

# The Impact of Legislative Harmonisation on Effective Judicial Protection in Europe's Area of Criminal Justice

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## Abstract

*By focusing on the adoption of EU minimum standards in the field of procedural rights in criminal proceedings, this article will assess the relationship between secondary law harmonisation, and the principles of effectiveness of EU law and of effective judicial protection in Europe's area of criminal justice. This article will begin by exploring the third pillar legacy on harmonisation, by focusing on what the EU has not done (i.e. to legislate on a horizontal instrument on defence rights) and what the EU has done (i.e. to legislate specifically on judgments in absentia with the specific purpose of clarifying, and in some instances limiting, the grounds for refusal in a number of EU mutual recognition measures). The analysis will then examine the impact of the entry into force of the Lisbon Treaty and will evaluate critically the impact of EU harmonisation measures on defence rights on effective judicial protection. The analysis will focus on the relationship between EU law and national law, as well as on the relationship between EU law and the Charter and ECHR. Great emphasis will be placed on the strengthening of enforcement avenues offered by the normalisation of EU criminal law after Lisbon. These avenues have the potential to ensure that, even minimum, harmonisation measures in the field of defence rights can have a real impact on enhancing effective judicial protection and achieving the effectiveness of EU legislation on the ground.*

## I. Introduction

Giving flesh to the principle of effective judicial protection in the field of European integration in criminal matters has been far from a straightforward task. European criminal law has developed initially under a highly securitised agenda, prioritising security objectives over the protection of fundamental rights, with the vast majority of EU third pillar legislation focusing on enhancing the effectiveness of law enforcement co-operation. The third pillar legacy also reflected the fact that integration efforts would be limited by Member States' concerns over maintaining their sovereignty in the sensitive area of criminal law. These concerns have led to the emergence of European criminal law focusing primarily on cooperation between national legal orders on the basis

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of the principle of mutual recognition, rather than on harmonisation of substantive and procedural criminal law. Harmonisation, if it occurred, focused primarily on enhancing the effectiveness of enforcement measures rather than on the effective protection of fundamental rights. The evolution of European criminal law along these lines has generated a number of concerns regarding the protection of fundamental rights at EU and at national level which have questioned the very legitimacy of European integration in criminal matters.

These concerns have been reflected partly in the Lisbon Treaty, whose entry into force marked a turning point with regard to both the form and the content of European integration in criminal matters. In terms of the form, efforts to clarify and extend EU competence in criminal matters have led to distinct and additional legal bases on harmonisation in the field of procedural law, a key provision in this context being Article 82(2) TFEU which grants the Union competence to adopt minimum standards in the field of criminal procedure. In terms of substance, this new competence extends also to rights, with Article 82(2) TFEU granting expressly competence to the EU to adopt minimum rules concerning the rights of the individual in criminal procedure. This legal basis has enabled the Union legislators to adopt within a relatively short space of time a considerable *corpus* of harmonisation measures aimed expressly at the protection of the rights of the individual in criminal proceedings. A number of provisions in these measures are closely related to, and can be seen as expressions of, broader rights enshrined in the Charter and in the ECHR (most notably the right to a fair trial).<sup>1</sup> It is these measures which will constitute the focus of this contribution in assessing the relationship between secondary law harmonisation, and the principles of effectiveness of EU law and of effective judicial protection in Europe's area of criminal justice. The article will begin by exploring the third pillar legacy on harmonisation, by focusing on what the EU has *not* done (i.e. to legislate on a horizontal instrument on defence rights) and what the EU *has* done (i.e. to legislate specifically on judgments *in absentia* with the specific purpose of clarifying, and in some instances limiting, the grounds for refusal in a number of EU mutual recognition measures). The analysis will then examine the impact of the entry into force of the Lisbon Treaty and will evaluate critically the impact of EU harmonisation measures on effective judicial protection. The analysis will focus on the relationship between EU law and national law, as well as on the relationship between EU law and the Charter and

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<sup>1</sup> The European Union has also legislated in the field of the rights of the victims, albeit in a piecemeal manner. This article will focus on the rights of the defendant as this is a field where harmonisation has covered a number of key aspects of criminal proceedings and as the EU harmonisation standards have a direct impact of effective judicial protection on the ground. On the development of EU law on victims' rights see V. Mitsilegas, 'The Place of the Victim in Europe's Area of Criminal Justice' in F. Ippolito and S. Iglesias Sanchez (eds), *Protecting Vulnerable Groups* (Hart Publishing, 2015) 313-338.

ECHR. Great emphasis will be placed on the strengthening of enforcement avenues offered by the normalisation of EU criminal law after Lisbon. They have the potential to ensure that, even minimum, harmonisation measures in the field of defence rights can have a real impact on enhancing effective judicial protection and achieving the effectiveness of EU legislation on the ground.

## 2. The legacy of the third pillar – from the defence rights saga to rules on judgments *in absentia*

One of the major criticisms of advancing European integration in criminal matters in the era of the third pillar has been that security has been unduly prioritised over the protection of fundamental rights.<sup>2</sup> This claim was made in particular in relation to the application of the principle of mutual recognition in the field of criminal law, and the operation of the emblematic mutual recognition, and arguably European criminal law, measure, namely the Framework Decision on the European Arrest Warrant.<sup>3</sup> As a means of addressing these concerns, the European Commission tabled at the end of April 2004 a draft Framework Decision ‘on certain procedural rights in criminal proceedings throughout the European Union’.<sup>4</sup> The proposal aimed at establishing minimum standards and contained provisions on the right to legal advice, the right to translation and interpretation, the right to communication and specific attention, and the duty to inform a suspect of his rights in writing through a common EU ‘Letter of Rights’. Although relatively modest in its scope and aiming at establishing minimum EU standards only, the Commission’s proposal has proven to be controversial with Member States and was ultimately not adopted by Member States. Failure to reach agreement on EU legislation on the rights of the defendant under the third pillar is due to three interrelated concerns put forward by a number of Member States during negotiations: concerns over the existence and extent of EU competence to legislate in the field, concerns over the impact of EU legislation on the rights of the defendant on the diversity and the special characteristics of domestic criminal justice systems; and (not always voiced expressly but underlying legal diversity concerns) concerns over the impact of EU legislation on Member States’ choices towards national law privileging security over the protection of fundamental rights.<sup>5</sup>

<sup>2</sup> For an early analysis in the context of the Framework Decision on the European Arrest Warrant, see S. Alegre and M. Leaf, ‘Mutual Recognition in European Judicial Co-operation: A Step Too Far Too Soon?’ [2004] ELJ 200.

<sup>3</sup> Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States [2002] OJ L190/1.

<sup>4</sup> Commission, ‘Proposal for a Council Framework Decision on certain procedural rights in criminal proceedings throughout the European Union’ COM (2004) 328 final.

<sup>5</sup> V. Mitsilegas, *EU Criminal Law* (Hart Publishing 2009).

With regard to competence, the proposed legal basis of the Commission's proposal was Article 31(1)(c) TEU, which enabled common action to be taken on judicial cooperation in criminal matters 'ensuring compatibility in rules applicable in the Member States, as may be necessary to improve such cooperation'. The Commission defended this choice by stating that the proposal constitutes the 'necessary complement' to the mutual recognition measures that are designed to increase efficiency of prosecution.<sup>6</sup> However, it was argued by Member States that the EU Treaty did not contain an express legal basis conferring upon the European Union powers to legislate in the field.<sup>7</sup> Negotiations have also been fraught with difficulties to reach a unanimous understanding of key criminal justice concepts which would underpin EU law on the rights of the defendant, including the concept of 'criminal proceedings' and concepts such as individuals 'arrested' and 'charged' with a criminal offence. Agreement at an EU level of such concepts which would not be entirely consistent with domestic criminal law definitions was deemed by Member States to be an undue challenge to the diversity of their national criminal justice systems and (implicitly) also for some to their internal policy and legal balance between the pursuit of security and the protection of fundamental rights.<sup>8</sup>

What Member States *did* manage to agree upon in their powers under the third pillar was a Framework Decision specifically on judgments *in absentia*.<sup>9</sup> The aim of the Framework Decision was not to introduce minimum harmonisation across the board, but rather to create a level playing field with regard to setting the parameters of the *in absentia* ground for refusal in a number of mutual recognition instruments (including the European Arrest Warrant Framework Decision) which the *in absentia* Framework Decision amended. The aim of the Framework Decision is thus not primarily the protection of fundamental rights, but rather, in principle, enhancing the effectiveness of enforcement under mutual recognition. This is confirmed by Article 1(1) of the Framework Decision which confirms that its objectives are to enhance the procedural rights of the persons subject to criminal proceedings, to facilitate

<sup>6</sup> See Commission, 'Proposal for a Council Framework Decision on certain procedural rights in criminal proceedings throughout the European Union' COM (2004) 328 final, para. 51.

