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Directorate-General for Internal Policies  
Directorate C - Citizens' Rights and Constitutional Affairs

## **ANNEX IV** **INVITATION TO TENDER IP/C/LIBE/IC/2013-056**

**Developing a Criminal Justice Area in the European Union**



**DIRECTORATE GENERAL FOR INTERNAL POLICIES**  
**POLICY DEPARTMENT C: CITIZENS' RIGHTS AND**  
**CONSTITUTIONAL AFFAIRS**

**JUSTICE, FREEDOM AND SECURITY**

# **Developing a Criminal Justice Area in the European Union**

**A study conducted by Dr Marianne L Wade,  
Institute of Judicial Administration, University of  
Birmingham in association with the Institute fuer  
Migrations- und Sicherheitsstudien, Berlin.**

## **Abstract**

This study addresses the development of an EU criminal justice area. By exploring key concepts and features of criminal processes in comparative perspective, it seeks to provide ideas for such an area. Because the situation in the member states is diverse, independent concepts guided by the study findings are explored.

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## LIST OF ABBREVIATIONS

- CJEU** Court of Justice of the European Union
- CPT** Committee for the Prevention of Torture
- EAW** European Arrest Warrant
- ECHR** European Convention for the Protection of Human Rights and Fundamental Freedoms – European Convention on Human Rights
- ECtHR** European Court of Human Rights
- EPPO** European Public Prosecutor’s Office
- PIF** (The offences concerning the) protection of the EU’s financial interests
- TFEU** Treaty of the Functioning of the European Union

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## EXECUTIVE SUMMARY

This study seeks to contribute to the discussion of how an EU criminal justice area should be developed. As envisaged by the LIBE committee it focuses initially on the concept of serious crime as one to potentially identify the legitimate substantive remit of such an area. Unfortunately the concept of serious crime is not a legal one in the member states and thus examination of it, special procedures and other mechanisms in the member states legal orders do not yield a satisfactory definitional basis for any EU development. It is clear that the concept must be defined autonomously and a different basis sought to define and limit the substantive scope of any EU criminal justice area.

A number of specialist agencies exists in the member states to deal in a more centralised manner with certain types of offences. This might be taken as indicative that such crimes require special treatment. The offences for which centralising structures are, however, often found at national levels are on the one hand classic transnational crimes such as terrorism, organised crime, cybercrime and money laundering and financial offences on the other. In terms of providing indicators for an EU legal area, this finding therefore does not appear to suggest anything further is needed than that already being considered. There is no particular pattern of specialisation to be discerned from these findings which might be helpful in assisting the development of a more theoretical notion of the appropriate substantive content of any EU criminal justice area.

Furthermore an examination of specialist procedures in the member states reveal these as designed mostly to free up criminal justice system resources to enable concentration on serious crimes in "normal proceedings" not as specialist procedures to be applied to (and thus helping to identify) crimes considered as particularly serious. In a small number of member states, the use of certain specialist, more coercive investigative measures is allowed only for a group of offences considered particularly serious.

It is thus, unfortunately, not possible to turn to a legal comparative analysis of member state practices for indicators as to the legitimate reach of any EU criminal justice area. Clearly this must be limited to offence areas for which there is a special need for supra-nationalised intervention but it appears that drawing the boundaries of this sphere requires autonomous definition. This study postulates that two broad areas of criminal activity can legitimately fall within such a definition. On the one hand offences of which the EU itself becomes a victim (and thus all its citizens are equally victimised by) as well as offences for which the EU has a moral obligation to intervene because it in some way facilitates the commission of transnational crimes. The latter is above all the case when freedoms provided by the Union are abused for illegitimate purposes. These are the common values of the Union as a community and therefore potentially to be protected by criminal law.

The use of criminal justice mechanisms is, in accordance with European traditions, to occur as an ultima ratio only. Careful consideration of areas of wrong-doing and the proportionality of utilising supra-national criminal justice mechanisms to combat them as well as the requirements of a subsidiarity examination must ensue before any EU criminal justice area can be determined the proper setting for dealing with offences.

The individual and procedural rights traditions of the member states are not unexpectedly varied and highly diverse. Comparative analysis of rights regarded as core yields a long list and even in concreto, rights such as the right to be heard are manifested very differently across differently EU jurisdictions. It is therefore difficult to draw conclusions for any EU

criminal justice area from such comparative analysis. If, however, any EU criminal justice system is regarded as serving EU citizens, their expectations of criminal justice and the procedures which contribute to it, may be regarded as central. Given the high priority accorded to many rights and the in part stringent enforcement of them – e.g. via evidential admissibility rules – much speaks for any EU criminal justice area developing as an area of high standards and best practice. If it does not, the EU bears potential to act as a constitutional loop-hole, depriving citizens of important rights and will be vulnerable to arguments of illegitimacy.

Investigations in the member states are complex interactions. For serious crimes, however, these factually always seem to be based upon prosecutorial (at least co-) leadership. The vast majority of jurisdictions lend prosecutors the legal status of investigative leaders and for serious crimes, this is also reflected in practice. However, investigations are not seen as only matters for state agencies. A significant number of member states provide defendants and/or their lawyers with participatory rights and a smaller number of states also provide formal rights to victims. In developing any EU criminal justice area it is important that such interests are not overlooked for they will form an important part of citizens' expectations of justice.

The length of prison sentences citizens can be subject to varies greatly across the member states demonstrating very different conceptions of what a state can legitimately subject its citizens to. It is difficult to envisage any common notion developing in the near future. Deficient detention conditions are an all too common phenomenon across the EU. A significant number of member states detain citizens in deficient detention conditions sometimes found to be in breach of the ECHR or subject to serious criticism by the Committee for the Prevention of Torture. This specifically undermines the mutual trust of criminal justice practitioners in other member states' systems which should form the basis to mutual recognition. If any EU criminal justice area is to serve EU citizens and their notions of justice this is a matter which must be addressed with the utmost urgency.

A majority of member states require a defendant to have legal representation when he or she is investigated and/or on trial for a serious crime or exposed to the risk of a high sentence. Other member states require representation for vulnerable suspects or for those who are detained. Much therefore speaks for European cases requiring mandatory defence counsel presence in accordance with the traditions of the member states. Logically such defence is usually paid for by the respective state though the particular mechanism for ensuring this varies.

Juvenile defendants are treated significantly differently to adult suspects and offenders. The age at which a child becomes subject to criminal liability varies significantly. A clear EU definition of who and how criminal justice measures can affect juvenile offenders must be developed autonomously.

Fundamentally this study identifies EU citizenship as key concept for the development of any EU criminal justice area: Core to this thinking is the idea that there are certain interests only the EU can protect effectively for its citizens. Good governance will thus require the use of an EU criminal justice area for a limited remit of substantive offences. It is key, however, in ensuring correct development of any such area, that the EU citizen is recognised as the intended beneficiary of this area. An EU citizen is, by virtue of his or her national citizenship, a constitutional rights holder with legitimate expectations of justice and in particular criminal justice. Any system which reduces this notion only to the idea of effective prosecution, illegitimately curtails any vision of citizenship as defined in European traditions. Although effective prosecution is doubtlessly an important consideration to citizens, it is far from the only one. Notions of fairness, individual rights, the interests of victims and broader society in criminal procedure are similarly key. Criticism of EU criminal

justice related developments thus far point to these aspects, particularly relating to individual rights, being disproportionately neglected if not overlooked. Placing an idea of any EU criminal justice area as serving European citizens as well as dealing with individual citizens (and thus rights holders) via mechanisms which place them in a precarious position, is suggested as a helpful corrective for the further development to an EU criminal justice area.

## INTRODUCTION

### 1.1. PURPOSE AND SCOPE OF THE STUDY

This study aims to provide a conceptual basis for the development of a criminal justice area within the EU. In so doing it recognises that the Treaties – in demonstrative respect of the principle of subsidiarity – impose certain substantive limitations upon any such developments. The substantive remit assigned to the Union is to protect its own budget and **“areas of particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis”** (article 83 TFEU). A number of crimes is listed to explain this term but the Council is empowered via the special legislative procedure to identify further offence areas in the future.

As such the Treaties provide us with some basis of understanding what the legitimate substance of any EU criminal justice area may be but they do not provide a conclusive picture. Given how controversial this topic is, this study aims to offer a means by which to identify the substantive bounds beyond those offences listed. It seeks to identify any principles by which the legitimate substantive reach of an EU criminal justice area might be determined.

Recognising, however, that any cross-border provision for criminal justice touches not only upon substantive issues, the study also sets out to highlight a number of important procedural points of orientation which signal boundaries to any EU activity relating to criminal justice. Above all, it is recognised that each member state features a unique criminal justice system reflecting its cultural norms and values and containing many rules reflecting what it regards as the constitutionally acceptable bounds of the relationship between state and citizen. In identifying these key procedural boundaries set by the member states, the study thus illustrates how far any EU action can go before it will be regarded as illegitimate by member states’ legal systems and above all the citizens of those jurisdictions.

This study thus provides a comparative insight but aims to draw principled conclusions for any EU criminal justice area from them.

### 1.2. BACKGROUND

In the main this study’s basis is formed by the call issued for it by the LIBE committee (IP/C/LIBE/IC 2013-056). It aims to answer the questions posed by this call but to do so in a coherent way which provides the reader with as full an understanding of the current state of knowledge as possible. It further aspires to placing this information within a conceptual framework which can be useful to the reader in considering developmental paths for any EU criminal justice area.

The topics for which information was requested of this study was very broad and the desire to gain a comprehensive overview of the legal systems of all EU member states significantly widened the remit of this project. The study delivery period was indicated as 6 months – a time period in which no such specifically designed study can be performed. However, it was recognised that much of what is called for is knowledge accrued by previous studies performed to explore specific comparative questions or aspects of the developing EU criminal law. Therefore this study was envisaged as evaluating previous study results to

provide the information required. The aim was always to glean information on all 30 EU member state legal jurisdictions, where this was not possible, information was sought at least for representative legal circles (romanic, common law, post-communist, Germanic and Nordic).

Fundamentally, however, the study is ordered in according to the understanding of the author. Since working at the European criminal law section of the Max Planck Institute for Foreign and International Criminal Law in Freiburg, Germany where I headed and co-headed a number for comparative projects, I have been a close follower of criminal justice relevant EU developments. Whilst at the MPI I co-headed the "Rethinking European Criminal Justice" study which comparatively explored key criminal justice stages, institutions and principles in 21 jurisdictions, occupying 35 partners for 3 years. I further headed the EuroNEEDs study which empirically explored the needs for and the requirements of an EU criminal justice system in 19 member states occupying 23 partners for 2 years. Both projects were co-funded by the Hercule programme of the European Commission. I was also a member of the working group of the "model procedural rules for a European Public Prosecutor's Office" run by Prof. Katalin Ligeti of the University of Luxembourg from 2010-13. As such I take an approach to EU criminal justice matters pre-determined by my understanding as developed through these projects.

## **A. METHOD**

As indicated the major method adopted was desk research drawing upon prior studies which had gathered relevant information. These include the three studies mentioned above but also a number of academic studies carried out by other institutions. It is not possible in a report of this nature to fully acknowledge sources in the usual academic style. Each topic will, however, feature a statement explaining which sources were utilised.

Where information was not readily available, experts for the particular jurisdiction were consulted. This was necessary on a comprehensive level for Cyprus and my thanks are expressed to Assistant Professor Charalambos Papacharalambous, University of Cyprus, for his swift assistance in this matter.

Due to administrative problems at the beginning of the envisaged project period, the research was carried out from September to December 2013. Preliminary results and the project concept was, however, validated at an experts' meeting in November 2013. The research was carried out in the main by Bence Leb together with Sam Cole and Daniel Jaggot in accordance to templates designed by and under supervision of the author.

A number of questions were identified as requiring answers in order to fulfil the aims of the study. These were then studied in a comparative perspective incorporating, in as far as possible, the situation in all 30 EU member state legal jurisdictions. Evaluative conclusions are presented drawing upon these results.

## 1. CLASSIFICATIONS OF SERIOUS CRIME

### KEY FINDINGS

- Serious crime is not a term for which legal meaning can be found in the member states.
- Member states practice and priorities within criminal justice systems is geared to ensure a maximum of transparency in and resources devoted to cases of serious crime.
- Very serious crimes which are regarded as an exceptional threat to member states are sometimes subject to special procedures allowing greater interference with the rights of those suspected of them.
- For the purposes of determining the legitimate reach of an EU criminal justice area serious crime requires an autonomous definition to be developed at the European level.

The primary question posed of this study was the definition of serious crime in the 28 member states of the EU. This seemingly simple question is, unfortunately far from it. Above all the concept of serious crime as understood by this study is a political and not a legal term. A few jurisdictions do feature a notion of aggravated forms of crime ("schwere Faelle" in the German terminology) this is, however, not a helpful notion for determining what constitutes serious crime and the basis of any legitimate EU action in accordance with article 83 TFEU. The former refers only to a more serious/particularly culpable form of an offence (which may or may not be a serious crime in itself) but does not signal whether the offence is of such a nature that special mechanisms – such as those provided by an EU criminal justice area – are warranted in order to tackle these crimes because of their serious nature.

For this reason another approach had to be taken. It is a common trend amongst many criminal justice systems to develop alternative, more efficient procedures to deal with less serious crimes. It was hoped that by looking at such procedural definitions, some information could be gleaned as to what constitutes a serious crime in EU jurisdictions. This is nevertheless fundamentally problematic as such procedures are recognized as having been developed above all to reserve criminal justice resources (particularly precious court time and full hearings) for serious crime. In other words, the purpose of such proceedings is the opposite to ours; their aim is to filter out less serious crime to facilitate full investigation and prosecution of serious crime whilst this study's is to identify serious crime. Any definition provided via examining member state approaches is thus residual and not consciously constructed. We may be able to speak with some clarity about what does not determine serious crime that does not necessarily mean that we can speak with confidence as to what constitutes such crimes.

Nevertheless there is no doubt that serious crime is an important political term which the member states introduced into the TFEU with good reason. The aim is clearly to express the desire that any EU criminal justice related action should be restricted to tackling crime which is worth of this sovereignty-breaching additional effort. It is clear – in accordance with the principle of subsidiarity – that an EU criminal justice area should only be concerned with crimes which are not petty and for which EU activity is justified.

## 1.1. Definitions of Serious Crime in the Member States

Unsurprisingly given what was said above, the search for a definition of serious crime in the legal orders of the member states is not a fruitful exercise. Figure 1 shows the information gleaned about the member states' definition of serious crime. We can recognise that although some categories are singled out for treatment as particularly serious, this is not the case for a comprehensive category of offences considered serious, nor indeed is such particular treatment necessarily reserved only for serious offences. Thus for example although one might usually regard cases being investigated by investigating magistrates in France and Spain as serious, the fact is, such investigations are required when certain coercive measures are to be used. In other words, the logic of employing an investigating magistrate is related to the desire to protect citizens' rights. Naturally these are most under threat in serious cases but investigations into less serious crimes may also justify these kinds of measures which necessitate the involvement of an investigating magistrate.

**Figure 1: Classifications of Offences as Serious in Member States**

Special Provisions for Terrorism	Croatia, Italy, Northern Ireland, Romania, Spain
Special Provision for Organised Crime	Austria, Croatia, France, Romania, UK (all three jurisdictions)
Investigation by Magistrate	Belgium, France, Netherlands (but NB this role is strongly reformed/reduced), Malta, Spain
Catalogue Offences	Croatia, Finland, Germany
No such classification	Cyprus

Sources: All reports in RIDP (2009)

All country reports in Ligeti (2012)

All country reports in Sieber/Wade (forthcoming)

This comparison is thus of very limited use for the purposes of this study as one can recognise that member states have chosen to reserve particular treatment for certain offences they regard as particularly serious and possibly posing particular challenges to law enforcement but, as explained above, this does not provide comprehensive understanding of what is regarded as serious. There is no indication of any comprehensive definition of serious crime per se in the member states.

Other mechanisms which could be used to identify these are, for example, the catalogue offences mentioned in the table. These are offences listed by the criminal procedure codes of the member states for particular investigative measures which are considered particularly intrusive. Unfortunately these are not to be found in a sufficient number of member states to provide guidance for this study's purposes.

Another potential indicator is the allocation of offences to institutions. As noted above the examining magistrate might be one such indicator but it is associated with other matters than offence seriousness. The same can also be said for allocation of cases to court jurisdictions. A study of these might well reveal something of how member states rank crimes in order of seriousness. However, these are just as likely to be marked by historical developments and the frequency of occurrence of offences and so were not explored for these purposes.

In an attempt to shed further light on what constitutes serious crime in the member states, this study examined which offences have seen specialised investigative and prosecutorial agencies developed to deal with them and whether any special procedures have been developed to deal with serious crimes.

### 1.1.1. Specialist Agencies Dealing with Crime

**Figure 2: Specialist Structures to deal with Offence Areas in the Member States**

<b>Offence Area/Type</b>	<b>Member State with Specialist Institutional Provision for Investigation and/or Prosecution</b>
<b>Agriculture/Food Safety</b>	<b>Netherlands, UK: England and Wales</b>
<b>Border Control</b>	<b>Finland, Germany, Hungary, Lithuania, UK (all)</b>
<b>Customs</b>	<b>Belgium, Denmark, Estonia, Finland, France, Germany, Hungary, Lithuania, Nordic Co-operation, Netherlands, Norway, Poland, Sweden, UK (all)</b>
<b>Child Pornography</b>	<b>Belgium, Denmark, Poland, UK (all)</b>
<b>Consumer protection</b>	<b>France, UK: England and Wales</b>
<b>Corruption</b>	<b>Austria, Belgium, Croatia, Germany, Hungary, Poland, Portugal, Romania, Spain, Sweden</b>
<b>Counterfeiting Currency</b>	<b>Belgium, Poland, Spain, Germany</b>
<b>Data/ information</b>	<b>Denmark, Spain, UK</b>
<b>Drugs</b>	<b>Belgium, Finland, France, Germany, Netherlands, Nordic Co-operation, Italy, Poland, Romania, Spain, UK (all)</b>
<b>Economic</b>	<b>Belgium, Denmark, Finland, France, Germany, Hungary, Italy, Netherlands, Poland, Portugal, Romania, Spain, Sweden, UK: Northern Ireland</b>
<b>Employment</b>	<b>Belgium, Denmark, Finland, France, Germany</b>
<b>Environment</b>	<b>Belgium, Finland, France, Netherlands, Spain, UK: England and Wales and Scotland</b>
<b>Financial</b>	<b>Belgium, Finland, France, Germany, Greece, Hungary, Italy, Lithuania, Luxembourg, Netherlands, Poland, Portugal, Romania, Spain, UK: England and Wales and Scotland</b>
<b>Fraud</b> See also under economic, serious fraud often in that	<b>Belgium, Denmark, France, Netherlands, Portugal, Romania, Spain, UK (England and Wales and Scotland, UK (as a whole)</b>



<b>Gambling</b>	<b>Poland, Spain</b>
<b>Health</b>	<b>Denmark, France, Netherlands, UK: England and Wales</b>
<b>Homicide</b>	<b>UK: England and Wales</b>
<b>Illegal Migration</b>	<b>Germany, UK: Scotland</b>
<b>Internet-related offences/ Computer crime</b>	<b>Belgium, Finland, Germany, Poland, Romania, Spain, UK-England/Wales, UK-Northern Ireland, UK-Scotland</b>
<b>Money Laundering</b>	<b>Belgium, Cyprus, Germany, Hungary, Italy, Poland, Spain, UK: Scotland</b>
<b>Organised Crime</b>	<b>Belgium, Croatia, Finland, France, Germany, Hungary, Italy, Latvia, Netherlands, Nordic Co-operation, Poland, Portugal, Spain, Sweden, UK: England and Wales, Scotland, Northern Ireland (and – UK as a whole)</b>
<b>Postal</b>	<b>Belgium</b>
<b>(Road) Traffic</b>	<b>Belgium, Denmark, Finland, France, Germany, Hungary, Netherlands, Nordic Co-operation</b>
<b>Social Security</b>	<b>Belgium, Netherlands,</b>
<b>Tax</b> (sometimes part of financial and economic crime)	<b>Belgium, Denmark, Estonia, Finland, France, Germany, Hungary, Italy, Latvia, Netherlands, Poland, Spain, Sweden, UK (as a whole)</b>
<b>Terrorism</b>	<b>Belgium, Croatia, Finland, Germany, Hungary, Netherlands, Poland, Romania, Spain, Sweden, UK (as a whole), UK: England and Wales</b>
<b>Trafficking</b>	<b>Belgium, Denmark, Germany, Hungary, Italy, Netherlands, Poland, Portugal, Spain</b>
<b>Violent crime</b>	<b>Finland (against women and children), Spain</b>
<b>Water and Forests</b>	<b>Belgium, France, Hungary</b>

**Sources: All reports in RIDP (2009)  
All country reports in Ligeti (2012)  
All country reports in Sieber/Wade (forthcoming)  
Wade (forthcoming)**

As figure 2 demonstrates, the member states have developed a panoply of specialist investigative and indeed prosecutorial structures to deal with specific offence types and areas. Often this will be because the offences are particularly serious and their investigation warrants the bundling of expertise and the overcoming of traditional organisation structures to ensure success. However, although these results may be of interest to those seeking a European definition of serious crime, there is no denying that in some cases at least, these special structures are just as likely to reflect the complexity of investigations in an offence area, that the offences concerned are rare but of high impact, that they may present or

have presented a high political priority as their seriousness. These findings can thus only be regarded as indicative of seriousness although this cannot be taken for granted.

