The Procedural Rights Debate

A Bridge Too Far or Still Not Far Enough?

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The establishment of the area of freedom, security and justice has undeniably led to an increase in people becoming involved not only in criminal proceedings in a Member State other than that of their residence, but, even moreso, in criminal proceedings that involve investigative and/or prosecutorial acts in multiple Member States. These so-called "multi-Member State criminal proceedings" have sparked awareness of the need to take measures to ensure adequate procedural rights in such situations. Without a doubt, criminal proceedings spread over multiple Member States run the risk of jeopardizing those procedural rights. It explains the origin of the current procedural rights debate in the European Union.

With this contribution, the authors wish to present a threefold critique related to the boundaries of the current procedural rights debate:

- First, paradoxically, the current procedural rights debate has, to a large extent, lost the link with cross-border situations and multi-Member State criminal proceedings;
- Second, there is an apparent over-focus on "traditional fair trial rights," whereas the most important focus should be on the rights during the pre-trial investigative stage;
- Third, there is a clear inconsistency between the expectations and requirements EU Member States have with respect to other EU Member States compared to non-EU Member States.

Before discussing this threefold critique, the main developments leading up to the current debate will be reviewed to the extent deemed necessary to follow our line of argumentation.

I. The Current Procedural Rights Debate

The establishment of the area of freedom, security and justice constitutes an important turning point for the status of procedural rights in European criminal policy making. Even though all 27 Member States are party to the European Convention on Human Rights (hereafter ECHR), many scholars and policy makers considered it problematic that the European Union itself had no binding texts on the protection of human rights in criminal proceedings. This lacunae had gained attention, especially in light of increased cooperation in criminal matters. Both the introduction of the area of freedom, security and justice and the principle of mutual recognition have contributed to this heightened awareness.

First, the 1998 Commission communication on the area of freedom, security and justice voiced a general feeling: EU action to establish minimum standards to protect individual rights in criminal proceedings was deemed necessary to counterbalance judicial cooperation measures that significantly enhanced the powers of prosecutors, courts, and investigative officers.[1] Only the establishment of such minimum standards would be able to neutralise the negative effects of having multiple Member States involved in investigative and prosecutorial acts.

Second, the importance of a debate on procedural rights was intensified following the 1999 Tampere conclusions, in which it was established that mutual recognition would be the cornerstone of judicial cooperation in the EU.[2] Recognising the possible impact of mutual recognition on procedural rights, the 2000 Programme of Measures stated the following: "It must be ensured that the treatment of suspects and the rights of the defence would not suffer from the implementation of the principle of mutual recognition."[3] Furthermore, it stated that procedural rights "should not only not suffer from the implementation of the principle of mutual recognition but also that the rights would even be improved through the process". This baseline is key to our line of argumentation.

The impact of the last clause of the baseline can easily be misinterpreted. It should be emphasised that the improvement of procedural rights in pure domestic situations can never be a goal in itself.[4] The EU has neither the intention nor the competence to interfere with domestic regulations. The scope of EU legislative intervention is limited to ensuring a high level of procedural rights in cross-border situations. Only in such cross-border situations, where procedural rights cannot otherwise be guaranteed, is EU intervention justified.

Therefore the EU's objective is to develop common minimum standards and a set of best practices that can ensure a high

level of procedural rights with respect to multi-Member State criminal proceedings.

The following two clarifications make clear that this development of minimum standards should not be interpreted as a race to the bottom. Firstly, it is not desirable that minimum standards are limited to the smallest common denominator in procedural rights. On the contrary, it might very well be that several Member States change their national legislation in light of agreed minimum standards. Secondly, there is no need to fear that common standards will lead to a lowering of standards, as Member States remain free to implement the highest level of rights they consider appropriate as long as they comply with the agreed minimum. Therefore, it is correct to argue that the entire process of accommodating the problems of cross-border cooperation will lead to the improvement of rights, even though such improvement in a mere domestic situation is not a goal in itself.

This balanced interpretation of the improvement of procedural rights explains our mixed feelings with respect to the formulation of the goals in the 2003 Commission Green Paper on "Procedural Safeguards for Suspects and Defendants in Criminal Proceedings throughout the European Union."[5] The Green Paper states that European citizens and residents can reasonably expect to encounter equivalent standards in respect of procedural rights throughout the EU, regardless of any cross-border aspect. In doing so, it loses the link with cross-border multi-Member State criminal proceedings and thus exceeds the scope of justified EU intervention. Furthermore, the Green Paper presents a very narrow interpretation of what procedural safeguards are, clearly inspired by and limited to the rights listed in Article 6 ECHR.

