# Introduction

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## I. Background and objectives of the research[1]

For the past decade, the *modus operandi* of cross-border cooperation in the field of EU criminal law has been premised on the principle of mutual recognition (MR). Its operation presupposes the acceptance of mutual trust between the – as yet diverse – legal systems of the Member States. The Court of Justice of the EU (CJEU) acknowledged the existence of differences between national orders but noted that these should not prejudice mutual trust. Pursuant to this principle, each Member State "recognises the criminal law in force in other Member States even when the outcome would be different *if* its own national law were applied".[2] Moreover, in its controversial *Opinion 2/13*, the CJEU added that mutual trust is a principle "of fundamental importance in EU law … that allows an area without internal borders to be created and maintained".[3] As noted elsewhere, this resulted in the establishment of "a comprehensive system whereby national judicial decisions in criminal matters are recognised and executed across the EU quasi-automatically, with a minimum of formality and with the aim of speedy execution".[4] That being said, ensuring effective prosecutions was never the sole objective of mutual recognition (MR). MR was designed "not only to strengthen cooperation between Member States but also to enhance the protection of individual rights".[5] Its implementation hinges on the mutual trust of Member States in each

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[1] This comparative research draws on the findings of a study entitled 'Criminal procedural laws across the European Union – A comparative analysis of selected main differences and the impact they have over the development of EU legislation' (PE 604.977) prepared for the European Parliament in June 2018. It is available for free and can be downloaded via the following link: https://www.europarl.europa.eu/thinktank/fr/document.html?reference=IPOL_STU%282018%29604977.

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[2] C-187/01, *Gözütok and Brügge*, 11 February 2003 EU:C:2003:87, paras. 32-33.

[3] Opinion 2/13 of the Court on Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms, 18 December 2014, EU:C:2014:2454, para. 191.

[4] V. Mitsilegas, *EU Criminal Law after Lisbon: Rights, Trust and the Transformation of Justice in Europe*, Oxford/Portland, Hart Publishing, 2016, 124.

[5] Programme of measures to implement the principle of mutual recognition of decisions in criminal matters, *OJ*, No. C 12, 15 January 2001, 1.

other's criminal justice systems and that trust "is grounded, in particular, on their shared commitment to the principles of freedom, democracy and respect for human rights, fundamental freedoms and the rule of law".[6]

This notwithstanding, multiple calls for EU action in the field of the rights of suspects and accused persons arose after the adoption in 2002 of the EU's flagship mutual recognition measure of EU criminal law, namely the European Arrest Warrant (EAW).[7] Despite the significant impact on the rights of individuals arising from the multiplication of EAWs,[8] along with the establishment of accelerated and simplified procedures for the recognition of judicial decisions, fundamental rights never featured as an explicit ground for refusal in the EAW Framework Decision (FD). Whereas some authors criticised the mutual trust principle for being eponymous with "blind faith",[9] it is noteworthy that all Member States examined for the purpose of this study incorporated a more or less explicit fundamental rights ground for refusal in the national laws transposing the EAW FD.

In 2001, a Framework Decision was adopted to establish minimum rights on the standing of victims.[10] The Commission went on with a Green Paper on procedural safeguards in 2003, this time for suspects and defendants.[11] Finally, the Commission put forward a proposal for a Council Framework Decision on certain procedural rights in criminal proceedings throughout the European Union in 2004.[12] The proposed FD sought to establish minimum standards covering suspects' and defendants' rights, and contained provisions on the right to free translation and interpretation, the right to legal advice (including legal aid), the right to communication and/or consular assistance, the right to specific attention for persons who cannot understand the proceedings and the right to information. Despite the relatively modest scope of its provisions (i.e. only aiming at minimum standards), the proposal gave rise to heated debates among the Member States. Opponents invoked, *inter alia*, the lack of legal basis in the Treaties for such a proposal and its potentially far-reaching

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[6] *Ibid.* See also Tampere European Summit, Presidency Conclusions, 15 and 16 October 1999, SN 200/99, para. 33: 'Enhanced MR of judicial decisions and judgements and the necessary approximation of legislation would facilitate co-operation between authorities and the judicial protection of individual rights'.

