EU Balance of Competence Review: Police and Criminal Justice

Submissions

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Contents

These submissions are made in response to the Call for Evidence on the Government's Review of The Balance of Competences between the United Kingdom and the European Union in Police and Criminal Justice. They are based on the expertise of the author and are therefore focused on the use of the principle of mutual recognition to develop EU measures in criminal matters, the added value of EU action on human rights and the implementation of the EAW as a case study.

Introduction

In a common area of dissolving borders for the economy and people, it is inevitable that a group of people will exploit these freedoms. This is what Professor John Spencer labels as the "fifth freedom" (of criminals and their crimes). As a result a criminal justice system which can flow as freely across borders also has to be established to counter such criminal activity. Subsequently, as these measures are introduced they too need to be balanced with appropriate levels of protection for individuals who may be caught up in their web. Within the EU an equilibrium needs to be maintained and can only be achieved through what can be described as "joined up thinking" were one EU measure is countered by another and with the system working as one.

The EU cannot be a pick and mix of competences, measures, systems and mechanisms. If Member States decide to benefit from EU competence in one area or aspect, they should not be limiting the necessary competence of the EU in another area. Needless to say that this does not afford the EU a blank cheque; checks and balances are in place and competences are restricted by the principles of subsidiarity and proportionality, with actions requiring justification. Additionally there can be different streams of integration with variable packages of measures.

Thus the balance of competence between the EU and a Member State, in this case the UK, needs to also take into account the necessary balance which needs to be achieved within the EU.

The relevant example in the field of police and criminal justice is the premature introduction of the EAWFD. In particular its adoption without the accompanying 2004 proposal on procedural safeguards. Whilst the EAWFD is not within the scope of this Review, important lessons and conclusions can be drawn from the EAW experience. As the first mutual recognition instrument it made clear that existing national and ECHR mechanisms to protect human rights are not sufficient or capable of dealing with the demands of a transnational system. Additionally a stronger enforcement system and a more visible standard setting mechanism are required. The basis of most measures at EU level on police and criminal matters rely on the principle of mutual recognition.

If it is deemed necessary to establish a unified system or area to combat crime, then it is of equal importance to protect individuals by adopting minimum standards applicable and enforceable at the same level and having an equal position within the area of freedom, security and justice.[1]

In theory Human Rights are protected at international, regional and national level, however, Mutual Recognition and mutual trust displace this protection in practice. It is not necessarily that no regard has been given to human rights but rather the manner in which it has. Human rights protection was based on presumptions, that human rights are protected across the EU are analogous with an empty box whose shell enables the fast tracked and near automatic surrender of individuals. The actual protection was not sufficiently detailed to create the requisite clarity and certainty for mutual trust.

[1] What follows includes modified extracts from of the author's PhD thesis.

The catch up game being played via the Stockholm Roadmap shows that the theoretical presumptions made were not sufficient and that before such presumptions are relied on it is important for these rights to harmonised. The minimum standards need to be uniform across the EU. The protection mechanisms in Member States need to be all on par with effective implementation of these standards.

As set out in the recitals of the Directives adopted to date following the Stockholm Roadmap, the justification is promotion of Mutual Recognition through increased mutual trust. This enables the ability to consider decisions equivalent and trusting that the protection of procedural guarantees has been applied sufficiently. The recent Directives discussed go further by making a direct link between the setting of common minimum standards, efficient judicial cooperation, mutual trust and the promotion of a culture of human rights in the EU.

Whilst commendable, the Stockholm measures are not in themselves a panacea and cannot redress the balance alone. They address the essential procedural guarantees, but for obvious reasons they did not attempt to tackle all aspects. A prime example is the provision of bail and specifically the conditions which Member States and citizens need to be confident will not be implemented in a discriminatory manner. The length of pre-trial detention varies dramatically across the EU Member States and although Member States may not want the length of time to be harmonized, minimum standards regulating review of detention and the granting of bail will need to work in parallel with the ESO.

The remainder of the submissions attempt to respond to the questions posed by the Review.

Chapter 1: Policy Context - General Questions

1. Has the development of EU police and criminal justice competence over the years led to improved cross-border co-operation?

As will be addressed in subsequent sections, the adoption of legislation has improved cross-border cooperation. EU action in the field of police and criminal justice has not only led to the adoption of legislation but also the development of key institutions and organisations such as Eurojust and Europol, as well as non-governmental organisations and networks which have improved overall cooperation. Legislation on its own cannot improve cross-border cooperation, it must be accompanied by other activities such as establishment of networks or reliance upon existing networks which enable dialogue, increase understanding and exchange of practice. The provision of training and capacity building for key actors to enable them to effectively use and deploy the measures is also important. Having participated in a number of such EC sponsored activities, they are effective and have a positive impact. Their activities and programmes in particular promote networking and exchanges which increase understanding of the other's systems. This in turn increases confidence in them and leads to genuine mutual trust further raising the probability of engagement.

2. What are the advantages and disadvantages arising from the UK's ability to opt in to new or amended EU policing and criminal justice legislation, and opt-out individually of new policing and criminal justice measures in relation to Schengen?

The advantages and disadvantages of the ability to opt in or opt out of future EU policing and criminal legislation will need to be assessed depending on the individual measures and their

connectivity to existing opted-in measures. What is important is to ensure that overall consistency and clarity of the system and its mechanisms is maintained.

