

A Manifesto on European Criminal Procedure Law

European Criminal Policy Initiative

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The Manifesto is published in ZIS 2013, 430 et seq., available online at www.zis-online.com.



With Financial Support from the Criminal Justice Programme of the European Union
and the Ragnar Söderbergs Stiftelse

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Preamble

The undersigned criminal law scholars from ten Member States of the European Union hereby present a Manifesto on European Criminal Procedure Law, which follows the Manifesto on European Criminal Policy in the field of substantive criminal law of 2009.¹

This manifesto is rooted in the common tradition of European enlightenment. Its authors act in recognition of the fact that the spirit of enlightenment is the major contributor to and the driving force behind European civilisation and current integration, and that it should provide guidance for the preservation of European culture and future cooperation between Member States. In particular, the laws of criminal procedure and mutual legal assistance, which recently have increasingly been shaped by Union legislation, must adhere to the highest standards of the rule of law and must continuously guarantee fundamental rights, notwithstanding the fact that in this area of law various interests of states, societies and individuals have to be balanced.

Being aware that effective criminal justice is a basic prerequisite for peaceful coexistence in any society, the undersigned emphasise that the inevitable clash with the fundamental rights of those persons against whom the proceeding is conducted or who are otherwise affected by it may not, however, be resolved one-sidedly in favour of the criminal prosecution – regardless of whether it is conducted by national or supranational authorities.

The undersigned acknowledge that if a cross-border criminal prosecution is to be conducted on the basis of the competences that have been granted to the Union, the interests of those Member States whose participation is required also must be taken into account. Respect for their sovereignty alone already requires this. Conversely, the Member States are also obliged to loyally cooperate among themselves and with the Union for the purposes of criminal prosecution.

The authors furthermore emphasise that, if the European Union is to become a single area of justice which places the individual at the centre of its actions and in which the highest requirements of the rule of law as well as the legal orders and traditions of the Member States are observed at the same time, the Union legislator must strike a balance between the – national or supranational – interest in criminal prosecution, the

individual rights that are affected, and the Member States' legal orders and traditions. In particular, Union legal instruments on cross-border or supranational criminal proceedings should aim to create a level of protection for individuals which sets standards internationally.

For this purpose, the undersigned direct the following demands to those institutions that participate in the enactment of Union legal instruments in the area of criminal procedure law. In doing so, the undersigned are aware that far-reaching informal cooperation among police and intelligence services may circumvent parts of the demands. Therefore, the Union legislator is also emphatically called upon to prevent or suppress these possible circumventions through legal instruments on police cooperation.

I. Fundamental demands to the Union legislator

1. First demand: limitation of mutual recognition

The Member State or Union interest in the efficient execution of a cross-border criminal proceeding on the basis of the principle of mutual recognition must not be absolute, but rather is to be limited in two respects. It must recede where the criminal proceeding would risk violating legitimate interests either of the individual or the Member State. The extent to which mutual recognition is to be limited is determined by means of a proportionality test. This must take into account both individual and national interests. Such a limitation of mutual recognition also reinforces mutual trust among Member States and citizens' trust in the Union.

a) Limitation of mutual recognition through the rights of the individual

Where cross-border criminal proceedings are conducted based on the principle of mutual recognition, different legal orders intertwine. The transnational nature of such proceedings alone risks placing those persons who are affected by them in a weaker position than had the proceedings been purely domestic, regardless of the general recognition of their basic rights. This is particularly problematic if they have relied on a legal position which does not exist in the forum state in full or at all. Moreover, the overlap of different legal orders can result in ambiguity as to the applicable law and thereby impair legal certainty. Specifically, therefore, the Union legislator must observe the following guidelines depending on the affected group of persons:

aa) The rights of the suspect

In every fair proceeding held in accordance with the rule of law, the suspect must be granted the status of a subject of the proceedings with comprehensive suspect's rights at the earliest possible opportunity and in any event before investigations are initiated or compulsion is used against him. This is necessary in order to satisfy the second paragraph of art. 47 of the Charter of Fundamental Rights and art. 6 para. 1 of the European Convention on Human Rights.

* This project has been funded by the European Commission's Criminal Justice 2010 Programme and the Ragnar Söderbergs Stiftelse.

** A list of the ECPI members can be found at the end of the document. We would like to kindly thank Mr Georg Langheld, Mr Christoph Wesch, Mr Simon Drew, Ms Miriam Meyer, Mr Adrian Mühlbauer, Mr Carl Whittaker and Ms Alexandra Zahn, without whose great commitment this project could not have been accomplished.

¹ The manifesto was published in various languages in ZIS 12/2009, available online at: http://www.zis-online.com/dat/artikel/2009_12_383.pdf.

In the course of a criminal prosecution where several Member States cooperate on the basis of mutual recognition, this status may be withheld from the suspect and the attendant rights may be weakened or granted to him too late. Similarly, due to the legal and factual differences that continue to exist between the Member States, the suspect's rights may be largely devalued or circumvented by "forum shopping".

The Union legislator must primarily respond to this danger by creating a general level of protection in respect of the most important suspects' rights which clearly exceeds the minimum rules of the European Convention on Human Rights. In any case, under the principle of compensation (below I. 6.), Union legal instruments must provide full compensation for weakened or deprived legal positions and for the abovementioned factual differences (e.g. ensure interpretation or translation services and consular assistance).

bb) The rights of the victim of a crime

The legitimate interests of a person who presumably has been harmed by a crime (victim) are to be taken into account in a criminal proceeding. However, the balance of the criminal proceeding must not be impaired thereby.

If the criminal proceeding takes place outside the victim's country of residence, those rights risk being weakened: the victim must then cope with a foreign legal order and foreign society. Typically, victims also face linguistic problems and, due to the physical distance alone, their communication with authorities and the victim protection facilities in the prosecuting state are limited. The fact that Member States each grant different rights of participation in the proceedings does not in itself legitimise harmonisation.

In order to resolve the abovementioned difficulties under the principle of compensation (below I. 6.), there is first and foremost a need for practical assistance, in particular through timely information about the criminal proceeding, on victim protection facilities and on victims' rights, interpretation or translation assistance as well as assistance with the appointment of legal counsel.

cc) The rights of third persons affected by the proceeding

If other persons are affected by measures taken in connection with a criminal proceeding – such as, for example, family members, witnesses or owners of seized property – their rights may only be interfered with to the smallest extent possible.

As a result of the principle of mutual recognition, legal positions which third persons affected by the proceeding enjoy in the executing state, and on which they rely, can be devalued. This may amount to a violation of their basic rights as recognised in the Charter of Fundamental Rights, the European Convention on Human Rights and the constitutional traditions of the Member States.

The Union legislator must respond to this possible devaluation under the principle of compensation (below I. 6.).

b) Limitation of mutual recognition through the national identity and ordre public of the Member States

As a classic expression of sovereign state power, every criminal proceeding – including one conducted cross-border – requires that the ordre public and national identities of the Member States involved be taken into account (art. 4 para. 2 TEU). In principle, the Union legislator must also respect them.

If a Member State is compelled to recognise and execute another Member State's measures and thus acts of foreign sovereignty which run counter to its own values, this can present a serious challenge to its legal and social order.

Therefore, under the principle of compensation (below I. 6.), Union legal instruments based on the principle of mutual recognition must always be drafted in such a way that the executing state can act in accordance with its national traditions and values. This can be achieved by introducing a specific ground for refusal of cooperation, as is for instance explicitly provided for in respect of civil proceedings.

c) Limitation of mutual recognition through the principle of proportionality

A fundamental principle of the exercise of power in accordance with the rule of law is the principle of proportionality. This is enshrined both in art. 5 para. 4 TEU and in the constitutions of numerous Member States. Therefore, also in the course of a cross-border criminal proceeding, all measures must be suitable, necessary and appropriate to achieve the legitimate aim. In a system based on mutual recognition, the Union legislator must ensure that the issuing state examines the proportionality of each of its measures.

In cross-border criminal proceedings, interferences with individual rights are often more intrusive than in a purely domestic proceeding. This is so, *inter alia*, because affected persons are confronted with measures which have been taken by a foreign authority on the basis of a law that is foreign to them, because they cannot communicate in their language, and because they have more difficulties contacting next of kin. In the course of the assessment of a measure's proportionality by the issuing state, the principle of compensation (below I. 6.) requires that the specific disadvantages for the affected person resulting from the cross-border dimension are given particular consideration.

As far as mutual recognition results in only the authorities of the issuing state assessing a measure's proportionality, the authorities of the executing state have – except for cases where the national identity and the ordre public are affected (above I. 1. b) – no opportunity to make adjustments even though they may be in a better position to evaluate some aspects of the measure that are relevant to proportionality. In any case, as far as the factual basis of the proportionality test is concerned, the Union legislator must ensure that the issuing authority obtains and takes into account the assessment of the executing state's authorities to the extent that the latter are closer to the relevant facts.

Moreover, the law of the executing state may provide for measures which are less repressive but entirely sufficient to achieve the aim pursued, yet were not considered by the issuing state's authorities when the order was made. The executing

state must at least be permitted to resort to less repressive measures that evidently are equally effective for the purposes of the issuing state.

2. Second demand: balance of the European criminal proceeding

With regard to both a criminal proceeding on the basis of mutual recognition and an increasingly supranationalised European criminal proceeding, the fundamental rights that apply in the Union and art. 4 para. 2 TEU require that the public interest in criminal prosecution, the Member State's interest in preserving the national identity, and the affected citizens' interests are all balanced on the basis of the principle of proportionality.

