



ASSISES DE LA JUSTICE

DISCUSSION PAPER 2: EU CRIMINAL LAW¹

This discussion paper was produced as input to discussions leading up to and during the Assises de la Justice conference (Brussels, 21-22 November 2013). It will also contribute to the preparation of the Commission's Communication on future initiatives in the field of Justice. The content of this paper does not reflect the official opinions of the European Commission or other institutions of the European Union.

I. Introduction:

In a genuine European area of Justice, citizens can legitimately expect that their lives, safety and security are protected against crime across the EU and that their fundamental rights are respected when they get into contact – whether as victims or defendants – with a criminal justice system, within or outside their home country. While such protection is primarily the responsibility of Member States, the Union has gradually become a key player in this policy area to counter globalised criminality and to accompany other Union policies².

Creating a European area of Justice, based on the principle of mutual recognition³ was included as a new objective of the Union in the Treaty of Amsterdam in 1999 although the methods of adopting criminal law remained largely intergovernmental. Ten years later, the Treaty of Lisbon provided fresh opportunities to develop EU criminal law legislation allowing new opportunities to strengthen mutual trust by further approximation of substantive and procedural criminal law⁴. Indeed, for the European area of Justice to operate in practice, national authorities involved in judicial proceedings need to be satisfied that the initial decision was taken fairly. Common minimum rules in certain crime areas are therefore needed to enhance the mutual trust between Member States and the national judiciaries. This high level of trust is indispensable for smooth cooperation among the judiciary in different Member States. The principle of mutual recognition of judicial measures can only work effectively on this basis.

¹ "Criminal law" is used in a broader sense in this paper. It refers, in addition to the approximation of criminal law and procedural law stricto sensu, to measures of judicial cooperation and flanking measures as well.

² See the speech of Vice-President Viviane Reding, EU Justice Commissioner, of 12 March 2010 "The Future of European Criminal Justice under the Lisbon Treaty": http://europa.eu/rapid/press-release_SPEECH-10-89_en.htm

³ This means that a decision of judicial authorities in one Member State is recognised, and where necessary, enforced by other Member States as if it was a decision taken by the authorities of those latter countries. Based on the presumption that justice systems within the EU are, if not the same, at least equivalent, this principle helps overcome the difficulties stemming from the diversity of the legal traditions and systems of the Member States.

⁴ Commission Communication – "Towards an EU Criminal Policy: Ensuring the effective implementation of EU policies through criminal law" – COM(2011)571 of 20 September 2011.

II. What has been achieved?

The EU *acquis* in the field of criminal law is a substantial and wide-ranging set of measures covering judicial cooperation, approximation of legislation and flanking measures. The main achievements include the following:

- A common understanding on **what types of conduct should be criminalised**. The EU *acquis* provides common definitions of, and sanctions for, serious and/or cross-border crimes such as currency counterfeiting, terrorist offences, racism and xenophobia, child exploitation, cybercrime and trafficking in human beings and drugs⁵.
- Common **standards to protect persons suspected or accused of crime**: After ten years it has been possible to unblock the situation related to the EU proposals on procedural rights. Today, the EU *acquis* includes a coherent set of criminal procedural rules providing common minimum standards to ensure a high standard of fair trial rights for citizens and a level-playing field throughout the EU in this area, during the entire criminal justice process⁶.
- Common standards to **protect victims of crime**: The EU *acquis*, now based on an integrated policy includes a comprehensive body of rules providing rights, support, advice and protection for victims and close relatives. The objective is that all the victim's rights and protection measures follow the individual when he/she moves within the EU.
- Tools facilitating the **investigation and prosecution of crimes**: The EU *acquis* provides for the mutual recognition of various judicial decisions taken throughout criminal proceedings⁷. In this context, the most far-reaching instrument is the European Arrest Warrant, which has significantly facilitated the surrender of suspects and convicted persons by increasing the speed and ease of the surrendering process.
- Specific measures to **protect the financial interests** of the EU and the proposal of a European Public Prosecutor Office: As part of a wider strategy to protect the EU's budget against fraud, the Commission tabled the anti-fraud Directive and an innovative proposal on the establishment of a European Public Prosecutor Office which will set up a Union-wide prosecution office to tackle fraud against the EU's financial interests, an unprecedented evolution towards creating a genuine European space of justice.
- Union-level organs and systems to **support the fight against crime**: National prosecution and judicial authorities are assisted by Eurojust, which the Commission has proposed to strengthen and modernise, and the European Judicial Network which have become essential components in the fight against cross-border crime. The European Criminal Records Information System (ECRIS) for the exchange of criminal records data enables judicial and law enforcement authorities in 24 Member States to benefit from information that serve to prevent crime in Europe.

⁵ Under a different legal basis, and originally independent from the concept of approximation of criminal law, the EU also adopted two Directives on environmental crime and on ship source pollution to ensure the efficiency of the Union's environmental policy.