[7] V. Mitsilegas, *EU Criminal Law after Lisbon*, *Rights, Trust, and the Transformation of Criminal Justice in Europe* (above, n4).

[8] For an analysis of the multiple infringements to human rights caused by the operation of EAWs, see A. Weyembergh, I. Armada, C. Brière, 'Critical Assessment of the Existing European Arrest Warrant Framework Decision', 2014, Research Paper for DG EPRS, European Parliament.

[9] S. Peers, *EU Justice and Home Affairs Law*, Oxford, Oxford University Press, 2016, 160.

[10] Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings, 2001/220/JHA, *OJ*, No. L 82, 22 March 2001.

[11] Commission 'Green Paper on Procedural Safeguards for Suspects and Defendants in Criminal Proceedings', COM (2003) 75 final, 19 February 2003.

[12] Commission 'Proposal for a Council Framework Decision on certain procedural rights in criminal proceedings throughout the European Union' COM (2004) 328 final, 28 April 2004.

encroachments into national criminal justice systems[13], in particular into the legal balance between the pursuit of security and the protection of fundamental rights.[14] The staunch opposition of Member States, added to the rule of unanimity in decision-making under the Third Pillar, had the effect of delaying negotiations and significantly watering down the FD provisions, to the point where it became impossible to reach an agreement.

To address the fundamental rights concerns arising from the increasing use of mutual recognition and cross-border cooperation instruments, the Lisbon Treaty conferred an express competence to the EU under Article 82(2) Treaty on the Functioning of the European Union (TFEU) for the adoption of minimum standards in the field of domestic procedural criminal law, thus replacing the vague power of Article 31(1)(c) of the old Treaty on "ensuring compatibility in rules applicable in the Member States, as may be necessary to improve such cooperation".[15] As a result of the communautarisation of the Third Pillar by the Lisbon Treaty, a distinctive feature of Article 82(2) TFEU is that it applied the ordinary legislative procedure as the standard decision-making method in lieu of the prior rule of unanimity in the Council with the consultation of the European Parliament.

Despite a substantial increase in the EU's margin for manoeuvre in the ambit of procedural law, two points of caution should be raised. First, an emergency brake rule was inserted under Article 82(3) TFEU, allowing Member States to put an end to discussions when a measure proposed under Article 82(2) TFEU "would affect fundamental aspects of its criminal justice system", thus reflecting the particularly sensitive dimension of the field. Second, EU competence exists only to the extent "necessary to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension". In other words, the approximation of criminal procedures is not an end in itself but rather a means to facilitate or achieve mutual recognition and cooperation in criminal matters more broadly. It is therefore believed that conferring an EU competence to set minimum requirements in the field of procedural criminal laws will enhance trust among the EU States involved, and, *in fine*, facilitate the operation of mutual recognition instruments.[16] Emphasis on the rights of individuals feeds into the broader momentum of a more values-based approach to EU criminal law, as demonstrated by the integration of the Charter of Fundamental Rights into primary law by the Lisbon Treaty. The Charter of Fundamental Rights has proved a

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[13] T. Spronken, 'Effective Defence: The Letter of Rights and the Salduz-directive', *in* G. Vermeuleun (ed.), *Defence Rights: International and European Developments*, Antwerp, Maklu, 2012, 86.

[14] Mitsilegas (above, n4).

[15] Consolidated version of the Treaty on European Union, 2002, *OJ*, No. C 325/5, 24 December 2002.

[16] On the articulation between mutual trust, mutual recognition and the competence conferred on the EU under Art. 82(2) TFEU, see P. Asp, 'European criminal and national criminal law', *in* V. Mitsilegas, M. Bergström, T. Konstadinides, *Research handbook on EU criminal law*, Cheltenham/Northampton, Edward Elgar Publishing, 2016, 331.

useful tool not only to interpret several provisions of EU law,[17] but also to bring EU human rights policies closer to European Convention on Human Rights (ECHR) standards.[18] Hence, the right to a fair trial under Article 6 ECHR also appears in Article 47 of the Charter of Fundamental Rights , along with Article 48 on the rights of the defence. In a similar vein, the CJEU confirmed in its case law that Article 6 of the Charter of Fundamental Rights incorporates ECHR standards on detention.[19]

