Better Regulation in European Criminal Law

Assessing the Contribution of the European Parliament

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Article

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The entry into force of the Lisbon Treaty on 1 December 2009 resulted in a number of important changes for the democratic accountability of European criminal law. Among them is the enhanced role of the European Parliament as regards the adoption of EU legislation in this area. This coincides with the Charter of Fundamental Rights of the European Union (EU Charter) achieving binding status.[1]

A new European Parliament was installed in July 2014, followed by the confirmation of the Commission presided over by Jean-Claude Juncker. Together with the Council, these European institutions now have the obligation to make a convincing case for European integration, by producing better regulation (meaning that it has added value), based on a holistic impact assessment – effective and of high quality – including in the area of European criminal law.[2] The work of the new Justice Commissioner is overseen by the First Vice President of the European Commission and the European Commissioner for the portfolio of Better Regulation, Inter-Institutional Relations, the Rule of Law and the Charter of Fundamental Rights (Mr. Frans Timmermans).

Looking back at experience gained by the European Parliament in the exercise of democratic scrutiny during the past five years, and taking into account the ambitions of the new Commission, this article addresses the question of to which extent the enhanced role of the European Parliament has led to better regulation in the area of European criminal law. It also contains a number of recommendations for the future.

I. Impact of the entry into force of the Lisbon Treaty

Since the entry into force of the Lisbon Treaty, the provisions relating to judicial cooperation in criminal matters have been moved from the Treaty on the EU (TEU) to the Treaty on the Functioning of the EU (TFEU).[3] This has led to a significant enhancement of the role of the European Parliament, which was previously *de facto* excluded from negotiations on EU legislation in the above-mentioned area as it had only been formally consulted. As a general rule, the ordinary legislative procedure now applies to this area (Commission proposal, co-decision with Parliament and qualified majority voting in the Council of Ministers). However, the Commission still has to share its right to legislative initiative, as one quarter of the Member States (currently seven) is still allowed to propose EU legislation in this area.[4] The uniform application of this legislation is also not guaranteed, as Member States have maintained possibilities for enhanced cooperation,[5] "opting in"[6] or staying out.[7]

The EU Charter now needs to be taken as the main point of reference in determining the level of protection required from EU legislation in this area. It should be noted that the EU Charter offers a minimum level of protection.[8] Member States may go beyond that, for instance, based on a higher level of protection provided for by their national constitution, though the Court of Justice has held that such a higher level of protection may only be called for to the extent that the primacy, unity, and effectiveness of EU law are not thereby compromised.[9] The interpretation of the principle of mutual recognition plays an important role in the context of primacy and fundamental rights protection in European criminal law, as the Treaty stipulates that it should be taken as a basis for judicial cooperation measures, on the one hand, whereas, on the other, the approximation of procedural rights is limited to the extent necessary to facilitate mutual recognition of judgments and judicial decisions.[10]

The Commission spells out on an annual basis the steps it takes to ensure that EU legislation complies with the EU Charter from the moment a proposal is developed and its impact is assessed to its discussion during negotiations between the EU institutions and its final adoption. A guidance document on how to take into account fundamental rights in Commission impact assessments was published in 2011.[11] In the same year, the Council adopted conclusions on the effective implementation of the Charter, in which it commits itself to

ensuring the fundamental rights compliance of its initiatives and amendments to Commission proposals. Its working party on fundamental rights, citizens' right and free movement of persons (FREMP) has since developed 'guidelines on methodological steps to be taken to check fundamental rights compatibility at the Council's preparatory bodies.'[12]

II. Parliament's experience in the exercise of democratic scrutiny

The European Parliament has taken up its role as ordinary legislator in the area of European criminal law in an evolving context within which there have been many open questions regarding the exact practical implications of the institutional and fundamental rights framework outlined above.[13]

Council document 14449/09, 16 October 2009. In a resolution focussing on the development of an EU approach to criminal law, the need for Parliament to develop its own procedures in order to ensure a coherent criminal law system of the highest quality was acknowledged.[14] In scrutinizing legislative proposals, including their compliance with the EU Charter, Parliament's Committee on Civil Liberties, Justice and Home Affairs (LIBE) can rely on the Directorate for impact assessment and European added value (IMPA).[15] It may also seek the opinion of EU agencies, such as the Fundamental Rights Agency,[16] Parliament's legal service, and academic experts.

