon submission of the merits of the accusation to the judgement of the court’.³³⁸ This provision is rather awkwardly drafted as it could result in materials being submitted to the defence at a moment too late to ensure a preparation of the case in line with the requirements of the ECHR. In some Member States this provision would allow for the submission of these materials at the presentation by the prosecution of the case at trial and not any earlier.

Access to materials may be limited, unless this would prejudice the right to a fair trial, if it leads to serious risk to life or the fundamental rights of another person, or if it is strictly necessary to safeguard an important public interest, such as prejudicing an ongoing investigation or where it may seriously harm national security.³³⁹ The decision not to disclose certain materials must be taken by a judicial authority or at least be subject to judicial review.

A suspect has the right to challenge ‘the possible failure or refusal of the competent authorities to provide the information’.³⁴⁰ However, the provision lacks clarity on a duty to inform a suspect on whether access has been limited. Clearly no challenge can be made by the defence if they were not made aware of the existence of certain material. This omission makes the effectivity of the provision questionable.

As mentioned before, an indicative model letter of rights is annexed to the Directive for both national cases and EAW cases. These letters are inspired by the model developed in a study conducted on the way suspects throughout the EU are informed of their rights in writing during criminal proceedings.³⁴¹ The model letters are examples of simple and accessible language usage in order to explain what rights are available.³⁴² Both model letters list what

³³⁶ Article 7(1).

³³⁷ Article 7(2).

³³⁸ Article 7(3).

³³⁹ Article 7(4).

³⁴⁰ Article 8(2).

³⁴¹ Spronken, *supra* note 87.

³⁴² As required by Article 3(2).

rights a suspect or accused person is entitled to and subsequently explains these rights in more detail. These explanations are simple and clear, and do not consist of references to the legal codes in which the rights originate. The model letters have been criticised for having a limited scope, focusing on the first stages after arrest.³⁴³ These remarks seem fair as the full scope of the instrument is not reflected in the model letters. However, these model letters are only meant to be ‘indicative’ for Member States and it thus remains to be seen how Member States will actually draft these letters in practice. But it is clear that if the later stage of proceedings will not be included in letters, the full potential of the measure will not be used, in this light particularly can be thought of information on appeal possibilities.

5.3.3. Textual comparison with the ECHR

Again there are many similarities between the right to information as provided for by the Directive and the right as developed by the ECtHR. Here both instruments are compared to get an insight into what the similarities are and where possible differences can be found.

Right to information about procedural rights

	Directive 2012/13/EU	ECHR Article 6(3)(a)
Information about procedural rights	Provided promptly with information on procedural rights, including access to a lawyer, legal aid, information on the accusation and interpretation and translation, Article 3(1).	To be made aware of certain procedural rights, see <i>Panovits v. Cyprus</i> , paras. 72-73, including access to a lawyer, information on the charge, access to the file and right to an interpreter.
Written information about rights (letter of rights)	Promptly at arrest, Article 4(1). For EAW proceedings see Article 5.	A written notification alone may not suffice, see <i>Panovits v. Cyprus</i> .

Figure 3.

³⁴³ Blackstock, supra note, 252.

Article 6 ECHR does not expressly set out the right to information about procedural rights, the right to information on the charge being an exception. The ECtHR has ruled in *Panovits* and *Padalov* that the accused should be informed of his right to counsel, the Court required the judicial authorities to actively assure that applicants knew that they could request for legal advice free of charge. A similar positive obligation is contained in the Directive. Likewise, the ECHR does not expressly provide for a right to be informed of the right to an interpreter. From *Cuscani* it however became clear that if an accused cannot participate effectively because of a lack of an interpreter, and judicial authorities do not act, it is likely to be a violation of Article 6(3)(e).

The right to be brought promptly before a judge is also not explicitly mentioned in the ECHR. The ECtHR has however ruled that this must happen automatically, thus without the accused requesting for a hearing. Authorities are required to do so within a 96 hours period of the accused's detention.

Here, as was also the case with Measure A, it is shown that the Directive makes explicit mention of rights already developed by the ECtHR, but not explicitly mentioned in the text of Article 6. This codification of doctrine developed in the Court's case law over the years is a strengthening of the position of the defence as, under the EU regime, they can directly refer to a codified provision.

Furthermore the requirement to provide suspects or accused with a letter of rights is not included in the ECHR, although this is practice in a number of Member States. With reference to this already existing practice the value of inclusion of this right in the Roadmap was often not considered as 'ground breaking',³⁴⁴ however recent study has shown that this practice is not as widespread and effective as often presumed and therefore inclusion in the Directive can become valuable.³⁴⁵ The Strasbourg 'view' on the letter of rights is that provision of a letter of rights on its own does not dismiss judicial authorities of taking other action. Even after issuing a suspect with such a letter; Member States remain obliged to positively ensure that a suspect is fully aware of his rights. This is an example of how rights secured by the Directive can be further strengthened by looking at both 'systems' of protection in a 'harmonious' way. The Directive explicitly states that suspects have to be provided with a letter of rights, and the ECtHR in its turn points out that this on its own does not necessarily dismiss judicial authorities from their other obligation to ensure that the suspect is provided with sufficient

³⁴⁴ For instance by Summers, supra note 294.

³⁴⁵ See Spronken, supra note 87.

information regarding his rights. An example like this shows that both instruments in the future might cooperate and complement each other, and where one instrument lacks a safeguard, the other might provide it.

Information about the charge

	Directive 2012/13/EU	ECHR Article 6(3)(a)
Information about the charge	‘promptly and in such detail as is necessary’, Article 6(1); detailed information of the accusation and the nature of participation, Article 6(3).	‘promptly and in a language which he understands and in detail about the nature and cause of the accusation’, Article 6(3)(a). For information about facts see <i>Mattoccia v. Italy</i> , and for the law see <i>Pélissier and Sassi v. France</i> .

Figure 4.

The requirement of Article 6 Directive that a suspect/accused is provided with both a detailed description of the charge against him and information about the nature and classification of the offence is similar to the requirement in Article 6(3)(a) ECHR that the accused be informed in detail of the ‘nature and cause of the accusation’, and thus provides us with another example of how the measures adopted in line with the Roadmap set a standard identical to the Strasbourg standard. It can be noted though that it is not yet clear what exactly ‘in such detail as is necessary’ means, whereas the ECHR is clearer in stating ‘in detail’. Here again, it is only when these instruments enter into force that we will be able to see how these norms have been interpreted by the Member States and ultimately how the ECJ views this. Important for our purposes is to determine that in some instances the provisions contained in the various directives clarify certain issues, but in other instances (like here) lead to the opposite, as they leave room for a variety of interpretations.

Access to materials of the case

	Directive 2012/13/EU	ECHR
On arrest	Access to documents in the case-file which are essential to challenge ‘the lawfulness of the arrest or detention’, Article 7(1).	Access to documents relevant to challenge the lawfulness of the detention, see <i>Lamy v. Belgium</i> ³⁴⁶ ; <i>Lietzow v. Germany</i> ³⁴⁷ , Article 5(3) and 5(4).
For preparation of defence	Access shall be granted ‘in due time to allow the effective exercise of the right of defence’, Article 7(3).	Access to enable defence to exercise the right to be heard, Article 6(3)(b) and 6(1).
Upon conclusion of the investigation	‘all material evidence’ in possession of authorities, Article 7(2); ‘at the latest upon submission of the merits of the accusation to the judgement of a court’, Article 7(3); certain documents may be refused by judicial authorities, Article 7(4).	Access to the case-file in order to enable the defence to exercise the right to be heard in pursuit of the principles of adversarial proceedings and the principle of equality of arms, Article 6(3)(b) and 6(1).

Figure 5.

The new EU instrument assures for the accused access on arrest to the ‘documents related to the specific case’ necessary to challenge ‘the lawfulness of the arrest or detention’. The ECtHR has also specified that in the context of Article 5 ECHR an accused should have access to the ‘relevant evidence’ to enable him an effective challenge of the lawfulness of his detention. In earlier versions of the proposal for a Directive on the right to information reference was made to ‘case-file’ instead of ‘documents related to the specific case’.³⁴⁸ The term ‘case-file’ however can cause uncertainty as in some national legal systems there is no

³⁴⁶ ECtHR 30 March 1989, *Lami v. Belgium*, No. 10444/83.

³⁴⁷ ECtHR 13 February 2001, *Lietzow v. Germany*, No. 24479/94, para. 47.