The adoption of a roadmap on the procedural rights of suspects and defendants in 2009 under the leadership of the then Swedish Presidency of the EU gave a much-needed impetus for the adoption of an unprecedented and growing body of legislation in this area. Despite the many qualms about harmonisation of national law in such a 'sensitive and distinctive' field,[20] thus far six directives have been adopted on the rights of suspects and defendants. These include, in chronological order:

(i) Directive 2010/64/EU on the right to interpretation and translation;
(ii) Directive 2012/13/EU on the right to information;
(iii) Directive 2013/48/EU on the right to access to a lawyer and the right to have a third party informed upon deprivation of liberty and to communicate with relatives and consular authorities while deprived of liberty;
(iv) Directive 2016/343/EU on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings;
(v) Directive 2016/800/EU on safeguards for children in criminal proceedings; and
(vi) Directive 2016/1919/EU on the right to legal aid.

All six directives apply to suspects and accused persons on the one hand, as well as arrested and detained persons on the other hand, from the pre-trial stage to the end of the criminal proceedings and provide specific provisions for European Arrest Warrant proceedings. Another roadmap released in 2011 on victims' rights resulted in the adoption of Directive 2012/29/EU (hereafter, the Victims' Rights Directive), establishing a comprehensive set of minimum standards on the rights, support and protection of victims of crime, thus repealing the aforementioned Framework Decision of 2001.

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[17] Directive 2016/343/EU strengthening certain aspects of the presumption of innocence was interpreted in the *Milev* case in light of Article 48(1) of the Charter of Fundamental Rights. See, C-439/16 PPU, *Emil Milev*, 27 October 2016, EU:C:2016:818.

[18] According to the explanations relating to the Charter of Fundamental Rights, several provisions have the same meaning and scope as ECHR case law. Art. 48(1) of the Charter for example mirrors Art. 6(1) of the Convention.

[19] C-237/15 PPU, *Lanigan*, 16 July 2015, EU:C:2015:474.

[20] *Ibid.*

Despite the adoption of a body of legislation, this research purports to go beyond the realm of procedural rights where approximation has already been launched. Indeed, it aims to identify areas in which differences between national criminal procedures affect the functioning of both cooperation instruments and actors. This shift in the focus of the research is based on the empirical observation that the current framework on procedural rights is incomplete and needs to be further developed. Several limitations are inherent to the scope of Article 82(2) TFEU itself, which only purports to achieve a common denominator at a rather minimum level, thus leaving the door open to the persistence of divergences between national criminal procedural laws.[21] For instance, one may wonder why a specific reference to EAW proceedings was inserted under five out of six of these procedural rights directives and other cooperation instruments were left aside. This raises the question as to whether EU directives are 'fit for the purpose' in the sense of fulfilling their objective of facilitating mutual recognition in the absence of dedicated provisions spelling out how they should be interpreted in cooperation frameworks involving measures other than EAW FD. Administrative proceedings were excluded from the scope of EU directives despite the widening of cooperation frameworks in recent years to assign a central role to other, non-judicial actors.[22] Alongside limitations in terms of scope, the difficulty in finding a consensus on the provisions of some of the most contentious measures, such as the Access to a Lawyer Directive, sometimes resulted in broadly formulated provisions as well as the retention of a wide margin of discretion for the Member States.

In spite of these shortcomings, this research does not recommend a revision of EU directives in the near future. The transposition period has expired for all of them,[23] but they have suffered from transposition delays,[24] and from some incorrect transpositions. Instead, this study explores where and how additional instruments could act as a complement to the current framework of approximation, by focusing on crucial areas of cross-border cooperation which were insufficiently tackled or simply left unaddressed. As such, it feeds into current debates which, against the background of intense legislative activity in criminal matters,[25] question whether

[21] ECHR minimum standards, for example, were never fully implemented, or complied with by the Member States. However, in the case of ECHR, it is rather the lack of incentives for compliance, together with the absence of a proper enforcement mechanism established by the European Court of Human Rights that account for the persistence of disparities among criminal procedural laws.