The creation and increasing involvement of supranational institutions in criminal proceedings – especially of a future European Public Prosecutor's Office – may lead to a shift in power solely in favour of the prosecution. This may weaken the position of the suspect, the victim, and third persons affected by the proceeding. In addition, supranational authorities can be harder to communicate with than national authorities in a domestic criminal proceeding. To a lesser extent, Member States' national identities may be affected too.

To avoid such an imbalance and to comply with the principle of compensation (below I. 6.), the Union legislator should, in addition to guaranteeing procedural rights for the affected individuals, consider establishing institutions that strengthen their position. When creating supranational authorities and defining their competences, preserving Member States' national identities is important.

3. Third demand: respect for the principle of legality and judicial principles in European criminal proceedings

A criminal proceeding is characterised by its high degree of formalisation. To comply with the requirement of legality, decisions on the applicable law and on criminal procedural measures which interfere with individual rights, at least, must be based on clear legal provisions. The affected person must be allowed to seek a remedy before a tribunal, which the first paragraph of art. 47 of the Charter of Fundamental Rights also requires.

When criminal proceedings were governed by purely national law, the Member States' legislators could ensure that these principles were observed. The lack of clear supranational rules for cross-border cases therefore could be tolerated more easily. However, nowadays cooperation in criminal matters is increasingly governed by Union law. Therefore, in the future the adherence to the principle of legality and judicial principles in cross-border criminal proceedings must be ensured at the Union level.

Where several Member States have criminal jurisdiction over an offence, there is a danger of parallel proceedings which not only cost time and money but also put a significant burden on the suspect. As the current provisions on *ne bis in idem* follow the principle "first come, first served", it is largely a matter of chance which substantive and procedural law is applicable in the end. Furthermore, some of the conditions under which basic rights may be interfered with in the course

of judicial cooperation within the Union are unclear, and they are laid down in a multiplicity of legal instruments which often are only partially implemented by the Member States. The interaction between supranational and national institutions in cross-border criminal proceedings, too, is not always clearly regulated.

The Union legislator, therefore, must create a clear set of rules governing which Member States may exercise criminal jurisdiction over an offence and thereby prevent conflicts of jurisdiction. If the Union legislator creates possibilities for cooperation between Member States or procedural participation of supranational institutions, then under the principle of compensation (below I. 6.) it must at least define the requirements and limits to interferences in individual rights as clearly as possible. Similarly, it must ensure that the affected person can obtain effective legal protection.

4. Fourth demand: preservation of coherence

A fair criminal proceeding in accordance with the rule of law is only possible in a system without internal contradictions which strikes a balance in each case between the interests of the state and the suspect. Further, the law of criminal procedure must be coherent with substantive criminal law, which it is supposed to enforce.

When the Union legislator sets out requirements for cross-border criminal proceedings, there is the danger that these provisions would contradict rules and definitions contained in existing Union legal instruments and thereby violate art. 11 para. 3 TEU and art. 7 TFEU (lack of horizontal coherence). At the same time, the harmonisation of criminal procedure law may interfere with the consistency of domestic systems of criminal justice (lack of vertical coherence). The consistency and balance of a national criminal proceeding is also endangered if, through mutual recognition, elements of different procedural systems are combined with one another ("hybrid proceeding").

Coherence at a vertical – within the legal order of the Union – and horizontal – in respect of Member States' systems of criminal justice – level must be borne in mind by the Union legislator. If it deviates from the frame of reference established at the Union level, this requires specific justification. To avoid unnecessary interference with the consistency of national criminal justice systems, the Union legislator has to examine the impact of new legal instruments – both for the implementation of the principle of mutual recognition and for the harmonisation of national systems of procedure – in this regard and must explicitly substantiate their harmlessness on this basis. If the coherence of a Member State's system of criminal justice was to be seriously disrupted, the Union legislator would have to arrange appropriate compensation under the principle of compensation (below I. 6.).

5. Fifth demand: observance of the principle of subsidiarity

Instruments which are relevant for criminal procedure law and which are enacted on the basis of shared competences must, in accordance with the general principles of Union law (art. 5 para. 3 TEU), observe the principle of subsidiarity.

According to this principle, the Union legislator may take action only on the condition that the goal pursued:

- (a) cannot be reached as effectively by measures taken at the national level; and
- (b) due to its nature or scope can be better achieved at Union level.

The principle of subsidiarity applies to instruments regulating criminal law cooperation between the Member States, to harmonisation of national procedural law and to the establishment of supranational institutions or entities such as the European Public Prosecutor's Office.

Accordingly, the national legislator should have priority over the Union legislator to the extent that the Member State can deal with a given issue. In that way, citizens will be brought closer to decision making on questions of criminal procedure law.

Moreover, in determining whether a goal pursued within criminal procedure is "better achieved" at Union level, side effects regarding, in particular, democratic participation and human rights related issues (effective defence) must be taken into consideration. If the proposed Union legislation, for instance, considerably weakens the position of the defence – and if this weakness cannot be compensated at the Member State level – the goal is not "better achieved" at Union level.

The test of subsidiarity should be applied separately in every single case, i.e. in relation to every instrument and each part of that instrument. Legislative measures must be thoroughly justified in accordance with the protocol on subsidiarity (Protocol no. 2 to the Lisbon Treaty); the national parliaments must be involved as provided for therein. In accordance with the requirements of good governance, the proposition of a legal instrument relating to criminal procedure law must always be preceded by an extensive evaluation (in the sense of a prior subsidiarity test) weighing all circumstances and taking into account all alternative courses of action. A merely formalistic affirmation of the subsidiarity requirements is not sufficient under any circumstances.

6. Sixth demand: compensation of deficits in the European criminal proceeding

To ensure that each legal instrument in the area of criminal procedure law adheres to the aforementioned demands, the Union legislator must first and foremost provide for safety mechanisms in each respective legal instrument. To the extent that such mechanisms are not sensible or not sufficient, particularly in areas in which the deficits of the European criminal proceeding present themselves as purely factual consequences of cross-border criminal prosecution, the enactment of supplementary measures which provide for appropriate compensation for existing deficits is necessary.

In the spirit of good governance, the Union legislator has to explain in detail why it decides in favour or against a particular type of compensation. In principle, it must be guided by the notion that the more serious the effects of a legal instrument are, the more extensive the compensation measures need to be. Particularly in the area of mutual recognition, a

legal instrument has to grant to the executing state a degree of leeway corresponding to the degree to which the relevant provisions have not been harmonised beforehand.

II. Explanatory notes to the demands of the European Criminal Policy Initiative

In the following, the Manifesto's criminal policy demands for the Union legislator will be explained by referring to concrete examples of legal instruments that are already in force or in preparation. This will show that, especially in more recent legislation, there are positive tendencies which address concerns voiced in regard to older legal instruments. Nonetheless, there is plenty of room for improvement. When assessing the compliance of Union legal instruments with the demands of the Manifesto, it becomes apparent at several points that none of these demands can be examined in isolation; rather, they are linked in multiple ways. The result is that while a provision may be welcomed in regard to one demand, other demands may require its improvement.

1. Explanatory notes to the demand of limiting mutual recognition

The principle of mutual recognition is enshrined in primary Union law, see art. 82 para. 1 TFEU. But that provision is silent about the extent to which decisions in criminal matters by one Member State's authorities must be recognised in all Member States. There is no authority requiring absolute, unrestricted recognition. Rather, it has always been accepted that the extent of the obligation to recognise another Member State's judicial decisions has to be determined individually for each measure based on its particular circumstances.² Consequently, there is room to limit mutual recognition where this is sensible.

This section first presents examples of legal instruments that are directly based on the principle of mutual recognition. To the extent that the Proposal for a Regulation on the establishment of the European Public Prosecutor's Office³ also raises questions in regard to individual rights, state interests, or the balance struck by the principle of proportionality, these are examined more closely in the explanatory notes to the second demand of the Manifesto.

a) Limitation of mutual recognition through the rights of the individual

aa) The rights of the suspect

The realisation of the state interest of uncovering the truth through a criminal proceeding is limited by the rule of law and the status of the suspect as subject of the proceedings. Respect for the subject's dignity demands that he is not reduced to being a mere object of the state's efforts to determine the truth. Rather, he must be granted a position that enables him to pursue his rights effectively in the criminal proceeding.

² See the programme of measures to implement the principle of mutual recognition of decisions in criminal matters, OJ EC 2001 no. C 12, p. 10, 11 et seq.

³ COM (2013) 534 final.

For European criminal policy, this means that the scope of the principle of mutual recognition must be limited by providing for essential rights of the suspect.

That a sensible limitation of mutual recognition is possible, yet has not been sufficiently achieved so far, can be seen in the following provisions:

- Art. 23 para. 4 of the Framework Decision on the European arrest warrant⁴ permits the postponement of the surrender of a person to the issuing state as long as serious humanitarian reasons require this, such as substantial grounds for believing that it would manifestly endanger the life or health of the requested person. Art. 20 para. 3 of the Framework Decision on mutual recognition of financial penalties⁵ goes even further, providing for an – albeit only optional – ground for refusal in cases where fundamental rights or fundamental legal principles of the Union may have been infringed. Regrettably, infringements of fundamental rights, however, are not generally acknowledged as limiting the principle of mutual recognition: only recently the CJEU failed, in its decisions in the cases of Radu⁶ and Melloni⁷, to establish such a human rights-driven limitation to mutual recognition. The blanket references to human rights obligations⁸ that are frequently found in legal instruments have thus proven to have had little effect in practice.
- The affected person's interest in protection from being prosecuted twice for the same act (*ne bis in idem*) is in many ways taken into account in legal instruments for the implementation of mutual recognition. Thus, for instance, art. 3 no. 2 of the Framework Decision on the European arrest warrant⁹ contains a mandatory ground for refusal. Furthermore, it is to be welcomed that art. 4 no. 2 of this Framework Decision permits the executing Member State to refuse the transfer of a person where he is being prosecuted for the same act in the executing Member State (even though a statutory regime of criminal jurisdiction at the European level would be preferable, see below II. 3.).

