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Criminal Law: Mutual Recognition and Criminal Procedure

9.1. Introduction

In order to ensure that substantive criminal law achieves its intended objectives, it is obviously necessary both to investigate alleged crimes and to prosecute the alleged offenders, and then to carry out any sentence imposed. But in democratic societies committed to human rights, ensuring effective prosecutions cannot be the sole objective. Since it is unacceptable to punish the innocent with the force of criminal sanctions such as imprisonment, the process of determining guilt or innocence needs to be fair. So the right to a fair trial carries a prominent place in any general international human rights treaty or national constitutional bill of rights, along with associated principles like the legality and non-retroactivity of criminal law.

Yet putting in practice the right to a fair trial, balancing defendants' rights with the need to ensure effective prosecutions, is a complex and often controversial process, both as regards the general rules of criminal procedure and their application to specific cases. The process is complicated when there are cross-border elements, such as the presence of a suspect, witness, or other evidence in another country. To address such issues, there is a considerable body of international treaties, mostly emanating from the Council of Europe. But since the operation of these treaties is often considered to be ineffective in light of a perceived increase in cross-border crime, the EU has been active in adopting measures in this area and planning further measures. In particular, since 1999, the EU has been implementing a principle of mutual recognition in criminal matters, according to which the decisions of the judicial authorities of one Member State should as far as possible take effect automatically in all other Member States.

There are objections to the detailed measures adopted to apply this principle, most notably from national parliaments and courts, in light of doubts in particular about the fairness of foreign criminal procedures due to the diversity of systems of criminal procedure between Member States and fears that criminal suspects facing trial in a foreign system will face de facto discrimination. These doubts could be addressed by EU-wide harmonization of

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domestic criminal procedural law, but there have been objections in turn to such measures due to the limited legal powers of the EU as regards domestic criminal procedure, qualms about harmonization of national law in such a sensitive and distinctive field, and doubts about the necessity of such measures in light of the fair trial provisions of the European Convention of Human Rights (ECHR) and the possibility of enforcing those rights in the European Court of Human Rights. But in the absence of harmonized procedural rights, the 'free movement of prosecutions and sentences' could arguably lead to the violation of the right to a fair trial. To address these concerns, the Treaty of Lisbon provides for a specific legal base for the adoption of measures regarding domestic criminal procedure, and the EU has committed itself to adopt legislation in this area.

This chapter surveys these issues in detail, starting with the basic issues of the institutional framework, an overview of measures adopted, legal competence, territorial scope, human rights, and overlaps with other (non-JHA) EU law. It then examines the EU's mutual recognition measures, starting with extradition and the 'flagship' European Arrest Warrant, moving to analyse pre-trial measures addressing issues such as the movement of evidence and freezing orders, and then post-trial measures such as the recognition of sentences and confiscation orders and the transfer of prisoners. It then examines EU harmonization of domestic criminal procedure, in the specific fields referred to in the Treaty of Lisbon (evidence law, suspects' rights, and victims' rights). Finally, it concludes by examining the issues of administrative cooperation and EU funding and external relations, as they apply to criminal procedure.

Issues related to jurisdiction (including cross-border double jeopardy) and prosecution, notably the development of Eurojust and the prospect of creating a European Public Prosecutor, are addressed separately in Chapter 11. The connected issue of substantive criminal law is addressed in Chapter 10, and the closely related issue of policing is examined in Chapter 12. As noted in the latter chapter, this book observes the English distinction between the prosecution and trial process before the courts (addressed in this chapter) and the *investigation* of crime by the police or similar authorities (addressed in Chapter 12), even though in continental countries, investigations are more closely linked to the judicial process.

9.2. Institutional framework and overview

9.2.1 Cooperation before the Treaty of Amsterdam

Before the entry into force of the Treaty of Amsterdam in 1999, the main source of the law on international criminal procedure was Council of Europe Conventions,

which addressed in turn: extradition;[1] mutual assistance in transferring evidence;[2] the international validity of criminal judgments (or transfer of sentences);[3] the transfer of sentenced persons, with a subsequent protocol);[4] and measures concerning the proceeds of crime.[5] Most of these Conventions have been universally ratified by Member States, but the Convention on the international validity of criminal judgments attracted much less interest.[6]

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At first, the EU Member States focused on agreeing European Political Cooperation (EPC) Conventions that would enhance the application of the Council of Europe Conventions among themselves, and encourage cooperation between Member States in the areas where the Council of Europe Conventions had attracted little enthusiasm.[7] To this end, they agreed on Conventions concerning the application of a Council of Europe terrorism Convention (which contains further extradition and mutual assistance rules), the faxing of extradition requests, the international validity of criminal judgments, and the transfer of sentenced persons.[8] However, none of these EPC Conventions entered into force, as they failed to attract much enthusiasm among Member States.[9]

Outside the framework of cooperation between the (then) EEC Member States, the 1990 Schengen Convention contained a number of detailed provisions on cross-border cooperation, addressing mutual assistance,[10] extradition,[11] and the transfer of sentenced persons.[12] The Schengen Executive Committee also adopted two relevant Decisions, concerning mutual assistance as regards drug trafficking and a separate agreement concerning cooperation regarding road traffic offences.[13] Furthermore, the Schengen Information System (SIS) contains data of use to prosecutions and judicial investigations, in particular as regards extradition, wanted persons, and objects which could be used as evidence.[14]

With the entry into force of the Treaty of Maastricht, the EU had a formal intergovernmental framework to address criminal procedural issues. The main development during the 'Maastricht era' was the signature of two extradition Conventions in 1995 and 1996, concerning in turn consented and disputed extradition.[15] These Conventions sought to reduce or eliminate a number of the main bars to extradition under the Council of Europe Conventions. During this period, there were also lengthy attempts, starting in 1995, to agree a Convention

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[1] See 9.5.1 below. [2] See 9.6.1.1 below. [3] See 9.7 below. [4] See ibid.
[5] See 9.6.2 and 9.7.4 below.
[6] For ratification details of all of the Conventions and Protocols, see Appendix I.
[7] On the EPC process, see 2.2.1.1 above. [8] See 9.5.1, 9.6.1.1, and 9.7 below.
[9] For ratification details of all of the Conventions and Protocols, see Appendix I.
[10] Arts 48–53 of the Convention (Chapter 2 of Title III), [2000] OJ L 239. See 9.6.1 below.
[11] Arts 59–66 of the Convention (Chapter 4 of Title III). See 9.5.1 below.
[12] Arts 67–69 of the Convention (Chapter 5 of Title III). See 9.7.1.2 below.
[13] See respectively 9.6.1 and 9.7.1.1 below.
[14] See particularly Arts 95, 98, and 100 of the Convention. On the SIS, see 12.6.1.1 below.
[15] See 9.5.1 below.

