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EU competence in relation to procedural rights and detention conditions

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Annex I

Research Paper on the Costs of Non-Europe in the Area of Procedural Rights and Detention Conditions

**Research paper
by RAND Europe**

Abstract

People who are suspected or accused of criminal offences or who are held in prison are in a vulnerable position and face many possible threats to their fundamental rights. The aim of this Research Paper is to establish the Cost of Non-Europe in the Area of Procedural Rights and Detention Conditions.

The study has three areas of focus: procedural rights of suspects and accused persons in relation to mutual recognition instruments (the European Arrest Warrant, European Investigation Order, European Supervision Order, the Framework Decision on the Transfer of Prisoners, Framework Decision on the recognition of Probation Measures and Alternative Sanctions); the rights of suspects and accused persons included in the 2009 “Roadmap”; and detention conditions.

Based on a review of literature and stakeholder interviews, this study identifies a number of gaps in relation to the implementation and effectiveness of existing EU measures aiming to protect procedural rights. It also highlights the imposition and use of pretrial detention and the conditions of detention (pre and post-trial) as areas where there are currently no specific EU measures, but where there is evidence that practice in Member States poses threats to fundamental rights.

The study identifies the potential cost that could be saved to individuals and Member States through reductions in the use of detention, and makes extensive suggestions for legislative and non-legislative measures to address the identified gaps and barriers.

AUTHORS

This study has been written by researchers from RAND Europe, a not-for-profit research organisation that helps to improve policy and decision-making through research and analysis, at the request of the European Added Value Unit of the Directorate for Impact Assessment and European Added Value, within the Directorate General for Parliamentary Research Services (DG EPRS) of the General Secretariat of the European Parliament.

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settlement of conflicts of exercise of jurisdiction in criminal proceedings, adopted in 2009 following attempts to introduce a FD to regulate the *ne bis in idem* principle (a requested person does not face repeated arrests for the same circumstances) in 2005, which were not met with agreement in the council (European Commission, 2005). The EIO (discussed in Chapter 2) is relevant to the admissibility of evidence, but does not introduce minimum standards.

Also not included in the scope of this paper, but relevant to procedural rights and mutual recognition, is data protection legislation, which has implications for the transfer of sanctions and related information under mutual recognition instruments (Tomkin et al., 2017).

III – EU competence in relation to procedural rights and detention conditions

An important starting point for all Cost of Non-Europe studies is to understand the competence the EU has to act in a particular area. This section firstly sets out the existence of EU competences to take **legislative action**. It secondly examines the **limits on the exercise** of such competence. Thirdly, the EU's competences to take **non-legislative measures** are analysed, focusing on three examples in particular: accession to the ECHR; measures to stimulate Member States to give better effect to EU law; and Article 7 Treaty on the European Union (TEU).

The EU's competence to legislate on criminal matters, including on procedural rights and detention conditions, forms part of the EU's AFSJ, introduced by the Treaty of Amsterdam.²²⁵ The AFSJ is fundamentally built on the principle of mutual recognition²²⁶ and respect for national legal systems and traditions.²²⁷ Harmonisation of laws is partially excluded and largely limited to a means to facilitate mutual recognition.²²⁸

The EU's competences for criminal matters within the AFSJ emerged from judicial cooperation in several phases. The **Schengen Agreement (1985)** established the Schengen area and included certain rules on police and judicial assistance in criminal matters (i.e. extradition and transfer of enforcement of criminal judgments). In 1993 the **Treaty of Maastricht** stipulated that judicial cooperation should be regarded as a matter of common interest to ensure the free movement of

²²⁵ Following the entry into force of the Treaty of Amsterdam, Article 2 TEU set the objective 'to maintain and develop the Union as an area of freedom, security and justice'. The AFSJ concerns *inter alia* the free movement of citizens and their protection. In the field of criminal law and justice, it seeks to strengthen police and judicial cooperation between Member States, while also respecting the human rights and fundamental freedoms of EU citizens (Hodgson, 2016).