It should also be noted that many of the EU laws are interrelated and build upon each other. It is therefore questionable whether it is appropriate to opt in to certain parts of a system or mechanism and not others.

3. Are there any areas where the EU is looking to expand its competence (either by legislating or by other means) beyond the treaty?

Recent commissioned studies by the European Commission would suggest that an area of interest is the development of legislation on substantive law, including the definition of offences and the deployment of minimum sanctions.

The EC commissioned Thomson Reuters Aranzadi study on criminal sanction legislation and practice in representative Member States, assessed the implementation of EU existing legislation on five offences. Conclusions were drawn as to the effect of these laws on the harmonization of the definitions and elements of the offences, as well as the consistency between sanctions imposed. There was overall an increase in consistency, however for the most part there was only partial implementation of the relevant laws. Member States appear to have taken a flexible approach to implementation, in particular where the relevant law was a Framework Decision rather than a Directive. At the same time it is evident that the EU legislations left wide margins for implementation and imposition of sanctions. It is the author's view that when deemed appropriate within the mandate of the EU to legislate on a matter, precision is necessary to ensure consistency and for the law to achieve its aims. Widely drafted laws leave too much room for discrepancies to exist and the value of the legislation is lost.

The minimum maximum sanction provision was found in some measures, however even the use of this left discrepancies on the maximum sanction imposed by states. A valid question could be why discrepancies at national level should matter to the EU. It is of relevance in the context of transnational cooperation and where the subjective view of offences at the national level could have a negative impact on such cooperation. Interference at a detailed level of national criminal justice (whether it be the precise definition of an offence or the sanction to be imposed) should occur only where national law interferes with horizontal coherence of EU laws and mechanisms. Any new legislation at EU level must include a fully reasoned justification.[2]

The study showed that only half of the 11 Member States studied set out minimum sanctions in their laws. A current EC commissioned study looks specifically at minimum sanctions in EU Member States.[3]

The author is not aware of any indications that the EU is seeking to expand beyond the competence provided by the Treaty in Article 83.

The important element to assess is whether any value is added by EU activity on any given issue.

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[2] European Commission, Tender JUST/2011/JPEN/PR/0066/A4, *Study on criminal sanction legislation and practice in representative Member States*, Written by Thomson Reuters Aranzadi, November 2013. Available at: http://ec.europa.eu/justice/criminal/document/files/sanctions_delivery_en.pdf

[3] Ongoing European Commission funded, ECLAN/ECORYS Study on minimum sanctions in the EU Member States.

4. Has the development of EU police and criminal justice competence helped or impeded the effectiveness of law enforcement?

One of the measures adopted over the years is the EAW. Even on the face of it, its innovations suggest efficiency, in particular the single set of rules, the uniform form and the reduced time limits. In practice the average time it takes for a person to be surrendered has been reduced significantly from the time it previously took to extradite a person. This view is reflected in evidence given to the Parliamentary Joint Committee on Human Rights both Commander Gibson, representing the Association of Chief of Police Officers (ACPO) and the then Director of Public Prosecutions, Keir Starmer QC, agreed that the EAWFD had made the process easier, simpler and quicker than the previous system.[4]

The flanking measures which followed the EAWFD further increased the efficiency of cross-border criminal cases. Specifically, the ability to enforce financial penalties without requiring the person to be surrendered to the requesting country, in addition the European Investigation Order will further increase the efficiency of justice systems by the mere fact of not requiring a person to be transferred between states.

5. Has the development of EU police and criminal justice competence benefitted or caused problems for the British criminal justice system?

From a human rights view the new system had the potential to cause problems for the British justice system, however these did not materialise. This was not because there was a lack of issues, but rather because of the margin given by judges (both national and regional) to this new system.

At the start the principle of Mutual Recognition was prematurely introduced, lacking support and a firm foundation with key actors uncertain as to the limits and the red lines which would destroy the Mutual Recognition principle foundations. As time went by and key actors (in particular the judges) build up confidence to work within the framework, it is becoming more balanced between security and liberty (which should not be considered as mutually exclusive).

Aside from the principle of mutual recognition, the EAW also highlighted the need for an adjustment period in order to adapt existing systems to the different demands of new mechanisms.

Chapter 2: Judicial Cooperation

Judicial cooperation is a key component of fostering an area of freedom, security and justice. As guardians of justice, judges must be given the tools and space to implement their roles effectively. The current legislation and practice appears to place Mutual Recognition above HRs, a rebalance of the system was required. Judges make their decisions independent of the government policies of the day.[5] Despite the fact that governments may be keen to apply Mutual Recognition, judges are also

[4] Joint Committee on Human Rights, *The Human Rights Implications of UK Extradition Policy*, Fifteenth Report of Session 2010–12, HL Paper 156 HC 767, 22.06.2011

[5] A recent reminder of this fact can be found in the words of the Court of Appeal;

> Public policy, as contemplated in the Regulation, cannot be determined by the current thinking of the government of the day as to what is an expedient foreign policy. To allow that would itself be a breach of a rule of law essential in the legal order of the United Kingdom (Krombach).

Meletios Apostolides v David Charles Orams and Linda Elizabeth Orams [2010] EWCA Civ 9 at §66

aware of the Human Rights burden placed on their shoulders. Visible human rights minimum standards would support the role of judges given them a foundation for questioning another Member State's system or decision.