[22] For example, the EIO Directive provides that administrative or any other competent authorities may be involved either in the issuing (with some restrictions) or the execution of EIOs (Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters, *OJ*, No. L 130, 1 May 2014).

[23] The last directives to be transposed were the Safeguards for Children and Legal Directives (on 11 June 2019 and 25 May 2019 respectively).

[24] Such as the Access to a Lawyer Directive and the Victims' Rights Directive.

[25] As evidenced by the adoption of the European Investigation Order, the adoption of a Regulation on the European Public Prosecutor's Office in October 2017 (Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO'), *OJ*, No. L 283, 31 October 2017),

further harmonisation efforts should be undertaken in the field of criminal procedure approximation to support the operation of mutual recognition instruments and allow effective cross-border cooperation in criminal matters.[26]

## II. Literature review

The scope of this book feeds into an ever-expanding literature in the realm of EU criminal procedural law. Several authors have addressed the interplay between approximation of national criminal procedures and mutual recognition since the adoption of several cooperation instruments at the beginning of the 2000s.[27] Some emphasised the difficulty of reconciling effective cooperation in criminal matters and the diversity of legal traditions, either by following a 'theme-by-theme' methodology[28] or by putting national approaches into a comparative perspective.[29] Others focused more specifically on the difficulty of striking a balance between ensuring effective cooperation through the adoption of several mutual recognition instruments while, at the same time, ensuring respect for fundamental rights and enhancing mutual trust.[30]

Previous studies on procedural rights assessing the feasibility of the numerous instruments and proposals contained in the roadmap should be mentioned, in particular academic projects coordinated by Taru Spronken and Gert Vermeulen,[31] as well as

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and of Regulation (EU) 2018 / 1805 of 14 November 2018 on the mutual recognition of freezing orders and confiscation orders, *OJ*, No. L 303, 28 November. 2018 and a proposal for a Regulation and a Directive on cross-border access to electronic evidence (Proposal for a Regulation of the European Parliament and of the Council on European Production and Preservation Orders for electronic evidence in criminal matters COM (2018) 225 final, 17.4.2018. Proposal for a Directive of the European Parliament and of the Council laying down harmonised rules on the appointment of legal representatives for the purpose of gathering evidence in criminal proceedings, COM (2018) 226 final, 17.4.2018.).

[26] See the paper presented by ECBA President Holger Matt at the 2017 ECBA spring conference. Retrieved at: www.ecba.org/extdocserv/conferences/prague2017/ECBAAgenda2020NewRoadmap.pdf.

[27] Especially, A. Weyembergh, *L'harmonisation des législations : condition de l'espace pénal européen et révélateur de ses tensions*, Bruxelles, Éditions de l'Université de Bruxelles, 2004.

[28] On transnational investigations, see S. Ruggeri (ed.), *Transnational Evidence and Multicultural Inquiries in Europe*, Heidelberg, Springer, 2014; S. Ruggeri, *Transnational Inquiries and the Protection of Fundamental Rights in Criminal Proceedings*, Heidelberg, Springer, 2014; on the transfer of prisoners, see T. Marguery (ed.), *Mutual Trust under Pressure: The Transferring of Sentenced Persons in the EU*, Oisterwijk, Wolf Publishers, 2018.

[29] T. Wahl, 'The perception of the principle of mutual recognition of judicial decisions in criminal matters in Germany', *in* G. Vernimmen-Van Tiggelen, L. Surano, A. Weyembergh (eds.), *The future of mutual recognition in criminal matters in the European Union*, Bruxelles, Éditions de l'Université de Bruxelles, 2009, 115, 147; A.-G. Zarza, 'Mutual recognition in criminal matters in Spain', *in ibid*., 189, 219.

[30] A. Erbežnik, 'Mutual Recognition in EU Criminal Law and Fundamental Rights-The Necessity for a Sensitive Approach', *in* C. Brière, A. Weyembergh (eds.), *The Needed Balances in EU Criminal Law, Past, Present and Future,*Oxford/Portland, Hart Publishing, 2018.