on mutual assistance to supplement the Council of Europe measures, but these attempts did not bear fruit until after the Treaty of Amsterdam was in force. A Convention on recognition of driving disqualifications was signed in 1998, but it has attracted few ratifications.[16] There were also a handful of Joint Actions addressing criminal procedural issues. These measures concerned the exchange of liaison magistrates;[17] the 'Grotius' programme of incentives and exchanges for legal practitioners;[18] good practice in mutual legal assistance;[19] the creation of a European judicial network;[20] and money laundering and confiscation of proceeds.[21]

9.2.2. The Treaty of Amsterdam

9.2.2.1 Institutional framework

The Treaty of Amsterdam inserted an Article 31 into the EU Treaty, which provided that:

the range of action since Amsterdam in matters of justice cooperation

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> Common action on judicial cooperation in criminal matters shall include:
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> (a) facilitating and accelerating cooperation between competent ministries and judicial or equivalent authorities of the Member States in relation to proceedings and the enforcement of decisions;
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> (b) facilitating extradition between Member States;
>
> (c) ensuring compatibility in rules applicable in the Member States, as may be necessary to improve such cooperation;
>
> (d) preventing conflicts of jurisdiction between Member States;
>
> (e) progressively adopting measures establishing minimum rules relating to the constituent elements of criminal acts and to penalties in the fields of organised crime, terrorism and illicit drug trafficking.

The Treaty of Nice subsequently added a second paragraph to the previous Article 31 TEU, referring to the 'Eurojust' prosecutors' agency which EU leaders had agreed to create in the meantime. This issue, along with Article 31(1)(d) regarding conflicts of jurisdiction, is addressed further in Chapter 11.

The measures adopted pursuant to Article 31 TEU were governed by the revised general third pillar rules on the jurisdiction of the Court of Justice, the role of the political institutions, and the use of specific instruments and their legal effect.[22] On the latter point, the Court's judgment in *Pupino*, finding that Framework Decisions had indirect effect,[23] was of great relevance to this area, since a number of Framework Decisions in the field of criminal procedure partly or wholly govern the legal position of individuals (particularly crime victims and

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[16] See 9.7.3 below. [17] See 9.9 below. [18] See ibid. [19] See 9.6.1 below.
[20] See 9.9 below. [21] See 9.6.2 and 9.7.4 below. [22] See 2.2.2.2 above.
[23] Case C-105/03 [2005] ECR I-5285; see discussion in ibid.

suspects), whose legal position may be altered significantly by the ability to invoke the indirect effect of a Framework Decision.

Also, with the entry into force of the Treaty of Amsterdam, the various Schengen rules on criminal procedural matters were allocated to the third pillar of the EU.[24]

9.2.2.2. Implementing the Treaty of Amsterdam

As with other areas of JHA cooperation, some key basic principles for development of policy and legislation in this area were set out by the Tampere European Council in the autumn of 1999.[25] The relevant conclusions focused in particular on mutual recognition of judicial decisions, described as the 'cornerstone' of criminal (and civil) judicial cooperation; the principle of mutual recognition should apply not just to judgments but also to 'other decisions of judicial authorities'. However, the conclusions also referred to the 'necessary approximation of legislation'. Approximation and mutual recognition together 'would facilitate co-operation between authorities and the judicial protection of individual rights'.

More specifically, the conclusions urged Member States to ratify the EU's two extradition Conventions, and stated that extradition as such should be abolished in the case of persons who fled after final sentencing. In other cases, there should be consideration of 'fast track' extradition procedures, 'without prejudice to the principle of fair trial'. Furthermore, there should also be mutual recognition of 'pre-trial orders, in particular' measures on seizure of assets and evidence, and 'evidence lawfully gathered by one Member State's authorities should be admissible before the courts of other Member States, taking into account the standards that apply there'. Finally, the conclusions asked the Council and Commission to adopt a programme of measures to implement the principle of mutual recognition by the end of 2000.

The conclusions also provided that 'minimum standards should be drawn up on the protection of the victims of crime, in particular on crime victims' access to justice and on their rights to compensation for damages'. Member States were called upon to provide full mutual legal assistance in the investigation and prosecution of serious economic crime (referring to taxes and duties), money laundering 'should be rooted out wherever it occurs', and the European Council was 'determined to ensure that concrete steps are taken to trace, freeze, seize and confiscate the proceeds of crime'. To that end, Member States were urged to implement various relevant EU and international measures.

To implement this agenda, the Council agreed upon the mutual recognition work programme, as requested, by the end of 2000.[26] The programme ultimately

[24] [1999] OJ L 176/17. [25] Paras 32–52 of the conclusions.

[26] [2001] OJ C 12/10. See earlier Commission communication on the issue (COM (2000) 495, 26 July 2000) and discussion of the development of the principle in S Peers, 'Mutual Recognition

included a list of twenty-four measures, ranked by priority, but without dates for concluding the programme as a whole or agreeing individual measures.

According to its introduction, the mutual recognition programme was to be subject to a number of 'parameters': whether each measure should be general in scope or limited to specific crimes; whether the concept of double criminality (requiring the act in question to be a crime in both the requesting and the requested State) should be dropped; 'mechanisms for safeguarding the rights of third parties, victims and suspects'; the need to define 'common minimum standards' necessary to facilitate mutual recognition (for example, the competence of courts); whether enforcement is direct or indirect;[27] the grounds for refusing recognition (such as public policy and double jeopardy, and exclusion of military, fiscal, or political offences); and the existence of 'liability arrangements in the event of acquittal'.

Before the entry into force of the Treaty of Lisbon, this programme was implemented by Framework Decisions on: a European Arrest Warrant (EAW), which replaces extradition between Member States; freezing orders; the mutual recognition of financial penalties; execution of confiscation orders (and related domestic law on confiscation); a European Evidence Warrant (following an earlier EU Convention and Protocol on mutual assistance in criminal matters); the transfer of sentenced persons; probation and parole orders; pre-trial supervision orders; recognition of convictions; the exchange of criminal records; and *in absentia* trials (trials held without the attendance of the accused).[28] However, the Commission decided against proposing EU legislation on witness protection.[29]

The development of EU policy in this area was clearly accelerated by the terrorist attacks of 11 September 2001, which were followed almost instantly by the proposal to establish the EAW and the agreement on the text. This Framework Decision became the 'flagship' of the EU's mutual recognition policy, but it was subsequently attacked on human rights grounds in the Court of Justice and national courts.[30] The adoption of further measures in this area was also encouraged by the Hague Programme of 2004, and its related Action Plan.[31]

As for approximation of legislation, there was no real development as regards the law of evidence or suspects and defendants' rights.[32] However, victims' rights were

and Criminal Law in the European Union: Has the Council Got it Wrong?', (2004) 41 CML Rev 5 at 7–10.

[27] Direct enforcement means application of the foreign decision without any intervening procedure in the executing Member State. Indirect enforcement means that some form of procedure (usually quite limited) by the executing State's authorities is necessary before the decision can be executed there.

[28] See 9.5–9.7 below.

[29] See the Communication on this issue (COM (2007) 693, 13 Nov 2007).

[30] See further 9.5.2 below.