⁴ Framework Decision 2002/584/JHA, OJ EC 2002 no. L 190, p. 1.

⁵ Framework Decision 2005/214/JHA, OJ EU 2005 no. L 76, p. 16.

⁶ CJEU, judgment of 29.1.2013 – case C-396/11 (Radu).

⁷ CJEU, judgment of 26.2.2013 – case C-399/11 (Melloni).

⁸ See e.g. art. 1 para. 3 Framework Decision 2002/584/JHA on the European arrest warrant, OJ EC 2002 no. L 190, p. 1; art. 10 Directive 2012/13/EU on the right to information in criminal proceedings, OJ EU 2012 no. L 142, p. 1; art. 8 Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings, OJ EU 2010 no. L 280, p. 1; art. 14 of the agreed text of the Proposal for a Directive on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest, Council Document no. 12899/13.

⁹ Framework Decision 2002/584/JHA, OJ EC 2002 no. L 190, p. 1.

Furthermore, the protection of the suspect is additionally extended by the optional ground for refusal in art. 4 no. 5, according to which the execution of a European arrest warrant can be denied on account of the requested person being finally judged in a third state in certain circumstances.

However, this must not conceal the fact that this protection from double punishment in mutual recognition instruments remains incomplete: For the most part, only optional grounds for refusal are provided to prevent a violation of the *ne bis in idem* principle. This is for instance demonstrated by art. 4 no. 3 of the Framework Decision on the European arrest warrant regarding final decisions by authorities in another Member State, which according to the jurisprudence of the CJEU, in principle, also fall under art. 54 of the Convention Implementing the Schengen Agreement (CISA)¹⁰. Similarly, the latest version of the draft Directive on a European investigation order¹¹ and the Framework Decision on mutual recognition of financial penalties¹² provide merely optional grounds for refusal (in the original initiative for a European investigation order¹³, a possibility to deny recognition on grounds of *ne bis in idem* was absent altogether). But if it is already apparent that a further conviction in the issuing state will be barred by the prohibition of double punishment, any cooperation between Member States aimed at this should be impermissible.

Several legal instruments also illustrate the general problems in respect of the principle of mutual recognition from the suspect's perspective.

- The principle of mutual recognition facilitates the mixing of different national systems of criminal procedure law (see also below II. 4. b) – vertical coherence). Thus, important safeguards protecting the suspect can be weakened: if evidence such as DNA samples or the transcript of an interrogation is gathered in a purely domestic proceeding in Member State A, this is done in accordance with the procedural law of Member State A. If subsequently Member State B requests this evidence by way of a European evidence warrant or, in the future, by way of a European investigation order for use in its own criminal proceeding, then the requirements which its own law provides for the collection of evidence (such as the right to consult a lawyer prior to interview) can no longer be seen at all. Accordingly, there is (already on the basis of the legal instruments currently in existence!) the danger of a “patchwork proceeding” in which rights of the suspect are disregarded. The European Court of Human Rights' decision

¹⁰ OJ EC 2000 no. L 239, p. 19.

¹¹ See art. 10 para. 1 lit. e Council Document no. 18918/11.

¹² Art. 7 para. 2 lit. a Framework Decision 2005/214/JHA, OJ EU 2005 no. L 76, p. 16.

¹³ Council Document no. 9145/10.

in the case of *Stojkovic*¹⁴ illustrates that this separation of competences for ordering and executing a measure is not merely a theoretical problem but can lead to a palpable loss of rights.

- The forum regit actum rules (first sentence of art. 12 of the Framework Decision on the European evidence warrant¹⁵, art. 8 para. 2 of the Proposal for a Directive on the European investigation order¹⁶) can help to prevent a mixing of procedural systems and thus a “patchwork proceeding” in which suspects’ rights are weakened or even circumvented. But this is true only subject to some restrictions: First, whether and to what extent the issuing state makes use of the forum regit actum rule is purely a matter of that Member State’s discretion. It would be more sensible to impose a general obligation to specify the formalities and procedures that are obligatory under its national law. Second, the formal requirements indicated by the issuing state can be disregarded by the executing state on the grounds that they are contrary to its fundamental principles of law. On the one hand, this is sensible and to be welcomed because it enables the executing state to preserve the coherence of its legal system. On the other hand, this, of course, amounts to a significant weakening of the forum regit actum rule and its above-mentioned benefits.
- The fact that requirements for ordering a measure and for its execution are to be assessed under different legal orders makes an effective defence more difficult. In particular, the affected persons often need legal counsel in both Member States. This is not taken into account by the mutual recognition instruments currently in force. Very much to be welcomed, by contrast, is the text of the future Directive on the right of access to a lawyer in criminal proceedings¹⁷ which has recently been adopted by the Parliament and the Council. In its art. 10 paras. 1 and 4, it provides for the first time that a person who has been arrested on the basis of a European arrest warrant has the right of access to a lawyer in the issuing as well as in the executing state. What matters now is that the Member States effectively implement this right. Furthermore, it would be desirable to introduce a similar guarantee into other measures based on the principle of mutual recognition. In addition, communication and coordination between the legal representatives in the executing state and the issuing state must be ensured so that institutional support should be considered (cf. on this also below II. 2.).
- Despite ever so far-reaching limitations on mutual recognition, material points of criticism remain from the defence’s point of view. These often have their origins in

factual circumstances, such as linguistic difficulties, problems in the selection of a suitable legal representative or the suspect’s lack of legal knowledge. To remedy these shortcomings and to further control the abovementioned risk of patchwork proceedings, it is vital that the Union continues to harmonise the Member States’ procedural law. The directives which have so far been adopted or drafted to compensate for the suspect’s disadvantages (cf. on this below II. 6.) can only be a first step in this regard.

- The principle of mutual recognition represents an additional burden on the suspect against the background that multiple criminal proceedings in respect of one offence are not effectively excluded. This leads to a lack of legal certainty because the suspect cannot know which substantive and procedural law will ultimately apply and thus cannot prepare his defence properly (see on this also II. 3.). Leaving the ineffective division of work among the prosecution authorities wholly to one side, parallel proceedings on the basis of the principle of mutual recognition can, moreover, lead to a situation where the suspect is confronted with investigative measures in several Member States and has to defend himself in several legal orders at the same time. That can only succeed with a team of cooperating lawyers who are not only experts in the respective legal orders but also in respect to interjurisdictional cooperation. The “average” suspect, however, cannot organise much less finance such a coordinated defence.

The existing rules of art. 54 CISA or art. 50 of the Charter of Fundamental Rights (which actually are suspect-friendly forms of mutual recognition) cannot prevent this because they intervene too late, i.e. only after a decision has become final in one Member State. Moreover, the exceptions to the prohibition on double punishment and double prosecution in art. 55 CISA appear too broad. Under certain conditions, they allow further punishment even if the courts of the Member State of the first instance have already sufficiently taken into account the other Member State’s interest in prosecution. If, for instance, a Frenchman kills an Italian in Germany and is convicted of murder in France (by virtue of the active personality principle) or Italy (by virtue of the passive personality principle), then, according to art. 55 para. 1 lit. a of CISA, Germany could, nonetheless, take action against this person once more – even though it is not obvious why the other Member States’ court decisions should be insufficient.

Against this background, the rules of the Framework Decision on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings¹⁸ are very disappointing. This legal instrument does not provide for a mandatory termination of parallel proceedings. On the contrary, it leaves it entirely to the Member States whether they choose to concentrate the proceedings in one Member State (“consultations [...] which may, where ap-

¹⁴ ECtHR, judgment of 27.10.2011 – 25303/08 (*Stojkovic* ./ France and Belgium).

¹⁵ Framework Decision 2008/978/JHA, OJ EU 2008 no. L 350, p. 72.

¹⁶ Council Document no. 18918/11.

¹⁷ Council Document no. 12899/13.

¹⁸ Framework Decision 2009/948/JHA, OJ EU no. L 328, p. 42.

appropriate, lead to the concentration of the criminal proceedings”) or to continue parallel proceedings. Thus, the double burden on the citizen remains.

bb) The rights of the victim of a crime and of third persons affected by the proceeding

Just as instruments for the implementation of the principle of mutual recognition can weaken the legal position of the suspect, some instruments also create difficulties from the view of third persons who are affected by the proceeding.

- Therefore, the Council’s compromise text in regard to the Proposal for a Directive on the European investigation order¹⁹ is to be viewed positively. By virtue of its art. 21 para. 6 lit. e and art. 22 para. 4 it provides for most-favoured treatment clauses in regard to questioning witnesses or experts by videoconference or other audio-visual transmission. According to those provisions the affected person can benefit from both Member States’ rights not to testify.
- Generally, it also is to be welcomed that the Framework Decision on the European evidence warrant²⁰ and the abovementioned future Directive on the European investigation order²¹ contain provisions according to which recognition and execution can be refused where they would contravene immunities or privileges. According to the latter’s draft recital 12b, this may also include immunities or privileges for medical and legal professions. Similarly, rules on the freedom of the press and freedom of expression in other media are also encapsulated by this. Nonetheless, these grounds for refusal leave significant points of criticism unaddressed:
First, the rules are unclear and the draft recitals refer very selectively to a number of circumstances so that doubts remain in respect of other important cases: the examples are exclusively tailored to certain professions. But “privileges and immunities” should also include provisions protecting family members or clerics. This should have been clarified explicitly in the Union instruments to avoid ambiguity.
Second, in these cases only an optional ground for refusal is provided to the executing state. This may satisfy the executing state’s interest in preserving the integrity of its legal order. But from the point of view of citizens’ rights it is not apparent why their application should be placed fully within the discretion of that state: Even if the affected persons rely on these legal positions, it would then depend on the discretion of the executing state whether their rights apply – although observance of those rights would be mandatory in a purely domestic proceeding in the executing state.

