

# Approximation and mutual recognition of procedural safeguards of suspects and defendants in criminal proceedings throughout the European Union

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## 1 General introduction

Since the concept of an ‘area of freedom, security and justice’ was introduced in 1997 with the Amsterdam Treaty, the European Union (EU) has added a new dimension to the traditional police and judicial cooperation between its member states. In the main EU policy documents aimed to elaborate this ambitious goal, European policy makers have always stressed the importance of a well-balanced agenda taking into account the core principles which lay at the foundation of the EU itself. In the conclusions of the Tampere European Council of 15 and 16 October 1999, the following principles – which have been reiterated in subsequent policy documents in this area ever since – were expressed:

*“From its very beginning European integration has been firmly rooted in a shared commitment to freedom based on human rights, democratic institutions and the rule of law. These common values have proved necessary for securing peace and developing prosperity in the European Union. They will also serve as a cornerstone for the enlarging Union.*

*”People have the right to expect the Union to address the threat to their freedom and legal rights posed by serious crime. To counter these threats a common effort is needed to prevent and fight crime and criminal organisations throughout the Union. The joint mobilisation of police and judicial resources is needed to guarantee that there is no hiding place for criminals or the proceeds of crime within the Union.”*

In other words, according to Europe’s leaders, in building the ‘area of freedom, security and justice’, crime-fighting and protection of fundamental rights and freedoms should go hand in hand.

Within this context, European criminal (procedural) law has developed with the central goal of improving cooperation, both at the supranational as the inter-state level. Important achievements have indeed been made since the Tampere Council. The European arrest warrant being probably the best example of the direction in which the EU wants to proceed. The main characteristic of this innovative instrument (the adoption of which was highly influenced by the post ‘9/11’ trauma) is the principle of mutual recognition. This principle, in a broad sense meaning the recognition of foreign decisions without prior conditions and with immediate effect in the requested

state, has taken judicial cooperation in criminal matters to a new level. However, the practical implementation of the mutual recognition principle may be detrimental to fundamental rights. The most striking example is the formal removal of the non-discrimination rule from extradition/surrender law in the European Arrest Warrant (EAW) framework.<sup>1</sup>

A critical observer of EU policy in the field of criminal law, cannot deny that the practice of EU-policy making (in the implementation of the Tampere Programme, particularly since September 2001) and the main emphasis of the Action Plan implementing the Hague Programme are mainly repressive and prosecution-oriented.<sup>2</sup> The idea of introducing a set of common (minimum) rules, guaranteeing the rights of defence at a EU-wide level, has not been accorded the same attention as the introduction of instruments aimed at improving the effectiveness of crime-fighting. Although some symbolic steps have been taken (such as the signing of the Charter of Fundamental Rights of the European Union in December 2000 by the European Commission, the Council and the Parliament and the Proposal for a Council Framework Decision on certain procedural rights in criminal proceedings throughout the European Union, submitted by the European Commission on 28 April 2004), the realisation of minimum standards still seems far away.

What does this finding mean for the future of the EU's criminal policy? Will the EU succeed the coming years in developing an area where freedom, security and justice are truly balanced? According to several authors, the EU has evolved in the opposite direction. As one observer put it: "if Procedural Criminal Law arises from the application of Constitutional Law, or indeed if it may be described as 'a seismograph of the constitutional system of a State', then as a consequence the Procedural Criminal Law of the European Union shows the extent of the Democratic Rule of Law, of the existence of a true 'Rechtsstaat', within an integrated Europe. This situation may be qualified as lamentable, as the main plank of the EU's criminal justice policy relates to the simplification and the speeding up of police and judicial cooperation – articles 30 and 31 of the Treaty of the EU – but without at the same time setting an acceptable standard for fundamental rights throughout a united Europe."<sup>3</sup>

Against this background, the current article aims to explore some of the options available to the EU in proceeding with its work in this field. Three aspects constitute the main framework. Firstly, a description of the work the EU has done so far in relation to procedural rights in criminal proceedings. Depending on this 'status questionis', a

- 1 The remaining paragraph in the preamble, stating that the framework decision respects the fundamental rights and observes the principles recognised by Article 6 Treaty on the European Union (TEU) and the EU Charter of Fundamental Rights (Chapter VI) and that nothing in the framework decision may be interpreted as prohibiting refusal to surrender a person for whom a EAW has been issued when objective elements exist for believing that the EAW is issued for the purpose of prosecuting or punishing a person on account of his or her sex, race, religion, ethnic origin, nationality, political opinion or sexual orientation, or that that person's position may be prejudiced for any of these reasons, is *de iure* insufficient to rule out that persons will be subjected to discriminatory prosecution in one of the member states.
- 2 See, *inter alia*, M. Anderson, Law enforcement cooperation in the EU and fundamental rights protection, in M. Martin (ed.), *Crime, rights and the EU: the future of police and judicial cooperation*, JUSTICE, 2008, 105-120; E. Cape, J. Hodgson, T. Prakken and T. Spronken (eds.), *Suspects in Europe, procedural rights at the investigative stage of the criminal process in the European Union*, Intersentia, 2007, 2-3.
- 3 K. Ambos, Mutual recognition versus procedural guarantees?, in M. de Hoyos Sancho (ed.), *Criminal proceedings in the European Union: essential safeguards*, Lex Nova, Valladolid, 2008, 25.

positive answer to the question whether there is a real need for EU action in this field is a prerequisite in order to proceed to the final aspect, comprising an in-depth analysis of the ideal (legal) mechanism(s) to achieve the two core objectives in this area: (1) improving judicial (and police) cooperation and (2) providing suspects and defendants within the EU with a procedural protection adequate to counterbalance the rapidly expanding spectrum of investigation/prosecution-oriented instruments.

## 2 Criminal procedure within the EU: *status questionis*

### 2.1 Introduction

The current basic framework of the EU regarding procedural rights in criminal proceedings consists of article 6 of the Treaty on European Union (TEU) and the EU Charter of Fundamental Rights. Both documents explicitly refer to the *acquis* of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) of the Council of Europe.

Article 6 TEU provides that the Union shall respect fundamental rights, as guaranteed by the ECHR and as they result from the constitutional traditions common to Member States.

In December 2000, The European Commission, The Council and the Parliament jointly signed and solemnly proclaimed the Charter of Fundamental Rights of the European Union.<sup>4</sup> The Charter includes several rights applicable to criminal proceedings such as the ‘right to an effective remedy and a fair trial’ (article 47) and ‘the presumption of innocence and right of defence’ (article 48). Moreover, article 53 states that “in so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.” Following the entry into force of the Lisbon Treaty, the Charter now is a legally binding text.<sup>5</sup>

In order to better understand the background of the developments the past five years at EU level in regard of procedural guarantees, two basis concepts should first be explained, both lying at the core of the EU’s efforts to enhance cooperation between competent authorities in criminal cases: (1) approximation and (2) mutual recognition.

