

What Role for Legal Certainty in Criminal Law Within the Area of Freedom, Security and Justice in the EU?

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1 Introduction

This article analyses the current position of legal certainty (*Rechtssicherheit*)¹ within the area of freedom, security and justice (AFSJ), and more specifically in EU criminal law. Legal certainty as a concept is ambiguous even in a national legal order, in relation to criminal law, but it is considered of utter importance, also within EU criminal law. How does legal certainty get expressed within the area of freedom, security and justice, and what does it consist of? These are the questions this article seeks to answer.

The area of freedom, security and justice and its present status are analysed in this article, as is the concept of legal certainty within this area. EU criminal law is focused on, and the characteristics of it are analysed especially in relation to the nature of the European criminal justice system. This is done to exemplify legal certainty more specifically. Four examples from EU criminal law are chosen for this. These are firstly mutual recognition in relation to human rights, which especially in relation to the European arrest warrants show possible lacunas, secondly minimum procedural rights, which the EU is currently focusing on, thirdly the position of the victim, which quite recently has been added to the EU criminal law field, and fourthly the possible European public prosecutor's office. These examples will show the diversity of EU criminal law and some of the

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¹ See Radbruch, *Rechtsphilosophie* (Studienausgabe, 2. Auflage C.F. Müller Verlag 2003) pp. 73-77 on *Rechtssicherheit*. In German, the term *Rechtssicherheit* is used, as is *rättssäkerhet* in Swedish. Legal certainty is perhaps not the best term for this, as it is used differently in different contexts and it is in this article not used in the sense of only *res judicata* (*Rechtskraft, rättskraft*), but in a broader meaning. See chapter 4 below for a definition and Paunio, *Law, Language and Communication: Legal Certainty in Multilingual EU Law: Language, Discourse and Reasoning at the European Court of Justice* (Ashgate Publishing Group, 2013) pp. 54-60 on legal certainty and the rule of law.

challenges this poses for legal certainty. Finally, some concluding remarks will be made to sum up the situation.

2 The current legal basis

The Lisbon Treaty stipulates the competences for EU criminal law.² The introductory article 3(2) of the Treaty on the European Union (TEU)³ states that '[t]he Union shall offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime'. Article 67(1) of the Treaty on the Functioning of the European Union (TFEU)⁴ continues by stating that '[t]he Union shall constitute an area of freedom, security and justice with respect for fundamental rights and the different legal systems and traditions of the Member States'. Ensuring a high level of security through preventing and combatting crime is laid down as one of the main aims of the EU in article 67(3) TFEU.

The relevant provisions on EU criminal law are then found under chapter V, entitled area of freedom, security and justice. Article 82 TFEU regulates cooperation in criminal matters, article 83 TFEU regulates substantive criminal law and articles 85-86 regulate cooperation through Eurojust, and the possibility of a European Public Prosecutor's Office. If we look at institutional cooperation firstly, Eurojust's mission is to support and strengthen coordination and cooperation between national investigative and prosecution authorities (art. 85(1) TFEU). The initiation of a prosecution is however carried out by competent national authorities (art. 85(2) TFEU). Therefore, Eurojust's competence does not have a supranational character as such. It builds on national competences.⁵

The competences on cooperation in criminal matters are based on the principle of mutual recognition. Realisation of this cornerstone includes harmonisation of relevant areas, such as establishing rules for union wide recognition of judicial decisions (art. 82(1) TFEU). Furthermore can minimum rules be established, concerning evidence admissibility, the rights of individuals in criminal procedure and the rights of victims of

² On the former third pillar and the competences, see Denza, *The intergovernmental pillars of the European Union* (Oxford University Press 2002), pp. 63–84. There are further rules on the legislative process and possibilities for Member States to oppose to instruments, but for the sake of this article, these are not focused on. For a more comprehensive analysis of these, see Herlin-Karnell, *The Lisbon Treaty and the Area of Criminal Law and Justice*, *SIEPS European policy analysis 3/2008* pp. 6-7, available at <http://www.sieps.se/sites/default/files/421-20083epa.pdf> (last visited 7.3.2014) and Herlin-Karnell, *EU competence in criminal law after Lisbon*, in Biondi *et al.* (eds.) *EU law after Lisbon* (Oxford University Press 2012) pp. 331-346.

³ Consolidated version of the Treaty on European Union, OJ C 326/13, 26.10.2012.

⁴ Consolidated version of the Treaty on the functioning of the European Union, OJ C 326/47. 26.10.2012.

⁵ For more information on Eurojust, see Satzger, *International and European criminal law* (C.H. Beck, Hart, Nomos 2012) pp. 112-113 and Suominen, *Eurojust, the past, the present and the future*, 15 *MJ 2* (2008) pp. 217-234.

crime. This is to be done in the extent necessary for the realisation of mutual recognition and police and judicial cooperation in criminal matters having a cross-border dimension. (art. 82(2) TFEU).⁶ Harmonisation of substantive criminal law may be done in order to establish minimum rules concerning the definition of criminal offences and sanctions. This applies in the areas of ‘particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis.’ These crimes are listed and are: terrorism, trafficking of human beings and sexual exploitation of women and children, illicit drug and arms trafficking, corruption, money laundering, organised crime, counterfeiting of means of payment and computer crime (art. 83(1) TFEU). There is a further annex-competence which regulates harmonisation of criminal law that can be done for the effective implementation of a Union policy, in an area which is subject to harmonisation measures (art. 83(2) TFEU).⁷

3 The area of freedom, security and justice

The area of freedom, security and justice was launched at the Tampere conclusions and established with the Amsterdam Treaty.⁸ This area was created to ensure the free movement of persons and to offer a high level of protection to European citizens. It covers policy areas from the management of the EU’s external borders to judicial cooperation in civil and criminal matters, and it also includes asylum and immigration policies and police cooperation.⁹ For the purpose of this article, criminal matters are focused on. The criminal law area entails a high level of security for its citizens through Member States cooperating in criminal matters. This security is considered of utmost importance for an efficient criminal justice system throughout the Union. The national criminal law systems of the Member States together form the area of freedom, security and justice, which then is to function as one system, where law enforcement, in a similar way as the perpetrator, is not prohibited by Member State borders.

⁶ For more information on mutual recognition, see Kinzler, *Das Prinzip gegenseitiger Anerkennung im europäisierten Strafverfahren am Beispiel von Auslieferung und Beweismitteltransfer* (Verlag Dr. Kovač 2010) and Suominen: *The principle of mutual recognition in cooperation in criminal matters - A study of the principle in four framework decisions and in the implementation legislation in the Nordic Member States* (Intersentia, 2011). See also Gless and Vervaele, Law should govern: aspiring general principles for transnational criminal justice, *Utrecht Law Review* vol. 9, 4/2013 p. 3, where they note that mutual recognition applies a state-oriented approach where the individual’s interests are not adequately taken into account. See also Asp, Mutual recognition qua legal principle, in *Festschrift für Helmut Fuchs* (Verlag Österreich 2014) pp. 1-17.

⁷ For more information on harmonisation, see Asp, *The substantive criminal law competence of the EU* (Stiftelsen skrifter utgivna av juridiska fakulteten vid Stockholms Universitet 2012).

⁸ Conclusions of the Tampere European Council 15–16 October 1999, 33–37 (available on www.europarl.europa.eu/summits/tam_en.htm) and Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and related acts, OJ C 340/1, 10.11.1997.

⁹ The relevant articles are found under title V in the TFEU.

The goal, which can foremost be considered the area itself, is to be achieved by preventing and combating crime. This is to be achieved through three different forms of cooperation. Mirroring the presentation on the competences in chapter 2 above, firstly, institutional cooperation, such as Eurojust increases cooperation between the relevant institutions of the Member States and assists in relation to problems connected to cross-border crimes. Secondly, cooperation in procedural criminal law, usually expressed with the principle of mutual recognition, is itself dedicated to increasing effectiveness of cooperation between the Member States. The idea is that judgments and judicial decisions move freely within the area of freedom, security and justice. Thirdly, harmonisation of substantive criminal law is essential for achieving an area of freedom, security and justice. There should not be too much diversity between the criminal laws of the Member States in relation to those crimes, of which a common focus is on. Some harmonisation is therefore necessary. These three forms of cooperation are together intended to prevent and combat crime and to securing that no perpetrator goes unpunished, only because he has crossed a border to another Member State.¹⁰

The area of freedom, security and justice can to some extent be considered a reflection of the internal market of the EU.¹¹ Applying ideas similar to those that apply within the internal market, especially for the principle of mutual recognition, to the area of criminal law was considered necessary due to the free movement of persons that the EU, and Schengen cooperation in particular enables. Within this area of freedom, security and justice, judicial decisions and judgments are to move freely and the idea is that recognition should prevail, regardless of whether the decision or judgment is a national one or one from another Member State. The area of freedom, security and justice is a European area where the effectiveness of cooperation is not to be hampered by actors belonging to different Member States. Due to the close connection between criminal law and state

¹⁰ This is the current focus for example in the Commission, see <http://ec.europa.eu/justice/criminal/criminal-law-policy> (last visited 7.3.2014). On these three parts and their roles see Suominen, EU criminal law cooperation before and after the Lisbon Treaty - aspects and comments especially in relation to the Norwegian position, *JFT* 6/2012 pp. 573-604.