The Directive on Access to a Lawyer[17] and the Directive on the European Investigation Order[18] will be treated as examples of the way Parliament has managed to exercise democratic scrutiny so far.

1. Directive on Access to a Lawyer

The negotiations on the Directive on Access to a Lawyer proved to be particularly contentious. The Commission proposal[19] was not well received by a number of Member States, with a coalition of five of them (NL, BEL, FR, UK and IRL) claiming that this proposal went beyond European Court of Human Rights case law and that allowing early access to a lawyer would reduce the effectiveness of law enforcement and lead to disproportionate costs.[20] The Council's general approach contained a number of consequential adaptations of the text, in particular as regards the exclusion of "minor offences" from the scope of the measure, the moment of access, the modalities of the lawyer's participation during questioning, derogations from access to a lawyer, lawyer-client confidentiality, and remedies against breaches of the right of access to lawyer.[21] Spain and Italy, however, joined the Commission in a joint declaration expressing their discontent with the level of fundamental rights protection achieved in the general approach.[22] At the same time, the Council's general approach ushered in difficult negotiations with the European Parliament, which largely followed the Commission proposal. An exception was the mandatory exclusion of evidence obtained in violation of the right of access to a lawyer, taking into account the differences among Member State as regards rules and systems on the admissibility of evidence.

As overcoming the differences between Council and Parliament hinged upon the exact interpretation of decisions of the European Court of Human Rights (ECtHR), the Parliament sought the advice of the Secretariat of the Council of Europe.[23] This was perhaps a bit surprising given the existence of the Fundamental Rights Agency. However, this hesitation might be explained by the fact that this agency's mandate has so far not been aligned with the Lisbon Treaty to include the areas of police and judicial cooperation in criminal matters.[24] Parliament also relied on the work of academics, practitioners, and NGOs.[25] Their task was made more difficult by the fact that the "four column document" comparing the positions of Commission, Council, and Parliament, including the latest compromise suggestions, was not publicly available,

although the rapporteur provided feedback to the LIBE committee after the trialogues.[26] Another difficulty resulted from the relative speed with which trialogue negotiations, meetings between the rapporteur and shadow rapporteurs, feedback to the LIBE committee, and new compromise proposals on behalf of the Council followed each other. These are issues which are the topic of wider concern within the Parliament and those studying the way in which inter-institutional negotiations are conducted in practice.[27]

The Directive resulting from these negotiations[28] contains a number of points on which Parliament managed to defend its position, notably on avoiding derogations to lawyer-client confidentiality in the articles of the Directive (Parliament was strongly supported by the European Commission on this point, in line with the joint declaration attached to the general approach).[29] As regards other points, notably limiting derogations to the right of access to a lawyer, Parliament was forced to compromise.[30] The article on remedies has also been criticised for its weak language on excluding evidence obtained in absence of a lawyer, though it remains to be seen whether this may be compensated for through an interpretation in line with the accompanying recital in which ECtHR case law is explicitly cited.[31]

2. European Investigation Order

The Stockholm programme foresaw a measure on the setting up of a comprehensive system for obtaining evidence in cases with a cross-border dimension, based on the principle of mutual recognition as well as on common standards for gathering evidence in criminal matters in order to ensure its admissibility.[32] Before the Commission came up with legislative proposals, in 2010 a group of Member States decided to launch their own initiative for a Directive regarding the European Investigation Order.[33] This initiative was even accompanied by a detailed statement thoroughly justifying the need for the Directive from a law enforcement perspective, as well as an "impact analysis,"[34] also referring to fundamental rights. However that particular fundament rights impact analysis was limited to the rights of freedom and security and good administration as well as a statement that an evidence collecting instrument with a global scope would "meet the concern of the citizens to be protected and to combat criminality."[35] It notably did not assess the impact of the proposal on the rights to a fair trial and data protection as spelled out in the (subsequent) Commission guidance document.[36]