<sup>7</sup> For details, see V. Mitsilegas, 'Trust-building Measures in the European Judicial Area in Criminal Matters: Issues of Competence, Legitimacy and Inter-institutional Balance' in S. Carrera and T. Balzacq (eds), *Security versus Freedom? A Challenge for Europe's Future* (Ashgate 2006) 279-289.

<sup>8</sup> V. Mitsilegas, *EU Criminal Law* (Hart Publishing 2009).

<sup>9</sup> Council Framework Decision 2009/299/JHA of 26 February 2009 amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial [2009] OJ L81/24, 24-36.

judicial cooperation in criminal matters and, *in particular to improve mutual recognition of judicial decisions between Member States*. The Preamble to the Framework Decision noted that the various Framework Decisions implementing the principle of mutual recognition do not deal consistently with the issue and claimed that this diversity could complicate the work of the practitioner and hamper judicial cooperation.<sup>10</sup> It was therefore necessary, according to the Preamble, to provide clear and common grounds for non-recognition of decisions rendered following a trial at which the person concerned did not appear in person, with the Framework Decision aimed at *refining* the definition of such common grounds, allowing the executing authority to execute the decision despite the absence of the person at the trial, while fully respecting the person's rights of defence.<sup>11</sup> The limits to the harmonising effect of the Framework Decision are laid out clearly in the Preamble, according to which:

"The Framework Decision is limited to refining the definition of grounds for non-recognition in instruments implementing the principle of mutual recognition. Therefore, provisions such as those relating to the right to a retrial *have a scope which is limited to the definition of these grounds for non-recognition. They are not designed to harmonise national legislation*. This Framework Decision is *without prejudice to future instruments* of the European Union designed to approximate the laws of the Member States in the field of criminal law."<sup>12</sup>

### 3. Transferring the third pillar logic post-Lisbon: the impact of *Melloni*

Notwithstanding these clear limits to the scope, aim and harmonising reach of the *in absentia* Framework Decision, this measure has not been treated as a minimum harmonisation measure by the Court of Justice when ruling on the extent and limits of mutual trust and the grounds of refusal to execute European Arrest Warrants. The interpretation of the Framework Decision was key in the CJEU ruling in *Melloni*<sup>13</sup>, where the Court effectively confirmed the primacy of third pillar law over national constitutional law, which provided a higher level of fundamental rights protection than EU law. In order to reach this conclusion, the Court followed a three-step approach.<sup>14</sup> The first step for the Court was to demarcate the scope of the Framework Decision on

<sup>10</sup> Recital 2.

<sup>11</sup> Recital 4. Emphasis added.

<sup>12</sup> Recital 14. Emphasis added.

<sup>13</sup> Case C-399/11 *Stefano Melloni v Ministerio Fiscal* EU:C:2013:107.

<sup>14</sup> V. Mitsilegas, 'The Symbiotic Relationship between Mutual Trust and Fundamental Rights in Europe's Area of Criminal Justice' [2015] NJECL 460 whereupon this section builds.

the European Arrest Warrant as amended by the Framework Decision on judgments in absentia (and in particular Article 4a(1) thereof<sup>15</sup>) in order to establish the extent of the limits of mutual recognition in such cases. Starting from an enforcement effectiveness position,<sup>16</sup> the Court adopted a literal interpretation of Article 4a(1), confirming that that provision restricts the opportunities for refusing to execute a European Arrest Warrant.<sup>17</sup> The second step was to examine the compatibility of the above system with European fundamental rights and in particular the right to an effective judicial remedy and the right to fair trial set out in Articles 47 and 48(2) of the Charter. By reference to the case law of the European Court of Human Rights,<sup>18</sup> the Court of Justice found that the right of an accused person to appear in person at his trial is not absolute but can be waived.<sup>19</sup> The Court further stated that the objective of the Framework Decision on judgments in absentia was to enhance procedural rights whilst

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<sup>15</sup> Article 4a(1) of the *in absentia* Framework Decision reads as follows:

‘1. The executing judicial authority may also refuse to execute the European arrest warrant issued for the purpose of executing a custodial sentence or a detention order if the person did not appear in person at the trial resulting in the decision, unless the European arrest warrant states that the person, in accordance with further procedural requirements defined in the national law of the issuing Member State:

(a) in due time:

(i) either was summoned in person and thereby informed of the scheduled date and place of the trial which resulted in the decision, or by other means actually received official information of the scheduled date and place of that trial in such a manner that it was unequivocally established that he or she was aware of the scheduled trial; and

(ii) was informed that a decision may be handed down if he or she does not appear for the trial; or

(b) being aware of the scheduled trial, had given a mandate to a legal counsellor, who was either appointed by the person concerned or by the State, to defend him or her at the trial, and was indeed defended by that counsellor at the trial; or

(c) after being served with the decision and being expressly informed about the right to a retrial, or an appeal, in which the person has the right to participate and which allows the merits of the case, including fresh evidence, to be re-examined, and which may lead to the original decision being reversed:

(i) expressly stated that he or she does not contest the decision; or

(ii) did not request a retrial or appeal within the applicable time frame; or

(d) was not personally served with the decision but:

(i) will be personally served with it without delay after the surrender and will be expressly informed of his or her right to a retrial, or an appeal, in which the person has the right to participate and which allows the merits of the case, including fresh evidence, to be re-examined, and which may lead to the original decision being reversed; and

(ii) will be informed of the time frame within which he or she has to request such a retrial or appeal, as mentioned in the relevant European arrest warrant.’

<sup>16</sup> Para 36-38.

<sup>17</sup> Para 41.

<sup>18</sup> *Medenica v Switzerland* App no 20491/92 (ECtHR, 14 June 2001); *Sejdovic v Italy* App no 56581/00 (ECtHR, 1 March 2006); *Haralampiev v Bulgaria* App no 29648/03 (ECtHR 24 April 2012).

<sup>19</sup> Para 49.

improving mutual recognition of judicial decisions between Member States<sup>20</sup> and found Article 4a(1) compatible with the Charter. Having asserted the compatibility of the relevant provision with the Charter, the third step for the Court was to rule on the relationship between the secondary EU law in question with the national constitutional law which provided a higher level of protection. The Court rejected an interpretation of Article 53 of the Charter as giving general authorisation to a Member State to apply the standard of protection of fundamental rights guaranteed by its constitution when that standard is higher than that deriving from the Charter and, where necessary, to give it priority over the application of provisions of EU law.<sup>21</sup> That interpretation of Article 53 would undermine the principle of the primacy of EU law inasmuch as it would allow a Member State to disapply EU legal rules *which are fully in compliance with the Charter* where they infringe the fundamental rights guaranteed by that State's constitution.<sup>22</sup> Article 53 of the Charter provides freedom to national authorities to apply national human rights standards provided that the level of protection provided for by the Charter, as interpreted by the Court, and the *primacy, unity and effectiveness* of EU law are not thereby compromised.<sup>23</sup> Allowing a Member State to avail itself of Article 53 of the Charter, to make the surrender of a person convicted *in absentia* conditional upon the conviction being open to review in the issuing Member State, in order to avoid an adverse effect on the right to a fair trial and the rights of the defence guaranteed by the constitution of the executing Member State, by casting doubt on the uniformity of the standard of protection of fundamental rights as defined in that framework decision, '*would undermine the principles of mutual trust and recognition which that decision purports to uphold and would, therefore, compromise the efficacy of that framework decision*'.<sup>24</sup>

In summary, in *Melloni*, the Court has given priority to the effectiveness of mutual recognition based on presumed mutual trust. Secondary pre-Lisbon third pillar law whose primary aim is to facilitate mutual recognition has primacy over national constitutional law which provides a high protection of fundamental rights.<sup>25</sup> In reaching this conclusion, the Court has interpreted fundamental rights, including the right to an effective remedy, in a restrictive manner. It has emphasised the importance of the Framework Decision on judgments *in absentia* for the effective operation of mutual recognition, a Framework Decision which as the Court admitted restricts the opportunities for refusing to execute a

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<sup>20</sup> Para 51.