¹¹ Similarly Nuotio, Eurooppalaisen integraation uusi painopiste: vapauden, turvallisuuden ja oikeuden Eurooppa, in *Vapauden, turvallisuuden ja oikeuden Eurooppa*, eds. Nuotio and Malkki (Forum Iuris 2010) pp. 1-3, also Klip *European Criminal Law* (2nd edition, Intersentia 2012) pp. 20-22.

sovereignty, deprivation of liberty and fundamental rights, the application of mutual recognition and enforcement in general has not been problem-free within this area.¹²

This area has been further developed over the last fifteen years to include more and more legal instruments. Effective crime combating can be considered its main goal, which is seen in the instruments agreed of within the area. These include instruments on serious crimes with a cross-border dimension such as terrorism and human trafficking and crimes typically of an interest to protect for the EU such as financial crimes against the EU. Further instruments regulate cross-border cooperation such as mutual recognition of decisions on surrender (extradition), evidence gathering and execution of financial penalties.¹³ Effectiveness of cooperation, in all its forms, has become a leading ideal in EU criminal law. This applies especially in relation to institutional and procedural cooperation, as effectiveness in some way can be measured here and especially increased effectiveness is visible. This is in contrast to harmonisation of substantive law, where the increase of effectiveness and what it entails is more difficult to decipher.¹⁴ Simultaneously, harmonisation of substantive criminal law is important, if not crucial, for the functioning of an area of freedom, security and justice.

A component relevant for the area and particularly for cooperation is mutual trust between the Member States. This is inevitable for the area of freedom, security and justice. The Member States are considered to trust each other in terms of respecting human

¹² Especially the European Arrest Warrant, which is the most frequently applied mutual recognition instrument in criminal law, has had its problems. See the judgments of the German constitutional court, BverfG 1 BvL 14/76 (on the sentence of a life-long duration without a possibility of review and its contradiction with fundamental rights) and BverfG 2 BvR 2236/04 (on the surrender of own nationals and constitutionality of the EAW), the judgment from the Polish constitutional tribunal of 27.5.2005 in case P1/05 (on the surrender of own nationals and constitutionality of the EAW) and the judgment of the Supreme Court of Cyprus of 7.11.2005 in case 294/2005 (on the surrender of own nationals and the constitutionality of the EAW). See further Smith, Running before we can walk? Mutual recognition at the expense of fair trials in Europe's area of freedom, security and justice. *NJECL* Vol. 4, 1-2/ 2013 pp. 82-98, Mitsilegas, The constitutional implications of mutual recognition in criminal matters in the EU. *CMLRev* 43:2006 p. 1281, Mitsilegas, The limits of mutual trust in Europe's area of freedom, security and justice: from automatic inter-state cooperation to the slow emergence of the individual. *Yearbook of European Law*, Vol. 31, No. 1, 2010 pp. 320-328, Klip 2012 pp. 15-22. See also Asp 2012 pp. 76-78 on why criminal law is a special in relation to other areas of law. On the difference between mutual recognition in criminal law versus the internal market, see Janssens, *The principle of mutual recognition in EU law* (Oxford University Press 2013) and Suominen 2011 pp. 62-64.

¹³ As can be seen, the offences legislation concerns fall under the scope of art. 83 TFEU (and its predecessors). It is not possible here to include all relevant instruments. See Miettinen, *Criminal law and policy in the European Union* (Routledge 2013), Klip 2012 and Suominen 2012 pp. 587-590, 593-596 and 599-601 for an overview.

¹⁴ See Herlin-Karnell, *The constitutional dimension of European criminal law* (Hart Publishing 2012) pp. 42-61, Nicolaidis and Geilmann, What is effective implementation of EU law? *19 MJ* 3 (2012) pp. 383-399 and SOU 2003:74 Ökad effektivitet och rättssäkerhet i brottsbekämpning pp. 13-26 (official reports from the Swedish Government).

rights and applying national legislation according to these.¹⁵ This trust does not as such resolve any problems related to legal certainty, but with increasing legal certainty and imposing higher standards for procedural rights, the level of a common legal certainty can be improved. Increased knowledge will increase the level of mutual trust, and lifting up legal certainty problems can also have a positive development.

The Commission has for instance in its communication on the area of freedom, security and justice pointed out that the rights of the defence have to be strengthened to uphold mutual trust and the public confidence in the EU and that the common minimum guarantees should be extended.¹⁶ This is a good example of legal certainty matters being focused more within the area.¹⁷

The area is often characterised by a tension between security on one hand and freedom and justice on the other. Security is prevalingly considered as crime combating and securing the European citizens against crime. Freedom and justice are prevalingly considered as protection of the individual and legal certainty.¹⁸ Effective crime-combating has seemingly been considered as the most important by the EU legislator, and most of the instruments on EU criminal law have an efficiency idea and crime combatting emphasis. Focus has therefore been on security issues whereas other aspects of the area, freedom and justice, have not been given as much legislative attention.¹⁹ Legal certainty is usually connected with justice, implying that the criminal justice system is just. This is however not always very clearly defined. We will therefore have a look at how legal certainty can be understood within the area of freedom, security and justice.

4 Legal certainty

4.1 *The national perspective*

In a national setting, legal certainty is understood as entailing a state having legislation and a legal system that protects the individual against arbitrary measures from the state itself. Such measures include not being prosecuted or sentenced without sufficient evi-

¹⁵ On trust within the area of freedom, security and justice, see Mitsilegas 2010 pp. 319-372. See further what is mentioned in chapter 6.2. below on mutual trust in mutual recognition cooperation.

¹⁶ Communication from the Commission to the European Parliament and the Council, An area of freedom, security and justice serving the citizen, COM(2009) 262 final, 10.6.2009 at point 4.2.2.

¹⁷ See also the new Communication from the Commission to the European Parliament, the Council, the European economic and social committee and the committee of regions, The EU Justice Agenda for 2020 - Strengthening Trust, Mobility and Growth within the Union, COM(2014) 144 final, 11.3.2014, which emphasises trust.

¹⁸ Similarly Thunberg-Schunke, *Internationell rättslig hjälp i brottmål inom EU, effektivitet v. rättssäkerhet* (Iustus förlag 2004) p. 264. See further Hudson, Who needs justice? Who need security? pp. 17-18 and Gröning, Security, justice and the criminal justice system: remarks on EU criminal law pp. 136-139, both in *Justice and Security in the 21st Century*, eds. Hudson, Ugelvik (Routledge 2012).

¹⁹ Asp 2012 p. 73.

dence, not being sentenced without legal support and that all individuals are considered and treated equally regardless of their social status or origin. Furthermore is legal certainty considered including legal rules being applied efficiently and predictably, and these are associated with a democratic state subscribing to the rule of law. Legal certainty can be divided into formal and substantive forms. Formal legal certainty is the traditional legal certainty where fairness resulting from predictability is considered important. Punishment, coercive measures, prosecution and sentencing of criminals should be predictable and be applied uniformly and in a systematic order. This entails that criminal law cannot be applied retroactively. Substantive legal certainty includes that judicial practice is ethically and morally good.²⁰

Legal certainty can be considered denoting *res judicata*, the legal force of judgments and judicial decisions, meaning the finality of the decision when there is no possibility to appeal it. This is however not what is the subject of study here. In relation to the area of freedom, security and justice, legal certainty can be considered encompassing more than the legal force of judicial decisions and consisting of more aspects than *res judicata*.²¹

4.2 The ECHR

Certain rights guaranteed by the European Convention on Human Rights (ECHR)²² can be considered exemplifying legal certainty. Articles 5, 6 and 7 and in some respects 8, as well as article 4 of protocol 7 are all relevant to legal certainty in a European perspective. The right to liberty and security is included in legal certainty. As article 5 ECHR states, no one is to be deprived of his liberty unless in certain specified cases and as prescribed by law. Such cases include situations of lawful detention after a conviction, lawful arrest or detention for not complying with a lawful order, or lawful arrest or detention with the purpose of bringing the person before a competent legal authority based on reasonable suspicion.²³ The right to a fair trial prescribed in article 6 ECHR is included in legal certainty and comprises the right to a fair, public hearing within a reasonable time and before an independent and impartial court established by law. The individual is to be presumed innocent until proven guilty and he should be granted certain minimum rights, such as being informed in detail and in a language he understands of the nature and cause of the accusation, enough time to prepare his defence, and a possibility to defend himself,

²⁰ See Peczenik, *On law and reason* (Springer 2009) p. 24-27, also Ehrenkrona, Rättssäkerhetsbegreppet och Europakonventionen, *SvJT* 2007 pp. 38-49.

²¹ See further Trechsel, *Human rights in criminal proceedings* (Oxford University Press 2005) p. 115.

²² The European Convention on Human Rights, Rome 4 November 1950.

²³ See Trechsel 2005 pp. 405 ff, especially chapters 18 and 19 for a detailed presentation of these rights.

possibly through legal assistance, the right to examine and have witnesses examined on his behalf as well as the possibility to have an interpreter, if necessary.²⁴

The legality principle *nulla poena sine lege* is naturally included in legal certainty. Pursuant to article 7 ECHR, no one shall be found guilty of an offence or omission that did not constitute an offence under national or international law at the time committed. The legality principle is relevant in many connections with legal certainty, and these two concepts can be considered somewhat intertwined. In addition to *res judicata*, the legality principle is one of the most typical aspects of legal certainty, which is often analysed and considered expressing legal certainty. In this article, the legality principle is considered part of legal certainty, but only constituting one part of it.²⁵ The *ne bis in idem* principle enshrined in article 4 of protocol nr. 7 is furthermore a part of legal certainty. This principle entails that a person can be tried and punished only once for the same criminal offence.²⁶ The right of private life in article 8 ECHR can furthermore be included in the concept of legal certainty. This right entails everyone's right to private and family life, unless otherwise prescribed by law and deemed necessary in a democratic society.