²²⁶ The establishment of an EU area in which citizens may move freely has not been coupled with a single area of law. However, Member States have traditionally resisted European integration in the field of law enforcement. For this reason, the application of the principle mutual recognition in this field – which provides a simple and quasi-automatic mechanism whereby national decisions are recognised and enforced in Member States different to the one where they had been taken – has provided a system that facilitates interaction between Member States' criminal systems. Mitsilegas (2016).

²²⁷ The general obligation to respect legal systems and traditions of Member States in the AFSJ is laid down in Article 67(1) TFEU. Article 82(2) and (3) TFEU goes beyond that general obligation by establishing that EU measures falling under that provision must 'take into account' the differences between the legal traditions and systems of the Member States and by introducing an 'emergency brake' allowing Member States that feel a proposed measure would affect fundamental aspects of its criminal justice system to request the suspension of the process and the referral of the measure to the European Council.

²²⁸ While the Tampere conclusions of the European Council referred to mutual recognition as the 'cornerstone' of EU criminal law, they also mentioned the 'necessary approximation of legislation' as a means to facilitate cooperation between authorities and judicial protection of individuals (§33). (European Council Presidency, 1999). The principle of mutual recognition was later confirmed in the Hague and Stockholm programmes, as well as by Title V of the Treaty of Lisbon (AFSJ).

persons. At the time, judicial cooperation took place under the third pillar of the then European Union and followed more intergovernmental rules. The **Treaty of Amsterdam (1999)** brought the Schengen acquis within the EU legal order and took first steps towards a body of European criminal law with the creation of the AFSJ. Finally, in 2009 the **Treaty of Lisbon** abolished the pillar structure and brought AFSJ within the Treaty on the Functioning of the European Union (TFEU), with the consequence of normalising this policy area by making it largely subject to the ordinary legislative procedure, conferring enforcement powers on the Commission and bringing it under the jurisdiction of the CJEU. It also extended the EU's competences for criminal matters.

The **pre-Lisbon difficulties** that the EU faced when taking legislative action in this field are best illustrated by the failure to adopt even the draft FD on certain procedural rights in criminal proceedings throughout the EU, including, among others, rights to legal advice and the right to interpretation and translation in criminal proceedings (Mitsilegas, 2016). A large number of Member States opposed EU competence on several issues and voiced their concern to protect the diversity of national choices in the context of criminal procedure. In combination with the unanimity requirement under the then third pillar, even the *modest scope* of the proposed FD proved too ambitious (Mitsilegas, 2016). The political salience of policy choices framed as balancing between collective security and individual procedural rights made it impossible to reach EU-wide agreement.

Post-Lisbon, Article 82(2) TFEU is the express legal basis conferring on the EU the competence to adopt minimum standards in criminal proceedings. Article 82(1) TFEU emphasises that the basis of judicial cooperation is mutual recognition. This is the starting point for the EU's competence under Article 82(2) TFEU, both in terms of justification and in terms of setting limits (approximation is permitted to the extent necessary to facilitate mutual recognition). One of the underlying general objectives of Article 82(2) is to exclude discrimination in criminal proceedings on the basis of nationality.

This general objective is in line with the right to equality before the law in Article 20 of the CFREU, the right to non-discrimination on grounds of nationality in Article 21(2) of the CFREU, and the policy objective of combatting discrimination and exclusion in Article 3(3) TEU. Moreover, Article 18 TFEU was introduced to prohibit 'any discrimination on grounds of nationality' and procedural rights are core citizenship rights. Article 18 TFEU governs situations where no other specific rights of non-discrimination exist (Weiss and Kaupa, 2014).

Article 82(2) TFEU also prescribes a number of express limitations on the EU's competence. The EU legislator can only choose the instrument of a Directive. It is a functional competence in the sense that it is limited to measures necessary to facilitate mutual recognition. Finally, the EU's competence is limited to criminal matters having a cross-border dimension. The **functional nature** of the EU's competence under 82(2) TFEU requires that the EU only adopts minimum standards for criminal procedure in the national context to the extent that they are necessary to ensure mutual recognition. As a matter of principle it is not a self-standing legal basis for human rights legislation. This functionality, however, justifies a broad scope of action. Effective functioning of mutual recognition instruments requires a high level of deep and comprehensive mutual trust,²²⁹ which in turn requires a holistic approach. Deep trust means that Member States presume that all other Member States have not only made a formal commitment to certain standards, as all of them have as Contracting Parties to the ECHR and as EU Member

²²⁹ See e.g. Recital 4 of Directive on the right to interpretation and translation in criminal proceedings. For the relationship between mutual trust and mutual recognition (Eckes, 2018b).