³⁴⁸ See COM (2010) 392/3, Article 7(1).

provision for a case-file as such. Therefore a text closer to the Strasbourg jurisprudence was chosen in the latest and final proposal in order to cover all relevant documents in all jurisdictions. The right to access to the case-file is another example where the Directive incorporates a practice developed by the Strasbourg Court which is not explicitly mentioned in the ECHR.

Regarding the effective preparation of defence and the opportunity to challenge pre-trial detention the time limit as set by the Directive³⁴⁹ is important. As noted earlier this provision is rather unclear and can potentially cause a substantial delay in provision of documents. It seems that the ECHR provides a more useful standard as it ensures access to documents in order to enable a suspect to exercise his right to be heard.³⁵⁰ Thus according to the ECHR documents have to be provided in time for a suspect to exercise his right to be heard, a protection equally provided by the Directive, however the added sentence of ‘the latest upon submission’ of a case to a court is rather awkward and potentially threatens the effectiveness of the provision. Here it is obvious that the right as assured by the case law of the ECtHR provides a more useful and valuable safeguard.

Lastly, at the conclusion of the investigation, the defence is entitled to the full case-file in accordance with both instruments. The EU Directive specifies further under what circumstances exceptions are permitted and prescribes this decision to be taken by a judicial authority or at least being under scrutiny of judicial review. Here the Directive foresees in a necessary protection for the suspect/accused as the decision to not (or not completely) disclose the case-file, which can have far-reaching implications for the person involved, has to be made either by a judicial authority or can be scrutinised by such an authority. The other side to this story however, as mentioned before, is that there is no mention of an obligation for authorities to inform the defence of such a non-disclosure, which significantly weakens this essential safeguard.

5.4. Measure C- The Right of Access to a Lawyer and the Right to Communicate Upon Arrest³⁵¹

The Directive implementing Measure C of the Roadmap was proposed by the Commission in June 2011.³⁵² After negotiations on this proposed directive started in July 2011,³⁵³ a general

³⁴⁹ Article 7(3).

³⁵⁰ Articles 6(1) and 6(3)(b) ECHR.

³⁵¹ See also C. Heard and R. Schaeffer, ‘Making Defence Rights Practical and Effective: Towards an EU Directive on the Right to Legal Advice’, 2(3) *New Journal of European Criminal Law* (2011), 270-281.

approach has now been reached by the Council and negotiations with the European Parliament are ongoing,³⁵⁴ it is anticipated that a final agreement will be adopted in spring 2013. The proposal aims at approximating national law on access to a lawyer and on the right to communicate upon arrest. Contrary to what was agreed in the Roadmap, the instrument does not deal with the politically difficult issue of legal aid. At the same time it does include the right to consular assistance and notification of a third person as initially was set out to be arranged in Measure D.

The right of access to a lawyer is often considered as the most essential of procedural safeguards, this because a lawyer is able to introduce a suspects to all other rights to which he is entitled, something of which suspects quite often do not possess knowledge. What follows is a short study of how the right on access to a lawyer is safeguarded by the ECHR; this study includes also the right to free legal assistance in order to lay out the full, much broader, protection offered by the Convention in this context.

5.4.1. The right to (free) legal assistance and to defend oneself as safeguarded by the ECHR³⁵⁵

Article 6(3)(c) guarantees that everyone charged with a criminal offence has the right to ‘defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require’. The purpose of this provision is to ensure that proceedings against an accused ‘will not take place without an adequate representation of the case for the defence’.³⁵⁶ The accused’s lawyer serves as the ‘watchdog of procedural regularity’,³⁵⁷ ‘both in the public interest and for his client’.³⁵⁸ Article 6(3)(c) applies to all stages of the criminal process.³⁵⁹ Concerning the pre-trial stage, the provision will be infringed ‘if and insofar as the fairness of the trial is likely to be seriously prejudiced’ by a failure to comply with it at that stage of the proceedings.³⁶⁰

³⁵² COM (2011) 326 final, 8 June 2011 Brussels.

³⁵³ Progress Report, Council doc. 18215/11, 6 December 2011 Brussels.

³⁵⁴ General Approach, Council doc. 10908/12, 8 June 2012 Brussels.

³⁵⁵ See Trechsel, *supra* note 169, 242-290.

³⁵⁶ ECtHR 25 April 1983, *Pakelli v. Germany*, No. 8398/78, para. 84.

³⁵⁷ ECommHR 8 July 1978, *Ensslin, Baader and Raspe v. Germany*, Nos. 7572/76, 7586/76 and 7587/76, p. 114.

³⁵⁸ *Harris et al.*, *supra* note 168, 312.

³⁵⁹ It does not apply to proceedings challenging detention on remand; these claims fall within Article 5(4).

³⁶⁰ ECtHR 24 November 1993, *Imbrioscia v. Switzerland*, No. 13972/88, para. 36.

The right to a defence, as in Article 6(3)(c), contains three guarantees: the right to defend oneself in person, the right to legal assistance and the right to free legal aid.³⁶¹

Right to self-representation

According to Article 6(3)(c) the accused does have the right to defend himself in person. However, the right to self-representation is not an absolute right.³⁶² Member States are allowed a ‘margin of appreciation’,³⁶³ and in certain cases may require compulsory appointment of a lawyer if the interests of justice so require.³⁶⁴ Relevant circumstances include the subject matter of the case, the complexity and legal issues, and the personality of the accused,³⁶⁵ or when an appeal is lodged.³⁶⁶

*Legal assistance*³⁶⁷

An accused who does not defend himself in person is entitled to have legal assistance either through a lawyer by his own choosing, or at the expense of the state, the latter is dependent on the presence of certain conditions though. Legal assistance means advice and representation, both in and out of court.³⁶⁸ The state cannot require an accused to defend himself in person.³⁶⁹ The right of the accused ‘to defend himself ... through legal assistance of his own choosing’ is the most absolute right contained in Article 6(3)(c),³⁷⁰ and is one of the fundamental features of a fair trial.³⁷¹ A suspect represented by a lawyer is in a better position regarding his rights, both because he is better informed on his rights and because his lawyer ensures his rights are being enforced.

³⁶¹ *Pakelli v. Germany*, para. 31.

³⁶² ECommHR 5 July 1977, *Decision on the Admissibility of X v. Austria*, No. 7138/75; ECtHR 25 September 1992, *Croissant v. Germany*, No. 13611/88, para. 29.

³⁶³ *Decision on the Admissibility of X v. Austria; Croissant v. Germany*, para. 27.

³⁶⁴ ECtHR 15 November 2001, *Decision on the Admissibility of Correia de Matos v. Portugal*, No. 48188/99; ECtHR 14 January 2003, *Lagerblom v. Sweden*, No. 26891/95, para. 50.

³⁶⁵ *Croissant v. Germany*, para. 30.

³⁶⁶ ECtHR 24 November 1986, *Gillow v. the United Kingdom*, No. 13611/88, para. 69.

³⁶⁷ For a more detailed account of the right to (practical and effective) legal assistance see Harris *et al.*, *supra* note 168, 315-317 and 319-322.

³⁶⁸ *Can v. Austria*.

³⁶⁹ *Pakelli v. Germany*.

³⁷⁰ Trechsel, *supra* note 169, 266.

³⁷¹ ECtHR 23 November 1993, *Poitrimol v. France*, No. 14032/88, para. 34.

Furthermore, when the accused is represented by a lawyer, his own presence at the trial is also guaranteed.³⁷² Even though as a general rule the accused can choose his own lawyer,³⁷³ a state may refuse to recognise it for ‘relevant and sufficient’ reasons.³⁷⁴

*Legal aid*³⁷⁵

Article 6(3)(c) also provides for a right to legal assistance free of charge. Whether an accused is indigent and requires legal aid is in first instance for the national authorities to determine, as a ‘margin of appreciation’ applies, however the Strasbourg Court remains competent to review their assessment.³⁷⁶

An accused’s right to free legal aid is subject to two conditions, first the accused must lack ‘sufficient means’ to pay for legal assistance, and second when the interests of justice so require.³⁷⁷ Even though the accused needs to show that he lacks ‘sufficient means’, he does not have to prove ‘beyond all doubt’ that he lacks the means to pay for his assistance.³⁷⁸ The Court has furthermore identified three factors that should be taken into account in determining whether the ‘interests of justice’ require legal assistance. First, the seriousness of the offence and the possible sentence;³⁷⁹ in *Benham* the Court stated that where any ‘deprivation of liberty is at stake, the interests of justice in principle call for legal representation’.³⁸⁰ Second, the complexity of the case; in *Gutfreund* the Court suggested that the more complicated a case was, either on the law or on the facts, the more likely that legal aid is required.³⁸¹ Third, the personal situation of the defendant; the capacity of the accused would be tested in order to find out whether he could present his case.³⁸²

³⁷² *F.C.B. v. Italy*.

