

Editorial



EU Competence in the Area of Procedural Criminal Law: Functional vs. Self-standing Approximation of Procedural Rights and Their Progressive Effect on the Charter's Scope of Application

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Procedural rights in criminal proceedings have been receiving considerable attention in the European Union's legislative agenda of the past decade.¹ The piecemeal approach introduced in 2009 in the Council's Roadmap Resolution² has resulted in an impressive number of common minimum norms on procedural rights for defendants and victims of crime, adopted under the heading of Article 82(2) TFEU. As to defence rights,³ six directives have been adopted between 2010 and 2016 covering the rights to interpretation and translation, the right to information (about rights, about the accusation and about the essential materials of the case); the right of access to a lawyer, the right to

1 This editorial is based on a lecture given at the conference 'Procedural rights in criminal proceedings in the EU' which was held at Utrecht University on 13–14 September 2018, <https://www.uu.nl/en/events/conference-procedural-rights-in-criminal-proceedings-in-the-eu>.

2 Resolution on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings [2009] OJ C295/1.

3 This piece focuses on defence rights, but acknowledges the EU's efforts in the field of victims' rights, see e.g. Directive 2012/29 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA [2012] OJ L315/57.

communicate with third persons and consular authorities, the presumption of innocence (including the right not to incriminate oneself and the right to remain silent), the right to be present at trial; the right to state-paid legal aid; and rights specific to children who are suspected of crime.⁴

Considering the previous emphasis on repressive measures – such as the establishment of instruments for cross-border law enforcement,⁵ or the adoption of criminal prohibitions⁶ – the legislative achievements in the area of procedural rights for defendants have been widely welcomed by practitioners and academics, particularly to counterbalance the strong position of law enforcement authorities under the various cooperation mechanisms. From that perspective, the aforementioned so-called procedural rights package must be considered a great step forward. Moreover, since the EU increasingly presents itself as a fundamental rights actor, it is likely that further steps will follow.

But promising as this may sound, I will argue that the extent of EU competence to harmonise defence rights is too limited to justify major new steps in this regard, for Article 82(2) TFEU expressly envisages a *functional* approach towards approximation powers in the field of defence rights. After all, the

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- 4 Directive 2010/64 on the right to interpretation and translation in criminal proceedings [2010] OJ L280/01; Directive 2012/13 on the right to information in criminal proceedings [2012] OJ L142/1; Directive 2013/48 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty [2013] OJ L294/1; Directive 2016/343 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings [2016] OJ L65/1; Directive 2016/800 on procedural safeguards for children who are suspects or accused persons in criminal proceedings [2016] OJ L132/1; and Directive 2016/1919 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings [2016] OJ L297/1.
 - 5 Probably most well-known is the European arrest warrant mechanism, based on Framework Decision 2002/584/JHA on the European arrest warrant and surrender procedures between Member States [2002] OJ L190/1. Other instruments for instance include the European Enforcement Order (Framework Decision 2008/909/JHA on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty [2008] OJ L327/27) and the European Investigation Order (Directive 2014/41/EU regarding the European Investigation Order in criminal matters [2014] OJ L130/1).
 - 6 Such as Directive 2014/57 on criminal sanctions for market abuse [2014] OJ L173/179, and Directive 2011/36 on preventing and combating trafficking in human beings and protecting its victims [2011], L101/1.

competence to establish common minimum norms concerning, among other things, the rights of individuals in criminal procedure can be exercised 'to the extent necessary to facilitate mutual recognition of judgment and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension'. Approximation of defence rights is thus considered a means to an end, i.e. a means to achieve smoother cross-border cooperation between police and judicial authorities.⁷ But as the following reflections will demonstrate, the *actual* scopes of adopted EU-level defence rights fail to reflect the limited, functional scope of approximation powers expressed in Article 82(2) TFEU. Moreover, considering the specific relationship between approximated defence rights on the one hand, and related rights enshrined in the EU Charter of Fundamental Rights (hereinafter: the Charter) on the other, it will be shown that approximated defence rights potentially extend the Charter's applicability in the Member States, and hence provide further reason to question the functionalist logic reflected in Article 82(2) TFEU. To conclude, I will argue that Article 82(2) TFEU is too confined to respond to the demand for a *self-standing* EU policy on procedural safeguards for defendants in criminal proceedings and, hence, recommend a broader mandate in this area, allowing both functional and self-standing powers.