¹⁹ Council Document no. 18918/11.

²⁰ Art. 13 para. 1 lit. d Framework Decision 2008/978/JHA, OJ EU 2008 no. L 350, p. 72.

²¹ Art. 10 para. 1 lit. a Proposal for a Directive on the European investigation order, Council Document no. 18918/11.

- That the separation of competences for ordering and executing a measure may also reduce the rights of third persons becomes apparent, for instance, if rules exist in the issuing state which govern the handling of confidential documents after seizure. These are at risk of being devalued if corresponding provisions are absent in the executing state and if observance of these rules is not (cannot be) requested by way of the *forum regit actum* provisions.

b) Limitation of mutual recognition through the national identity and the ordre public of the Member States

The executing state’s interest in the preservation of its identity is taken into consideration in several provisions:

- In the Framework Decision on the European evidence warrant²² and in the Proposal for a Directive on the European investigation order²³, grounds for refusal are provided for where the executing state has an interest in the confidentiality of particular pieces of evidence. In the Framework Decision on mutual recognition of financial penalties²⁴ and in that on the European arrest warrant²⁵, the Member States’ typically value-based positions regarding the age of criminal responsibility are taken into consideration. However, this by no means resolves all the problems: For instance, it still remains possible to issue a European arrest warrant in respect of behaviour which in the issuing state is punishable on the basis of strict liability, i.e. irrespective of fault. In the executing state, this can lead to a conflict with the principle of *nulla poena sine culpa*.
- Similarly, it is a positive point that as regards mutual recognition of custodial sanctions, probation, and surveillance measures, there is the possibility of resorting to alternative measures if conflicts with the law of the executing state can be avoided thereby²⁶.
- Important provisions can also be found in art. 20 para. 4 lit. a of the EU Convention on mutual legal assistance²⁷ and art. 27d para. 3 of the Council’s general approach on

²² Art. 13 para. 1 lit. d Framework Decision 2008/978/JHA, OJ EU 2008 no. L 350, p. 72.

²³ Art. 10 para. 1 lit. a Council Document no. 18918/11.

²⁴ See art. 7 para. 2 lit. f Framework Decision 2005/214/JHA, OJ EU 2005 no. L 76, p. 16; similarly art. 15 para. 1 lit. g Framework Decision 2009/829/JHA, OJ EU 2009 no. L 294, p. 20.

²⁵ Art. 3 no. 3 Framework Decision 2002/584/JHA, OJ EC 2002 no. L 190, p. 1.

²⁶ Art. 13 para. 1 Framework Decision 2009/829/JHA on the mutual recognition of supervision measures, OJ EU 2009 no. L 294, p. 20; art. 9 para. 1 Framework Decision 2008/947/JHA on the mutual recognition of probation decisions, OJ EU 2008 no. L 337, p. 102; art. 8 para. 2 Framework Decision 2008/909/JHA on the mutual recognition of custodial sentences or measures involving deprivation of liberty, OJ EU 2008 no. L 327, p. 27.

²⁷ OJ EC 2000 no. C 197, p. 1.

the Proposal for a Directive on the European investigation order²⁸: if the technical assistance of the Member State in which a person is present is not necessary for the surveillance of that person's telecommunications, that Member State can demand that the surveillance is stopped and the material already obtained while the above person was on its territory is not used. Thereby, account is taken, in such cases, of circumstances where the communication has at least partially taken part on the territory of a Member State other than the surveilling state. That state's sovereignty would be called into question if the surveilling state could wiretap without consultation. On the other hand, this restriction also protects the suspect's confidence that investigative measures will only infringe on his rights in accordance with the law of the Member State in which he is present.

Irrespective of these welcome developments, the executing state must realise that its interest in its identity and its ordre public remain unaddressed in many cases:

- Specifically, a general ordre public reservation is lacking in the area of criminal justice. This makes little sense because in the area of free movement of goods – from which the concept of mutual recognition stems – such a reservation is provided for in art. 36 TFEU. Similarly, in regard to the enforcement of many decisions in civil matters, art. 45 para. 1 lit. a of the new Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters²⁹ continues to provide, on the application of any interested party, for the refusal of recognition if it is manifestly contrary to the ordre public in the Member State concerned. That such a ground for refusal is lacking altogether in the area of criminal justice, which has a particularly strong connection to basic rights and therefore is linked to fundamental value judgments underpinning the legal order, cannot be justified.
- Due to the priority regime created by art. 54 CISA, in extreme cases one Member State can take a case away from another legitimately interested Member State simply by completing the proceeding first. For instance, where the offence has been committed in several Member States, art. 55 para. 1 lit. a CISA determines that the chronological order of judgments is decisive, even if the slowest Member State has a far greater connection to the offence (majority of acts in the case take place there, citizenship of offender and victim).
- The so-called “positive lists”, for instance in art. 2 para. 2 of the Framework Decision on the European arrest warrant³⁰ and art. 7 para. 1 of the Framework Decision on the

recognition of custodial sanctions³¹, also include behaviour which is by no means considered criminal in all Member States. Thus, for instance, euthanasia, which under certain conditions may be permitted in Member State A and not subject to punishment, may be classified as part of the case group of “murder” in Member State B. The consequence is that Member State A must transfer the suspect to Member State B and thereby act against the values of its own legal order. Similar cases can be constructed e.g. in regard to abortion (“murder”) and the circumcision of boys (“grievous bodily injury”).

c) Limitation of mutual recognition through the principle of proportionality

The current legal instruments for the implementation of the principle of mutual recognition often do not place sufficient weight on the principle of proportionality.

- First, de minimis limits such as those in art. 7 para. 2 lit. h of the Framework Decision on the recognition of financial penalties³² for particularly low sanctions (below 70 EUR or the equivalent to that amount) are to be welcomed. This provision may in fact be aimed at the executing state's interest not to undertake significant measures if the result does not warrant the effort. However, it at least indirectly benefits the affected citizens.
- Commendable approaches can also be found in the current text of the Proposal for a Directive on the European investigation order³³: Generally, it is positive that distinctions are drawn between measures of lesser and greater intrusiveness, with additional grounds for refusal in respect of the latter. Moreover, art. 9 para. 1*bis* of the Proposal merits special attention. It provides that the executing state may, under certain conditions, for the requested measure substitute a less intrusive one. Such a discretion is very sensible because the executing state's authorities are “closer” to the execution of the measures and can assess the adequacy of less intrusive measures better than the issuing state's authorities can from a distance. Nonetheless, there is room for further improvements: First, in regard to the European investigation order, it is unsatisfactory that the replacement power is purely optional – the choice of proportionate measures cannot be left to the discretion of the executing state. Apart from this point, criticism must be made that this very sensible rule is not used throughout all instruments on mutual recognition – for instance in the Framework Decision on the European arrest warrant which infringes fundamental rights to an even greater extent. Here, there is a need for amendment to safely rule out the issuing of a European

²⁸ Council Document no. 18918/11.

²⁹ Regulation (EU) 1215/2012, OJ EU 2012 no. L 351, p. 1.

³⁰ Framework Decision 2002/584/JHA, OJ EC 2002 no. L 190, p. 1.

³¹ Framework Decision 2008/909/JHA, OJ EU 2008 no. L 327, p. 27.

³² Framework Decision 2005/214/JHA, OJ EU 2005 no. L 76, p. 16.

³³ Council Document no. 18918/11.

arrest warrant if, for instance, procedural acts may be ordered on the papers without the suspect being present.

- The Framework Decision on the European arrest warrant³⁴ does not provide for a mandatory proportionality assessment by the issuing authority at all. Compared to this, art. 5a para. 1 lit. a of the Proposal for a Directive on the European investigation order³⁵ must be regarded as an improvement, as it states that a measure may only be issued if this is proportionate for the purpose of the proceedings. Regrettably, among the factors which are to be taken into account in the proportionality assessment, the cross-border dimension of the proceeding is not mentioned. However, this factor, in particular, can amount to an extraordinary burden on the affected person and his right to an effective defence due to the attendant practical difficulties.
- Art. 2 para. 1 of the Framework Decision on the European arrest warrant³⁶ (issued for the purpose of conducting a criminal prosecution) extends this measure's scope of application to all criminal offences punishable by a custodial sentence or a detention order for a maximum period of at least twelve months. This is not only problematic because the Member States' penalty regimes differ greatly and the minimum maximum penalty has only limited indicative value in regard to the seriousness of the crime. In particular, in the vast majority of national criminal justice systems, a maximum penalty of one year is a threshold that is crossed even by minor offences. It would (besides introducing a compulsory proportionality test in the issuing state, see above) be preferable to make the issuing of a European arrest warrant dependent upon the sanction that is to be envisaged in the particular case or at least to increase the threshold significantly.
An example of a higher threshold is found at art. 14 para. 1 of the Framework Decision on the recognition of supervision measures,³⁷ which applies only in case of a maximum penalty of three years or more. It is, however, not understandable why such a supervision order, which – as a less intrusive measure – can at least sometimes make a European arrest warrant unnecessary, should not be available in particularly minor cases (also see below II. 4. a) on horizontal coherence). A more far-reaching recognition of supervision measures re-placing the European arrest warrant would be very welcome, specifically for reasons of proportionality.