³⁷³ *Goddi v. Italy*, p. 5.

³⁷⁴ *Croissant v. Germany*, para. 30.

³⁷⁵ See also *Harris et al.*, supra note 168, 317-319.

³⁷⁶ *Decision on the Admissibility of Correia de Matos v. Portugal*, p. 315.

³⁷⁷ *Pakelli v. Germany*, para. 34.

³⁷⁸ In *Pakelli v. Germany* this formula was applied and satisfied as the applicant had spent two years in custody prior to the case, provided evidence of means to the Commission that made them decide to award him legal aid in lodging his ECtHR application, and had also offered to provide the West German Federal Court with evidence, see para. 34.

³⁷⁹ ECtHR 24 May 1991, *Quaranta v. Switzerland*, No. 8398/78, para. 34.

³⁸⁰ ECtHR 10 June 1996, *Benham v. the United Kingdom*, No. 19380/92, para. 61; In this case it concerned a potential three months’ imprisonment for non-payment of community charge.

³⁸¹ ECtHR 12 June 2003, *Gutfreund v. France*, No. 45681/99, para. 40.

³⁸² *Quaranta v. Switzerland*, paras. 35-36.

The right to choose a lawyer can be subject to limitations, in particular in cases where the state pays for the defence,³⁸³ even though the wishes of the accused must be taken into account. The Convention does not explicitly require judicial authorities to inform suspects on their right to (free) legal assistance, however the Court has made clear that such obligation does exist and states must ‘actively and adequately’ inform suspects of their right to legal representation.³⁸⁴

5.4.2. Content of Measure C

The right of access to a lawyer is a good example of the great variety of legal systems throughout the EU, evidenced by the differences between when this right entails and what a lawyer is entitled to do. Often these differences can be attributed to the differences between adversarial and inquisitorial systems, but the Strasbourg court has uniformly stressed the importance of a lawyer in criminal proceedings. In this context the recent *Salduz*³⁸⁵ ruling is of paramount importance,³⁸⁶ in which the Grand Chamber established the right of access to a lawyer from the first interrogation by the police where the information gained is used to further proceedings as a fundamental aspect of a fair trial. In the subsequent *Dayanan* ruling the Court further specified how that right can be made practical and effective.³⁸⁷

The Commission proposal was a clear attempt to bring these elements into an EU instrument which at the same time adds value to the Strasbourg body of law.³⁸⁸ The proposal was drafted in a broad manner aiming at including persons at the outset of an investigation who, because of tactical reasons practiced by police to dodge suspect’s rights applying, may be seen as witnesses or suspects of less serious crimes.³⁸⁹ However this broad approach and inclusion of people ‘at the outset’ has not survived the first reading by the Council. It is the text on which the Council has reached a general approach that will be analysed here, as this is the most recent text. It has to be noted that this is not going to be the final text as the Parliament will have differing views and it is to be expected that they would prefer a version of the text closer to the initial Commission proposal.

³⁸³ *Lagerblom v. Sweden*, para. 54.

³⁸⁴ *Padalov v. Bulgaria*, paras. 53-55; *Panovits v. Cyprus*, para. 64.

³⁸⁵ ECtHR 27 November 2008, *Salduz v. Turkey*, No. 36391/02.

³⁸⁶ *Salduz* is also a good example of the ability of the ECtHR to deliver substantial judgements, despite the current problems with the functioning of the system.

³⁸⁷ ECtHR 13 October 2009, *Dayanan v. Turkey*, No. 7377/03.

³⁸⁸ Explanatory Memorandum, COM (2011) 326 final, para. 14.

³⁸⁹ Article 10, *supra* note 352.

The proposed Directive has a different scope from Measures A and B and more stringent conditions are required for this instrument to apply.³⁹⁰ Limitations as regarding minor offences are still to be debated as Member States differ on the question what offences to exclude from the scope of the instrument.³⁹¹ There are sounds that these minor offences might be extended to also cover courts martial and other procedures.³⁹² If this further limitation would become reality it would be a serious limitation and the justification for this is unclear at the moment.

Access to a lawyer

The central provision provides for access to a lawyer ‘in such a time and manner so as to allow the person concerned to exercise his rights of defence practically and effectively’.³⁹³ This is in any event, whichever is the earliest, either before any questioning by the police or other law enforcement authorities; or upon carrying out any procedural or evidence gathering act; or as soon as practically possible after the deprivation of liberty; or before a suspect appears before a criminal court.³⁹⁴ The right as proposed by the Commission applies thus from the first interrogation, regardless where and under what circumstances this takes place, in line with the *Salduz* ruling. Debate has taken place as to how this works in practice, and it will prove to be useful only if questioning does not take place until at the police station where interrogation can be properly recorded and a lawyer can be present. However, after first reading the Council has proposed to amend the text to include ‘formal questioning’, instead of ‘from the first interrogation’. This new wording requires further clarification as to what ‘formal’ in this context means. The danger of this new wording is that Member States might misuse this provision and interpret this in such a way that certain forms of questioning, which for instance take place before the first official interrogation or outside the police station, fall outside the scope of the Directive and thus not assure the *Salduz* standard.

³⁹⁰ Article 2, supra note 354. All the following references in this subsection are to the text of the Council General Approach, unless otherwise mentioned.

³⁹¹ Portugal has for instance declared that the instrument ‘should have a large scope of application in which minor offences should also be included’, *ibid*, declaration 5.

³⁹² See Blackstock, supra note 252, 30.

³⁹³ Article 3(1).

³⁹⁴ Article 3(2).

As to the content of the right; a suspect or accused person is entitled to communicate with his lawyer, and for his lawyer to be present and participate when he is officially interviewed, which shall be recorded in accordance with national law.³⁹⁵

The Commission proposal contained a broader and more detailed provision on what a lawyer was allowed to do (this included asking questions, request clarification and make statements).³⁹⁶ Furthermore, in the initial proposal a lawyer had the right ‘to check the conditions in which the suspect or accused person is detained’;³⁹⁷ it was however questioned by Member States whether this is a role for lawyers, and even if so whether this is the place to deal with this. A further amendment made to the Commission Proposal is the inclusion of paragraph 4. After debate in the Council on what ‘access’ meant in practice it was set out that a distinction exists between cases in which a person is deprived of his liberty and cases in which this does not happen. If a person is deprived of liberty he should be ‘in a position to effectively exercise his right of access to a lawyer’.³⁹⁸ Furthermore an important change to the initial proposal has been made by the Council by including a ground for derogation to Article 3. Member States may ‘in exceptional circumstances and in the pre-trial stage only’ temporarily derogate from the right to a lawyer, when this is ‘justified by compelling reasons in the light of the particular circumstances of the case’.³⁹⁹ This derogation undermines the effectiveness of the instrument as it provides Member States with a possibility to deny persons deprived of liberty of their right to a lawyer. This has already been contested in the Council and it is expected that the European Parliament will further challenge this ground for derogation.

The provision on confidentiality provides that confidentiality applies to all methods of communications. Thus not only confidentiality of communication in person, but also of correspondence, telephone conversations and other forms of communications as permitted under national law.⁴⁰⁰ Derogation is allowed when justified by ‘compelling reasons’, being an ‘urgent need to prevent serious crime’, or when there is ‘sufficient reason to believe that the lawyer concerned is involved in a criminal offence with the suspect or accused person’.⁴⁰¹ This provision has been the most controversial as in the Council a group of Member States

³⁹⁵ Article 3(3).

³⁹⁶ Article 4(2), supra note 382.

³⁹⁷ Article 4(4), *ibid.*

³⁹⁸ Article 3(4).

³⁹⁹ Article 3(5).

⁴⁰⁰ Article 4.

⁴⁰¹ Article 4(2).

did not want any exceptions to this principle.⁴⁰² It is to be expected that the Parliament will not support this derogation either, thus this provision will be further debated and it would only increase the strength of the instrument if such derogations would be dropped.