<sup>21</sup> Paras 56-57.

<sup>22</sup> Para 58. *Emphasis added.*

<sup>23</sup> Para 60. *Emphasis added.*

<sup>24</sup> Para 63. *Emphasis added.*

<sup>25</sup> V. Mitsilegas, 'The Symbiotic Relationship between Mutual Trust and Fundamental Rights in Europe's Area of Criminal Justice' [2015] NJECL 460.

European Arrest Warrant. This aim sits uneasily with the Court's assertion that the *in absentia* Framework Decision also aims to protect the procedural rights of the individual. By privileging the teleology of mutual recognition and upholding the text of the Framework Decision on judgments in absentia and the subsequently amended Framework Decision on the European Arrest Warrant, via the adoption also of a literal interpretation, over the protection of fundamental rights, the Court has shown a great, and arguably undue, degree of deference to the European legislator.<sup>26</sup> The Court's reasoning also seems to deprive national executing authorities of any discretion to examine the compatibility of the execution of a European Arrest Warrant with fundamental rights in a wide range of cases involving in absentia rulings.<sup>27</sup> This deferential approach may be explained by the fact that the Court was asked to examine the fundamental rights implications of measures which have been subject to harmonisation at EU level, with the Court arguing that the Framework Decision reflects a consensus among EU Member States with regard to the protection of the individual in cases of in absentia rulings within the broader system of mutual recognition.<sup>28</sup> It has been argued that national constitutional standards will be more readily applicable in cases where EU law has not been harmonised.<sup>29</sup> The Court's ruling in the case of *Jeremy F*<sup>30</sup> has been cited as an example of this approach.<sup>31</sup> In *Jeremy F*, the Court found that the Framework Decision on the European Arrest Warrant as amended by the Framework Decision on judgments in absentia did not preclude Member States from providing for appeals with suspensive effect, provided that such appeals comply with the time-limits set out in the European

<sup>26</sup> L.F.M. Besselink, 'The Parameters of Constitutional Conflict after Melloni' [2014] ELRev 531, 542; A. Torres Pérez, 'Melloni in Three Acts: From Dialogue to Monologue' [2014] EConLRev 308, 317-318.

<sup>27</sup> See also the Opinion of AG Bot, who linked national discretion to refuse surrendering with the perceived danger of forum shopping by the defendant - para103.

<sup>28</sup> See also the Opinion of AG Bot, according to whom the Court cannot rely on the constitutional traditions common to the Member States in order to apply a higher level of protection (para 84) and that the consensus between Member States leaves no room for the application of divergent national levels of protection (para 126).

<sup>29</sup> See K. Lenaerts and J.A. Gutiérrez-Fons, 'The European Court of Justice and Fundamental Rights in the Field of Criminal Law' in V. Mitsilegas, M. Bergström and T. Konstadinides (eds), *Research Handbook of European Criminal Law* (Edward Elgar 2016) 7-29; B. de Witte, 'Article 53' in S. Peers, T. Hervey, J. Kenner and A. Ward, *The EU Charter of Fundamental Rights. A Commentary* (Hart Publishing 2014); AG Bot, Opinion, para 124. According to the AG, it is necessary to differentiate between situations in which there is a definition at European Union level of the degree of protection which must be afforded to a fundamental right in the implementation of an action by the EU and those in which that level of protection has not been the subject of a common definition.

<sup>30</sup> Case C-168/13 PPU *Jeremy F. v Premier ministre* EU:C:2013:358.

<sup>31</sup> K. Lenaerts and J.A. Gutiérrez-Fons, 'The European Court of Justice and Fundamental Rights in the Field of Criminal Law' in V. Mitsilegas, M. Bergström and T. Konstadinides (eds), *Research Handbook of European Criminal Law* (Cheltenham and Northampton M.A., Edward Elgar 2016) 7-29.

Arrest Warrant Framework Decision.<sup>32</sup> The Court noted that the absence of an express provision on the possibility of bringing an appeal with suspensive effect against a decision to execute a European Arrest Warrant does not mean that the Framework Decision prevents the Member States from providing for such an appeal or requires them to do so.<sup>33</sup> However, *Jeremy F* must be distinguished from *Melloni*: while *Melloni* concerned the possibility of refusing the execution of a mutual recognition request on fundamental rights grounds, *Jeremy F* did not question fundamentally the essence of the mutual recognition system. Rather, the question in *Jeremy F* was a meta-question, concerning the specific procedural rules which apply in the process of the execution of a Warrant.<sup>34</sup> Here, the Court responded positively to national efforts to provide effective judicial protection in the process of execution of the Warrant.

In *Melloni* the Court uses EU legislation aiming to establish a level playing field in terms of grounds for refusal in mutual recognition instruments in *in absentia* proceedings as a tool for limiting national discretion in protecting fundamental rights. Perceived harmonisation in the field of procedural rights is thus used as a means to *lower*, rather than to enhance, fundamental rights protection in individual cases. The Court's reasoning can be understood if viewed within the framework of the primary objective of enhancing, or at least not undermining, the effectiveness of third pillar enforcement via the smooth running of mutual recognition. Yet, justifying this approach with the argument that there has been harmonisation at EU level is problematic in many respects. Firstly, the Court's deferential approach gives undue emphasis to what are essentially intergovernmental choices (the choices of Member States adopting a third pillar measure without the involvement of the European Parliament), which sit even more uneasily in the post-Lisbon, post-Charter era. Secondly, claims that the Framework Decision has intrinsic fundamental rights protection objectives may be difficult to substantiate, as the ultimate objective of action by Member States has been to set clearer limits to the grounds of refusal to recognise and execute, with the primary aim of the Framework Decision being not to enhance fundamental rights protection but to enhance the effectiveness of mutual recognition. Thirdly, the harmonising effect of the *in absentia* Framework Decision has been overstated. It must be reminded that any harmonising effect of the Framework Decision is limited to the delimitation of the parameters of grounds for refusal in mutual recognition proceedings, and as the Preamble to the Framework Decision states clearly, is without prejudice to any future EU legislation in the field. This point is of central importance in view of the sub-

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<sup>32</sup> Para 74.

<sup>33</sup> Para 38.

<sup>34</sup> V. Mitsilegas, 'The Symbiotic Relationship between Mutual Trust and Fundamental Rights in Europe's Area of Criminal Justice' [2015] NJECL 460.

sequent, post-Lisbon, adoption of a series of EU secondary law measures aiming specifically to enhance the protection of the rights of the defendant, including a Directive regulating aspects of *in absentia* proceedings. The following sections will address the impact of these measures in detail.

#### 4. The constitutional and political impetus towards harmonisation post-Lisbon

The entry into force of the Lisbon Treaty signalled a major breakthrough towards further harmonisation in the field of fundamental rights in Europe's area of criminal justice. Article 82(2)(b) TFEU confers upon the European Union, for the first-time, express competence to adopt minimum rules on the rights of individuals in criminal procedure. EU competence in the field is not self-standing, but functional: competence to adopt rules on procedural rights has been conferred to the EU only to the extent necessary to facilitate mutual recognition and police and judicial cooperation in criminal matters having a cross-border dimension. This constitutional impetus has been accompanied by political impetus at the time of the entry into force of the Lisbon Treaty. Helped by the strengthening of defence rights by the European Court of Human Rights in the case of *Salduz*,<sup>35</sup> the fresh momentum for EU legislation in the field was created by the Swedish Presidency of the Council of the European Union in the second half of 2009. From the very outset of its Presidency, the Swedish Government tabled a Roadmap on fostering protection of suspected and accused persons in criminal proceedings.<sup>36</sup> On the basis of this plan, the Presidency secured the adoption by the Council of a Resolution on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings, adopted one day before the entry into force of the Lisbon Treaty.<sup>37</sup> The Roadmap injected fresh momentum towards the adoption of EU legislation on procedural rights. Its Preamble recognised that there is further room for EU action in relation and beyond the ECHR to ensure full implementation and respect the Convention standards and, where appropriate, to ensure consistent application of the applicable standards and to raise existing standards.<sup>38</sup> The Roadmap referred expressly to the need to rebalance the relationship between security and human rights in the European Union and linked

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<sup>35</sup> On the impact of *Salduz* in this context see J. Jackson, 'Cultural Barriers on the Road to Providing Suspects with Access to Lawyer' in R. Colson and S. Field (eds), *EU Criminal Justice and the Challenges of Legal Diversity. Towards A Socio-legal Approach to EU Criminal Policy* (Cambridge University Press 2016).