Undoubtedly being a part of a single system makes it easier to cooperate with the other members. Legislation is important in providing judges the basis for asserting their power without suspicion of distrust. At the same time forums for cross-border interaction are necessary. Increased judicial interaction across borders is necessary to promote judicial cooperation. An example is the network of EAW judges which the author established with Lord Thomas of Cwmgiedd. Its usefulness was recognised to the extent that it attracted funding from the EU (a project run by the Judicial Office of the Royal Courts of Justice together with the UK Ministry of Justice) which is working towards extending the network to include all Member States and create a permanent structure. A number of lessons were learnt during the networking sessions held with the original network, least of all it was necessary to dispel myths concerning one another's systems and working towards genuine mutual trust rather then forced trust via Mutual Recognition.

Chapter 3: Policing customs co-operation on judicial matters and internal security

This is not an area of the author's expertise, although many of the general comments made in response to the other Chapters apply equally to police cooperation.

Chapter 4: Minimum standards in criminal law and procedure

17. What are the advantages and disadvantages to the UK of EU action in the field of minimum standards in criminal law and procedure? You may wish to refer to specific examples

One of the key aims of the EU action in the field of minimum standards is to increase mutual trust across the EU and thereby support the Mutual Recognition in criminal matters programme. An advantage of such programme is that it creates a level playing field across the EU in terms of common standards; creating a space where genuine mutual trust can exist.

EU action in the field of minimum standards in criminal law and procedure are largely a positive thing. Key advantages include the ability to set minimum standards above those set by the ECHR, thereby raising the level of protection across the EU. These advanced safeguards are verifiable and the UK can have increased confidence that a certain level of protection will exist across Member States. This will provide reassurance that UK nationals abroad will have access to due process.

The effect of the UK's abstention from such measures is an interesting question to consider. It should be noted that the UK standards are by comparison already amongst the highest and that the EU legislation would not prevent higher standards to be maintained or set. Other Member States look to the UK as an example of a good functioning legal system. Opting out undermines the measures and sends out a message that the UK somehow disagrees with the rights or the raised standards.

18. To what extent is EU action in this area effective in raising standards, or enhancing cooperation? And to what extent is it necessary? And to what extent is the EU the most appropriate level for action in the field of minimum standards in criminal law and procedure?

The EU is the most appropriate level for action on minimum standards because the alternatives have reached their limits, e.g. the ECHR. The EU is also better placed to legislate within this new legal landscape. It is the only one capable of matching the criminal justice measures with appropriate and necessary minimum standards which have the same applicability and ability to flow across borders.

There has not been enough time to fully assess the effectiveness of raising minimum standards in practice. However the simple initiative of introducing a letter of rights is a good starting point and has already raised the standard of human rights respect given to suspects in those EU Member States where such a mechanism did not exist or was ineffective. It is also an example of the UK's standards being exported to the EU.

The appropriateness of the EU being the level at which these minimum standards are set and enforced depends on two considerations. Firstly the value added by EU involvement. Secondly, the reality that engagement in cross-border cases requires an appropriately matched cross-border response. In such cases the law cannot be restricted within national boundaries. The impact of transnational crimes does not stop at the borders of a Member State and cannot be prevented at national level alone.

Although the main focus of the EU action's should rightly be where an EU nexus exists, and specifically where there is a cross-border element. However the reality is that it is difficult to distil the elements of a national criminal justice system which are engaged with cross-border cases from the rest of the system. It is therefore inevitable that in particular EU legislation on minimum standards will have an impact on the entire national criminal justice system of Member States. Ensuring that these minimum standards are met will also mean that judges can develop a genuine mutual trust for each other's systems.

Territoriality

States have individually subscribed to obligations under Human Rights treaties however the structure of international society has changed, states no longer have exclusive control over decisions impacting on their territory. The existing legal landscape within the EU has changed too; aspects of the criminal justice systems of Member States are fusing together, there exists overlapping jurisdiction and intersecting obligations. As illustrated by the EAWFD, cooperation is no longer bilateral or territorial; it follows that the protection of Human Rights within the EU cannot be ring-fenced by sovereignty, territory or mutual trust.[6] In the single AFSJ, all Member States share in the responsibility for Human Rights protection within the "area".

When assessing the fairness of criminal proceedings they are ordinarily considered as a whole. However, in cross border cases the proceedings are broken up into parts which although closely linked (with the individual and offence being the common factor), they are at the same time separate. Mutual Recognition and mutual trust erect the barriers permitting only the extended reach of one Member State's decisions.

[6] Extraterritorial jurisdiction for human rights violations in *Soering* following *Ng v Canada,* CCPR/C/49/D/496/1991 (1993) See also Theodora Christou and Catherine Meredith, *Not in my Front Yard: Security and Resistance to State Responsibility for Extraterritorial Acts and Omissions*, 2009

European criminal law creates an infinite combination and permutations of spaces within which individuals are placed. The result is that any given case will be subjected to a multifarious combination of investigations, arrests, questioning, cautions and trials. National criminal justice systems normally focus on certain stages of the proceedings and inadequacies at one stage are balanced by safeguards at another stage. When a case is subjected to different jurisdictions, these inadequacies risk not being balanced. These differences are most obvious, but not exclusively, between adversarial and inquisitorial systems. Access to a lawyer, in particular at the preliminary stages is a difference that has been highlighted recently. In the common law system where the police investigation is not subject to external supervision, defence rights are strong with access to a lawyer guaranteed and police questioning always tape recorded.