[31] [2005] OJ C 53/1 and [2005] OJ C 198/1. See also the Commission communication on mutual recognition and harmonization of criminal law (COM (2005) 195, 19 May 2005; SEC (2005) 641, 20 May 2005).

[32] See 9.8.1 and 9.8.2 below.

addressed in particular by both a third pillar measure on their position in criminal procedure and by an EC law (as it then was) measure on compensation.[33]

Other relevant measures have included the development of the Schengen Information System (SIS), in particular as regards the inclusion of further data relevant to prosecutions, access to the SIS by judicial authorities, and the creation of second-generation SIS (SIS II), which will in particular include information on EAWs.[34] Also, the Framework Decision on personal data protection, adopted in 2008, also applies to the judicial sector.[35]

There is also a link between measures on substantive criminal law and abolition of the dual criminality principle (the requirement that an (alleged) act must amount to a criminal offence in both States concerned) in the EU's mutual recognition measures, because the harmonization of substantive criminal law reduces the differences between national rules which underlie the principle of dual criminality.[36]

Finally, the Court of Justice had begun to play a significant role as regards interpretation of measures in this area even before the Treaty of Lisbon entered into force, receiving five references for interpretation of the Framework Decision on crime victims' rights,[37] a reference on the validity of the Framework Decision on the European Arrest Warrant;[38] and six references on the interpretation of the same Framework Decision.[39]

9.2.2.3. Basic principles of mutual recognition in criminal law

Although the various EU measures setting out the details of the principle of mutual recognition in criminal law differ in the detail, they have certain common features which it is useful to summarize at the outset.[40] These features remain relevant following the entry into force of the Treaty of Lisbon, as the pre-Lisbon measures will remain in force until replaced or amended, and since post-Lisbon measures appear set to follow the template established by previously adopted measures.

A frequent feature of the mutual recognition measures is that they replace or supplement the Council of Europe measures referred to above, whether those

[33] See 9.8.3 below. [34] See 12.6.1.1 below.

[35] [2008] OJ L 350/60. See 12.6.4 below. [36] See generally ch 10 below.

[37] Cases: C-105/03 *Pupino* [2005] ECR I-5285; C-467/05 *Dell'Orto* [2007] ECR I-5557; C-404/07 *Katz* [2008] ECR I-7607; C-205/09 *Eredics*, pending (opinion of 1 July 2010); and C-483/09 *Gueye*, pending. On the substance of these cases, see 9.8.3 below.

[38] Case C-303/05 *Advocaten voor de Wereld* [2007] ECR I-3633. On the substance see 9.5.2 below.

[39] Cases: C-66/08 *Koslowski* [2008] ECR I-6041; C-296/08 PPU *Santesteban Goicoechea* [2008] ECR I-6307; C-388/08 PPU *Leymann and Pustovarov* [2008] ECR I-8993; C-123/08 *Wolzenburg* [2009] ECR I-9621; C-261/09 *Mantello*, pending (opinion of 7 Sep 2010); and C-306/09 *IB*, pending (opinion of 6 July 2010). On the substance, see ibid.

[40] The Court of Justice has not yet been asked whether an identical clause must be interpreted the same way in different mutual recognition instruments, although see the opinion in *Mantello* (ibid).

measures have the full support of Member States or only limited support. It should be recalled that even those Council of Europe measures with wide support by Member States have restrictions on their scope and significant possibility for reservations, or provide only a general framework for cross-border criminal law cooperation. So there is a clear perceived 'added value' to the EU's involvement, which principle provides for a far more intensive degree of cooperation. In most cases, the EU mutual recognition measures 'replace' the 'corresponding' provisions of the relevant Council of Europe Conventions and prior EU measures as between Member States, without specifying exactly which provisions of the relevant Conventions are replaced. Most of the EU measures give a power to Member States to retain existing bilateral or multilateral treaties, or to conclude new bilateral or multilateral treaties, which expand or enlarge on the EU mutual recognition measures or simplify and facilitate the procedures for mutual recognition, subject to an obligation to inform the Council and/or Commission about such measures. This begs the question as to when such criteria are met.[41] A further underlying question is whether pursuant to such provisions, Member States can reduce protections regarding human rights in order to facilitate the movement of judgments and decisions between Member States.[42]

2 During the Amsterdam era, mutual recognition measures always took the form of Framework Decisions, while so far, all of the post-Lisbon proposals and agreed measures have taken the form of Directives. Their application by Member States has been reviewed by the Commission several years after the implementation date. In a few cases, there have been time-limited derogations for a small number of Member States. Usually the mutual recognition measures apply regardless of when the underlying (alleged) criminal offence was committed, but in some cases Member States must or may limit the effect of the measures in time.

3 As for the substance, each of the mutual recognition measures sets out an obligation to recognize another Member State's judgment or decision, with limited grounds for a refusal to recognize such decisions. The measures refer to the 'issuing' State and the 'executing' State, rather than the 'requesting' and 'requested' State pursuant to Council of Europe measures—demonstrating the more binding degree of obligation as compared to the latter measures, and the more general difference between the principle of mutual recognition in criminal matters and traditional judicial cooperation rules. Although, in the sphere of judicial cooperation, the discretion of the requested State over *whether* to assist the requesting State has been limited by successive treaties, a fundamental degree of discretion over whether to assist the requesting State remains.[43] Conversely, in the system

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[41] See further 9.10 below. [42] See 9.3.5 and 9.5.2 below.

[43] See A Weyembergh, 'La reconnaissance mutuelle des decisions judiciaires en matiere penale entre les Etats Membres de l'Union europeenne: mise en perspective' in G de Kerchove and A Weyembergh, eds, *La reconnaissance mutuelle des decisions judiciaires penales dans l'Union europeenne* (Institut d'Etudes Europeennes, 2001), 25–63.

of mutual recognition, the decision of the issuing State (comparable to the 'home State' in free movement law) takes effect *as such* within the legal system of the executing State (comparable to the 'host State' in free movement law), subject to the remaining grounds for refusal to execute that decision. Therefore, the effect of a mutual recognition system is that the executing State has in principle lost some of its sovereign power over the full control of the enforcement of criminal decisions on its territory.

CONCLUSION ON ALL FEATURES

With some mutual recognition measures, there have been issues of material scope (ie defining the concept of criminal proceedings) as well as, to some extent, personal scope (ie limitations based on nationality and/or residence). The traditional ground of refusal as regards criminal cooperation, dual criminality, has been abolished in most cases for a standard list of thirty-two crimes, as defined by the *issuing* State, subject to a three-year threshold of *possible* punishment (ie the actual sentence which was imposed, or which is subsequently imposed in the event of a conviction, is not relevant for this purpose).[44] Other traditional grounds of refusal (political offences, military offences) have also been abolished, and the traditional 'fiscal offence' ground for refusal is now limited by the standard qualification that it cannot be applied merely because the two States in question levy different taxes or duties.