2. Explanatory notes to the demand of balancing the European criminal proceeding

Striking a fair balance between the interest in having an effective criminal prosecution, rights of the individual and matters of state sovereignty is indispensable not only with regard to measures for the implementation of the principle of mutual recognition. The reason is that limitations of mutual recognition alone do not sufficiently address the enrichment of the criminal proceeding with supranational elements – for instance with a future European Public Prosecutor's Office. An aspect of particular importance in an increasingly supranationalised criminal proceeding is the observance of the rights of individuals, which thankfully, albeit with a significant delay, enjoy the increasing attention of the Union legislator. That legislator's efforts to introduce certain minimum standards in this regard by means of directives can significantly contribute to reducing the factual difficulties for the suspect and re-establishing a balance in European criminal proceedings. This becomes particularly apparent when, for instance, the suspect is granted the right to have access to a lawyer in each of the Member States involved in a cross-border criminal proceeding (see further below II. 6.).

Moreover, the Proposal for a Regulation on the establishment of the European Public Prosecutor's Office,³⁸ presented by the Commission in summer 2013, exhibits some clear improvements over earlier approaches³⁹ in this regard.

- The emphasis in art. 11 para. 1 and art. 32 para. 1 on the application of the Charter of Fundamental Rights is positive, even though it is merely declaratory and thus does not, in itself, raise the level of protection. However, the wording of some provisions in the proposal is unfortunate. Thus, art. 32 para. 2 grants "the following procedural rights as they are provided for in Union legislation and the national law of the Member State". This could be understood as meaning that the rights are only granted insofar as both legal orders provide them. This would be questionable if, for instance, a Member State fails to comply with its obligation to implement procedural rights required by a Directive. What is more, the rights referred to in arts. 33 to 35 are granted only to the extent that they are also provided for in national law.
- It is to be welcomed that art. 32 para. 3, in contrast to other Union legal instruments (below II. 6.), clarifies that the procedural rights apply from the time a person is suspected of having committed an offence. Thus, those rights must also be respected during the preliminary analysis preceding the decision on whether an investigation should be initiated (art. 15 para. 4 and art. 16 para. 1). This approach is further underlined by art. 32 para. 4, according to which suspects' rights (as set out in art. 32 para. 2) also apply to a person who is heard (for instance as a witness) and in the course of the questioning, interrogation or hearing becomes suspected of having committed an offence.

³⁴ Framework Decision 2002/584/JHA, OJ EC 2002 no. L 190, p. 1.

³⁵ Council Document no. 18918/11.

³⁶ Framework Decision 2002/584/JHA, OJ EC 2002 no. L 190, p. 1.

³⁷ Framework Decision 2009/829/JHA, OJ EU 2009 no. L 294, p. 20.

³⁸ COM (2013) 534 final.

³⁹ See, for instance, COM (2001) 715 final.

- Art. 13 establishes the possibility of prosecuting offences affecting the financial interests of the Union jointly with offences connected to them if (*inter alia*) they are based on identical facts. This is sensible in view of the *ne bis in idem* principle: such concentration of proceedings can prevent parallel proceedings and furthermore takes efficiency considerations into account, because under the *ne bis in idem* principle, the other proceeding would in any event have to be discontinued once a trial has been finally disposed of (art. 54 CISA). Even though the provision is therefore in principle to be welcomed, it raises questions in particular in regard to foreseeability (below II. 3.) and horizontal coherence (below II. 4. a).

- Two further provisions are particularly to be welcomed from the view of the affected citizen (on vertical coherence see below II. 4. b). These are aimed at the limitation of disadvantages due to the mixing of Member State's procedural systems: art. 32 para. 5 provides that persons who are involved in the proceedings of the European Public Prosecutor's Office shall always be able to invoke the procedural rights of the applicable national law. This provision guards against the danger that prerequisites for an investigative measure in one Member State are bypassed by requesting it under the law of a Member State with more lenient requirements. Otherwise provisions which limit the scope of gathering evidence with the purpose of protecting the individual could be systematically circumvented.

At the same time, art. 30 contains a parallel provision in regard to the admissibility of evidence. Thus, evidence presented by the European Public Prosecutor's Office (this refers to evidence gathered according to the law of another Member State) shall in principle be admitted without additional requirements. However, the court can nonetheless declare it inadmissible if it believes that its admission would adversely affect the fairness of the procedure or the rights of defence (as enshrined in arts. 47 and 48 of the Charter of Fundamental Rights), art. 30 para. 1. Moreover, according to art. 30 para. 2, the assessment of evidence presented by the European Public Prosecutor's Office – and thus the decision on its weight – remains fully within the competence of the court. This represents an important safeguard against the combination of low requirements for the gathering of evidence on the one hand and low requirements for its admission on the other. Without such a provision, the unconditional admission of evidence gathered abroad could result in a substantial erosion of suspects' rights.

Unfortunately, only the fairness of the procedure and the rights of the defence can be opposed to the admission of evidence. It would have also been worth considering granting the court a greater discretion on the admission of evidence in respect of violations of the European Convention on Human Rights and the Charter of Fundamental Rights that do not concern specific guarantees of criminal procedure (such as, for instance, the right to respect for private and family life, art. 8 of the Convention). Admit-

tedly, these similarly apply in all Member States. But the jurisprudence of the European Court of Human Rights shows that these rights are often violated in Member States of the Union as well. To force the court in such cases to admit evidence is unacceptable not only in view of the concerned individual's rights, but also in view of the *ordre public* of the forum state.

- Problematic in regard to the protection of the individual is, for instance, art. 26 para. 1 lit. r, which permits without further requirements the targeted surveillance in public places not only of the suspect but also of third persons. On the basis of this provision, the rights of persons who are only by chance involved in a proceeding conducted by the European Public Prosecutor's Office can be interfered with extensively.
- The guarantees of rights of individuals which are contained or declaratorily repeated in the Proposal are, as shown, often dependent on their recognition by the Member States involved. Thus they are neither intended nor suitable for creating a satisfactory Union level of protection. This much rather requires a more far-reaching harmonisation of procedural rights through the Union. The Directives on suspects' rights that have been enacted so far for the compensation of deficits regarding the fairness of proceedings (see further below II. 6.) are first steps in the right direction. The path thus taken, however, has to be consequently followed.

If the Union legislator wants to grant special rights of participation to a person involved in a criminal proceeding, this must not impair the balance of the proceeding as a whole:

- This would, for instance, be the case if Member States were obliged to grant to the victim of an offence a comprehensive right to remedies. In some Member States, such a right may be provided, but in a procedural system to which such rights of participation are foreign it could weaken the position of the suspect and thus permanently disturb the balance of the proceeding.

Further, in order to balance an increasingly supranationalised European criminal proceeding, it is necessary also in this regard to adhere to the principle of proportionality:

- It should be a matter of course in any criminal proceeding in accordance with the rule of law that for each measure of criminal procedure there has to be a sufficient reason and that the least invasive, equally effective measure should be employed. Thus it is to be welcomed that art. 11 para. 2 read in conjunction with art. 26 para. 3 of the Proposal for a Regulation on the establishment of the European Public Prosecutor's Office⁴⁰ emphasises the application of this fundamental principle. Even though these provisions do not explicitly mention it, the last sentence of

⁴⁰ COM (2013) 534 final.

art. 5 of the Protocol on the application of the principles of subsidiarity and proportionality⁴¹ furthermore clearly requires that any measure considered must be commensurate with the objective to be achieved. Only if conflicting interests are balanced and compensated in this way, can unacceptable results – especially in view of some far-reaching competences such as art. 26 para. 1 lit. r of the Proposal – be avoided.

The balance of the European criminal proceeding, moreover, is impaired by the mere fact that new supranational institutions are being created:

- Already the interconnection of Member States' criminal prosecution authorities, for instance through Eurojust, and the creation of supranational structures for data collection have contributed to the strengthening of the prosecution. This is sensible to compensate for deficits which arise if state authorities, even in a unified Europe, are confined to state borders while organised, well-funded criminals of the most serious kind abuse the fundamental freedoms to commit offences. However, in respect of the "average criminal", who has at his disposal neither special organisational structures nor significant financial means, these steps create an imbalance which can make an effective defence considerably more difficult.
- Admittedly art. 11 para. 5 of the Proposal for a Regulation on the establishment of the European Public Prosecutor's Office provides that this authority shall conduct its investigations in an impartial manner and seek all relevant evidence, whether inculpatory or exculpatory. This however does not change the fact that it would, above all, facilitate criminal prosecution. Going beyond the general provision of art. 11 para. 5, it is therefore necessary that in the creation of the European Public Prosecutor's Office (as well as generally of supranational institutions for the promotion of cross-border criminal prosecution) regard be had to not putting the defence at a disadvantage. In particular, this can be done by arranging for compensation, also at an institutional level, in respect of the strengthening of the criminal prosecution authorities. Examples for this are, for instance, provided by the criminal proceeding before the International Criminal Court, where an "Office of Public Counsel for the Defence" inter alia has to ensure that the defence is given support regarding legal research and legal advice wherever it so desires.⁴² This could be used as a model for a defence organisation at the Union level – corresponding proposals for an ombudsman⁴³ or "Eurodefensor"⁴⁴ already exist.