The Council reached a general approach in December 2011,[37] allowing negotiations with the European Parliament, whose mandate for negotiations was adopted in May 2012.[38] As with the Directive on Access to a Lawyer, the differences between the positions of Parliament and Council again mostly revolved around fundamental rights safeguards. Parliament's position was inspired by the disproportionate use of the European Arrest Warrant, a matter on which it has more recently (unsuccessfully) called for legislative amendments.[39] The Commission, due to the fact that it had been sidelined by the Council, did not play an active role in the negotiations.[40] In this specific case, Parliament did ask for the opinion of the Fundamental Rights Agency, which helped set the parameters for a ground for non-execution based on fundamental rights,[41] facilitating an agreement between Parliament and Council.[42]

When comparing the Directive on the European Investigation Order with that on Access to a Lawyer, there is, however, a remarkable difference between them as regards the way in which they frame the relationship with fundamental rights protections offered by national law. Recital 54 to the Access to a Lawyer Directive maintains that "a higher level of protection [offered by national law] should not constitute an obstacle to the mutual recognition of judicial decisions."[43] However, Recital 39 to the Directive on the EIO (the first mutual recognition measure adopted afterwards) argues that it "respects the fundamental rights and observes the principles recognised by Art. 6 of the TEU and in the Charter (…) and in the Member States' constitutions in their respective fields of application."[44] Exactly how these recitals are to be reconciled is not clear. The EIO seems to leave too much scope for Member States to intervene based on national law, whereas the Access

to a Lawyer directive seems to leave too little. It would have been better if Recital 54 would have more closely followed the (already contested) language of the Court by replacing "constitute an obstacle to mutual recognition of judicial decisions" with "compromise the primacy, unity and effectiveness of EU law."[45]

III. Achieving better regulation in the area of European criminal law

The fact that Member States are still allowed to come up with legislative proposals in the area of European criminal law may be seen as a serious problem, as their proposals do not go through a proper impact assessment procedure, including a fundamental rights impact assessment (though the revised Council guidelines might signal an improvement in this respect). Still, from a better regulation perspective, the preferred option would be for the Commission to exercise its right of legislative initiative. Parliament also cannot be expected to compensate for a Council general approach agreed below the minimum level of protection offered by the EU Charter. Council needs to be held to its commitment to comply with the Charter in its amendments to Commission proposals.

At the same time, the European Parliament and its LIBE committee can take further steps in ensuring better regulation by relying more on the expertise of EU agencies as well as seeing to it that negotiations are conducted with a maximum of transparency and at a pace that allows academics, practitioners, and NGOs to contribute to the quality and coherence of the resulting legislation. Ensuring compliance with fundamental rights is not just a matter of checking ECtHR case law. One also needs to take into account the legal traditions and systems of the Member States, including the way in which they guarantee fundamental rights as well as the specific supranational context in which European criminal law is developed.

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1. O.J. C 115 of 9 May 2008, p. 1; For a commentary on the EU Charter, see S. Peers, T. Hervey, J. Kenner, A.Ward (eds.), *The EU Charter of Fundamental Rights*, Hart publishing, 2014.↩
2. The various Commission initiatives on better/smart regulation are available at: http://ec.europa.eu/smart-regulation/index_en.htm↩
3. For an overview of the institutional framework after the entry into force of the Lisbon Treaty, see S. Peers, *EU Justice and Home Affairs Law*, 3rd edition, Oxford University Press (2011), pp. 41-107.↩
4. See Art. 76 TFEU.↩
5. Art. 82(3) TFEU; Peers (2011), p. 93.↩
6. Protocol (No. 21) on the position of the United Kingdom and Ireland in respect of the Area of Freedom, Security and Justice, O.J. C 83 of 30 March 2010, p. 295.↩
7. Protocol (No. 22) on the position of Denmark, O.J. C 83 of 30 March 2010, p. 299.↩
8. See Art. 52(3) and 53 EU Charter.↩
9. Case C-399/11, *Melloni*, not yet published, § 59: It is settled case law that, by virtue of the principle of primacy of EU law, which is an essential feature of the EU legal order (see Opinion 1/91 [1991] ECR I-6079, § 21 and Opinion 1/09 [2011] ECR I-1137, § 65), rules of national law, even of a constitutional order, cannot be allowed to undermine the effectiveness of EU law on the territory of that State (see, to this effect, *inter alia*, Case 11/70, *Internationale Handelsgesellschaft* [1970] ECR 1125, § 3 and Case C-409/06, *Winner Wetten* [2010] ECR I-8015, § 61); It is true that Art. 53 of the Charter confirms that, where an EU legal act calls for national implementing measures, national authorities and courts remain free to apply national standards of protection of fundamental rights, provided that the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity, and effectiveness of EU law are not thereby compromised.↩
10. See Art. 82 (1) and (2) (b) TFEU; For recent publications on mutual recognition more generally, see Ouwerkerk, *Quid Pro Quo? A comparative law perspective on the mutual recognition of judicial decisions in criminal matters*, Intersentia, 2011; A. Suominen, *The principle of mutual recognition in cooperation in criminal matters, a study of the principle in four framework decisions and in the implementation legislation in the Nordic Member States*, Intersentia, 2011; Janssens, *The principle of mutual recognition in EU law*, Oxford University Press, 2013.↩
11. 2013 Report on the Application of the EU Charter of Fundamental Rights, COM (2014) 224 final; Commission staff working paper, Operational guidance on taking account of Fundamental Rights in Commission Impact Assessments, SEC (2011) 567.↩
12. Council document 13390/14, 29 September 2014.↩
13. For a more general assessment, see Carrera, Hernanz and Parkin, *The 'Lisbonisation' of the European Parliament, Assessing progress, shortcomings and challenges for democratic accountability in the area of freedom, security and justice*, CEPS Paper in Liberty and Security in European No. 58, September 2013.↩
14.
15.
16. *dom, security and justice*, CEPS Paper in Liberty and Security in European No. 58, September 2013.