One might furthermore anticipate that **specialist proceedings** have been developed by criminal justice systems to deal with serious crime. In some cases this is true and the classification as terrorist or an organised crime offence is often associated with specialist proceedings in the member states indicated as drawing such distinctions in figure 1. Beyond this, however, this study found no indication in the member states that serious crimes are systematically defined in order to allow special procedures to be used. The particular seriousness of some offences may well lead those suspected of them to be exposed to more intrusive investigative measures (see next section), however, fundamentally our findings are compatible with previous studies of criminal procedure in European states which demonstrated that special criminal procedures have in fact been developed to deal with non-serious crimes so that court time and "normal" criminal proceedings can be devoted to serious crime. These are pragmatic solutions found in criminal justice systems often growing from practice. The definition of certain offence areas as non or less serious is thus not dependent upon some substantive exploration of the nature of offences (which would in turn provide a negative definition of what constitutes serious crime) but upon practical consideration of what offences occur and of their relative seriousness (see Wade (2006)).

#### 1.1.2. Consequences of Classification as a Serious Crime

In order to demonstrate the meaning of the classification of offences as serious outlined in figure 1, this section provides information about the consequences of that classification. In so doing it demonstrates why member states sometimes have some definition of a crime as serious whilst simultaneously highlighting that the purpose of this classification was not a substantive one as is sought here but often a more pragmatic reason. Above all, classification of an offence as particularly serious is a gateway for suspects to be subject to more restrictive or coercive treatment. This is, however, reserved for a small group of perpetrators considered particularly dangerous or whose suspected offences are considered particularly heinous and is not applicable to all perpetrators of serious crime.

Thus for example, in Austria special investigative measures are available in investigations of terrorist or organised crime offences for which over ten years imprisonment are expected, an obligation to provide physical samples arises only for offences likely to be punished by over five years of imprisonment (in the case of sexual offences, over three). In Croatia the classification as one of these offences triggers jurisdiction by a specialist agency which in turn has special powers. In France the classification as organised crime triggers the use of a specialist procedure which allows more intrusive measures. In Germany the catalogue of offences which is identified as particularly serious was developed to limit the offences for which the so-called "grosse Lauschangriff" is allowed. This involves the use of aural surveillance techniques in domestic premises, a breach of fundamental rights considered particularly problematic in the German constitutional context. In Croatia similarly certain investigative techniques are permitted with reference to an enumerated catalogue of offences. In Italy a suspect of a terrorist crime may be subjected to longer pre-trial detention. In the Netherlands and Romania, classification as a terrorist or organised crime suspect, leads to the possibility of certain restrictions being applied to the trial procedure. In Spain the definition as terrorist leads cases to be dealt with via a specialist procedural track. This is also the case indicated in Northern Ireland. For the UK as

a whole a categorisation of offences as organised crime lead these to fall within the remit of the Serious Organised Crime Agency a specialist investigative body which is not subject to the same comprehensive accountability as normal policing bodies. In the UK: England and Wales and in Northern Ireland terrorist offences are subject to a special legislative regime which allows the use of exceptional, special measures against those suspect of committing such offences.

In other words, a definition of offences as particularly serious results from the legislature's desire to restrict the use of particularly controversial investigative measures. Their use is defined as justified only by the occurrence of offences of a particular nature or which are considered particularly heinous. To say an offence is defined as serious because such measures can be used is certainly true but it is likely a circular argument. Member state criminal justice systems have not sought to separate offences out as serious in order to subject suspects to particular measures but have justified the latter's use only in relation to particular offences which we can consequently conclude are particularly serious. Unfortunately for this study's purposes, they tell us little about where the broader boundary between serious and less serious offences lies.

#### 1.1.2.1. Special Procedural Forms to Deal with Serious Crime

Criminal procedure regimes across Europe feature a multitude of special procedural forms which are often used more frequently than the "normal" criminal procedure. Referring to special procedures is often true only in relation to the ideals of the procedural regime as opposed to the empirical reality of criminal justice systems. One might well anticipate such procedural forms to have been introduced to deal with serious crimes. However, examination of member states' systems reveal that the reasons behind such reforms is often pragmatic. As explained above, they often result from pressure on practitioners who seek simpler ways to deal with cases and these solutions in turn become law. Such pragmatic solutions are, however, seen as acceptable in relation to less serious offences. Thus for example we often see prosecutorial case-ending mechanisms being used to deal with thefts and low-level drug offences; the mass daily business of criminal justice systems (see Wade 2006).

As systems become increasingly overloaded, special procedural forms can also be found in more serious contexts. Thus for example the Polish criminal procedure code allows the use of consensual proceedings for offences for which a prison sentence of up to ten years is available. Dutch prosecutors may employ special procedures to offences for which a maximum of seven years imprisonment is available. As such, these procedures may also be used to respond to crimes of moderate but not the highest seriousness (See Bulenda et al (2006) and Smit (2006)). Even where they are sometimes used for offences other than the most serious, this may be for pragmatic reasons or simply reflective of how high the caseload of a criminal justice system is.

As could be seen from figure one, however, there are cases in which particularly serious crimes are made subject to special procedural forms. This is also true for economic and financial crimes with, e.g. more recently UK jurisdictions seeking to exclude such cases from the remit of jury trials. In that case, this reform took place because the challenges of making such cases comprehensible to juries was regarded as insurmountable. Often member state systems feature special procedures for economic and financial crimes, also when serious in nature but it is difficult to determine why these procedures have resulted. There is evidence that they are required due to the specific nature of such investigations; which often require a far higher degree of participation by the defendant than normal (in that information supplied by him or her, often in business, tax, etc. papers, will form the basis of the investigation) – but variation may also occur because of the type of suspect often involved (legal persons or more socio-economically powerful defendants).

In relation to terrorism and organized crime special procedures were introduced in member states above all because of the threat recognized as emanating from these offence forms. Across Europe reforms to criminal procedure have, above all, served the purpose to widen investigative powers in such cases and to ensure conviction for such offences has become easier. This is reflective of the particular threat posed by such crimes but is often extremely controversial and not practice which can be transferred to serious crimes more broadly. Except for in exceptional circumstances such as these, special procedural forms are created to allow criminal justice systems to devote their resources to dealing with serious crime. The consensus across Europe is that precisely these offences are deserving of normal criminal procedure (see all contributions in Tak (2004) and (2005) as well as in Jehle/Wade (2006)).

As indicated above, there are rarely special procedural forms associated with any categorization as serious crime. This is demonstrated in Figure 3. Alternative procedural forms in national criminal justice systems have been developed, above all, to provide pragmatic, simpler procedures by which prosecutors can dispense of simpler and less serious cases.

**Figure 3: Special Procedural Forms to Deal with Serious Crime**

No such procedure exists	Austria, Belgium, Croatia, Cyprus, Czech Republic, Denmark, Estonia, England and Wales, Finland, France, Germany, Hungary, Italy, Latvia, Lithuania, Luxembourg, Netherlands, Poland, Romania, Slovakia, Spain, Sweden UK: Northern Ireland
Plea-bargaining or guilty plea proceedings can be used	France, Cyprus, Germany, UK: England and Wales, UK: Scotland

**Source: All country reports Sieber/Wade (forthcoming)  
All country reports Ligeti (2012)  
Vogler/Huber (2008)  
RIDP (2009)**

Malta features investigation and attachment orders which can be issued in accordance to the Money Laundering Act. Portugal has special procedures for particularly serious tax offences. In Slovenia special measures (such as the formation of joint task forces is possible).

Many jurisdictions feature a dedicated court jurisdictions as demarking particular seriousness of offences and where the study found these as a basis for identifying a category of serious crime, particularly serious and rare offences were described as being dealt with by these in accordance with standard criminal procedure. In most case such court jurisdiction was, however not mentioned as a means of determining what constitutes serious crime or a special procedure to deal with it and the study deemed this to be correct. Higher courts are utilized not necessarily to determine whether a crime was particularly serious or not (although higher jurisdictions do not deal with less serious crimes) but to provide the degree of transparency and lay participation deemed necessary by the respective criminal justice system.

Thus the British Crown Courts, the French Cour d'Assise and the German Schoeffengerichte serve to remind us that criminal; justice systems across the Union, no matter what their

form, embody a culture of accountability to the public. For the most serious cases this is expressed through the need of lay participation. This might well be regarded as indicative that the use of special procedures – which provide for less accountability as key stages take place behind closed doors – is regarded as unsuitable for more serious crimes. Alongside direct lay participation in decisions concerning guilt or innocence, such higher courts also provide for open, public trials. As such they serve to satisfy the interests of the broader audience to which criminal justice is addressed. Seen from the perspective of criminal justice practitioners it is tempting to resort to the pragmatic view of how most efficiently to deal with crime. The jurisdiction and procedures of such higher courts remind us that criminal justice serves deeper interest in the member states and indeed across the EU. The general public and victims in particular have strong interests in seeing justice done and this is the purpose served by these courts.

As the EU citizen comes into focus as having a stake in criminal justice across Europe it is important to recognize this core function of criminal justice. The latter is expected also to provide for democratic accountability and indeed to serve e.g. the consumer interests of citizens. Criminal justice is legitimately being drawn upon by the EU to serve deeper interests of EU citizens in core policy areas, much of what can be learnt from the member states, however, demonstrates that the EU citizen should know who is regarded as a particular wrong doer to them. As such open and accountable criminal justice processes would appear key.

1.1.2.2. Loss of Procedural Rights associated with Classification as Serious Crime

Figure 4 demonstrates any procedural rights lost in member state criminal justice systems as a result of prosecution for serious crime.

**Figure 4: Loss of Procedural Rights**

No loss of rights permitted	Austria, Belgium, Cyprus, Czech Republic, Denmark, Hungary, Italy, Netherlands, Poland, Sweden.
More intrusive measures allowed	Croatia, Finland, France (organised crime), Germany (particularly serious crimes-catalogue),UK: England and Wales
Some restriction possible	Romania, Spain (terrorism),

**Source: All country reports Sieber/Wade (forthcoming)  
All country reports Ligeti (2012)  
Vogler/Huber (2008)  
RIDP (2009)**

Perhaps not surprisingly given what was found in the previous sections, one can conclude that persons accused of serious crime are rarely deprived of procedural rights. Quite the opposite is true. Where we see a restriction upon individual rights associated with more serious offences, this equation serves to restrict the use of more intrusive coercive measures often to a set of particularly serious crimes. The crimes are enumerated not because of their particular serious but serving the purpose of limiting the use of controversial measures by the criminal justice system.

## **1.2. At a European Level**

The central point of identifying what constitutes serious crime for the purposes of this study is, of course, to determine the legitimate substantive scope of any criminal justice area developed at the EU level. As such, it seems logical to look at the member states deliberations when they have given specific thought to this. That is not the case within the context of their own, domestic criminal justice systems but very much so when they consider the use of European Union mechanisms.

There is a long history of international cooperation and special agreement between states to deal with certain forms of crime which concern the member states or which present their criminal justice agencies with problems. For a number of crimes sovereign states have concluded agreements to cooperate and treat crimes differently in transnational criminal law. Much of the work undertaken by the member states in the pre-Lisbon third pillar area of the EU can be regarded as a specialist form of this.

Because this work required unanimous decision making by the member states, it is ventured that the inclusion of offence types within third pillar action is indicative of all member states agreement that such offences are sufficiently serious to warrant overcoming traditional sovereignty concerns and subjecting such offences to special treatment. It can, in other words, be taken as an indication of seriousness warranting EU activity and that cooperation between member state authorities alone will not suffice. Thus an alternative approach is to examine these instruments in order to identify which offences are warranted serious enough to make action within an EU criminal justice area justifiable.

Clearly article 83 of the post Lisbon TFEU provides the clearest indication of area of legitimate criminal justice activity at the EU level. These are agreed as: terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime, organised crime. This list is, however, clearly not intended to be exhaustive given the potential to expand work to any other area of serious crime requiring transnational cooperation. The Eurojust Decision of 2009 defines that agency's remit to the offences also falling under the Europol remit (as well as crimes committed along with them). According to the 2009 Europol Decision, these add crime connected with nuclear and radioactive substances, illegal immigrant smuggling, motor vehicle crime, murder, grievous bodily injury, illicit trade in human organs and tissue, kidnapping, illegal restraint and hostage taking, racism and xenophobia, organised robbery, illicit trafficking in cultural goods, including antiquities and works of art, swindling and fraud, racketeering and extortion, counterfeiting and product piracy, forgery of administrative documents and trafficking therein, illicit trafficking in arms, ammunition and explosives, illicit trafficking in endangered animal species, illicit trafficking in endangered plant species and varieties, environmental crime and illicit trafficking in hormonal substances and other growth promoters, alongside the offences mentioned in article 83, to the substantive remit of EU criminal justice agencies. Clearly these are offence area for which use of EU institutions and mechanisms are regarded as legitimately being utilised.

The framework decisions passed under the third pillar relating to substantive crime essentially focus on these crimes or expand somewhat upon them. The Framework Decision listing offences for special cooperation conditions under the European Arrest Warrant adds trafficking in stolen vehicles, rape, arson, crimes within the jurisdiction of the International Criminal Court, unlawful seizure of aircraft/ships and sabotage.

However, because Europol and Eurojust are pitched as service institutions to the member states and procedural measures such as the EAW are intended to enhance cooperation between the criminal justice authorities of the member states, their remit naturally includes offences which the member states consider serious enough to warrant cooperation within the EU criminal justice area but not necessarily genuine EU activity. As part of subsidiarity examinations the offence areas for which genuine supranational, EU activity – i.e. the involvement of bodies such as an EPPO or indeed enhanced versions of Europol and Eurojust, is necessary will have to be determined in detail. Nevertheless an EU criminal justice area also covers such cooperation mechanisms.

Activity within EU criminal justice related work of the past 15 years does give us some indication of which crimes are regarded as sufficiently serious to warrant action against them within and EU criminal justice area. Naturally it is important to recognise that these were the result of political negotiations but also therefore of compromise. They can, however, perhaps at least be used as helpful indicators of the level of seriousness necessary for inclusion in an EU criminal justice area.

The problem is that EU action is possible in two regards: relating on the one hand to criminal justice activity which involves genuine EU action - e.g. legislative definition at this level or key activity under the responsibility of an EU agency - i.e. genuine supra-nationalisation on the one hand and as a facilitator of member state cooperation on the other. EU criminal justice has developed above all as a specialist form of cooperation. With the proposal for a European Public Prosecutor's Office (see European Commission (2013)) we now stand on the cusp of genuine supra-nationalisation, also in institutional terms, but any EU criminal justice area will also be deeply marked by the member states cooperation needs. Indeed the principle of subsidiarity demands that where criminal justice aims can be achieved by cooperation between the member states, this should be the form it takes.

Cooperation between member state criminal justice agencies must suffice for less serious crime. Where offences are of a certain level of seriousness and perpetrators exploit features of the EU (such as e.g. deliberately running a boiler room fraud from an EU member state known to cooperate less effectively with the criminal justice agencies in the member state in which it victimises individuals – as described e.g. by Roth (2014)), any EU criminal justice system serving EU citizens' interests may want to ensure such crimes are successfully prosecuted but this may be achieved via facilitating good cooperation mechanisms and no more. Just as is currently the case, the vast majority of European criminal procedures will need to be handled as a matter of cooperation between member states. Only where there is significant added value in participation by EU agencies and indeed supra-national bodies; either because these provide an understanding of criminal phenomena national bodies cannot achieve alone or because they overcome problems inherent to offences – such as their legal complexity or the strong, international investigative action required, should EU criminal justice mechanisms and agencies become involved. Even where the highest degree of supra-nationalisation is deemed necessary, it may often be useful to think only in terms of an EU body dealing only with particularly serious and complex cases and otherwise overseeing equivalent prosecution within the member states; above all facilitating cooperation and only taking over cases as a last resort (following the model of the Italian anti-mafia prosecution offices – see Illuminati in Sieber/Wade (2014)).

The member states and work done within the EU so far provide some guidance as to which offences might legitimately form the substantive remit of an EU criminal justice system. However, they certainly do not provide any criteria by which to exclude offences from this area. This is, however, one of the most important points if any EU criminal justice area is

not to become potentially endlessly expansive and thus subject to the kind of criticism often associated for example with the federal level of criminal justice administration in the USA. The central study question thus becomes whether there is an autonomous way in which to identify which crimes may legitimately fall into the remit of any EU criminal justice area.

#### 1.2.1. Autonomously defining the legitimate reach of an EU criminal justice area

The EU is subject to, sometimes ferocious criticism, as a governance level now influencing the criminal justice systems of its member states (see e.g. Browne (2005) and Peers (2006) and (2011)). The current debate over a UK opt-out from all EU criminal justice measures demonstrates this discussion as going to the heart of a core criticism member states have levelled at the EU for decades: namely the accusation that the EU is illegitimately encroaching on the member state's sovereignty. A government's power to punish its citizens and those who do wrong on its territory is one of the most fundamental elements of sovereign power. The process for doing so – the criminal process – is also one of the most carefully balanced interactions between citizen and state. In the theoretical terms of the social contract it is amongst the most carefully negotiated process by which a sovereign can exercise power over citizens; governmental power is exercised in a carefully controlled manner to produce criminal justice. Nevertheless during the last 15 years, EU member states have increasingly regulated such powers via EU legislation and tasked EU bodies and agencies (such as the European law enforcement agency: Europol and the judicial cooperation unit: Eurojust) with criminal justice related responsibilities. This development is so far reaching that the author regards it, when legal and institutional factors as well as the effect of EU mechanisms on criminal justice practice are analysed together, as a fledgling supra-national criminal justice system. The time is therefore unquestionably ripe to determine what the substantive scope of any such system or legal area should be.

Given the importance of the principle of subsidiarity and the instructive guidance to be gained from a notion of complementarity (between any EU criminal justice area and the criminal justice systems of the member states), the principled development of an EU criminal justice area can proceed only upon the basis that limited criteria determine the legitimate substantive reach of this area. The Treaties provide for competence for certain offences and further that cases must be serious and have a cross-border element. The examination above has, however, clearly demonstrated that this is not a useful tool for those wishing to specifically delineate the competence of any EU criminal justice area.

The developing criminal justice area to be found at the EU level relates to two phenomena. On the one hand, the EU has long-standing status as the regulator of certain economic activities. The agricultural, fisheries and food sectors for example are dominated by EU funds and the regulatory schemes governing them. Where any individual working in these sectors is found in breach of regulations of these EU schemes, sanctions imposed by the EU have serious consequences. These have, however been found to stop short of being criminal sanctions according to the European Court of Justice (ECJ). Considering that ultimately they will lead to e.g. a milk farmer losing his occupation (if he is excluded from EU funding for two years) this is arguably to be viewed critically. In the competition law area, the member states have also consistently denied the EU as having criminal justice powers. Defendants, however, have increasingly argued for and been granted rights strongly parallel to those in criminal proceedings. Furthermore, leading commentators view the punitive nature of sanctions (up to 10% of a recidivist company's worldwide turnover) as pushing this policy area into the criminal (see Klip (20XX)) and therewith the EU into the



position of a criminal justice power. We are arguably beyond the point at which the label attached to the Union by the member states is correct.

Re-enforcing this idea is the nature of policy areas for which the EU is responsible. Powers transferred to the EU e.g. to protect the environment have come to be viewed differently to how they were regarded when originally transferred and an expectation that offences in these areas will lead to criminal punishment in turn brings the EU into a position of responsibility for a policy area in which criminal law measures are regarded as appropriate. The EU is active as the central level of governance in areas for which we would expect to be able to utilise criminal law and sanctions.

In this regard the EU is a regulator of behaviour and one for which the utilisation of criminal proceedings would arguably appropriate in doing so. This debate has been controversially held between the European Commission and the member states resulting in ferocious argument before the European Court of Justice. Not unusually the ECJ case-law was criticised for advancing European integration. By finding that EU organs can prescribe to member states that they must use criminal law mechanisms to protect interests in certain, vital, central EC policy areas the Court supported the Commission taking this robust stance. The member states were only calmed when in a further case, the Court allocated priority to the coherence of domestic criminal justice systems denying the Union any right to prescribe the type and severity of sanction to be imposed upon a person convicted of an offence (see cases C-176/03 and C-440/05).

The EU has an interest in the use of criminal law not only as a regulator of behaviour, however. Its governance role as the source of funding for sectors such as agriculture also renders it a potential victim of fraud and other crimes against its financial interests. Theoretically these interests should be protected by the criminal law of the member states. The slow implementation of the so-called PIF Conventions which should have ensured this across all member states provides a clear indication of the difference between theory and reality. The European Commission's assertions that the EU's budget is inadequately protected has now led the member states to lend it powers in the criminal justice realm. Article 325 TFEU revolutionises this context enabling EU organs to take all necessary steps to prevent and combat crimes against its financial interests. The creation of criminal law is pointedly not excluded. In this sector even the member states have thus conceded and assigned the EU the power to govern through criminal law.

On this basis we can conclude that criminal justice activity within the EU legitimately relates to **offences of which the EU itself becomes a victim** (or EU citizens as policy addresses become collectively victimised). Given that the Member States have so far failed to do so adequately protect such interests by any reading of the Greek Maize criteria, one can argue that the post-Lisbon EU cannot be denied the right to protect its interests (and arguably to a certain extent the interests of the citizens its core policies serve). Such criteria provide a broader basis upon which to examine whether the so called PIF offences as detailed in the relevant Conventions as well as now in the European Commission's suggested Directive and the suggested remit of the proposed EPPO is an adequate basis for defining this offence area. Given the EU's key governance role in other core policy areas it is probable that EU interests, its potential victimisation (and thus the collective victimisation of all EU citizens) can be drawn somewhat more broadly than its financial interests alone.

On the other hand the member states have also resorted to the EU governance level to combat **trans-national crime**. This has long been a field which calls for co-operation between countries and their criminal justice institutions. Within Europe, above all, this kind of co-operation and looser harmonisation efforts related to it occurred traditionally through the mechanisms of the Council of Europe. As the importance of the European Communities grew during the last decades and as the four freedoms impacted more strongly upon our daily lives (in particular the right to free movement of persons and goods), the need for stronger co-operation amongst EEC, EC and then EU member states grew. Above all, the Schengen agreement (initially a 5 party multi-lateral contract now integrated into the EU aquis with 29 signatory and a number of participatory and pending member states), lent yet another dimension to this development with the realisation of a vast stretch of (effectively) borderless European territory through which inhabitants can pass freely.