4.3 EU law and EU criminal law

In EU law generally, legal certainty is usually associated with protection of legitimate expectations, which is often connected to enforcement and effectiveness of EU law.²⁷ Legal certainty is a general principle of EU law and is considered to include several sub-principles.²⁸ These include full enforcement of Union law, unity and coherence of the Union legal order, procedural exclusivity and non-retroactivity in relation to legitimate expectations as well as acquired rights, legitimate expectations and *res judicata*.²⁹ The prohibition of retroactivity is in respect to criminal law absolute.³⁰ Law, and also EU law requires a

²⁴ See Trechsel 2005 pp. 45 ff, especially chapters 3 to 6 on the right to a fair trial, also Gless, Transnational cooperation in criminal matters and the guarantee of a fair trial: approaches to a general principle, *Utrecht Law Review*, vol. 9, 4/2013 pp. 91-101 especially on equality of arms in a EU setting.

²⁵ Unfortunately this paper does not allow for further deliberations on the legality principle, but see Murphy, The Principle of Legality in Criminal Law under the ECHR, *European Human Rights Law Review*, Vol. 2, 2010 pp. 192-210, on the legality principle in EU law Besselink et al. (eds.) *The eclipse on the legality principle in the European Union* (Wolters Kluwer 2011), Asp 2012 pp. 168-178 and in national criminal law Frände, *Den straffrättsliga legalitetsprincipen* (Juridiska föreningens i Finland publikationsserie N:o 52 1989).

²⁶ See Trechsel 2005 pp. 382-402 as well as Rui, *Forbudet mot gjentatt straffefølgning (ne bis in idem)* (Universitetsforlaget 2009).

²⁷ Paunio 2013 pp. 68 ff. and already in 1995 connected to the effectiveness, Ward: Effective sanctions in EC law: a moving boundary in the division of competence, *European Law Journal*, Vol. 1, 2/1995 pp. 214-215.

²⁸ See CJEU joined cases C-42/59 and C-49/59 SNUPAT v High Authority, case C-63/93 Duff, C-107/97 Max Rombi and C-126/97 Eco Swiss as well as C-224/01 Köbler, C-318/10 SIAT and C-284/11 EMS-Bulgaria Transport OOD.

²⁹ Paunio 2013 p. 65 and Tridimas, *The general principles of EU law* (2nd edition, Oxford 2006) pp. 242 ff.

³⁰ Tridimas 2006 p. 253.

certain degree of predictability, so that the actors can foresee the legal consequences of their actions.³¹ Legal certainty can be divided into formal and material legal certainty, which denote predictability and acceptability.³² Legal certainty has been considered to apply 'as a directly applicable principle used in judicial decision-making as well as an interpretive principle influencing decision-making at the Court'.³³

In EU criminal law, legal certainty is usually connected to the legality principle. Legal certainty could encompass only the legality principle, but within the area of freedom, security and justice it seems to be a broader concept of which the legality principle is a part, and legal certainty and the legality principle are intrinsically linked.³⁴ From the case law of the Court of Justice of the European Union (CJEU) in criminal cases, legal certainty is used as a term covering procedural rights in European cooperation situations,³⁵ and here *ne bis in idem* is relevant,³⁶ or the fact that the legal certainty motivates using the urgent procedure (PPU).³⁷ Moreover, legal certainty is used in relation to the prohibition of *contra legem* interpretation,³⁸ conform interpretation of EU law³⁹ or the legality principle.⁴⁰

In relation to general principles of transnational criminal law, Gless has considered legal certainty comprising the principle of legality, the principle of personal guilt as a prerequisite for criminal responsibility, fair trial rights and procedural safeguards, an internationalised *ne bis in idem* principle and judicial control of transnational law enforcement and criminal prosecution. She continues, stating that legal certainty 'forms part of all the national legal European systems as well as the case law of the European court of

³¹ Paunio 2013 p. 51.

³² Paunio 2013 p. 52 including references.

³³ Paunio 2013 p. 64, see furthermore pp. 64-99 for a comprehensive analysis.

³⁴ CJEU cases C-201/88 Plantanol GmbH & Co. KG para. 36, joined cases C-74/95 and C-129/95, Criminal proceedings against X para. 25 and Klip 2012 pp. 179-190 on the legality principle.

³⁵ Cases C-192/12 West PPU, C-296/08 PPU Santesteban Coicoechea, C-105/03 Pupino, T-348/07 Al-Aqsa, opinions of advocate general in cases C-399/11 Melloni, C-297/07 Bourquain, C-467/05 Dell'Orto, C-354/04 P Gestoras pro amnistia and others.

³⁶ Cases C-228/05 Kretzinger, C-150/05 van Straaten, and opinions of advocate general in cases C-261/09 Mantello, C-463/04 van Esbroek and joined cases C-187/01 and C-385/01 Gözütok and Brügge.

³⁷ Case C-192/12 PPU West. The urgent preliminary ruling is an expedited procedure for references for a preliminary ruling relating to the area of freedom, security and justice, see art. 23a of the Protocol (no 3) on the statute of the Court of Justice of the European Union, OJ C 83/210, 30.3.2010.

³⁸ Opinion of the general advocate in case C-79/11 Maurizio Giovanardi and others.

³⁹ Case C-188/10 Melki.

⁴⁰ Cases C-303/05 Advocaten voor de Wereld, joined cases C-74/95 and C-129/95 criminal proceedings against x, C-384/02 Grøngaard and Bang, opinion of advocate general in case C-457/02 Antonio Niselli. It is interesting further to notice that the CJEU applies the term legal certainty in these cases, and does not seem to distinguish further between different terminological aspects.

human rights and the European Union body of law'.⁴¹ As the EU does not have competence in relation to the general part of criminal law (such as defining the guilt principle, although it can, in its instruments, regulate that intent is to be criminalised, it is up to the Member States to further regulate how this is defined), the principle of personal guilt cannot be considered part of legal certainty as such in the context of the area of freedom, security and justice, although this is naturally present in the Member States legal orders.⁴² Gless's definition is otherwise well-suited for the area.

4.4 *A working definition*

Gless's definition of legal certainty is applied in this article, but without the principle of personal guilt. Legal certainty, within the area of freedom, security and justice, is therefore in the context of this article to be construed of the principle of legality, safeguarding procedural rights connected to the requirement of a fair trial, including victims' rights. Furthermore are the *ne bis in idem* principle and judicial control of transnational law enforcement and criminal prosecution considered part of this concept. Although there is today no European court with a punitive competence (to rule on criminal law responsibility), the actors in the cooperation in criminal matters are the authorities of the Member States, which are subjected to national judicial review. The general competence of the CJEU is relevant as far as preliminary rulings are concerned; all national courts can and courts of last resort (national Supreme Courts) shall request a preliminary ruling, if necessary for the judgment.⁴³

All these parts of legal certainty are found in the constitutional traditions of the Member States, the ECHR, EU instruments, such as the Charter of fundamental rights of the EU (CFREU)⁴⁴ and other relevant documents, in addition to the case law of the European Court of Human Rights (ECtHR) and CJEU.⁴⁵

⁴¹ Gless, General principles of transnational criminal law - a European perspective on the principle of legal certainty. A paper presented at the Globalization of crime: criminal justice responses conference August 7-11, 2011 Ottawa, Canada p. 2, quote p. 4. Paper available at <http://www.icclr.law.ubc.ca/files/2012/july/Sabine%20Gless%20Principles%20Transnational%20Law.pdf> (Gless 2011a) See further Gless, A new test for mens rea? Safeguarding legal certainty in a European area of freedom, security and justice, *EuCLR* vol 1, 2011/2 pp. 114-122 (Gless 2011b), where she applies a slightly more restricted concept, which seems to resemble the legality principle.

⁴² For more information see Blomsma, *Mens rea and defences in European criminal law* (Intersentia 2012).

⁴³ Articles 267 TFEU and 258-260 TFEU. There is a possibility pursuant to article 257 TFEU to establish specialised courts. It is possible to establish a specialised criminal court, but such a court would not have a punitive competence of its own, as this competence lies at the national level.

⁴⁴ Charter of fundamental rights of the European Union, OJ C 326/391, 26.10.2012.

⁴⁵ See correspondingly the Communication from the Commission to the European Parliament and the Council, A new EU Framework to strengthen the Rule of Law, COM(2014) 158 final, 11.3.2014, which will be briefly dealt with in chapter 7.