### 2.2 Approximation of criminal procedure vs. mutual recognition

For decades, differences between national laws and legal cultures have been a breeding ground for distrust and have resulted in a reluctance to cooperate and delays to investigations. Taking away these differences, often referred to as harmonisation of

4 OJ., 18 December 2000, C.346/1

5 Declarations annexed to the final act of the intergovernmental conference which adopted the Treaty of Lisbon, signed on 13 December 2007 (OJ., 9 May 2008, C.115/337).

criminal law and procedure although approximation is a more accurate term, is one way of getting round such difficulties.<sup>6</sup>

This strategy, however, is inclined to run up against the hurdle of subsidiarity in the field of justice and home affairs, states not being much inclined to regard their own laws and policies as being in need of adaptation.<sup>7</sup> Therefore, a more subtle mechanism has been developed.

The concept of mutual recognition of judicial decisions has been known, since the European Council of Tampere in 1999,<sup>8</sup> as the future 'cornerstone' of judicial cooperation in – civil as well as – criminal matters and has in that context fulfilled the role of catalyst in the development of harmonisation of the criminal law of the EU member states. It implies that while another state may not deal with a certain matter in the same or even a similar way as one's own state, the results are accepted as equivalent to decisions of one's own state.

Finding its practical rendering in a well-structured 24-measure programme,<sup>9</sup> the realisation of the concept has featured high on the EU's justice and home affairs agenda during the past six years. Aimed at the elimination of all *exequatur* procedures applicable between the EU member states, the mutual recognition principle requires mutual trust between these states in the sense that they feel confident relying on each other's decisions in criminal matters and executing them without further requirements or conformity control vis-à-vis their own substantive and procedural criminal law standards.<sup>10</sup> So far, several steps have been taken to accomplish mutual recognition of certain decisions in criminal matters.<sup>11</sup>

6 Ch. Brants, *Procedural safeguards in the European Union: too little, too late?*, in J. Vervaele (ed.), *European evidence warrant: transnational judicial enquiries in the EU*, Intersentia, 2005, 105.

7 *Ibid.*

8 European Council, *Presidency Conclusions*, 15-16 October 1999.

9 Council of the EU, *Programme of measures to implement the principle of mutual recognition of judicial decisions in criminal matters*, OJ C 12, of 15.1.2001.

10 For this analysis, see earlier: G. Vermeulen, 'Mutual recognition, harmonisation and fundamental (procedural) rights protection', in M. Martin (ed.), *Crime, rights and the EU: the future of police and judicial cooperation*, JUSTICE, 2008, 89-104.

11 Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, OJ L 190/1 of 18.7.2002; Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence, OJ L 196 of 2.8.2003; Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties, OJ L 76 of 22.3.2005; Council Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders, OJ L 328 of 24.11.2006; Council Framework Decision 2008/675/JHA of 24 July 2008 on taking account of convictions in the Member States of the European Union in the course of new criminal proceedings, OJ L 220 of 15.8.2008; Council 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, OJ L 327 of 5.12.2008; Council Framework Decision 2008/947/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions, OJ L 337, 16.12.2008; Council Framework Decision 2008/978/JHA of 18 December 2008 on the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters, OJ L 350 of 31.12.2008.

In addition the Commission produced a green paper on the principle of mutual recognition: *Communication from the Commission to the Council and the European Parliament on the mutual recognition of judicial decisions in criminal matters and the strengthening of mutual trust between Member States*, COM (2005) 195, 19 May 2005.

### 2.3 The link between mutual recognition and procedural safeguards

The principle of mutual recognition has been known and applied in the context of Europe's internal market for decades (by establishing free movement of goods and mutually recognising product standards).<sup>12</sup> Transferring this principle to the setting of criminal proceedings is not a simple matter though. The free movement of goods cannot be compared to the free movement of evidence or data<sup>13</sup> in the context of a criminal prosecution. This is not only due to the fact that evidence or data to be used in criminal proceedings cannot be extracted or 'exported' as a 'final product' from the general context of its legal order, with its respective particularities relating to the way it is gathered, without bringing about changes or loss of probative value.<sup>14</sup> At least as crucial is the fact that the personal freedoms of the EU's citizens are at stake in this field. This requires a specific approach.

The Tampere version of the mutual recognition principle was something of a novum, in that it requires the recognition and execution of judicial decisions from other member states without a national, judicial test of their lawfulness or legitimacy.<sup>15</sup> The logical implication of this is mutual recognition a priori that the foreign process in question meets all of the requirements that flow from the rule of law, as understood by the executing state. It is a logical conclusion therefore that, given the sensitivities surrounding sovereignty and feelings of superiority with regard to one's own national criminal procedures, mutual recognition in the field of judicial cooperation in criminal matters is only feasible if all states can rely on decisions taken abroad meeting at least the minimum safeguards that their own procedures provide.<sup>16</sup>

### 2.4 Towards approximation of procedural rights of suspects and defendants: the proposal for a framework decision

The Commission stated in 2000 in a Communication to the Council and the European Parliament that "it must therefore be ensured that the treatment of suspects and the rights of the defence would not only suffer from the implementation of the principle (of mutual recognition) but that the safeguards would even be improved through the process".<sup>17</sup> This was endorsed in the Programme of Measures to implement the Principle of Mutual Recognition of Decisions in Criminal Matters, adopted by the Council and the Commission. It pointed out that "mutual recognition is very much dependent on a number of parameters which determine its effectiveness" and that these parameters include "mechanisms for safeguarding the rights of [...] suspects" (parameter 3) and "the definition of common minimum standards necessary to facilitate the application of the principle of mutual recognition" (parameter 4).<sup>18</sup>

This conviction led to the drafting by the Commission in 2004 of a 'Proposal for a Council Framework Decision on certain procedural rights in criminal proceedings

12 ECJ, 20 February 1979 (case 120/78).

13 Through the so-called principle of availability, cf. *supra*.

14 K. Ambos, *l.c.*, 31.

15 Ch. Brants, *l.c.*, 106

16 *Ibid.*.

17 Communication to the Council and the European Parliament of 26 July 2000 on Mutual Recognition of Final Decisions in Criminal Matters (COM(2000) 495 final, 29.7.2000).

18 OJ, 15 January 2001, C.12, p. 10.

throughout the European Union'.<sup>19</sup> Emerging from the consultation process preceding the drafting of this proposal were five areas of priority rights: legal aid for suspects and defendants; the development of a 'letter of rights' to inform suspects which rights they could exercise; extra protection for 'vulnerable groups'; consular assistance; and translators and interpreters. Other subjects (such as bail, the principles of *nemo tenetur* and *ne bis in idem*, fairness in the handling of evidence, appeal and trial in absentia) were reserved for 'further research'.