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As for human rights, there are standard clauses in the main text and the preambles to the mutual recognition legislation,[45] but almost all of these measures beg the fundamental question as to whether Member States may or must refuse to recognize other Member States' judgments or decisions on human rights grounds—an issue discussed further below.[46] Other remaining grounds for refusal or other forms of restriction applying to most or all Framework Decisions (sometimes subject to further exceptions or special procedural obligations) include: territoriality (ie the possibility of refusing execution because the act concerned took place partly or wholly on the territory of the executing State);[47] *de minimis* rules (ie the amount of a financial penalty, the length of the sentence which was or could be imposed, or the amount of the time of custodial sentence or supervision period still left to serve); double jeopardy or *ne bis in idem*, which raises questions as to whether the general EU double jeopardy rules, including the provisions of the EU Charter of Rights, take precedence over the specific rules in the mutual recognition legislation;[48] the age of criminal responsibility; lapse of time (also known as statute-barring, ie the expiry of a time limit to begin and/or conclude a prosecution); *lis pendens* (ie proceedings for the same offence underway in the

[44] For this list of crimes, see Art 2(2) of the Framework Decision establishing the European Arrest Warrant ([2002] OJ L 190/1). [45] See 9.5–9.7 below, in particular the discussion in 9.5.2.
[46] 9.3.5 and 9.5.2. [47] On criminal jurisdiction generally, see 11.5 below.
[48] On the general double jeopardy rules, and the case for giving priority to those rules over mutual recognition measures, see 11.8 below.

executing State);[49] immunity; amnesty or pardon—although sometimes this is a question of applicable law; *in absentia* trials, although the rules on this issue in the relevant legislation have been harmonized;[50] and the rule of specialty (ie the ban on prosecuting a person for an offence other than that which motivated the original mutual recognition decision).

The mutual recognition legislation also includes technical rules on processing applications, costs, and languages, as well as the use of standard forms. Decisions or judgments are issued through judges or prosecutors, not ministries as in Council of Europe measures. There are generally strict time limits to comply with (or refuse) the issuing State's decisions, as well as rules on applicable procedural law issues (ie determining when the power to take further decisions is transferred to the executing State, and when it is retained or transferred back to the issuing State).

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Finally, an obvious distinction between the Council of Europe legal framework and the EU legal framework is the jurisdiction of the Court of Justice to interpret the relevant EU measures, and thereby to ensure a greater degree of uniform interpretation.

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It is higly important to keep in mind that this article concerns the various aspects of criminal procedural law, which is at the very heart of criminal justice cooperation! Article 83 TFEU concerns substantive criminal law,which I need to discuss, but separately (and in a concise way).

9.2.3. Treaty of Lisbon

The relevant provision of the Treaties following the entry into force of the Treaty of Lisbon is Article 82 of the Treaty on the Functioning of the European Union (TFEU):

1. Judicial cooperation in criminal matters in the Union shall be based on the principle of mutual recognition of judgments and judicial decisions and shall include the approximation of the laws and regulations of the Member States in the areas referred to in paragraph 2 and in Article 83.

The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures to:

legal basis for adoption of 'mutual recognition' measures in the field of procedural criminal law

(a) lay down rules and procedures for ensuring recognition throughout the Union of all forms of judgments and judicial decisions;
(b) prevent and settle conflicts of jurisdiction between Member States;
(c) support the training of the judiciary and judicial staff;
(d) facilitate cooperation between judicial or equivalent authorities of the Member States in relation to proceedings in criminal matters and the enforcement of decisions.

legal basis for adoption of approximation measures in the field of procedural criminal law

2. To the extent necessary to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension, the European Parliament and the Council may, by means of directives adopted

[49] On the coordination of multiple prosecutions, see 11.6 below.
[50] On the standard *in absentia* exception, see 9.3.5 and 9.5.2 below.

in accordance with the ordinary legislative procedure, establish minimum rules. Such rules shall take into account the differences between the legal traditions and systems of the Member States.

They shall concern:

(a) mutual admissibility of evidence between Member States;
(b) the rights of individuals in criminal procedure;
(c) the rights of victims of crime;
(d) any other specific aspects of criminal procedure which the Council has identified in advance by a decision; for the adoption of such a decision, the Council shall act unanimously after obtaining the consent of the European Parliament.

Adoption of the minimum rules referred to in this paragraph shall not prevent Member States from maintaining or introducing a higher level of protection for individuals.

The Treaty of Lisbon made a fundamental change to the decision-making in this area, applying the 'ordinary legislative procedure' (qualified majority voting (QMV) in Council and joint powers for the EP) in place of the prior rule of unanimity in Council with consultation of the EP. However, Article 82(3) TFEU sets out a special 'emergency brake' rule, allowing a Member State to halt discussions when a measure proposed pursuant to *Article 82(2)* (but *not* Article 82(1)) 'would affect fundamental aspects of its criminal justice system'. This special procedure, which also applies to the adoption of substantive criminal law measures,[51] is discussed in detail in Chapter 2.[52] However, the application of this rule to Article 82(2), but not to Article 82(1), makes it necessary to distinguish between these two legal bases.[53] The power to adopt measures concerning the prevention and settlement of conflicts of jurisdiction (Article 82(1)(b)) is discussed in Chapter 11.[54] Criminal procedure issues might also result from measures adopted regarding Eurojust and the European Public Prosecutor (Articles 85 and 86 TFEU); such issues are also discussed in Chapter 11.[55]

Compared to the previous Treaty provisions, Article 82 TFEU includes a reference to the principle of mutual recognition, which must include approximation of law. The Treaty retains a reference to facilitating (but not *accelerating*) cooperation between judicial or equivalent authorities (but not also ministries). However, the specific reference to facilitating extradition was dropped. There is a specific reference to ensuring mutual recognition instead, along with a further specific reference to judicial training. The previous power regarding ensuring compatibility of national law was replaced by Article 82(2) TFEU. Although the express reference to the basic principle of mutual recognition is new as compared to the previous Treaty rules, this principle had already been used as the basic principle governing the adoption of criminal law legislation within the previous

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Apparently, this article provides the legal basis for adoption of measures in the field of substantive criminal law

[51] Art 83(3) TFEU; see 10.2.3 below. [52] See 2.2.3.4.1 above. [53] See 9.2.4 below.
[54] See 11.6–11.8. On jurisdiction over offences as such, see 11.5.
[55] See 11.9 and 11.10. On the question of competing legal bases which might result, see 9.2.4 below.

third pillar legal framework.[56] The specific requirement that judicial cooperation 'shall include' approximation of procedural and substantive law indicates clearly that the EU cannot limit itself to adopting mutual recognition measures.