5 The 'system' of an area of freedom, security and justice and its focus on legal certainty

5.1 Introduction

To begin with, it can be noted that several Member States have breached legal certainty as defined in the ECtHR, showing that adding the EU into the cooperation is not the only problematic aspect. Examples of such breaches are different violations of the right to a fair trial, which include the lack of opportunity to cross-examine witnesses, which had not effectively been counterbalanced in the proceedings, the fairness and length of the trial, the legality principle in relation to applying the more lenient criminal law, the procedure prescribed by law relating to deprivation of liberty and refusal of access to documents in case file material relating to lawfulness of detention.⁴⁶

5.2 A European criminal justice 'system'?

The criminal justice 'system' of the EU is different, as a legal system, when compared to the national criminal justice systems. The area of freedom, security and justice is an area comprising the Member States, where different criminal law systems coexist. These criminal justice systems are different and diverse priorities and understandings arise. This is especially true in relation to legal certainty. The area of freedom, security and justice does not as such unify the national legislations in it. Cooperation and harmonisation are focused on within this area. There is however not only one system of criminal and criminal procedural law, in the sense we usually tend to understand a criminal law system.⁴⁷

EU criminal law usually focuses on effective crime combatting within the EU and is often criticised for its focus on effectiveness and repressive measures of criminal law.⁴⁸ Although it seems difficult to say why there is a (over-) reliance on criminal law as an effective means to regulate unwanted behaviour, most such reliance seems to exist without much basis in empirical studies.⁴⁹ At the same time, focus on effectiveness in EU criminal law can lead to the decrease of focus on legal certainty aspects. One can think of legisla-

⁴⁶ See on art. 6 e.g. *Al-Khawaja and Tahery v. UK* appl. nos. 26766/05 and 22228/06 (2011), *Zielinski and Pradal and Gonzales and others v. France* appl. nos. 24846/94 and 34165/96 to 34173/96 (2009), on art. 7, *Scoppola v. Italy* (No. 2) appl. no. 10249/03 (2009), and on art. 5, *Medvedyev and others v. France* appl. no. 3394/03 (2010) and *Mooren v. Germany* appl. no. 11364/03 (2009).

⁴⁷ Another question is naturally if there even is such a need at all. This question cannot be further elaborated on in this context.

⁴⁸ Similarly Wiczorek, A needed balance between security, liberty and justice. Positive signals arrive from the field of victims' rights, *EuCLR* vo. 2, 2012/2 p. 142. See also Asp 2012 pp. 71-73.

⁴⁹ Elholm, Does the EU cooperation necessarily mean increased repression in the Nordic countries? *European Journal of Crime, Criminal Law and Criminal Justice*, Vol. 17, 3/2009 pp. 220 and 222 and de Bondt, Evidence Based EU Criminal Policy Making: In Search of Matching Data, *European Journal on Criminal Policy and Research* vol. 1, 1/2014 pp. 23-49.

tive initiatives where new forms for cooperation are invented, but not taking into account the possible problems and lacunas for the suspected or accused person at the same time, or raising the level of minimum penalties very high, in an area which is not necessarily problematic in all Member States and therefore creating an imbalance in the national systems. Having effectiveness as a main focus does not automatically lead to less legal certainty, but one should have the complete criminal justice system in mind when legislating and issuing new measures.⁵⁰ Although the area of freedom, security and justice is not, as such, a criminal justice system, it tries to adhere to one in relation to mutual recognition, other measures striving for free movement of judicial decisions and judgments and in relation to harmonisation of substantive criminal laws.⁵¹

The question is perhaps whether the EU should, and can strive for a similar balanced system, as the national criminal law ones. If this is the objective, focus should be more on a comprehensive approach than on the ad hoc approach that perhaps characterises today's EU criminal law. The legal instruments enacted represent somewhat a patchwork of instruments, where problems hindering effective cooperation are focused on, but not in a very systematic or coherent way. EU measures on criminal law centre on effective crime combatting, and police-, prosecutor- and court-cooperation is made more effective without giving the same attention to defence rights or other individual rights, which exemplify legal certainty.

5.3 *Current focus on legal certainty*

Of course this is not to say that legal certainty is not given any attention at all. Some measures to safeguard legal certainty have been implemented, such as the charter on fundamental rights, the roadmap for minimum procedural rights and the Stockholm programme.⁵²

The charter confirms the human rights position of the EU, and is not intended to further amend the Member States' obligations as prescribed under the ECHR, nor to extend the competences of the EU.⁵³ The charter applies when the Member States act within the scope of application of EU law. This has been considered encompassing implementing,

⁵⁰ See Asp *et al.* A Manifesto on European Criminal Policy, *ZIS (Zeitschrift für Internationale Strafrechtsdogmatik* – www.zis-online.com) 12/2009 pp. 707-716.

⁵¹ See further Klip 2012 pp. 469-484, especially pp. 479-481 and Gröning, A Criminal Justice System or a System Deficit? Notes on the System Structure of the EU Criminal Law, *European Journal of Crime, Criminal Law and Criminal Justice* 18 2/2010 pp. 115-137.

⁵² Resolution of the Council of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings, OJ 2009/C 295/01 and The Stockholm programme - an open and secure Europe serving and protecting citizens, OJ 2010/C 115/1.

⁵³ Gless 2013 p. 92 and for more information see Franklin, The Legal Status of the EU Charter of Fundamental Rights after the Treaty of Lisbon, 15 (2011) 2 *Tilburg Law Review* pp. 137-162.

enforcing or interpreting EU legislation at the national level.⁵⁴ The charter confirms the rights of individuals in the EU, based on the ECHR, the case law of the CJEU and other relevant principles or rights from EU law. The provisions regulating justice matters in the charter are naturally relevant for legal certainty. These are the provisions entailing the right to an effective remedy and to a fair trial (art. 47), the presumption of innocence (art. 48), the principles of legality and proportionality of criminal offences and penalties (art. 49) and the *ne bis in idem* principle (art. 50). The protection of human rights in the event of removal, expulsion or extradition (art. 19(2)) can further be considered relevant. These rights are mainly postulated as they are found in the ECHR and in the ECtHR case law, and the proportionality of penalties is based on the common constitutional traditions of the Member States and the case law of the CJEU.⁵⁵

The roadmap includes six different measures which are to be focused on. These are translation and interpretation, information on rights and charges, legal advice and legal aid, communication with relatives, employees and consular authorities, special safeguards for vulnerable suspected or accused persons and the green paper on pre-trial detention. For the two first measures, there are directives adopted and there is a proposal for a directive on the access to a lawyer and a green paper on pre-trial detention.⁵⁶ The step-by-step approach chosen for legislating on each different measure, in an instrument on its own is based on the reluctance of the Member States to agree on a previous proposal on a framework decision on certain procedural rights.⁵⁷ Although perhaps systematically it might be preferable to include such rights in one instrument, this was not possible and has led to this patchwork of procedural rights legislation within the EU today. The roadmap will be analysed in more detail under chapter 6.3.

The Stockholm programme, an agenda setting out the priorities of the EU for the area of freedom, security and justice for 2010-2014 emphasises the importance of the

⁵⁴ Franklin 2011 pp. 152-153.

⁵⁵ On proportionality and penalties in relation to the ECHR, see Aall, Prosessuelle garantier og forholdsmessighet i straffeprosessen. *Jussens Venner* vol. 48, 4/2013 pp. 253-256.

⁵⁶ Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings, OJ 2010/L 280/1, Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings, OJ 2012/L 142/1, 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 (latest resolution by the EP 10.09.2013) and Green paper on 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. On the replies to the Green paper, see http://ec.europa.eu/justice/newsroom/criminal/opinion/110614_en.htm (last visited 25.2.2014).

⁵⁷ Proposal for a Council framework decision on certain procedural rights in criminal proceedings throughout the European Union, 28.4.2004 COM(2004) 328 final presented by the Commission. The reluctance may of course have been motivated by the lack of a legislative ground for the proposal under then current Treaties.

roadmap.⁵⁸ The programme includes aspects such as increasing access to justice, further developed cooperation in criminal matters between the Member States, more harmonisation and increasing of mutual trust. Procedural minimum rights, relevant for legal certainty, are also mentioned, but the Stockholm programme does not explicitly refer to legal certainty further.⁵⁹ A need for EU measures emphasising legal certainty is therefore present within the area of freedom, security and justice. This has evidently been noted by the EU, as it has taken many relevant initiatives, and legal certainty is in focus today.

Some studies have shown that legal certainty, especially safeguarding the suspected or accused persons' rights, is not always easy to ensure in a European setting. This is naturally problematic, if the nature of the procedure, being European, leads to legal certainty not being properly realised. In some cases this depends, in addition to the effectiveness of the prosecutorial side, on the defence not being familiar enough with the (national) remedies and rights available in cross-border proceedings.⁶⁰ This is hugely problematic and shows that application of EU criminal law needs to focus more closely on these aspects. That the criminal proceedings crosses borders should not lead to legal certainty being weakened. Further measures and training on defence rights and rights of the individual are necessary for a balanced criminal justice system. The Stockholm programme mentioned training of legal professionals, but unfortunately does not mention defence in this respect.⁶¹

5.4 *Lastly*

A last question can be raised in this context. Is if the EU the right actor in relation to legal certainty? Worth noting is that neither the ECHR nor the CFREU regulate cross-border situations, but state-internal rights.⁶² A possibility would be that the Member States are responsible for the developments and safeguarding of legal certainty. These are after all the primary actors within the area of freedom, security and justice, since police, prosecutors, judges, courts and correctional services etc. are national. Having in mind that the EU enables and, more importantly, demands Member States to harmonise criminal law and to cooperate more effectively, it seems logical that the EU should focus also on legal certainty aspects. If a lacuna, such as a suspected or accused person not being able to use all national safeguards in a European procedure, results directly from EU instruments making cooperation more effective, it is imperative that the EU takes responsibility and

⁵⁸ The programme covers the whole area of freedom, security and justice, but only the criminal law aspects are focused on here.

⁵⁹ For more information on the Stockholm programme and its implementation, see the Presidency note on the Stockholm Programme mid-term review, 15921/12, 13.11. 2012.

⁶⁰ Fair trials international, Defence rights in the EU, 2012 p. 46-52.

⁶¹ Stockholm programme p. 6.