Communication upon arrest

The other component of the proposed Directive, communication with a third person, is of equal importance as the right to council. Contact with the outside world is an essential safeguard against human rights violations such as ill-treatment and enforced disappearance. It furthermore ensures that a suspect's private matters are being dealt with and also enables a challenge to the detention. However, even though the right to communicate with a consular assistant is included in the proposal, it does not guarantee an equal standard as the Vienna Convention on Consular Relations, which guarantees to communicate 'in person'.⁴⁰³

Regarding communication upon arrest it is set out that a person who is deprived of his liberty 'has the right to have at least one person, such as a relative or employer, named by him, informed of the deprivation of liberty without undue delay'.⁴⁰⁴ Here again is the standard set by the Commission Proposal lowered as in the initial text was provided for communication with a third person, instead of having a third person 'informed'. Also a ground for derogation is added allowing for Member States to temporarily derogate from this right when this is 'justified by compelling reasons in the light of the particular circumstances of the case'.⁴⁰⁵ This broad derogation could seriously undermine this right as it is not further specified what such 'compelling reasons' are. In case the suspected or accused person is a non-national he has the right to have the consular authorities 'informed' of the detention as soon as possible and is allowed to communicate with them.⁴⁰⁶ Here the Council added the possibility for Member States to 'set the terms of such communication', it is unclear what this vague provision aims at, but here again it leaves room for Member States to abuse this and allow for restrictions. These important rights are already assured by the majority of Member States,⁴⁰⁷ and it is unclear why the Council added further 'conditions' to these rights.

⁴⁰² Spain, Italy and Portugal have reserved the right to further negotiations with the Parliament on the issue of 'derogations', see declarations 4 and 5.

⁴⁰³ 1963 Vienna Convention on Consular Relations, UN, *Treaty Series*, Vol. 596, p. 261, Article 36.

⁴⁰⁴ Article 5(1).

⁴⁰⁵ Article 5(3).

⁴⁰⁶ Article 6.

⁴⁰⁷ The right to communicate with consular authorities is already covered by the 1963 Vienna Convention on Consular Relations which is binding for all Member States.

Derogation and waiver

The Council has included a provision on derogation stating the general conditions for derogation under Articles 3(5), 4(2) and 5(3).⁴⁰⁸ It provides that derogations made under this instrument should not go ‘beyond what is necessary’, ‘shall be limited in time as much as possible’, shall not only be based on the ‘type of the alleged offence’ and ‘shall not prejudice the overall fairness of the proceedings’.⁴⁰⁹ Derogations have to be reasoned and authorised by a competent authority and should be subject to judicial review.⁴¹⁰ What provisions will eventually be allowed to derogate from and under what specific circumstances will be a topic of further debate and the Parliament will play an important role to counter the tendency to extend derogation grounds.

A waiver of the right to assistance of a lawyer is subject to conditions to ensure that a suspect is fully aware of the consequences of his decision. The importance of this provision cannot be underestimated as police officers often advise suspects not to request a lawyer as this only slows down proceedings or because there would be no need for a lawyer.⁴¹¹ Under the current proposal a waiver is only valid if ‘the suspect or accused person has been provided with sufficient information so as to allow him to have adequate knowledge about the content of the right concerned and the possible consequences of waiving it’ and when ‘the waiver is given voluntarily and unequivocally’.⁴¹² Even under these conditions it remains essential for suspects to have an understanding of the benefits of legal assistance; this could for instance be achieved by explaining this in the letter of rights. The Council has changed ‘legal advice’ to ‘sufficient information’; this might allow suspects to waive their right to a lawyer without having ever seen one. The Parliament has already voiced a concern and also wants to include that a waiver cannot apply for children.

Application in EAW proceedings

The right of access to a lawyer in EAW proceedings is an essential part of the Directive, but has already led to adjustments. In the initial Commission proposal a right of access to a lawyer in both the issuing state and the executing state of an EAW was contained. This would be a major improvement in terms of legal protection within the EU. A lawyer in the issuing

⁴⁰⁸ Article 7.

⁴⁰⁹ Article 7(1).

⁴¹⁰ Article 7(2).

⁴¹¹ L. Skinnis, ‘The Right to Legal Advice in the Police Station: Past, Present and Future’, 1 *Criminal Law Review* (2011), 19-39.

⁴¹² Article 8(1).

state can play an important role in advising on the national law and negotiating the execution of the warrant with the issuing Member State. This could streamline proceedings and significantly increase the rights protection of the person involved. However, a majority of Member States has already made clear that this would go much further than the Framework Decision on the EAW allows for and should therefore not be included. The current proposal thus only provides for ‘access to a lawyer upon arrest ... in the executing Member State’.⁴¹³

Furthermore the Proposal contains a provision ensuring that the Directive is ‘without prejudice to national law in relation to legal aid’. What this inclusion exactly ‘politically’ means is unsure, hopefully this does not mean this is all the Council can agree on concerning the topic of ‘legal aid’.

Lastly it is apparent from the proposal that a provision on training (such as contained in Measure A) is absent. In the context of this right such a provision could particularly be useful to ensure a uniform standard of defence across the EU and to improve knowledge of the instrument amongst practitioners.

5.4.3. Textual comparison with the ECHR

One of the most relevant questions regarding the Directive on access to a lawyer is whether it meets the standard set by the ECtHR in *Salduz*. If so the EU can more effectively assure compliance with this standard since it is better equipped than the Strasbourg Court to do so. It has to be noted that this comparison will show even more signs of a provisional comparison than the previous two, as the negotiations are currently ongoing and it is difficult to predict in what direction negotiations are leading.

Right to legal advice

	Proposed Directive Council doc. 10908/12	ECHR Article 6(3)(c)
The moment at which the right of access to a lawyer arises	Access to a lawyer is granted ‘without undue delay’ and in any event before a suspect is ‘officially interviewed by the police’, Article 3(2).	‘access to a lawyer should be provided as from the first interrogation of a suspect by the police’, <i>Salduz v. Turkey</i> , paras. 54-55.

⁴¹³ Article 9(1).

Content of the right	Suspect has the right to meet with his lawyer, Article 3(3); and for the lawyer to be present and participate in interviews, Article 3(3). Communication is confidential, Article 4. Derogations allowed, Article 4(2).	Lawyers should be able to visit and speak with their clients in confidence, <i>Zagaria v. Italy</i> . ⁴¹⁴
Restrictions	Derogation is only permitted if ‘compelling reasons’ require so, Articles 3(5), 4(2), 5(3) and 7.	Only if ‘compelling reasons’ are demonstrated, <i>Salduz v. Turkey</i> , para. 54.

Figure 6.

The Commission proposal followed closely the rules set out by the *Salduz* doctrine. Added value was found in the precise provision on the content of the right (competences of a lawyer), although this is also guaranteed by the ECHR under ‘effective defence’. An important element of the Directive is the guarantee of presence of the lawyer. Presence of lawyers during police detention and interrogation is essential in order to ensure decent treatment and effective defence. In some Member States physical presence of lawyers is not always guaranteed.⁴¹⁵ The text after first reading in the Council has lowered the standard set by the Commission and does not meet the *Salduz* requirements in this form. The ECtHR has stated that a lawyer should be provided as from the first interrogation, where the text agreed by the Council speaks of an ‘official interview’, which leaves room for speculation as to what such an ‘official interview’ is.

It cannot be denied that the proposal as tabled by the Commission is an ambitious instrument as it contains an effective right to legal assistance. However, it faces a difficult negotiation phase because in some of the (inquisitorial) Member States the right for a lawyer to be present during interrogation is not guaranteed,⁴¹⁶ this in spite of what the ECtHR has decided in

⁴¹⁴ ECtHR 27 November 2007, *Zagaria v. Italy*, No. 58295/00, para. 30.

⁴¹⁵ For instance in England and Wales telephone advice is sufficient in minor offence cases.

⁴¹⁶ Belgium, the Netherlands, and also Ireland.

Salduz. In some other Member States access is not granted immediately upon arrest,⁴¹⁷ or can be restricted when the interests of the investigation require.⁴¹⁸ The financial consequences of a directive which provides suspects with such a right can be an obstacle for some Member States, especially in times of austerity Member States do not want to see an increase in their legal aid expenditure.

Even though the right to legal aid is stalled for the moment, it is not hard to imagine that Member States will have the financial consequences in the back of their minds. These political difficulties can be further illustrated by a note issued by a group of Member States which raises concerns about the proposed directive.⁴¹⁹ It can therefore only be hoped that negotiations will result in a strong directive that actually sets an effective EU standard for the right to legal advice. However the General Approach reached by the Council does not provide us with such hope. The Parliament has an important role to play to counter the minimalistic approach demonstrated by the Council.