In the first nine months after the entry into force of the Treaty of Lisbon, there were five proposals or initiatives in this area: two competing proposals concerning interpretation and translation rights for criminal suspects (the first of which has been agreed between the Council and EP);[57] a proposal to establish a European protection order;[58] a proposal to establish a European Investigation Order;[59] and a proposal on the right to information for criminal suspects.[60] Two substantive criminal law proposals (one of them agreed within the Council) also include a dual legal base relating to procedural law.[61] So far, the 'emergency brake' has not been pulled. The Commission also suggested the conclusion of some treaties in this field that had been signed, but not concluded, before the entry into force of the Treaty of Lisbon.[62]

This area is subject to the enhanced jurisdiction of the Court of Justice for measures adopted after the Treaty of Lisbon; this jurisdiction will also apply to pre-existing measures after the end of a five-year transitional period (so as from 1 December 2014) and to any pre-existing measures which are amended during this transitional period.[63] In the first few months after the entry into force of the Treaty of Lisbon, there were three references to the Court of Justice in this area.[64]

The revised rules on opt-outs from JHA matters also apply to this area.[65] So do the general provisions of Title V of Part Three of the TFEU, in particular the provision that the Union JHA policy must have 'respect for fundamental rights and the different legal systems and traditions of the Member States',[66] and the power to adopt measures concerning cooperation between the administrations of Member States.[67]

For the future, the Stockholm programme and the action plan concerning its implementation provide inter alia for measures on the proceeds of crime (addressing

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[56] See 9.2.2 above.

[57] [2010] OJ C 69/1 and COM (2010) 82, 9 Mar 2010. See 9.8.2 below.

[58] [2010] OJ C 69/5. See 9.7.6 below.

[59] [2010] OJ C 165/22. See 9.6.1.3 below.

[60] COM (2010) 392, 20 July 2010. See 9.8.2 below.

[61] COM (2010) 94 and 95, 29 Mar 2010, concerning sexual offences against children and trafficking in persons. On the legal base issues, see 9.2.4 below. For the Council's agreement on the latter proposal, see Council doc 10845/10, 10 June 2010; the Council must still agree with the EP on this proposal.

[62] See 9.10 below.

[63] On these transitional rules, see 2.2.3.3 above. The proposal for a European Investigation Order (n 59 above) would repeal one pre-existing measure and replace the corresponding provisions of several others.

[64] Cases: C-1/10 *Salmeron Sanchez*, pending, on the interpretation of the Framework Decision on standing of victims; C-105/10 PPU *Gataev*, withdrawn, concerning the interpretation of the Framework Decision on the European Arrest Warrant; and C-264/10 *Kita*, pending, on the same issue.

[65] See 9.2.5 below.

[66] Art 67(1) TFEU.

[67] Art 74 TFEU. On the general provisions, see 2.2.3.2 above.

freezing and confiscation of assets), recognition of financial penalties, mutual admissibility of evidence, the rights of criminal suspects, and victims' rights.[68]

9.2.4. Competence issues

This links up with the article of Mitsilegas

Before the entry into force of the Treaty of Lisbon, there was a dispute as to whether the EU could harmonize domestic criminal procedural law, in particular because Article 31(1)(a)–(d) of the previous TEU referred essentially to cross-border matters, with only Article 31(1)(c) referring to powers to 'ensur[e] compatibility in rules applicable in the Member States, as may be necessary to improve such cooperation'. This issue remains relevant after the entry into force of the Treaty of Lisbon, as long as there are still pre-existing measures in force whose validity could still be called into question. On this point, the opening words of the previous Article 31(1) TEU provided that '[c]ommon action on judicial cooperation in criminal matters shall *include*' the following list of measures, indicating clearly that this list was non-exhaustive.[69] In any event, a broad interpretation of Article 31(1)(c) could be envisaged, in particular since the harmonization of law on procedural protection for suspects could in fact have facilitated national courts' willingness to cooperate with foreign courts.[70]

this justifies why the article of Mitsilegas is still applicabale (although written in 2008

As for competence issues following the entry into force of the Treaty of Lisbon, the basic issues arising are the extent of the competence conferred by Article 82 TFEU as such, including the distinction between Article 82(1) and (2),[71] and the distinction between Article 82 and the rest of the JHA provisions. These issues will be examined in turn.

First of all, it is necessary to distinguish Article 82(1) and (2) TFEU, on the grounds that one paragraph is subject to the emergency brake and the other is not.[72] It would certainly be necessary to draw this distinction if a *dual* legal basis of these paragraphs would be considered incompatible due to this difference in decision-making.[73] However, since the emergency brake is not applicable every

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[68] [2010] OJ C 115/1 and COM (2010) 171, 20 Apr 2010; see also the 'roadmap' on suspects' rights ([2009] OJ C 295/1). See further the summaries of future plans in 9.6–9.10 below.

[69] See similarly the discussion of competence in 10.2.4 below.

[70] This interpretation is confirmed by the Opinions in Cases C-105/03 *Pupino* [2005] ECR I-5285 (paras 48–52) and C-303/05 *Advocaten voor de Wereld* [2007] ECR I-3633 (note 21). See also the Opinion in Case C-467/05 *Dell'Orto* [2007] ECR I-5557, paras 36–37. For a different view, see V Mitsilegas, 'Trust-Building Measures in the European Judicial Area in Criminal Matters: Issues of Competence, Legitimacy and Institutional Balance', in T Balzacq and S Carrera, eds, *Security versus Freedom? A Challenge for Europe's Future* (Ashgate, 2006), 282, who asserts that the previous TEU conferred no competence to adopt measures on criminal procedure.

[71] The discussion here on this point is adapted from S Peers, 'EU Criminal Law and the Treaty of Lisbon' (2008) 33 ELRev (2008) 507 at 510–514.

[72] Furthermore, Art 82(2) requires the use of Directives, whereas Art 82(1) does not.

[73] On the case law on dual legal bases, see 3.2.4 above.

time that Article 82(2) TFEU is used to adopt measures, but will only apply in the exceptional cases where a Member State pulls the brake, then it should be possible to combine the two provisions. On the other hand, it is certainly necessary to distinguish between the two legal bases on the grounds that Article 82(2) is subject to a number of specific requirements ('necessary to facilitate', 'having a cross-border dimension' and 'tak[ing] into account' different national legal traditions) which do not apply to Article 82(1).[74] In the event of a dual legal base being used, an emergency brake could only be pulled as regards those aspects of a proposal that fall within the scope of Article 82(2), and so 'fast-track' enhanced cooperation could only apply to part of the relevant proposal. The remaining provisions could still be adopted separately, and would therefore apply to all Member States. But it is possible that many Member States (and/or the EP) would not want to adopt a mutual recognition measure, for example, unless all the Member States which would be bound by that measure were also bound by a parallel measure harmonizing procedural law (or substantive criminal law, where the emergency brake also applies).[75] A reasonable compromise would be to provide in the mutual recognition measure for broader grounds for refusal to execute decisions of the authorities of the Member State(s) which were not participating in to the parallel measure.[76] The same compromise could also be used to address cases where the UK or Ireland opted into a mutual recognition measure, but out of a parallel measure.

It is surprising to see that Member States were willing to accept the adoption of mutual recognition measures without a veto or at least an emergency brake, given the national constitutional disputes concerning the adoption of the EAW.[77] In light of those disputes, which reflected legitimate national concerns, it would have been preferable to allow for an emergency brake here as well. Moreover, applying an emergency brake to both paragraphs would have avoided the need to distinguish between them.