Indicators displaying a rising rate of trans-national crime (see e.g. Bouloukos et al (2003) and Meier (2002)) along with the knowledge that illegitimate ends are served just as well by the new freedom of movement granted within the Union as the legitimate activity it seeks to promote, have led the EU member states to exhibit great desire to try to ensure their criminal justice institutions – naturally still bound by the geographic boundaries of the state they serve - can achieve adequate mobility to keep up with the crime phenomena they are fighting. Thus recent years have witnessed the introduction of mechanisms and institutions perhaps best described as mutations of traditional mutual legal assistance within the EU. Some member states desire to avoid harmonisation led the Tampere Council to follow the British suggestion to make mutual recognition the central principle of criminal justice co-operation within the EU. This has spawned the European Arrest Warrant and proposals for the European Evidence Warrant (now effectively replaced by the European Investigation Order) alongside various specific measures such as the mutual recognition of asset freezing and the principle of availability. All of these measures have in common that they require equivalent instances throughout the Union to recognise directly the decision of another MS' criminal justice system; extraditing a suspect, accepting evidence gathered by a foreign institution or orders made by a foreign court as correct without further examination of credibility, quality or political considerations.

Trans-national crimes are offences traditionally lent priority by states in transnational governance contexts (such as the Council of Europe or the United Nations) and so are normally viewed as essentially harming the interests of nation states. For the purposes of this study, however, these crimes are regarded as facilitated by the EU development (particularly provisions for the four freedoms<sup>1</sup>) and the EU thus regarded as potentially under a moral obligation to ensure they are effectively combatted. Like crimes against the EU budget (which affect all tax payers), these are crimes for which *all* (law-abiding) European citizens can fundamentally be said to have an equal interest in seeing them prosecuted. A European criminal justice system may be regarded as necessary to secure the European public interest.

The factual behaviour of the member states provides some basis for this perspective. Recognising that in particular the investigation of trans-national crime within the Union may require co-ordinated action and co-operation, they have provided for co-ordinating and supporting institutions to be created at the European level. Initially the organically growing European Judicial Network acted as a series of contact points enabling prosecutors and magistrates to find co-operation partners in other member states when they required help in specific cases. With the introduction of Eurojust in 2002, the member states signalled a desire that much of this work be transferred to a supra-national institution, albeit one facilitating cooperation and no more. Eurojust now provides immediate assistance and co-ordination for investigations as well as occasional decisions as to the appropriate forum for prosecution of trans-national cases. With the implementation of the new Eurojust Decision (article 13 of which obliges the domestic authorities to report all relevant cases to Eurojust), as well as the development due under article 85 of the Lisbon Treaty (which

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<sup>1</sup> The four fundamentals upon which the EC is based the freedom of movement of persons, goods, capital and services.

provides a basis to assign more powers to it), this body is set to assume a more central role in trans-national cases.

The European Police Agency: Europol began as a data analysing institution for certain key offences of a trans-national nature but has grown to receive broad competence and powers of its own; arguably bringing its agents close to being operational. It has factually gained greater status due to its housing of joint investigation teams (JITs – in which Europol agents can become operational) and formerly the Police Chiefs’ Operational Task Force (now formalised within the framework of COSI meetings). Powers under the new Europol decision requiring member states to explain any refusal to initiate investigations suggested by Europol (based upon the analysis of police intelligence) and Europol’ role in setting up and financing JITs will only enhance this office’s status. Especially as the quality of its intelligence increases when member states comply with the new Europol Decision and feed case information to Europol more systematically.

Alongside these roles in relation to trans-national crimes, EU agencies also have a mandate to protect the EU’s financial interests. Currently this occurs via member states’ criminal justice systems. This thus provides another source of cases involving cooperation by domestic criminal justice agencies but requiring support from the European level. These, have led to a broader network of agencies and bodies established at the European level (most significantly the European Union’s anti-fraud office: OLAF). These have been given increasing powers to analyse data, to facilitate or even to make decisions in criminal proceedings which render them significant criminal justice powers.

The mutation of mutual legal assistance has also given birth to a number of European mechanisms which now deeply affect or bear potential to affect the criminal processes in which they are used. These are the mechanisms of mutual assistance referred to above. The oldest and only well-established measure is the European arrest warrant which sees individuals surrendered to a requesting member state with the surrendering state trusting the decision of a judicial figure in the requesting state as expressed via minimal information provided in a European arrest warrant. Surrender is normally required to take place within 14 days meaning that criminal justice within the EU demonstrates a unique feature, revolutionising the traditionally slow extradition context. This demonstrates the EU having been given a systematic, criminal justice response to its nature as a borderless, free movement area. Further mechanisms introduced but not yet implemented or in practice will further this extraordinary development.

The member states insistence that this policy area remains essentially one driven purely by political will via ad hoc action (symbolised still by the exceptional need for unanimity in passing criminal justice measures as well as member states’ ability to stop such measures using the “emergency break” proceedings) is to ignore the powers effectively gained by supra-national institutions. Furthermore this allows national governments a forum in which it one-sided criminal policy concerns (namely relating only to the efficiency of criminal investigation and prosecution) dominate.<sup>2</sup> By recognising such mechanisms as the beginning of a system in their own right, one can perhaps look more even-handedly, drawing parallels to national systems, thus highlighting the need for a better rounded system in which it is illegitimate to ignore the relative disadvantage of affected individuals. In other words: in which an obligation to provide for effective defence rights also arises. Such an approach views the criminal law as marked also by a shield function; as bearing protective features enshrined in substantive but often also the law of criminal procedure. By viewing European criminal law as set within a broader justice system, this study proceeds in what follows to demand more of it as a quasi-constitutional setting. The European Charter of Fundamental Rights and the jurisprudence of the European Court of Human Rights are natural places to look for solutions to the problems described. However,

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<sup>2</sup> Symbolised above all by the failed framework decision on procedural rights in criminal proceedings now replaced by an incremental approach introducing defence rights via the Roadmap conceived under the Stockholm Programme.

its conception of the EU as a governance level to which powers have been assigned in the name of the citizens of the states assigning such powers, means that this study questions the validity of that assignment if driven purely by executive desire for efficiency. The fledgling EU criminal justice system is hypothesised as suffering from utilisation to undermine the constitutional relationship governments have with their citizens. Should this be the case, the result is an illegitimate status quo which, in accordance with European Constitutional traditions the member states have no power to create. Any development towards an EU criminal justice area must urgently take a more holistic view to it as such.

**Clearly there must be limits placed upon the EU's involvement in the criminal justice arena.** These are marked just as strongly by respect for state's sovereignty and the principle of subsidiarity which forms the cornerstone of the EU relationship with the member states. What constitutes legitimate EU involvement in criminal justice must be determined substantively on the grounds of necessity. Nevertheless it seems impossible to deny the legitimacy of an EU criminal justice area extending to a second category of offences, namely: **offences for which the EU has a moral obligation to intervene.**

Whilst area 1 (offences of which the EU itself becomes a victim) is doubtlessly now recognised by many as a potential basis for developing a specialised EU criminal justice system (as acknowledged by article 86 TFEU). The assertion that an EU criminal justice area could be developed on the basis of 2 (offences for which the EU has a moral obligation to intervene) is likely controversial. Some might well argue this area of activity is included in art. 83 TFEU purely by virtue of the member states' decisions to utilise the post Treaty of Amsterdam EU structures to facilitate cooperation.

This study, however, asserts that the **notion of EU citizenship supports a developing constitutional relationship between all EU citizens and the EU as a governance level.** As a governance level affecting many areas of citizens lives, it is asserted that the EU not only has the obligation to ensure negative and unwanted effects of its policies are countered but that this is effectively done. The EU member states have through their activities of the past ten years that EU mechanism represent a more efficient way of dealing with a variety of crimes some of which are listed in article 83 TFEU. The examinations above provide us with some indication as to what these offences are. Nevertheless it is proposed that this approach to offences can serve as an overarching determining factor in deciding whether or not EU activity in relation to certain offences would be ultra vires.

There will doubtlessly be a difficult boundary to draw between those offences for which there truly is a European public interest in combatting them at a European level and those for which this is served by continuing to facilitate member state authority cooperation via especially Europol and Eurojust. The principle of subsidiarity as strongly re asserted by the Treaty of Lisbon demands that great care is taken in drawing this boundary. Nevertheless, given for example the range of activity (especially legislative) and institutional development related e.g. to trafficking human beings, it is clear that such offence areas exist for which the European citizen has a public interest in ensuring effective combatting across the Union.

This notion of course entails two ideas; a **moral duty of the EU towards its citizens** on the one hand but also the **recognition that there are some crimes the EU as a governance level is better placed to protect its citizens from than the individual member states**, even working at the state of the art of current cooperation mechanisms. This notion is also recognised by several criminal justice related norms of the post-Lisbon Treaties when they provide a legal basis for activities "requiring common action by two or more member states."

It is thus submitted that the search for the substantive remit of any European Union criminal justice area must be based above all upon the question as to what this framework **should** be used for. The delimiting notion of serious crime is central in that it expresses above all a need for a proportionality consideration. Offences should only fall within the scope of European criminal justice if they are serious enough, particularly considering the potential impact upon a defendant's position, to warrant the use of this "higher" and more potent criminal justice system. Beyond that, however, legitimacy must be determined by factors going beyond the history of how such a legal area has emerged. Offences can only be the subject of EU criminal justice if they on the one hand are necessary to protect the EU as a (potential) victim. To a certain extent this notion should include the victimisation of EU citizens in core areas regulated by the EU (thus e.g. environmental offences can be seen as victimising EU citizens collectively). On the other hand there are doubtlessly offence areas involving serious criminality which, with particular regard to the demands of subsidiarity, require EU action or facilitating support in order to be dealt with effectively. These are in turn offences so serious that all European citizens must be regarded as having a collective interest in seeing they are successfully prosecuted and prevented. These will above all be offences which involve the utilisation of the freedoms granted by the Union to illegitimate ends for which the Union thus bears a moral responsibility to ensure criminal justice systems can adequately combat them. This may involve facilitating cooperation between national authorities (also at levels thus far not explored so as to prevent offences with serious impact upon victims but not yet falling within the remit of EU agencies – see (Roth 2014)) and - for the offences which present the greatest challenges to member states criminal justice systems – pro-active involvement of EU agencies, legislation at the EU level and ultimately, supra-national EU criminal justice actors.

The notion of serious crime is key as a threshold gatekeeper determining when offences may become subject to EU criminal justice activity. Beyond this test, however, further questions must be answered positively before offences can be determined to legitimately fall within the remit of any European Union criminal justice area.

## **2. COMPARISON OF THE PROCEDURAL RIGHTS AND PRACTICES IN THE MEMBER STATES' CRIMINAL JUSTICE SYSTEMS FROM THE DEFENCE PERSPECTIVE**

### **KEY FINDINGS**

- A broad range of procedural rights are regarded as central to the criminal justice systems of the member states. These have thus far not been adequately addressed at the EU level.
- The individual and procedural rights traditions of the member states are highly diverse. Comparative analysis demonstrates a long list of rights as central to member state systems and manifestation of rights occurs very differently across the Union. If any EU criminal justice area is to serve European citizens and their expectations of justice, the development of high common standards appears central.
- The use of evidence admissibility rules to police the correctness of investigations varies strongly. A few member states do, however, stringently exclude evidence to protect the sanctity of investigations. If European cases are to be heard in domestic courts, it is difficult to see transferability of evidence being achieved unless common standards for evidence gathering are agreed upon.
- Investigations into serious crimes are frequently associated with court approval for coercive measures and see prosecutorial involvement as guaranteeing the quality of investigation. European investigations should be built on prosecutorial authority at least.
- Investigations are, however, not the exclusive reserve of criminal justice authorities. Many member states lend defendants (or their lawyers) participatory rights. To a lesser extent formal rights are also granted to victims.
- The sentencing range available in EU member state jurisdictions varies significantly. In other words the various legal traditions feature very different concepts as to what length of imprisonment it is acceptable to subject citizens to. It is difficult to imagine any agreement on appropriate sentence length emerging in the near future.
- A significant number of member states detain citizens in deficient detention conditions sometimes found to be in breach of the ECHR or subject to serious criticism by the Committee for the Prevention of Torture. This specifically undermines the mutual trust of criminal justice practitioners in other member states' systems which should form the basis to mutual recognition. If any EU criminal justice area is to serve citizens and their notions of justice, improvement of this situation must be viewed as a matter of the utmost urgency.
- As any EU criminal justice area should deal only with serious crime and with defendants likely in detention and at the risk of high prison sentences much speaks for them requiring mandatory provision of defence counsel in accordance with the traditions of the member states.

- The treatment of juvenile defendants varies significantly to that of adult suspects and offenders. The age at which a child becomes subject to criminal liability varies significantly. A clear EU definition of who and how criminal justice measures can affect juvenile offenders must be developed autonomously.

This study is devoted to the notion of developing an EU criminal justice area. Thus far criminal justice developments at the EU level have been subject to strong criticism as one-sided and benefiting almost exclusively the prosecution of crime. The parameters of this study correctly view any criminal justice area as serving broader interests and this next section highlights this. Some guidance will be given as to how the disproportionality and the neglect of human rights related issues and impacts for which the EU as a criminal justice “actor” has so frequently might be countered. Common European philosophical and constitutional traditions and histories, demonstrate that the idea of criminal justice is one which has been negotiated (and fought over) between citizen and sovereign over centuries. Given this common tradition it is unfortunate that the EU has thus far, mostly, been associated only with the facilitation of executive measures to ensure effective combatting of crime without a more human rights based approach of any equivalence developing (despite the very significant efforts of many member states and individuals working in areas such as the proposed Framework Decision on Procedural Rights of 2003 and on, the Roadmap etc.). Judgments of the ECJ but now centrally also Charter of Fundamental Rights and the post-Lisbon notion of EU citizenship, these have been set in another context. The EU also as a criminal justice actor, faces the challenge of living up to its new profile as an (at least) quasi-constitutional governance level.

It is hard to imagine anyone legitimately calling for the development of an EU criminal justice area or system which is not firmly rooted in the dynamic European human rights tradition as well as respectful of Central European principles such as proportionality (as a matter of EU law as well as a strong constitutional tradition in many member states). For this reason, although it is regarded as essential that the preliminary basis of any EU criminal justice system is recognised as a need for EU action in line with the principle of subsidiarity to combat crime, this must immediately be paired with a recognition that any such action will impact upon the human rights of citizens.

Centrally this impacts immediately upon the need to secure liberties and particularly defence rights in criminal proceedings. For this reason, any exploration of a European criminal justice system must address the potential mechanisms for adjudication in European investigations and indeed resulting cases as well as the position of the defence. In what follows, key practices and traditions of the member states are explored and the guidance they give for any developing EU criminal justice area is highlighted.

## 2.1. Divergences and similarities in the formulation and application of the main criminal procedural principles among the member state criminal justice systems

As highlighted above, the criminal justice systems of the member states are a finely balanced combination or coercive and punitive mechanism tempered by safeguarding protections lent to anyone who becomes subject to investigative, prosecutorial and judicial measures. As any EU criminal justice area develops more comprehensively clearly close attention must be paid to the boundaries and restrictions the member states have set for their own sovereign criminal law. This is not only a matter of legitimacy in terms of the principle of subsidiarity and thus the Union as a governance level demonstrating its respect of the member states' sovereignty; it is similarly a pre-condition for legitimacy in the eyes of EU citizens. Their expectations of criminal justice are likely to be deeply marked by their own criminal justice system. Unless the EU criminal justice area respects the protections afforded to citizens in their domestic context, it runs the risk of disappointing the valid expectations of those citizens and being viewed as illegitimate by anyone holding the same expectations of justice. It is vital to remember that this notion is a deeply important one to all citizens; any EU criminal justice system addresses these as suspects, defendants but also as their friends and relatives, as a broader public and indeed as victims. In other words any EU criminal justice area addresses a broad and varied stakeholder group well beyond its constituent member states. Everything research into accountability and perceptions of legitimacy communicates to us is that processes which are regarded as open and in dialogue with the reasonable expectations of stakeholders are more likely to be accepted, even if the results they produce are not necessarily viewed as particularly pleasant.

The following exploration of principles and rights in member state criminal justice systems is thus informative as to the expectations of citizens. However, the conclusions drawn from it should also be marked by considerations of what the potential cost of finding a politically viable compromise is and the potential gains to any EU criminal justice area if it is seen to offer a best practice model.

### 2.1.1. Central Defence Rights/Procedural Principles in the Member States

In Figure 5 the defence rights viewed as central in the member states are listed. It must be noted that just because a country is not listed next to the right concerned, this in no way means that that particular right is not recognised and indeed highly valued by that system. In the studies examined it was simply not named as central or discussed in terms which demonstrate it as of slightly lower importance than others. As such many of the principles recognised as central in only a few systems are still of great importance in many others. Only central principles are listed here.

**Figure 5: Defence rights viewed as central**

The presumption of innocence	Austria, Belgium, Bulgaria, Czech Republic, Cyprus, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Italy, Latvia, Lithuania,
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	Luxembourg, Malta, Poland, Portugal, Slovakia, Slovenia, Spain, UK: Scotland
Right to legal advice	Bulgaria, France, Germany, Greece, Hungary and Italy (right to defence), Latvia, Netherlands, Poland, Slovakia (if detained), Spain, UK: all (right to defence)
Access to file	Bulgaria, Netherlands
Right to Silence	<p>Austria, Bulgaria, Czech Republic, Cyprus, Denmark, Finland, France, Luxembourg, Portugal, Slovakia, UK: Scotland</p> <p>As the right not to incriminate oneself: Germany, Hungary, Netherlands, Spain</p> <p>Fundamentally but negative inferences may be drawn: Malta, exceptionally in the Netherlands, UK: England &amp; Wales and Northern Ireland</p>
Freedom to lie	Denmark, Italy
Fair Trial	Belgium, Cyprus, Finland, France, Germany, Italy, Slovenia, and all EU member states as laid down by the ECHR
Principle of Legality/Rule of Law (certainty, non-retroactivity, etc.)	Cyprus, Finland, France, Hungary, Italy, Poland, Slovakia, Spain, UK: all
Individual liberty	Belgium, France, Italy
Dignity of individual	France (is overriding constitutional principle in Germany)
To know details of accusation	France
Right to be heard	Germany, Italy, Slovakia, Spain (to participate)
Equality of arms	Denmark, Spain
Proportionality	Belgium, France, Spain
Prosecution carries burden of proof	Denmark, France, Germany, Hungary, Italy
	Belgium, Cyprus, Finland, France

Equality	
Respect for family life	Belgium
Ne bin in idem	Cyprus, Slovenia, UK: all
Reasoned judgements	Belgium
Impartial tribunal	Cyprus, Denmark, Finland, France, Italy, Slovenia
Prescribed judge	Cyprus, Germany, Italy, Slovenia
Right to be present at trial	Netherlands
Public hearing	Slovenia
Lay participation	Poland
Right to jury trial	UK: all
Proceedings within reasonable time	Cyprus, Germany, Italy
Objectivity	Denmark, Finland

Sources: All country reports in Ligeti (2012)

All EU country reports in Sieber/Wade (2014)

All reports in Vogler/Huber (2008)

Clearly therefore a multitude of rights are held as centrally important by EU member state criminal justice systems. Many of those listed above are, of course, also made central by the ECHR and thus of mandatory importance to any developing EU system. The right to a public hearing is for example recognised through the *Engels* jurisprudence of the European Court of Human Rights as of central importance in matters beyond the realms of criminal justice. It is important to recognise that the court has already set mandatory conditions for certain stages of the criminal justice process which may well be regarded as more advanced than those ideas currently discussed in the EU arena. Thus recent case-law concerning detention conditions clearly goes further than the EU's procedural rights Roadmap's measure F. In the above habeas corpus is interestingly not mentioned although it, again might be argued as a central principle to many legal systems. A dedicated study is required to provide a clear overview of all central rights exercising influence upon domestic criminal justice processes.

As recent developments at the EU level have recognised, it is, however not only the right itself which is important but also the obligation placed upon authorities to inform suspects of their rights. Thus measure B of the Roadmap clearly indicates that any EU development will rightly place weight upon measures to ensure rights can be meaningfully exercised. Although there is an argument to be made that many of the rights highlighted in figure 5 are implicitly considered in EU law and should thus become features of any EU criminal justice area, it seems fair to conclude that many regarded as central by European citizens have not yet been adequately drawn into any notion of EU criminal justice. The negotiations surrounding the framework decision on procedural rights in fact resulted in the exclusion of

some very central rights from European declarations foreseen and the incremental approach of the Roadmap means that current focus is on a fairly limited area. Clearly if any EU criminal justice area is to serve all EU citizens and their expectations this is a matter which must be addressed.

The discussion of criminal justice as serving a diversity of citizens’ interests above naturally also highlights the notion of victims’ interest and right to see justice done. In some discussion of higher rights standards, there is thus criticism to be heard that high protective standards may undermine this “right to security.” It is important to recall that procedural rights and principles are by no means intended to protect the guilty from just prosecution but serve a dialectic purpose. Naturally a central goal is to serve the dignity of the individual subject to proceedings but procedural rights also serve the smooth and legitimate running of justice processes and must always also be evaluated in the light of this purpose.

The right to be heard for instance is a classic example of a right which serves to protect the suspect but frequently also serves the efficiency of an investigation. This right is manifested in the member states as follows.

**Figure 6: Manifestations of the right to be heard**

Right to comment (orally)	Austria, Bulgaria, Czech Republic, Estonia, Germany, Greece, Hungary, Ireland, Latvia, Poland, Portugal, Romania, Slovenia, Spain
Right to make a written statement	Cyprus, Czech Republic, Denmark, Estonia, Finland, Germany, Greece, Hungary, Ireland, Italy, Latvia, Luxembourg, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain (in complex cases), UK: England & Wales, Northern Ireland and Scotland

Sources: All country reports in Ligeti (2012)

All EU country reports in Sieber/Wade (2014)

Suspects thus frequently have a right to make written statements explaining their perspective on a case during investigations across the EU legal area as demonstrated in figure 6. Where this right is present it is presumably accompanied also by a right to make oral statements although this was not always expressly stated as so.