What also becomes very clear from our analysis is that the right contained in Article 6(3)(c) and as developed by the ECtHR contains a much broader right as it consists of three elements. The Directive has dropped the right to legal aid from the agenda and therefore whatever results will be achieved, for many suspects they will be meaningless since they don't have the means for legal assistance. This is especially important because the right to legal aid as protected by the ECHR is subject to strict conditions and does not apply in all cases in which legal aid is necessary. Therefore it can be concluded that whereas the previous two directives show very positive results and introduce a serious standard that leads to an actual improvement in terms of rights available to suspects in the EU; the Council's take on this instrument do not seem to lead to such a high standard and fails to meet the high expectations raised by the Roadmap.

5.5. Taking all the pros and cons together: what is the actual legal value of the Roadmap?

Setting minimum standards for procedural rights in the EU has known a rocky road, but since the Roadmap has been adopted progress has been made and the question arose whether these efforts really strengthen procedural safeguards?

⁴¹⁷ Austria, Denmark, Germany, Hungary, Ireland, Luxembourg and Sweden.

⁴¹⁸ Supervision of communications is optional in Austria, Belgium, Czech Republic, the Netherlands, Poland, Romania, Spain, Sweden and the UK.

⁴¹⁹ Note by Belgium, France, Ireland, the Netherlands and the UK, Council doc. 14495/11, 22 September 2011 Brussels.

It seems that there is agreement in the literature that there is a need for a set of EU provisions on procedural rights to balance the current crime control bias.⁴²⁰ At the same time there are differing views on whether the Roadmap can actually add value to the existing level of safeguards. From a sceptical point of view one could question the attempts made by the Roadmap. In doing this often is pointed towards the standard already set by the ECHR. Summers supports this view as she is unsure whether the EU provisions add much additional protection and fail to properly consider the successes and failures of the ECHR.⁴²¹ Also the question is raised whether the rights in the Roadmap are not formulated in such a way that all criminal procedures can achieve them without making amendments (common denominator argument). Common to most of this critique is that it was formulated before the first directive in line with the Roadmap was adopted, therefore it can be said that now we have seen some of the measures set out in the Roadmap adopted, it is the time to respond to this criticism.

More specific critique of the measures; regarding the letter of rights it is said that such letters already exist in many countries and the right of access to a lawyer is relatively uncontroversial post-*Salduz*. But the current problem is not with access to a lawyer, but with the moment when this right arises and with the guarantee of free access to counsel. Many people will be unable to exercise their right to counsel due to an inability to pay or will not be allowed the assistance of a counsel at their first hearing. The scepticism around the Roadmap is understandable taking into consideration that in its current form Measure C does not incorporate the *Salduz* standard together with the decision not to include a right to legal aid. Negative developments as these contribute to the main concern that the EU is not really interested in going beyond the protections set out in Article 6 ECHR. However, from a less sceptical perspective three main points can be raised that lead to a more positive outlook on the Roadmap.

Firstly, if the criticism is based on the contention that the EU is not able to raise the Strasbourg standard this creates false expectations. The aim of the Roadmap is not necessarily to raise this standard, but to adopt EU instruments with equal standards. And the result from the substantial analysis above has shown that for the first two measures this goal has been achieved. This brings us to the second point; even though at the moment it is very uncertain where Measure C will take us and the first signals do not meet the high ambitious set out by

⁴²⁰ See, for instance, L. van Puyenbroeck and G. Vermeulen, 'Towards Minimum Procedural Guarantees for the Defence in Criminal Proceedings in the EU', 60(4) *International and Comparative Law Quarterly* (2011), 1017-1038.

⁴²¹ Correspondence with S. Summers, on file with the author.

the Roadmap itself, but at the same time the first two instruments that have been adopted show a much more positive outcome and have managed to set a standard at least similar to Article 6 ECHR. In addition to this; these instruments have the potential to even add to existing safeguards by clarifying some of the issues surrounding the right to interpretation and translation and the right to information and by incorporating some of the case law of the ECtHR in the text of the directives.

Thirdly, and this is an aspect of the Roadmap which has been received positively by everyone, is its capacity to substantially increase safeguards in the context of EAW proceedings. As procedural safeguards are very scarce in the Framework Decision itself the inclusion of these proceedings in all the legislative instruments foreseen in the Roadmap is a big step forward and will lead to a better protection of rights of persons subjected to an EAW.

In addition to the main substantial argument of this thesis, an effectiveness argument can be presented. One of the main problems with the ECHR system is the effectuation of Strasbourg rulings.⁴²² The EU has got much stronger legislative tools and a more effective control mechanism than the Council of Europe. The Lisbon Treaty has enhanced the role of the ECJ in the AFSJ and has opened the road for minimum rules on individual rights. The enforcement mechanisms that come with these improvements have much greater potential than the *ex post* complaint procedure of the ECtHR. The ECJ has a general competence regarding questions of interpretation of the Treaty.⁴²³ National courts can request the ECJ for a preliminary ruling in criminal proceedings concerning procedural safeguards. Next to this the Commission has the power to bring a case against a Member State for failing to fulfil its obligations under the Treaty and can ultimately lead to financial penalties imposed by the ECJ (the so called ‘infringement proceedings’). This strong enforcement mechanism in combination with the legal instrument used, directives rather than framework decisions (thus may have direct effect), open up the possibility of preliminary rulings and infringement proceedings.

A potential threat for the Roadmap lies in the step-by-step approach as most of the rights proposed are complementary to each other and the full effects might only be visible when all of the Roadmap is adopted and in force.⁴²⁴ At the same time it will be easier to reach political agreement on one topic at a time than to present the full range at once; as was done in 2004 with the proposal for a framework decision. Another potential threat is the implementation by

⁴²² See chapter 2.3.

⁴²³ Article 267 TFEU.

⁴²⁴ Spronken argues for a ‘holistic approach’ and is rather sceptical on a piecemeal approach, *supra* note 82.

Member States; we have seen with the implementation of the EAW that some Member States have interpreted the text of the instrument rather loosely. An advantage here though is that the measures are not contained in framework decision, but in directives.

Overall it can be concluded that even though it is still uncertain how the EU will further develop its programme on procedural rights, the progress made on Measures A and B has given us reason to believe that the EU is willing to adopt instruments that actually set a high standard of protection for suspects and defendants throughout the EU. The two measures adopted show that this means a standard mostly equal to the ECHR and in some respects an even more complete protection is offered. At this point the question can be asked whether such a high standard will also be achieved by Measure C, based on the Council general approach we have to answer this question with a swift 'no'. But, more positively, it is necessary to stress that the negotiations are currently in a critical phase and the European Parliament will opt for a text closer to the initial Commission Proposal. The position of the Parliament will be to thoroughly scrutinize the Council general approach by holding a strong position in securing human rights at EU level.

In defending the importance and potential of the Roadmap we could even go one step further and point to the wider potential of the Roadmap as it serves only as a 'starting point'.⁴²⁵ We might in the future see a full and complete catalogue of criminal procedural safeguards unfold at EU level. An advantage the EU has in this respect is that within the Council of Europe standards set have to be acceptable for all its members (from Russia and Turkey to the UK and Germany), which can be very diverse in nature, EU cooperation is at a more advanced level. But for the near future our hopes will be on the adoption of the measures as set out by the Roadmap and their capacity under the Lisbon Treaty framework.

⁴²⁵ The Stockholm Programme invites the Commission to examine what rights require further attention, supra note 44.

Chapter 6. Analysing the EU policy on criminal procedural rights from a governance perspective

6.1. Introduction

Next to the substantial perspective- does the Roadmap add value to existing standards and what is the legal need for the Roadmap- there is a second way to analyse the Roadmap, namely how does this approximation of procedural laws influence the application of the principle of mutual recognition in the AFSJ? Before this chapter further examines this question, a brief evaluation of the background of mutual recognition in this context is given.

6.2. Mutual recognition- ‘the cornerstone of judicial cooperation in criminal matters’

The idea of applying the mutual recognition principle in the field of criminal law was put forward by the UK Government during its EU Presidency in 1998. The European Council at Cardiff urged ‘the need to enhance the ability of national legal systems to work closely together’ and requested the Council ‘to identify the scope for greater mutual recognition of decisions of each other’s courts’.⁴²⁶ The UK regarded mutual recognition the only realistic option, as they saw that the differences between Member States’ legal systems were significant and harmonisation of criminal law was difficult to negotiate, time consuming and unrealistic.⁴²⁷

The application of the principle of mutual recognition in JHA cooperation was endorsed⁴²⁸ at the Tampere European Council of 1999,⁴²⁹ and according to the Council the principle ‘should become the cornerstone of judicial cooperation’ in criminal matters.⁴³⁰ Following the Tampere Council the Commission released a Communication expressing their thoughts on the principle.⁴³¹ The Commission articulated its view that the traditional cooperation in the field is slow, cumbersome and uncertain, and presented its own interpretation of mutual recognition in criminal justice matters:

⁴²⁶ Tampere Conclusions, supra note 39, para. 39.