<sup>36</sup> Council doc 11457/09, Brussels, 1 July 2009.

<sup>37</sup> Resolution of the Council of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings [2009] OJ C295/1, 1.

<sup>38</sup> Preamble, recital 2.

the protection of human rights with broader EU free movement objectives: according to the Preamble, efforts should be deployed to strengthen procedural guarantees and the respect of the rule of law in criminal proceedings, no matter where citizens decide to travel, study, work or live in the European Union.<sup>39</sup> In order to avoid the stagnation encountered in negotiations of procedural rights by previous EU Presidencies, Sweden adopted an incremental and gradual approach: rather than resuscitating calls for the adoption of a single EU legal instrument on procedural rights, a 'roadmap' was proposed, anticipating the entry into force of the Lisbon Treaty and consisting of the step-by-step adoption of a series of specific measures on procedural rights including measures on interpretation and translation (measure A), information on rights and information about the charges (measure B), legal advice and legal aid (measure C), communication with relatives, employers and consular authorities (measure D), special safeguards for suspected or accused persons who are vulnerable (measure E) and a Green pPaper on pre-trial detention (measure F).

The combination of a constitutional and political impetus post-Lisbon has led to the development, largely by the European Commission, and to the adoption post-Lisbon of six minimum standards Directives under the Article 82(2)(b) TFEU legal basis.<sup>40</sup> These Directives cover the right to interpretation and translation,<sup>41</sup> the right to information,<sup>42</sup> the right of access to a lawyer,<sup>43</sup> legal aid,<sup>44</sup> procedural safeguards for children<sup>45</sup> and the presumption of inno-

<sup>39</sup> Recital 10.

<sup>40</sup> On detailed analyses of this body of law see S. Ruggeri (ed), *Human Rights in European Criminal Law - New Developments in European Legislation and Case Law after the Lisbon Treaty* (Springer 2015); S. Allegrezza. and V. Covolo (eds), *Effective Defence Rights in Criminal Proceedings. A European and Comparative Study on Judicial Remedies* (Wolters Kluwer-CEDAM 2018); V. Mitsilegas, 'The European Union and the Rights of Individuals in Criminal Proceedings' in D. Brown, J. Turner and B. Weisser (eds), *The Oxford Handbook of Criminal Process* (Oxford University Press 2019) 115-138.

<sup>41</sup> Directive 2010/64/EU of the European Parliament and of the Council on the right to interpretation and translation in criminal proceedings [2010] OJ L280/1.

<sup>42</sup> Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings [2012] OJ L142/1.

<sup>43</sup> Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty [2013] OJ L294/1.

<sup>44</sup> Directive (EU) 2016/1919 of the European Parliament and of the Council of 26 October 2016 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings [2016] OJ L297/1.

<sup>45</sup> Directive (EU) 2016/800 of the European Parliament and of the Council of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings [2016] OJ L132/1.

cence and the right to be present at the trial in criminal proceedings.<sup>46</sup> The Commission has also released a Green Paper on the application of EU criminal justice legislation in the field of detention, discussing the possibility to propose legislation on the matter based on Article 82(2) TFEU.<sup>47</sup> The adoption of these Directives has been justified on the grounds that they would serve to enhance of mutual trust. The Preamble to the Directive on the right to interpretation and translation states, for instance, that ‘mutual recognition of decisions in criminal matters can operate effectively in a spirit of trust in which not only judicial authorities but all actors in the criminal process consider decisions of the judicial authorities of other Member States as equivalent to their own, implying not only trust in the adequacy of other Member States’ rules, but also trust that those rules are correctly applied’.<sup>48</sup> The same wording is used in the Preamble to the Directive on the right to information,<sup>49</sup> and the right to access to a lawyer.<sup>50</sup> While it may be difficult to establish a direct causal link between the minimum harmonisation of criminal procedural rules at EU level on the one hand, and the enhancement of mutual trust in the operation of mutual recognition on the other,<sup>51</sup> the adoption of EU law in the field, by translating and amplifying key procedural rights set out in the Charter and the ECHR into EU secondary law, will have a significant effect on the reconfiguration of effective judicial protection and its enforcement in national and EU law. The following sections focus more extensively on these interactions.

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<sup>46</sup> Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings [2016] OJ L65/1, 1–11.

<sup>47</sup> Commission, ‘Green Paper: Strengthening mutual trust in the European judicial area – A Green Paper on the application of EU criminal justice legislation in the field of detention’ COM (2011) 327 final.

<sup>48</sup> Directive 2010/64/EU of the European Parliament and of the Council on the right to interpretation and translation in criminal proceedings [2010] OJ L280/1, 1–7, recital 4.

<sup>49</sup> Ibid.

<sup>50</sup> Ibid, Preamble, recital 6. While earlier drafts of the Directive on access to a lawyer expanded the link between defence rights and trust by stating that common minimum rules ‘should increase confidence in the criminal justice systems of all Member States, which in turn should lead to more efficient judicial cooperation in a climate of mutual trust *and to the promotion of a fundamental rights culture in the Union*’. Commission, ‘Proposal for a Directive of the European Parliament and of the Council on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest’ COM (2011) 326 final, recital 3, emphasis added. Council of the EU, Proposal for a Directive of the European Parliament and of the Council on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest [First reading] - General approach, 10467/12, 2011/0154 (COD) recital 3.

<sup>51</sup> For such a critique, see V. Mitsilegas, *EU Criminal Law After Lisbon* (Hart Publishing 2016) ch 6.

## 5. The relationship between EU secondary law and national law

The conferral upon the EU of an express competence to harmonise national legislation in the field of the ‘rights of the defendant’ under Article 82(2) TFEU comes with a number of caveats, including limiting harmonisation to the adoption of minimum rules and mandating that such rules must take into account the differences between the legal traditions of Member States. The ‘minimum rules’ approach has been confirmed by the CJEU in the context of the presumption of innocence Directive, stating that in the light of the minimal degree of harmonisation pursued therein, the Directive cannot be interpreted as being a complete and exhaustive instrument intended to lay down all the conditions for the adoption of decisions on pre-trial detention.<sup>52</sup> Limiting harmonisation to minimum rules, however, does not negate the fact that the EU Directives on defence rights have a considerable impact on upholding the protection of fundamental rights in the functioning of criminal justice systems in their interaction with EU law. In addition to the impact generated by bringing into the fore a number of distinct enforcement measures under EU law,<sup>53</sup> the text of the Directives themselves and their interpretation by the CJEU has ensured their considerable impact on national systems. Three factors are central to this impact: the enlargement of the scope of the Directives, the requirement of achieving effectiveness in their implementation, and the insertion, throughout, of strong non-regression clauses in regard to the level of the protection of fundamental rights at national level.

In terms of the scope and applicability of the Directives, it is important to note that, notwithstanding the link with mutual recognition, the legal basis to these instruments (Article 82(2) TFEU) entails, all adopted measures apply not only in cross-border cases involving the operation of the European Arrest Warrant system, but also in purely domestic cases.<sup>54</sup> This is an important development as the implementation of the EU procedural rights measures in domestic law will have to cover all cases in the field of domestic criminal procedure which fall within the scope of the Directives. As Caeiro has noted, the Directives have created an autonomous, self-designed project for the protection of individual rights in criminal proceedings before the authorities of Member States.<sup>55</sup> This

<sup>52</sup> C-310/18 PPU *Milev* EU:C:2018:732, para. 47.