**Figure 7: The fundamental purpose of the right to be heard**

Participation for pro-active defence	
Fairness to the defendant	Austria, Bulgaria, Belgium, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia,

	Poland, Portugal, Romania, Slovakia, Slovenia, Spain, UK: England & Wales, Northern Ireland and Scotland
Efficiency of the criminal process	Cyprus, Finland, Lithuania, Netherlands,

**Sources: All country reports in Ligeti (2012)  
All EU country reports in Sieber/Wade (2014)**

Overwhelmingly however, as demonstrated in figure 7, the right to be heard appears in the member states to have been manifested in pursuit of fairness for defendants. Nevertheless some systems expressly recognise that this right also serves the interests of the investigation. It is important to highlight that this breaks with the old inquisitorial tradition of making use of a suspect as a source of information. The nature of the modern right is really to allow the accused to put across his or her point of view. That this will also ensure investigators are provided with relevant information and thus serve for greater efficiency is incidental to the purpose of this right being lent, it would seem.

In recent times this right has become controversial due to the apparent disruptive potential of certain categories of suspects (in particular counter-intelligence trained terrorist suspects). The European Court of Human Rights has, however, been clear in its desire to reassert this as a general and important right.

Fundamentally the right to be heard as manifested above is associated with the right of a suspect to be informed of this right. Interestingly the consequence of any failure to inform is unclear. On occasion the ability to participate at trial is seen as counteracting any problem although severe consequences are more common than that. Thus in Greece, Italy, Romania and Slovakia the protection of this right and obligation to inform is very strong. In the context of serious crime investigations are often associated with exceptions to the obligation of investigators to inform suspects of this right. This may well be justified in the offence categories for which an EU criminal justice area is likely to develop. However, because of the potential of this right to serve the interests of justice and indeed efficient investigation more broadly, it is important that this exception remains such and does not become a matter of course.

In the most extreme scenario a **breach of defence rights can cause the exclusion of any evidence gathered** via it. Figure 8 provides an overview of when this is the case in the member states.

**Figure 8: A breach of defence rights leads to an exclusion of evidence**

At the judges' discretion	Germany, Ireland, Malta, Netherlands, Poland, Slovakia, UK: England & Wales
As a result of any illegality in gathering it	Greece, Hungary, Latvia, Lithuania, Luxembourg, Portugal (non-curable nullities as defined by CPP), Romania, Spain, UK: Scotland
For special categories of evidence	Austria, Croatia, Czech Republic, Italy, Slovakia, Slovenia,
As an extreme only	Denmark, Estonia,

Never	Bulgaria, Finland, Sweden
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**Sources: All country reports in Ligeti (2012)  
All EU country reports in Sieber/Wade (2014)**

The special categories of evidence referred to in figure 8 include such things as torture evidence or the results of body searches and surveillance where these were illegal, evidence gathered by secret service agencies, etc.

We can therefore observe that the situation relating to the exclusion of evidence is extremely diverse across the EU. Some member states protect the sanctity of their investigations very strongly whilst others rely upon their judiciary to weigh the benefits of admitting such evidence or determining its probative value altogether. It is a minority of member states which has a clear and definitive rule requiring evidence to be excluded pursuant to any illegality in gathering it but is only very rarely the case that this consequence will never result. All systems feature some system for achieving justice many balancing the sanctity of investigations with other interests. Clearly any EU criminal justice area would need to determine its own rule and there is no average value to gravitate too (though, again, in-depth research might yield greater insight). However, it is clear from the above alone, that tolerance of breaches of procedure will clearly sit badly with a significant number of the EU’s constituent jurisdictions. Again the question is raised as to what kind of criminal justice area the EU should be? Only by adhering to the highest of standards to be found in the member states can it hope to satisfy all citizens’ expectations of justice. Resorting to a lower standard will provide for a justice loss in the eyes of a significant proportion of citizens.

The admissibility of evidence and its transferability across the Union’s jurisdictions has been a focal issue for many years now. This brief overview cannot do the topic justice does, however, clearly indicate some member states systems as stringent whilst others are very lenient, trusting in other balancing mechanisms. Much points to the conclusion reached by other studies such as the recent “model procedural rules for an EPPO” that evidence transferability can only truly be achieved if a common set of rules is agreed upon. Another viable option is perhaps any EU criminal justice area as one of best practice which is perhaps a more organic way to achieve approximation of standards. Unless this is, however, to a high level, the transferability of evidence is likely to remain a thorny issue if European cases are brought to member state courts. Given the strong criticism levelled at the recent EPPO proposal, mutual recognition based solutions do not appear viable.

**2.1.2. Participation in Criminal Proceedings**

The following section outlines the interaction of agencies and individuals in criminal proceedings in the member states.

**Figure 9 Division of responsibility between criminal justice agencies in exemplary member state jurisdictions**

	England and Wales	France	Germany	Netherlands	Poland	Sweden
Investigative Act						
Search of premises	Court	PPS/EM	Court	PPS/EM	PPS	P/PPS/Court

Confiscation/Forfeiture	PPS/Crt	EM/Court	Court	P	PPS post-facto	P/Court
Assets frozen	PPS/Crt	EM	Court	Court	Court permit	Court permit
Visual surveillance (recording)	Home Office	P	Court	PPS	Court	Court permit
DNA-test	P	PPS	Court	PPS/EM	PPS	P
Telephone taps	Home Office	EM permit	Court	PPS or assistant	Court	Court permit
Police detention <6 hours	P	PPS	PPS/Crt later	PPS or assistant	P	P/PPS
Police detention <12 hours	P		PPS/Crt later	PPS or assistant	P	PPS
Police detention <24 hours	P		PPS/Crt	PPS or assistant	P	PPS permit
Police detention < 36/48 hours	PPS/Crt	PPS		PPS or assistant	P <48 then Crt	PPS permit
Travel ban	Court permit					PPS permit
Obligation to report	Court permit					PPS permit
Pre-trial detention	PPS/Crt permit	Judicial permit	Court permit	EM/Court permit	Court permit	Court Permit

P=Police independent, PPS=Prosecution Service, EM=Examining Magistrate, Crt= Court

As figure 9 demonstrates by means of member states representative of the various legal circles present in the EU, responsibility for investigative actions varies significantly between member states. For the most serious coercive measures against suspects, court permission is required but for others prosecutorial authority suffices and, more rarely, sometimes investigative agencies can act autonomously. There is no clear pattern as to when responsibility is assigned where, this being a product of historical and cultural influences upon justice system development. Thus the logic of each system can only be explained within that context. We therefore, for example, clearly see the ghost of the examining magistrate (the *juge d'instruction* born of Napoleonic legal orders) in the requirement for court participation in investigations in Germany (and indeed to a lesser extent in the Netherlands) although this institution is long extinct in that system.

As recently determines by the project determining model procedural rules for an EPPO, any European regulation of procedural measures will require an independent establishment of responsibility. Given the sensitivity of measures in some member states and to citizens, it is again ventured that much speaks for a European criminal justice area as a model of best practice.

Figure 9 further highlights the variety of measures which may be available as ancillary to criminal proceedings in the member states. Asset freezing and confiscation measures are available to courts across Europe whilst powers to enforce a travel ban or require a

defendant or convict to report regularly to e.g. a police station appear to be less well known (this may well have changed or change resulting from the implementation of the European Supervision Order legislation).

In some member states **prosecutorial authority** is, as shown in the last section a mechanism for securing the quality of an investigation and its legitimacy. Figure 10 demonstrates how this authority is manifested in the EU member states.

**Figure 10: The relationship between investigative and prosecutorial agencies in the member states**

Investigations independent	Cyprus, Ireland, Malta, Netherlands and Poland (for less serious crime), UK: England & Wales
Hierarchical relationship	Austria, Belgium, Czech Republic, Estonia, France, Germany, Hungary, Italy, Latvia, Lithuania, Luxembourg, Netherlands, Poland, Portugal, Romania, Slovakia, Spain, Sweden, UK: Scotland
Police and prosecution one body	Denmark

Sources: All country reports in Ligeti (2012)  
All EU country reports in Sieber/Wade (2014)

In a large majority of member states it is the prosecution service which is charged with investigating crime. The investigative agencies which conduct investigations on a day to day basis are thus subjugated to them when operating in this function. Although many national criminal justice systems now widely allow investigative agencies much factual independence when dealing with less serious crime (meaning that they operate, e.g. under general prosecution service guidelines rather than case by case instruction), it is important to recognise that member states not steeped in the common law tradition (or reformed in the manner of Poland for less serious crimes only), fundamentally require prosecutorial oversight of investigations.

This is of particular importance because prosecutors usually inhabit a constitutionally curious position as, at least, quasi-judicial figures although they are performing basically executive tasks. Their participation in investigations thus functions to underline the expectation of objectivity and fairness within these; they are intended to provide an infusion of judicial thinking, authority and protection for all parties even in parts of the investigation for which fully fledged judicial authority is not required. Much can be said about practice and the reality of this expectation and theory. Nevertheless, all academic study of prosecutorial activity in relation to the serious types of offences at which any EU criminal justice system is likely to be directed, demonstrates prosecutors as active participants in investigations. It is essential to recognise this quality of prosecutorial work and the fundamental, theoretical expectation of even the investigative stage which this participation flows from and which marks the majority of EU member states notion of criminal justice.

This information must naturally be read in conjunction with the information presented in figure 2 which highlights that for many of the offences of interest to the Union, the member states' criminal justice systems feature specialist structures. These may well involve the integration of investigative and prosecutorial units. This overview demonstrates the diversity of the criminal justice systems within the member states but it should be noted that research into the factual situation in systems of all traditions indicates that for serious crimes, prosecutors and investigators work in close consultation no matter what their formal, legal relationship (Wade (2006)). For this reason it seems best that any EU criminal justice area features investigative and prosecutorial agencies working closely together.

As highlighted above, however, it is not only the criminal justice institutions of member state systems which participate and have deep participatory interests in criminal proceedings. **Individual citizens** have these too. These are explored in the following section.

**Figure 11: Defence rights to participate in domestic criminal investigations**

Right to investigate independently	Austria, Estonia, Germany, Hungary, Ireland, Italy, Lithuania, Netherlands, Slovakia, Sweden, UK: England & Wales, UK: Scotland
Right to request investigative measures	Belgium, Denmark, Finland, France, Luxembourg, Poland, Portugal, Romania
Strong participation but not a right	Belgium, Spain
No right granted	Bulgaria, Czech Republic, Greece, Hungary, Ireland, Malta, Portugal, Slovenia

**Sources: All country reports in Ligeti (2012)**

**All EU country reports in Sieber/Wade (2014)**

Clearly the position of the defendant and or the defence varies very significantly across the European Union. Many systems allow their citizens to investigate their own cases (obviously bound by the constraints of legality; meaning they cannot exercise coercive powers in the ways that criminal justice agencies do). This in turn means that a large number of EU citizens have this expectation of a criminal justice system even though this right is usually likely highly theoretical. The post-Lisbon EU in which any criminal justice area is developing features citizenship of the EU as a core principle, care must be taken to ensure that the constitutionally sensitive criminal justice policy area is not developed at odds with the legitimate expectations these citizens have. Whilst EU citizenship cannot, nor indeed should it, ever equate to the citizenship relationship developed within member states between people and government, it would be dangerous to develop any aspect of EU citizenship clearly undermining any rights won by citizens in their national context. This aspect will be explored further below but is mentioned here where it must serve as a warning to any developing EU criminal justice area as thus far developments at this level have certainly not proved particularly friendly to defence participation.

Notions of criminal justice, however, are important not only to defendant citizens but to a far broader spectrum. Thus far, the EU has included victims as addressees and intended beneficiaries of criminal justice developments. Their participatory rights are as follows:



**Figure 12: Victims' rights to participate in domestic criminal proceedings**

To be found in	Austria, Slovenia, Spain
Are adhesive rights	Belgium, Finland, France, Germany, Hungary, Italy, Poland, Slovenia, Spain, Sweden
Are not to be found in	Denmark, Netherlands
Are limited to rights of private prosecution only in	Cyprus, UK: England & Wales, Northern Ireland, Scotland (v. limited)

**Sources: All country reports in Ligeti (2012)  
All country reports in Vogler/Huber (2008)  
All EU country reports in Sieber/Wade (2014)**

Compared to the defence situation, victims clearly do not benefit as strongly from formal participatory rights in criminal proceedings. However, clearly some member states assign victims a broader role than simply as witnesses and this should be a matter of sensitivity to the Union in light of the above point on citizen expectation alone. Half the member states of the Union legally allocate victims a potential participatory role in proceedings so such expectation is certainly not minor. The EU has itself, of course, taken up a position championing victims' rights and as such a stance limit the rights of any victims is unlikely to sit well with this profile. Furthermore it is important to note that whilst victim participation may not be being cases in the vocabulary of specific legal rights, the political discourse and trend towards giving them soft rights requires consideration if any developing EU criminal justice area is to be regarded as legitimate. The consideration of victims' position in criminal proceedings is vital should any emerging EU criminal justice area not wish to suffer reputational damage. As highlighted above it is considered that a citizenship based approach to developing the EU criminal justice area is preferable and victims and considerations of their interests should, naturally, feature in this.

### 2.1.3. Exceptions to Central Principles

Criminal justice is a social good addressed not only to those immediately affected. More serious crimes and how they are dealt with are a concern to society more widely. Highly emotive debates about what constitutes criminal justice in a particular case or relating to a particular issue are regular objects of political, newspaper and broader debates. On occasion the intricate balance of a criminal justice system is viewed as insufficient in view of such broader interests, sometimes causing exceptions to be allowed to fundamental principles of such systems because the status quo is considered inadequate in regard to certain, less easily frameable interests.

Ne bis in idem and the transferability of evidence across borders are matters of particular interest to any developing EU criminal justice area because the Schengen ne bin in idem rules preclude prosecution by one member states' authorities where one in another has previously prosecuted or indeed exercised formal prosecutorial powers against an individual. Any exception to this principle to be found in the member states is thus of potential interest as the EU legal area develops.

**Figure 13: Ne bis in idem exceptions**

Very exceptional revision of acquittals	Austria, Croatia, Germany, Slovenia, UK: England & Wales,
Partial non-finality	Austria (sentence), Hungary
None (except to benefit convict)	Belgium, Cyprus, Estonia, France, Greece, Latvia, Netherlands, Poland, Spain.

**Sources: All country reports in Revue Internationale de Droit Penale (2002)  
All country reports in Vogler/Huber (2008)**

Figure 13 demonstrates that whilst a minority of member states have recognised that in very exceptional cases, the interests of justice may require the ne bis in idem principle to be set aside, this is only exceptionally provided for. In the vast majority of member states there appears to be no exception to the ne bis in idem rule allowed except in order to benefit a convict. If a final conclusion has been achieved in a case, this is usually always means that any potential for prosecution is spent.

The EuroNEEDs study provided very little evidence of the Schengen ne bis in idem rules being taken advantage of by defendants to seek or even negotiate case settlements with prosecutors in one jurisdiction in order to bar a fully-fledged prosecution in another. However, the recent frustration of Belgian prosecutors in the Fortis Bank case and similar cases may mean that this becomes a more controversial topic. Naturally any notion that ne bis in idem rules are being utilised to allow more socio-economically powerful defendants to influence the means and ways by which they are brought to justice, bears potential to undermine and seriously damage the legitimacy of any such system. However, given that there is little indication of a problem and how controversial ne bis in idem exceptions appear to be to the member states, there seems little need for action at the present time.

In terms of transferability of cases between jurisdictions, a matter of great importance already within the EU, the key issue is that of transferability of evidence. Exclusionary rules are often the expression of fundamental expectations as to how an investigation and particular parts of it should be run. Thus figure 14 demonstrates measures taken by member states thus far to ensure evidence from abroad can be admitted and thus ensure cross border aspects of criminal investigations can be utilised – recognising that the interests of justice may increasingly transcend national borders and the investigative traditions housed within them.

**Figure 14: Special provisions made to accommodate evidence from other EU member states in domestic criminal proceedings**

Austria	Subject to judges' free evaluation of evidence all is admissible. However, principle of immediacy can be a hurdle if e.g. witness is abroad. There are some provisions allowing the use of protocols which may help
Croatia, Finland	MLA mechanisms
	Video conference provisions may

Germany	be used
Hungary	Special provisions on admissibility of documentary evidence can help, otherwise MLA
Italy	“Irreplicable” records of evidence collected by foreign police officers may be included in trial dossier if they are examined as a witness or the parties consent. Foreigners’ out of court statements may be used only if it is not possible for person to be present at trial. MLA
Netherlands	Special documentary status can be afforded to official reports of foreign investors if has substantive relationship with another piece of evidence. Official reports of foreign investigative agencies afforded same status as Dutch equivalent if judge considers document reliable.
Poland	MLA, special cooperation rules relating to EU countries (articles 589a-f CCP)

**Source: Relevant reports *Revue Internationale der Droit Penale* vol. 80, 2009/1-2 (Annexe)**

There is relatively little indication of special provision being made to ensure foreign evidence is admissible in criminal proceedings. In some jurisdictions – like Austria, Germany, Hungary and the Netherlands, particular provisions of procedural law may lend themselves to ensuring foreign evidence can be used. However, only exceptionally have we found indication of special provision being made to ensure foreign evidence is admissible to courts. Given that this is a key concern at the EU level and for any developing EU criminal justice area, it seems likely that a solution will have to be found at that level. As discussed above, the EU features some member state jurisdictions which us admissibility rules to protect investigative standards, considering such traditions it is difficult to imagine genuine transferability of evidence being achieved unless common standards are developed.

As was highlighted above, exceptional provisions such as those explored in this section relate to allowing exceptions to very fundamental principle of criminal justice in a legal order. It is posited that consideration of the relevance of any such development at member state level requires very careful examination before any conclusions can be drawn for a developing European criminal justice area. Those jurisdictions which feature exceptions to the ne bis in idem principle, bear this as an extremely rare exception. No empirical argument for mirroring any such development at the EU level can be built nor could it even if a majority of national systems featured such exceptions. Only with a deeper understanding of when the exception is engaged might any legitimate consideration of

these issues for any EU criminal justice area ensue. It seems particularly important that further research is conducted in relation to such exceptional phenomena if any lessons are to be drawn from them for the purposes of reports such as this one.

## 2.2. Divergences and Similarities in the Conditions of Treatment of the Defendant

The principle of mutual recognition upon which criminal justice related developments within the EU have been based so far and which is to continue to form the cornerstone of cooperation post-Lisbon, premises on a basis of mutual trust between the member states. Objections to EU mechanisms, such as the EAW, are, however, often based upon argument that no such trust exists or indeed can exist given the diversity between member states on key issues. Not infrequently these relate to sentencing and factual detention conditions.

Mutual trust one would assume to be built on a ground of common values which were most certainly assumed at the birth of criminal justice cooperation within the EU with references made to blanket signatory status of all (then) member states to the European Convention on Human Rights. Meanwhile it is surely uncontroversial to assert that the (now expanded) EU features a range of differences; highlighted in member states' approaches to criminal justice.

This section highlights a few of these differences. Centrally perhaps some notion of what is deemed acceptable treatment of citizens can be gleaned from knowledge as to how long a member state deems it acceptable to detain them and under what conditions.

**Figure 15: Maximum prison term**

Years	Countries to which applicable
10	Lithuania, Sweden (exceptionally +4)
12	Finland (single)
15	Finland (joint), Germany, Hungary, Latvia, Netherlands
16	Denmark (usually),
20	Austria, Bulgaria (usually), Croatia, Denmark (exceptionally), Estonia, Hungary (joint & organised crime), Latvia (esp. serious), Portugal, Spain
25	Lithuania (if prev. sentence not served), Poland, Portugal (exceptionally), Slovakia
30	Belgium, Bulgaria (exceptionally), Czech Rep., France, Malta, Italy, Netherlands (exceptionally), Romania, Slovenia

**Source: Relevant section of criminal or criminal procedure code**

Figure 15 thus demonstrates quite impressively that the conceptualisation of the extent to which a state may legitimately imprison its citizens is subject to great variation across the EU member states. It should be noted that except in Spain and Portugal, factual life imprisonment appears always to be an option. For some jurisdictions, such as those in the UK and Cyprus, this means that no formal limit is to be found (although the standard life sentence in England and Wales, for instance, is set at 15 years). The central point is that most criminal justice systems have been set a limit relating to how much time in prison a citizen may be subject to. This will likely bear relation to fundamental considerations of the relationship between citizen and state and to the particular constitutional view of the limits of legitimate state power.

The situation illustrated by figure 15 is thus clearly indicative of very widely ranging conceptions across Europe. There can be little doubt that any attempt by any EU criminal justice area to make sentencing suggestions for serious offences will likely be very controversial as ordinal proportionality will almost certainly be disrupted in a number of jurisdictions no matter what suggestion is made. Again this is a point which may be illuminated further by in-depth, in this case perhaps offence specific, research on sentencing but based upon these basic findings, the conclusion of the ECJ in case 440/05 (ship source pollution) that sentencing is a matter for the member states appears the only plausible solution.

2.2.1. Comparative overview of the quality of detention conditions in the 28 States

A not uncommon protest to surrender proceedings under the EAW is the assertion that the detention conditions in which a to be surrendered individual is likely to be held are unfit for purpose. The mutual trust engendered by the principle of mutual recognition is challenged where citizens and residents point out to the criminal justice professionals handling their case, likely infringements of their human rights resulting from the action those professionals are involved in. It should be remembered that precisely the *Soering* doctrine of the European Court of Human Rights requires anyone involved in criminal justice extradition to consider the likely consequences for the affected individual, particularly if these are likely to be extreme. Figure 16 provides an overview of findings concerning detention in EU member states.