This staggering or division of criminal proceedings means that guarantees need to apply at all stages. Each stage is capable of being compartmentalized. Currently Member states only partner up to facilitate the crime fighting and not the Human Rights protection. Each national system has its own means by which to rectify interferences with procedural guarantees and they may come into effect at different stages of the proceedings and may not be able to be applied to interferences which occurred extraterritorially and which they did not commit – despite their ability to extend the reach of their criminal law extraterritorially.

The standardisation of safeguards at all stages of the criminal proceedings at the EU level will assist in promoting the integrity of the criminal procedure as a whole in the new transnational landscape. Stronger safeguards can only increase the credibility of the criminal justice systems and strengthen cooperation between Member States.

Mutual Recognition measures such as the EAW do not function in isolation, they lie at the heart of criminal proceedings with a cross-border nexus (the offence or the individual). As such these measures by their nature need to be part of a package. To date those adopted cover the full scope of criminal proceedings from pre-trial to post-trial. As alternatives to surrendering an individual are increasingly available through the ESO, Transfer of Prisoners FD and Financial Penalties FD, justice across EU borders will become more efficient and individuals will have access to a modified surrender enabling them to serve their sentence near family or to pay a financial penalty or be supervised pre-trial instead of having to leave their life (and employment). The important object is to ensure that the theory behind these measures is effective in practice.

EU Human Rights measures need to delve deeper into the system safeguards, in line with the ECtHR principle of equivalent protection, the EU has the responsibility to ensure that the necessary safeguards are put in place to balance the increased powers over the individual.

The ‘let's take their word for it now and deal with the consequences later’ approach, is not of much use to individuals who are separated from their families, lose their jobs, are detained in Art 3 prohibited treatment or are subjected to an unfair hearings. Human Rights must be protected and violations prevented at the first opportunity, rights cannot be recalled at a later date when the system fails a quality control test. Individuals are not products and the consequences of their ill treatment cannot always be isolated but may also impact innocent individuals. Prisons are not equally crowded and as such depending on which Member State an individual serves their sentence the conditions will not be equally degrading across the EU. Mutual Recognition provides a veil behind which Member States can hide to avoid both investigation by other Member States but also to turn a blind eye ignoring their obligations under the ECHR. It should not be forgotten that Member States, including the UK, owe their own nationals a duty to ensure that when exercising

their Treaty rights across the EU, their human rights will be respected in practice to an acceptable minimum standard.

The added value of the EU legislating for minimum standards

The minimum standards set by the EU tend to be higher than the ECHR, with an increased scope within the CFR. The CFR is only applicable to Member States when implementing EU law, for example the CFR is not applicable to the decision to issue a domestic arrest warrant for its own national located within its territory, however adoption of EU measures such as the Stockholm Directives has the effect of extending the scope of the CFR, to criminal proceedings in general. The Directives adopted to date set out minimum standards which are applicable to the domestic criminal proceedings of Member States whether a cross-border nexus exists or not. This has the effect of creating uniformity across the EU Member State criminal justice systems. It has the potential to reassure judges that due process will be followed and the procedural guarantees of an individual they surrender will be respected.

The key added value of EU competence in police and criminal justice is the strengthened enforcement of mechanisms, in particular in relation to minimum standards. These new measures adopted as Directives will benefit from doctrines of supremacy, direct and indirect effect as well as state liability. Whilst the ECtHR has done a commendable job of promoting and protecting Human Rights across the Council of Europe, its mechanism is not ideal. Apart from reliance on political will for the enforcement of judgments, the process itself takes a long time. Before making an application to the ECtHR, individuals must first exhaust the effective domestic remedies available. Depending on the nature of the proceedings this may take a good number of years. Whereas the financial costs of taking such proceedings are substantial, thus by the time individuals have exhausted the domestic remedies they be disheartened and unable to pay any further legal costs. Those who do make an application to the ECtHR then face long delays as the ECtHR attempts to grapple with the backlog of cases pending before it. The statistics for a successful case are also not on the side of the individual since only 5% of applications lead to a finding of a violation, with the vast majority of cases declared inadmissible.[7] The mechanisms introduced by Protocol 14 to deal with the backlog do not increase the odds of succeeding.

On the other hand protection of rights set out in an EU measure is quicker. At first instance the rights are directly applicable and justiciable in the national courts of Member States. Additionally where necessary, National Courts can make a preliminary reference under Article 267 TFEU to the CJEU during the course of national proceedings, thus removing the need to first exhaust domestic remedies. The timescale for delivery of CJEU judgments is faster, on average just over 16 months for preliminary references and 15-20 months for infringement proceedings and appeals to the General Court. Additionally in Article 267 TFEU provides for accelerated proceedings where the referred cases concern migration or security issues.[8] This urgent procedure known by its French acronym PPU (*procedure prejudicielle d'urgence*), fast tracks preliminary references which require a prompt decision because they concern a person in custody, a vulnerable person or child. The turnaround of such cases is 3 months and it has been applied to a number of EAW cases.