3. Explanatory notes to the demand of respecting the principle of legality and judicial principles in European criminal proceedings

In the legal instruments that have been enacted so far, some provisions can be found where the Union legislator has made an effort to create sufficiently clear rules which comply with the criminal proceeding's high standard regarding formalisation and judicial principles:

- A satisfactory level of judicial reviewability is for instance provided by art. 7 para. 4 of the Directive on the right to information in criminal proceedings⁴⁵. According to it, restrictions of the right to information can only be imposed following a decision by a judicial authority or at least subject to judicial review. Likewise, cases of neglect or denial of this right have to be challengeable under provisions of the domestic legal order, cf. art. 8 para. 2. In a similar manner, art. 2 para. 5 and art. 3 para. 5 of the Directive on the right to interpretation and translation in criminal proceedings⁴⁶ provide that (according to procedures in national law) the suspected or accused person can both take action against the denial of these rights as well as complain against the quality of interpretation or translation services.
- If a European supervision order is to be issued, the choice of the executing state, meaning the supervising state, is made on the basis of the clear criterion of art. 9 of the respective Framework Decision⁴⁷ (Member State in which the person is lawfully and ordinarily residing; deviation only upon request of the affected person). The relevant proceeding is also set out in detail in arts. 10 and 11.

This, however, must not conceal the fact that in this area there still are very significant deficits:

- As the decision on the proceedings' forum state is decisive for the applicable substantive and procedural law, in a single area of justice it must be made on the basis of precise rules. The Framework Decision on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings⁴⁸ does not satisfy this requirement in any way. On the contrary, it provides for wholly unregulated consultations between the Member States in the course of which they are to consider "the facts and merits of the case and all the factors which [the participating Member States] consider to be relevant." Thereby, the Framework Decision refrains from making even an indicative specification of the requirements for the determination of the forum state, although it is of immense importance particularly for the affected citizen. Even a decision on the basis of the expected punishment, the likelihood of a conviction,

⁴¹ OJ EU 2007 no. C 306, p. 150.

⁴² See Regulation 77 of the Regulations of the Court.

⁴³ See *Mitchell*, in: Schünemann (ed.), *A programme for European Criminal Justice*, 2006, p. 191 et seq.

⁴⁴ See Schünemann (fn. 43), p. 4 et seq.

⁴⁵ Directive 2012/13/EU, OJ EU 2012 no. L 142, p. 1.

⁴⁶ Directive 2010/64/EU, OJ EU 2010 no. L 280, p. 1.

⁴⁷ Framework Decision 2009/829/JHA, OJ EU 2009 no. L 294, p. 20.

⁴⁸ Framework Decision 2009/948/JHA, OJ EU 2009 no. L 328, p. 42.

or altogether arbitrary criteria is not excluded thereby. Somewhat pointedly, one could say that by creating an obligation to consult without further regulating that consultation, the Framework Decision virtually spells out an “invitation to forum shop”.

At the same time, the *ne bis in idem* provisions entail a strict regime of chronological priority true to the motto “first come, first served”. Which Member State prosecutes a matter and which legal order applies thus depends on pure coincidence. For instance, longer processing times, which in turn result from aspects such as the speed of delivering mail, sickness of a judge etc., can determine which Member State has the “last word”. That such circumstances should determine the applicable substantive law (and thus also whether the behaviour is subject to punishment at all and how severe the sanction may be) as well as the law of procedure according to which the offence is prosecuted and decided is not acceptable in a single area of justice.

- The Proposal for a Regulation on the establishment of the European Public Prosecutor’s Office⁴⁹ goes one step further than the abovementioned Framework Decision: Its art. 27 para. 4 provides for several criteria which must be taken into account by this new authority when choosing the jurisdiction of trial. The starting point is somewhat different than in other conflicts of jurisdiction because offences which are within the prosecutorial competence of the European Public Prosecutor’s Office are harmonised or supposed to be harmonised further. It will therefore be less difficult to foresee the criminalisation of a particular behaviour. Similarly, the Proposal provides for a minimum standard of procedural rights which accordingly apply irrespective of the trial jurisdiction.

Nonetheless, the proposed rule in art. 27 para. 4 is problematic: in the absence of effective harmonisation in this area, differences between the Member States regarding the type and level of criminal sanctions will probably remain. The large margin of appreciation that the European Public Prosecutor’s Office will enjoy can therefore be considered as a violation of the legal certainty requirement in regard to criminal sanctions. Furthermore, the decision on the forum state also applies to related offences encompassed by art. 13 para. 1 for which there has been no harmonisation. Procedural law, notwithstanding the latest hesitant efforts towards harmonisation, remains a paramount factor for the likelihood of a conviction. Against this background, it is unacceptable that the criteria referred to in art. 27 para. 4 (and thus the decision by the European Public Prosecutor’s Office which is based on them) will often be determined by chance. Moreover, the list lacks a hierarchy among the criteria and the wording of the provision does not make clear whether they are exhaustive. Consequently, the European Public Prosecutor’s Office in fact is absolutely unfettered in its choice of a forum state, even though this decision is key to the proceeding. That the new authority

shall be obliged to “[bear] in mind the proper administration of justice” according to art. 27 para. 4 actually addresses the efficiency of criminal prosecution and thus is of little help. In line with art. 30, at least an obligation to observe the fairness of the proceeding and the rights of defence (as enshrined in arts. 47 and 48 of the Charter of Fundamental Rights) should have been included.

As a related point, it should be noted that the inclusion of the criterion of “the place where the direct victims have their habitual residence” in a provision which primarily is aimed at the protection of the Union’s financial interests does not seem very reasonable.

- Furthermore the new authority shall not only have the possibility to choose the jurisdiction of trial, but also the European Public Prosecutor, according to art. 18 para. 5 of the Proposal, shall be given significant discretion in deciding which European Delegated Prosecutor will investigate the case. This ultimately allows the choice of the Member State where investigative measures are taken and, thus, of the legal requirements for infringements upon fundamental rights during the pre-trial phase.

Apart from this fundamental problem of conflicts of jurisdiction, which also continues to exist in the area of offences against the financial interests of the Union, several individual provisions in Union law are in need of improvement:

- The abovementioned separation of competences for ordering and executing a measure has the consequence that legal protection is similarly split in respect of measures that are executable across the Union via instruments of mutual recognition. This can entail that the selfsame measure has to be reviewed on the basis of different legal orders and potentially on the basis of varying standards (regarding the problems in view of an effective defence see above II. 1. a). There also is a strong curtailment of legal protection if, due to the principle of mutual recognition, a measure can be challenged only in respect of those violations of law that follow from the order itself (cf. for instance art. 20 para. 3 of the Framework Decision on mutual recognition of financial penalties⁵⁰).
- The types of offences set out in the “positive lists” of mutual recognition instruments (e.g. art. 2 para. 2 of the Framework Decision on the European arrest warrant⁵¹) are in some parts vague, for instance where they refer to “sabotage”, “computer-related crime” or “grievous bodily injury”. As a result, it is not always clear whether an obligation for cooperation exists in regard to a particular offence – when, for instance, is bodily injury “grievous”? In view of the infringements of fundamental rights which result at least from some types of cooperation (for instance

⁴⁹ COM (2013) 534 final.

⁵⁰ Framework Decision 2005/214/JHA, OJ EU 2005 no. L 76, p. 16.

⁵¹ Framework Decision 2002/584/JHA, OJ EC 2002 no. L 190, p. 1.

the transfer of the suspect) and thus require a legal basis, this lack of certainty is highly problematic. Against this background, it can only be a “makeshift” solution to allow an opt-out from these “positive lists”, as is possible under art. 23 para. 4 of the Framework Decision on the European evidence warrant⁵² or art. 14 para. 4 of the Framework Decision on the European supervision order⁵³.

- According to art. 19 para. 2 of the Framework Decision on the European arrest warrant⁵⁴, the conditions of hearing a requested person can to some extent be negotiated by the investigating authorities of the issuing and the executing state. This protects the suspect from being heard according to differing rules. But it cannot be accepted that the prosecution authorities may – more or less arbitrarily – decide for themselves on the procedural rules they consider appropriate for the individual case: there is no guarantee that they will take the legitimate interests of the suspect into consideration – this is precisely the reason why in domestic proceedings procedural acts are governed by law. If the Union wishes to be a single area of justice, it has to measure up to this standard and must define the procedural rules – or at least a minimum level of suspects’ rights – with significantly more precision.
- In some Member States decisions on at least certain investigation measures are the preserve of a judge. This permits an independent ex ante control and thus contributes to the formalisation of the proceeding. By allowing the European evidence warrant⁵⁵ or the future European investigation order⁵⁶ to be issued by prosecutors and investigation authorities (especially the police) if this is possible under the law of the issuing state, the reservation of powers to a judge may be devalued. Since such a reservation is often born from constitutionally guaranteed basic rights, this would be highly problematic for the executing state. Intended as an alternative, the validation proceeding (art. 5a para. 3 of the Council’s general approach on the Proposal for a Directive on the European investigation order⁵⁷) is a step in the right direction. It envisages that, under certain conditions, investigation orders that were issued by the police or investigation authorities must be

validated by a judge, court, public prosecutor or investigating magistrate of the issuing state. However, if such a validation could also be performed by a prosecutor, no judge would have to be involved. Moreover, it is questionable whether a judicial authority of the issuing state can exercise sufficient control since its legal order is unfamiliar with such reservations and it also cannot be familiar with the proportionality considerations which would have to be taken into account under the executing state’s law. A significantly better solution would be what the Commission suggested in its Proposal for a Regulation on the establishment of the European Public Prosecutor’s Office⁵⁸: According to art. 26 para. 4 of that instrument, a number of investigative measures require authorisation by the competent (under national law) judicial authority of the Member State where they are to be carried out. In respect of certain other investigative measures, under art. 26 para. 5 a requirement of judicial authorisation that is laid down in national law is at least tolerated.