As negotiations developed, increasing opposition to the proposal emerged. Probably the main dividing line was the question whether the EU was competent to legislate on purely domestic proceedings or whether the legislation should be devoted only to cross-border cases.<sup>20</sup> It is striking to note in this respect that this element did not prevent member states to adopt a wide range of measures in the fight against crime, which also have direct implications for domestic law and domestic proceedings (e.g. common definitions on terrorist offences<sup>21</sup> or minimum standards on maximum sentences for certain types of trafficking in persons<sup>22</sup>). Nor was it an obstacle in 2001 for improving the standing of victims in criminal proceedings.<sup>23</sup> In this context reference should also be made to article 82 of the Treaty on the Functioning of the European Union (TFEU).<sup>24</sup> According to this article, directives establishing minimum rules should aim at facilitating mutual recognition of judgments and judicial decisions, and police and judicial cooperation in criminal matters. These minimum rules should concern, *inter alia*, mutual admissibility of evidence between member states, the rights of individuals in criminal procedure and the rights of victims of crime. This competence of the EU is new, in the sense that criminal procedure had so far been left out of the scope of harmonisation (cf. the wordings of article 31 TEU). Another common critique to the proposed framework decision was that the rights were too vague and set at too low a threshold or that the proposal would have added little value to the existing protections under the ECHR.

Eventually, no political agreement could be reached.<sup>25</sup> The Commission however remained convinced of the need for EU action on this point. A Study carried out for the Commission by the Université Libre de Bruxelles (ULB) between 2007 and 2009 showed that almost all practitioners involved in cross-border proceedings consider an instrument of this sort to be essential.<sup>26</sup> Moreover, the Commission ordered a study

19 COM(2004) 328 final.

20 Press release on the 2807th Session of the Council on the 12th and 13th of June 2007.

21 Council Framework Decision of 13 June 2002 on combating terrorism, OJ L 164/3, 22.6.2002.

22 Council Framework Decision of 19 July 2002 on combating trafficking in human beings, OJ L 203/1, 1.8.2002.

23 Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings, OJ L 82/1, 22.03.2001.

24 OJ. 9 May 2008, C 115, 47. With the entrance into force of the Lisbon Treaty, the existing Treaty establishing the European Community will be renamed as Treaty on the Functioning of the European Union (TFEU). Together with the new Treaty on the European Union (TEU), the TFEU constitutes the new foundation of the EU (see for a detailed explanation and for the status of ratifications: [http://europa.eu/lisbon\\_treaty/index\\_en.htm](http://europa.eu/lisbon_treaty/index_en.htm))

25 Even on a diluted version, Justice Ministers could not find any agreement at the Justice and Home Affairs Council on 19 to 20 April 2007. The proposal was discussed again by the Council on 13 June 2007. The Council was unable to agree and there the matter has lain since.

26 G. Vernimmen-Van Tiggelen and L. Surano, Institute for European Studies, Université Libre de Bruxelles ECLAN – European Criminal Law Academic Network, Analysis of the Future of Mutual Recognition in Criminal Matters in the European Union, 20th November 2008, EC DG JLS.

to be carried out in order to obtain up to date information on this subject that could provide a basis for a new proposal for a council framework decision.<sup>27</sup>

Finally, on 8 July 2009 the European Commission presented a new and much more limited draft for a Council Framework Decision on procedural rights.<sup>28</sup> Unlike the previous proposal, this new draft only focuses on one set of rights, namely those relating to interpretation and translation.

### 3 Is there need for EU action in the field of procedural rights in criminal proceedings?

#### 3.1 Introduction

Given the difficulties already encountered in the negotiation of the 2004 Proposal and taking account of the possible overlap with the ECHR, as stated by several member states, it is useful to reflect on the need for a EU instrument on procedural rights. Could it not suffice to refer to the ECHR as the main mechanism for preserving fundamental rights in Europe? Could the EU bring added value and, if so, in what way? And does the mutual recognition doctrine not imply a basic level of trust between EU's member states?

The current chapter will show that the answer to each of these questions all comes down to the same fundamental conclusion: there is an urgent need for an in-depth EU legal initiative on procedural rights, not only to safeguard subjects involved in criminal proceedings throughout the EU but also to ensure the effectiveness of judicial and police cooperation as such.

#### 3.2 The (in)adequacy of the ECHR framework

A first question is whether the ECHR framework does not offer sufficient protection to suspects and defendants in criminal proceedings. Doubts about whether the ECHR and the European Court for Human Rights (ECtHR) are able to offer this kind of protection, are not ill-founded. The ECHR is implemented to very differing standards in the member states and there are many violations. The number of applications is growing every year and the ECtHR is seriously overloaded (there are currently 110,000 cases outstanding at the ECtHR and articles 5 and 6 of the Convention are the most commonly cited in applications). Moreover, member states have not always amended their legislation to adapt them to the condemnatory judgements of the ECtHR which – in essence – are not of an enforceable nature.

Further, the ECHR jurisprudence does not contain any explicit imperative on the rules of evidence.<sup>29</sup> The admissibility of evidence is primarily governed by the rules

27 The 'Study on Procedural Rights in Criminal Proceedings: existing levels of safeguards in the European Union – 2008 update is carried out by the University of Maastricht (Prof. Taru Sponken) and by the Institute for International Research on Criminal Policy of Ghent University (Prof. Gert Vermeulen). The study is a revision and update of an earlier study performed by Taru Spronken and Marelle Attinger of Maastricht University, published in December 2005.

28 COM (2009) 338.

29 S. Gless, Mutual recognition, judicial inquiries, due process and fundamental rights, in J. Vervaele (ed.), o.c., 124.

of domestic law, provided that they respect the rights and freedoms guaranteed by the Convention. It often remains difficult to conclude from the ECHR's decisions whether or to what extent the use of illegally or unfairly obtained evidence constitutes a violation.

Besides the apparent need to complement or reinforce the protection offered by the ECHR mechanism, a reflection on the need for initiatives on procedural rights at EU level should also include some of the latest developments in the field of police and judicial cooperation in criminal matters within the EU, in particular in the area of evidence gathering and transferral.

### 3.3 Towards a free movement of evidence: what with procedural rights?

The main aspect in this respect concerns the recent adoption of the Council Framework Decision on the European Evidence warrant (EEW).<sup>30</sup> It has the aim of simplifying and accelerating the gathering and transfer of evidence in criminal proceedings with a cross-border element. It is mainly intended to replace the 19th century mutual assistance approach with a modern procedure.<sup>31</sup>

The Framework Decision applies to objects, documents or data obtained under various procedural powers, including seizure, production or searches. The EEW can however not be used to interview suspects, take statements or hear witnesses and victims.<sup>32</sup> It can also not be used for investigative measures which involve obtaining evidence in real-time such as interception of telecommunication and monitoring of bank accounts.<sup>33</sup> Nor can it be used to obtain evidence that can only result from further investigation or analysis (e.g. to require the commissioning of an expert's report or to require the executing authority to undertake computerised comparison of information (computer matching) to identify a person). The EEW will thus be used where evidence is directly available in the executing state (e.g. extracting information from a register of criminal convictions or requesting data on the existence of bank accounts). It is also useable for obtaining objects, documents or data falling within the excluded categories provided that they had already been gathered prior to the issuing of the warrant (e.g. to obtain existing records of intercepted communications, surveillance, interviews with suspects, statements from witnesses and DNA test results).<sup>34</sup>

Although the framework decision on the EEW does not directly address the issue of mutual admissibility of evidence, the EEW nevertheless aims to facilitate the admissibility of evidence obtained from the territory of another member state. It intends to achieve this mainly in two ways, which touch upon the legal position of the individual(s) concerned.