[7] Council of Europe, *Practical Guide on Admissibility Criteria*, 2011

[8] An accelerated procedure was introduced by the CJEU in March 2008 and has already been used in a number of cases. Council Decision of 20 December 2007 amending the Protocol on the Statute of the Court of Justice, OJ L 24 of 29 January 2008, p. 42; Amendments to the Rules of Procedure of the Court of Justice, OJ L 24 of 29 January 2008, p. 39, and OJ L 92 of 13 April 2010, p. 12.

As is evident from other areas, the CJEU has the power and potential to play a key role in the development of EU principles such as Mutual Recognition. Pre-Lisbon Treaty, in the AFSJ, Member States felt it necessary to limit the effect of the EU on their sovereignty. For this reason, an opt-in was given to Member States as to whether preliminary references concerning Third Pillar measures, could be made and by which courts.[9] It is interesting to note that even if a Member State opted not to grant jurisdiction to the CJEU, it was still entitled to intervene as a third party in cases from other Member States.

By restricting access to the CJEU, Member States felt that they could maintain control over the scope of Mutual Recognition within their criminal law. Nascimbe considers this restriction as a shortcoming in the protection of individuals within European judicial cooperation. He considers the "a la carte (or 'variable geometry') regime" as hindering "the uniform interpretation and application of European Community law in the member states and consequently jeopardises the main objective of the judicial protection system itself."[10]

The CJEU has however adapted its jurisdiction and previous jurisprudence so as to extend its judicial protection to police and judicial cooperation.[11] Reiterating that the purpose of a preliminary reference is to ensure uniform application of EU legislation across all MSs, it has given some words and phrases in Third Pillar measures an autonomous meaning. This uniform application also furthers the Mutual Recognition ambitions.

Some of the shortcomings flowing from the restrictions placed on the CJEU within the third pillar have been addressed by the Lisbon Treaty.[12] In addition to the abolition of the pillar system, the suppression of the distinction between first and third pillar and the changes in the legislative sphere, the same legal remedies are now available.[13]

Preliminary references from the national courts to the CJEU can include whether the Human Rights point at issue is appropriate for consideration within the framework of the particular EU law. The competence of the CJEU to examine Human Rights can be summarized as follows: the compatibility of EU legislation with HRs;[14] the compatibility of national implementing measures with HRs;[15] when Member States invoke Human Rights as derogation from an obligation under EU law;[16] and where the EU legislation concerns Human Rights.[17] In *Radu*[18] the CJEU was asked to rule on the

[9] Under Article 35 of the EU Treaty (introduced by the Treaty of Amsterdam), Member State needed to confer jurisdiction upon the CJEU to make preliminary rulings on the validity of measures implemented under Title VI. Those Member State who granted jurisdiction could restrict which courts could refer to only their courts of final instance.
[10] Bruno Nascimbene, *European judicial cooperation in criminal matters: What protection for individuals under the Lisbon Treaty?*, ERA Forum (2009) 10: 397–407
[11] See Case C-105/03 *Criminal proceedings against Maria Pupino* [2005] ECR I-5285 and see also Case C-355/04 P *Segi et al v Council* [2007] ECR I-1579 for the extension of procedural guarantees.
[12] Lisbon Treaty*, Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community,* OJ C 306 of 17 December 17.10.2007. Consolidated version of the Treaty on the European Union and the Treaty on the Functioning of the European Union, OJ C 115 of 09.052008
[13] There is a transitional period of 5 years with respects to the measures adopted in the area of police and judicial cooperation in criminal matters before the entrance into force of the Lisbon Treaty (Article 6 Lisbon Treaty).
[14] C-402/05 P and C-415/05 *P Yassin Abdullah Kadi and Al Barakaat International Foundation v Council and Commission,* [2008] ECR I-06351
[15] *Case 5/88 Wachauf* [1989] ECR 2609; Case C-260/89 [1991] ECR I-2925
[16] *Case C-36/02, Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn*, [2004] I-09609
[17] Case C-465/07 *Meki Elgafaji and Noor Elgafaji v Staatssecretaris van Justitie* [2009] ECR I-00921
[18] *C-396/11 Proceedings relating to the execution of European arrest warrants issued against Ciprian Vasile Radu* [2013] ECR 00000

compatibility of EAWFD obligations with the ECHR and CFR. The CJEU shies away from the broader question, despite the detailed Opinion from Advocate-General Sharpston. What can be taken from this and other cases is that the CJEU on the one hand is giving an opportunity for measures to be adopted before it interprets particular rights, whilst on the other hand it is indicating that it is important for the adopted measures to reflect the highest acceptable common standards otherwise such measures will not serve their full potential of creating uniformity and certainty across the EU.

The CJEU is increasingly called upon by national courts to interpret Human Rights under the CFR. The cases referring questions relating to the CFR are increasing year on year and the CJEU continues to emphasize that under Lisbon the CFR is given equal legal value to the Treaties and EU measures are to be assessed in light of the CFR.[19] Whilst *Radu* was disappointing in terms of their avoidance of dealing face on with the broader Human Rights issues, this appears to be more to do with treading carefully around the principle of Mutual Recognition whilst it is in its infancy in criminal matters rather than with the CJEU mandate on Human Rights.