European Parliament resolution of 22 May 2012 on an EU approach to criminal law, P7_TA(2012)0208.↩

17. Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty, O.J. L 294/1 of 6 November 2013.↩
18. Directive 2014/41/EU of 3 April 2014 regarding the European Investigation Order in criminal matters, O.J. L 130 of 1 May 2014, p. 1.↩
19. COM (2011) 0326 final, 8 June 2011.↩
20. Proposal for a Directive of the European Parliament and of the Council on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest – Note by Belgium / France / Ireland / the Netherlands / the United Kingdom, Council document 14495/11 of 22 September 2011.↩
21. Council document 10467/12, available at http://register.consilium.europa.eu/pdf/en/12/st10/st10467.en12.pdf↩
22. Council document 10908/12, p. 3: "The Commission, Spain and Italy note that in the course of the negotiations in the Council good progress has been made towards strengthening procedural rights, notably on the access to a lawyer in criminal proceedings in the European Union. The draft Directive as it currently stands still does not satisfy all our concerns as far as protection of fundamental rights and procedural guarantees is concerned. We notably continue to have some important concerns about the derogations included in the current compromise text, including to the principle of confidentiality of the communication between the lawyer and the suspect or accused person, which is a key pillar of the fundamental rights of the person concerned. Our objective is to achieve a high level of protection of fundamental rights on the basis of the standards set out in the Charter of Fundamental Rights. As a matter of principle the application of derogations should be subject to law and judicial control. Further, as regards minor offences, we believe that exclusions from the scope should be limited to those which are duly and objectively justified. However, we believe that time is now ripe for starting negotiations with the European Parliament on the draft Directive and we will therefore support the Presidency in carrying on negotiations with the European Parliament on these issues, taking full account of our remaining concerns."↩
23. Council of Europe, Opinion of the Secretariat on the Commission's proposal for a Directive of the European Parliament and of the Council on "the right to access to a lawyer in criminal proceedings and on the right to communicate upon arrest", Strasbourg, 9 November 2011; Council of Europe, Opinion of the Secretariat on the Commission's proposal for a Directive of the European Parliament and of the Council on "the right to access to a lawyer in criminal proceedings and on the right to communicate upon arrest", Strasbourg, 20 September 2012.↩
24. Council Regulation (EC) No. 168/2007 of 15 February 2007 establishing a European Union Agency for Fundamental Rights, O.J. L 53, 22 February 2007, pp. 1–14↩
25. Notably Justice, the Open Society Institute, Council of Bars and Law Societies of Europe (CCBE), the European Criminal Bar Association (ECBA), the Meijers Committee and Fair Trials International; Joint NGO briefing on the Directive on the right of access to a lawyer in criminal proceedings and the right to inform a third party upon deprivation of liberty, 15 April 2013; T. Spronken, 'The Dutch exception', *Nederlands Juristenblad*, 2012, 37.↩
26. See Rule 73 of the Rules of Procedure of the European Parliament and Annex XX containing a Code of conduct for negotiating in the context of the ordinary legislative procedures.↩
27. *T. Bunyan*, Secret trialogues and the democratic deficit, Statewatch viewpoint, September 2007.↩
28. Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty, O.J. L 294/1 of 6 November 2013.↩
29. Directive 2013/48/EU, Art. 4.↩
30. Directive 2013/48/EU, Arts. 3(5) and 3(6), Recitals 31, 32.↩