**Figure 16: Detention conditions across Europe**

Allegations of physical mistreatment	Austria (police custody), Belgium (police brutality), Bulgaria (frequent police brutality), France (inhumane treatment around arrest), Poland, Romania, Spain
Prison conditions inadequate	Bulgaria (hygiene, cramped), Czech Rep (overcrowding with very serious consequences, serious violence), UK: England & Wales (overcrowding), France (hygiene, physical abuse by staff), Greece (serious overcrowding, breach of ECHR because of hygiene), Hungary (hygiene & treatment), Ireland (severe overcrowding, hygiene), Netherlands (indiv. reports of poor

	conditions, tuberculosis problem), Poland (extreme overcrowding art. 3 violation, hygiene, demeaning treatment and widespread violence), Romania (ECHR breach for conditions and brutal pre-trial mistreatment: degrading pre-trial conditions), Slovakia (overcrowding but improving), Spain (individual accounts of poor conditions, findings of mistreatment by staff), Sweden (isolation of pre-trial detainees criticised and remand prisons "worst in Europe")
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**Sources: Diverse judgements of the European Court of Human Rights (see annex)  
Euromos (2012)  
Amnesty International Annual Report 2013**

As figure 16 illustrates, detention conditions are far from ideal in many EU member states. The information presented here draws upon a limited number of sources and whilst it must be emphasised that no such overview can possibly do any one system justice, it appears fair to conclude that the status quo certainly bears plenty of potential to present criminal justice professionals acting within the EU legal framework, and any area which develops from it, with a dilemma. EU citizens subject to surrender to many member states will be able to raise legitimate and well substantiated concerns about the conditions into which they are being surrendered. Conscientious criminal justice professionals faced with such individuals are currently likely unable to rely upon the poorly implemented European Supervision Order mechanism to relieve the situation and thus are faced with the choice of informing individuals that the requesting states' status as signatory to the European Convention protects them or the controversial decision not to surrender that individual in apparent contradiction of European law. This seems an unfair position to place criminal justice professionals in. So, however, is any expectation that they will do a job which exposes citizens and residents they hold a constitutional responsibility to, to unacceptable detention conditions, knowing that detention is highly probably upon surrender.

Arguments declaring protection through the European Convention further ring hollow given the following findings by Fair Trials International in its response to the European Commission's Green Paper on Detention within the EU and Amnesty International's 2013 Annual Report. These findings are presented in amended excerpts.

On 2 October the European Court of Human Rights ruled that Belgium had violated the right to liberty and security of L.B., a man with mental health problems, by detaining him for over seven years in prison facilities which were inadequate for his condition (see *LB v Belgium*, application number 22831/08, judgement of 12th October 2012). In December, the European Committee for the Prevention of Torture expressed concerns over overcrowding and inadequate sanitary facilities in many Belgian prisons.<sup>3</sup>

The Committee for the Prevention of Torture (hereinafter CPT) has criticised French prison conditions, citing unhygienic conditions, physical abuse by prison staff, and inadequate cell size as particular problems.<sup>4</sup> *G v France* found a breach of article 3 rights (inhumane and degrading treatment) for inadequate detention of a mentally ill prisoner.<sup>5</sup>

<sup>3</sup> Amnesty International Report 2013 p. 38

<sup>4</sup> Detained without trial: Fair Trials International's response to the European Commission's Green Paper on detention (2011), p. 53 f.

During 2013, the European Court of Human Rights found Greece in breach of the European Convention on Human Rights in three cases, due to poor detention conditions in the prisons of Ioannina, Korydallos and at the detention facility of Thessaloniki Police Headquarters.<sup>6</sup> A number of relevant cases are still pending (see ECHR 2013). In its 2010 report on Greece, the CPT stated that “the excessive overcrowding in a number of prisons in conjunction with severe understaffing, poor health-care provision, lack of a meaningful regime and unsuitable material conditions represent an even greater concern to the Committee today than they did in the past”.<sup>7</sup> In the pivotal *M.S.S. v Belgium and Greece* case (appl. Number 30696/09, judgement of the Court (Grand Chamber) of 21/01/2011) paragraph 160 of the judgement lists the main reports regularly published since 2006 “by national, international and non-governmental organisations deploring the conditions of reception of asylum seekers in Greece” (para. 159), the Court found Greece to be in violation of article 3 due to the detention conditions in which asylum seekers were held but also Belgium for failing to appreciate the non-functioning nature of the Greek system and transferring the detainee nevertheless. Although this is an asylum rather than a criminal justice case, it naturally raises significant concerns about detention in Greece more broadly.

Irish courts have criticised remand conditions. In one case a pre-trial detainee was held in an isolated padded cell, normally used to house mentally disturbed prisoners who posed a threat to themselves or others. Sensory deprivation was severe in the 3m<sup>2</sup> cell, and the detainee had no access to television, radio, or exercise facilities.

The severe overcrowding in some Irish prisons has also been criticised. In 2010 the Irish prison estate was operating at just over 100% capacity. The CPT has noted that overcrowding has led to detainees having to sleep on mattresses on the floor, enduring unhygienic conditions and being denied access to sufficient recreational activities. The CPT has also reported regional disparities regarding drug abuse, violence, and gang formation<sup>8</sup>

In 2010 the Italian government declared a state of emergency in relation to its overcrowded prisons. As of February 2011, Italy’s prisons were 49% over official capacity. In 2010 the CPT reported that Brescia prison, which mainly houses pre-trial detainees, was chronically overcrowded. With an official capacity of 206 places, Brescia was accommodating 454 prisoners, of whom 64 were sentenced prisoners<sup>9</sup>

The Chamber judgment of ECtHR of 8th January 2013 in *Torreggiani and Others v. Italy* highlights overcrowding as a massive problem. A breach of article 3 was found and the Court has given Italy 12 months to put in place remedies or procedures to remedy breaches flowing from overcrowding. Number of cases pending before the Court and likely to produce finding of breach led this to be a pilot-judgement.

The court has also found Poland in violation of Article 3 due to overcrowded prison conditions, and has drawn attention to the connection between lengthy pre-trial detention and overcrowding. FTI clients have described how pre-trial detainees are subjected to appalling prison conditions and held with prisoners convicted of serious offences. FTI also

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<http://www.fairtrials.org/documents/DetentionWithoutTrialFullReport.pdf>

<sup>5</sup> ECHR 076 (2012) 23.02.2012

<sup>6</sup> Amnesty International Report 2013 p. 109

<sup>7</sup> Detained without trial: Fair Trials International’s response to the European Commission’s Green Paper on detention (2011), p. 59

<http://www.fairtrials.org/documents/DetentionWithoutTrialFullReport.pdf>

<sup>8</sup> Detained without trial: Fair Trials International’s response to the European Commission’s Green Paper on detention (2011), p. 62 f.

<http://www.fairtrials.org/documents/DetentionWithoutTrialFullReport.pdf>

<sup>9</sup> Detained without trial: Fair Trials International’s response to the European Commission’s Green Paper on detention (2011), p. 65 f.

<http://www.fairtrials.org/documents/DetentionWithoutTrialFullReport.pdf>

document receiving reports that vulnerable pre-trial detainees are targeted for violence by convicts, particularly if they have been charged with a sexual offence. In 2010 the Polish Human Rights Ombudsman received 7,233 complaints about prison conditions, mostly concerning mistreatment by prison staff, poor living conditions, and inadequate access to medical care.<sup>10</sup>

In *Pantea v Romania* ([2003] ECHR 266) the ECtHR made findings of multiple ECHR violations in relation to the applicant's treatment in pre-trial detention, which included being savagely beaten, denied medical treatment and transported for several days in a railway wagon in appalling conditions. It was almost four months before the applicant was brought before a judge, which the ECtHR found violated Article 5(4) ECHR. The *Pantea* case led to widespread reforms in Romania. However, more recently the ECtHR has found Romania in breach of the ECHR due to lengthy delays before judicial authorisation of detention, excessive lengths of pre-trial detention, and inhuman and degrading pre-trial detention conditions (*Samoila and Cionca v Romania* (App no. 33065/03), 4 March 2008, *Toma v Romania* (App no. 42716/02), 24 February 2009, *Tanase v Romania* (App no. 5269/02), 12 May 2009, *Ciupercescu v Romania* (App no. 35555/03), 15 June 2010, *Carabulea v Romania* (App no. 45661/99), 13 July 2010).<sup>11</sup>

Overcrowding in Slovakia's prisons has improved, although a recent CPT report noted that the average amount of space stood at 3.5m<sup>2</sup> per prisoner, thus falling short of the CPT's recommended standard of 4m<sup>2</sup>. The lack of recreational activities for remand prisoners has also been criticised by the CPT. However, recent changes have seen the introduction of a "mitigated regime" for 25-30% of remand prisoners which allows them access to the corridor and a TV room for most of the day. Despite this, many remand prisoners face 23 hours a day locked in their cells<sup>12</sup>

The CPT has reported that detainees in Spain can face mistreatment at the hands of the authorities. Important safeguards to prevent this from happening have not been observed in practice; in one case a defendant was remanded in custody without the judge having actually seen him<sup>13</sup>

The President of the International Prison Chaplains' Association has branded Swedish remand prisons as the worst in Europe, claiming that the isolation of pre-trial detainees is impeding their ability to prepare for trial<sup>14</sup>

Clearly where criminal justice practitioners being asked to surrender nationals or residents to countries against which findings of Convention breaches or inhuman treatment has been made by the Strasbourg court or either the European or UN Committee for the Prevention of Torture, their ability to reach a satisfactory decision in good faith to both the individual and the developing European legal order is seriously compromised. The association of any European legal order with exposing citizens to human rights breaching detention conditions cannot do it anything but harm in the eyes of anyone dealing with such cases.

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<sup>10</sup> Detained without trial: Fair Trials International's response to the European Commission's Green Paper on detention (2011), p. 74

<http://www.fairtrials.org/documents/DetentionWithoutTrialFullReport.pdf>

<sup>11</sup> Detained without trial: Fair Trials International's response to the European Commission's Green Paper on detention (2011), p. 79 f.

<http://www.fairtrials.org/documents/DetentionWithoutTrialFullReport.pdf>

<sup>12</sup> Detained without trial: Fair Trials International's response to the European Commission's Green Paper on detention (2011), p. 83

<http://www.fairtrials.org/documents/DetentionWithoutTrialFullReport.pdf>

<sup>13</sup> Detained without trial: Fair Trials International's response to the European Commission's Green Paper on detention (2011), p. 86

<http://www.fairtrials.org/documents/DetentionWithoutTrialFullReport.pdf>

<sup>14</sup> Detained without trial: Fair Trials International's response to the European Commission's Green Paper on detention (2011), p. 88

<http://www.fairtrials.org/documents/DetentionWithoutTrialFullReport.pdf>



In addition to the above information which was compiled from multiple sources, the recent Euromos survey of defence lawyers across the Union indicated some concerns by one or more interviewees without these necessarily being backed up by broader reports by NGOs, ECHR cases, etc. The countries for which allegations were only made in these interviews (which were with 3 defence lawyers), those results are not included in the table above. There were allegations of police brutality in: (Germany, "pressure"), Greece, Hungary (threats), Ireland and detention conditions were criticised in: Cyprus ("not always adequate"), Denmark (one of three said not always adequate), Estonia (over-crowding hygiene), Finland (2 of 3: police jail conditions, lack of access to showers and lawyer), Lithuania. Often of course, accounts given in this study corroborate what is reported by other sources. It should be noted, however, that for Latvia the deficits reported by the defence lawyers are so serious they report the problems constitute so much pressure upon detainees who will "do anything" to secure their release that defence lawyers claim they undermine any efforts to defend such individuals. The defence lawyers questioned attest to suspects being placed in cells with dangerous prisoners deliberately in order to exert pressure upon them. This study thus particularly in this case highlights the need for further research.

Obviously such reports are not as substantiated as European Court of Justice case law or more comprehensive NGO reports but they highlight a problem. The problem may be confined to a single facility or a region in countries with otherwise good facilities or they may be indicative of a wider but as yet less well documented system failure. It is important to recognise – of course – that this section deals with detention as a singular system. This is not correct and there may be significant differences between conditions in prisons designed for "proper" detention and short-term facilities for pre-trial detention.

In any case this section highlights that criminal justice professionals considering the surrender of citizens or residents to a significant number of jurisdictions within the EU may face legitimate objections by those individuals and are unlikely to feel comfortable ignoring their calls to them – as representatives of criminal justice systems these practitioners work in and in which affected individuals place their faith and indeed citizens regard as their own and turn to for help – to protect their human rights. Inadequate detention conditions and the sometimes horrific experience of citizens in them cannot but undermine trust in fellow criminal justice systems or indeed European mechanisms which ensure transferability between them. If, as is already the case, any EU criminal justice system is associated with innocent EU citizens enduring horrors or indeed convicted citizens experiencing massive breaches of their human rights, it is unrealistic to expect this system to be associated with justice of any kind.

Research increasingly demonstrates legitimacy as something gained by a process recognised as fair and appropriate. The association of EU criminal justice mechanisms with mistreatment – also of innocent individuals who come to the attention of criminal justice system – bears the potential to entirely undermine acceptance of any EU criminal justice area. Not only in the eyes of those citizens subjected to such mistreatment but also in those of the practitioners dealing with their cases, their relatives, friends and indeed society more broadly. Such cases also provide powerful and emotive argument to those opposed to any EU development on political or ideological grounds.<sup>15</sup> Again, a strong argument for any EU criminal justice area development to be associated with a raising of standards is again to be forged. Unless higher standards are achieved, criticism based on citizens experiences of inadequate standards (and indeed system failure) at whatever level, will always remain a

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<sup>15</sup> see the recent use of the Symeou case by UKIP's Nigel Farage in a blog published on the Independent newspaper website.

threat to the establishment of any EU criminal justice area the aim of which must always be to “produce” justice and to be seen to do so.

### 2.2.2. Comparative overview of the nature and conditions for obtaining of legal aid in the 28 States

As demonstrated in figure 5 (and backed up as illustrated in figure 9), there are a multitude of central rights granted to suspects and defendants during the course of criminal proceedings in member states. The fundamental status allocated to them in the systems as described highlights the central role they are seen to play in ensuring justice is done. Across the Union, any process “producing” justice is intrinsically linked with vitally important rights being granted to those subject to them.

As recognised by the EU Roadmap, such rights are, however, negated in their value if defendants do not know about them (as now legislated for in measure B) or are not granted sufficient access to a lawyer to exercise them for them (addressed by the ambitious proposal of the European Commission in measure C). In this section our attention is turned to the formal requirements to provide legal assistants to suspects and defendants in the member state systems.

**Figure 17: When is defence counsel mandatory**

Where the suspect is vulnerable	Bulgaria, Czech Rep., Estonia, Greece, Hungary, Ireland (lack of education), Latvia, Lithuania, Poland, Portugal (&has <i>arguido</i> status), Slovakia (& court thinks it necessary), Slovenia, Sweden
Very serious crime/high sentence	Austria, Belgium, Bulgaria, Croatia, Cyprus (for life, when in interests of justice for serious sentences below that), Czech Rep., Denmark, Estonia (life), France, Germany, Greece (where accused of felony >5 years) Hungary, Ireland (murder), Lithuania, Poland, Romania (oblig. sentence above or equal to 5 years), Slovenia (immediately if IM investigating or 30 years possible, later if >8 years), Sweden (>6 months imprisonment is prescribed punishment)
Suspect is in detention	Austria, Denmark, Estonia (>6 months), Hungary, Netherlands, Malta, Portugal (&has <i>arguido</i> status), Romania, Slovakia, Slovenia, Sweden
Trials in absentia	Bulgaria

Abbreviated proceedings	Czech Rep., Denmark, Estonia, Latvia (plea-bargain), Poland, Portugal (evidential simplifications)
At judge's discretion	Finland, Hungary (if defendant is unable to defend him/herself), Ireland, Romania (as Hungary), Slovakia, Sweden (where there are special circumstances)
Always	Denmark, Italy, Spain, Sweden (for investigation or triggered by certain events or actions)
Never	UK: England & Wales, UK: Northern Ireland, UK: Scotland
Paid for in	Austria (impecunious defendant, court approves), Bulgaria (when fairness requires), Cyprus (if court appt.), Germany (if court appt.), Greece (where mandatory), Hungary (impecunious and/or court appointed), Ireland (impecunious and/or in interest of justice), Lithuania (all mandatory cases), Netherlands (all mandatory cases), Poland (all mandatory cases), Sweden

**Source: All country reports in Sieber/Wade (2014)  
All Country Reports in Ligeti (2012)  
EU Country Reports in RIDP (2009, 1-2)**

Figure 17 illustrates that a number of factors lead to defence counsel becoming mandatory in member states. Above all this is where the defendant is considered vulnerable (the definition of which naturally varies significantly), this is often the major consideration for courts if it is at their discretion whether or not to require the use of defence counsel.

Interestingly for any developing EU criminal justice area the seriousness of the crime of which a defendant is accused or the length of any potential prison sentence are the major triggering factor for mandatory defence. Thus if the development of an EU criminal justice area is intrinsically linked to serious crime – and there are many grounds upon which to argue that it should be – the failure to ensure adequate defence provision is a serious short-coming; particularly from any citizen's expectation perspective.

A suspect's detention is a further, important qualifying trigger in a number of systems. Again, given that transfer between EU jurisdictions is currently very strongly associated with detention (albeit that one must hope the European Supervision Order will be utilised to change this in the future), this lends force to an argument that the provision of defence counsel in European cases is necessary.

In how far mandatory defence counsel is paid for is somewhat opaque. Many member states pay for all mandatory defence counsel whilst others do so only when the suspect has not already engaged defence counsel of their own. Clearly this is a politically difficult issue but it is clear that no system of mandatory defence can function unless financial provision is made for it.

Finally it is important to mention that the 3 UK jurisdictions traditionally value the right to self-representation very highly and thus never require representation. Nevertheless judges are reportedly fairly pro-active in assigning defence counsel where attempted self-representation is considered inadequate. Duty schemes in courts often mean this is a simple process. Similarly the covering of all police detention centres by duty schemes providing legal representation to those brought or held there again means the systems operate on an entirely different basis but one within which legal advice is usually easily accessible.

**Figure 18: Legal aid available based upon**

Means-test	Austria, Belgium (upon application, or for asylums seekers, those on disability benefit, min. pension), Bulgaria, Cyprus, Czech rep., Finland (most of population qualify), France, Greece (in severe & complex cases), Hungary, Ireland, Latvia, Lithuania (when not mandatory), Luxembourg, Malta, Netherlands (not for misdemeanours, test only if not detained), Poland (provided hasn't appointed own), Portugal, Slovakia, Slovenia, Spain, UK: England & Wales, UK: Northern Ireland, UK: Scotland
Merits-test	Bulgaria, Cyprus, Estonia, Greece, Hungary, Romania, Slovakia, Sweden (public defence appointed when mandatory)
No test	Denmark (may be demanded back if convicted)
Duty scheme	Latvia (whilst in detention), UK : England & Wales (detention and 11st appearance before magistrates) UK: Northern Ireland, UK: Scotland
No provision	Germany (court appointed is paid for)

Sources: Annex 3, Spronken et al (2009)  
 All country reports in Sieber/Wade (2014)  
 All Country Reports in Ligeti (2012)

Figure 18 provides some insight into the availability of legal aid in the member states. As has become clear during the recent discussions in the European Council concerning Measure C of the Roadmap – access to a lawyer, this is a complicated issue. Naturally there is a level of inter-relationship between the availability of legal aid, the presence of duty schemes or public defence counsel and how these operate vis a vis the mandatory defence requirements outlines above.

Nevertheless figure 18 spells out very clearly that European citizens will overwhelmingly have an expectation that financial assistance should be available to them for legal assistance. Presumably this will be particularly strong for serious cases or those in which serious consequences (traditionally interpreted as long prison sentences) are a possibility. Bearing this in mind there is much to suggest that cases being dealt with across borders in any EU criminal justice area fall into these categories. Apart from dealing only with serious crimes, these cases also invariably expose individuals targeted by them to serious consequences; transfer to a foreign jurisdiction in which suspects will face greater challenges accessing legal advice (and indeed understanding the system as a whole) as well as a far higher probability (if not certainty) of detention. Seen from this perspective, any EU criminal justice system – in accordance with the logic of the member states’ systems (though admittedly the perspective given here is highly superficial) – would seem logically to require strong provision for defence counsel. Traditionally member states may well have ensured this via legal aid schemes although the presence of other models and the logical interaction between legal aid and such schemes bears further, careful consideration.

### 2.3. Treatment of the Minor Defendant

One important consideration when considering the general logic by which any criminal justice system, and indeed area, operates is the who it applies to. In relation to serious crime such as terrorism and organised, some EU member states have tended to witness an expansion of the pool of suspects and indeed convicts in recent years. Nevertheless it is important to recognise that one line between those who can legitimately be called to account by criminal justice systems and those who cannot remains firm. Member states criminal justice systems have very clear notions of juveniles being criminally inculpable and/or treated differently. This section demonstrates how this group is defined and, where parts of it fall into the criminal justice process, how it is treated as particular.

#### 2.3.1. Comparative overview of the criminal liability and treatment of juveniles

Who can legitimately be dealt with by any criminal justice process is defined in the EU member states as follows:

**Figure 19: The Minimum age of criminal responsibility**

9	Malta (Where there is „mischievous misdirection“)
10	Ireland (v. serious crimes), UK: England & Wales, UK: Northern Ireland
12	Ireland, Netherlands, UK: Scotland

13	France, Greece, Poland
14	Austria, Bulgaria, Croatia, Cyprus, Estonia, Germany, Hungary, Italy, Latvia, Malta, Romania, Slovakia, Slovenia, Spain
15	Czech Rep., Denmark, Finland, Sweden
16	Belgium, Lithuania, Luxembourg, Portugal

**Sources: Council of Europe (2011)  
Junger-Tas and Dünkel (2011)**

As figure 19 clearly demonstrates, there is clearly a category of persons who may well be involved in crime, also of relevance to any EU criminal justice area, but which in the eyes of a large number of member states are not touchable by any criminal justice mechanism. This is likely a matter of significant sensitivity and indeed a core value emerging from each constitutional context and what is regarded as a valid exercise of executive power within it.