<sup>53</sup> See section on effective enforcement below.

<sup>54</sup> Directive on the right to interpretation and translation: Article 1(1); Directive on the right to information: Article 1; Directive on access to a lawyer: Article 1.

<sup>55</sup> P. Caeiro, ‘Introduction (or: Every Criminal Procedure Starts with a Bill of Rights)’ in P. Caeiro, *The European Union Agenda on Procedural Safeguards for Suspects or Accused Persons: the ‘second wave’ and its predictable impact on Portuguese law* (Instituto Jurídico, Faculdade de Direito, Universidade de Coimbra 2015) 13-18, 17.

is notwithstanding the ‘functional’ articulation of the legal basis for EU measures on procedural rights under Article 82(2) TFEU. In addition, the fact that these measures have introduced minimum harmonisation only does not mean that they are deprived of effectiveness. As Advocate General Bot has noted, the minimum standards character of EU law in the field does not mean that this is not equally binding as other standards of EU law. On the contrary, minimum standards must be interpreted broadly, to ensure the effectiveness of EU law in a field which is marked by considerable diversity between national legal systems.<sup>56</sup>

Adopting a teleological approach, the CJEU has consistently stressed the requirement to achieve the effectiveness of the provisions of the Directive.<sup>57</sup> Effectiveness includes here the effective *exercise* of defence rights<sup>58</sup> and the obligation of national authorities to interpret national law in accordance with the aims stated in the Directives.<sup>59</sup> This approach is important in shifting the focus of European criminal law from a system privileging the effectiveness of enforcement, to a system which must also take seriously the effective exercise of fundamental rights as enshrined in secondary EU law aiming to harmonise national law.

Another important mechanism in ensuring a high-level of protection of fundamental rights at a national level has been established by the inclusion, in all harmonisation measures, of non-regression clauses, affirming that nothing in the Directives must be construed as limiting or derogating from any of the rights and procedural safeguards that are ensured under the Charter, the ECHR, or other relevant provisions of international law or the law of any Member State which provides a higher level of protection.<sup>60</sup> In particular, this is the case in

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<sup>56</sup> Advocate General Bot, paras 32-33.

<sup>57</sup> Case C-216/14 *Covaci* EU:C:2015:686; Joined Cases C-124/16 *Ianos Tranca*, C-188/16 *Tanja Reiter* and C-213/16 *Ionel Opria* EU:C:2017:228; Case C-612/15 *Kolev and others* EU:C:2018:392, paras 89, 100, 103, 107-8; Case C-278/16 *Sleutjes* EU:C:2017:757, para. 33; also Opinion of AG Bot, Case C-216/14 *Covaci* EU:C:2015:305, para. 32-33, 74; Case C-612/15 *Kolev and others* EU:C:2018:392, para. 89 and 103.

<sup>58</sup> See in particular C-612/15 *Kolev and others* EU:C:2018:392, paras 89, 100, 103; Joined Cases C-124/16 *Ianos Tranca*, C-188/16 *Tanja Reiter* and C-213/16 *Ionel Opria* EU:C:2017:228, para. 47; Case C-278/16 *Sleutjes* EU:C:2017:757, para. 33; Case C-216/14 *Covaci* EU:C:2015:305, para. 67.

<sup>59</sup> Joined Cases C-124/16 *Ianos Tranca*, C-188/16 *Tanja Reiter* and C-213/16 *Ionel Opria* EU:C:2017:228, para. 49; Case C-612/15 *Kolev and others* EU:C:2018:392, paras 107-108, referring to the objectives of national law corresponding to those of the Directive.

<sup>60</sup> Directive on the right to interpretation and translation, Article 8; Directive on the right to information, Article 10; Directive on access to a lawyer, Article 14; Directive on legal aid, Article 11; Directive on the rights of children, Article 23; Directive on presumption of innocence, Article 13.

situations not explicitly dealt with by EU law,<sup>61</sup> which may arise in particular as the defence rights Directives bring forward minimum harmonisation only.<sup>62</sup> The inclusion of express non-regression clauses in instruments aiming to harmonise national provisions on defence rights is of paramount importance in allowing Member States to provide a higher protection of fundamental rights in relation to EU law. In view of the fact that the defence rights Directives have been adopted under Article 82(2) TFEU in order to facilitate the operation of mutual recognition in criminal matters, the non-regression clauses they include bring about a significant change to the CJEU approach in *Melloni*. The existence of non-regression clauses renders the CJEU approach in *Melloni* questionable, if not obsolete. In conformity with the non-regression clauses, national law which provides a high level of protection of procedural rights will apply, even if the level of protection is higher than that provided by EU law (in any case minimum) standards. This is in particular the case in relation to *in absentia* judgments in particular, as the post-Lisbon harmonisation exercise has brought about a specific Directive regulating the issue, which co-exists with the 2009 Framework Decision.<sup>63</sup> While it could be argued that the Framework Decision constitutes *lex specialis*, addressing specifically the parameters of grounds for refusal in mutual recognition instruments, it is submitted that the provisions to take into account when upholding fundamental rights at national level are those of the post-Lisbon Directive on the presumption of innocence, as this applies across the board on cross-border and domestic cases and it has been adopted in order to facilitate the operation of mutual recognition in criminal matters in the first place. As the Preamble to the access to a lawyer Directive states expressly, a higher level of protection by Member States should not constitute an obstacle to the mutual recognition of judicial decisions that those minimum rules are designed to facilitate.<sup>64</sup> On the contrary, it is clear that a higher level of human rights protection would rather facilitate, not hinder, mutual recognition. In terms of the interaction of national authorities trying to establish mutual trust, it may be a challenge to accept lower standards in fundamental rights in another Member State when EU law provides only for minimum harmonisation (which can constitute the lowest common denominator for protection at times) and leaves a considerable margin of discretion for the adoption of higher standards by Member States. This is particularly the case, as in this kind of legislation, law in the books is inextricably linked with

<sup>61</sup> See for instance Directive on the right to interpretation and translation, recital 32; Directive on the right to information, recital 40.

<sup>62</sup> C-216/4 *Covaci* EU:C:2015:686, para. 48.

<sup>63</sup> On the relationship between the two, A. Schneider, 'In Absentia Trials and Transborder Criminal Procedures. The Perspective of EU Law' in S. Quattrocchio and S. Ruggeri (eds), *Personal Participation in Criminal Proceedings* (Springer 2019) 605-639.

<sup>64</sup> Preamble, recital 54.

law in action, with effective protection being dependent on how the provisions of the Directives are actually implemented on the ground.

## 6. The relationship with the ECHR and the Charter

The EU defence rights Directives have translated, expanded and clarified in EU secondary law, some of the rights enshrined in the ECHR, in particular in Articles 5 and 6, and in the EU Charter of Fundamental Rights, in particular in Articles 47 and 48.<sup>65</sup> The Directives themselves include provisions to address the key question of the relationship between general ECHR and Charter norms with the specific provisions of EU secondary law on defence rights. As regards the ECHR, it has been acknowledged from the outset that its provisions constitute the starting point and the benchmark under which the legality of EU secondary legislation on procedural rights should be judged upon. In the beginning of the development of EU secondary legislation, every effort has been made from the outset<sup>66</sup> and throughout negotiations to ensure compliance with the ECHR by seeking the opinion of the Council of Europe on draft proposals.<sup>67</sup> Moreover, the Preambles to the adopted EU Directives include extensive references to their relationship with the ECHR. It is noted in particular, that the right to interpretation and translation for those who do not speak or understand the language of the proceedings, is enshrined in Article 6 of the ECHR, as interpreted in the case-law of the European Court of Human Rights and also that the Directive on the right to interpretation and translation facilitates the application of that right in practice.<sup>68</sup> The Preamble to the Directive on the right to information states that Article 5 ECHR enshrines the right to liberty and security of person adding that any restrictions on that right must not exceed those permitted in accordance with Article 5 ECHR and inferred from the case law of the European Court of Human Rights.<sup>69</sup> The same provision makes reference to Article 6 of the Charter. The Directive on the right to access to a lawyer on the other hand, while continuing to refer to the ECHR, contains more

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<sup>65</sup> The EU Charter of Fundamental Rights includes a general provision on the right to a fair trial (Article 47) and a specific provision guaranteeing respect for the rights of the defence of anyone who has been charged (Article 48(2)).