31. Directive 2013/48/EU, Art. 12, Recital 50; Cras (2014), p. 40↩
32. Stockholm programme, Council doc 14449/09, 16 October 2009; Action plan implementing the Stockholm programme, COM (2010) 0171 final, 20 April 2010.↩
33. 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, Council document 9288/10; F. Zimmermann, S. Glaser, A. Motz, 'Mutual recognition and its implications for the gathering of evidence in criminal proceedings: a critical analysis of the initiative for a European Investigation Order, *European Criminal Law Review*, 2011, pp. 56-84; D. Sawyers, 'The European Investigation Order, Travelling without a 'roadmap', CEPS Paper in Liberty and Security in Europe, June 2011, available at: http://www.ceps.eu/book/european-investigation-order-travelling-without%E2%80%98roadmap%E2%80%99.↩
34. Council document 9288/10, ADD 2.↩
35. Council document 9288/10, ADD 2, p. 33.↩
36. Report from the Commission to the European Parliament, the Council, the European economic and social committee, and the Committee of the Regions, 2013 Report on the application of the EU Charter of Fundamental Rights, COM (2014) 224 final; Commission staff working paper, Operational guidance on taking account of Fundamental Rights in Commission Impact Assessments, SEC (2011) 567.↩
37. Council document No. 18225/1/11, available at http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%2018225%202011%20REV%201.↩
38. Available at http://www.europarl.europa.eu/document/activities/cont/201205/20120523ATT45657/20120523ATT45657EN.pdf.↩
39. European Parliament resolution of 27 February 2014, with recommendations to the Commission on the review of the European Arrest Warrant (2013/2109 (INL)), P7_TA-PROV (2014); Follow-up to the European Parliament resolution of 27 February 2014, with recommendations to the Commission on the review of the European Arrest Warrant, received by the European Parliament on 24 July 2014.↩
40. Commission comments on the EIO Initiative, COM (2010) 5789, http://register.consilium.europa.eu/pdf/en/10/st13/st13446.en10.pdf .↩
41. Available at http://fra.europa.eu/sites/default/files/fra_uploads/1490-FRA-Opinion-EIO-Directive-15022011.pdf .↩
42. Directive 2014/41/EU of 3 April 2014 regarding the European investigation order in criminal matters was published on 1 May 2014 (O.J. L 30/1 of 1 May 2014).↩
43. Directive 2013/48/EU, Recital 54: "This Directive sets minimum rules. Member States may extend the rights set out in this Directive in order to provide a higher level of protection. Such higher level of protection should not constitute an obstacle to the mutual recognition of judicial

decisions that those minimum rules are designed to facilitate. The level of protection should never fall below the standards provided by the Charter or by the ECHR, as interpreted by the case-law of the Court of Justice and of the European Court of Human Rights'↩

44. Directive 2014/41/EU, Recital 39: "This Directive respects the fundamental rights and observes the principles recognised by Article 6 of the TEU and in the Charter, notably Title VI thereof, by international law and international agreements to which the Union or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and in Member States' constitutions in their respective fields of application. Nothing in this Directive may be interpreted as prohibiting refusal to execute an EIO when there are reasons to believe, on the basis of objective elements, that the EIO has been issued for the purpose of prosecuting or punishing a person on account of his or her sex, racial or ethnic origin, religion, sexual orientation, nationality, language or political opinions, or that the person's position may be prejudiced for any of these reasons."↩
45. Case C-399/11, *Melloni*, not yet published, paragraph 59.↩

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