The adoption of Directives on procedural safeguards under the Lisbon Treaty means that the CJEU also enjoys full jurisprudence enabling courts of all Member States to refer preliminary questions to consider conformity with primary law and the CFR. It can also consider conformity of national law including with respect to self-executing provisions. It can also be asked to interpret the scope or application of a particular right which might otherwise not have fallen within its competence.

Of most importance is perhaps the enforcement mechanism of the EU in comparison with the purely politically reliant enforcement system of the Council of Europe.[20] This key difference is one reason why EU measures on Human Rights can promote judicial cooperation and Mutual Recognition measures. Whilst ECHR standards provide a useful starting point for setting EU-wide minimum standards and continues to act as a safety net, the enforcement mechanism of the EU is more powerful and can also lead to serious financial and institutional implications. The EU mechanism also aims to ensure uniformity of standards across the EU, which is what gives coherence to the EU system and reassures judicial authorities that those who leave their control will continue to have their rights respected.

The Commission has its full powers including the bringing of infringements proceedings before the CJEU against Member States who fail to implement in full or correctly the Directive[21] or are identified as falling short of standards set out in a Directive. Unlike ECHR judgments, these are binding and supported by strong enforcement mechanisms. Additionally, if a Member State is found to not be complying with a particular Directive, the CJEU will impose a fine against them.

The ultimate sanction is suspension from the particular aspect of the *acquis* or if sufficiently serious from the EU as a whole. In addition to non-compliance with a Directive, Article 7 provides a political oversight of compliance by MSs, providing for suspension of a Member State from the EU if its Human Rights standards fall short of the minimum standards acceptable to the EU.

[19] For one example see the Joined cases C-92/09 and C-93/09 *Volker und Markus Schecke GbR* [2010] ECR I-11063. Other cases include: Case C-555/07 *Kucukdeveci* [2010] ECR I-0000, §22; Case C-135/08 *Rottman* [2010] ECR I-0000; Case C-578/08 *Chakroun* [2010] ECRI-0000, §44

[20] Once an ECtHR judgment is final, monitoring of its implementation passes to the Committee of Ministers, a body composed of representatives from the Member States.

[21] Under Articles 258 and 260 TFEU. See Annex 6.

The TFEU sets out a number of provisions relating to assessment and evaluation within the EU. The working methods, outcomes, effects and sanctions of these are not set out in detail the provisions.[22]

The CJEU will continue to play a significant role in re-aligning Member State standards and ensuring compliance with obligations. *Schecke*[23] underlines the fact that for proportionality to be effectively respected it needs to be reinforced by assessments "of less intrusive policy alternatives and by internal processes guaranteeing that such an assessment is in fact carried out and documented".[24] This obligation is placed on the EU and its institutions as well as the implementing Member State[25]

20. What future challenges do you see in the field of minimum standards in criminal law and procedure and what impact might this have on the national interest?

As described above, implementation and enforcement at the EU level of minimum standards will be stronger then they have been at ECHR level (this is one of the key added value of legislation at the EU level).

21. Are there any other general points in relation to this area that you wish to make which are not captured above?

In addition to what has already been set out above. The importance of tailored minimum standards of human rights protection should not be overlooked. The following modified extract provides a brief synopsis of the key issues.

Importance of Human Rights Minimum Standards at the EU level

The importance of reinforcing Human Rights within the criminal justice system is no longer a grey area but is set out in black and white not only by the Commission, practitioners, academics and NGOs but also by national courts and institutions of the Member States as well as the CJEU. Human Rights are the key to promoting mutual trust and thus protecting the principle of Mutual Recognition.

For example, the real dangers of the EAW is that an individual could be surrended on the basis of evidence obtained by practices not accepted in the Executing Member State They could remain in pre-trial detention for periods intolerable in the Executing Member State with no likelihood of obtaining bail as a non-resident and kept in sub-standard conditions. However, according to Mutual Recognition, all these risks are minimised because the Issuing Member State is a signatory to the

[22] It is sufficient to note that whilst extensive mechanisms exist, these are not a panacea. For example, Article 70 TFEU provides for Member State assessment together with the Commission, however the relationship between the two in this assessment is not clear. Participation of the Fundamental Rights Agency in Article 70 assessments is also not clear and neither is the relationship between the two evaluations. Other questions include what principles/criteria will be used to evaluate and who decides these; whether the reports will be made public; what sanctions could be imposed following a finding of non-conformity, Article 70 specifies that the evaluation is without prejudice to Articles 258-60 infringement proceedings and so the Commission may bring infringement proceedings following a negative evaluation, Article 7 is also not excluded; and whether the Commission's role as 'watchdog' will be compromised in favour of Member State evaluation.

[23] *C-92/09 and C-93/09 Volker und Markus Schecke GbR* [2010] ECR I-11063 and also the Opinion of Advocate-General Sharpston.

[24] Clemens Ladenburger, *FIDE 2012 – Session on "Protection of Fundamental Rights post-Lisbon – The interaction between the Charter of Fundamental Rights, the European Convention of Human Rights and National Constitutions*", Institutional Report, 2012

[25] In *Schecke* (n21) this included the requirement, provided for in the Directive, for Member States to conduct 'prior checks' to determine the processing operations likely to present specific risks to the rights and freedoms of data subjects.

ECHR and if they fail to protect Human Rights either the first time or the second time (to ECHR standards), the individual can apply to the ECtHR for a remedy.