⁶² See Gless 2013 pp. 93 ff. However, as ECtHR case law indicates, this is not completely clear cut, see *Soering v. The United Kingdom*, appl. no. 140388/88, 7.7.1989 para. 113 and *Stojkovic v. France and Belgium*, appl. no. 25303/08, 27.10.2011 paras. 51-57.

repairs the situation.⁶³ In terms of a balanced and rational criminal justice system, the EU should make sure such gaps do not occur. Enacting legislation for the detriment of the suspected or accused person and not focusing on the overall balance will affect legal certainty. This has previously been noted by *Fair trial international*, which demand more effectiveness in relation to procedural rights within the EU and point out that these need to be prioritised.⁶⁴

6 Examples from EU criminal law

6.1 Introduction

As mentioned above, the area of freedom, security and justice is construed of many different parts and is somewhat difficult to grasp in a more concise and coherent way. For illustrating more concretely the position of legal certainty within the area of freedom, security and justice today, four examples from EU criminal law are presented here. It is very difficult to cover the whole aspect of criminal law within the area of freedom, security and justice. The four examples are chosen due to their actuality today and as they represent different parts of EU criminal law and grasp the width of relevant legal certainty questions.

Mutual recognition as the cornerstone of cooperation in criminal matters opens up many possible detriments for the suspected or accused. The most important ones, namely human rights grounds for refusal, are analysed here from a legal certainty point of view. Minimum procedural rights are a given example in respect to legal certainty, as these embody the core of it. The rights of the victims are perhaps not as given, but taken into account the possibilities of overlapping jurisdictions, cooperation in criminal matters and diversities in the Member States' legislation on the rights of victims, these are also an important part of legal certainty today. Lastly, the proposal for the EPPO is looked upon to exemplify the possible problems of legal certainty, when focus is so heavily on effectiveness of prosecution. With these four examples of different aspects currently focused on within the EU, the complexity of a concept such as legal certainty within the area of freedom, security and justice is demonstrated.

6.2 Mutual recognition and human rights

Mutual recognition is one of the main principles within the area of freedom, security and justice. Applying this principle has its main focus on effectiveness and recognition of foreign judicial decisions as national ones, which again impacts legal certainty. There

⁶³ Thunberg-Shunke, En kodifiering av tillräckliga rättssäkerhetsgarantier för misstänkta och tilltalade - krav för ett fortsatt samarbete i brottmål inom EU? In *Festskrift för Suzanne Wennberg* (Nordstedts Juridik 2009) pp. 373-381 demanded (already in 2009) modern solutions for the current problems within the EU.

⁶⁴ Defence rights in the EU, 2012 p. 41.

are several different aspects that could be analysed here, as effectiveness can pose several problems for legal certainty, but only three are focused on here.

Firstly, being the cornerstone for cooperation in criminal matters, the idea from the EU's perspective is that cooperation should be as efficient as possible and that judicial decisions should be recognised as far as possible. There are certain grounds for refusal in the instruments, which regulate situations where recognition should or may be refused, such as if the matter has already been solved in the executing state (*ne bis in idem*), or if the person sought is under the age of criminal responsibility in the executing state. There are however no grounds for refusal based on human rights concerns. This means that if the execution of a judicial decision would contravene with human rights, the instruments do not as such have a ground for refusal for this. This is based on the presumption that all Member States are considered to protect these rights sufficiently. No human rights issues should exist, where recognition can or may be refused between the Member States.⁶⁵ This is expressed in the recitals and introductory articles of the instruments, where it is stated that the instruments respect human rights and that nothing in the instrument is to be considered amending the Member States' obligation to respect fundamental rights. These are however not grounds for refusal, but mainly declamatory statements.

The common respect of human rights in addition to a mutual trust between the Member States lead to no need for such grounds for refusal. The Member States are considered to trust each other in terms of respecting human rights, and this applies also for applying all national legislation according to common European human rights standards. No instruments applying mutual recognition in the different forms of cooperation therefore have human rights grounds for refusal.⁶⁶ The newly adopted European investigation order is an exception to this, and is a positive development as regards human rights grounds for

⁶⁵ Further on these, see Suominen 2011 pp. 197-205.

⁶⁶ Framework decisions today in addition to the EAW concern confiscation orders, financial penalties, freezing orders, evidence, taking convictions into account, custodial sentences, suspended and alternative sentencing and the European supervision order. These are the Council framework decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, OJ/2002 L 190/1, as amended by the 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, OJ L 81/24, 27.3.2009, Council Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders,

refusal.⁶⁷ The CJEU has in its case law on the European Arrest Warrant (EAW) concluded that Member States can only refuse cooperation based on a mutual recognition instrument when there is a ground for refusal found in the EU instrument.⁶⁸ Therefore, if there is concern in relation to human rights, the recognition should not be refused, if there is no such possibility according to the instrument.

Although the EU considers such grounds for refusal unnecessary, several Member States have included human rights as grounds for refusal in their national implementing legislation, as previous studies have shown.⁶⁹ In addition to this, there are several cases where Member States have been found breaching different human rights under the ECHR by the ECtHR. The presumption that human rights are always respected and that cooperation can be based on this presumption has come close to being rebuttable.⁷⁰ This does not lessen the fact that the instruments should already at the EU level include a possibility to refuse recognition in case of human rights concerns.

This means that legal certainty within the area of freedom, security and justice is not as highly protected when it comes to human rights aspects in mutual recognition cooperation, as it should be. Although the Member States take their responsibility and several of

OJ L 328/59, 24/11/2006, Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties, OJ L 76/16, 22/03/2005, Council framework decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence, OJ L196/45, 2.8.2003, Council framework decision 2008/978/JHA of 18 December 2008 on the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters, OJ L 350/72, 30.12.2008, Council framework decision 2008/675/JHA of 24 July 2008 on taking account of convictions in the Member States of the European Union in the course of new criminal proceeding and custodial sentences, OJ L 220/32, 15.8.2008, Council framework decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union, OJ L 327/27, 5.12.2008 and Council Framework Decision 2008/947/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions, OJ L 337/201, 16/12/2008 and Council framework decision 2009/829/JHA of 23 October 2009 on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention, OJ L 294/20, 11.11.2009).

⁶⁷ Directive of the European Parliament and of the Council regarding the European Investigation Order in criminal matters Brussels, of 7.3.2014, PE-CONS 122/13. Its art. 11f) states that the recognition and execution of an EIO may be refused if 'there are substantial grounds to believe that the execution of the investigative measure indicated in the EIO would be incompatible with the executing State's obligations in accordance with Article 6 TEU and the Charter.'

⁶⁸ CJEU case C-388/08 PPU *Leymann and Pustovarov* para. 51, also cases C-261/09 *Mantello* para. 37 and C-396/11 *Radu*, para. 43 (although in this particular case it is not hard to agree with the CJEU) and C-399/11 *Melloni* para. 63.

⁶⁹ Suominen 2011 pp. 197-200 and 205-222.

⁷⁰ See further Suominen, Grundläggande rättigheter i straffrättsligt samarbete, *JFT* 1-2/2014 pp. 44-51 also on such case law.

these have inserted such grounds for refusal, the situation is not optimal.⁷¹ This is a rather serious deficit in the European cooperation in criminal matters. Hopefully this deficit will be given more attention also in the light of the new instruments on mutual recognition, and also those regulating minimum procedural rights (see chapter 6.3).

Secondly, there are some discrepancies in the current arrest warrant system. In some situations a person can be subjected to the same arrest warrant several times, although the recognition of the arrest warrant has already been refused. If the recognition is refused based on a legitimate ground for refusal, this refusal is not recognised within the area of freedom, security and justice. As the arrest warrant is sometimes left in the Schengen Information System (SIS or SIS II),⁷² the person, when travelling to another Member State, can be apprehended based on the same arrest warrant and subjected to the same procedure, as he already has been, where a ground for refusal was applied and recognition refused. This connects to a larger discussion on a European dimension of legal force.⁷³ Without going further into this, it can be noted that in some cases, the refusal not having a European legal force can be motivated. This applies for refusals based on national aspects, such as ongoing prosecution of the same person for other offences in the executing state. In situations where the refusal is based on an aspect having a European dimension, such as *ne bis in idem* or human rights as argued above, the refusal having no effect within the area of freedom, security and justice seems illogical.

The fact that a person within this area can be subjected several times to the same arrest warrant, which has already been refused, does not seem promising for legal certainty nor effectiveness. If a refusal is based on a ground having relevance within the whole area, there should at least be some form of recognition of such a refusal. When the EU legislator has legislated instruments for effective cooperation, it should make sure that no loopholes or problematic situations occur when applying those instruments. Making it possible for Member States to issue or keep the arrest warrant in the information system, when the recognition has been refused should be addressed, or should at least be acknowledged as a practical problem for the individual, which may hamper his right of free movement within the EU.

This links to the third aspect where mutual recognition affects legal certainty. When focus lies heavily on the effective cooperation, this sometimes has a detrimental effect on the suspected or accused person. In several cases a more lenient measure could be used, but such measures do not yet exist at the EU level, or applying such an instrument is too cumbersome. For example arrest warrants are used in many cases, where other forms of

⁷¹ On the problems when applying such a ground in Finnish and Swedish legislation, see Suominen 2014 pp. 32-43, and more generally Asp 2014 pp. 8-9.

⁷² Council decision 2007/533/JHA of 12 June 2007 on the establishment, operation and use of the second generation Schengen Information System (SIS II), OJL 2007/205/63.