States, but also that they comply with these standards in practice. Comprehensive trust refers to the understanding that the whole criminal justice system complies with these standards, at all levels and in all situations.

The European Treaties do not expressly confer competence to the EU to legislate on detention conditions. PTD falls within the meaning of rights of individuals in criminal procedure within the meaning of Article 82(2)(b) TFEU. The conditions of PTD form part of how the state treats individuals in criminal procedure. This is also the reading of the majority of Member States, which did not raise objections to EU law making in this area on competence grounds in their response to the Commission 2011 Green Paper on detention.²³⁰ The EP also expressed the desire to see EU action in this area based on Article 82(2)²³¹ and expressly links its recommendation of introducing a fundamental rights exception into the EAW or mutual recognition instruments in general to its concerns about the conditions in prisons and other custodial institutions (European Parliament Committee on Civil Liberties Justice and Home Affairs, 2014, European Parliament, 2015). Moreover, the cases of *Aranyosi and Căldăraru* 2016 (discussed in greater detail in Chapter 2) highlight that in practice detention conditions may not only breach fundamental rights as guaranteed under the CFREU but may constitute an obstacle to Member State compliance with mutual recognition instruments, such as the EAW.²³²

Concerning **post-trial detention** conditions, while Article 82(2)(b) TFEU specifically refers to the rights of individuals *in criminal procedure*, it is not clear whether this phrase should be interpreted restrictively so as to leave post-trial detention conditions out of the scope of the Article. In this regard, the Stockholm Programme and the 2009 Roadmap on procedural rights appear to leave the door open to a broad notion of ‘criminal procedure’, which could include post-trial aspects such as sentence execution.²³³ The EP has repeatedly stated its position on this matter. In 2011, it formally called on the Commission to develop and implement minimum standards for prison and detention conditions (European Parliament, 2011) based on Article 82(2)(b), in order to ensure compliance with the CFREU, the ECHR and ECtHR case law. The CJEU made no distinction between the two above-mentioned cases of *Aranyosi and Căldăraru* (2016), one of which concerned an individual who had already been convicted. This makes the Court’s reasoning applicable and relevant both to pre- and post-trial detention. The FD TOP also expressly confirms this link between post-trial detention conditions and mutual recognition.

As expressly stated in Article 82, ensuring the preconditions for **mutual recognition** is the main motivator, objective and justification for the EU’s competence to establish minimum standards

²³⁰ Only two Member States (Denmark and Poland) expressed concerns about the competence of the EU, invoking the principle of subsidiarity. This opinion was also shared by one responding association – the German Association of Judges (European Commission 2011a).

²³³ For instance, Vermeulen et al. argue that while Provision 2.4. of the Stockholm Programme adopts a strict interpretation of criminal proceedings by referring exclusively to the rights of the accused and the suspect, provision 3.2.6 can be read as pointing to a certain level of uncertainty with regard to the competence of the EU by inviting the Commission to reflect on the issue further ‘within the possibilities offered by the Lisbon Treaty’. Furthermore, the 2009 Roadmap reflects this uncertainty when it establishes that ‘for the purposes of this Resolution’ criminal proceedings must be understood as covering pretrial and trial stages. This may imply that for purposes other than the Roadmap Resolution, post-trial issues may fall under the umbrella of ‘criminal procedure’. Another example in support of a broader definition of ‘criminal procedure’, i.e. that incorporating the post-trial phase, is Recital 5 of FD TOP, which makes an explicit reference to criminal proceedings in its discussion of the transfer of detainees (Vermeulen, et al., 2011).

for individual rights in criminal procedure. The principle of mutual recognition is central to the functioning of the AFSJ, the functioning of which requires equivalent protection in order to permit that national authorities treat the decisions of the authorities of other Member States as 'equivalent to decisions by one's own state' (European Commission, 2000). Member States agree to recognise and carry out judicial decisions made by authorities in another Member States *without undertaking their own review* (Tomkin et al., 2017). Thus, an EU citizen may be prosecuted, convicted and sentenced in one Member State different than her Member State of origin, and the Member State of origin will enforce the sentence against its own national laws, including detaining her.