Having said that, how should Article 82(1) and (2) TFEU be distinguished? First of all, Article 82(1) concerns (inter alia) mutual recognition rules as such, whereas Article 82(2) concerns procedural harmonization in order to *facilitate* (inter alia) mutual recognition. Similarly, Article 82(2) cannot extend to rules concerning training, since Article 82(1) is a *lex specialis* for these issues. As for the power in Article 82(1)(d) to 'facilitate cooperation' as regards criminal proceedings and enforcement of decisions, it cannot extend to the *substance* of the national procedural laws which fall within the scope of Article 82(2), even though the

[74] The requirement to 'respect' different national legal systems (set out in Art 67(1)) also applies to Art 82(1), but this is arguably a subtly different obligation than the requirement to take those systems *into account*, as set out in Art 82(2). See the discussion of this point below.

[75] Art 83 TFEU. See 10.2.3 and 10.2.4 below.

[76] See, by analogy, the special rules regarding recognition of UK judgments in Reg 4/2009 on maintenance proceedings ([2009] OJ L 7/1), discussed in 8.2.5 above.

[77] See 9.5.2 below.

latter appears to overlap with the former (since it also concerns 'facilitation' of, inter alia, 'judicial cooperation'). Otherwise the specific safeguards in Article 82(2) could be circumvented.

Applying these principles, Article 82(1) would be a sufficient legal base for adopting measures such as the Framework Decisions on the EAW; freezing orders; the mutual recognition of financial penalties and confiscation orders; the European Evidence Warrant (EEW); the transfer of prisoners; the mutual recognition of criminal sentences; prior convictions and probation/parole and pre-trial orders; mutual assistance and the transfer of information relating to criminal records, as long as the relevant proceedings take place in a judicial context. All of the legislation adopted on these issues before the entry into force of the Treaty of Lisbon was adopted on the basis of the previous Article 31(1)(a) TEU,[78] which was interpreted to encompass mutual recognition as a form of cooperation between administrations, although several measures were additionally adopted on the basis of other provisions of Article 31(1) TEU.[79] Article 82 TFEU provides for two separate powers for mutual recognition on the one hand, and cooperation between judicial authorities on the other.

In particular, it should be observed that the prior measures on the EEW and mutual assistance rules do not concern the *admissibility* of evidence (an issue which falls within the scope of Article 82(2)(a) TFEU), but rather the *transfer* of evidence between Member States, an issue within the scope of Article 82(1). Furthermore, a measure amending the Schengen double jeopardy rules would not concern the rights of suspects as such (Article 82(2)(b)), but rather fall within the scope of Article 82(1), since such a measure would concern mutual recognition (according to the Court of Justice),[80] and possibly also conflicts of jurisdiction.

As for Article 82(2) in particular, the adoption of measures on domestic criminal procedure has to be 'necessary' to 'facilitate mutual recognition and police and [criminal law] cooperation', which has to have a 'cross-border dimension'. Only 'minimum rules' can be adopted, and these rules have to 'take into account' national legal differences. In light of Article 82(2)(d), this list of powers (unlike the list of powers in the prior Article 31(1) TEU) must necessarily be exhaustive.

First of all, the concept of 'minimum' rules is implicitly further defined in the third sub-paragraph of Article 82(2), which provides that Member States are free to introduce or maintain higher standards for individuals. This proviso must mean that Member States are free to provide for higher standards of protection for suspects and victims than the EU measures provide for, but not lower standards.

this passage could help me in explaining the difference between harmonization and mutual recognition and how particularly crucial this differences is in the field of criminal procedural law: whereas the latter facitliates cooperation without changing one's legal system, the former requires adjustment of one's legal system according to one common (EU) standard

[78] On these measures, see 9.2.2 above.

[79] The EAW Framework Decision also had a legal base of Art 31(1)(b) TEU, while the Framework Decisions on recognition of probation and parole orders, and on recognition of pre-trial orders also had a legal base of Art 31(1)(c) TEU. Moreover, the Framework Decisions on the EEW, the recognition of convictions and criminal records were based generally on Art 31.

[80] See, for instance, Cases C-187/01 and 385/01 *Gozutok and Brugge* [2003] ECR I-1345, para 33.

Next, the requirement to take account of national legal traditions and systems is nearly identical to the general requirement set in Article 67(1) TFEU that the EU must 'respect' such systems and traditions. However, it is arguable that a requirement to 'take into account' is more of a positive obligation than an obligation to 'respect', perhaps entailing an obligation to reflect those differences in the adopted legislation, rather than merely to refrain from damaging national legal systems in that legislation.

This brings us to the most important limitation: the requirement that the measure must be necessary to facilitate mutual recognition and policing and criminal law cooperation with a cross-border dimension. It might be tempting, at first sight, to conclude that this power is be limited to matters which have a specific relationship with cross-border proceedings, like the EU's civil law powers.[81] But the wording of the criminal law power ('cross-border dimension') is broader than the wording of the civil law power ('cross-border implications'). Moreover, the phrase 'cross-border dimensions' also governs the scope of the EU's substantive criminal law powers,[82] and it is hard to believe that the Union's power to harmonize substantive criminal law was intended to be limited to cases where an alleged offence has factual links to more than one Member State. Furthermore, the EU's specific criminal procedure powers would be rendered meaningless if they could only be applied in cross-border proceedings, given that Article 82(1) already sets out a power to regulate criminal proceedings with a purely cross-border nature.

wat ik denk dat Peers hier bedoelt is dat er ook strafzaken zijn die geen cross-border elementen hebben maar wel rechtshulp van een andere lidstaat vergen (in tegenstelling tot strafzaken waar een strafbaar feit door meerdere lidstaten wordt gezien als gericht tegen de eigen rechtsorde

In particular, although rules on mutual admissibility of evidence must necessarily have a link to cross-border proceedings, it will be hard in practice to limit their impact to cross-border cases, given that some degree of harmonization of the laws of evidence is necessary in order to ensure mutual admissibility, and that such harmonization cannot easily be restricted to cases which have a specific cross-border element, given that the evidence might be collected before it was clear that such an element was present. The point applies equally to the EU's powers as regards victims' and suspects' rights (which might also concern evidence issues),[83] *a fortiori* because the Treaty does not insist upon as strong a cross-border element in these matters as it requires as regards evidence law. The better approach to the limit on the EU's criminal procedure is therefore to insist on a *degree of likelihood* that the rules in question will have a particular impact on cross-border proceedings. This will be the case in particular whenever there is (in effect) a 'free movement clause' in the legislation, which provides specifically that Member States could not refuse to recognize judgments and other decisions of judicial authorities on grounds falling within the scope of a measure adopted pursuant to Article 82(2) TFEU. This would parallel the limits which the Court

this passage also helps in explaining the difference between harmonization and mutual recognition and how particularly crucial this differences is in the field of criminal (see earlier page).