⁷³ See Gless 2011a pp. 3-5 and Öberg, EU criminal law, democratic legitimacy and judicial review of Union criminal law legislation in the wake of the Lisbon Treaty, *Tilburg Law Review* 16 (2011) p. 63.

mutual legal assistance could be used, or pre-trial detention is used in many arrest warrant cases after the person is surrendered to the issuing state, where alternatives could have a similar effect.⁷⁴ Today the arrest warrant is very effective and easy to use in situations where hearing the person initially through video-link or other alternatives might be enough. Similarly, in most cross-border cases, pre-trial detention is considered necessary as the suspected or accused person may be foreign, and therefore more prone to be at flight risk. Other alternatives to pre-trial detention are perhaps not always suitable for cross-border situations, which may also to some extent impact the use of pre-trial detention as in addition to being effective it is the easy solution.⁷⁵

Not all aspects of EU criminal law cooperation are addressed at the EU level, and certain instruments have proven more effective than others. This is related to the imperfect EU criminal justice system in which all parts are not yet developed, and which can result in the 'misuse' of current instruments. This will become better in the future, with some new instruments which enable more forms of cooperation, and EU criminal law becoming more encompassing and including more aspects of cooperation in criminal matters improving this. Already today, if we look at the three framework decisions concerning transfer of prisoners, probation and alternative sanctions and the European supervision order (mentioned above), this can be seen as improved. These instruments address different aspects of cooperation, where improvements and alternatives come into play. These instruments should together with the EAW lead to more functional cooperation legislation within the area of freedom, security and justice where more options are available. These instruments have however not yet been properly implemented by all Member States, and the practical use of them is therefore yet to be seen.⁷⁶

It is nevertheless important that relevant instruments are used for their purpose, and that certain instruments are not overused due to their effectiveness. As regards the use of pre-trial detention, the answer is not simple.⁷⁷ In addition to the question on whether the EU has competence to legislate on the matter (is this included under article 82(2) TFEU,

⁷⁴ Statistics on pre-trial detention is somewhat problematic, as the situation can change from day to day, see further chapter 6.3. This is partly also true for the EAW cases. See Maior, The principle of proportionality: alternative measures to the European arrest warrant, in Keijzer and van Sliedregt (eds), *The European arrest warrant in practice* (Asser Press 2009) pp. 214-216.

⁷⁵ See further the Report from the Commission to the European Parliament and the Council on the implementation by the Member States of the Framework Decisions 2008/909/JHA, 2008/947/JHA and 2009/829/JHA on the mutual recognition of judicial decisions on custodial sentences or measures involving deprivation of liberty, on probation decisions and alternative sanctions and on supervision measures as an alternative to provisional detention, COM(2014) 57 final, 5.2.2014.

⁷⁶ *Ibid.* on the implementation status.

⁷⁷ The Green paper has already been mentioned, and it is of course very interesting. It does however not solve all relevant questions, and for more information on it, see Report Detained without trial: Fair Trials International's response to the European Commission's Green Paper on detention, October 2011 (available on <http://www.fairtrials.org/documents/DetentionWithoutTrialFullReport.pdf>, last visited 19.2.2014).

and is this related to mutual recognition?), the question is what form of instrument best would address the problems here. Alternatives to pre-trial detention, harmonisation of the conditions, more monitoring of such, or making sure that the suspect or accused person being foreign not automatically leads to the use of pre-trial detention and focus on rehabilitation are only a few examples of possibilities.⁷⁸

There should be an option to assess the arrest warrant to avoid using it in situations where more lenient measures could be used, but the arrest warrant is chosen due to its effectiveness. It should be possible to apply arrest warrants respecting legal certainty, including after the person has been surrendered, and the balance of the system within the area of freedom, security and justice should be preserved. The whole system of overuse of efficient crime combatting instruments when strictly not necessary should be more balanced overall within the area of freedom, security and justice. Regardless of how the mutual recognition system is construed, it should in any case not result in no Member State's taking responsibility for human rights or other aspects of legal certainty in these cross-border cooperation situations.⁷⁹

6.3 *Minimum procedural rights*

The minimum procedural rights for the suspect or the accused are another good example of current EU criminal law focus. Minimum standards for suspects' or accused persons' procedural rights are considered essential for compensating for the possible disadvantages resulting from cross border criminal proceedings, such as not understanding the language of the court proceedings, the different rules on coercive measures or the mere reality of standing in court in another Member State, with all its disadvantages. One might consider the minimum rights guaranteed by the ECHR as being somewhat standard minimum rights within Europe. The EU has nevertheless considered that cooperation in criminal matters between the Member States goes further than under the Council of Europe, and due to the possibly problematic situations the suspects can encounter, common minimum standards are necessary. This seems logical also when taking mutual recognition into account, as it imposes rather far-reaching cooperation duties on the judicial authorities of the Member States as well as the ECHR and the CFREU not *per se* regulating fundamental rights in cross-border situations.

⁷⁸ It is not possible to further elaborate on these matters in this context, but see these publications based on IRCP studies, Vermeulen *et al.* *Cross-border Execution of Judgements Involving Deprivation of Liberty in the EU: Overcoming Legal and Practical Problems Through Flanking Measures* (IRCP Series, Vol. 40 Maklu Publishers 2011) and Vermeulen *et al.* *Material Detention Conditions, Execution of Custodial Sentences and Prisoner Transfer in the EU Member States* (IRCP Series, Vol. 41 Maklu Publishers 2011).

⁷⁹ See CJEU case C-396/11 Radu, and slightly differently case C-399/11 Melloni although the latter was on the specific issue of judgments in absentia, also Thunberg-Schunke, *Whose responsibility? A study of transnational defence rights and mutual recognition of judicial decisions within the EU* (Intersentia 2013) pp. 5-6 and 123-134 and Marguery, *European Union fundamental rights and Member States action in EU criminal law*, 20 *MJ 2* (2013) p. 298.

As mentioned above, the roadmap presents some procedural rights that the EU is focusing on. Some of these are already regulated through directives, and these concern translation and interpretation and information on rights and charges. There is furthermore a proposal for a directive on the access to a lawyer and a green paper on pre-trial detention. The directives adopted (although not yet implemented), are positive improvements for the suspect, but perhaps do not solve all nor the bigger problems in relation to deficits in European criminal proceedings.⁸⁰

Despite these being positive examples of current EU legislation, there are some drawbacks as well. For example, in the directive on the right to information in criminal proceedings, it is clear that the list of rights to which the suspected person is entitled in article 3(1) is incomplete, since the right to be heard and the right to effective defence, among others, are not included. Although the article regulates which procedural rights at least should be guaranteed, there is no logical explanation for why some are left out of the list. The fact that article 4(2) of the directive adds some additional rights does not succour this, as these rights are not listed here either. It is unclear if the ambition has been to include all relevant rights (based on the ECHR), and if so, why some have been left out. Furthermore is the time limit in article 6 of the same directive not optimal with regard to the person being informed of the charges. Although the fairness of the proceedings, effective defence and that the information is to be given promptly is focused on in the article, this article does not further specify when the information is to be given, but states that this should take place 'at the latest on submission of the merits of the accusation to a court' (article 6(3)). This might be too late for an effective defence.

In the directive on the right to interpretation, again the right to interpretation and translation in article 1 is not optimally regulated, as it actualises when the person is made aware that he is suspected or accused, and this in some cases can be too late in relation to having an effective defence. The list of essential documents that the person has a right to have translated, seems somewhat arbitrary in article 3 (1-4) as these are not further specified, but all 'documents which are essential to ensure that they are able to exercise their right of defence and to safeguard the fairness of the proceedings' are included. There are further restrictions, which do not seem very logical, and in article 3(7), there is an option to give an oral translation or summary in some circumstances. The fact that the conditions under which this is possible are not predefined can be problematic because there is no indication of how extensive such an oral translation or summary should be. It is difficult to see how an oral translation, or a summary could be beneficial for the suspected, or in which cases such a translation could be sufficient.

⁸⁰ Critically on the roadmap, see Smith, Running before we can walk? Mutual recognition at the expense of fair trials in Europe's area of freedom, security and justice, *NJECL*, vol. 4 1-2/2013 pp. 91-95, and pp. 95-98 on pre-trial detention, which cannot unfortunately be focused on more here. See also the new Communication COM(2014) 144 final, 11.3.2014 pp. 3 and 6-7.

On a more general level, it can be questioned whether it is reasonable for the EU legislator to legislate minimum procedural rights with a one-by-one approach, and if so, what the scope of such instruments should be. According to the above-mentioned roadmap, the one-by-one approach is the prevailing, and the current directives are usually narrow in scope.⁸¹ The added value compared with the ECHR is not very visible as such, as the minimum rights guaranteed usually are not much higher than the already existing level of protection. Although the symbolic nature of such instruments might add something, it seems bizarre that the EU cannot agree on a higher protection than the ECHR. The directives seem to guarantee a low protection for the individual, which might lead to a 'race to the bottom', entailing that cooperation is 'easier' when all Member States apply the same low standards for minimum procedural rights. This is in no way a desirable development. Legislating on minimum procedural rights should not lessen the impact of legal certainty within the area of freedom, security and justice, but quite the contrary.

There are, of course, positive examples to be found in the directives as well. First of all both directives, in the respective provisions under article 1, explicitly refer to the EAW, which is positive, as it has been noted that the EAW creates some lacunas and that EU action for this is necessary. It is imperative that legal certainty be enhanced in relation to the even more efficient use of mutual recognition in EAWs. The right to judicial review on a decision concerning refusal of access to some material in the directive on the right to information, article 7(4) is furthermore a positive example in relation to legal certainty.