⁴²⁷ See document submitted by the UK delegation to the (then) K.4 Committee, Council doc. 7090/99, 29 March 1999 Brussels, paras. 7 and 8.

⁴²⁸ For a more detailed look at the negotiations that led to this adoption see H. Nilson, ‘Mutual Trust or Mistrust?’, in G. de Kerchove and A. Weyembergh (eds.), *La Confiance Mutuelle Dans l’Espace Pénal Européen/Mutual Trust in the European Criminal Area* (Brussels, 2005), 29-33.

⁴²⁹ At the Tampere Council meeting a five year agenda was set up for EU JHA.

⁴³⁰ See the Presidency Conclusions at the Tampere European Council, supra note 39.

⁴³¹ COM (2000) 495 final, 26 July 2000 Brussels.

‘Thus, borrowing from concepts that have worked very well in the creation of the Single Market, the idea was born that judicial cooperation might also benefit from the concept of mutual recognition which, simply stated, means that once a certain measure, such as a decision taken by a judge in exercising his or her official powers in one Member State, has been taken, that measure- in so far as it has extra national implications- would automatically be accepted in all other Member States, and have the same or at least similar effects there.’⁴³²

It does seem that the institutions involved supported the application of the principle of mutual recognition in the criminal justice area as an alternative to harmonisation. Mutual recognition can be interesting for those opposing harmonisation, as it can increase efficiency in cross-border cooperation without requiring Member States to harmonise their national legal systems. At the same time it can satisfy those supporting further integration as it evades slow and cumbersome legislation procedures, and ultimately, can the successful application of mutual recognition lead to minimum harmonisation (a ‘spill-over’ effect).

The first instrument adopted in the AFSJ following the principle was the Framework Decision on the EAW.⁴³³ Even though the Commission has hailed the EAW ‘a success’,⁴³⁴ constitutional concerns have remained since its adoption.⁴³⁵

The application of mutual recognition in the criminal law context will not lead to a ‘European criminal law’ comparable to what currently exists at national level. The pieces of legislation we see introduced now and the case law that eventually will develop will ultimately lead to a

⁴³² Ibid, p. 2.

⁴³³ A large body of literature has since formed on the EAW, see, for instance, Alegre and Leaf, supra note 120; R. Blextoon and W. van Ballegooij (eds.), *Handbook on the European Arrest Warrant* (The Hague, 2005); M. Plachta, ‘European Arrest Warrant: Revolution in Extradition?’, 11 *European Journal of Crime, Criminal Law and Criminal Justice* (2003), 178-194.

⁴³⁴ Report from the Commission on the implementation of the EAW, COM (2007) 407 final, 11 July 2007 Brussels.

⁴³⁵ See Z. Deen-Racsmány, ‘The European Arrest Warrant and the Surrender of Nationals Revisited: The Lessons of Constitutional Challenges’, 14 *European Journal of Crime, Criminal Law and Criminal Justice* (2006), 271-305; M. Fichera, ‘The European Arrest Warrant and the Sovereign State: A Marriage of Convenience?’, 15 *European Law Journal* (2009), 70-97; E. Guild and L. Marin (eds.), *Still Not Resolved: Constitutional Issues of the European Arrest Warrant* (Nijmegen, 2009); see also ECJ 3 May 2007, Case C-303/05, *Advocaten voor de Wereld v. Leden van de Ministerraad* (2007), ECR I-3633; and F. Geyer, ‘Case Note: *Advocaten voor de Wereld*’, 4 *European Constitutional Law Review* (2008), 149-61.

‘coordinated’ system of diverse national criminal systems, as the monopoly of force remains with the Member States.⁴³⁶

6.3. Objections to mutual recognition in the criminal justice sphere

The principle of mutual recognition is ‘borrowed’ from the Community pillar and originates in a completely different context. It was first applied by the ECJ in relation to freedom of goods (product requirements),⁴³⁷ and gradually expanded to cover other Community policy areas.⁴³⁸ The objections articulated against the transfer of the principle from the internal market to the AFSJ are inherent to the fundamental differences between the two policy areas.⁴³⁹ The most fundamental concern (the qualitative argument) is that criminal justice is an area that substantially differs from the regulation of markets. Criminal law concerns the protection and limitation of individual rights and amendments to such fundamental rules should be properly debated and democratically legitimized. A second concern (the quantitative argument) regards the mode and effect of recognition. Where mutual recognition in the internal market results in the free movement of (amongst others) products and thus leads to a greater application of fundamental EU principles, it could in the criminal law sphere ultimately result in the limitation of fundamental rights as further disadvantageous or even coercive measures are required in order to execute a judicial decision (such as arrest, surrender and detention).⁴⁴⁰ Mitsilegas calls the recognition of national standards by other EU Member States a ‘journey into the unknown’,⁴⁴¹ because an individual national standard must be recognised by other Member States- not an EU-wide negotiated standard. It is exactly this leap of faith that Member States have agreed upon when putting forward the principle of mutual recognition as the leading principle in criminal justice cooperation that now leads to difficulties as Member States are not as willing as initially thought to make this ‘journey’.

⁴³⁶ For a discussion of this ‘coordination of national systems’ see M. Fletcher, R. Loof and B. Gilmore, *EU Criminal Law and Justice* (Cheltenham, 2008), 108.

⁴³⁷ ECJ 20 February 1979, Case-120/78, *Commission Rewe-Zentrale AG v. Bundesverwaltung fur Branntwein (Cassis de Dijon)* (1979), ECR 649.

⁴³⁸ For more on mutual recognition in the internal market see, for instance, K. Armstrong, ‘Mutual Recognition’, in C. Barnard and J. Scott, *The Law of the Single European Market: Unpacking the Premises* (Oxford, 2002), 225-267.

⁴³⁹ Mostl however notes that one has to be careful in drawing analogies between the internal market and the AFSJ because of these fundamental differences; the assessment of the application of the principle can only be made on the basis of a clear distinction. See M. Mostl, ‘Preconditions and Limits of Mutual Recognition’ 47(2) *Common Market Law Review* (2010), 405-436, at 409.

⁴⁴⁰ The two ‘arguments’ as formulated by Mitsilegas, supra note 117, 116-120; See also S. Lavenex, ‘Mutual Recognition and the Monopoly of Force: Limits of the Single Market Analogy’, 14 *Journal of European Public Policy* (2007), 762-779.

⁴⁴¹ *Ibid*, 119.

This brings us to the third challenge to the successful application of mutual recognition in the criminal justice area, namely the matter of mutual trust. Trust is a necessity in a system in which Member States are required to recognise standards that originate in the legal systems of other EU Member States. It is widely recognised that there currently is a lack of trust among Member States in each other's criminal justice systems and it will be difficult for the principle of mutual recognition to operate without a certain level of trust.⁴⁴² This lack of trust was already acknowledged at an early stage by the Commission when the Green Paper on an EU instrument on procedural safeguards was issued.⁴⁴³ Underlying the main reasons for such an instrument of offering suspects and defendants a decent standard of procedural fairness, was the contention that something had to be done to accommodate the lack of trust and a common instrument on procedural standards would be the solution. Unfortunately Member States could not agree on such an instrument and in the meantime continued with the adoption of measures based on mutual recognition; thus sooner or later the lingering problem of this lack of trust would return.

The EU has since been trying to deal with this lack of trust in two ways: by the introduction of procedural rules (such as grounds for refusal) and referrals to human rights in the mutual recognition instruments; and by the adoption (or attempts to) of specific trust-building measures. The first way; the introduction of procedural rules, has only led to very few safeguards in the actual mutual recognition led instruments and a list of preambular referrals of which the legal value is unsure. For examples of the second way; the adoption of trust-building measures, one has to think of measures such as evaluation mechanisms, training programs and enhancing the role of the ECJ. It is the perspective of these 'trust-building' measures that will be taken upon the Roadmap here.

6.4. Can the Roadmap increase trust among Member States?

What exactly is the Roadmap required to achieve as a 'trust-building' measure? If mutual recognition is the key principle for the development of the AFSJ, why are we even looking at approximation here? Mutual recognition differs from harmonisation; whereas in the former differences are kept in a system of cooperation and trust, in the latter differences are being eliminated in order to create a single homogeneous system. Harmonisation creates a common

⁴⁴² See Vernimmen-Van Tiggelen *et al.*, *supra* note 78, especially Section V.