⁶ This includes the right to interpretation and translation, the right to information in criminal proceedings ("letter of rights"), the access to a lawyer and the right to communicate with one's family and employer upon arrest. Initiatives to strengthen the rights of children and other vulnerable persons, legal aid as well as the presumption of innocence are underway.

⁷ See Framework Decisions on obtaining evidence for criminal trials, exchange of criminal records, freezing, confiscation, pre-trial supervision orders, financial penalties, "in absentia" trials, taking into account of foreign convictions, custodial sentences, probation orders and alternative (non-custodial) sanctions.

III. The challenges ahead for EU criminal law

Criminal law has evolved into a mature EU policy field where mainly the normal legislative procedure applies with the European Parliament and the Council acting as co-legislators. The objective remains to design a fully coherent criminal law policy which proposes where necessary responses to developments in crime in the 21st century whilst strengthening mutual trust between Member States and the national judiciaries. Designing such a coherent criminal law policy will need to be achieved by full recognition of the rights of the victims and respect for the procedural safeguards of suspected and accused persons.

1) Ensuring fundamental rights for strengthening mutual trust

Criminal law measures should be firmly grounded in strong EU-wide standards for procedural rights and victims' rights in line with the EU Charter of Fundamental Rights. This is central to strengthen mutual trust and requires defining and reinforcing the rights of individuals involved in criminal proceedings. It is necessary to encompass the rights of the defendant in all stages of criminal proceedings but also those of the victim. Any identified gaps in the EU legislation would need to be addressed.

Victims could also benefit from stronger safeguards. Many of them still do not benefit from a satisfying level of State or offender compensation, nor of legal aid. The creation of victim funds composed of confiscated criminal assets could be an answer which is compatible with the current economic climate. It is necessary to explore how to promote the use of tools and mechanisms, such as mediation and restorative justice which treat victims of crime with more respect and dignity whilst reducing the risk of recidivism.

2) Ensuring the effectiveness of EU criminal law

The EU must ensure that what legal acts promise on paper corresponds to the reality on the ground. EU criminal law has in many cases neither been transposed nor used in practice at national level. However, and as provided by the Lisbon Treaty⁸, it is possible to build a genuine implementation and enforcement strategy as rigorous as any other EU policy.

There is also a need to analyse the difficulties for practitioners which can derive from separate instruments on mutual recognition for each phase of the criminal proceeding. It is important to identify the need to consolidate, simplify and standardise the methods of judicial cooperation within the EU. It could be useful to further assess whether additional measures are necessary for judicial cooperation to become reality.

Practitioners need to work together, exchange information in a fast and secure way, and obtain assistance from their colleagues through efficient tools. Whereas mechanisms already exist in the Union (Union bodies, networks, data-bases, Joint Investigation Teams) they are not always easily accessible for practitioners (language barrier, costs, centralisation of information) or simple to use. There could be a need to further simplify these tools and make them more easily accessible to practitioners also through training schemes.

⁸ As of 1 December 2014, the Court of Justice will have full jurisdiction, including preliminary rulings on the interpretation of legislation, in the area of police cooperation and judicial cooperation in criminal matters. The Commission as well as Member States will be entitled to launch infringement proceedings against those Member States which have not implemented or not correctly implemented EU law (Protocol 36, Article 10 TFEU).

3) Ensuring that EU criminal law policy is connected to the developments in crime

The EU response to crime could be more dynamic to take into account the constantly evolving criminal landscape. Priorities need to be identified in light of new trends in criminal activities which would justify EU action, including, where necessary, expanding the list of Euro-crimes currently referred to by Article 83(1) TFEU. For those crimes the Union decides to tackle as a priority, it is necessary to examine how to ensure that investigation and prosecution are not blocked by the diversity of the judicial systems, neither by disagreement on what exactly is a “criminal matter”.

4) Accompanying other EU policies

Criminal law is a horizontal tool which has the potential to ensure the effective implementation of other EU policies as already proven for the protection of the environment. Since Article 83(2) TFEU explicitly confirmed this function of EU criminal law, it could be worth reflecting on whether to extend this approach to other areas (food safety, market abuse, intellectual property). Beside definitions of offences and sanction levels, common approaches to the liability of natural and legal persons and statutory limitation could also be helpful to ensure consistency and effectiveness of action in the Member States. To that end, it may be necessary to explore how to make appropriate use of the means available under the Lisbon Treaty, including the “*passerelle*” and enhanced cooperation.

IV. Questions

1. *What further development of criminal law at EU level is needed?*
2. *What initiatives at EU level would best strengthen mutual trust between Member States?*

Full information on submitting contributions:

http://ec.europa.eu/justice/events/assises-justice-2013/discussion_papers_en.htm