Another positive note is that the Commission recently issued a communication on making progress on procedural safeguards for suspected and accused persons and strengthening the foundation of the European area of criminal justice.⁸² Here the Commission states that it wants more procedural rights for citizens in criminal proceedings and in relation to this presented five proposals.⁸³ The proposals, which are from late 2013, consist of three proposals for directives concern the presumption of innocence and to be present at trial,⁸⁴ special safeguards for children when suspected or accused of a crime⁸⁵

⁸¹ The EU is aware of this and is currently considering codifying these, see Communication COM(2014) 144, final, 11.3.2014 p. 8.

⁸² Communication from the Commission to the European Parliament, the Council the European economic and social committee and the committee of the regions. Making progress on the European Union Agenda on Procedural Safeguards for Suspects or Accused Persons - Strengthening the Foundation of the European Area of Criminal Justice, COM(2013) 820 final, Brussels 27.11.2013.

⁸³ See the press release of 27.11.2013 at http://europa.eu/rapid/press-release_IP-13-1157_en.htm (last visited 11.03.2014).

⁸⁴ Proposal for a directive of the European Parliament and the Council on the strengthening of certain aspects of the presumption of innocence and of the right to be present at trial in criminal proceedings, COM(2013) 821 final, Brussels, 27.11.2013, 2013/0407 (COD). There is an impact assessment accompanying the proposal, SWD(2013) 478 final, 27.11.2013.

⁸⁵ Proposal for a directive of the European Parliament and of the Council on procedural safeguards for children suspected or accused in criminal proceedings, COM(2013) 822 final, Brussels, 27.11.2013, 2013/0408 (COD). Also accompanied by an impact assessment, SWD(2013) 480 final, 27.11.2013.

and legal aid.⁸⁶ These are complemented by two recommendations, which concern procedural rights for vulnerable people⁸⁷ and the right to legal aid.⁸⁸

The proposals concern important aspects of legal certainty and are positive initiatives towards a more balanced area of freedom, security and justice. Legal certainty is prioritised and the current deficits in the balance of EU criminal law are focused on. Especially the presumption of innocence is a fundamental principle of the Member States' criminal law systems, which the Stockholm programme mentioned as a tool to promote cooperation.⁸⁹ The presumption of innocence can further be considered important for mutual trust between the Member States, as it a fundamental principle also enshrined in the case law of the ECtHR.⁹⁰

6.4 *The rights of the victim*

The rights of the victim in cross-border criminal proceedings have been actively discussed in the EU, concerning amongst other how the victim should be protected, which rights and role he should have and how far these should be extended, especially in a European proceeding.⁹¹ What makes this especially interesting within the area of freedom, security and justice is the addition of the victim into the equation of the state and the suspected or accused person as actors. This raises additional fundamental questions on how the criminal procedure should be and what its ultimate aim is.⁹² Depending on how legal certainty is defined, the rights of the victim can be either included in this, or excluded. Taking into account that within the area of freedom, security and justice, the EU shall guarantee the rights of the victim, these rights are here considered as part of legal certainty.

⁸⁶ Proposal for a directive of the European Parliament and of the Council, on provisional legal aid for suspects or accused persons deprived of liberty and legal aid in European arrest warrant proceedings, COM(2013) 824 final, Brussels, 27.11.2013, 2013/0409 (COD). Also accompanied by an impact assessment, SWD(2013) 476 final, 27.11.2013.

⁸⁷ Commission recommendation of 27 November 2013 on procedural safeguards for vulnerable persons suspected or accused in criminal proceedings (2013/C 378/02).

⁸⁸ Commission recommendation of 27 November 2013 on the right to legal aid for suspects or accused persons in criminal proceedings (2013/C 378/03).

⁸⁹ Stockholm programme p. 10.

⁹⁰ On the case law of the ECtHR see e.g. cases *Allen v. The United Kingdom*, appl. nr. 25424/09, 12.7.2013, *Yassar Hussain v. The United Kingdom*, appl. nr. 8866/04, 7.6.2006, *Minelli v. Switzerland*, appl. nr. 8660/79, 25.3.1983 and *Ringvold v. Norway*, appl. nr. 34964/97, 11.2.2003. For more information on the presumption of innocence, see Duff, Who must be presume whom to be innocent of what? *Netherlands Journal of Legal Philosophy* 2013 (42) 3 pp. 170-192, Ulväng, Presumption of innocence versus a principle of fairness, *Netherlands Journal of Legal Philosophy* 2013 (42) 3 pp. 205-224 and Frände, The presumption of innocence and the Finnish Law of Evidence, *Festschrift für Helmut Fuchs* (Verlag Österreich 2014) pp. 163-169.

⁹¹ See also Letschert and Rijken, Rights of victims of crime: tension between an integrated approach and a limited legal basis for harmonisation, *NJECL* vol. 4, 3/2013 pp. 227-233.

⁹² Similarly Mitsilegas, Security versus justice The individualisation of security and the erosion of citizenship and fundamental rights, in *Justice and Security in the 21st Century* 2012 pp. 206-207.

Wieczorek has, based on victimology and the categories in the Commission proposal, listed six needs of victims. These are the need of respect and recognition, the need for participation, the need for information, the need for protection, the need of support and the need of reparation.⁹³ She points out that the needs are not fully reconcilable with each other, and that these are challenging especially in a cross-border criminal proceeding. Cross-border victims have special needs, and these are not necessarily similar to the needs of national victims, such as the need for interpretation and translation, and plans for avoiding the risk of secondary victimisation.⁹⁴ This shows that protecting the victim within the area of freedom, security and justice is not a simple task and specific attention should be given to this. As European proceedings based on mutual recognition might lead to the victim's rights not being recognised or them not having any rights in cross-border situations, it is positive that the EU is addressing this matter.

This was noted already in 2001, as there is a framework decision on the rights of the victims from that year, but this framework decision never gained much practical use between the Member States.⁹⁵ The Stockholm programme emphasised the rights of victims of crime and in article 82(2) TFEU, the rights of the victim are mentioned as one relevant area for EU legislation, as long as measures only concern minimum harmonisation and these are necessary for facilitating mutual recognition.⁹⁶ The position of the victim in a European setting has politically risen, as can be seen by the Council resolution on a roadmap for strengthening the rights and protection of victims, in particular in criminal proceedings.⁹⁷ As the framework decision was not successful, it is being replaced by a directive on minimum standards on the rights, support and protection of victims of crime.⁹⁸

The directive on minimum rights has as its main purpose to 'ensure that victims of crime receive appropriate information, support and protection and are able to participate in criminal proceedings'.⁹⁹ It is divided into three main parts, including a part on information and support, a part on participation in criminal proceedings and a part on

⁹³ Wieczorek 2012 pp. 144-145.

⁹⁴ Ibid. p. 147.

⁹⁵ Council framework decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings, OJ L 82/1, 22.3.2001 and implementation reports Report from the Commission on the basis of Article 18 of the Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings COM(2004)54 final/2, 16.02.2004 and Report from the Commission pursuant to Article 18 of the Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings (2001/220/JHA) COM(2009) 166 final, 20.4.2009.

⁹⁶ See further Letschert and Rijken 2013 pp. 234-235 on this competence.

⁹⁷ Resolution of the Council of 10 June 2011 on a Roadmap for strengthening the rights and protection of victims, in particular in criminal proceeding, OJ C 187/1, 28.6.2011.

⁹⁸ Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, OJ L 315/57, 14.11.2012.

⁹⁹ Art. 1(1) of the directive.

protection of the victims. The directive includes many of the rights that were included in the framework decision, such as the right to be heard and to give evidence,¹⁰⁰ the reimbursement of expenses,¹⁰¹ the right to receive information¹⁰² and the right to legal aid.¹⁰³ The directive introduces certain improvements, which the framework decision did not cover. These are the right to translation and interpretation,¹⁰⁴ the right to be informed of available procedures for making a complaint, if their rights are not respected,¹⁰⁵ the right to receive written acknowledgment when making a complaint¹⁰⁶ and the possibility to demand a review of a decision not to prosecute.¹⁰⁷ There is further a provision regarding vulnerable victims, for those in need of specific protection.¹⁰⁸

Taking into account that the rights regulated are not always automatic in cross-border situations, the directive is a welcome improvement for the rights of victims. Its focus can be characterised as ensuring victims broad participation rights and that the protection of victims is focused on.¹⁰⁹

Another example increasing legal certainty for victims is the European protection order.¹¹⁰ As a starting point, national protection orders only apply within the national jurisdiction. This instrument applies mutual recognition to protection orders, which are decisions imposing prohibitions or restrictions on persons representing a danger to other persons (these can be considered a form of restraining order). The idea is free movement of decisions concerning protection measures for victims of crime between the Member States. The recognition of the protection order applies throughout the area of freedom, security and justice and extending mutual recognition to this aspect of criminal procedure is welcome, as previously decisions on protective measures have not had a Union wide effect. Applying protection orders only nationally can be problematic when Union citizens use their right of free movement.¹¹¹

A European protection order can only be issued based on protection order in the issuing state, and can impose one of the three alternatives on a person causing danger: '(a) a prohibition from entering certain localities, places or defined areas where the protect-

¹⁰⁰ Art. 10 of the directive and art. 3 of the preceding framework decision.

¹⁰¹ Art. 14 of the directive and art. 7 of the preceding framework decision.