Considering this focus on ECHR, it comes as no surprise that the 2004 proposal for a Framework Decision on procedural rights translated this narrow interpretation into a focus on traditional fair trial rights, such as the right to legal advice, the right to interpretation, and the right to communication. As some Member States were not convinced of the added value of this proposal in relation to the ECHR, the proposal was not adopted.[6] Recently, the discussion on procedural rights flared up again. In spite of the critique on the lack of added value, the focus on ECHR has not changed. The current 2009 Roadmap for strengthening the procedural rights of suspected and accused persons in criminal proceedings calls for the adoption of five measures in a step-by-step approach.[7] The focus is once more on very traditional fair trial rights, fully in line with the failed 2004 proposed Framework Decision.

The boundaries of the current procedural rights debate are elaborated on in the following threefold critique.

II. A Threefold Critique

1. Losing the Link with Cross-Border Situations

The first critique is centred around the observation that the current procedural rights debate has lost the link with cross-border situations.

As explained in the opening paragraphs, cross-border situations that involve multiple Member States in investigative and prosecutorial acts give reason to start the procedural rights debate and reflect on the necessity for EU intervention. The baseline for the debate is that the level of procedural rights should not be affected by whether or not multiple Member States are involved. Any debate on the necessity for EU intervention should be viewed from an EU perspective, which means that only problems arising from cross-border and multi-Member State criminal proceedings should be discussed.

The direction taken with the 2009 Roadmap on procedural rights, as the sequel to the failed 2004 proposed Framework Decision, has clearly lost the link with cross-border situations. The Roadmap calls for strengthening a list of traditional fair trial rights, such as the right to translation and interpretation, the right to information on the charges, and the right to legal aid and advice. Even though we do not intend to minimise the importance of these rights, we consider the structure of this Roadmap "a bridge too far" in that it insufficiently clarifies why these rights are the most important concerns in cross-border multi-Member State criminal proceedings. The strengthening of these rights is first and foremost inspired by pragmatic and ideological concerns aimed at establishing an area of freedom, security and justice in which European citizens and residents can reasonably expect to encounter equivalent standards of procedural rights throughout the EU. This is, however, beyond the scope of justified EU intervention to facilitate cross-border judicial cooperation and is incompatible with the statement that the diversity between the Member States' criminal justice systems should be respected unless differences hinder cross-border judicial cooperation.

Even if the measures listed in the Roadmap were to be limited and warrant justification in light of cross-border and multi-Member State criminal proceedings, the authors' concern remains that the interpretation of the concept of "procedural rights" is too narrow.

2. Too Narrow Interpretation of Procedural Rights

The second critique relates to the scope of the current procedural rights debate. There is a lot more to procedural rights

than the traditional fair trial rights that dominate the current debate.

We strongly believe that the criminal justice system in its entirety is one big cluster of procedural rights, in which traditional fair trial rights represent only a small fraction. The criminal procedure should not be limited to the trial phase in front of a judge. Procedural rights incompatibilities are far more significant when pre-trial evidence gathering is spread over multiple Member States.

Even though it should be commended that the 2003 Green Paper argued that a discussion of the right to have evidence handled fairly was equally important,[8] it is regrettable that no clear link was made to specific evidence gathering techniques and even more regrettable that the issue was shelved indefinitely. Separating the debates on procedural rights and evidence gathering is a lost opportunity to look at evidence gathering techniques from a procedural rights perspective as opposed to an effective prosecution perspective. Two new elements should be introduced to the procedural rights debate:

- Firstly, the feasibility of establishing minimum standards beyond traditional fair trial rights;
- Secondly, the feasibility of *lex mitior* discussions and "best of both world" scenarios.

Firstly, from the argumentation above, it is clear that minimum standards are needed that go beyond traditional fair trial rights. The feasibility thereof should be scrutinised for each domain of judicial cooperation. For example, in a mutual legal assistance context, minimum standards could be established for a series of investigative techniques. The introduction of such minimum standards would support the further roll out of mutual recognition for evidence gathering. Even though the adoption of these kinds of minimum standards is, to a certain extent, subject to debate in the context of the European Investigation Order, it should be stressed that the focus of this debate is on an effective prosecution and ensuring the admissibility of evidence. The debate would additionally benefit from a procedural rights perspective.

Similarly, the possibility of introducing minimum procedural rights standards should be scrutinised, e.g., in the context of pre-trial supervision and extradition as well as in the context of transfer of proceedings or execution.

Furthermore the adoption of these kinds of minimum standards could also contribute to a more transparent and strict interpretation of the mutual recognition principle. The current instrumentarium is anything but transparent and does not adhere to a strict interpretation of the mutual recognition principle. Such a strict interpretation has implications for the positions of both the issuing and the executing Member States: the executing Member State is to accept the validity of a decision if taken in accordance with the law of the issuing Member State; and the issuing Member State is to accept the execution of its decision if executed in accordance with the law of the executing Member State.