Some scholars question how introducing EU-wide minimum procedural standards would enhance mutual trust and confidence (Vermeulen, 2014). However, a more detailed and, hence, higher level of procedural protection may reasonably be expected to facilitate mutual recognition. Indeed, the successful application of the principle of mutual recognition, understood as giving effect to decisions of the competent authorities of another Member State without carrying out any form of review, appears unattainable without a high level of **mutual trust** between Member States. National authorities at different levels must be able to trust in each other's criminal justice systems for them to give effect to EU mutual recognition instruments (Eckes, 2018b). Mutual trust can only exist if Member States have reason to be confident that all EU Member States comply with EU fundamental rights standards.²³⁴ While this does not require uniform standards in all Member States, it presupposes that the protection of procedural rights and detention conditions is equivalent in all Member States (Lenaerts, 2015). The general and abstract commitment to fundamental rights may not be enough to establish sufficient reason to presume equivalence. Arguably, agreement and commitment to more detailed *minimum* EU standards in criminal procedure and detention conditions, applicable both pre- and post-trial, may be necessary.

Detention conditions, both pre- and post-trial, are directly relevant to allow for the necessary trust in connection to all EU mutual recognition instruments that involve the transfer of a person. Examples are the EAR and the FD TOP. If stronger evidence demonstrated that poor detention conditions constitute in practice a core obstacle to the functioning of the EAW, using the functional competence of Article 82 TFEU to take EU legislative actions establishing minimum conditions is justified (Weyembergh, 2014). The precise scope of Article 82(2)(b) was subject of discussion during the negotiations of the children's rights Directive (Cras, 2016). In that debate, the European Commission and the Parliament took the view that standards on detention conditions could be adopted under Article 82. This opinion was opposed by at least some Member States, which argued that Article 82(2) TFEU was limited to the pretrial stages.²³⁵

Article 82 TFEU refers to 'a cross-border dimension'. The extent to which this affects EU competence to adopt standards applicable to national (i.e. not cross-border) cases is a matter that needs further clarification. The CJEU has not yet ruled on this point. Yet the post-Lisbon Directives on minimum standards in criminal procedure apply also in purely domestic cases.²³⁶

²³⁴ For the distinction between EU and national fundamental rights standards see Eckes, 2018b. On compliance with fundamental rights in general see Mitsilegas, 2012.

²³⁵ At the end of trilogue negotiations, the European Parliament formally agreed with the Council's view. However, this represents a political decision that should be viewed separately from the broader legal debate on EU competence in the area. The goal of the Directive was to respond to the call from the Council to adopt measures to ensure the rights of suspects and accused in criminal proceedings.

²³⁶ See, for example, Article 1(1) of Directive on the right to interpretation and translation; Article 1 of Directive on the right to information; Article 1 of Directive on access to a lawyer.

Legal certainty, equal treatment, the establishment of deep mutual trust in fundamental rights compliance between Member States and contextual arguments of Treaty interpretation strongly speak in favour of interpreting Article 82(2) as the legal basis for EU legislation, applicable not only to cross-border criminal proceedings, but also to strictly domestic cases. Most importantly, **a substantively unjustified** differentiation would eventually be detrimental to the protection of fundamental rights (European Commission, 2013b), including the right to equal treatment, and the building of mutual trust. Mutual trust in judicial justice within one legal order can only be built if sufficiently high (or at least equivalent) standards apply across the board in the jurisdictions of all other Member States (European Commission, 2013b). If Member States were at liberty to apply lower standards to purely domestic proceedings, this would not only be detrimental to legal certainty and equal treatment, but would also undermine mutual trust between judicial authorities.

A broad reading, covering all cases of criminal procedure, is suggested **by the different language used in Articles 81(3) and 82(2) TFEU**. Article 82(2) TFEU refers to ‘cross-border dimension’. Article 81(3) TFEU, by contrast, confers on the EU the power to adopt measures concerning family law cases with ‘cross-border implications’. The term ‘implication’ is more specific than ‘dimension’. Another indication of a comprehensive power is Article 83(1) TFEU, which concerns the EU power to adopt substantive criminal law provisions and also uses the term ‘cross-border dimension’. As Peers argues, harmonisation of substantive criminal law cannot reasonably be limited to cross-border cases (Peers, 2011).