- Finally, the provisions in art. 29 of the Proposal for a Regulation on the establishment of the European Public Prosecutor’s Office⁵⁹, which allow for an out-of-court agreement with the suspect, merit a mention. Art. 29 appears to apply to all stages of the criminal proceeding (even after charges have been brought) and at the same time allows no judicial control whatsoever. This leaves the door wide open for secretly negotiated “deals” in which the suspect can be subjected to significant pressure, and which do not satisfy the requirements of a judicial proceeding. It should also be emphasised that such out-of-court agreements are not available in all Member States and may thus create problems with vertical coherence (for further examples see below II. 4. b).

4. Explanatory notes to the demand of preserving coherence

a) Horizontal coherence

For the preservation of coherence in the horizontal perspective, the Union legislator must ensure that its legal instruments do not contradict the framework created by other provisions of Union law. This has been done successfully in respect of several instruments:

- Thus, for instance, the Framework Decision regarding the mutual recognition of decisions rendered in absentia⁶⁰, which unified the grounds for refusal of several Framework Decisions, is to be welcomed – although one could criticise that these decisions still must be recognised by the executing state to a large extent.
- Similarly, linking the Framework Decision on the European supervision order to the requirements of the European

⁵² Framework Decision 2008/978/JHA, OJ EU 2008 no. L 350, p. 72.

⁵³ Framework Decision 2009/829/JHA, OJ EU 2009 no. L 294, p. 20.

⁵⁴ Framework Decision 2002/584/JHA, OJ EC 2002 no. L 190, p. 1.

⁵⁵ See art. 2 lit. c Framework Decision 2008/978/JHA, OJ EU 2008 no. L 350, p. 72.

⁵⁶ See art. 2 lit. a Council Document no. 18918/11; see also art. 6 para. 2 Framework Decision 2009/829/JHA on the mutual recognition of supervision measures, OJ EU 2009 no. L 294, p. 20.

⁵⁷ Council Document no. 18918/11; already in this sense art. 11 paras. 4 and 5 Framework Decision 2008/978/JHA on the European evidence warrant, OJ EU 2008 no. L 350, p. 72.

⁵⁸ COM (2013) 534 final.

⁵⁹ COM (2013) 534 final.

⁶⁰ Framework Decision 2009/299/JHA, OJ EU 2009 no. L 81, p. 24.

arrest warrant⁶¹ is an example of the preservation of horizontal coherence, as both instruments pursue the same purpose. However, as has been seen, congruence of both legal instruments was not achieved as a result, as the European arrest warrant can be issued for offences with a significantly lower minimum maximum penalty than is the case with the European supervision order (see above II. 1. c).

- Art. 13 para. 1 of the Proposal for a Regulation on the establishment of the European Public Prosecutor's Office⁶² provides that offences affecting the financial interests of the Union can be prosecuted jointly with other offences if (inter alia) those other offences are "based on identical facts". This, as seen (above II. 2.), makes sense with respect to the *ne bis in idem* principle. However, in view of the coherence of Union law it is questionable why the provision refers to identical facts when art. 54 CISA refers to "the same acts" and art. 50 of the Charter of Fundamental Rights refers to "an offence". This wording also does not fully correspond to the terminology of the CJEU's jurisprudence on identity of acts.⁶³ Due to the lack of an explanation in the preparatory materials and the recitals, this deviation leads to ambiguities regarding the content of the provision which could easily have been avoided.

Significant inconsistencies also emerge between the various legal instruments for the realisation of the principle of mutual recognition in respect of the grounds for refusal.

- For instance, a prior final judgment in another Member State regarding the same acts (*ne bis in idem*) is a mandatory ground for refusal pursuant to art. 3 no. 2 of the Framework Decision on the European arrest warrant.⁶⁴ In contrast, in other legal instruments it is only an optional ground for refusal, e.g. in art. 10 para. 1 lit. e of the Proposal for a European investigation order⁶⁵ and art. 15 para. 1 lit. c of the Framework Decision on the European supervision order⁶⁶. This leads to the paradoxical result that while an affected person may not be transferred to another Member State due to new investigations (which is convincing), he must put up with the search of his home on the basis of a European investigation order if the exe-

cuting state – for whatever reason – does not invoke the ground for refusal.

- The lack of coordination between the individual instruments also appears in respect of the grounds of refusal concerning offences which have been committed at least in part on the territory of the executing state: For the Framework Decision on the European arrest warrant⁶⁷, for instance, it is enough for the offence in question to have been partly committed on the territory of the executing state. The Framework Decision on the European evidence warrant⁶⁸ restrictively requires that a major or essential part of the conduct in question has been committed there. Finally, the Proposal for a Directive on the European investigation order⁶⁹ further curtails the ground for refusal by additionally imposing the cumulative requirements that the offence has been committed exclusively outside the territory of the issuing state, that the investigation order concerns the use of a coercive measure and that the conduct in connection with which the order is issued is not an offence in the executing state. The Union legislator does not explain the justification for this much more narrow admittance of the ground for refusal.
- The compromise text of the future Directive on the European investigation order permits the executing state to resort to less intrusive, equally effective measures.⁷⁰ This possibility, however, is *inter alia* not provided in the Framework Decision on the European arrest warrant (see above II. 1. c).⁷¹

b) Vertical coherence

The preservation of coherence in the vertical perspective requires that the Union legislator considers the consistency of the Member States' legal orders.

- A conflict with this principle was avoided e.g. when in the course of Council negotiations concerning the Commission Proposal for a Directive on the right of access to a lawyer in criminal proceedings⁷², a provision according to which certain violations would have led to mandatory inadmissibility of evidence was abandoned.⁷³ Such a requirement would not have been acceptable for a Member State whose law does not permit restrictions on the weighing of evidence by the judge. However, this conflict could have been resolved better: Instead of deleting altogether the provision requiring inadmissibility, it

⁶¹ Art. 15 para. 1 lit. h Framework Decision 2009/829/JHA on the mutual recognition of supervision measures, OJ EU 2009 no. L 294, p. 20.

⁶² COM (2013) 534 final.

⁶³ CJEU, judgment of 9.3.2006 – case C-436/04 (Van Esbroeck), para. 36: "identity of the material acts, understood in the sense of the existence of a set of concrete circumstances which are inextricably linked together".

⁶⁴ Framework Decision 2002/584/JHA, OJ EC 2002 no. L 190, p. 1.

⁶⁵ Council Document no. 18918/11.

⁶⁶ Framework Decision 2009/829/JHA, OJ EU 2009 no. L 294, p. 20.

⁶⁷ Art. 4 no. 7 lit. a Framework Decision 2002/584/JHA, OJ EC 2002 no. L 190, p. 1.

⁶⁸ Art. 13 para. 1 lit. f sublit. i Framework Decision 2008/978/JHA, OJ EU 2008 no. L 350, p. 72.

⁶⁹ Art. 10 para. 1 lit. f Council Document no. 18918/11.

⁷⁰ Art. 9 para. 1 *bis* Council Document no. 18918/11.

⁷¹ Framework Decision 2002/584/JHA, OJ EC 2002 no. L 190, p. 1.

⁷² Art. 13 COM (2011) 326 final.

⁷³ See art. 11 Council Document no. 12988/13.

would have been wholly sufficient – and preferable for the preservation of suspects’ rights – to merely include an exception clause (ordre public clause) for those Member States who would have faced serious problems regarding coherence.

- It has already been mentioned that the principle of mutual recognition can lead to a mixing of systems of criminal procedure which has a detrimental effect in particular on the position of the suspect (see above II. 1. a). This shows that the coherence of national procedural rules is also indispensable for the preservation of individual rights. The forum regit actum principle (e.g. in art. 8 para. 2 of the compromise text for a Directive on the European investigation order⁷⁴) can remedy this by contributing to the general application of the issuing state’s rules in the proceeding. A different solution was chosen in the Proposal for a Regulation on the establishment of the European Public Prosecutor’s Office⁷⁵: art. 30 of that instrument ensures for the most part that the admissibility of evidence which has been gathered in a Member State other than that in which the proceeding is conducted does not cause inconsistencies within the national legal order (see above II. 2.).

5. Explanatory notes to the demand of observing the principle of subsidiarity

Even though it is relatively easy to demonstrate observance of the principle of subsidiarity, if a Union legal instrument has cross-border criminal prosecution as its subject, there are rules and drafts which seem open to doubt in this regard.

- For one, this concerns the Directive establishing minimum standards on the rights of victims of crime⁷⁶: Why it should be necessary to provide for certain minimum victims’ rights even for proceedings that have no cross-border dimension whatsoever would have required further explanation by the Union legislator.
- Against the background of the subsidiarity principle, it also is at least open to doubt to what extent the creation of a European Public Prosecutor’s Office⁷⁷ is currently justified when there are Member States in which the criminal prosecution of offences against the financial interests of the Union already works. These concerns would be even more relevant if at some point in the future the extension of the competences of this body to other forms of serious cross-border crime should be considered pursuant to art. 86 para. 4 TFEU. In any event, a concept that preserves the sovereign interests – for instance following a model of complementarity such as that applicable to the exercise of jurisdiction of the ICC – would be worth contemplating.