1. Before demonstrating that the actual codifications of EU-level defence rights are bound to go beyond the functional approach reflected in Article 82(2) TFEU, it must be acknowledged that the various directives that so far were adopted under its heading expressly endorse the functional approach towards EU-level defence rights – the approach being that such common rights must facilitate cross-border cooperation in criminal matters. For example, the preamble to Directive 2016/1919 on state-funded legal aid for persons who sufficient resources states that

[b]y establishing common minimum rules [concerning the right to legal aid for suspects, accused persons and requested persons, this Directive aims to strengthen the trust of Member States in each other's criminal

⁷ Compare also the use of the term 'functional criminalisation', used by Mitsilegas in his interpretation of Article 83 TFEU. He observes a 'dual securitised/functional criminalisation approach' and argues that the second paragraph of Article 83 reflects the functional criminalisation approach: 'Rather than assuming the status of a self-standing Union policy, criminal law is thus perceived as a means to an end, the end being the effective implementation of other Union policies'. V. Mitsilegas, *EU Criminal Law after Lisbon. Rights, Trust and the Transformation of Justice in Europe*, Hart Publishing 2016, p. 57, 60.

justice systems and *thus to improve mutual recognition of decisions in criminal matters*' (emphasis added).⁸

The preamble to Directive 2013/48 on the right of access to a lawyer contains a wording of the same kind:

'Common minimum rules should lead to increased confidence in the criminal justice systems of all Member States, which, in turn, *should lead to more efficient judicial cooperation* in a climate of mutual trust...' (emphasis added).⁹

Considering the objective to facilitate cross-border criminal justice cooperation between the Member States, it figures that the rights established in both of these directives also apply in surrender proceedings under the European arrest warrant mechanism (Article 1(1)(b) of Directive 2016/1919; Article 2(2) of Directive 2013/48). Once again, this confirms the strong relationship between approximation and effective cooperation as envisaged in Article 82(2) TFEU.

Be that as it may, there is no denying that the minimum standards on defence rights established in these directives as well as in other procedural rights directives apply in purely domestic criminal proceedings too. Thus, in daily practice, it are not only suspects sought under a European arrest warrant or suspects whose premises have been searched under a European investigation order who under EU legislation are entitled to translations of essential documents in a language they understand, or to state-funded legal aid if their own resources are insufficient; rather, *all* suspects are entitled to the EU-level defence rights before the national authorities of the Member States – irrespective of whether or not the case has a cross-border dimension. This cannot surprise, for it would be practically impossible to draw a clear distinction between cross-border cases and domestic cases. As a consequence, the impact of approximated safeguards for defendants in criminal proceedings naturally goes beyond the cross-border context.

What strikes more is that in some of the preambles, the objective to foster cross-border cooperation is accompanied by a second objective which suggests an express choice for applying harmonised defence rights to all criminal proceedings, including purely domestic proceedings. This is best illustrated by citing once more from the preamble to Directive 2013/48. Besides reflecting a

8 Recital 2 of the preamble to Directive 2016/1919, [2016] OJ L297/1.

9 Recital 8 of the preamble to Directive 2013/48, [2013] OJ L294/2.

functional approach to the approximation of defence rights in the EU,¹⁰ this preamble also seems to promote a more self-standing view on common defence rights, aiming at a strong level of protection for individuals involved in criminal proceedings across the EU:

‘Common minimum rules should lead to increased confidence in the criminal justice systems of all Member States, which, in turn, should lead to more efficient judicial cooperation in a climate of mutual trust *and to the promotion of a fundamental rights culture in the Union*’ (emphasis added).¹¹