[31] See in particular two major studies conducted during the pre-Lisbon era on the potential for harmonisation of procedural criminal laws across the Union on the basis of the 2004 Proposal for a Framework Decision on certain procedural rights in criminal proceedings throughout the

those comparing national criminal procedures.[32] Other comparative works focused on evidence and procedural criminal law carried out in the run-up to the establishment of a European Public Prosecutor's Office, those coordinated by the Max Planck Institute,[33] alongside those coordinated[34] and edited by Katalin Ligeti in particular.[35] Another strand of the literature puts a more narrow emphasis on either specific procedural safeguards, such as the right to information,[36] the right to translation[37] and the right to access to a lawyer[38] or those areas where the EU has only taken preliminary steps towards harmonisation, such as evidence law[39] and detention conditions.[40] Finally, a

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European Union. See T. Spronken, G. Vermeulen, D. de Vocht, L. van Puyenbroeck, EU Procedural Rights in Criminal Proceedings, Report funded by the European Commission, 2009; E. Cape, Z. Namoradze, R. Smith and T. Spronken, *Effective Criminal Defence in Europe*, Antwerp/Oxford, Intersentia, 2010.

[32] G. Vermeulen, W. De Bondt, C. Ryckman, *Rethinking International Cooperation in Criminal Matters in the EU, Moving beyond actors, bringing logic back, footed in reality*, Antwerp, Maklu, 2012.

[33] Rethinking European Criminal Justice, coordinated by the Max Planck Institute and funded by OLAF for 2006-2007, Freiburg.

[34] Study coordinated by the University of Luxembourg and funded by OLAF on EU model rules of evidence and procedural safeguards for the procedure of the proposed European Public Prosecutor's Office, 2012 and EU model rules of criminal investigations and prosecution for the procedure of the proposed European Public Prosecutor's office, 2011-2012.

[35] See K. Ligeti (ed.), *The Future of Prosecution in Europe*, Vol. 1, Oxford, Hart Publishing, 2013, 945, 985.

[36] S. Allegrezza, V. Covolo, 'The Directive 2012/13/EU on the Right to Information in Criminal Proceedings: Status Quo or Step Forward?', 2016, *Croatian Association of European Criminal law*, 41, 51; I.-M. Rusu, 'The right to information within the criminal proceedings in the European Union. Comparative examination. Critical opinions', 2016, 6, *Judicial Tribune*, 139, 150.

[37] E.-J. Van Der Vlis, 'The right to interpretation and translation' 2010 *The Journal of Specialised Translation*, 26, 40; E. Hertog, 'Directive 2010/64/EU of the European Parliament and of the Council on the Right to Interpretation and Translation in Criminal Proceedings: Transposition Strategies with regard to Interpretation and Translation', 2015, 7 *MonTI*, 73, 100; S. Quattrocolo, 'The Right to Information in EU Legislation', *in* S. Ruggeri (ed.), *Human Rights in Criminal Law: New Developments in European Legislation and Case Law after the Lisbon Treaty*, New York, Springer International Publishing, 2015; R. Vogler, 'Lost in Translation: Language Rights for Defendants in European Criminal Proceedings', *in* Ruggeri, *ibid*., 96-108.

[38] V. Mols, 'Bringing directives on procedural rights of the EU to police stations: Practical training for criminal defence lawyers', 2017, 8, *New Journal of European Criminal Law*, 300, 308; A. Soo, 'How are the Member States progressing on transposition of Directive 2013/48/EU on the right of access to a lawyer? An inquiry conducted among the Member States with the special focus on how Article 12 is transposed', 2017, 8, *New Journal of European Criminal Law*, 64, 76.

[39] M. Kusak, 'Common EU Minimum Standards for Enhancing Mutual Admissibility of Evidence Gathered in Criminal Matters', 2017, 23, *European Journal of Criminal Policy Research*, 337, 352.

[40] A. Bernardi, A. Martufi (eds.), *Prison overcrowding and alternatives to detention. European sources and national legal systems*, Naples, Jovene Edirore, 2016.

few authors analysed the challenge of implementing EU directives in national laws from the standpoint of individual Member States, such as France,[41] Romania,[42] Italy[43] and Portugal.[44]

Whereas this brief overview of academic works provides valuable insights on the state of procedural criminal laws at EU and national levels, the study at hand does not dwell on any of these. Rather, it constitutes an attempt at providing an assessment of the interplay between national criminal procedures and cross-border cooperation. Ten years after the entry into force of the Lisbon Treaty, and the granting of an explicit competence to the EU in the approximation of criminal procedures, the time is ripe to assess, in a comprehensive manner, the impact of EU legislative efforts in harmonising procedural safeguards, to analyse recent evolutions in the case law as well as to measure the complexity of the challenges that lie ahead for cross-border cooperation in criminal matters and to outline potential next steps to address them most effectively.