The contention and justification for Mutual Recognition is that it is sufficient for Human Rights to be specified in Mutual Recognition instruments. It is clear that the required protection is not, as originally believed by the Member States, sufficed through proclamations and membership of the ECHR. A mere declaration of Human Rights in recitals is sufficient to make the implementation of a measure compliant for the legislator but necessitates a more concrete foundation; these common standards need to exist in practice and not only in theory. The practice of Member States needs to be supported and recorded by a monitoring and enforcement mechanism more efficient then the ECHR.

The basis of the principle of Mutual Recognition is mutual trust. Whilst justice can be evaluated objectively; trust is a more subjective concept. When referring to 'mutual trust' what is meant? Does it take on its ordinary meaning? What is being trusted; the judges, the respect for HRs, the respect for the rule of law, the procedural guarantees, the criminal justice system? By whom do they need to be trusted? At what level does this trust reach and when is it rebuttable?

As a term 'mutual trust' is nebulous, open to different understandings and difficult to assess, it is not a legal term, but rather falls within the more capricious area of politics. Uniform standards are absent; nevertheless, despite all the above, mutual trust is a necessary and crucial component of Mutual Recognition in criminal matters. Judges are being asked to trust (blindly) all of the above, but with sweeping distrust existing under the veil of Mutual Recognition. Whilst the law can support trust building and provide remedies; it cannot create on its own the requisite trust. This flows from the practice and the building of relationships between not only the judges, but also the other state institutions as well as the citizens themselves. Judicial networks are mechanisms capable of building trust and once trust is established between judicial authorities it needs to be trickled down to authorities and citizens.

Whereas the ECtHR principle of equivalent protection applies, Mutual Recognition appears to nullify it through the policy of non-inquiry. The principle of non-inquiry is applied strictly in the context of the EAW, following a similar line of argument; that the Issuing Member State is best placed to deal with any complaints and that its criminal justice system is trusted to respect Human Rights. The principle of non-inquiry in the context of the EAW is neither new nor unique to the EAW, but has been applied to varying degrees by states in the guise of international comity.[26] In practice courts have been hesitant to sweep aside mutual trust and the presumption has been extremely difficult to rebut. However, almost a decade of implementing the EAWFD, judges are slowly releasing the mutual trust noose.

The role of the judges, as both gate-keepers and guardians, is to keep the system moving whilst at the same time ensuring that the rule of law is respected. What they have been doing one pigeon-step at a time is trying to determine at what level Member States can accept doubts and challenges to mutual trust without the Mutual Recognition programme being undermined. The boundaries have been broached within the asylum *acquis* with judges receiving their instructions to conduct effective and not merely cursory reviews and to use their margin of discretion to determine whether the presumption of trust is rebutted. Over the past decades Human Rights as a branch of

[26] See John Dugard and Christine Van den Wyngaert, *Reconciling Extradition with Human Rights*, The AJIL, (1998) Vol.92 No.2, 187-212

international law has grown in terms of acceptability and respect. The danger is that the unmodified application of Mutual Recognition through the EAWFD and other mutual recognition instruments may now relegate HRs; the need for more active protection in practice cannot be ignored.

The CJEU's view is that the system is workable without harmonization but requires respect for autonomous and uniform application of rules. It was always envisaged that Mutual Recognition measures would be accompanied by HR in the AFSJ to include justice for all. Standardisation of common minimum standards relating to procedural guarantees and Human Rights is required to support Mutual Recognition.

The key human rights in criminal matters occupy an important position in the Mutual Recognition mechanism. They illustrate the vulnerabilities of both the individual concerned and the Member State criminal justice systems. As things stand human rights appear to be trumped by Mutual Recognition measures, to re-set the balance legislation setting minimum standards are required.

Existing Human Rights obligations cannot be ignored, trumped or nullified by Mutual Recognition measures such as the EAWFD. Within the EU there is a 3-fold protection system: (1) CFR; (2) ECHR; (3) principles resulting from common Constitutional rights of MSs. These may be common values but they are not commonly adhered to across the Member State.

Execution of an EAW and mutual recognition measures "cannot be applied automatically but must, on the contrary, be viewed in the light of the personal and human context of the individual situation underlying each request".[27] The appearance of automaticity stems from the high presumption associated with mutual recognition. Checks and controls are at least in theory available in the form of the exhaustive list of grounds for refusal, human rights obligations of Member States and adjudication by the independent judiciary. These may be limited but they alter Mutual Recognition which in other spheres operates with automaticity.

These grounds are being gradually given autonomous meanings by the CJEU. The caselaw indicates that the CJEU is prepared to give a wide margin of discretion to Member States. For example it has shown leniency towards Executing Member States when the issue relates to their own nationals and those in their territory. This may be because such cases do not have any bearing on reciprocity and mutual trust and are implemented under the guise of protecting the rights of individuals with a good reason to remain in the country (nationality, residence or staying). On the contrary cases relating to trials in absentia and concerns about human rights in the issuing state directly effect on reciprocity and mutual trust and the CJEU has so far taken a narrow approach.

Mutual Recognition appears to trump Human Rights obligations in the eyes of many judges, requiring the production of exceptionally strong evidence that an individual's rights risked being violated before the presumption can be rebutted. However, this hard-line shows signs of softening. National judges are finding it harder to rely on Mutual Recognition to dispel Human Rights arguments. Mutual Recognition has its limits and as its fog slowly fades through litigation and reports, mutual trust will need to be supported by more concrete measures – both legislative and non-legislative.