It could be argued that such a self-standing view was already reflected in the Council’s Roadmap Resolution in which it was stated that

‘[e]fforts should be deployed to strengthen procedural guarantees and the respect of the rule of law in criminal proceedings, no matter where citizens decide to travel, study, work or live in the European Union’.¹²

EU legislative measures thus establish a broad scope of application of procedural rights for defendants; not only are defence rights bound to apply in purely domestic criminal cases too, but the motives given for the approximation of defence rights suggest the explicit pursuit of making procedural rights also applicable beyond cross-border cooperation proceedings. Hence, the EU’s legislative achievements in the field of procedural rights only partially reflect the functional approximation powers stipulated in Article 82(2) TFEU. As aptly noted by Caeiro, these achievements reveal ‘an autonomous, self-designed project for the protection of individual rights in criminal proceedings before the authorities of the Member States’.¹³ Both Caeiro and Mitsilegas have argued that this constitutes a paradigm shift in the EU criminal justice area.¹⁴

10 See n 9 and accompanying text.

11 See n 9.

12 See n 2, at preamble, recital 10.

13 P. Caeiro, ‘Introduction (or: Every Criminal Procedure Starts with a Bill of Rights)’, in: P. Caeiro et al (eds.), *The European Union Agenda on Procedural Safeguards for Suspects or Accused Persons: the ‘second wave’ and its predictable impact on Portuguese law*, Instituto Jurídico, Faculdade de Direito, Universidade de Coimbra 2015, p. 17.

14 Caeiro 2015, *ibid*: ‘...it is legitimate to see a “shift” in the direction of the European policy in this realm’. Mitsilegas 2016, n 7, p. 183: ‘the construction of Europe’s area of criminal justice has moved from a paradigm privileging the interests of the state and of law enforcement under a system of quasi-automatic mutual recognition to a paradigm where

True, it concerns a development that for obvious reasons must be welcomed¹⁵ and, furthermore, generally fits the increased attention for fundamental rights protection in the institutional legal framework of the EU under the Lisbon Treaty. For the EU Charter of Fundamental Rights (the Charter) has now full legal effect (Article 6(1) TEU) and the EU has committed to accede to the ECHR (Article 6(2) TEU). Moreover, respect for human rights has been recognised as a foundational value of the EU (Article 2 TEU).¹⁶ But notwithstanding the positive side of this paradigm shift, it should not be ignored that a self-standing¹⁷ body of EU procedural rights cannot legitimately be realized under the too limited functionalist scope of Article 82(2) TFEU. The provision is not fit for today's European Union which in matters of criminal justice currently presents itself as a values-based actor, leading to both repressive and – to an increasing extent – protective criminal law measures.

2. But there is more reason to criticize the functionalist logic reflected in Article 82(2) TFEU. It regards the relationship between procedural rights stipulated in directives and related rights protected under the Charter, and the consequences of this relationship. As clearly follows from the texts of the directives themselves, the various procedural rights fall under the scope of Charter Rights. To be precise, provisions in procedural rights directives regulate in a clearer and/or into greater detail what the scope of a Charter right entails, and, sometimes, mention an express objective to enhance the minimum level of protection safeguarded under the ECHR and the, till then, corresponding level of protection under the Charter.¹⁸ For example, the preamble to Directive 2013/48 on the right of access to a lawyer – relating to the right to a fair trial ex Article 47 of the Charter – states that

the rights of individuals affected by such system are brought to the fore, protected and enforced in EU law'.