[81] See 8.2.4 above. [82] See Art 83(1) TFEU, discussed in 10.2.4 below.
[83] See 9.8.3 below (as regards victims' rights) and Art 6(3)d ECHR (as regards evidence).

has set as regards the comparable general power to harmonize law for the purposes of facilitating the internal market.[84] Of course, it also assumes that Member States would otherwise have the power or even the obligation to refuse to recognize other Member States' criminal law decisions on human rights grounds, an issue examined further below.[85] More generally, it must be kept in mind that measures adopted pursuant to Article 82(2) are expressly not limited to those necessary to facilitate *mutual recognition*, but can facilitate police and criminal law cooperation more generally.

Finally, there are questions regarding the scope of the individual provisions of Article 82(2). In the absence of any specific limit, the power to regulate suspects' rights conferred by Article 82(2)(b) applies to any aspect of the right to a fair trial (other than the double jeopardy rule, as noted above), provided that the general limits on the powers conferred by Article 82(2) are complied with. As for victims' rights, Article 82(2)(c) does not apply to the harmonization of rules concerning *state compensation* of crime victims, which was the subject of a Directive adopted pursuant to the previous 'residual powers' clause of the EC Treaty,[86] because Article 82 TFEU only applies to 'judicial cooperation'. In the absence of any other specific legal base addressing this issue, it remains within the scope of the Treaty's residual powers clause.[87]

The next key issue is the distinction between Article 82 TFEU and other JHA legal bases. As compared to other criminal law powers, Article 82(1) in particular must be distinguished from the substantive criminal law powers set out in Article 83, because the latter Article is subject to the emergency brake procedure.[88] While rules concerning asserting jurisdiction can be regarded as ancillary to the definition of substantive offences, other procedural rules cannot, and the EU can only invoke such powers as the Treaty has conferred upon it. For example, it should be noted that the proposals for Directives on trafficking in persons and sexual exploitation of children include provisions on victim protection, which can be (and are) based on Article 82(2)(a) TFEU.[89]

The Treaty powers relating to Eurojust (Article 85 TFEU) must be distinguished from Article 82(2) in particular, since there is no emergency brake applicable to Article 85. It should follow that any harmonization of national

[84] See particularly the tobacco advertising case law: Cases C-376/98 *Germany v EP and Council* [2000] ECR I-8419 and C-380/03 *Germany v EP and Council* [2006] ECR I-11573.

[85] See 9.3.5 and 9.5.2.

[86] Dir 2004/80 ([2004] OJ L 261/15), based on the prior Art 308 EC. On the substance of this Directive, see 9.8.3 below.

[87] Art 308 EC became Art 352 TFEU after the entry into force of the Treaty of Lisbon.

[88] Furthermore, Art 83(2) will in some cases require unanimous voting. See further 10.2.4 below.

[89] For instance, the provisions on victims' rights in the proposed Directives harmonizing the *substantive* law relating to trafficking in persons and offences against children: COM (2010) 95 and 94, 29 Mar 2010.

criminal procedure directly related to the functioning of Eurojust, in particular (but not only) concerning the specific functions of Eurojust mentioned in Article 85(1)(a), (b), and (c). Similarly, the Treaty powers relating to the European Public Prosecutor (Article 86 TFEU) must be distinguished from Article 82 in that Article 86 requires unanimous voting. Again, any measure directly relating to the operation of the European Public Prosecutor, whether it concerns national procedural law or mutual recognition (ie national authorities' recognition of the Prosecutor's decisions and vice versa) must be based on Article 86.[90]

This passage indicates the difference between criminal law in the traditional sense (it's about judicial proceedings, whereas police cooperatoin is about cooperation between police and non-judicial authorities

Next, there is also a need to distinguish between Article 82 and Article 87 TFEU, as regards policing powers, given that legislation on some aspects of police cooperation is not subject to an emergency brake (Article 87(2)), whereas measures on operational police cooperation are subject to unanimous voting (Article 87(3)).[91] On this point, it should be emphasized that Article 82 only extends to *judicial* proceedings, arguably as defined by Member States,[92] not to cooperation between police or other non-judicial authorities. The policing legal bases would have to be used instead (or in addition) to adopt legislation on such issues. Although by way of exception, Article 82(1)(d) extends to authorities which are *equivalent* to judicial authorities, this extension is clearly limited in scope by the *ejusdem generis* rule of interpretation, considering also that the policing provisions of the Treaty are a *lex specialis*. Although Article 82(1)(d) is not expressly limited to judicial authorities, the whole of Article 82(1) is limited in scope to '[j]udicial cooperation' and Article 82(1)(d) is expressly limited in scope to criminal proceedings. Any other interpretation could render Article 87 redundant. In any case, it is hard to see how police officers are 'equivalent' to judges. Applying this rule, it may be doubted whether some of the provisions in the proposed Directive on the European investigation order fall within the scope of Article 82.[93]

It is also necessary to distinguish between Article 82 and the civil law powers set out in Article 81 TFEU, given that civil law measures cannot be subject to an emergency brake, can only be proposed by the Commission, are subject to a stronger 'cross-border' requirement, and can potentially (and in fact usually) take the form of Regulations. The issue of distinguishing between these legal bases arose shortly after the entry into force of the Treaty of Lisbon, when the Commission queried the correct legal base for the proposed Directive on a European protection order,[94] since some Member States address such issues by means of civil or administrative law, not criminal law.

[90] For instance, rules on the 'admissibility of evidence' referred to in Art 86(3). For more on Arts 85 and 86, see 11.2.4 below.

[91] For further details on these provisions, including the distinction between Art 87(2) and (3), see 12.2.4 below.

[92] This follows from the requirement of respect for national legal systems, as set out in Art 67(1) TFEU.

[93] [2010] OJ C 165/22. On the substance, see 9.6.1.3 and 12.7.1 below.

[94] [2010] OJ C 69/5. On the substance, see 9.7.6 below.

It is understood that the Council legal service took the view that the proposal was correctly based on Article 82 TFEU, since the prevention of crime could fall within the scope of that Article.[95] On this point, while it is true that Article 67(3) TFEU refers to prevention of crime, more specific references to crime prevention are set out in Articles 84, 87(1), and 88(1) TFEU, not in Article 82.[96] The requirement to respect different legal systems, as set out in Article 67(1) TFEU, instead points toward the need to respect the different approaches that Member States have towards addressing this issue. So a measure based wholly on Article 82 can only address issues connected to criminal law proceedings. It would be possible to adopt a measure based jointly on Articles 81 and 82 TFEU—but it would have to be proposed by the Commission.