Finally, in a significant number of cases, it is impossible to categorise *ex ante* criminal proceedings as either cross-border or domestic.²³⁷ The European Commission repeatedly pointed this out (European Commission, 2011e). Moreover, since the entry into force of the Lisbon Treaty, the CFREU is binding to EU primary law applicable to all actions of the EU institutions and to the Member States when they act within the scope of EU law (See Article 6(1) TEU and Article 51(1) CFREU). It applies to all situations with a certain degree of connection to EU law, including in cases where national legislation does not expressly or directly implement EU law (*Aklagaren v Hans Akerberg Fransson*; *Cruciano Siragusa v Regione Sicilia*). The latter excludes making a sharp distinction between two different levels of protection depending on whether a case has a cross-border dimension.

However, in the context of adopting the Directive on the right to information in criminal proceedings, the Council explicitly stated that its broad scope should not be interpreted as constituting a precedent for future work (Council of the European Union, 2011). It cannot hence be ruled out that future EU legislative measures relating to procedural rights are challenged as going beyond the competence conferred in the Treaties. Still, all experts interviewed in the course of this Cost of Non-Europe study who commented on the issue, while acknowledging the historical debate on EU competence in this area, generally considered this debate as settled in favour of a more expansive view of EU competence.

Once the EU possesses the formal competence to adopt legislative measures, the **exercise** of such a competence is subject to additional limitations flowing from other provisions of the Treaties, such as the principle of subsidiarity, proportionality, human rights and respect for

²³⁷ Peers points out that a better approach is to look at the ‘degree of likelihood that the rules in question will have a particular impact on cross-border proceedings’. In his view, this will be the case ‘whenever there is a “free movement clause” in the legislation [providing] that Member States could not refuse to recognize judgments and other decisions of judicial authorities on grounds falling within the scope of measures adopted pursuant Article 82(2) TFEU’ (Peers, 2016a).

national identities. The principle of subsidiarity is subject to judicial review,²³⁸ but has not so far proven to have much judicial bite. The CJEU only verifies 'whether the Union legislator was entitled to consider, on the basis of a detailed statement, that the objective of the proposed action could be better achieved at Union level' (*Philipp Morris*). However, the principle of subsidiarity is highly relevant in the legislative procedure, in particular in the AFSJ where, for example, the threshold for the yellow card procedure (European Parliament, 2016b) is lowered to one quarter of all national parliaments.²³⁹ All EU legislation must be proportionate. Limiting EU action to adopting Directives, rather than regulations, and *minimum* standards for criminal procedure are concrete expressions of the principle of proportionality. The limitation to the instrument of a Directive should require the EU legislator to leave a certain leeway to Member States as to how EU legislation is implemented as long as their objectives are met. All EU legislation must meet the standards set out in the CFREU and in the ECHR. Beyond this, it is justified to expect that it not only codifies and gives structure and detail to the body of case law of the ECtHR, but also where appropriate extends the Strasbourg protection, which is also a *minimum* standard. Finally, Article 4(2) TEU requires the EU to respect national identities. The CJEU has interpreted this provision with a particular focus on the constitutional identity and the specificities of the national legal order, which also covers the national criminal justice system.

For a comprehensive legal culture that allows for mutual trust, actions **other than legislative action** may also be advisable. In the CJEU's post-Lisbon referencing practices, the CFREU has replaced the ECHR as the main codified source of fundamental rights. The ECHR however remains an important source of inspiration for the EU's general principles (Article 6(3) TEU). The CFREU was meant to incorporate the dynamic interpretation of the ECHR in the ECtHR's case law and has largely succeeded in achieving this objective (European Commission, 2005). Yet the CJEU continues to rely heavily on the ECtHR's case law as a persuasive source of inspiration and even vests it with exceptional status and force within the EU legal order (Tomkin et al., 2017).