⁴⁴³ See chapter 3.1.

normative standard and mutual recognition accepts that many normative standards co-exist.⁴⁴⁴ In order to fully understand harmonisation it is important to distinguish between the different degrees, from the lowest, approximation, to the highest, unification. Unification aims at eliminating all disparities between judicial systems by introducing a ‘uniform’ set of rules which broadly apply; it would therefore lead to a completely uniform system. It is widely acknowledged that such unification of criminal law in the EU context is not a very realistic target as Member States regard their national criminal justice systems as the core of the state and reflect on a national tradition and culture. Therefore the Lisbon Treaty allows for approximation of procedural laws, thus the lowest form of harmonisation, and aims at eliminating the most relevant disparities between Member States. Approximation does not lead to a full harmonization of national systems, but only creates a common minimum standard, so Member States can rely on this ‘minimum’ standard to be existent in all jurisdictions. It is therefore not a question of harmonisation *or* mutual recognition, but approximation (the ‘lowest’ form of harmonisation) in order to make mutual recognition successfully operate in the criminal law sphere.

To answer the question whether the approximating instruments set out by Roadmap can increase trust (and thus enhance mutual recognition) among Member States requires an instrumental viewpoint. Instrumental in the sense that what is being examined here is whether the measures adopted in accordance with the Roadmap can lead to improving trust among Member States and therefore improve the application of mutual recognition. The Roadmap will thus be judged on how it contributes to the development of a governance principle. This could be seen as a rather ‘sceptical’ approach towards the EU policy on procedural safeguards as it views the Roadmap as if only issued to make the ‘overarching aim’ of mutual recognition work. But even if (one of the) purpose(s) of the Roadmap is to enhance trust and thus mutual recognition, rights protection would at the same time still increase and therefore the AFSJ would become a more ‘just’ place; as has been pointed out by the previous chapter on the substance of the Roadmap.

Because a degree of minimum trust is necessary in order for mutual recognition to function effectively, mutual trust could be described as ‘the principle behind the principle’. The ECJ has assumed in its case law on *ne bis in idem* that a high level of trust between Member States

⁴⁴⁴ For more on this see, for instance, I. Bantekas, ‘The Principle of Mutual Recognition in EU Criminal Law’, 32(3) *European Law Review* (2007), 365-385.

exists.⁴⁴⁵ According to the ECJ mutual trust necessarily underpins Article 54 Schengen Implementing Agreement on the principle of *ne bis in idem*, which requires Member States to recognise foreign judicial decisions. The Court does not accept the diversity that exists between the various legal systems as a ground for non-execution of the principle.⁴⁴⁶ This pragmatic approach by the Court is understandable as any other decision would have left the fundamental *ne bis in idem* principle without effect. But however much this ‘legal fiction’ in the context of *ne bis in idem* cases is necessary, practice shows a different less prospering image of mutual trust.

Criminal law is the field *par excellence*⁴⁴⁷ in which states have the belief that their own national laws and procedures are superior to those of other countries. States easily point to the flaws and shortcomings in foreign procedures and at the same time defend their own system. Interestingly enough there is not a single signatory to the ECHR whose criminal justice system has not been found in violation of Article 6 ECHR by the Strasbourg Court. Thus an essential first step towards improvement would be for Member States to at least recognise that other criminal justice systems in the EU can be equal even though different. But recent developments such as for instance the cumbersome and difficult implementation of the EAW⁴⁴⁸ have shown that trust is lacking and mutual recognition requires some form of approximation of criminal procedural law across the EU in order to work.⁴⁴⁹

The Roadmap as a ‘trust-building’ measure aims at increasing mutual trust by setting an EU wide standard for procedural safeguards.⁴⁵⁰ Whether it will ultimately increase trust remains uncertain at the moment as the first measure still has to enter into force and the manner of

⁴⁴⁵ See ECJ 11 February 2003, Joined Cases C-187/01 and C-385/01, *Gozutok and Brugge*, ECR I-1345; see also M. Fletcher, ‘Some Developments to the *ne bis in idem* Principle in the European Union: Criminal Proceedings Against Huseyn Gozutok and Klaus Brugge’, 66(5) *Modern Law Review* (2003), 769-780; K. Ligeti, ‘Rules on the Application of *ne bis in idem* in the EU’, 1(2) *EU Crim* (2009), 37-42; M. Wasmeier, ‘The Development of *ne bis in idem* into a Transnational Fundamental Right in EU Law: Comments on Recent Developments’, 31 *European Law Review* (2006), 565-578.

⁴⁴⁶ ECJ 28 September 2006, Case C-467/04, *Gasparini*, ECR I-9199; see also B. Van Bockel, *The Ne Bis in Idem Principle in EU Law* (The Hague, 2010).

⁴⁴⁷ Brants, *supra* note 101, 103.

⁴⁴⁸ For instance the failure to bring the EAW into force and the inclusion of extensive grounds of refusal by some Member States can be mentioned. See Commission Report, *supra* note 434. See also M. Fichera, *The Implementation of the European Arrest Warrant in the European Union: Law, Policy and Practice* (Antwerp, 2011); N. Keijzer and E. van Sliedregt (eds.), *The European Arrest Warrant in Practice* (The Hague, 2009).

⁴⁴⁹ Harmonisation of substantial criminal law has already taken place and has led to secondary legislation on for instance money laundering, terrorism and cybercrime; for an overview of these measures see D. Chalmers, G. Davies and G. Monti, *European Union Law: Cases and Materials* (Cambridge, 2010), 611-618.

⁴⁵⁰ As envisaged by the Stockholm Programme, *supra* note 44, point 2.4; and in the Roadmap itself, *supra* note 140, recitals 6-8.

implementation will be very important. Even though these reflections have a provisional character, it is still possible to voice high expectations regarding the effect of the Roadmap on trust within the EU. This especially in conjunction with the conclusions drawn earlier on the legal value of the Roadmap, because even though these two perspectives have been treated separately here, they are very much intertwined. The matter of trust (or the lack thereof) mainly originates in concerns in ‘foreign’ criminal procedures, and a common EU standard could help assure that if persons are being sent to other Member States they at least have the assurance of a proper and fair treatment. Theoretically this should already be the case under the ECHR, but the poor record of many of the Member States required EU involvement in procedural safeguards. Even though the Roadmap may not directly result in an unconditional trust, it could be a positive step and lead to further development of the EU programme on criminal procedure. ‘Mutual trust is more likely to occur if legal systems are comparable to or at least easily understood by others’,⁴⁵¹ and this is something the Roadmap can help achieve. In the end; if Member States have to fully scrutinize the safeguards guaranteed in another jurisdiction each time they submit or receive a request, they will no longer be able to cooperate with each other in a useful and efficient manner, as aimed at by a system of cooperation based on mutual recognition. As concluded in the previous chapter, the first two Roadmap measures adopted have set a serious standard of legal protection for suspects in criminal cases and when implemented in all national jurisdictions throughout the EU this means that Member States can have full faith in respect for these rights across the EU. More specifically this means that after Measure A and B have entered into force suspects and defendants throughout the EU will be assured a right to translation and interpretation together with the issuance of a letter of rights which informs them of their other rights under the law of that ‘foreign’ jurisdiction and a right to access to the case file. The further development of the Roadmap is ongoing and if all the rights as set out by the Roadmap have entered into force this creates a broad and useful catalogue of rights at EU level and assures suspects and defendants throughout the EU a more just process. Of course the previous chapter has also shown that there are currently some difficulties in the negotiating phase and especially the removal of the right to legal aid from Measure C is worrying. However, the first Directive enters into force soon and it is possible that it is only then that by positive experience Member States realise the EU has got great potential in this field and that mutual recognition operates

⁴⁵¹ C. Rijken, ‘Re-Balancing Security and Justice: Protection of Fundamental Rights in Police and Judicial Cooperation in Criminal Matters’, 47 *Common Market Law Review* (2010), 1455-1492, at 1473.

better with a common minimum standard in place; thus Member States might be more inclined to successfully execute the plan set out by the Roadmap.

Trust has proven not to be blind, but conditional upon the respect of rules (the respect for procedural rules by other Member States),⁴⁵² and without a formal mechanism for monitoring ‘criminal procedures’ this evaluation by Member States is fairly subjective.⁴⁵³ This brings us to the connection made previously between a high standard of protection together with the EU potential in enforcement. Transparency and enforcement are key factors in this evaluation and can create *good faith* between Member States by not only making rights more visible at EU level but also by subjecting them to the strong EU enforcement tools and supervision by the ECJ.