<sup>66</sup> See point 5 of the Roadmap Resolution stating that the Council will act in full cooperation with the European Parliament, in accordance with the applicable rules, and will duly collaborate with the Council of Europe.

<sup>67</sup> See Opinion of the Secretariat on the Commission's proposal for a Directive of the European Parliament and of the Council on 'the right to access to a lawyer in criminal proceedings and on the right to communicate upon arrest', Strasbourg, 9 November 2011. Opinion of the Secretariat on the Commission's proposal for a Directive of the European Parliament and of the Council on 'the right to information in criminal proceedings', Strasbourg, 8 December 2010.

<sup>68</sup> Preamble, recital 14.

<sup>69</sup> Preamble, recital 6.

detailed provisions and arguably demonstrates a greater emphasis on rights as enshrined in the Charter. It is stated that the conditions in which suspects or accused persons are deprived of liberty should fully respect the standards set out in the ECHR, in the Charter, and in the case law of the Court of Justice of the European Union and of the European Court of Human Rights.<sup>70</sup> Moreover, the Preamble adopts a holistic approach to rights on the basis of the Charter, stating that the Directive upholds and should be implemented in accordance with the fundamental rights and principles recognised by the Charter, including the prohibition of torture and inhuman and degrading treatment, the right to liberty and security, respect for private and family life, the right to the integrity of the person, the rights of the child, integration of persons with disabilities, the right to an effective remedy and the right to a fair trial, the presumption of innocence and the rights of the defence.<sup>71</sup> Both the ECHR and the Charter constitute benchmarks for the provisions of the access to a lawyer Directive: the level of protection should never fall below the standards provided by the ECHR or the Charter as interpreted in the case-law of the Court of Justice and of the European Court of Human Rights.<sup>72</sup> Greater emphasis on EU law can also be discerned in the Directives adopted subsequently, with Preambles to a number of Directives stating that the fact that EU Member States are parties to the ECHR does not always provide a sufficient degree of trust in the criminal justice systems of other States.<sup>73</sup>

In the subsequent interpretation of the Directives by the CJEU, a two-level approach on their relationship with the ECHR and the Charter can be discerned. Firstly, the CJEU relies on the ECHR in order to determine the general parameters of the requirements, to comply with the right to a fair trial,<sup>74</sup> and in order to interpret the content of specific provisions of EU secondary law when case-law of the Strasbourg Court has already emerged.<sup>75</sup> The CJEU has referred to the Charter explanations, according to which Article 48(2) of the Charter corresponds to 6(3) ECHR and has the same meaning and scope of the latter, in accordance with Article 52(3) of the Charter.<sup>76</sup> However, there may be further scope for the CJEU to interpret the provisions of the defence rights Directives autonomously under the Charter when relevant Strasbourg case-law is not applicable; there may also be cases where the Charter is applicable, following the

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<sup>70</sup> Preamble, recital 29.

<sup>71</sup> Preamble, recital 52.

<sup>72</sup> Preamble, recital 54.

<sup>73</sup> See for instance presumption of innocence Directive, recital 5; legal aid Directive, recital 3; children's Directive, recital 3.

<sup>74</sup> See for instance C-216/4 *Covaci* EU:C:2015:686, para. 39.

<sup>75</sup> See Case C-612/15 *Kolev and others* EU:C:2018:392, para. 106.

<sup>76</sup> C-612/15 *Kolev and others* EU:C:2018:392, para. 105.

*Fransson* doctrine,<sup>77</sup> in cases where Member States' action is deemed to fall within the scope of EU law even when such action is not designed to implement specifically the Directive provisions. This may be the case for instance regarding national measures aimed at the organisation of the criminal justice system on the ground (appointment of lawyers, interpreters etc) which may have an impact on upholding the rights of the defendant in national criminal proceedings.

On a secondary level, specific interpretations of rights under the ECHR and the Charter may give way to broader considerations when the CJEU is called to perform a constitutional balancing exercise between the protection of fundamental rights at national level and other considerations related to the effectiveness of EU law. A recent example of the Court's approach has been the Court's ruling in *Kolev*<sup>78</sup>, where the CJEU focused on the conformity of national procedural measures with fundamental rights in proceedings aiming to safeguard the EU financial interests. *Kolev* is a development of the CJEU *Taricco* case law, where the CJEU stressed the need to ensure the effectiveness of the fight against fraud against the EU budget, inter alia by granting Article 325 TFEU direct effect and imposing on national authorities the duty to disapply national law which is contrary to the objectives of EU law in this context.<sup>79</sup>

In *Kolev*, the CJEU proceeded into a delicate balancing act: on one hand, it called upon the national legislator to amend rules when there is a systemic risk that acts that may be categorised as offences against the Union's financial interests may go unpunished, while also ensuring that fundamental rights of accused persons are protected,<sup>80</sup> and for the referring court to ensure that, at the various stages of proceedings, any deliberate and abusive obstruction on the part of the defence to the proper conduct and progress of those proceedings can be overridden.<sup>81</sup> On the other hand, the CJEU stated that fundamental rights cannot be defeated by the obligation to ensure the effective collection of the Union's resources.<sup>82</sup> The CJEU then focused on the requirement to protect the right of accused persons to have their case heard within a reasonable time<sup>83</sup> which was treated by the Court as a general principle of EU law, enshrined in Article 6(1) ECHR and in Article 47 of the Charter.<sup>84</sup> The Court referred to Strasbourg case law to determine the temporal applicability of that right in the

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<sup>77</sup> Case C-617/10 *Åklagaren v Hans Åkerberg Fransson* EU:C:2013:105.

<sup>78</sup> Case C-612/15 *Kolev and others* EU:C:2018:392.

<sup>79</sup> Case C-105/14 *Taricco and Others* EU:C:2015:555; Case C-42/17 *M.A.S. and M.B.* EU:C:2017:936.

<sup>80</sup> Para 65.

<sup>81</sup> Para 67.

<sup>82</sup> Para 68.

<sup>83</sup> Para 70.

<sup>84</sup> Para 71.

field of criminal law.<sup>85</sup> However, and while the interpretation of the parameters of a specific rights have again been based on Strasbourg case-law, it is noteworthy that the CJEU reverted to its internal 'constitutional' approach focusing on the general principles of EU law in order to address the broader question of balancing the protection of fundamental rights with the requirement to achieve effective enforcement of EU law in the protection of an EU interest. The approach of the CJEU thus far has demonstrated that the interaction between EU secondary law and ECHR and Charter norms has not been problematic, with the CJEU relying on the ECHR to determine the content of specific Directive provisions when there is already Strasbourg case-law, but reverting to general principles of EU law when called to balance the effectiveness of enforcement with the effectiveness of fundamental rights protection more broadly.

## 7. Enhancing effective judicial protection via effective enforcement

A key element of added value is that harmonisation via EU secondary law of rights, which may also be enshrined in general human rights instruments such as the ECHR or the Charter, is the enforcement mechanisms that the adoption of secondary legislation brings under EU law. Decentralised enforcement of these standards before national courts is key in this context. A powerful enforcement tool accompanying a number of provisions in the defence rights Directives has direct effect, which empowers individuals to invoke and claim rights directly before their national courts if the EU Directives have not been implemented or have been inadequately implemented in national legal orders. Direct effect is important and applicable in view of the emphasis in securing defence rights in practice and on the ground in EU law and means in practice that a suspect or accused person can derive a number of key rights, such as the right to an interpreter or the right to access to a lawyer, directly from EU law.<sup>86</sup> Another enforcement avenue of importance at national level, is the availability of effective remedies in national law for breach of the rights conferred by the Directives.<sup>87</sup> A number of the EU defence rights Directives adopted thus far include provisions on remedies.<sup>88</sup> However, these provisions are worded in very broad terms and do not circumscribe specific duties to

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<sup>85</sup> Ibid.

<sup>86</sup> The Spanish Constitutional Court has confirmed that provisions of the Directive on the right to information entail direct effect. See STC 13/2017, of 30 January 2017.