There is clearly no agreement amongst the member states concerning when an individual becomes criminally liable for his or her action and so again a question arises as to what any EU approach should be. Again, given the likely controversy attached to pushing the limits of criminal liability beyond what is seen as acceptable in a number of member states, much speaks for the EU adopting a maximum protection stance in any approach it takes. If any compromise is sought it also appears clear from the above alone that any attempt to impose criminal liability upon any person under the age of 14 will be unacceptable to the vast majority of EU member states.

Even where potential criminal liability is attached to persons under the age of 18 (or in some cases 21), this is normally associated with certain restrictions imposed upon the criminal process. These are outlined in figure 20.

**Figure 20: Enhanced procedural rights for minors**

Presence of parent/suitable adult during interrogation	Austria, Cyprus, Finland, Ireland, Sweden, UK: England and Wales, UK: Northern Ireland, UK: Scotland
Defence lawyer is mandatory	Belgium, Bulgaria, Estonia, Finland, France, Hungary, Lithuania, Poland, Romania
Special court	Belgium, France, Germany, Greece, Italy, Latvia, Netherlands, Slovenia, Spain, UK: England & Wales (usually), UK: Northern Ireland (usually), UK: Scotland (usually)
Special sanctions	Finland, Germany, Greece, Hungary, Latvia, Netherlands, Spain, UK: England & Wales, UK: Northern Ireland, UK: Scotland
Hearing not public	Germany, Greece, Slovenia, UK: England & Wales

Ban of in absentia trials	Slovenia
Detention as an exception only	Czech Rep., Cyprus, Greece, Slovenia
Involvement of Special Institutions (often social services)	Czech Rep., Denmark, Finland, France, Greece (welfare report compiled), Italy, Malta, Slovenia, Spain, Sweden (where incarceration possible), UK: England & Wales, UK: Northern Ireland, UK: Scotland
Restricted use of some investigative measures	Denmark (interrogation), France (interviews must be recorded), Slovenia (sensitivity required)

**Sources: Juenger-Tas and Dünkel (2011)**

**All country reports in Sieber/Wade (2014)**

**All Country Reports in Ligeti (2012)**

**Country Reports in Vogler/Huber (2008)**

**EU Country Reports in RIDP (2009, 1-2)**

**Spronken et al (2009)**

**Storgard (2005)**

Figure 20 very clearly illustrates that criminal proceedings against juveniles are treated as different entity to those against adult suspects. Often different institutional settings are utilised and these have a far broader social function, more alternative processes and consequences/punishments (often aiming far more to correct or influence than punish the juvenile) are available. The involvement of welfare and protection services also underlines the different nature of proceedings. Above all, juveniles are treated as vulnerable suspects to whom a special duty is owed and who are expected to be lent additional support during proceedings.

From this superficial treatment of this topic alone it is apparent that juveniles and their inclusion in any criminal process affected by EU criminal justice mechanisms requires particular consideration and attention. Far greater provision for the welfare of young persons is expected by a significant number of member state systems and thus, presumably, also their citizens.

**Figure 21: Maximum term of imprisonment available for juveniles, in years**

2	Latvia (serious, non-violent offences)
4	Malta (<14)
5	Latvia (serious, violent offences)
7	Slovakia (14-18)
10	Bulgaria (14-16), Estonia (<18), Germany (if CC sanction >10, otherwise 5), Hungary (<16), Latvia (esp. serious), Lithuania
12	Bulgaria (16-18)

15	Hungary (<16-18), Italy, Romania, Slovakia (serious offences)
20	Austria, Greece
No long term sentences	Croatia (<21)
Reference to special law	Finland, Latvia (no incarceration if not in categories shown), Malta, Lithuania, Slovenia, Spain
No life sentences	Belgium (<18), Bulgaria, Denmark (<18), (Estonia), Hungary (<20)
No limit set	UK: England & Wales, UK: Northern Ireland, UK: Scotland

**Source: Dünkel (2010)**

Again the special treatment associated with juveniles in EU member states' criminal justice systems is underlined by the information provided in figure 21. Here we see clearly that in the vast majority of member states a specific restriction is imposed upon any length of incarceration imposed upon such convicts. It is important to note that a juveniles' status as such is usually determined by his or her age at the time of perpetrating the offence in question, not at the trial.



## **2.4. The 2009 Roadmap and the Development of a Criminal Justice Area within the EU from the Defence Perspective**

### **2.4.1. Recent Developments and the Status Quo**

As highlighted in the sections above, the 2009 Roadmap for defence rights developed for the EU level is currently being used to create a European stance on a number of rights and topics of great importance to defence matters within the EU.

The incremental approach, though sometimes painfully slow and difficult – as shown particularly in relation to the now much less ambitious access to a lawyer measure introduced (measure C) – in the long term promises to set important standards. This process is, however, currently marked strongly by the concerns of the member states (the more ambitious vision of measure C was brought down, in the end, because of its budgetary implications for the member states) and the processes of political compromise so well known to criminal justice cooperation under the pre-Lisbon third pillar.

As has become clear above, however, this report regards the developing EU criminal justice area as one which should be regarded as autonomous. As such, the setting of defence rights standards via political compromise – though doubtlessly useful progress can be made – is not the most relevant path to tread. As can be deduced from the sections detailing central defence rights above, the Roadmap has thus far only touched upon the defence rights viewed as vital in criminal justice systems across Europe. Measure C also looks destined to fall short in terms of the standards many member states set.

For this reason, but also because one month after the deadline for implementation the European Commission reported that only 50 % of member states have notified them of implementation of measure A (the first Roadmap measure), this report is not examining the progress and implementation of these measures in detail as that does not appear a productive course from which to learn.

As should already have been come clear and will be explored in the coming sections of this report, it is thought much wiser to begin considering what any EU criminal justice area should look like in order to address the central concern of this study, rather than how it is currently, slowly emerging at the hands of member states negotiation.

### **2.4.2. Evaluation and Quo Vadis?**

The results outlined in the previous section highlight the considerable diversity amongst EU member states when defence, participatory and broader rights in criminal proceedings are set out. They clearly highlight this as a very particular constitutional context in which rights and their meanings have been negotiated between government and broader society over centuries.

This report provides only a few examples of how any EU criminal justice system, developing to a minimum or average idea of the tenets of criminal responsibility or defence rights would inevitably breach rights as established by a number, if not a majority of member states. This in turn would mean an association of any EU criminal justice area and mechanisms with negative, constitution-breaching, consequences for a large number of

European citizens. Given that the EU as a governance level strives not only for legitimacy in the eyes of member state citizens but indeed to serve them as its own citizens, this would seem a dangerous and regrettable path for the EU to take. Not only does it in the worst case mean that the EU constitutes a constitutional loop-hole for executive measures but it also leaves it prone to and an easy target for criticism from all sides in this sensitive and controversial policy area.

Whilst there is no denying that developments, particularly in the defence rights realm will require pain-staking discussion and negotiations, not least in relation to budgetary matters, it is asserted than any other approach than one aiming to enhance the lives of EU citizens is a dangerous one for the EU to take. On this point, it is perhaps useful to remember that the US federal criminal justice system grew more powerful in defending the civil rights of its citizens (by bringing prosecutions to defend the rights of its coloured citizens in the 1960's) and raising standards and thus the legitimacy of criminal justice processes (thus the Miranda warning and improved DNA technologies stem from practices at the Federal level). There is no denying that such analogy has significant limits but trans-Atlantic comparison provides some interesting food for thought in this context.

Based upon the results and considerations set out above, the final section of this report will indicate some potential paths for any EU criminal justice area. At its heart it conceives EU criminal justice mechanisms as being used only to deal with crime of significant seriousness for the benefit of the citizens of the EU. The legitimate addressees of any such criminal justice area are viewed not as the executive agencies which operate via them, nor indeed the defendants and other practitioners which come into contact or conflict with them, but broader society more generally which is also recognised as having strong interests in any such developments; as victims, as friends, relatives, etc. of victims and defendants, as citizens concerned with the enforcement of criminal law but equally as constitutional rights holders with a legitimate expectation that their rights - forged in conflict more or less recently in each particular national context - and their vision of justice will prevail alongside and within any EU criminal justice area.

It is important to note in this context that any EU criminal justice area must be viewed as potentially fundamentally different to national ones. As such it is important to recognise that justice processes in this context may require particular consideration. The very *raison d'être* of any EU criminal justice area is to ensure offences which cannot be successfully prosecuted by national agencies alone are effectively combatted, perpetrators brought to justice, victim and broader societal interests vindicated. The very point is to expose suspected criminals to a longer arm of the law which can call them to account across the Union.

This may well mean that European investigations, intrinsically transnational as they are, have a different character to purely national ones. As such decisions made, e.g. in relation to jurisdiction, which have no character recognised to be changing the legal position of the accused (and thus triggering a possibility of judicial review under the case-law criteria of the CJEU for example) in domestic settings, may in fact have such an effect in transnational settings. Consequently it may be that defence rights may require constituting differently in order to give effect to the constitutional rights they protect. In other words transnational investigations may not only require mechanisms to secure effective defence rights but possibly also additional ones. Ensuring that courts are well equipped to adjudicate in such cases is also a vital consideration which must further be undertaken. The added value EU agencies and mechanisms bring to criminal justice processes must also be recognised in our legal categorisation of their work.

Naturally the pursuit of efficient and effective investigations and just results must be served and the following section also considers the ne bis in idem and evidence admissibility findings outlined above in this light. However, currently the illegitimate overriding of procedural rights currently often criticised in relation to and indeed equated with the developing European Union criminal justice area is extremely harmful to its potential development – which is fundamentally regarded as seeking justice for EU citizens more broadly - because it seriously undermines its legitimacy. It is suggested that this issue must be addressed as one of the greatest emergency if legitimate EU criminal justice developments to aid efficient investigation and prosecution are not to be stopped in their tracks.

### 3. Study Conclusions and Developing an EU Criminal Justice Area

#### KEY FINDINGS

- Developing any EU criminal justice area requires the development of autonomous definitions of the offences to be covered and many other key concepts. Guidance and inspiration can be sought from the member state criminal justice systems but comparative research results will not provide clear conclusions.
- The substantive reach of any EU criminal justice system must be clearly limited by somewhat theoretical criteria. The concepts of offences by which the EU (and thus all EU citizens collectively) are victimised and for which the EU bears a moral obligation to combat are suggested as bases. The need for EU action must, of course, be strictly determined in accordance with a subsidiarity examination.
- The central notion guiding any EU criminal justice area should be the concept of EU citizenship. Any EU criminal justice system must be designed to serve citizens and their status and expectations as constitutional rights holders. Their interests in effective investigations and prosecutions must be recognised alongside their interests in fair and legitimate procedures. All citizens involved in criminal justice processes whether as defendants, citizens or more broadly interested members of the community must be recognised and treated as such. Their rights and expectations as constitutional rights holders should not be undermined by EU criminal justice procedures. Consequently much speaks for a need to develop the EU criminal justice area as one of high standards and good practice. Currently urgent attention is needed to ensure such development is balanced and the focus on efficient executive measures is not continued. The legitimacy of any EU criminal justice area in the eyes of those it must serve – the EU citizen – is otherwise at stake.

### **3.1. A Principled Approach to Defining the Substantive Reach of an EU Criminal Justice Area**

An elemental step in systematically developing an EU criminal justice area is the definition of its substantive scope. This is a fundamental matter necessary to ensure its legitimacy and many rights based issues can only be fully addressed once this question is dealt with.

As outlined in section 2 of this study, there are two separate legitimate bases upon which to develop a European criminal justice area. Currently – most recently due to the suggestion for a European Public Prosecutor’s Office issued by the European Commission – the focus of this discussion is upon the EU’s financial interests. Whilst this is doubtlessly the core area of victimisation vulnerability associated with the Union, it might be beneficial to think about Union victimisation and interests to be protected as the Union’s in a somewhat broader fashion. Thus for example Euro currency counterfeiting is an offence which should logically fit into any concept of EU interests to be protected by European criminal justice mechanisms. Conceiving of potential EU victimisation as associated with any interest in which all (or at least a large majority of) European citizens as such have an equal interest in protection appropriately assigned to the European level (due e.g. to policy responsibilities) might provide a more holistic yardstick against which to measure potential substantive content of EU criminal justice measures.

Due respect must naturally be paid to the principles of subsidiarity and proportionality and this should never be lost sight of in defining the legitimate substantive scope of any EU criminal justice area. Nevertheless concepts such as the PIF offences do appear too narrow to provide satisfactory guidance. Furthermore the development of proposals with a view to political viability – such as that for an EPPO – whilst entirely understandable, should perhaps not form the entire basis of conceptualisation of EU criminal justice. Thus, for example, anyone reading the EPPO proposal alone might conclude that VAT carousels are not a matter of interest to the Union; a curious conclusion for anyone following the practice and discussion surrounding the protection of the Union’s financial interests in the past decades.

The second criteria for determining the legitimate bounds of any EU criminal justice area furthering the work begun relating to other, transnational crimes outlined in section 2, is even more challenging. As we have seen article 83 TFEU’s reference to serious crime is not legally helpful. Again developing a notion of genuine interests held by all EU citizens in ensuring freedoms are not abused as proportionately protected by criminal justice might be used alongside subsidiarity examinations to determine the legitimate boundaries of any EU criminal justice area.

In any case it is to be hoped that at this Lisbonised moment of criminal justice related development within the EU, some conception of the legitimate content and the boundaries of any EU criminal justice area will be born. Given that any EU criminal justice area must serve EU citizens as such, it is surely vital to depart from the nation-based, ad hoc development of all criminal justice mechanisms and concepts? There can be no doubt that the member states and their domestic criminal justice systems will remain the major players in investigating and prosecuting crime. Nevertheless it is ventured that if an EU criminal justice area is necessary, this is because there are some offence phenomena which are not correctly conceptualised, investigated and prosecuted from and with this domestic perspective.

A more holistic vision of what EU criminal justice should encompass is also one which clearly defines what it should not. It must naturally be strongly guided by the principle of subsidiarity. Nevertheless some concept of the EU as a community and its citizens as equal stake-holders in certain interests would contribute to a more positive and comprehensive means of defining the legitimate subject-matter, and bounds, of any EU criminal justice area. Such a definition is the necessary first step to forging any such area.

## **3.2. The EU Citizen and EU Criminal Justice**

As explored at several points in the preceding sections, the EU citizen as the central addressee of any EU criminal justice area is considered a core notion for the development of any EU criminal justice area. Many of the criticisms of EU criminal justice mechanisms as they have developed thus far result from their nature as, above all, executive measures designed to further the efficiency of domestic criminal justice authorities at the EU level. Although significant effort has been made to ensure this is counter-balanced by equivalent individual and procedural protections, alone the political processes creating these mechanisms alone – executive driven as they are – have ensured that a fundamental imbalance has arisen.

The vision – now in the process of slowly being corrected – of the EU citizen or the beneficiary of EU criminal justice has been dominated by the security interested side of any such character. The citizenship interests of suspects and defendants, to a certain degree victims as well as the broader interests of civic society in criminal justice have been left largely as matters for the national, domestic setting. The recognition of EU citizenship, and the representation of the EU population as such in legislative procedure by the European Parliament post-Lisbon, bears great potential to infuse this policy area with a more holistic vision of EU criminal justice as serving the EU citizen as a constitutional rights holder. Unquestionably the EU citizen has a strong interest in ensuring the freedoms of the EU are not abused to facilitate crime and serious victimisation; there is naturally a strong interest in effective combatting of offences legitimately to be tackled by any EU criminal justice area. Nevertheless this interest is currently well represented in EU criminal justice mechanisms – although it should be drawn upon to define the substantive scope of any EU criminal justice area as outlined in the previous section – and thus the following exploration of the meaning of EU citizenship in relation to a potential EU criminal justice area focuses above all upon what corrective developments would be required to the status quo to do justice to any appropriate notion of an EU criminal justice area.

### **3.2.1. The Current Standing of Individuals in the EU Criminal Justice Area**

As we have seen in the previous sections of this report, notions of criminal justice will usually be associated in citizens minds with the rights he or she holds in his or her constitutional context; the expectation he or she legitimately places upon his or her government as to his or her participatory and defence rights in the course of criminal proceedings. In any European context the concern is thus the danger that any EU criminal justice area associated with lesser rights will be viewed as illegitimate. If citizens' rights and their expectations of justice processes are not served by EU mechanisms and indeed any criminal justice area at the EU level, they will rightly view these/this as a constitutional

loop-hole being used to undermine their position. As argued in section 2, much speaks for any EU criminal justice area developing as an area of high standards and best practice. If it does not, the EU bears potential to act as a constitutional loop-hole, depriving citizens of important rights and will be vulnerable to arguments of illegitimacy. This must be viewed as a fundamental threat to any EU development as it bears potential to entirely undermine its legitimacy in the eyes of the citizens it should be serving.

The problem is that in many ways EU criminal justice mechanisms have developed in such a way to reduce the importance of the nationality of persons subject to them. Thus e.g. the removal of the double criminality requirement for the 32 European Arrest Warrant crimes strips the warrantee of part of the distinctive features of his nationality, the procedure foreseen is deliberately standardised, in other words stripped of distinctive national features. Seen from another perspective, the central feature and point of the EU criminal justice framework as currently conceived, is that the identity of the perpetrator, including his or her nationality, becomes of lesser importance as a transnationalised investigative machinery gets under way and the logic of that 'system' takes over to ensure the suspect is charged and brought to justice before the appropriate court as dictated by the rationale of this specific set-up. From a governance and criminal justice administration point, this is all well and good.

Undeniably, however, the subject of such investigations and mechanisms retains his or her identity and is likely to attach some importance to it. A suspect will remain a particular nationality and the subject or addressee of a particular constitution with the expectation of criminal process inherent in that. His or her knowledge and understanding of what is criminal will be influenced by this, the expectation of defence and procedural rights during an investigation and trial will be marked by this identity as will his or her expectation of what action he or she can undertake within the context of the criminal process. A number of European Union Member States including France, Italy and the Netherlands, for example, grant their suspected citizens a right to investigate their own cases in parallel to the police.<sup>16</sup> European criminal law thus far pays no heed to this right, it is given to and expected by a significant number of the subjects of their investigations nevertheless.

There is simply a gulf between citizen and governance level as far as EU criminal justice is currently concerned. Even successful, frequently-used instruments such as the European arrest warrant are subject to significant criticism for disproportionate use possibly endangering the human rights of suspected individuals. Such success furthermore stands in sharp contrast to the failed process relating to the Framework Decision on Fundamental Rights in Criminal Proceedings. The current difficult negotiations to measure C of the incremental approach adopted in consequence only seek to underline this point. The Union can criminalise, can facilitate arrest, the surrender of individuals and their trial and imprisonment in a foreign country. It cannot, however, ensure those people the access to a lawyer they may legitimately expect across the same territory (as detailed in figures 17 and 18).<sup>17</sup>

The institutions, mechanisms and procedures already made available by the EU mark it as a criminal justice actor or a – at least fledgling – framework for a multi-level criminal justice system. The consistent denial of this by the member states and their refusal to

<sup>16</sup> M. Wade, 'Part III – Present National Criminal Justice Structures, II.C.1.e.bb. – Active Participation in the Investigative Stage', in U. Sieber & M. Wade (2014).

<sup>17</sup> See e.g. C. Heard & D. Mansell, 'The European Arrest Warrant: The Role of Judges when Human Rights are at Risk', 2011 *New European Criminal Law Journal* 2, no. 2, pp. 133-147 and <[http://ec.europa.eu/justice/criminal/criminal-rights/index\\_en.htm](http://ec.europa.eu/justice/criminal/criminal-rights/index_en.htm)> (last visited 9 September 2013).

endow the EU with a strong constitutional framework leaves citizens in a vulnerable position where these mechanisms or agencies are utilised. It is asserted that this problem can only be adequately addressed by the embedding of these powers in an EU criminal justice system. The classic debate between *Weiler* and *Manchini*<sup>18</sup> approached the question of the EU's nature at a meta-level this study cannot seek to. The thinking of this exploration does, however, conceive the EU as a criminal justice actor and thus automatically as in detailed, constitutionally relevant discourse with its citizens. The debate regarding a Constitution for Europe ended in the non-acceptance of such a treaty and the apparent denial of EU statehood. In the criminal justice realm, however, powers are continually transferred which require aspects of this debate to be revisited in this more concrete setting.

The member states insistence that this policy area remains essentially one driven purely by political will via ad hoc action (symbolised still by the exceptional need for unanimity in passing criminal justice measures as well as member states' ability to stop such measures using the "emergency break" proceedings) is to ignore the powers effectively gained by supra-national institutions. Furthermore this allows national governments a forum in which it one-sided criminal policy concerns (namely relating only to the efficiency of criminal investigation and prosecution) dominate.<sup>19</sup> By recognising such mechanisms as the beginning of a system in their own right, one can perhaps look more even-handedly, drawing parallels to national systems, thus highlighting the need for a better rounded system in which it is illegitimate to ignore the relative disadvantage of affected individuals. In other words: in which an obligation to provide for effective defence rights also arises. Such an approach views the criminal law as marked also by a shield function; as bearing protective features enshrined in substantive but often also the law of criminal procedure. Taking our perspective and viewing European criminal law and justice as requiring design to serve all EU citizens, we demand more of such constellations as a quasi-constitutional settings. If they provide powers to intervene in citizens' constitutional rights, this must be reflective of their nature. The European Charter of Fundamental Rights and the jurisprudence of the European Court of Human Rights are natural places to look for solutions to the problems described. However, our conception of the EU as a governance level to which powers have been assigned in the name of the citizens of the states assigning such powers, means we question the validity of that assignment if driven purely by executive desire for efficiency. The fledgling EU criminal justice system is hypothesised as suffering from utilisation to undermine the constitutional relationship governments have with their citizens. Should this be the case, the result is an illegitimate status quo which, in accordance with European Constitutional traditions the member states lack the legitimate power to create.