## III. Methodology

In order to assess where differences can lead to problems in the application of mutual recognition tools and instruments, this research is based on a representative sample of nine Member States. The following countries have been selected: Finland, France, Germany, Hungary, Italy, Ireland, the Netherlands, Romania and Spain. Several factors were taken into account in the selection process. Besides the need to strike a fair geographical balance between western, Mediterranean, central, eastern and Nordic Member States, particular attention was paid to the diversity of national legal systems, namely those adhering to inquisitorial, accusatorial and mixed systems. Indeed, previous comparative research on the commonalities and differences in applying procedural rights in criminal proceedings across the EU opted for a selection of Member States based on the three different paradigms of legal traditions in the EU, namely inquisitorial, adversarial, and post-socialist legal systems.[45] As noted elsewhere, the development of an Area of Freedom, Security and Justice (AFSJ) as well as a single European area where freedom of movement is secured has not been accompanied by the creation of a single area of law.[46] The relevance of legal pluralism as a selection criterion should therefore not be overlooked and the above classification has been construed so as to be in line with the cautious approach pursued by the

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[41] See E. Vergès, 'Emergence européenne d'un régime juridique du suspect, une nouvelle rationalité juridique', 2012, *Revue de Science Criminelle*, 635.

[42] See I.-M. Rusu, 'The right to information within the criminal proceedings in the European Union. Comparative examination. Critical opinions' (above, n36).

[43] G. Laura Candito, 'The Influence of the Directive 2012/13/EU on the Italian System of Protection of the Right to Information in Criminal Procedures', *in* Ruggeri (n37), 229-261.

[44] P. Caiero (ed.), 'The European Union Agenda on Procedural Safeguards for Suspects and Accused Persons: the 'second wave' and its predictable impact on Portuguese law', 2015, University of Coimbra, Report.

[45] E. Cape, Z. Namoradze, R. Smith and T. Spronken, *Effective Criminal Defence in Europe*, Antwerpen/Oxford, Intersentia, 2010.

[46] The law remains territorial. See Mitsilegas (above, n4).

drafters of the Treaty under Article 82(2) TFEU, that is to "take into account the differences between the legal traditions and systems of the Member States" in the harmonisation process of procedural criminal law. It should be noted, however, that Member States adhere neither to purely inquisitorial (i.e. France, Spain, Finland) nor purely adversarial (i.e. Ireland)[47] traditions as a result of subsequent reforms of the criminal justice systems over the past decades. Others define themselves as belonging to truly mixed (i.e. the Netherlands, Italy, Germany) systems, and a last group of states represent post-socialist legal systems (i.e. Romania, Hungary).

The legal diversity underpinning EU criminal justice systems lends itself to the adoption of a comparative approach to the topic at hand. It is believed that putting a representative sample of national legal systems into a comparative perspective lays adequate groundwork for an accurate rethink and evaluation of the current framework underpinning cross-border cooperation in criminal matters. Moreover, the comparative approach facilitates the identification of best practices in some Member States' legal systems that could be replicated in others. These include techniques on how to address differences between national criminal procedures, how to fill the gaps left by EU instruments in procedural safeguards and how to foster inter-State cooperation in those areas where the EU has not legislated yet, to name only a few examples.

The research was conducted by relying on a combination of desk research and empirical research methods. Desk research involved trawling through the aforementioned existing literature as well as a variety of official and policy documents, such as the 2009 and 2011 roadmaps, relevant EU procedural legislation and new cooperation instruments relevant to the topic at hand where differences between criminal procedures pose, or are likely to pose, obstacles to their effective functioning. Particular attention was also paid to *ex post* assessments by the European Commission and other reports carried out by the European Parliament, in respect to, *inter alia*, the Victims' Rights Directive,[48] the European Protection Order Directive,[49] and the implementation of procedural rights directives and detention conditions.[50] The work of EU agencies was also taken into consideration, such as the studies written by the

[47] There are few inquisitorial elements in Irish criminal procedure. For example, a judge generally acts as a referee at trial. Moreover, Ireland has a Constitution, meaning that there has been a degree of codification of the case law. See National report No. 2 on Ireland, Section on general questions (point 1).