<sup>87</sup> See to that effect also Recital 44 to the Preamble to the presumption of innocence Directive.

<sup>88</sup> See for instance: Article 10 of the presumption of innocence Directive; Article 12 of access to a lawyer Directive; Article 8 of the legal aid Directive; Article 19 of the children's Directive.

Member States to provide specific remedies under national law<sup>89</sup>, which arguably weakens the enforcement of the obligation in national law. This approach may lead to implementation deficits, as demonstrated in the Commission Reports on the implementation of the first two Directives adopted, the Directive on the right to translation and interpretation and the Directive on the right to information. The Commission has noted that in terms of the right to challenge and complain provided in Article 2(5) of the Directive on translation and interpretation, only 10 Member States have introduced procedures in their legislation addressing this review procedure, while the remaining Member States have relied on existing general procedures for appealing against decisions of investigating and court authorities and submitting complaints or objections during the course of the criminal proceedings.<sup>90</sup> Moreover, less than half of Member States made explicit reference to a specific complaint procedure in relation to the right to challenge and complaint regarding the quality of translation under Article 3(5) of the Directive.<sup>91</sup> The Commission has also noted that there has been diversity in the implementation of Article 8(2) of the Directive on the right to information, which lays down the obligation to ensure that suspects or accused persons or their lawyers have the right to challenge, in accordance with procedures in national law, the possible failure or refusal of the competent authorities to provide information, with some Member States relying on general provisions, some introducing specific provisions and others failing to enact key elements in national law.<sup>92</sup>

The identification of these gaps has been possible and addressing them may be feasible through the strong centralised enforcement mechanisms the adoption of harmonisation measures under secondary EU law entails. The enforcement role of the European Commission and the CJEU are crucial in this context. The ‘Lisbonisation’ of EU criminal law brings with it the full powers of the Commission as the ‘guardian of the Treaties’ in the field of harmonisation in defence rights, the Commission has the duty to monitor the transposition of these measures by Member States, which can lead to the Commission initiating infringement proceedings in cases of failure to implement. The Commission’s

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<sup>89</sup> See for instance: Article 10(1) of the presumption of innocence Directive according to which Member States must ensure that suspects and accused persons have an effective remedy if their rights under this Directive are breached; see similar wording in the legal aid Directive (Article 8) and in the children’s Directive (Article 19).

<sup>90</sup> Commission, ‘Report from the Commission to the European Parliament and the Council on the implementation of Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings’ COM (2018) 857 final, 6-7.

<sup>91</sup> *Ibid.*, 9.

<sup>92</sup> Commission, ‘Report from the Commission to the European Parliament and the Council on the implementation of Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings’ COM (2018) 858 final, 17.

first two implementation reports (on the Directives on the right to interpretation and translation and the right to information) indicate that the Commission's role has been critical in ensuring transposition, with the Commission instituting infringement proceedings against a large number of Member States for failure to transpose (against 7 Member States regarding the right to information Directive and against no less than 16 Member States in the case of the Directive on the right to translation and interpretation), leading to eventual transposition of the Directives by all Member States and the closure of all infringement proceedings by 2018.<sup>93</sup> The enforcement powers of the Commission have contributed to Member States at least appearing to take these new 'minimum standards' measures seriously, especially in cases (such as with the Directive on translation and interpretation) where transposition could involve considerable financial cost and require change in every day practices in the national criminal justice systems with the view of upholding rights effectively. The role of the Commission in this context will become even more critical regarding the transposition of key Directives such as the measures on the right to access to a lawyer and on legal aid, where similar issues will arise prominently in the implementation period.

The Commission implementation reports have also identified a number of areas where national action appears to fall short to the requirements of secondary EU law. In addition to its role in adjudicating in any infringement proceedings which may be brought about by the Commission, the Court of Justice will play a key role in ensuring the effectiveness of EU law in its interpretation of EU law. As seen above, the CJEU has already stressed the importance of achieving the effectiveness of the defence rights Directives, even though they are perceived to only introduce minimum rules. The preliminary reference procedure gives national courts a valuable avenue of cooperation with the CJEU, where the latter can address and rectify issues concerning the operation of defence rights measures on the ground. As Klip has noted, the Directives on the rights of the defendant have a direct and positive influence during the procedure at national level, with the CJEU thus far having intervened to dictate what the outcome of the defendant's protection must be during national proceedings.<sup>94</sup> The CJEU can particularly be influential in ensuring the enforcement of the right to an effective remedy in Member States. In a field presenting a considerable degree of diversity in national criminal procedure systems, the interpretative and enforcement role of the CJEU becomes more significant, notably by establishing

<sup>93</sup> Ibid, 3; see also Commission, 'Report from the Commission to the European Parliament and the Council on the implementation of Directive on the right of interpretation and translation' COM (2018) 857 final, 3.

<sup>94</sup> A. Klip, 'Violations of Defence Rights' Directives' [2018] EJCCLCJ 271, 273-274, referring to the case of *Tranca* above.

a level playing field via the development of autonomous concepts of EU law. The Court of Justice has developed autonomous concepts in order to ensure the uniform and independent interpretation of EU law, in cases where the latter does not refer expressly to national law as a tool for interpretation of the relevant EU law provisions. Autonomous concepts have been developed by the Court on the basis of a teleological and contextual interpretation, as well as on the basis of the need to ensure equality across the EU legal order.<sup>95</sup> This approach is directly applicable to a number of provisions in EU criminal law.<sup>96</sup> In the field of defence rights, the development of autonomous concepts can underpin harmonisation, especially in view of the fact that the need to agree on common EU minimum standards in the field while respecting national legal diversity has led to the inclusion of general, ‘every day’ and broad terminology which remains undefined in the EU instruments and which is not necessarily defined in accordance with national law.

The CJEU has already developed a series of autonomous concepts setting out the parameters of application of the Framework Decision on judgments *in absentia*. These include the concepts of ‘summoned in person’ and ‘by other means actually received official information...’<sup>97</sup> and various aspects of the concept of ‘trial resulting in the decision’, including whether it includes an appeal in which there has been an examination of the merits and which resulted in the passing of a (new) sentence,<sup>98</sup> the imposition of a cumulative sentence and appeal,<sup>99</sup> and the imposition of suspension revocation decisions.<sup>100</sup> There is further potential for the Court to develop autonomous concepts in interpreting the provisions of the defence rights Directives. Notwithstanding detailed provisions in the Directives, aspects of their *temporal scope* of application, including the precise time when rights become applicable or cease to become applicable, may be interpreted autonomously by the Court of Justice to create a level-playing field across the EU.<sup>101</sup> Crucially, autonomous concepts will also be key in defining

<sup>95</sup> See inter alia Case C-195/06 *Kommunikationsbehörde Austria (KommAustria) v Österreichischer Rundfunk (ORF)* EU:C:2007:613.

<sup>96</sup> V. Mitsilegas, ‘Managing Legal Diversity in Europe’s Area of Criminal Justice: The Role of Autonomous Concepts’ in R. Colson and S. Field (eds), *EU Criminal Justice and the Challenges of Legal Diversity. Towards A Socio-Legal Approach to EU Criminal Policy* (Cambridge University Press 2016) 125-160.

<sup>97</sup> Case C-108/16 PPU *Dworzecki* EU:C:2016:346.

<sup>98</sup> Case C-270/17 PPU *Openbaar Ministerie v Tadas Tupikas* EU:C:2017:628.

<sup>99</sup> Case C-271/17 PPU *Openbaar Ministerie v Sławomir Andrzej Zdźaszek* EU:C:2017:629.

<sup>100</sup> Case C-571/17 PPU *Ardic* EU:C:2017:1026.