Firstly, certain procedural safeguards are included to protect some fundamental rights: (1) only judicial authorities may issue such a warrant; (2) several conditions must be met before a warrant can be issued (such as certification of its content and

30 Council Framework Decision 2008/978/JHA of 18 December 2008 on the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters, OJ L 350 of 31.12.2008.

31 Explanatory Memorandum Nos. 38 f., Proposal for a European Evidence Warrant.

32 Article 4, 2° (a).

33 Article 4, 2° (c).

34 Article 4, 4°.



translation into one of the official languages of the executing state); and (3) certain grounds of refusal may be claimed by the executing state.

Secondly, admissibility should be facilitated by adopting the ‘forum regit actum’ principle, introduced in 2000 by article 4 of the EU Convention on mutual legal assistance in criminal matters.<sup>35</sup> According to this principle, the requested state must provide assistance in accordance with the formalities and procedures expressly indicated by the requesting state to the maximum extent possible. The requested state can only refuse to comply with these requirements where this would be contrary to the fundamental principles of law of the executing state or where the Convention itself expressly states that the execution of requests is governed by the law of the requested State.<sup>36</sup>

The rationale behind this principle is the idea that a piece of evidence, legally obtained in one member state would be admissible as evidence throughout the EU. This is probably not a realistic goal, for it requires the existence of a certain minimum degree of trust of member states in one another’s criminal justice system. Only when the executing member state deems the issuing state’s legal system sufficiently compatible with its own ‘fundamental principles of law’, will the execution of evidence warrants (and the admissibility of evidence acquired) happen in a smooth and flexible way. It is clear that a EU initiative on procedural rights would potentially have a positive effect on guaranteeing this necessary confidence of member states in one another.

This is all the more necessary given the current plans of the Commission to initiate preparatory work on a Framework Decision which would expand the scope of application of the Framework Decision on the EEW in order to further replace the existing regime of mutual assistance within the EU by the principle of mutual recognition.<sup>37</sup> The explanatory memorandum of the EEW leaves no doubt in this respect<sup>38</sup>: “...the European Evidence Warrant is, in the Commission’s view, the first step towards a single mutual recognition instrument that would in due course replace all of the existing mutual assistance regime. [...]. Such a single consolidated instrument would within the EU replace mutual legal assistance in the same way that the European arrest warrant will replace extradition. The existing mosaic of international and EU conventions governing the cross-border gathering of evidence within the EU would thus be replaced by a single EU body of law.”

Traditional judicial cooperation in criminal matters will thus eventually be replaced by the mutual recognition principle, which should smooth the way for interstate assistance and remove superfluous formalities from all methods of cooperation. Combined with the continuing shift from the traditional ‘locus regit actum’ rule to the ‘forum regit actum’ principle, this would imply that the execution of these mutually recognised warrants would be increasingly determined by the procedural rules of the

35 Convention of 29 May 2000 on Mutual Assistance in Criminal Matters between the Member States of the European Union, OJ C 197, 12.7.2000, p. 1.

36 Article 12.

37 A preparatory study “The laws of evidence in criminal proceedings throughout the European Union” (JLS 2008/E4/006) is currently carried out by the Institute for International Research on Criminal Policy (IRCP) of Ghent University (Prof. Gert Vermeulen) in cooperation with the University of Maastricht (dr. Wilma Dreissen).

38 COM(2003) 688 final, p. 10.

issuing/requesting state. This evolution implies that the EU is a considerable step closer towards a genuine free movement of evidence between its member states.<sup>39</sup>

The link with the respect for procedural safeguards at a minimum level throughout the EU is evident. The evolution towards a free movement of evidence would be detrimental for the legal position of suspects and defendants throughout the EU, if no adequate level of procedural protection were to be guaranteed. Furthermore, the effectiveness of the system (i.e. a smooth execution of the 'warrants') would be seriously hindered if the current differences between members in regard of procedural rights were to be maintained. The executing member state would have to make a case by case comparison between the procedural rules of the issuing member state and its own fundamental principles of law.

It cannot be predicted how member state would deal with such an exercise. One thing is sure though. A minimum standard of procedural safeguards, taking into account the ECHR and case law of ECtHR on the one hand, and the fundamental principles of each member state on the other hand, would hugely diminish potential obstacles in applying the 'forum rule'.

#### 3.4 The breakdown of mutual recognition: mutual trust vs. the resurrecting dominance of domestic procedures

Certain recent developments indicate that the EU is taking steps back in regard of the mutual trust model. It seems that the mutual recognition doctrine is being questioned by some member states in a fundamental way.<sup>40</sup>

The Council of the EU has – on a single but important stance, i.e. in the context of the EEW – broken with its former reasoning founding the separate regime for 32 offences not requiring any verification of dual criminality. Article 23(4) of the Framework Decision on the EEW leaves room for a declaration by Germany (which it has used) to reserve the right to make the execution of an EEW subject to verification of dual criminality in cases relating to terrorism, computer-related crime, racism and xenophobia, sabotage, racketeering and extortion or swindling, if it is necessary to carry out a search or seizure for the execution of the warrant. Such dual criminality checks will not be performed, however, in cases where the issuing authority has officially declared that its definition of one of the stated offences reflects the criteria set out in the German declaration, which – unsurprisingly – reflects the constituent elements the latter requires for the offence concerned. In other words, the Council has agreed to allow Germany to return to the traditional system of dual criminality for at

39 It should be noted in this respect that there are already legal instruments in place that provide extensive possibilities such as the Convention of 18 December 1997 on mutual assistance and cooperation between customs administrations (Napels II Convention), OJ C 24/1, 23.01.1998. This Convention – which can be applied between judicial authorities in criminal investigations (article 3) – not only provides that “the requested authority shall agree to comply a particular procedure in response to a request, provided that that procedure is not in conflict with the legal and administrative provisions of the requested Member State” (article 9, 6°) but also foresees a far-reaching framework for using information in a broad sense (“...findings, certificates, information documents, certified true copies and other papers...”) acquired in the requested state as evidence in accordance with national law of the requesting state (article 14).

40 For this analysis, see earlier, G. Vermeulen, 'Mutual recognition, harmonisation and fundamental (procedural) rights protection', in M. Martin (ed.), *Crime, rights and the EU: the future of police and judicial cooperation*, JUSTICE, 2008, 89-104.

least some of the core crime categories featured in the 32-list, such as terrorism, by granting it the possibility of opting-out. In allowing the opt-out clause, which itself is clearly triggered by the growing distrust of at least one of the member states, the EU seems to have taken a retrograde step. The proclaimed mutual trust model, on which mutual recognition is based, has been confronted by a new realism. It seems that we are close to exhausting the momentum that 9/11 created, which led to the political success of the mutual recognition principle.