However, the current instrumentarium often deviates from a strict interpretation of the mutual recognition principle. At times, it is possible for the issuing Member State to request that the executing Member State take certain procedural requirements into account, to the extent that these requirements do not violate the fundamental principles of the law of the executing Member State. The possibility to request formalities to be taken into account is incompatible with a strict interpretation of mutual recognition. Analysis in previous studies has revealed that the adoption of minimum standards with respect to procedural rights for certain investigative techniques would significantly reduce the perceived need for Member States to request formalities. It thus has the potential to bring logic and transparency back to the interpretation of the mutual recognition principle.[9]

It should, however, be recognised that the suggested minimum standards also have their limits. The adoption of minimum standards can never do away with all problems arising from the differences in criminal justice systems. Furthermore, minimum standards will not harmonise the criminal justice systems, as Member States will always be allowed to maintain a higher level of procedural safeguards.[10]

Therefore, secondly, an in-depth debate is necessary to assess the possibility of introducing a binding *lex mitior* principle into cooperation. Problems and differences will remain, which is why looking into the *lex mitior* principle is recommended. Such a principle would ensure that the persons involved can always enjoy the best of both worlds, meaning that questions of applicable law will be resolved based on what is best for the persons involved. The application of a *lex mitior* principle is the only way in which Member States can uphold the baseline set in the 2000 Programme of Measures, namely that the involvement of multiple Member States in a criminal proceeding may never negatively impact the procedural rights of the persons involved. Previous research has shown that Member States are open for a such debate on the potential of a *lex mitior* principle.[11] The following examples illustrate what a *lex mitior* principle would mean in concrete situations.

Some instruments already imply a *lex mitior* principle. In cases where transfer of the execution relates to a sanction involving deprivation of liberty, the executing Member State has the right to adapt the nature or duration of a sanction if it is incom-

patible with its own criminal justice system. The possibility of adapting the sanction is limited by the stipulation that such an adaptation may never aggravate the sentence passed in the issuing state in terms of its nature or duration.[12]

More interestingly, for the procedural rights debate, questions also arise as to the applicable early release regime. It is unclear whether the regime of the sentencing Member State should apply or whether early release possibilities are solely governed by the regime of the executing Member State. Despite the general rule that execution is governed by the law of the executing Member State, there is much to recommend in entitling the person concerned to claim application of the early release regime in the sentencing state if that regime is more beneficial. In addition, not only is the regime in the sentencing state taken into account by the sentencing judge when deliberating on the duration of the sanction, but the baseline agreed in the 2000 Programme of Measures clearly states that involvement of multiple Member States may never negatively impact the rights of the persons involved. The introduction of a *lex mitior* principle would provide an answer to these questions of which law is applicable. Even though, in practice, it will be extremely difficult to determine how early release conditions would have influenced the execution of a sentence if a person has served his sentence in another Member State, it is a viable point for discussion.

The complexity of applying the *lex mitior* principle is even clearer in the context of pre-trial supervision measures.[13] At first glance, application of a *lex mitior* principle would mean that an executing Member State cannot impose supervision measures for a longer period than that allowed by its own national law, even if the issuing Member State requests a longer period of supervision. However, it is questionable whether such a limitation would indeed amount to a true *lex mitior*. After all, a shorter period of pre-trial supervision in the executing Member State would most likely trigger an earlier use of a surrender request by the issuing Member State. Interpreting the *lex mitior* principle in such a way leads to the perverse effect of people being surrendered sooner than if the executing Member State would have imposed pre-trial supervision measures for the period requested by the issuing Member State – regardless of the limitations in its own national law. This example illustrates that analysis of the potential of a *lex mitior* principle should include the net effect of its application and should be exercised with the greatest caution.

In sum, for the reasons elaborated above, the current procedural rights debate is considered to be a bridge that does not extend far enough. The tunnel vision caused by the focus on traditional "Article 6 ECHR"-like fair trial rights has led to a debate that neglects the impact differences in pre-trial procedures have for procedural rights. The scope of minimum standards should be extended, and a feasibility study is needed to assess the potential of the introduction of a *lex mitior* principle.

3. Inconsistent Expectations and Requirements

The third and final critique reveals an inconsistency in expectations and requirements with respect to procedural rights. EU Member States are more demanding towards other EU Member States, compared to the demands with respect to non-EU Member States, even though cooperation has the same consequences for the persons involved. It should be underlined that differences in expectations and requirements with respect to procedural rights are only justified to the extent that cooperation between EU Member States is more far-reaching than cooperation with non-EU Member States. This constitutes an important limit for the procedural rights debate. The current distortion gives way to more distrust and reticence in relations between EU Member States when compared to relations with non-EU Member States. This situation is clearly incompatible with the EU's objective to evolve towards facilitating cooperation based on more trust and respect for each other's criminal justice systems.