<sup>101</sup> For instance, the Directive on access to a lawyer applies to suspects or accused persons in criminal proceedings from the time when they are made aware that they are suspected or accused of having committed a criminal offence until the conclusion of the proceedings, which is understood to mean the final determination of the question whether the suspect or accused person has committed the offence, including, where applicable, sentencing and the resolution of any appeal (Article 2(1)).

the *content* of the rights of suspects and accused persons in order to ensure the effectiveness of EU law. In the absence of a high level of legal certainty in a number of key Directive provisions where consensus has proven to be elusive in negotiations (see in particular the presumption of innocence Directive) the role of the Court of Justice in giving flesh to key rights will be crucial. Moreover, a number of provisions in the existing *acquis* on defence rights oblige Member States to ensure that rights are granted ‘promptly’<sup>102</sup> ‘without undue delay’,<sup>103</sup> ‘without delay’,<sup>104</sup> ‘in due time’<sup>105</sup> or ‘within a reasonable period of time’.<sup>106</sup> The Court will be called to interpret these concepts autonomously, as they are not defined further in the Directives nor are they defined by reference to national law. Treating these concepts as autonomous will give flesh to the rights enshrined in the Directives. The same will potentially occur in the Court defining other key concepts inherent in the content of the rights provided by EU law, including what constitutes access to ‘essential’ documents for the purposes of the right to information<sup>107</sup> and right to translation,<sup>108</sup> what constitutes interpretation and translation ‘of sufficient quality to safeguard the fairness of the proceedings’ for the purposes of the said Directive,<sup>109</sup> what constitutes an ‘effective legal aid system of an adequate quality’ and of ‘legal aid services of a quality adequate to safeguard the fairness of the proceedings’<sup>110</sup>, what constitutes ‘dili-

<sup>102</sup> Key rights in the right to information Directive including the right to information about rights (Article 3(1)), the right to information about the accusation and relevant changes in such information (Article 6 paras (1) and (4) respectively) and the provision of the Letter of Rights (Article 4(1)).

<sup>103</sup> See with regard to the Directive on access to a lawyer in particular: the right to access to a lawyer (Article 3(2)); the right to communicate with third persons and with consular authorities (Articles 6(1) and 7(1) respectively); the obligation to inform a person deprived of liberty in the execution of a European Arrest Warrant that they have the right to appoint a lawyer in the issuing Member State (Article 10(4)). See also Articles 4(5) and 6 of the legal aid Directive.

<sup>104</sup> The right to interpretation (Article 2(1)) of the Directive on the right to interpretation and translation.

<sup>105</sup> See the Directive on the right to information on the right of access to the materials of the case (Article 7(3)).

<sup>106</sup> The right to translation (Article 3(1)) of the Directive on the right to interpretation and translation.

<sup>107</sup> According to Article 7(1) of the right to information Directive, Member States must ensure access to documents related to the specific case in the possession of the competent authorities which are essential to challenging effectively, in accordance with national law, the lawfulness of the arrest or detention.

<sup>108</sup> Article 3(1) of the Directive on the right to interpretation and translation grants a right to translation of essential documents: Member States must ensure that suspected or accused persons who do not understand the language of the criminal proceedings concerned are, within a reasonable period of time, provided with a written translation of all documents which is essential to ensure that they are able to exercise their right of defence and to safeguard the fairness of the proceedings.

<sup>109</sup> Articles 2(8) and 3(9) respectively.

<sup>110</sup> Article 7(1) of the legal aid Directive.

gence' in the taking of decisions by national authorities to grant legal aid<sup>111</sup>, what constitutes effective participation in a new trial under the Directive on the presumption of innocence,<sup>112</sup> and what is the meaning of the right of access to a lawyer 'in such time and in such a manner so as to allow the persons concerned to exercise their rights of defence practically and effectively'.<sup>113</sup> The development by the CJEU of autonomous concepts in this context may serve to address implementation gaps in Member States, some of which the Commission has already identified.<sup>114</sup> The treatment of these concepts as autonomous will influence significantly criminal law and practice in EU Member States, in particular in view of the fact that the Directives apply not only to cross-border, but also to purely domestic cases. By superimposing a Union meaning of key domestic law concepts, autonomous concepts can be transformed from an interpretative tool to an effective instrument of enforcement.

## 8. Conclusion

The TFEU has conferred, for the first time, express EU competence for minimum harmonisation in the field of the rights to the defendant. Notwithstanding the potentially sensitive nature of such harmonisation for state sovereignty in the field of criminal law and for maintaining national legal diversity, the post-Lisbon era has been marked by sustained and wide-ranging EU harmonisation in a wide range of aspects of criminal procedure, ranging from access to an interpreter and to a lawyer to harmonisation on the presumption of innocence and judgments *in absentia*. The impact and potential of harmonisation towards enhancing the protection of fundamental rights and achieving effective judicial protection in Europe's area of criminal justice is significant. Although EU competence in Article 82(2) TFEU is functional, in that the legal basis for harmonisation exists in order to facilitate the operation of judicial co-operation under the principle of mutual recognition, harmonisation on defence rights has not been limited to cross-border cases, but also applies

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<sup>111</sup> According to Article 6 of the legal aid Directive, decisions regarding the granting of legal aid and on the assignment of lawyers shall be made, without undue delay, by a competent authority. Member States shall take appropriate measures to ensure that the competent authority takes its decisions diligently, respecting the rights of the defence.

<sup>112</sup> Article 9 of the presumption of innocence Directive.

<sup>113</sup> Article 3(1).

<sup>114</sup> According to the Commission, 'Report from the Commission on the implementation of Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings' COM (2018) 857 final, the requirement for interpretation and translation to be provided without delay was explicitly set out by only 11 Member States. According to the Commission Report on the right to information the understanding of 'essential documents' as well as the overall scope of access differs in various Member States. Only a few Member States specify the criterion of 'essential documents'.

to purely domestic cases. Although the Treaty limits EU power to minimum harmonisation, the CJEU has already confirmed that the effectiveness of EU law applies fully to EU measures on defence rights, including the securing the effective exercise of rights on the ground. Although it has been argued that EU secondary law would be superfluous in this field, as the rights are already enshrined in the ECHR and the Charter, the adoption of secondary harmonising EU law has had the effect of amplifying these rights and triggering the reach of a variety of enforcement mechanisms under EU law. The approach of the CJEU thus far has demonstrated that the interaction between EU secondary law and ECHR and Charter norms has not been problematic. With the CJEU relying on the ECHR to determine the content of specific Directive provisions when there is already Strasbourg case-law, reverting to general principles of EU law when called to balance the effectiveness of enforcement with the effectiveness of fundamental rights protection more broadly. Moreover, harmonisation has triggered significant enforcement powers by the European Commission, contributing towards more effective implementation on ground, and has proliferated avenues of effective judicial protection before national courts (in particular via the use of direct effect and the strengthening of remedies) and before the CJEU (in particular via its impact on national systems through the development of autonomous concepts underpinning effective judicial protection). The adoption of the defence rights Directive is a remarkable example of the Union 'legislating for human rights'<sup>115</sup> in a thus far heavily securitised field. Harmonisation in this context constitutes an important precedent, opening the door for further minimum harmonisation on other aspects of rights in criminal procedure (addressing issues of pre-trial detention must be a priority in this context especially in view of the mistrust rights violations are causing in the operation of the European Arrest Warrant system), but also, subject to further Treaty change, opening the door for a higher level of harmonisation, in a trajectory similar to the development of Europe's Common European Asylum System. Moreover, the impact of harmonisation on other aspects of EU criminal law should not be underestimated. The defence rights instruments constitute the minimum standard for the protection of rights in the operation of the European Public Prosecutor's Office (EPPO)<sup>116</sup> and in the system of mutual

<sup>115</sup> V. Mitsilegas, 'Legislating for Human Rights After Lisbon: The Transformative Effect of EU Measures on Procedural Rights in Criminal Proceedings' in M. Fletcher, E. Herlin-Karnell and C. Matera (eds), *The European Union as an Area of Freedom, Security and Justice* (Routledge 2017) 201-215.

<sup>116</sup> Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO') [2017] OJ L283/1, Article 4(2).

recognition of confiscation orders.<sup>117</sup> In this manner, harmonisation measures obtain a spill-over, cross-over effect, and their further development by the legislator or by the courts will be of central importance for re-positioning the protection of fundamental rights and effective judicial protection within Europe's area of criminal justice as a whole.

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<sup>117</sup> Regulation (EU) 2018/1805 of the European Parliament and of the Council of 14 November 2018 on the mutual recognition of freezing orders and confiscation orders [2018] OJ L303/1, Preamble, Recital 18.