Further, it seems that, once again, the mutual recognition principle is unexpectedly – probably due to its original success – facing manifest reluctance to make it the general policy for third pillar cooperation, i.e. including in the sphere of police cooperation. The principle of availability,<sup>41</sup> which the Hague Programme wanted to be applicable as from 2008, to the exchange of information relevant to law enforcement (services), does not encompass genuine mutual recognition of law enforcement decisions – as the EU has chosen to introduce it for judicial decisions in criminal matters only. On the contrary, mutual recognition is mitigated by a requirement for verification of equivalent access by the requesting authority and access by Europol within its competence. Here, the rationale is, therefore, distrust instead of blind confidence. This method of functioning does not even correspond to the essence of the forum regit actum rule. Like the gradual downfall of mutual recognition, illustrated above by the German reintroduction of a dual criminality check in the context of the EEW negotiations, this is a retrograde step.

Other illustrations of the recent resurrection of practices and concepts that, until recently, were perceived as incompatible with the mutual recognition principle, at least in its initial interpretation, may be found in the context of mutual recognition of custodial sentences and the mutual recognition of previous convictions. In the case of deprivation of liberty, member states should – according to the initial interpretation given to mutual recognition – have blind confidence in each other's decisions involving deprivation of liberty. Consequently, the executing member state should not be put in a position in which it should opt for the *lex mitior* (the 'mildest applicable' law) principle, as it was traditionally supposed to do under, e.g. the European Convention of 28 May 1970, on the international validity of criminal judgments, or the Convention of 21 March 1983, on the transfer of sentenced persons. Instead, it should simply take account of the sentence or disqualification and execute it without attaching any further requirements. In this respect, it suffices to refer to the explanatory memorandum to the initial Commission proposal on the EAW. Under Article 4, paragraph 6 of the EAW framework decision, it is possible for the executing member state, where surrender is sought for the purpose of executing a sentence, to execute the sentence itself instead of surrendering the person concerned to the member state issuing the EAW (*aut dedere aut exequi* rule) – which means mutual recognition of the sentence pronounced in the issuing member state. The Commission has pointed out that, in such a case, the executing member state would not be allowed to adapt the sanction imposed to bring it in line with its domestic law. The text of the memorandum is crystal clear:

41 European Commission, Proposal for a Council Framework Decision on the exchange of information under the principle of availability, COM (2005) 490 final.

*“Where this Article is applied, the amount of the penalty cannot be amended, even if it is different from what would have been ordered in the executing State. The text does not take over Article 10 (2) of the 1983 Convention, the implementation of which is basically incompatible with the principle of mutual recognition. The executing State’s system of execution of sentences will apply.”<sup>42</sup>*

Contrary to the initial Commission standpoint (i.e., in designing the EAW as the first mutual recognition-based EU instrument), according to which the executing member state enjoys no discretion whatsoever to convert or adapt the sentence imposed by the issuing member state, at least two recent mutual recognition-based legal instruments spell out that a person, following execution of a sentence or disqualification in another member state, may not be treated more unfavourably than if he or she had been imprisoned, respectively convicted by the national authorities of the member state executing the sentence or disqualification concerned.

The first example can be found in Council 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.<sup>43</sup> The text of Article 8, paragraphs 2-4, of the text reads as follows:

2. *Where the sentence is incompatible with the law of the executing State in terms of its duration, the competent authority of the executing State may decide to adapt the sentence only where that sentence exceeds the maximum penalty provided for similar offences under its national law. The adapted sentence shall not be less than the maximum penalty provided for similar offences under the law of the executing State.*
3. *Where the sentence is incompatible with the law of the executing State in terms of its nature, the competent authority of the executing State may adapt it to the punishment or measure provided for under its own law for similar offences. Such a punishment or measure shall correspond as closely as possible to the sentence imposed in the issuing State and therefore the sentence shall not be converted into a pecuniary punishment.*
4. *The adapted sentence shall not aggravate the sentence passed in the issuing State in terms of its nature or duration.*

However, as beneficial as the rationale of the proposed conversion and *lex mitior* rules may be, it is conceptually not compatible with the mutual recognition theory. As was pointed out, the European Commission – in the context of the EAW – explicitly recognised the ban of all procedures intended for the conversion of a foreign sentence or measure. In addition, the Commission has now even included a proposal in the above framework decision to also impose the *lex mitior* rule upon member states when they choose to execute the sentence themselves in the context of applying the *aut dedere, aut exequi* principle referred to above.

42 European Commission, Brussels, 19 September 2001, COM (2001) 522 final, 2001/0215 (CNS), 20.

43 Council 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.

The second example was originally to be included in the proposed framework decision on taking account of convictions in the EU member states in the course of new criminal proceedings,<sup>44</sup> in which the principle had been inserted that:

*“if, under national legislation, convictions handed down in the other member states against nationals or residents are entered in the national criminal record, the rules governing entry in the record, modifications or deletion of the information entered may under no circumstances have the effect of causing the person to be treated more unfavourably than if he/she had been convicted by a national court.”*

In the meantime, a political decision seems to have been reached that the matter concerned should be dealt with in the context of the negotiations on the proposal for a Council framework decision on the organisation and content of the exchange of information extracted from criminal records between member states, to which the phrase concerned would be copied.

In summary, there is a clear trend to return to the past – and to the *lex mitior* principle in particular as a core human rights characteristic of it – instead of further developing and enhancing the mutual recognition principle in accordance with the initial theoretical dogmas that marked it. At the same time, however, the observed trend marks a prominent resurrection of the domestic legal system (of the executing member state) as the point of reference, by which it could be argued that the essential mutual trust presumption on which the entire mutual recognition principle was built, has been substantially done away with.

It is clear that ‘mutual trust’ is “more of a stated intention than real trust that member states wish to carry through to its final consequences”.<sup>45</sup> These developments strengthen the call for actions promoting mutual trust, which lies at the heart of the mutual recognition model. In this respect, EU action on procedural rights would have the potential of turning things back around. The only question is: what should this ‘action’ look like?

## 4 From minimum approximation to mutual recognition of procedural rights

### 4.1 Minimum approximation of procedural rights at EU level

In order to create a true basis for genuine mutual trust between the member states, and a solid foundation for mutual recognition, a binding common base of procedural minimum standards is required. The proposal for a draft framework decision on certain procedural rights in criminal proceedings throughout the EU was a first important step taken by the Commission. There remains controversy however as to whether there was a legal basis for the EU to legislate in this area. The Council Legal Service in its opinion of 30 September 2004 on the subject concluded as follows:

44 See: Art 6, para 2 of the proposed Framework Decision, Council of the EU, COPEN 46, 8652/06, Brussels, 16 May 2006.

45 M. De Hoyos Sancho, Harmonization of criminal proceedings, mutual recognition and essential safeguards, in M. De Hoyos Sancho (ed.), o.c., 42.