It should be noted that guaranteeing an acceptable level of safeguards for suspects and defendants throughout the EU by approximation of national legislation is not the only possible measure to strengthen trust within the EU criminal justice space. A whole range of (non-) legal measures has been set out by the Stockholm Programme to improve trust and to make mutual recognition work.⁴⁵⁴ Nevertheless a strong EU involvement in procedural safeguards can prove to be the ideal solution and has the potential of enhancing judicial cooperation by strengthening mutual trust as well as providing suspects and defendants with an adequate level of procedural protection. Requests for recognition of a judicial decision would be executed more easily if the competent authorities within Member States would be assured that the requesting authorities are bound by the same procedural rules. The same procedural standards will lead to trust, and with trust being a prerequisite to the principle of mutual recognition, the Roadmap has the key to make mutual recognition flourish in the context of criminal justice cooperation. By starting with the ambitious project of the Roadmap the EU has acknowledged that a degree of procedural approximation is necessary to make the main mode of governance, mutual recognition, work. Now the first steps have been set to a serious implementation of the Roadmap programme this should show signs of an increase in trust between Member States as soon as the directives enter into force.

⁴⁵² M. Fichera, ‘Mutual Trust in European Criminal Law’, *University of Edinburgh School of Law, Working Paper Series* (2009/2010), 13.

⁴⁵³ A mechanism of monitoring procedural safeguards is clearly lacking from the Roadmap, it can only be hoped that such mechanism at EU level will ultimately be developed.

⁴⁵⁴ For instance evaluation, training and implementation are goals as set out by the Stockholm Programme, *supra* note 44, point 3.2.

Chapter 7. Conclusion

The developments in the field of EU criminal law in the past decade have undeniably led to a crime-control bias and have mainly been prosecution-oriented. This can be illustrated by the contrast between the prosperous and quick adoption of the EAW, and the failure to adopt the FDPR on which negotiations lasted over four years. This enforcement bias together with the fact that the level of human rights protection in criminal proceedings is not always sufficient across the EU, demonstrated by the difficulties the ECtHR is facing in enforcing its case law (many Member States show a poor compliance record with Article 6 ECHR), and by the failure of the Court to answer the large amount of cases brought to Strasbourg, shows a clear need for action at EU level. It is only recently that some progress was made in the development of procedural rights by the adoption of the Roadmap on procedural rights which identifies areas for legislative initiatives and provides for a step-by-step approach, bearing in mind the complexity of the issues. Since the adoption of the Roadmap we have seen two measures adopted and a major stumbling block lies ahead with the negotiations for the directives on the sensitive topics of access to a lawyer and legal aid.

The benefits and value of the Roadmap identified in this thesis mainly exist in the high standard of protection aimed at by the Roadmap, strengthened by the new enforcement opportunities created by the Lisbon Treaty. Also should be mentioned that the application of the 'co-decision' procedure to the area of criminal cooperation has made it easier to adopt instruments on criminal (procedural) matters, and the use of directives rather than framework decisions will lead to a direct obligation for Member States to comply with its content. The (upcoming) judicial control of the ECJ and the ability for the Commission to assure compliance with directives in the field- with the strong enforcement tool of the 'infringement proceedings', are the achievements that will ensure compliance with the norms set out in the EU instruments on procedural safeguards. Another aspect in which the Roadmap can prove beneficial is its application in EAW proceedings; a field in which little protection for those subjected to a warrant currently exists. All these elements together make the Roadmap a project with great potential that has to be taken seriously.

This thesis has shown that the most often heard critique on the Roadmap; its incapability of meeting the ECHR standard, can swiftly be dealt with by demonstrating that the standard of protection in the first two measures is at least similar to the standard in Article 6 ECHR. This is not to say that the two measures adopted have a scope equal to Article 6, it has been shown

that the ECHR offers a much broader and more complete protection than what the Roadmap has to offer yet. However, what has been argued here is that at least based on the first two measures the Roadmap is introducing a series of useful instruments that make the specific rights prioritised more visible and enforceable. What this thesis thus provides is very much a provisional judgement of the Roadmap, as well as a prospect on the future potential of it.

The specific analysis of the first two measures already adopted has shown that Member States are willing to set a high standard, both practically and legally. Measure A on the right to translation and interpretation meets the standard set by the ECHR and adds to this by: explicitly mentioning the right to translation, which is not stated as such in the text of the Article 6; making use of the practical term 'essential' in relation to what documents have to be translated; forbidding waiver of the right to interpretation and clarifying the circumstances regarding waiver of the right to translation; and providing for a right to interpretation of communication with counsel. Measure B on the right to information generally meets the ECHR standard, except for the time limit set for authorities to provide the defence with documents; thus limit is rather inefficient and does not meet the Strasbourg standard. In addition: the right to information about rights, as guaranteed by the Directive, is not as such guaranteed by the ECHR; the 'letter of rights' is a 'new' safeguard; and the Directive codifies access to the case file.

The negotiations on the following, politically more difficult, directive has shown a less encouraging image. The just described experience with the first two directives has provided us with a strong fundament for the expectation that an equal instrument can be the final result of these negotiations. At the same time one has to be realistic and acknowledge that the substance of the instruments under negotiation is of a different gravity than the first two, and has more farreaching implications; both financially and legally. However, it is to be expected that the minimalistic approach towards this instrument by the Council will be counter-balanced by the European Parliament. The Parliament's task is to ensure that the legislative process is conducted scrupulously and they will hold a firm position in upholding a worthy human rights standard that does not fall below what is guaranteed at EU level as well as internationally. What ultimately the outcome is going to be is unclear at the moment and all that can be done here is underlying its great potential and importance.

The other way of analysing the Roadmap; its effect on mutual trust, can provide us with an insight into why Member States would make an effort to allow an EU instrument to make

substantial changes to their criminal justice systems. An incentive for Member States to fulfil the mandate of the Roadmap might be its ability to increase trust. The principle of mutual recognition in criminal matters was presented as the ‘cornerstone principle’ of criminal cooperation and was useful as it allowed for Member States to retain their national legal systems, but at the same time to cooperate in an efficient manner. A prerequisite to this principle, and maybe overlooked at the time of the Tampere meeting, was that mutual trust is essential for mutual recognition to work in the context of criminal law. And after the ‘flagship’ instrument, the EAW, applying mutual recognition was adopted and entered into force, only then it was shown by practice that trust was lacking among Member States. One of the reasons to transfer mutual recognition from the internal market sphere to cooperation in criminal matters was to prevent the cumbersome and slow harmonisation of legal systems; ironically recent practice has shown that it is only through approximation that mutual recognition can flourish. This realisation has reached the Member States and it will undoubtedly play an important part in the decision each Member State has to make on whether to support a directive with a strong scope and content that will lead to rights that are practical and effective, or whether it will come up with an instrument that all procedures can achieve without making amendments and thus in effect would be ‘useless’. It can therefore only have a stimulating effect on negotiations that mutual recognition was at its adoption presented as if the Council had reinvented the wheel, and in the past decade huge efforts have been made to successfully implement the principle of mutual recognition in the AFSJ. The whole project of mutual recognition is simply too costly and important to fail. It would not be right to say that the ‘project’ of the AFSJ in its entirety and mutual recognition would be immediately jeopardised if the measures contained in the Roadmap will not all get adopted, but in time it can prove to be an essential factor in the success or failure of mutual recognition as the further development of the ‘recognition’ led measures is ongoing.

It is thus too early to question the value of the Roadmap, as it does have great potential mainly demonstrated by the high standard achieved in the first two instruments and the effective EU control mechanism that would apply to the safeguards set out in the Roadmap. The negotiations on these measures create a feeling of *deja-vu* as we have seen similar difficulties during the negotiations for a FDPR. The big difference and advantage of the current programme is that the debate on competence is no longer relevant and the Roadmap provides for a step-by-step approach and thus presents small pieces of legislation at a time; which will be easier to digest for Member States. At the same time this approach presents a disadvantage

as well because these procedural rights are complementary to each other and in order to be practical and effective all aspects have to be in balance. Thus again should be stressed that the negotiations are currently in a 'crucial' stage; the legislative framework and enforcement tools are provided for, it is now up to the Member States to show real political determination to finally provide suspects and defendants in the EU with a worthy set of safeguards. To come back to the question raised at the beginning; whether the Roadmap is actually leading towards an EU criminal justice system with rights at the heart of it, this thesis has shown that the Roadmap has the potential to lay the fundamentals of such a system and that the ambitious project set out by the Roadmap is one which can finally show that the AFSJ not only exists in name, but that one day 'justice' might be as much a pillar of the AFSJ as 'security' is.

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