The classic argument of Member States guarding their sovereignty jealously is that there is no need for the Union protect their citizens as such protections are provided by the Member States to their citizens.<sup>20</sup> This level of protection is regarded as suitable and sufficient

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<sup>18</sup> Mancini, G.F. (1998) Europe: the case for Statehood, *European Law Journal*, Vol. 4, 1, pp.29/42 and Weiler, J.H.H (1998) Europe: the case against the case for Statehood, *European Law Journal*, Vol. 4, 1, pp. 43-62.

<sup>19</sup> Symbolised above all by the failed framework decision on procedural rights in criminal proceedings now replaced by an incremental approach introducing defence rights via the Roadmap conceived under the Stockholm Programme.

<sup>20</sup> So the argument advanced by Ireland and reportedly also the UK in relation to German Presidency attempts to revitalise the Framework Decision on Fundamental Rights in Criminal Proceedings in 2006 – see M. Wade, 'Deep Rifts on Procedural Guarantees Mirrored at Conference in Berlin', 2007 *eu crim*, no. 1-2, p. 31, available at: <[http://www.mpicc.de/eu crim/archiv/eu crim\\_07-01.pdf](http://www.mpicc.de/eu crim/archiv/eu crim_07-01.pdf)> (last visited 9 September 2013). See also the arguments advanced by the Member States supporting the Council in case C-176/03, *Commission v Council*, judgment of the Court (Grand Chamber) of 13 September 2005, OJ C 315, 10.12.2005, p. 2.



because all EU Member States are also signatories to the European Convention for the Protection of Human Rights and Fundamental Freedoms of the Council of Europe (known as the European Human Rights Convention, hereinafter ECHR). As such it is assumed all EU Member States share certain common values and general principles. The veracity of such assumptions is naturally key and (as already demonstrated in section 3.2. above) not always well founded.

Concrete doubts have been raised in relation to the European arrest warrant because of the position it is increasingly demonstrated as placing citizens in. Evidence is emerging that citizens imprisoned or detained using the European arrest warrant are routinely deprived of rights and left extremely vulnerable by their linguistic isolation in foreign detention alone. Surrender following trials *in absentia* lead to long prison sentences being enforced without the surrenderer (who is frequently raising significant evidential or procedural issues) afforded the retrial promised to the surrendering state.<sup>21</sup> Figure 16 supra demonstrates all too clearly the deficiencies of detention conditions across Europe. Clearly EU citizens' rights are not sufficiently protected by the Member States in the course of criminal justice pursued via European criminal law nor does the ECHR provide sufficiently strong standards to ensure that even such relatively simple rights provision is secured. European criminal law and justice mechanisms inherently bears the potential to endanger individual rights both in relation to substantive and procedural matters.

The traditional binding of criminal justice processes to nation states means they are set within particular constitutional contexts. The protective nature of many mechanisms within national criminal justice processes stems from precisely this constitutional context. It is this setting which defines the relationship between citizen and executive and the expectations of individuals as to their treatment during such processes. European criminal justice mechanisms seek to alleviate the handicaps caused to transnational investigation by the binding of criminal justice agents to a territorial state. European criminal law may in doing so, however, now be viewed as raising these agents to a level beyond the nation state in respect of some key activities. This 'supranationalisation' of criminal justice agents, however, occurs in isolation. The criticisms of the mechanisms which provide for it indicate that EU criminal justice mechanisms have thus far resulted in criminal justice agents unfettered by their usual constitutional context, thereby exposing individuals subject to their decisions to unacceptable threats to their constitutional rights. Our attention must therefore turn to the legal consequence of these threats.

### *EU criminal justice processes as legally different?*

As already indicated above, there are some grounds for consideration of EU criminal justice processes as legally other than purely domestic ones. Legal decisions to be made and their ramifications as well as specific mechanisms may make this so. The EU is, however, also marked by a unique institutional set-up. Within the European Union context investigations are aided and supported by OLAF, Eurojust and Europol which, within the logic of their construction and working processes, appear above all as service institutions for the Member States' criminal justice agencies. They facilitate an overview of criminal phenomena, unprecedented and unachievable to any Member State,<sup>22</sup> they coordinate and guide, advise

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Case C 440/05, *Commission v European Parliament*, judgment of the Court (Grand Chamber) of 23 October 2007, OJ C 315, 22.12.2007, p. 9.

<sup>21</sup> See e.g. Fair Trials International, *Defence Rights in Europe*, 2012, available at: <<http://www.fairtrials.net/publications/policy-and-campaigns/defence-rights-in-the-eu-report/>>.

<sup>22</sup> Europol – e.g. TE-SAT 2012: Europol, 'EU Terrorism Situation and Trend Report', 2012, available at: <<https://www.europol.europa.eu/sites/default/files/publications/europoltsat.pdf>> and Europol, 'Trafficking Human Beings in the European Union', 2011, available at:

and facilitate the achievement of consensus amongst international groups of prosecutors.<sup>23</sup> Ultimately they support the investigation and successful prosecution of highly mobile and dangerous criminals. That is their function and there is evidence they perform it increasingly well. This reflects precisely the Member States' acknowledgment that their police forces and prosecutors require enhanced intelligence to be provided by Europol and in the future also Eurojust (in accordance with the article 13 powers lent by the new Eurojust Decision); that investigations and prosecutions require co-ordination and indeed that specialised legal knowledge (e.g. in relation to the financial regulations of the EU; thus the creation of OLAF) may be necessary for criminal justice processes to function within the EU context. There is quite explicitly, however, no acknowledgement of a system and thus not of a potential to systematically change the relationship between governance level and the individual thus governed by the enhanced powers of supranationalised criminal justice networks. Given the collective boost provided to Member State criminal justice authorities, however, unease at treating such investigations as legally the same creature as 'traditional' domestic ones is perhaps justified. A recent empirical study may be interpreted as highlighting this via the varying response rates of prosecutors and defence lawyers to whether or not a new system of criminal justice is emerging within the EU. The majority of both groups negate this. The proportion of defence lawyers doing so is, however, very significantly smaller than the group of prosecutors (see Wade 2011).

Most importantly, the individual is left in a curious situation. The European Court of Justice has decreed that the activities of relevant EU agencies will only bear potential to be held accountable to the Court where they change the legal position of the individual concerned.<sup>24</sup> The definition of what changes an individual's legal position is, however, defined in accordance with a more traditional perspective which views formal decisions by domestic bodies as key. This, in turn, causes asymmetry where cases are being dealt with at a supranationalised or Europeanised context. It is doubtlessly true that domestic authorities still make the formal decisions with greatest impact upon the individual. An investigation can, for example, only be started and charges only brought by domestic authorities. The processes which lead to such decisions are nevertheless strongly influenced by supranational agencies and possibly other (foreign – to the individual affected) national authorities when they are made in the course of or as a result of Europeanised proceedings. The question is whether the individual might not also potentially have influenced such processes, had he or she had the opportunity to do so. A further central consideration is whether this is not indeed legitimate and even desirable in some cases because of the way in which such precursor processes may end up affecting that individual.

Furthermore, one may question whether certain decisions regarded as not changing the legal position of an accused in domestic settings should not be regarded differently when supranationalised in such ways. For example, as previously mentioned, national systems do not recognise a decision determining jurisdiction as affecting the legal position of an individual. Such a decision will usually involve the transfer of a case from one court to another in the interests of justice – also the defendant's; it is a matter concerning the proper administration of justice, no more. It is therefore not a matter for legal debate.<sup>25</sup>

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<<https://www.europol.europa.eu/sites/default/files/publications/trafficking-in-human-beings-in-the-european-union-2011.pdf>>. For OLAF e.g. OLAF, 'The OLAF Report 2011', 2012, pp. 27 et seq., available at: <[http://ec.europa.eu/anti\\_fraud/documents/reports-olaf/2011/olaf\\_report\\_2011.pdf](http://ec.europa.eu/anti_fraud/documents/reports-olaf/2011/olaf_report_2011.pdf)>.

<sup>23</sup> See Eurojust, 'Annual Report 2011', 2012, pp. 15 et seq. available at: <<http://eurojust.europa.eu/doclibrary/corporate/eurojust%20Annual%20Reports/Annual%20Report%202011/Annual-Report-2011-EN.pdf>>.

<sup>24</sup> See in particular: case T193/04 *Hans-Martin Tillack v Commission of the European Communities*, judgment of the Court of First Instance (Fourth Chamber), 4 October 2006.

<sup>25</sup> M. Wade, 'Part III – Present National Criminal Justice Structures, II.G.1.', in U. Sieber & M. Wade, (2014).

When transposed to the supranational level, however, this question takes on a different dimension. An accused person has very significant interests relating to where s/he will be tried when a variety of countries is considered. The language of proceedings, the likelihood of pre-trial detention, the conditions and factual circumstances of that individual will all change enormously, depending upon where a conferring group of prosecutors decide to locate the trial.<sup>26</sup> S/he cannot, however, challenge this decision or indeed ensure his or her voice is heard. Eurojust – in the current legal evaluation – at most facilitates such decision-making; formally the decision is one of the Member States or rather the Member State authority which lodges charges. For this reason the supranational body cannot be held accountable by the individual. Where this occurs after a coordination meeting at Eurojust, this formally domestic decision has, however, likely been very significantly influenced by the other Member States' representatives who make up this supranational entity. The desire of an individual to dispute or far better influence the decision-making process is more than obvious. The legitimate expectations of an individual to at least be heard where his or her interests are affected in such a manner is legally (and likely factually) ignored in such circumstances because our legal perspective has not adapted to the reality of Europeanised processes.

The defence right to carry out its own investigation may be viewed as similarly affected by EU supra-nationalisation. An overview of states which feature this right is provided supra by figure 11. There are few grounds to believe this right to be anything but strongly aspirational even in domestic contexts, no matter how strongly grounded it may be. Even where a national jurisdiction lends its citizens such rights, they are likely to stand far behind any state investigation in resource terms alone.<sup>27</sup> Issues of investigative secrecy naturally also abound. Nevertheless, jurisdictions which allow investigations piggy-backing on the main police one: questioning of witnesses during this stage, viewing etc., undeniably change the position of their citizens when provision is made for Europeanised criminal investigations. There are many arguments against allowing individuals to have investigative rights in transnational settings, a number of citizens may nevertheless feel deeply disadvantaged in comparison to the expectations they have of criminal justice as informed by their domestic rights situation. And the central point is that this expectation is rooted in a constitutional rights setting stripped from that individual when his or her government supranationalises powers vested in it by that very constitutional context.

The existence of transnationalised criminal justice bodies illustrates that even powerful and rich states and their criminal justice systems are impotent in some investigations. Europol, Interpol, Eurojust and OLAF provide expertise and analysis to aid national prosecutors and investigators in cases with international dimensions. Europol and Eurojust go further, providing potential funding for joint investigation teams as well as legal expertise, practical support and advice as to how these can be set up and run.<sup>28</sup> How realistic is it to expect an individual to investigate in parallel to such processes? What value does his or her government's promise that his/her rights are being secured bear? It is not suggested that this is an easy question to answer nor indeed the rights constellation which must be lent greatest attention. Nevertheless, it is presented as a good example of the gulf between individuals' entirely legitimate expectations and the position they are currently left in by European criminal justice processes as they currently stand. At the moment Europeanisation strips individuals of their rights.

<sup>26</sup> Because although the Eurojust Decision (Art. 7(2) of the amended Eurojust Decision) confers powers to the College to make binding decisions as regards jurisdiction, it tends not to exercise these, allowing for informal decision-making, see European Parliament, 'The Future of Eurojust', 2012, pp. 96 and 100, available at: <<http://www.europarl.europa.eu/committees/en/studiesdownload.html?languageDocument=EN&file=73791>>.

<sup>27</sup> See e.g. P. Tak, 'The Criminal Justice System in the Netherlands', in U. Sieber M. Wade (2014).

EU criminal justice mechanisms expose citizens to investigations which by their nature should perhaps be regarded as a different animal to domestic ones. The rights and expectations individuals have will invariably be factually rendered less important as their ability to assert them diminishes.<sup>29</sup> In some cases, the failure to conceive rights anew in the European context is likely to challenge the feeling and perception of justice and fair process not only in the eyes of the suspect but also in broader society.

The situation becomes no less complex if viewed in this broader perspective. It is not only suspects who are rights holders in the criminal justice context. As recognised by the European Union in specific legislation and indeed the broader global community via the Rome Statue,<sup>30</sup> victims too are important rights bearers (see also figure 12 and discussion of it above). Their identity, expectations and legal entitlements are of significant relevance. As national systems raise expectations of participatory rights<sup>31</sup> (and indeed the EU emerges as a legislative actor for crime victims<sup>32</sup>), simultaneous provision for streamlined processes in which these are stripped away as these are Europeanised is likely to cause consternation and controversy.

These are not matters only of relevance to broader conceptualisation. They have specific ramifications for any – also institutional – development at the EU level. Thus for example, any legislative provision for institutions which bear the potential powers which Eurojust, Europol, etc. now most certainly do within the EU system should include consideration of its broader context and the institutionalisation of a citizen's right to appeal against the activities of bodies interfering with his or her rights. The European Union context is frequently criticised for its failure to do this. Although Eurojust and bodies like it are increasingly acknowledged to be performing their important function well and indeed being furnished with greater powers to do so more assertively and efficiently; precisely this furnishing – no matter how legitimate it is recognised as being – is subject to criticism because it is not matched by legislative and institutional development to ensure broader rights representation or the justiciability of decisions made by, amongst others, Eurojust, Europol and co. Where such imbalance exists in a multi-level justice system such as the EU is becoming, one can expect citizens to turn to courts to address it if the legislature fails to do so.

For the EU context, post Kadi it seems clear that the CJEU will take on this function if necessary. The question is, however, why on earth anyone would knowingly want to place the CJEU in such a position and indeed, how it could possibly cope with the potential case-load. Conceptualisation of any EU criminal justice area must be placed on a more holistic basis if negative impact for institutions already in existence is to be avoided. This must also include accountability and complaints procedures alongside necessary adjudication

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<sup>28</sup> See e.g. <<https://www.europol.europa.eu/content/page/joint-investigation-teams-989>>.

<sup>29</sup> This will not always be true of transnationalised criminal justice cases. Prosecutors in the EuroNEEDs study understandably often assert that European criminal cases are brought against powerful or socio-economically advantaged suspects who can afford a very good defence. It is interesting, however, to note in the European criminal justice context that the EuroNEEDs study features 9% of prosecutorial interviewees asserting that cases involving mutual recognition cause problems for the defence and that they have noticed this because European cases are easier to handle than domestic ones – see M. Wade (2011).

<sup>30</sup> Participatory rights and the right to have their interests considered are thus provided for, e.g. in Arts. 15(3), 19(3) and 54(1)c and 54(2)c of the Rome Statute.

<sup>31</sup> See e.g. the UK Victim's Charter – available at: <<http://www.gm-probation.org.uk/files/victims-charter2835.pdf>>

<sup>32</sup> See e.g. Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings (2001/220/JHA) and European Parliament (2011) Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims.

structures. Consideration of the CJEU's future role in any EU criminal justice area must inevitably include a call for more comprehensive review and reform. Any use of the Nobel Peace Prize winning European Union as conceived by the CJEU in *Kadi* to effectively undermine fundamental rights must be seen as fundamentally wrong. There is no vision advocating the EU as a liberty-restricting Union. Why should the citizen accept such a reality of Europe or of one of its agencies acting within it? Holistic and comprehensive consideration of an EU criminal justice area and institutions operating within appears necessary alone to ensure the latter can continue to function.

Investigations in the member states are complex interactions. For serious crimes, however, these factually always seem to be based upon prosecutorial (at least co-) leadership. The vast majority of jurisdictions lend prosecutors the legal status of investigative leaders and for serious crimes, this is also reflected in practice. However, investigations are not seen as only matters for state agencies. A significant number of member states provide defendants and/or their lawyers with participatory rights and a smaller number of states also provide formal rights to victims. In developing any EU criminal justice area it is important that such interests are not overlooked for they will form an important part of citizens' expectations of justice. Furthermore it is important to recognise that investigations are carried out by structures held democratically accountable for their actions by a variety of social mechanisms as well as in individual cases by courts. The problematic scenario painted above in relation to the CJEU results from this currently being the only venue citizens can turn to in order to hold EU criminal justice related mechanisms to account. Recognising that any EU criminal justice area is created to serve EU citizens should lead also to the creation of bodies to which agencies within it can be held appropriately accountable. Policy setting within such a system would necessarily also need to be transparent and accessible to citizen complaint.

### **3.3. Evaluation and perspectives given the objectives of the criminal justice area stressed in art. 82 TFEU**

#### **3.3.1. Objective of recognition throughout the Union of all forms of judgments and judicial decisions**

The study results clearly demonstrate that there are limits to which judgements and decisions, even when judicial can be accepted by member states where the legitimate bounds of their criminal justice system's ability to criminalise is touched upon or where fundamental protections have not been respected. These stem from fundamental differences in the conceptualisation and structure of criminal justice institutions and mechanisms. For example it is extremely difficult to imagine how a judge's decision to treat a piece of evidence as admissible in a jurisdiction which never excludes evidence due to rights breaches can be guaranteed acceptable in another jurisdiction which always excludes evidence where procedural rights have been breached. Unless common standards and values are determined in particularly sensitive areas, it would appear very difficult to achieve this aim.

### 3.3.2. Objective of conflicts prevention and settlement of jurisdiction between Member States

This appears to be much more a matter of organisation than law, especially given the positive experience Eurojust reports in this context so far. As member state authorities are required to provide Europol and Eurojust with information concerning potentially relevant investigations, the prevailing cooperative spirit amongst member states is likely to allow such matters to be settled.

There is, certainly potential for conflict due to the Schengen *ne bis in idem* rule which precludes any prosecution if prosecutorial case-disposal mechanisms requiring something from the defendant have been utilised to close a case prior to it going to court in another member state. This has, for example been the problem for Belgian prosecutors wishing to bring the Fortis Bank case to court only to find their prosecution barred by a settlement made with Dutch prosecutors. At this point it cannot be determined how significant a problem such cases are, naturally, however, it cannot be regarded as desirable that defendants can strongly influence the outcome of their cases if their legal teams are strong enough to negotiate them. Such influence by socio-economically more powerful defendants would also undermine any concept of justice.

Nevertheless the fact that exceptions to the *ne bis in idem* principle within the member states appears to be a rare phenomenon speaks against any attempt to remedy such problems via legislative means. It would seem better to ensure European institutions have an overview of cases dealing with transnational cases and mechanisms are created to ensure that no cases are disposed of if another jurisdiction has a strong interest in prosecuting.

### 3.3.3. Objective of the training support of the judiciary and judicial staff

If the citizenship approach to an EU criminal justice area is accepted above all training measures would need to embrace this. All personnel involved in EU criminal justice processes would require training to appreciate this and the duties towards EU citizens more broadly they are placed under.

Above all it would seem necessary to acknowledge that increasingly members of national authorities are in fact acting as executive or (quasi-)judicial agents of an EU criminal justice area. Their understanding of their role and the duties this entails must expand accordingly. If they are recognised as acting in a capacity of EU agents the logical result is that they act in order to serve EU citizens. As such they act with a duty of care to all EU citizens. Differences in treatment based upon nationality therewith should come to be viewed as problematic. Where, for example, prosecutors report subjecting EAWs against citizens of the member state whose prosecution service they belong to, to a proportionality test but not feeling able to do so for citizens of other member states, this would be seen as problematic from this perspective. A development of an EU criminal justice area to serve EU citizens requires a significant change in conception and practice of those who perform tasks within it. However, if this is to become an area serving criminal justice, it is difficult to envisage it working in a non-discriminatory and acceptable way without a development of this kind.

### 3.3.4. Objective of facilitation of the cooperation between judicial or equivalent authorities of the Member States in relation to proceedings in criminal matters and the enforcement of decisions.

The study results highlight fundamental differences in values and mechanisms held and featured by member state criminal justice system. It would appear important to realistically recognise the importance of these and that genuinely common values, procedural standards and accepted practices likely need developing before this aim can realistically be achieved.

## 3.4. Initial Recommendations for Developing a Criminal Justice Area within the EU

The European criminal justice context is particularly marked by controversy as to the legitimacy of its functioning.<sup>33</sup> Increasingly voices can be heard decreeing that we are developing the wrong kind of European Union. The frequency with which criminal justice is now Europeanised, the backdrop of controversy over the loss of sovereignty by European Union Member States and the density of bodies and agencies involved in European criminal justice means it is subject to intense scrutiny.

The European Union-created criminal justice setting is currently subject to unprecedented political kick-back with unquantifiable emotional reactions marking criticism of it. However, in terms of the current understanding of and knowledge about the criminal phenomenon and to ensure the effective and comprehensive investigation and prosecution of relevant crimes, European development is to be embraced. There can be little doubt that criminal justice in Europe currently relies upon the European Union to achieve it.<sup>34</sup> For precisely which crimes and which contexts this is the case are matters requiring critical debate. There are unquestionably offence areas for which effective prosecution can be achieved via member state cooperation alone. There may well be offence areas which could potentially be efficiently combatted and prosecuted via the European Union level but which are insufficiently serious to warrant EU action. Nevertheless the currently organically growing mechanisms and institutional responsibilities assigned to the EU level demonstrate the conviction – also of more Eurosceptic member states – that there are some crimes which can only be effectively combatted via EU criminal justice mechanisms. That a better balance is required in the use of mechanisms introduced via European criminal law stands beyond doubt. This is, however, not to doubt the fundamental legitimacy of those mechanisms.

The question of relevance here is whether when, as is the case in the European Union, the Member States claim to be protecting their citizens' rights even where powers to investigate and prosecute are transnationalised, there is any way to hold them to this or to require that they acquiesce to equivalent protections being provided at the level of the EU? This is of interest not only to the individual, affected citizen but ultimately also to the supranational governance level at which activity is taking place because its legitimacy is at stake. As illustrated in section 2, much speaks for creating an EU criminal justice area of high standards and best practices so that the EU level cannot be accused of providing member states with a way to circumvent constitutional rights granted to its citizens.