*“Therefore, if the Council is of the opinion that the guarantees laid down in the proposal at Union level offer advantages because of the positive effect on mutual trust between member states and between courts and on the functioning of criminal justice systems, and that these measures do not go beyond what is necessary to improve judicial cooperation, the Union may adopt the proposed measures and Article 31 (1) (c) of the TEU is the correct legal basis for that.”*

The Council Legal Service, therein followed by the Commission, thus agrees that as long as the main focus remains upon judicial cooperation in criminal matters, article 31 TEU can and should be interpreted broadly. This seems logical. Given the adoption of other framework decisions, there is nothing to prevent the Union laying down standards insofar as the essential aim is to facilitate mutual recognition.<sup>46</sup>

As such, the draft framework decision was a good initiative. However, it was insufficient to create the foundation of confidence it is striving for, due to its limited scope and the significant exceptions incorporated into the proposal.<sup>47</sup> Encompassing only the right to information, the right to legal assistance (including free legal assistance) and the right to interpretation and translation, made the proposal support a noble cause. However, building mutual trust between member states requires more than a minimum amount of approximation regarding the rights mentioned. Of deeper concern are the exceptions that had been integrated into the preamble of the draft legal instrument, stating that the “proposed provisions are not intended to affect specific measures in force in national legislations in the context of the fight against certain serious and complex forms of crime in particular terrorism.”

Making such essential exceptions, specifically with regard to terrorism, leads to the belief that there is still no real *acquis* in respect of procedural safeguards.

The Commission announced in its Legislative and Work Programme for 2009 (“Acting now for a better Europe”)<sup>48</sup> that it would propose a new draft Framework Decision on procedural rights in July 2009. As indicated earlier, the proposal published on 8 July 2009 is very limited in scope, its (only) objectives being to improve interpretation and translation.

#### 4.2 Approximation of procedural rights on a higher level

Due to their potentially exceptionally strong impact on the fundamental right to respect for private life, the field of (special) investigative measures – such as e.g. (house) search, infiltration, interception of telecommunications and having recourse to anonymous witness testimony and protection of and collaboration with witnesses – also requires a minimal level of approximation. In this respect, the steps to be taken towards approximation should at least incorporate the rich *acquis* of the jurisprudence of the European Court of Human Rights, which has ruled in many cases involving investigative measures and the right to private life and which has a substantial impact on domestic criminal procedure.

46 This view was also expressed in a Paper that was submitted by Justice, Amnesty International EU Office and the Open Society Justice Initiative for the experts meeting on procedural rights organised by the Commission on 26 and 27 March 2009.

47 Also see Ch. Brants, *l.c.*, 110-116.

48 COM(2008) 712 final.

In the field of house search for example, The ECHR provides the minimum standard for safeguards. These include the level of certainty that evidence is on the premises to be searched; the time of day when search powers can be used; notification of the person whose premises have been searched; the rules applicable when the occupier of premises is absent; and the need for independent third parties to be present at the search. Within this framework, significant national variations in the safeguards exist. In 2004, the Belgian Government was convicted in the Van Rossem case for having violated article 8 ECHR for using insufficiently detailed arrest warrants.<sup>49</sup> The case led to a change of the national rules on house search by the Belgian Supreme Court. Overall compliance within member states with these minimum rules would thus not only offer a basic procedural protection of those targeted by the search warrant, but would also facilitate the admissibility of evidence gathered through a house search in a cross-border context.

As is clear from the previous example, the ECHR acquis should constitute the minimum level of any approximation effort on procedural rights at EU level. For some member states, however, a meaningful and worthwhile measure would mean a measure that would not only be consistent (in the sense of not conflicting) with the ECHR but which would also go beyond the ECHR and add real value for those involved in criminal investigations or proceedings within Europe.<sup>50</sup>

The mutual recognition principle should thus be combined with a legally guaranteed respect for procedural criminal law standards through a wider and more specific minimum approximation than envisaged in the draft framework decision on certain procedural rights, while still respecting the subsidiarity principle. This would serve a double cause. Firstly, subjects targeted in investigations with a cross-border dimension would be offered a higher degree of protection (at a minimum respecting the ECHR acquis). Secondly, judicial cooperation in the broadest sense (including the admissibility of evidence gathered abroad) through the mutual recognition principle would be facilitated, given the general focus on the 'forum regit actum' rule. Cooperation according to this latter principle can only be successful if the requesting state's (forum) legislation or legal practice in respect of a certain investigative measure is not irreconcilable with the requested state's (locus) fundamental principles of law. Such incompatibilities would considerably be avoided if those fundamental principles were approximated. Exceptions in this respect could be made for investigative techniques with a high sensitivity such as controlled deliveries or Joint Investigation Teams (JIT).<sup>51</sup>

This conviction has inspired several preparatory legislative proposals, drafted by the Institute of International Research in Criminal Policy (IRCP). Two examples are elaborated below.<sup>52</sup> The first relates to the aforementioned principle of availability.<sup>53</sup>

49 ECHR, *Van Rossem v. Belgium*, 9.12.2004 (application no. 41872/98).

50 See in this respect the Report of the European Union Committee of the UK House of Lords, *Procedural rights in EU criminal proceedings – an update*, May 2009.

51 The current mutual legal assistance regime concerning a JIT still refers to the traditional locus rule (article 3(b) of the Council Framework Decision of 13 June 2002 on joint investigation teams, OJ L 162, 20.06.2002).

52 For this analysis, see earlier, G. Vermeulen, 'Mutual recognition, harmonisation and fundamental (procedural) rights protection', in M. Martin (ed.), *Crime, rights and the EU: the future of police and judicial cooperation*, JUSTICE, 2008, 89-104.

53 G. Vermeulen, T. Vander Beken, L. Van Puyenbroeck and S. Van Malderen, *Availability of law enforcement information in the European Union. Between mutual recognition and equivalent right of access* (Antwerp 2005) 110 pp.

The other relates to (both procedural and non-procedural) witness protection and collaboration with justice.<sup>54</sup>

The November 2004 Hague Programme introduced the principle of availability as the future principle for the exchange of law enforcement cooperation. It entails that information needed for law enforcement purposes should cross the EU's internal borders without any obstacles. In essence it calls for a free traffic of information relevant for law enforcement purposes. The principle of availability has the power to transform mutual recognition as it subsists today in its – by means of the requirements of access by equivalent authorities or Europol only – mitigated form into a stronger concept of genuine mutual recognition.

The IRCP proposal sought to ensure that, by using a so-called pre-evidence warrant, member states would be able to exchange relevant information on available law enforcement measures, provided that they comply with specific safeguards. Firstly, the proposed warrant would only concern existing information, ruling out the possibility of requiring investigatory measures for obtaining the information.<sup>55</sup> Secondly, the information would only be used in the pre-evidence phase.<sup>56</sup> Using the information as genuine evidence would mean that one would rely on traditional mutual legal assistance schemes in order to request and receive the information required. Thirdly, the pre-evidence warrant would ensure maximum traceability of the information: by systematic logging of the information in the executing state as well as in the issuing state; by introducing a duty to list all information obtained using the pre-evidence warrant in the criminal file and actually adding to the file the information that has been used effectively, even if only as 'steering' information and not as genuine evidence in court. Compliance with the traceability duties would be subject to disciplinary, civil and/or criminal liability.<sup>57</sup> Supplementary control would be provided by the introduction of the concept of 'information DNA', i.e., the complete historical trace to which a specific sample of information has been subject, that will be attached to the information, with a view to future access and use.