6. Explanatory notes to the demand of compensation for deficits in the European criminal proceeding

The examples mentioned so far have highlighted a variety of possibilities regarding the ways in which the Union legislator can (and, in part, already does) comply with the demands of the Manifesto by introducing safeguards in individual legal instruments. What has not yet been discussed, however, is the extent to which the difficulties which generally follow from cross-border criminal proceedings (especially for the suspect) have to be compensated for through Union legal instruments.

In a cross-border proceeding, the suspect must engage with at least one further legal order that is typically foreign to him and the (technical) language of which he usually neither speaks nor understands sufficiently well. To make use of his rights effectively, the suspect must make numerous arrangements for an additional and thus double defence. In the case of a transfer to another Member State, he also is torn from his social environment. European criminal policy must react to these dangers threatening the suspect by creating pan-European minimum standards for specific suspects’ rights which compensate for the disadvantages of suspects in a cross-border criminal proceeding:

- Thus, it is to be welcomed that in the Stockholm Programme⁷⁸, the Union has put the strengthening of procedural rights on its political agenda and that it has agreed on a “Roadmap”⁷⁹ for this aim. Particularly, consideration no. 8 of this “Roadmap”, merits unqualified approval. This clarifies that the standard set by the European Convention on Human Rights is not sufficient to achieve an adequate level of protection for suspects in the Union and that Union legal instruments must provide protection exceeding that standard.
- How important e.g. the Directive on the right to interpretation and translation in criminal proceedings⁸⁰ is – even though this right appears to be a matter of course – is illustrated by the extensive documentation of cases by the NGO “Fair Trials International”.⁸¹

The Union must unconditionally and consequently continue down this path (for instance in regard to requirements for judgments in absentia, legal aid in particularly expensive cross-border criminal proceedings and the preservation of the presumption of innocence). However, the creation of common minimum standards must under no circumstances lead to a “race to the bottom” (regarding these standards). This danger manifests itself in the interplay between harmonisation and mutual recognition, i.e. where harmonisation of procedural provisions in a particular area is to be followed by automatic mutual recognition. In this case, the executing state can no longer refuse recognition by reason of a higher level of pro-

⁷⁴ Council Document no. 18918/11.

⁷⁵ COM (2013) 534 final.

⁷⁶ Directive 2012/29/EU, OJ EU 2012 no. L 315, p. 57.

⁷⁷ COM (2013) 534 final.

⁷⁸ OJ EU 2010 no. C 115, p. 1.

⁷⁹ OJ EU 2009 no. C 295, p. 1.

⁸⁰ Directive 2010/64/EU, OJ EU 2010 no. L 280, p. 1.

⁸¹ <http://www.fairtrials.net/cases/> (accessed on: 5.11.2013).

tection in its own legal order; the Member States' lowest common denominator as set by the harmonisation instrument would strip more extensive rights for individuals in the executing state of their effect.

- This phenomenon is displayed particularly clearly in regard to the Framework Decision to which it is "owed" that under certain circumstances, decisions made in absentia must also be mutually recognised.⁸² On the one hand, certain minimum standards for judgments in absentia may have been established within the Union thereby. Yet on the other hand, in view of today's rather uncomplicated system of judicial assistance, the general justification for judgments in absentia is hardly up-to-date. As it usually impacts heavily upon the suspect's right to be present and thus interferes with his chance of an effective defence, this type of decision should soon – at least within the Union – be a thing of the past.
 - Moreover, it is unacceptable that the procedural rights which so far have been subject to harmonisation according to the respective Directives would often intervene too late. Thus, according to its art. 2 para. 1, the Directive on the right to information in criminal proceedings⁸³ as a whole applies only once the affected person has been informed by the competent authorities of a Member State that he is suspected or accused of having committed an offence. This creates possibilities for circumvention – the obligation to inform must in fact already apply from the point in time at which the authorities form an initial suspicion against the person who is questioned. Furthermore, the right to information is additionally watered down by certain provisions, such as the vague requirements of "prompt" information about the criminal act the person is suspected or accused of having committed (art. 6 para. 1). In art. 6 para. 2 (information on the grounds for arrest or detention), there no longer is any temporal requirement at all. According to art. 7 para. 3, access to the materials of the case is granted at the latest upon submission of the merits of the accusation to the judgment of a court. Especially here it would have been conceivable – without endangering the result of the investigation – to move this to the completion of the investigation.
- In art. 1 para. 2 of the Directive on the right to interpretation and translation in criminal proceedings⁸⁴ and in art. 2 para. 1 of the agreed text of the Proposal for a Directive on the right of access to a lawyer in criminal proceedings⁸⁵, the Union legislator similarly has decided to guarantee these rights from the time when the suspect is made aware by the competent authorities of the suspicion or accusation against him. However, art. 2 para. 1 of the Directive on the right to interpretation and translation in crim-

inal proceedings and art. 3 paras. 1 and 2 of the proposed Directive on the right of access to a lawyer in criminal proceedings ensure that these rights are already granted at the time of first being questioned – irrespective of whether the suspicion against him has been officially announced at this point of time. A comparable clarification should also be included in the Directive on the right to information in criminal proceedings.

- Furthermore, it is problematic that the abovementioned directives contain restrictions in view of less serious violations. To the extent that an authority, other than a court having jurisdiction in criminal matters, is competent to impose sanctions, the directives apply only to proceedings before the abovementioned court following an appeal to that court (provided always that such appeals are possible under national law). This restriction is found in the directives⁸⁶ currently in force as well as in the Proposal on the right of access to a lawyer in criminal proceedings⁸⁷ as adopted by the Parliament and the Council. First, these restrictions carry the danger that the Member States seek to circumvent their obligations under the directives. Second, it is not apparent why certain obligations of information, for instance regarding the right of access to a lawyer, should not also apply. In any event, a notification should be given in this proceeding concerning the possibility of activating these Union law warranties through the invocation of a legal remedy.
- The scope of individual rights and the requirements for infringements of the same are in part circumscribed so imprecisely that in practice there is a danger of their being hollowed out: Thus, according to the relevant Directive⁸⁸, the right to translation is limited to "essential" documents. In order to reasonably limit both the costs and length of the proceeding, the lawyer's right of access to the case materials does not necessarily require the translation of all documents, irrespective of their relevance. Nonetheless, this vague term (going beyond the negative criterion of art. 3 para. 4) should be specified, for instance by way of a clarification that all documents essential for the defence must be translated.
- In particular the debates on the content of the right of access to a lawyer have shown that the creation of would-be minimum standards in fact may hollow out procedural rights: A grave deficiency of the wording adopted by the Council as a compromise⁸⁹ was that the confidentiality of legal advice would not have been protected absolutely. Fortunately, these restrictions were removed in the wording

⁸² Framework Decision 2009/299/JHA, OJ EU 2009 no. L 81, p. 24.

⁸³ Directive 2012/13/EU, OJ EU 2012 no. L 142, p. 1.

⁸⁴ Directive 2010/64/EU, OJ EU 2010 no. L 280, p. 1.

⁸⁵ Council Document no. 12899/13.

⁸⁶ Art. 2 para. 2 Directive 2012/13/EU, OJ EU 2012 no. L 142, p. 1; art. 1 para. 3 Directive 2010/64/EU, OJ EU 2010 no. L 280, p. 1.

⁸⁷ Art. 2 para. 4 Council Document no. 12899/12; not in this sense Article 2 COM (2011) 326 final.

⁸⁸ Directive 2010/64/EU, OJ EU 2010 no. L 280, p. 1.

⁸⁹ Art. 4 para. 2 Council Document no. 10467/12.

of the future Directive⁹⁰ as adopted by the Parliament and the Council, thus preventing a violation of a taboo under the rule of law and an erosion of the right to an effective defence.

Further points of criticism regarding the Council's original compromise text for a Directive on the right of access to a lawyer⁹¹ were at least weakened over the course of common deliberations between the Council, the Parliament and the Commission.⁹² For instance, the requirements to waive the right to a lawyer are now drawn with significantly more precision in art. 9. Furthermore, the provision⁹³ according to which legal advice during the proceeding concerning a European arrest warrant must also be offered in the issuing state, which originally had been deleted by the Council, has been reintroduced in art. 10 para. 4 of the agreed text. Similarly, the requirements for an exceptional restriction of the right to a lawyer (which, however, remains problematic) were made significantly more concrete. But still, no right of the suspect to freely choose a lawyer is provided (at least not explicitly). Furthermore, the lawyer does not have (in contrast to art. 4 para. 4 of the Commission proposal⁹⁴) the right to examine the conditions of detention.

The abovementioned examples illustrate that considerable efforts still need to be taken in order to make the Union a genuine area of freedom, security and justice with regard to criminal prosecution. This Manifesto is intended to contribute to this aim.

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We wish to thank the following colleagues for their most valuable contributions to two preparatory workshops:

Lorena Bachmaier Winter (Madrid), *Pedro Caeiro* (Coimbra), *Wendy De Bondt* (Ghent), *Sabine Gleß* (Basel), *Stefano Manacorda* (Naples/Paris), *Carol Steiker* (Cambridge, MA), *Slavomir Steinborn* (Gdansk), *Valéry Turcey* (Paris/Berlin), *Jenia Turner* (Dallas), *Gert Vermeulen* (Ghent), *Joachim Vogel* (Munich)†, *Marianne Wade* (Birmingham), *Thomas Weigend* (Cologne), *Fritz Zeder* (Vienna)

⁹⁰ Council Document no. 12899/13.

⁹¹ Council Document no. 10467/12.

⁹² Council Document no. 12899/13.

⁹³ Council Document no. 10467/12.

⁹⁴ COM (2011) 326 final.