On the same issues, there are several criminal law measures that refer to issues which arguably fall within the scope of civil law, such as restitution of property,[97] compensation of victims by offenders, and return of property for crime victims.[98] Conversely, EU civil law measures address issues such as civil claims related to criminal proceedings and representation in criminal trials for non-intentional offences.[99]

Finally, it is necessary to distinguish the whole of Article 82, and Article 82(1)(d) in particular, from Article 74 TFEU, which is a legal base for the adoption of measures concerning cooperation between national administrations, and between national administrations and the Commission. Such measures are non-legislative acts, adopted by QMV in the Council with *consultation* of the EP. The obvious distinction between Articles 74 and 82 TFEU is that the former concerns cooperation between *civil servants*, whereas the latter concerns cooperation between *judges*.[100]

9.2.5. Territorial scope

Prior to the entry into force of the Treaty of Lisbon, there were no opt-outs for Member States in this area, except for the delayed application of the relevant Schengen *acquis* to the UK and Ireland. The *acquis* applied to the UK from

[95] See Council doc 6538/10, 17 Feb 2010.

[96] See also the analysis of the Commission legal service (Council doc 10005/10, 19 May 2010), which points out *inter alia* that the EU cannot harmonize national law on crime prevention pursuant to Art 84 TFEU.

[97] See the Convention on mutual assistance, discussed in 9.6.1 below.

[98] See the Framework Decision on crime victims, discussed in 9.8.3 below. Note also the exclusion of damages and restitution claims from the Framework Decision on financial penalties ([2005] OJ L 76/16, Art 1(b) of the Framework Decision).

[99] See Cases C-7/98 *Krombach* [2000] ECR I-1935 and 157/80 *Rinkau* [1981] ECR 1391. On the *Krombach* case, see further 9.3 and 11.2.4 below.

[100] On Art 74 generally, see 2.2.3.2 above.

1 January 2005,[101] and will also apply to Ireland at a date to be decided.[102] The EU rules and the Schengen *acquis* relating to criminal procedural law applied fully to the new Member States from their dates of accession (1 May 2004 and 1 January 2007),[103] and also applied fully to Denmark.[104]

The position changed with the entry into force of the Treaty of Lisbon, which extended the British and Irish opt-outs to new measures in the area of policing and criminal law, and provided for special rules if the UK and Ireland opted out of a measure which amends a measure which already applies to them.[105] In practice, the UK and Ireland have both opted into the Member States' initiative on suspects' rights to interpretation and translation, and the UK has opted in to the proposals on the European protection order and the European investigation order;[106] both have opted into the treaties in this area with Norway, Iceland, and Japan.[107] Their opt-in decisions regarding the proposal on the right to information are not yet known. On the other hand, Denmark is now excluded from measures in this area, unless those measures build upon the Schengen *acquis*.[108] If post-Lisbon measures are adopted which amend or repeal pre-Lisbon acts which already apply to the UK, Ireland, or Denmark, and those Member States do not participate in such measures, there is a possibility that their participation in the relevant pre-Lisbon acts will be terminated. In that case, the relevant Council of Europe treaties will then (re-)apply between those Member States and all other Member States.

As for non-Member States, pursuant to their association with the Schengen *acquis*, the relevant rules and measures building upon them (including aspects of the 2000 EU Convention on mutual assistance and its 2001 Protocol) also apply to Norway, Iceland, Switzerland, and (in future) Liechtenstein.[109] However, Switzerland and Liechtenstein have an exemption as regards any future measures building on the *acquis* which eliminate the 'double criminality' rule as regards search and seizure for offences relating to direct taxation.[110] It should be noted

[101] See the decision on UK participation in Schengen ([2000] OJ L 131/43) and on the practical application of that decision ([2004] OJ L 395/70). For more detail on UK participation, see 2.2.5.1.3 above.

[102] See the decision on Irish participation in Schengen ([2002] OJ L 64/20). For more detail on Irish participation, see 2.2.5.1.3 above.

[103] For more detail on accession and the Schengen *acquis*, see 2.2.5.3 above.

[104] On the substance of that *acquis*, see 9.2.1 above.

[105] For the detail, see 2.2.5.1.2 and 2.2.5.1.3 above.

[106] On the substance of these measures, see 9.8.2 and 9.7.6 below. However, there is a possibility that the UK will nonetheless be excluded from participation in the latter measure: see 2.2.5.1.2 above.

[107] See Council docs 9262/10, 3 May 2010, and 7670/10, 7673/10, and 7676/10, 18 Mar 2010.

[108] See 2.2.5.2 above. [109] See 2.2.5.4 above.

[110] Art 7(5) of the Schengen association treaty with Switzerland ([2008] OJ L 53/52) and Art 5(5) of the Protocol to that treaty concerning the association of Liechtenstein (COM (2006) 752, 1 Dec 2006). It should be noted that the proposed Directive establishing the European Investigation Order (see 9.6.1.3 below) would trigger these exceptions.

that the Court of Justice has implicitly assumed that it has jurisdiction to rule on the Schengen association treaty with Norway and Iceland.[111]

The EU, Norway, and Iceland have also signed a treaty committing themselves to implement all of the provisions of the EU mutual assistance Convention and its Protocol which do *not* fall within the scope of the Schengen *acquis*,[112] as well as a treaty establishing a surrender procedure between the EU Member States and Iceland and Norway.[113] The latter agreement is very similar to the Framework Decision on the EAW, but contains variations, particularly allowing for the continuation of a 'political offence' exception and the option to refuse to extradite States' own nationals, subject to some limitations.[114] Neither of these treaties is yet in force.[115]

Finally, Switzerland and the EU (more precisely, the EC (as it was then) and the EU's Member States) have concluded a treaty which concerns the particular issue of protection of the EU's financial interests. It contains a number of provisions relevant to mutual legal assistance.[116] The Commission has proposed the signature and conclusion of a parallel treaty with Liechtenstein.[117]

9.3. Human rights

9.3.1. Right to a fair trial

As noted at the outset, the human rights principle of greatest relevance to criminal procedure is the right to a fair trial. This right is set out in national constitutions, Article 6 ECHR, and Article 14 of the International Covenant on Civil and Political Rights (ICCPR). Article 6(2) ECHR expressly sets out a right to presumption of innocence in criminal cases, and Article 6(3) sets out minimum rights to be informed promptly of an accusation (Article 6(3)(a)); to have time and facilities for a defence (Article 6(3)(b)); to have access to a defence lawyer and free legal aid if 'the interests of justice' require (Article 6(3)(c)); to examine witnesses against and call witnesses for the defence (Article 6(3)(d)); and to 'to have the free assistance of an interpreter if he [or she] cannot understand or speak the language used in court' (Article 6(3)(e)). The Seventh Protocol to the ECHR, which has been ratified by a large majority of Member States, also includes the right to an

[111] Case C-436/03 *Van Esbroek* [2006] ECR I-2623. [112] [2004] OJ L 26/1.

[113] [2006] OJ L 292/1. See also the earlier Decision defining the Schengen extradition *acquis* as regards Norway and Iceland ([2003] OJ L 76/25).

[114] For details of the EAW, see 9.5.2 below.

[115] See the proposals to conclude the treaties: COM (2009) 704 and 705, 17 Dec 2009.

[116] Arts 25–38 of treaty ([2009] OJ L 46/6). The treaty entered into force as regards most Member States, the EC, and Switzerland on 8 Apr 2009 (see [2009] OJ L 177/7).

[117] COM (2009) 644, 23 Nov 2009.