In the field of (both procedural and non-procedural) witness protection and collaboration with justice, the current EU/multilateral *acquis* encompasses only a set of mainstream ideas, non-binding best practices and soft law instruments. The three IRCP proposals on protected witnesses<sup>58</sup>, anonymous witnesses and collaborators with justice<sup>59</sup> have made a genuine attempt to update and upgrade these concepts into binding EU minimum standards, with a clear view on approximation of criminal procedural

54 G. Vermeulen (ed.), *EU standards in witness protection and collaboration with justice* (Antwerp 2005) 280 pp.

55 G. Vermeulen, T. Vander Beken, L. Van Puyenbroeck and S. Van Malderen, o.c., p. 41.

56 *Ibid.*, p. 26.

57 *Ibid.*, pp. 44-46.

58 For a definition reference can be made to the Recommendation (2005) 9 of the Committee of Ministers of the Council of Europe to Member States on the protection of witnesses and the collaborator of justice, where a 'witness' is defined as "any person who possesses information relevant to criminal proceedings about which he/she has given and/or is able to give testimony (irrespective of his/her status and of the direct or indirect, oral or written form of the testimony, in accordance with national law) who is not included in the definition of 'collaborator of justice'."

59 In the aforementioned Recommendation (2005) 9 a 'collaborator of justice' is defined as "any person who faces criminal charges, or was convicted, or having taken part in an association of criminals or other criminal organisation of any kind, or in organised crime offences but agrees to cooperate with criminal justice authorities, particularly by giving information about the criminal association or organisation or any criminal offence connected with organised crime or other serious offences".



law within the member states.<sup>60</sup> The starting point used in the proposals is a maximum scope *ratione materiae* covering offences committed within the framework of a criminal organisation or participation in a criminal organisation,<sup>61</sup> terrorist offences, offences relating to a terrorist group or offences relating to terrorist activities,<sup>62</sup> offences within the jurisdiction of the International Criminal Court and the rest of the 32 offences commonly used in mutual recognition instruments, provided that they are punishable by a sentence involving deprivation of liberty for at least three years.

The link to the list of 32 offences is supplemented by an opt-out clause for member states implementing legal concepts in their domestic legal order – thereby ensuring respect for the subsidiarity principle – with the exception of offences committed within the framework of a criminal organisation or participation in a criminal organisation.<sup>63</sup>

An important feature incorporated into the proposals is the obligation for member states to accept evidence gathered in another member state which makes use of protected witnesses or collaborators with justice, even where such use is related to offences which this member state has excluded from the domestic scope of the legal concepts concerned by use of the opt-out clause. However, the value of the evidence gathered in this way is different in each of the three proposals. In the case of anonymous witnesses, information provided by them in accordance with the proposed procedural guarantees should be accepted in another member state as supportive evidence, even where the information relates to one of the opt-out offences in the latter. When information has been obtained from a collaborator with justice, provided that the procedural guarantees introduced in the proposal have been complied with, it is proposed that member states accept such information at least as supportive evidence, but allows them to accept it as core evidence if they so wish. In the case of a protected witness providing information in accordance with the procedural rules and guarantees embedded in the proposal, full recognition of the information as evidence is required.<sup>64</sup>

A second important innovation of the proposals relates to decisions not to prosecute (*res iudicata*) collaborators with justice. The *ne bis in idem* effect<sup>65</sup> that is created by these decisions should be respected, regardless of the use of the opt-out clause by the member state for (certain of) the non-mandatory offences. This means that, according to the proposal, a collaborator with justice who has been granted immunity from prosecution in accordance with the proposal in one member state, may not be prosecuted by another member state for the offences for which he or she has been granted immunity from prosecution. This is the case even where the latter member state has chosen not to provide in its legislation for the possibility that the competent authority may grant immunity from prosecution, provided that the decision whereby immunity was granted bars further prosecution in the member state where the immunity was granted.

60 G. Vermeulen (ed.), o.c., 280 pp.

61 As defined by the Framework Decision on the fight against organised crime (Council of the EU, CRI-MORG 132 OC 597, 12279/06, Brussels, 28 September 2006).

62 As defined by the Framework Decision of 13 June 2002 on combating terrorism, OJ L 164 of 22.6.2002.

63 G. Vermeulen (ed.), o.c., p. 240.

64 Ibid., p. 241.

65 See Court of Justice, 11 February 2003 (Gözütok and Brügger), C-187/01 and C-385/01.

By integrating the two aforementioned characteristics, a minimum mandatory mutual recognition is assured. In order to enhance this minimum mutual recognition, specific minimum criminal procedural law guarantees have been similarly included in all three proposals. These encompass guarantees regarding the competent authorities, the granting and revoking of the status of anonymous or protected witnesses and collaborators with justice,<sup>66</sup> the evidential value of evidence gathered using anonymous or protected witnesses or collaborators with justice,<sup>67</sup> the rights of the defence<sup>68</sup> and written agreement including the rights and duties in granting or revoking protection or benefits. Specifically, the principles of necessity and subsidiarity are recognised by opting for a well structured procedure verifying the need to rely on anonymous or protected witnesses or collaborators with justice. The rationale is logically related to the reliability of the individuals involved, the rights of the defence to challenge or question the witness, the costs involved and possible ethical issues that can rise as a result of using one of these possibilities.

The proposals, therefore, highlight the need for an approximation of minimum procedural rules. Complemented with a clear and comprehensive outline of minimum guarantees offered by the jurisprudence of the European Court of Human Rights, the proposals are believed to form a wide-ranging and effective instrument in strengthening the mutual recognition principle.

### 4.3 Towards genuine mutual recognition of procedural guarantees

The previously discussed options all imply establishing a binding minimum level of domestic procedural criminal law standards. These should be developed around the jurisprudence of the ECtHR, thus providing a solid base for mutual recognition. As explained above, this approximation effort should be done at a wider and more specific level than the current proposal for a framework decision on procedural rights. Another and final option concerns the question what should be done if, in respect of a certain investigative tool or method, the domestic procedural law of the requested state offers a higher standard than the requesting state (or vice versa). Should the lowest common denominator be applied? Or should the individual concerned be accorded the highest standard of protection?

In such cases, it should be considered to combine the option of approximation with a *mutual recognition of domestic procedural criminal law standards* which go beyond the binding minimum level. This combination of the safeguards of the member states' criminal justice systems would maximise procedural protection for suspects and defendants and would consequently enhance mutual trust between member states, facilitating the application of mutual recognition instruments.