- 15 See e.g. J. Ouwerkerk, 'Criminal Justice Beyond National Sovereignty. An Alternative Perspective on the Europeanisation of Criminal Law', *European Journal of Crime, Criminal Law and Criminal Justice* (23) 2015–1, p. 11–31.
- 16 Further on this development, see G. de Búrca, 'The Road Not Taken: The EU as a Global Human Rights Actor', *The American Journal of International Law* (105) 2011, p. 649–693.
- 17 The term 'self-standing' is borrowed from Mitsilegas, who uses the term to contrast the criminalisation approach reflected in Article 83(1) TFEU with the functionalist criminalisation approach under Article 83(2) TFEU, see Mitsilegas 2016, n 7. The dual approach he perceives in Article 83 TFEU, has been defined in more specific terms, i.e. the 'securitised/functional criminalisation approach', Mitsilegas 2016, n 7, p. 57–62.
- 18 For in line with Article 52(3) of the Charter, rights corresponding to ECHR rights have the same meaning and scope as those ECHR rights, unless it is clarified (through legislation or through CJEU case law) that the Charter provides more extensive protection.

‘[s]trengthening mutual trust requires *detailed rules* on the protection of the procedural rights and guarantees arising from the Charter, the ECHR and the ICCPR. It also requires, by means of this Directive and by means of other measures, *further development within the Union of the minimum standards set out in the Charter and in the ECHR*’ (emphasis added).¹⁹

Directive 2012/13 on the right to information illustrates this too. The rights enshrined in this Directive directly relate to Articles 47 (right to a fair trial) and 48 (respect for the rights of the defence) of the Charter. In this regard, its preamble states that

‘[s]trengthening mutual trust requires *detailed rules* on the protection of the procedural rights and guarantees arising from the Charter and from the ECHR’ (emphasis added).²⁰

Procedural rights directives thus clarify, and sometimes also enhance the scopes of related Charter rights. For instance, in the post-*Salduz* era it was for long still a matter for discussion whether ECtHR case law on fair trial rights unequivocally required national authorities to allow suspects to have a lawyer present and participating at all hearings, and thus it was also debatable whether such an obligation would follow from Article 47 of the Charter. But the express recognition (in Article 3(3) of Directive 2013/48) of the right to have a lawyer present and participating during questioning at least clarifies the contents of the right of access to a lawyer under Article 47 of the Charter.

Then – and here comes the reason to question the mere functionalist view on approximation of procedural rights – as an intriguing side effect, directives in this field significantly enlarge the scope of application of the Charter. Pursuant to Article 51 of the Charter, its provisions are only addressed to the Member States ‘when they are implementing Union law’. Up until recently, this provision clearly excluded the majority of domestic criminal cases, such as single theft cases, or cases of single rape committed against adults. In most of such cases, no link to Union law existed and therefore suspects could not rely in Charter rights in such cases. But with the implementation of procedural rights adopted in directives which aim to clarify and/or enhance the scope of Charter rights, the amount of criminal cases in which a link to Union law somehow exists has substantially been increased – not in the least because of the very fact that the harmonised procedural rights apply in all criminal cases, including

19 Recital 6 of the preamble to Directive 2013/48, [2013] OJ L294/2.

20 Recital 8 of the preamble to Directive 2012/13, [2012] OJ L 142/1.

the purely domestic cases. EU-wide procedural rights thus have a progressive effect on the Charter's scope of application - an effect that constitutes an additional reason to declare the functionalist view of Article 82(2) TFEU unfit for today's European criminal justice area.

3. This editorial has attempted to demonstrate that under the legislative powers for *functional* approximation of procedural rights – i.e. approximation with the objective to foster police and judicial cooperation – EU legislation practically establishes a body of law that only partially fulfills the functional objectives envisaged in Article 82(2) TFEU, and to a large part fulfills *self-standing* objectives rooted in the fundamental norms and values the EU is based on (Article 2 TFEU). Considering the increased attention in the EU for the protection and strengthening of democratic values and fundamental rights, the functional scope of Article 82(2) TFEU is too confined and too one-sided to develop a *self-standing* EU policy on procedural safeguards for individuals in criminal proceedings. Hence, approximation powers in this field should reflect both functional and self-standing views on the advancement of procedural rights. Such would perhaps also pave the way for considering the adoption of procedural safeguards on matters that currently fall outside the scope of criminal proceedings as such, yet concern highly relevant and topical matters, such as detention rights.