[48] A. Scherrer, I. K. Kristo, C. Chandler, S. Kreutzer, E. Lale-Demoz, J. Malan, 'The Victims' Rights Directive 2012/29/EU, European Implementation Assessment,' PE 611.022 December 2017.

[49] E. Cerrato, T. Freixes, M. Lutfi, V. Merino, N. Oliveras, L. Román, B. Steible and N. Torres, 'European Protection Order, European Implementation Assessment', PE 603.272, September 2017.

[50] W. Van Ballegooij, 'Procedural rights and detention conditions, Cost of non-Europe report' European Parliament (EPRS, European Added Value Unit) Report, PE 611.008, December 2017.

Fundamental Rights Agency[51] and Eurojust reports and case law analyses.[52] Another strand of the research includes a mapping of the extensive body of the case law of the European Court of Human Rights alongside recent judgments delivered by the Court of Justice of the European Union relating not only to procedural rights directives but also to mutual recognition instruments more broadly.

Turning to the gathering of empirical evidence, the research team identified national experts in the nine Member States selected. Each of those experts was responsible for preparing two different reports, covering respectively:[53]

– an overview of national case law where differences between the national criminal laws were perceived as an obstacle to the operation of mutual recognition instruments and cross-border cooperation in criminal matters at large (National Reports No. 1);
– the specificities of national procedural laws in areas covered by inter-State cooperation, such as the protection of victims, investigation measures and admissibility of evidence, to name but a few, on the basis of a questionnaire prepared by the research team (National Reports No. 2).

In order to complement the findings of national reports and to gain a clear picture of the state of play at EU level, the research process was complemented by conducting several semi-structured interviews. More than ten interviews were conducted with criminal law experts working at the European Commission, the Council of the EU and the European Parliament, as well as relevant EU agencies and networks, such as Eurojust and the European Judicial Network. Interviews also took place at the Belgian Federal Ministry for Justice in order to gain concrete insights as to the extent to which national diversity and perspectives hindered the negotiations of approximation and cooperation instruments.[54]

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[51] See, *inter alia*, country reports commissioned by the Fundamental Rights Agency for the following projects: 'Rehabilitation and mutual recognition – practice concerning EU law on transfer of persons sentenced or awaiting trial', 2015; 'Rights of suspected and accused persons across the EU: translation, interpretation and information', 2016.

[52] See, *inter alia*, 'EAW case work 2014-2016', Eurojust report, 11 May 2017; 'Conclusions of the Thirteenth Annual Meeting of National Experts on Joint Investigation Teams (JITs)', Eurojust Report, 17 and 18 May 2017.

[53] National reports are available at the following link: www.europarl.europa.eu/RegData/etudes/STUD/2018/604977/IPOL_STU(2018)604977(ANN01)_EN.pdf

[54] The interviewed practitioners (who all stressed that their responses reflect their personal opinion, and do not constitute the official position of their MS/institution) are Katarzyna Janicka, Team Leader, Procedural Criminal Law Unit, DG Just, European Commission; Isabelle Pérignon, Head of the Procedural Criminal Law Unit, DG Just, European Commission; Ingrid Gertrude Breit, Procedural Criminal Law Unit, DG Just, European Commission; Fabien Le Bot, Procedural Criminal Law Unit, DG Just, European Commission; Jesca Beneder, Procedural Criminal Law Unit, DG Just, European Commision; Peter Csonka, Head of the General Criminal Law Unit, European Commision; Steven Cras, Administrator, Justice and Home Affairs, Council of European Union; Anze Erbeznik, Administrator, Committee on Civil, Justice and Home Affairs, European Parliament; Wouter Van Ballengooij, Policy analyst, EPRS, European Parliament; Ola Lofgren, Secretary General, European Judicial Network; Vincent Jamin, Head of Joint Investigations Teams Network Secretariat, Eurojust; Laura Surano, Legal

Ultimately, the research team was helped by an advisory board composed of two leading researchers in the field, namely Pedro Caeiro and Valsamis Mitsilegas. The advisory board reviewed the questionnaire prepared for national rapporteurs and provided useful comments on the final version of the study.