An example of this idea can already be found in the EU acquis. Article 10 of the 2000 EU Convention on mutual assistance provides the legal framework for hearing a

66 Evidently, the specific conditions to grant or revoke the status differs in each proposal regarding respectively anonymous or protected witnesses or collaborators with justice. See G. Vermeulen (ed.), o.c., p. 247, p. 254 and pp. 261-262.

67 Evidently, the specific rules on the value of evidence gathered, differs in each proposal regarding respectively anonymous or protected witnesses or collaborators with justice. The relevant jurisprudence of the European Court of Human Rights was duly taken into account. See *Ibid.*, p. 241.

68 The relevant jurisprudence of the European Court of Human Rights was duly taken into account. See *Ibid.*, p. 241.

witness or expert by videoconference. With respect to the applicable rules, article 10 (5) (e) states that “*the person to be heard may claim the right not to testify which would accrue to him under the law of either the requested or the requesting member state*”. In other words, this article applies the ‘*lex mitior*’ principle concerning the rights of excuse regarding hearing by videoconference. This rule should be generalised at EU level by officially incorporating it into mutual recognition.

## 5 Conclusion

The underlying research question of this article basically deals with a comparison of the possible options to take legal action at EU level in order to provide suspects and defendants within the EU with a better procedural protection. At present measures in this regard at EU level are primarily concerned with the introduction of common minimum standards (cf. the proposal for a framework decision on procedural rights). It should be considered not only to continue these *approximation* efforts at a *wider and more specific scale* (meaning the adoption of rights that go beyond the minimum level and which take account of the specific characteristics of intrusive investigative measures such as house search or interception of telecommunications) but also to introduce a *mutual recognition of domestic procedural safeguards*. Through a profound legal analysis the authors see these options as a necessary counterbalance for the free movement of evidence within the EU that is currently being envisaged at EU level.

Guaranteeing an acceptable level of procedural protection to suspects and defendants throughout the EU by approximation of national legislations is, of course, not the only possibly effective measure to strengthen mutual trust within the EU’s common judicial area. Legal action on procedural rights at EU level should be combined with a wide range of actions: “from the simplest – training of legal agents, learning of foreign languages – to the administrative – creation of networks, establishment of liaison magistrates or contact points – to the most complex such as improvements in the inherent quality of national regulations and effective compliance with the judgments of the ECtHR...”<sup>69</sup>

Nevertheless, a combination of mutually recognised domestic procedural safeguards with a wide approximation of procedural rights would be an ideal solution, both in terms of enhancing judicial cooperation by strengthening mutual trust as of presenting suspects and defendants with an adequate level of procedural protection. Requests for legal assistance would be executed more easily, for the competent authorities within member states would be assured that their foreign counterparts are bound by the same minimum procedural rules. On top of that, mutually recognising domestic procedural safeguards that go beyond the binding minimum level would considerably strengthen the legal position of the persons concerned by offering them the best of two worlds according to the *lex mitior* principle. This would not be revolutionary since the EU *acquis* on mutual legal assistance already provides this (cf. article 10 of the 2000 EU Convention on mutual assistance on the hearing by videoconference). A generalisation of this rule would be an important step towards practical and

<sup>69</sup> M. De Hoyos Sancho, l.c., 46.

effective procedural protection of suspects and defendants throughout the EU and would thus contribute to a stronger area of freedom, security and justice.

## 6 Main references

- AMBOS, K., *MUTUAL RECOGNITION VERSUS PROCEDURAL GUARANTEES?*, IN DE HOYOS SANCHO, M. (ED.), *CRIMINAL PROCEEDINGS IN THE EUROPEAN UNION: ESSENTIAL SAFEGUARDS*, LEX NOVA, VALLADOLID, 2008, 25-38.
- ANDERSON, M., *LAW ENFORCEMENT COOPERATION IN THE EU AND FUNDAMENTAL RIGHTS PROTECTION*, IN MARTIN, M. (ED.), *CRIME, RIGHTS AND THE EU: THE FUTURE OF POLICE AND JUDICIAL COOPERATION*, JUSTICE, 2008, 105-120.
- BRANTS, CH., *PROCEDURAL SAFEGUARDS IN THE EUROPEAN UNION: TOO LITTLE, TOO LATE?*, IN VERVAELE, J. (ED.), *EUROPEAN EVIDENCE WARRANT: TRANSNATIONAL JUDICIAL ENQUIRIES IN THE EU*, INTERSENTIA, 2005, 103-119.
- CAPE, E., HODGSON, J., PRAKKEN, T. AND SPRONKEN, T. (EDS.), *SUSPECTS IN EUROPE, PROCEDURAL RIGHTS AT THE INVESTIGATIVE STAGE OF THE CRIMINAL PROCESS IN THE EUROPEAN UNION*, INTERSENTIA, 2007, 280 pp.
- DE HOYOS SANCHO, M., *HARMONIZATION OF CRIMINAL PROCEEDINGS, MUTUAL RECOGNITION AND ESSENTIAL SAFEGUARDS*, IN DE HOYOS SANCHO, M. (ED.), *CRIMINAL PROCEEDINGS IN THE EUROPEAN UNION: ESSENTIAL SAFEGUARDS*, LEX NOVA, VALLADOLID, 2008, 39-67.
- GLESS, S., *MUTUAL RECOGNITION, JUDICIAL INQUIRIES, DUE PROCESS AND FUNDAMENTAL RIGHTS*, IN VERVAELE, J. (ED.), *EUROPEAN EVIDENCE WARRANT: TRANSNATIONAL JUDICIAL ENQUIRIES IN THE EU*, INTERSENTIA, 2005, 121-129.
- VERMEULEN, G., *MUTUAL RECOGNITION, HARMONISATION AND FUNDAMENTAL (PROCEDURAL) RIGHTS PROTECTION*, IN MARTIN, M. (ED.), *CRIME, RIGHTS AND THE EU: THE FUTURE OF POLICE AND JUDICIAL COOPERATION*, JUSTICE, 2008, 89-104.
- VERMEULEN, G. (ED.), *EU STANDARDS IN WITNESS PROTECTION AND COLLABORATION WITH JUSTICE* (ANTWERP 2005) 280 pp.
- VERMEULEN, G., VANDER BEKEN, T., VAN PUYENBROECK, L. AND VAN MALDEREN, S., *AVAILABILITY OF LAW ENFORCEMENT INFORMATION IN THE EUROPEAN UNION. BETWEEN MUTUAL RECOGNITION AND EQUIVALENT RIGHT OF ACCESS* (ANTWERP 2005) 110 pp.
- VERNIMMEN-VAN TIGGELEN, G. AND SURANO, L, INSTITUTE FOR EUROPEAN STUDIES, UNIVERSITÉ LIBRE DE BRUXELLES ECLAN – EUROPEAN CRIMINAL LAW ACADEMIC NETWORK, *ANALYSIS OF THE FUTURE OF MUTUAL RECOGNITION IN CRIMINAL MATTERS IN THE EUROPEAN UNION*, 20<sup>TH</sup> NOVEMBER 2008, EC DG JLS, 93 pp.