<sup>33</sup> See e.g. the Justice in Europe Campaign of Fair Trials International, *supra* note 46, though note also its Interpol-related campaign: <<http://www.fairtrials.net/interpol/>>.

<sup>34</sup> See A. Hinarejos et al., 'Opting Out of EU criminal law: what is actually involved? 2012', available at: <[http://www.cels.law.cam.ac.uk/Media/working\\_papers/Optout%20text%20final.pdf](http://www.cels.law.cam.ac.uk/Media/working_papers/Optout%20text%20final.pdf)>.

The ability of executive decision-makers to dictate what can and cannot be done at the European Union level is fundamentally dangerous to that governance level. Ultimately the constituent executive organs (i.e. the Member States' governments) are free to take credit for any activity undertaken at EU level but at the same time free also to blame that very level for any problems which ensue. The case could not be clearer than in relation to EU criminal justice. The very forces which deny the Union the right to regulate defence rights in criminal proceedings are the same ones which also criticise the EU for its failings as a balanced criminal justice forum.<sup>35</sup> We thus see the Member States' control of the content of Union work as ultimately damaging to the reputation of the Union. In relation to the criminal justice wing of Union work, we now witness this discrepancy as potentially throwing its entire existence into question.<sup>36</sup>

This EU debate is one which essentially relates to the sovereignty of EU Member States<sup>37</sup> and their desire to protect their national identity in this regard. Similar debates are a strong tradition in the international law context. Cryer, for example, describes diverse scepticisms towards international law as sharing 'a fear that international law might be used to fetter their States absent their express consent.'<sup>38</sup> Just as the EU Member States appear in part reluctant to trust the EU, so Cryer highlights the Rome Statute as expressing a deep mistrust of judges and a resulting self-regulating restrictiveness in the latter's activities which he criticises as overly deferential. As he points out 'There are other audiences for the court than states, and legitimacy in their eyes is also important.' A statement no less applicable to the EU: it is not only a governance level serving its Member States. A direct relationship with individuals sees these now also citizens of the Union alongside their bearing the nationality of their Member State. What meaning this holds in relation to the criminal justice activities of the Union is surely worthy of exploration?

The criminal justice-related remit assigned to the EU thus far to, above all, regulate repressive powers but not equivalent ones defending the liberty of citizens<sup>39</sup> is in core not only a governance (and existential public relations) problem for the Union but fundamentally a greater threat to individual rights still.<sup>40</sup> If it is true that the executive

<sup>35</sup> See e.g. 'MPs urge Cameron to opt-out of EU laws on Policing', *The Telegraph*, 5 February 2012, available at: <<http://www.telegraph.co.uk/news/uknews/9062967/MPs-urge-Cameron-to-opt-out-of-EU-laws-on-policing.html>> and A. Travis, 'Why does Theresa May want to opt-out of 130 European Justice Measures?', *The Guardian*, 15 October 2012, available at: <<http://www.guardian.co.uk/politics/2012/oct/15/theresa-may-european-justice>>.

<sup>36</sup> The exercise of the Protocol 36 opt out by the UK clearly undermining any EU-wide criminal justice system for example.

<sup>37</sup> Thus discussion relating to legal aid is considered especially sensitive in binding the budgets of Member States. It is interesting to note, however, that Union resources were found to fund JIT projects but no such activity has been taken in relation to defence rights. There is, of course, no obvious potential Union agency to undertake the administration of such funds nor e.g. to apply to DG Justice programmes to funnel funds into such activities. This stands in contrast to the Eurojust initiatives which successfully applied for funding to DG Home Affairs to further support such activity – see <<http://eurojust.europa.eu/Practitioners/Eurojust-Support-JITs/JITS-Funding/Pages/jits-funding-project.aspx>>.

<sup>38</sup> R. Cryer, 'Royalism and the King: Article 21 of the Rome Statute and the Politics of Sources', 2009 *New Criminal Law Review* 12, no. 3, pp. 390-405 p. 391.

<sup>39</sup> The work being done on the roadmap and under the European supervision order provides the notable exception to this trend though the slow progress of such legislation compared to that of repressive measures does somewhat underline the point. The subjugation of the EU's legislative mandate to work in relation to individual rights in criminal proceedings 'to the extent necessary to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters' only (Art. 82(2)b TFEU), is telling.

<sup>40</sup> Thus the speed of adoption of the EAW and the European investigation order (EIO – see Initiative of the Kingdom of Belgium, the Republic of Bulgaria, the Republic of Estonia, the Kingdom of Spain, the Republic of Austria, the Republic of Slovenia and the Kingdom of Sweden for a Directive of the European Parliament and of the Council regarding the European investigation order in criminal matters. Explanatory Memorandum (2010/C 165/02), OJ C 165, 24.6.2010, pp. 22-39) cannot only be contrasted with the failed Framework Decision on Fundamental Rights in Criminal Proceedings and the incremental approach now taken via the Roadmap (see



branches of Member States control Union policy (and given the traditional and still criticised factual need for unanimity in criminal justice-related measures,<sup>41</sup> it is difficult to argue anything else) this effectively means that the supra-nationalisation of repressive criminal justice powers within the EU context is a tool for the undermining of individual rights. When a government (such as the UK during its presidency in 2005)<sup>42</sup> can steer the Union towards the criminalisation of acts (such as e.g. glorification or the public provocation of terrorism or endangerment)<sup>43</sup> which sit uncomfortably in the context of other Member States' national criminal law context; or subject citizens to extradition to foreign criminal justice systems for acts protected by freedom of expression provisions in their constitutional setting (so e.g. the famous example of denying the holocaust online in Denmark by virtue of the European arrest warrant negating the need for double criminality for 'computer-related crime') without so much as facing questions as to the legitimacy of its acts – which undermine the constitutional balance of the now obliged Member State(s) – this means the Union provides a constitutional loop-hole.

It is precisely such a loop-hole which the European Court of Justice sought to close by drawing 'inspiration from the constitutional traditions common to the Member States' in the *Kadi* case.<sup>44</sup> The European Court of Justice would appear to be recognising (and searching for) a legal mechanism to limit the activity of the Council and therewith the executive representatives of the Member States acting at EU level.<sup>45</sup> The study results outlined in section 2 outline that the member states do have clear constitutional traditions within their criminal justice systems and that frequently these provide for higher standards currently ignored when EU mechanisms are used. The frequent requirement that proceedings for serious crime feature mandatory defence participation (see figures 17 and 18 and their discussion), clearly points to a deficit in the EU development as it currently stands. Furthermore the degree of control exercised by prosecutors (if not examining magistrates) over investigations into serious crimes (see figure 10 and its discussion) might lead us to ask why European investigations are currently run as an ad hoc team effort for which a responsible, and accountable, head is often difficult to identify. Why do we currently allow

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supra), but also e.g. relating to the European supervision order which came into force on the 1<sup>st</sup> of December 2012 – see Council 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 OJ L 294, 11.11.2009, p. 20 and 'FTI The European Supervision Order: Key Facts', available at: <<http://www.eucriminallaw.com>>. Simple measures to secure liberty which clearly were not afforded similar priority as repressive measures to secure and facilitate investigations and prosecutions.

<sup>41</sup> See e.g. V. Reding, 'A European Union grounded in justice and fundamental rights', 2012, available at: <[http://europa.eu/rapid/press-release\\_SPEECH-12-918\\_en.htm?locale=en](http://europa.eu/rapid/press-release_SPEECH-12-918_en.htm?locale=en)>.

<sup>42</sup> See the declaration of the UK Presidency of the EU 2005 – 'UK Presidency, Justice and Home Affairs Purpose Statement, 2005', available at: <<http://www.eu2005.gov.uk/servlet/Front?pagename=OpenMarket/Xcelerate/ShowPage&c=Page&cid=1079979841177>>.

<sup>43</sup> See Proposal for a Council Framework Decision amending Framework Decision 2002/475/JHA on combating terrorism Brussels, 6.11.2007 COM(2007) 650 final and M. Borgers, 'Framework Decision on Combating Terrorism: Two Questions on the Definition of Terrorist Offences', 2012 *New Journal of European Criminal Law*, no. 1, pp. 68-82, available at SSRN: <http://ssrn.com/abstract=2083453>.

<sup>44</sup> Joined cases C-402/05 P and C-415/05 P, *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities*, judgment of the Court (Grand Chamber) of 3 September 2008, Para. 5.

<sup>45</sup> Although its position has changed by virtue of the co-decision procedure which has now become standard post-Lisbon – meaning that the European Parliament is drawn into the legislative procedure – the effectiveness of the Parliament as a counter-balance is yet to be achieved. That is not to belittle its position in extreme cases such as the S.W.I.F.T. context – see e.g. R. Turner, 'European Parliament rejects S.W.I.F.T. deal', 2010, *DW*, available at: <<http://www.dw.de/european-parliament-rejects-swift-deal-for-sharing-bank-data-with-us/a-5239595>> (last visited 11 September 2013). It is undeniably, however, still an institution developing its teeth. The same can be said for the mechanism developing the role of national parliaments in ensuring accountability. Clearly both of these changes bear significant potential to change the nature of the Union from an executive-steered governance level – see e.g. A Horvathova, 'EU Criminal Law and the Treaty of Lisbon – Where Shall We Go Now?', 2010, available at SSRN: <<http://ssrn.com/abstract=1836754>>. It seems fair to say this effect has, however, not yet materialised.

EU influenced criminal justice processes to run seemingly divorced from the constitutional traditions of the member states?

The problem is, as demonstrated all too clearly by the *Kadi* case, that governments' use of international governance levels is sometimes marked precisely by a desire to remove certain executive activity from its usual constitutional context. It is not necessarily only by accident that executive agents are left unfettered by their traditional constitutional context. The basic problem of an unchecked executive will driving internationalisation applies to all internationalised criminal justice 'systems'. International law exists purely by the will of the legal representatives of sovereign nation states: a collective of executives. At the supranational level these operate largely independently of the usual checks and balances of their respective system. Legislature and judiciary (even the *Bundesverfassungsgericht*) are understandably loath to require a breach of international obligations and thus deferential to treaty law.<sup>46</sup> Therefore where collective executives demonstrate above all punitive will, this too will become the nature of supra-nationalised criminal justice. Despite its unique nature as a governance level, there is little evidence to suggest the EU – for which fundamental criminal justice tenets and mechanisms developed so far were mostly created within the context of the inter-governmental, pre-Lisbon third pillar – forms a particular exception to this.

For the criminal justice context, the basic problem relates to an individual's rights to insist upon the rights he or she holds in his or her constitutional context; the expectation he or she legitimately places upon his or her government as to his or her participatory and defence rights in the course of criminal proceedings. In any supra-nationalised context our concern is thus any right to assert or insist upon such rights – or at least equivalent protection – where the executive of his or her nation state assigns powers impacting upon such rights to another governance level. The question is why the developing EU criminal justice area allows criminal justice practitioners acting on its behalf to proceed in this way? Placing the EU criminal justice area as serving the citizen notion at the heart of this development, meaning future development aims to correct this imbalance, would have to see investigators and prosecutors acting within this area embodying a different relationship – having a duty of care – towards all citizens subject to their actions.

The fundamental problem is, of course, that within the context of representative democracies, there can be no denying that the legislature bears powers to alter citizens' rights provided they are not made constitutionally inalienable. There is no stasis relating to the rights of individuals facing criminal proceedings. A change of this nature should, however, be subject to legislative discussion and, if necessary, the higher threshold required for constitutional change.<sup>47</sup> As such a citizen within democratic societies has a reasonable expectation to have a broad and public discussion of such changes to which he or she can also contribute if so desired. Full representations or protests by groups representing broad sections of society will normally be provided for. This surely is our expectation of the democratic process? Assignment of certain punitive powers to the EU governance level without ensuring the constitutional rights of citizens associated with them in the domestic setting, must surely be an assignment *ultra vires* and not one upon which any EU criminal justice area can solidly be built.

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<sup>46</sup> See BBC, 'Lisbon passes German court test', 2009, available at: <http://news.bbc.co.uk/1/hi/world/europe/8125742.stm> and M. Wade, 'The Constitution says yes [but...] to the Lisbon Treaty – The Judgment of the Second Senate of the Federal Constitutional Court of 30 June 2009', 2009 *eu crim*, no. 1-2.

<sup>47</sup> All EU Member States for instance reserve the right to make criminal law and criminal procedure law as a matter for Parliament itself indicating its importance – see M. Wade, 'Part III – Present National Criminal Justice Structures', in U. Sieber & M. Wade (2014).

How then can the law express the right of an individual not to be subjected to such executive will, merely because it comes in the form of supra-nationalised law? Is there any means of asserting that the unbalanced nature of the fledgling EU criminal justice system is currently wrong or let alone unlawful? Such a mechanism might be useful to assist in the conceptualisation of any developing EU criminal justice area.

In seeking the answer to such a question one must search for a common legal tradition or basis; inspiration as sought also by the European Court of Justice from 'constitutional traditions common to the Member States'. Whenever possible in rights-related matters, the Court, however, draws upon the more concrete ECHR. In some cases this may indeed provide a legally superior route to determining common values within the broader European context and therefore demanding specific rights protection mechanism. This is certainly true for some values and mechanisms. The case of *Salduz v Turkey*<sup>48</sup> for instance has provided a clear requirement of access to legal advice during police custody as a concretisation of fair trial rights unless exceptional circumstances speak against allowing such access.<sup>49</sup> A strong line of case law upholds the complete prohibition of torture or degrading treatment or punishment clearly demonstrating this as a common value.<sup>50</sup> ECHR case law is further instructive in determining more detailed principles flowing from such fundamental principles, for example when a charge must be viewed as criminal or several concrete requirements of the principle of equality of arms.<sup>51</sup>

The Court, however, naturally operates post facto and in relation to cases of all sorts. Not only those of relevance to the nitty-gritty of criminal justice systems cooperating closely in the EU settings. Furthermore it cannot be regarded as desirable to allow the legitimate bounds of EU criminal justice to be determined by court cases over time. Ultimately even amongst the EU Member States, there is such divergence in rights standards flowing from constitutional values (as demonstrated supra) that it would be illusionary to expect the ECHR, even through the jurisprudence of the Strasbourg Court, to provide a sufficiently tight system of rights protection to accompany processes such as those provided for by EU criminal justice mechanisms.

Even beyond such considerations, the problem is that the unfairness of supra-nationalised criminal proceedings will stem often from the process as a whole and the incompatibility of procedural protection systems with each other. Thus each step of the process may well be Convention compliant because it is within the realm of what the Court accepts or rather part of a process which the Court views as fair overall, nevertheless the combination of parts of different states' processes will result in unfairness. Thus, for example, a citizen whose procedural rights are breached during the investigation in jurisdiction A would have redress in that jurisdiction through the exclusion of any product of the breach as evidence in a trial against him. If, however, he is surrendered for trial in jurisdiction B this protection would be lost if jurisdiction B allowed all evidence to be admitted no matter what its origin (as is the case e.g. in Sweden which places great trust in the judicial evaluation of evidence probity). Such differences in procedural stages are entirely Convention acceptable because protection simply has to be provided in a balanced way within the logic of a country's procedure (and Sweden for example has far higher protective standards to ensure investigative actions such as wire-tapping are carried out legally as they occur. The logic of

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<sup>48</sup> See ECtHR (Grand Chamber) judgment of 27 November 2008, *Salduz v Turkey*, appl. no. 36391/02, [2008] ECHR 1542..

<sup>49</sup> Para. 55 of the judgment

<sup>50</sup> *Chahal v United Kingdom*, [1996] ECHR 54; *Saadi v Italy*, [2008] ECHR 179 and indeed *Othman (Abu Qatada) v United Kingdom*, [2012] ECHR 56.

the Swedish system is, however, lost when a suspect is tried there having been wire-tapped in another Member State).

Values determined under the ECHR are therefore subject to interpretation within the specific setting as well as to the margin of appreciation. Its jurisprudence is criticised for being insufficiently specific in any case. The ability to use ECHR jurisprudence to develop specific mechanisms of protection suitable for ensuring rights are respected in proceedings across a number of jurisdictions is asking too much. The ECHR was, after all, not conceived as a mechanism of harmonisation. Even where the Court can develop specific requirements – as it has done e.g. in the case of *Salduz v Turkey*, it cannot do so at a rate which keeps pace with supra-nationalised criminal justice in the European Union context.

If one accepts that these criminal justice processes may need to be viewed as legally different as argued above, it is not difficult to imagine that rights protection within them may also require instruments other than those designed to ensure respect for core fundamental rights across a number of domestic systems. The central point is to recognise such proceedings as part of a whole which is transnational in nature. Within the EU context, the drafting of the Charter of Fundamental Rights of the European Union provides an interesting opportunity. Its advent into Union law alone demonstrates that the Member States felt a need for standards more concrete than those offered by the ECHR. As the European Court of Justice embraces its role as the Charter's guarantor, Article 47 – which confers a right to an effective remedy upon anyone whose rights and freedoms (as guaranteed under Union law) have been violated by an executive power – provides significant potential to allow such procedures to be adjudicated with the necessary transnational perspective. Only time will tell what is made of this opportunity.

To wait for Court jurisprudence determining values is, of course, a highly inefficient method of rights protection. The better approach would be to ensure that repressive transfers of power are accompanied by an appropriate, rights-securing context. Unfortunately the history of the procedural rights framework decision<sup>52</sup> and the ongoing negotiations of the Roadmap,<sup>53</sup> clearly demonstrate that negotiation is necessary to achieve this. There may well be common traditions and values to be determined amongst the EU Member States via legal comparison and other methods. The problem is that a few Member States dispute the legitimacy of the EU framing rights declarations. The question of interest to our purposes – and independent of legal developments at the EU level – is whether the fact that these Member States deemed the EU a suitable venue to pass the European arrest warrant did not also inherently see them legitimising and indeed requiring a rights-protecting framework in which this could operate?

This study section is asserting that this must logically have been the case; otherwise the EU is a constitutional loop-hole. The assertion is thus that there should in fact be a mechanism for asserting that the governments which agreed to the European arrest warrant must also agree to an appropriate mechanism of rights protection. At this point it thus appears logical to recognise that the member states have passed certain criminal justice related powers and responsibilities to EU agencies and provided for certain processes via EU criminal law. If any EU criminal justice area is conceived of as serving EU citizens, failure to ensure such

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<sup>51</sup> See e.g. S. Trechsel, *Human Rights in Criminal Proceedings*, 2005, pp. 36 et seq. and pp. 94 et seq.

<sup>52</sup> Proposal for a Council Framework Decision on certain procedural rights in criminal proceedings throughout the European Union, 28.4.2004, COM(2004) 328 final and Wade 2007, supra note 30.

<sup>53</sup> Resolution of the Council of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings (Text with EEA relevance) (2009/C 295/01), OJ C 295, 4.12.2009, p. 1. See further <[http://www.ecba.org/content/index.php?option=com\\_content&view=category&layout=blog&id=65&Itemid=22](http://www.ecba.org/content/index.php?option=com_content&view=category&layout=blog&id=65&Itemid=22)>.

institutions and mechanisms are balanced and serving broad societal interests as embodied by the rights citizens hold, is a gap to be filled. Recognising the rights citizens across the Union are endowed with and the steps necessary to ensure these rights are not compromised or breached by EU criminal justice provisions, whilst conceiving of EU criminal justice proceedings as somewhat different than national ones, allows one to develop a different and more balanced view of what EU criminal justice should be achieving. As mentioned during the course of this study's explorations, much speaks for ensuring any EU criminal justice area is a forum in which best practices are identified and a race to a minimum protection level avoided.

The assignment of powers to investigate, prosecute and indeed adjudicate at a supranational level are doubtlessly legitimate acts of good governance securing the rights, interests and indeed entitlements of citizens in many contexts. As Boister phrases it 'we might conclude that very shocking or state-implicated harmful conduct which threatens general human interests has to be suppressed by humanity acting as a whole. Going down the scale, harmful conduct that crosses borders or threatens cross-border morality may only require affected states to act together. Finally, harmful conduct that only affects interests within states can be dealt with adequately by states acting alone.'<sup>54</sup>

Assignment via European criminal law is indicated as a necessary part of good government. It, however, appears incomplete as it currently stands. If the development of criminal justice systems in European countries is analysed within the terms of the social contract, centuries of 'negotiation' can be identified. The products of these, although dynamic in nature, clearly highlight the consent of citizens to punishment via criminal justice processes as contingent upon the risk of unsafe convictions or indeed unjustified deprivations of liberty being minimised. The resulting social contracts detail the requirements placed upon the executive in order to pursue the goal of criminal justice via processes fundamentally marked by (at least the striving for) fairness and balance within each of these nation states. Many of the rights held by citizens and seen as key to ensuring this balanced are outlined in figures 5 to 21 above). This theoretical view thus identifies powers to investigate and prosecute as part of a bundle of inter-dependent powers and duties. It consequently highlights that the legitimate assignment of such powers can only occur under consideration of this bundle as a whole. States endangering their citizens' rights via partial assignment are shown to breach their social contract. In doing so they in turn naturally not only negate the legitimacy of their own rule but also undermine the legitimacy of the very supra-national structures created by them to perform tasks which the executives of nation states cannot achieve alone. Social contract theory thus potentially provides us with a useful tool to discuss which constitutional values and resulting rights must form general principles of European criminal justice. As such comparative, study results such as those presented here provide a useful basis upon which to discuss what should constitute supra-national, EU criminal justice. Formation of ideas for an EU criminal justice area must, however, also be ready to depart from national precedents in recognition that ensuring the rights held by citizens will require recognition of the different nature of supra-national proceedings; the different risks such proceedings expose citizens to, as well as possibly all EU citizens as addressees of this system.

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<sup>54</sup> N. Boister, 'Transnational Criminal Law', 2003 *EJIL* 14, no. 5, pp. 953-976, p. 969.

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## **ANNEX**



## **NOTES**