Under EU law the relationship between state and individual is one of citizenship and territory, whereas under human rights it is one of jurisdiction and control. In antithesis however to Europe's

[27] *C-42/11 Proceedings concerning the execution of a European arrest warrant issued against João Pedro Lopes Da Silva Jorge* [2008] ECR 0000, Opinion of Advocate-General Mengozzi

dissolving internal borders, Mutual Recognition territorially ring-fences MS's criminal justice system from external scrutiny. The tension thus appears to be between fulfilment of human rights obligations and respect for Mutual Recognition.

> What is common to all of these grounds is a lack of trust in these authorities. If our courts were to accede to such arguments, they would be defeating the assumption which underpins the Framework Decision that member states should trust the integrity and fairness of each other's judicial institutions. This is a course that we should not take.[28]

The position of the UK Supreme Court is telling of the goliath struggle individuals face in attempting to rebut the presumption of mutual trust.

Mutual Recognition is not only recognition but requires a presumption that the decision was reached following due process and that it is trustworthy. Mutual Recognition gives domestic criminal laws and procedures of one Member State extraterritorial reach and transnational application, impacting on the power of another Member State and on the liberty of the individual. This needs to be matched with extraterritoriality of their Human Rights obligations which are attached to these procedures. To some extent this need has been recognised by the EU itself; an illustration is the EU's extended scope of the right to a fair trial which under the CFR applies to EAW proceedings in the Executing Member State.

Since the judiciary has been left in charge, they should be empowered to assess human rights at the point when the issue is first raised. The buck can only be passed if it is evident that it would be appropriate and not because of the principle of mutual recognition, the possibility of undermining mutual trust and concerns about reciprocity.

EU standards can assist in mutual trust by making the standards visible and introducing an additional enforcement mechanism.

The elephant in the room was for a long time the absence of Human Rights reinforcement. The EAWFD sister Framework Decision (the 2004 proposal) failed due to lack of support based on a misguided belief that the national laws of Member States were adequate and arguments of it lacking legality. Nevertheless the needs set out in the 2004 proposal (to counterbalance judicial cooperation, for divergent practices to be more visibly equivalent and for their uniform application) remained the same for the Stockholm Roadmap. The Lisbon Treaty supports increased Human Rights protection through the altered legislative process, removal of the democratic deficit and the elevation of the CFR. EU accession to the ECHR is progressing and will allow external scrutiny, although it is not clear how this will interact with the principle of equivalent protection. The added value of EU measures on Human Rights is primarily the enforcement and evaluation mechanisms which include the bringing of infringement proceedings and the CJEU jurisdiction. It is also hoped that they will create uniform protection of Human Rights in practice.

[28] *Jaso & Ors v Central Criminal Court No.2 Madrid* [2007] EWHC 2983 (Admin) §77

The Author

Dr Theodora A Christou has for over 14 years been a consultant primarily on Human Rights, but also on other areas including EU law, rule of law, public international law, transitional law and the link between human rights and commercial law. As a consultant she works on cases before regional and international bodies and courts, conducts research, designs and implements training including the production of material and manuals and also consults on legal reform and transitional justice. She has taught Criminal Law at QMUL and was also course convenor of the 'Forced Migration and Human Rights' unit on the MSc Refugee Studies at LSBU. She has also conducted human rights training in a number of jurisdictions, on a number of topics including fair trial rights, election rights, property rights, women's rights, state obligations and how to file applications for human rights violations.

As a Consultant at The AIRE Centre, Theodora advised in cases concerning human rights and EU law and more often than not at the crossroads between the two. She was project manager of the European Cross-Border Justice project which organised a series of workshops on the EAW with participants including Judges from the ECJ, the ECtHR and national judges, prosecutors, practitioners, academics and NGO representatives from 10 Member States. The dialogue focused on learning about other legal systems and addressing common misconceptions. It also provided a forum for the exchange of ideas and best practice. The project also published, *European Cross Border Justice: A Case Study of the EAW.*[29] As an extension of the project Theodora together with Lord Justice Thomas established a network of EAW judges across EU Member States. This network is currently being extended and developed through a project run by the Judicial Office.

Theodora has also been a member of Fair Trials International's LEAP (Legal Experts Advisory Panel), participating in meetings in addition to conducting training on their European Defender's Programme.

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Theodora was awarded a PhD from Queen Mary, University of London for the thesis entitled 'Justice and Trust: Human Rights and the European Arrest Warrant'. She was called to the Bar at Lincolns Inn and holds an LLM from King's College London and an LLB from LSBU. She has been an elected Executive Board member of the Bar Human Rights Committee since 2008. Theodora is currently developing Post-Doctoral research at the Centre for Commercial Law Studies, School of Law, Queen Mary University of London. The views expressed are not attributable to any of the abovementioned organisations.

[29] Theodora A Christou (Editor and Contributor), *European Cross Border Justice: A Case Study of the EAW*, AIRE Centre: 2010 (cited in the *Assange* case [2011] EWHC 2849 (Admin)) Available at: http://www.airecentre.org/resources.php/11/european-cross-border-justice-a-case-study-of-the-eaw