The adoption of the European Arrest Warrant (hereafter EAW) has been the irrefutable catalyst. Even though the transition from the former extradition-scene to the current surrender-scene did not negatively impact the rights of the persons involved – in that the consequences of cooperation remained the same – the adoption of the EAW was used to launch the debate on ensuring procedural rights. Strangely enough, situations that had never provoked debate in the past were suddenly considered highly problematic in an EAW context. Suddenly, a surrender to Poland creates more suspicion than an extradition to Azerbaijan: Even though we welcome the general increased attention paid to procedural rights, it is inacceptable to increase the expectations and requirements in EAW surrender cases between EU Member States, if no parallel increase is introduced in extradition to non-EU Member States.

Of course, we agree that EU citizens may expect their EU Member States to maintain a high level of procedural rights in relation to other states. However, this policy should not be dependent on the states involved. If EU policy requires a certain level of procedural rights to be maintained, this EU policy should stand in relation to other EU Member States no more and no less than it should stand in relation to non-EU Member States. It is inconsistent to have a different set of procedural rights requirements in relation to EU and non-EU Member States if the nature and consequences of the cooperation are the same.

Therefore, the current course of the procedural rights debate is either a bridge too far or a bridge not far enough. It is a bridge too far in that Member States are to limit expectations and requirements with respect to procedural rights in mere EU multi-Member State situations to the level maintained in relation to non-EU Member States. It is a bridge not far enough in that Member States should also increase expectations and requirements in relation to non-EU Member States.

III. Conclusion

The current procedural rights debate is clearly heading in the wrong direction. Not only is the debate often off-topic in that it has lost the link with cross-border multi-Member State criminal proceedings, but the subject of the debate is also too narrow and inconsistent in light of relations with non-EU Member States. Adjustments are needed to get the debate back on track.

The procedural rights debate would benefit from a broad interpretation of the concept of procedural rights, reflecting the entirety of the criminal justice procedure to assess the impact of multi-Member State criminal proceedings and the necessity of introducing minimum standards as flanking measures for the functioning of mutual recognition. Furthermore, it is important to find a way to ensure that the involvement of multiple Member States never compromises the position of the persons involved. It is most encouraging that Member States have expressed their willingness to assess the feasibility of introducing a *lex mitior* principle. This may well be a straightforward solution to cases involving conflicting systems of procedural rights.

A proper balance should be struck between individual debates on procedural rights and integrated debates combining both procedural rights and specific cooperation mechanisms. The current debate on the European Investigation Order would benefit from a stronger procedural rights perspective.

1 European Commission "Communication from the Commission. Towards an Area of Freedom, Security and Justice." COM (1998) 459 final, 14.07.1998.
2 European Council "Conclusions of the Presidency." SN 200/1/99 REV 1 15-16 October 1999.
3 Council of the European Union "Programme of Measures of 30 November 2000 to implement the principle of mutual recognition of decisions in criminal matters." O.J. C 12, 15.1.2001.
4 *Vermeulen, G.*, "Mutual recognition, harmonisation and fundamental (procedural) rights protection," in Martin, M., Crime, Rights and the EU. The future of police and judicial cooperation, Londen, JUSTICE − advancing access to justice, human rights and the rule of law, 2008, pp. 89-104.
5 European Commission "Green Paper on Procedural Safeguards for Suspects and Defendants in Criminal Proceedings throughout the European Union." COM(2003) 75 final, 19.02.2003.
6 *Spronken, T./Vermeulen, G./de Vocht, D./van Puyenbroeck*, L. EU Procedural Rights in Criminal Proceedings. Antwerp-Apeldoorn-Portland, Maklu, 2009, 116 p.
7 Council of the European Union "Resolution of the council on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings" O.J. C 295, 4.12.2009.
8 European Commission "Green Paper on Procedural Safeguards for Suspects and Defendants in Criminal Proceedings throughout the European Union." COM(2003) 75 final, 19.02.2003.
9 *Vermeulen, G./De Bondt, W./Van Damme, Y.*, EU cross-border gathering and use of evidence in criminal matters. Towards mutual recognition of investigative measures and free movement of evidence? Antwerp-Apeldoorn-Portland, Maklu, 2010.
10 Spronken, T./Vermeulen, G./de Vocht, D./van Puyenbroeck, L., EU Procedural Rights in Criminal Proceedings. Antwerp-Apeldoorn-Portland, Maklu, 2009, 116 p.
11 Vermeulen, G./De Bondt, W./Van Damme, Y. EU cross-border gathering and use of evidence in criminal matters. Towards mutual recognition of investigative measures and free movement of evidence? Antwerp-Apeldoorn-Portland, Maklu, 2010.

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12 Council of the European Union "Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union." O.J. L 327, 5.12.2008.
13 Council of the European Union "Framework Decision 2009/829/JHA of 23 October 2009 on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention" O.J. L 294, 11.11.2009.