The EU is not only competent to conclude an agreement on the **EU's accession to the ECHR**; the EU institutions are under an obligation to pursue accession (Article 6(2) TEU). While EU accession to the ECHR raises plausible concerns for the autonomy of the EU legal order (Eckes, 2017, Eckes, 2018a), the gains in terms of substantive protection remain questionable (Eckes, 2013).

A source of uncertainty in this regard (further discussed in Chapter 6) is, in particular, how to reconcile the preservation the functionality of EU's mutual recognition system with ECtHR approach of scrutiny in each case. This is another argument to support why a deep and comprehensive commitment to fundamental rights protection is needed by all national actors to ensure that the EU's mutual recognition system works and complies with the ECHR.

The holistic approach required to create an environment in which a high level of mutual trust is possible also requires taking action to **stimulate Member States to give better effect to EU law**. Provisions of Directives that confer rights on individuals are – under certain circumstances – susceptible of enjoying vertical have direct effect. Individuals can directly rely on them before national courts against the state. This will vest them with a certain level of inherent

²³⁸ Article 8 of Protocol No 2 on the Application of the Principles of Subsidiarity and Proportionality.

²³⁹ Articles 5(3) TEU and 69 TFEU in combination with Protocol No 2 on the Application of the Principles of Subsidiarity and Proportionality. Article 7(2) s.2 of Protocol No. 2 lowers the usual threshold of one third to one quarter for the AFSJ.

effectiveness irrespective of national implementation. Additionally, as stated above, the Lisbon Treaty has brought EU criminal law within the ordinary enforcement mechanisms under the European Treaties. This includes a strong role for the Commission in monitoring and taking enforcement action if Member States do not give adequate effect to EU law. The Commission's mandate extends more broadly to criminal procedure to ensure effectiveness of all rights under EU law and compliance with the CFREU. This mandate also covers adopting soft measures (e.g. training, handbooks and practitioner networks) supporting the effectiveness and compliance with EU law.

Article 7 TEU provides a formal legal mechanism for the EU to react to situations where there is 'a clear risk of a serious breach' of EU values by a Member State (Article 7 (1)) or where there is a 'serious and persistent breach' of EU values laid down in Article 2 TEU (Article 7(2)). The Member State concerned can ultimately be sanctioned through the suspension of membership rights (Article 7(3)). This mechanism covers a reaction by the institutions to poor detention conditions insofar as these constitute a serious and persistent breach of such values (i.e. the respect for human dignity and human rights). The Article 7 TEU mechanism is of high political and symbolic weight. In practice, Article 7 TEU confers on the EU, including the Commission, a far-reaching monitoring and enforcement mandate. Legal instruments in the AFSJ, such as the EAW, have specifically linked the limits of mutual recognition obligations to this mechanism.²⁴⁰ Hence, Article 7 TEU and the reference to the Article 7 TEU procedure in secondary law governing the cooperation in criminal matters justifies monitoring of Member State compliance with fundamental rights, explicitly mentioned as one of the values in Article 2 TEU.

Moreover, Article 7 TEU in combination with the principles of sincere cooperation in Article 4(4) and 13(2) TEU requires all actors involved (i.e. the EU institutions and the Member States) to cooperate constructively and in good faith to the objective of addressing breaches, but also to clear risks of a serious breach of the values that are the fundament for the EU as a Union of Law in Article 2 TEU.²⁴¹

IV – Methods and limitations of the study

The research activities undertaken to produce this research paper constitute:

- An analysis of the relevant mutual recognition instruments and Directives.
- A review of the literature, including academic papers, material published by the European institutions and publications from international organisations such as the FRA.
- Interviews with 10 expert stakeholders. The interviews were semi-structured, following a standardised topic guide, but allowing for a discussion of unanticipated topics. Interviewees were invited to provide comments on the following topics: EU competence; state of play and gaps in the areas of procedural rights and detention conditions; and options for policy action at the EU level. The topic guide is provided in Appendix G. Interviewees represented the following organisations and areas of expertise:
 - The Council Secretariat
 - Council of Bars and Law Societies of (CCBE)
 - World Prisons Research Programme
 - EP

²⁴⁰ See Recital 10 of the EAW Framework Decision; confirmed by Case C-168/13, *Jeremy F. v Premier Ministre* at para. 49.