## IV. Structure

Scholars based in different countries and representing different traditions of research wrote the first five sections of this book. Whereas the comparative analysis relies on the aforementioned nine national reports, only the contributions of France, Germany, Hungary, the Netherlands and Romania are presented here (Part I).

Based on the national reports received and extensive desk and field research, this book identified a set of nine domains where differences between national criminal procedures affect, to a greater or lesser extent, the negotiation and operation of cross-border cooperation instruments in criminal matters, including supranational actors such as the EPPO (Part II). It should be noted at the outset that the list of differences and the obstacles to cross-border cooperation and mutual recognition that derive from them is of a non-exhaustive nature. Drawing up a comprehensive overview of differences among national procedural criminal laws is nigh on impossible, at least in sound methodological terms.

The nine areas of conflict between cooperation and diversity in criminal procedures include:

1. Investigative measures;
2. Admissibility of evidence;
3. Transnational procedures and equality of arms: the case of cross-border investigations;
4. Pre-trial detention regimes and alternatives to detention;
5. Procedures to assess detention conditions and surrender following the *Aranyosi and Căldăraru* judgment;
6. Compensation schemes for unjustified detention;
7. The right to be present at a trial and conditions for *in absentia* surrender;
8. Compensation systems for victims;
9. Protection measures for victims.

In almost every one of these nine areas of analysis, a description of the main points of divergence among the procedural laws of the Member State is provided. The comparative study relies on the inputs provided by the national rapporteurs and was sometimes complemented by the findings of other reports, in particular those carried out by the Fundamental Rights Agency,[55] Fair Trials,[56] the European Parliament

Officer, Eurojust; Daniel Flore, Belgian Ministry of Justice; Stéphanie Bosly, Belgian Ministry of Justice; Nathalie Cloosen, Belgian Ministry of Justice; Amandine Honhon, Belgian Ministry of Justice; Nancy Colpaert, Belgian Ministry of Justice.

[55] 'Victims of crime in the EU: the extent and nature of support for victims' Fundamental Rights Agency, Report, 2015; 'Rights of suspected and accused persons across the EU: translation, interpretation and information', Fundamental Rights Agency, Report, 2015.

[56] Fair Trials, 'A Measure of Last Resort? The practice of pre-trial detention decision-making in the EU', 2016. Retrieved: https://www.fairtrials.org/wp-content/uploads/A-Measure-

Research Service,[57] as well as various research projects commissioned by the EU institutions, on the European Protection Order in particular.[58] Then, a second part analyses how these differences impact mutual recognition, cross-border cooperation and/or mutual trust. The term 'hindrance' has been understood broadly so as to capture the various nuances and degrees that this very notion encapsulates. Therefore, the following examines not only impairments to the effective operation of cooperation mechanisms, but also infringements – actual or potential – to fundamental rights and mutual trust.[59] Where applicable, a prospective impact of EU directives on the rights of victims and defendants is made, looking in particular at their potential to narrow divergences between criminal procedures and mitigate the adverse impact of these differences on cross-border cooperation and mutual trust. Although this analysis is merely prospective, it was deemed necessary to assess whether and where it might be advisable to move forward with new legislative proposals.

Ultimately, a number of recommendations, comprising both legislative and non-legislative measures, are offered (Part III). The research sought to be realistic and weighed the benefits of further harmonisation with the imperative of preserving the diversity of legal traditions. For this reason, practical tools and soft law instruments were sometimes preferred to legislative action or proposed to complement legislative action.

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[57] W. Van Ballegooij, 'Procedural rights and detention conditions, Cost of non-Europe report'.

[58] E. Cerrato *et al*., 'European Protection Order, European Implementation Assessment' (n49).

[59] The first reports on national jurisprudence prepared by the nine rapporteurs were particularly helpful in this respect.