¹⁰² Art. 4 of the directive and art. 4 of the preceding framework decision.

¹⁰³ Art. 13 of the directive and art. 4(1)(f)(iii) of the preceding framework decision.

¹⁰⁴ Art. 7 of the directive.

¹⁰⁵ Art. 4(1)(h) of the directive.

¹⁰⁶ Art. 5 of the directive.

¹⁰⁷ Art. 11 of the directive.

¹⁰⁸ Art. 22 of the directive.

¹⁰⁹ Similarly Wieczorek 2012 pp. 154-156, see also Letschert and Rijken 2013 pp. 245-247.

¹¹⁰ Directive 2011/99/EU of the European Parliament and of the Council of 13 December 2011 on the European protection order, OJ L 338/2, 21.12.2011.

¹¹¹ Also pointed out in recital 5 of the preamble of the directive.

ed person resides or visits; (b) a prohibition or regulation of contact, in any form, with the protected person, including by phone, electronic or ordinary mail, fax or any other means; or (c) a prohibition or regulation on approaching the protected person closer than a prescribed distance.¹¹² A European protection order is to be used when the protected person decides to reside or stay in another Member State, or already resides or stays there.¹¹³ There are, as in all mutual recognition instruments, certain grounds for refusal, which include the requirement of double criminality, statute-barred offences, *ne bis in idem*, immunity or amnesty and jurisdictional issues.¹¹⁴ The European protection order further contains rules on the discontinuance of measures based on an order, such as the maximum duration of the measure expiring, or the person no longer residing or staying in the other Member State.¹¹⁵ The protection order resembles many of the other mutual recognition instruments and can be considered a positive measure enhancing the protection of victims of crime, and through this, legal certainty within the Union.

Focus on the rights of the victims has previously not been such an essential part of the area of freedom, security and justice. The improvements in this field are positive. Both directives, the one on the victims' rights in criminal proceedings and the one on the European protection order are adopted, but not yet implemented (the deadline is late 2015). It will be interesting to see how these will function in practice. If the provisions are followed correctly in the national setting, the legal certainty as regards victims' rights is increased.

6.5 *The possible EPPO*

A proposal for a European public prosecutor's office (EPPO) is reality today. The Commission has, again, proposed that the EPPO be set up for the effective protection of the financial interest of the EU.¹¹⁶ Based on a fairly long road resulting in the proposal main-

¹¹² Art. 5 of the directive.

¹¹³ Art. 6 of the directive.

¹¹⁴ Art. 10 of the directive. For a more general overview of grounds for refusal in mutual recognition instrument, see Suominen 2011 pp. 111-277.

¹¹⁵ Art. 14 of the directive.

¹¹⁶ Proposal for a Council regulation on the establishment of the European Public Prosecutor's Office, COM(2013) 534 final, 17.7.2013. For the previous attempts, see the Green paper on criminal-law protection of the financial interests of the Community and the establishment of a European Prosecutor, COM(2001) 715 final, 11.12.2001, Delmas-Marty (ed.) *Corpus Juris: Introducing Penal Provisions for the Purpose of the Financial Interests of the European Union*, (Economica 1997), Delmas-Marty and Vervaele (eds.) *The Implementation of the Corpus Juris in the Member States: Penal Provisions for the Protection of European Finances, 4 Volumes* (Intersentia 2000), and the Communication from the Commission to the European Parliament, the Council, the European economic and social committee and the committee of the regions on the protection of the financial interests of the European Union by criminal law and by administrative investigation, COM(2011) 293 final, 26.5.2011. OLAF (European Anti-Fraud Office) is also relevant in this respect, see the Commission decision of 27 September 2013 amending Decision 1999/352/EC, ECSC, Euratom establishing the European Anti-fraud Office, OJ L 257/19, 28.9.2013. See also Zwiers, *The European public prosecutor's office, analysis of a multilevel criminal justice system* (Intersentia 2011).

taining the main competences at the Member State level, this proposal is interesting from many angles and many different aspects in relation to legal certainty. Adding yet another strong focus point on the prosecutorial side in EU criminal law poses many potential problems for legal certainty, such as lack of equality of arms and especially in relation to applicable jurisdiction, which procedural safeguards apply. It is not possible to go into all aspects of the proposal that might be relevant from a legal certainty point of view here. In this article, the chapters on procedural safeguards (IV) and judicial review (V) are of interest. These will be analysed from a legal certainty perspective.

As for procedural safeguards, the proposal firstly lists the rights that the suspected or accused person is to have.¹¹⁷ These mainly correlate with the applicable directives in EU criminal law today¹¹⁸ and the person shall have these rights from the time that they are suspected of having committed an offence.¹¹⁹ The proposal does not further elaborate when this takes place. The proposal further states that suspected and accused persons shall have all procedural rights available under applicable national law.¹²⁰ The proposal secondly focuses on the right to remain silent and the presumption of innocence. The right to remain silent shall apply in accordance with national law when the suspect or accused person is questioned,¹²¹ and the person is to be assumed innocent until proven guilty according to national law.¹²² Thirdly, the proposal contains a provision on the right to legal aid. The suspected or accused person shall, again in accordance with national law, have a possibility to legal assistance free or partially free of charge, if he cannot pay for it himself.¹²³ Fourthly, the proposal has a provision on evidence, stating that the suspect or accused shall have the possibility in accordance with national law to present evidence to the consideration of the EPPO.¹²⁴ It continues stating that the suspected or accused person shall have the right to request the EPPO to gather evidence relevant for the investigation, and this is again to be done in accordance with national law.¹²⁵

These are not a complete overview of the possibly necessary procedural safeguards or legal certainty safeguards within the EU today, but are those considered of importance for the functioning of the EPPO. The same critique as in relation to the minimum procedural rights in chapter 6.3 can of course be said to apply here; the rights guaranteed are narrow in scope and the added value is sometimes hard to grasp. At the same time, the

¹¹⁷ Art.32 of the proposal.

¹¹⁸ Art. 32(2) points a-f of the proposal.

¹¹⁹ Art. 32(3) of the proposal.

¹²⁰ Art. 32(5) of the proposal.

¹²¹ Art. 33(1) of the proposal.

¹²² Art. 33(2) of the proposal.

¹²³ Art. 34 of the proposal.

¹²⁴ Art. 35(1) of the proposal.

¹²⁵ Art. 35(2) of the proposal.

EPPO proposal does not as such create any rights in relation to procedural safeguards, but only lists the relevant EU instruments regulating these, or relies on the national law. No rights are as such introduced however, would the national law not have such rights available. This is interesting, as there seems to be no enhancement of the rights of the individual or legal certainty in this respect, whereas the EPPO enhances the possibilities of the prosecutorial side. The lack of balance in EU criminal procedural law has already previously been criticised.¹²⁶

In the EU setting, the balance can prove to be even more interesting, if the criminal justice system for some parts becomes European, in the meaning of ‘supranational criminal law’. At the moment, all actors are still national, the police, prosecutors and the courts. There is no EU court with competence to sentence individuals to criminal responsibility or to judicially review such national decisions (the ECHR is not considered here). The same will apply also when EU criminal law is directly enforced.¹²⁷ The EPPO proposal does not seem to alter this, as the proposed EPPO would to a large extent maintain the competence at a national level.

This is further seen in the provision regulating judicial review of procedural measures of the EPPO. Article (36(1)) of the proposal states that

[when] adopting procedural measures in the performance of its functions, the European Public Prosecutor’s Office shall be considered as a national authority for the purpose of judicial review.

This is interesting from many angles. It emphasises that the primary competence still will be national, or at least semi-national. The prosecutorial competence of the EPPO will have some sort of semi-supranational form, mainly still within the Member States’ competence but having some increased efficiency which adds some European features. Notwithstanding, the decisions made by the EPPO are to be considered national ones, and the judicial review of such decisions will still only be national. It would perhaps seem more logical if the CJEU would be competent for the judicial review of the procedural measures of the EPPO in the sense that there is a European dimension in deciding those measures. Especially for issues concerning deciding on the ancillary competence, the applicable jurisdiction or certain investigation measures, the CJEU would seem more legitimate to decide on judicial review of such decisions.¹²⁸

Taking into account the reluctance of the Member States to give further competences to the EU, this might seem logical, but how this will be dealt with in practice and what it results in for the individual is to be seen. The prosecutorial side has been strengthened

¹²⁶ Chapter 5 above and Asp *et al.* A manifesto on European Criminal Procedure Law, ZIS 11/2013 pp. 430-466 and on a possible Eurodefensor, Schünemann (ed.) *Gesamtkonzept für die Europäische Strafrechtspflege, A programme for European criminal justice* (Carl Heymanns Verlag 2006) pp. 301-307.

¹²⁷ See further arts. 256-281 TFEU on the competence of the CJEU.

¹²⁸ See arts. 13, 14 and 26 of the proposal.

but it can be argued that no additional safeguards or powers have been granted to the defence side. This is perhaps not surprising, but less desirable from a legal certainty perspective. If the courts of the Member States are equipped for this task and the legal certainty of the individuals will not suffer from labelling the EPPO as national in this sense, then of course this would not be problematic. If this focus leads to an unbalanced process to the detriment of the defence, this becomes more problematic. For the realisation of the EPPO, it is difficult to say how this will function or when it will function.

It is interesting to note that the model rules for the EPPO suggest that there should be a possibility to review the legality of the measures of the EPPO by the CJEU.¹²⁹ The model rules reach further in many other aspects, such as the competences of the EPPO, where the model rules foresee a more supranational character of the EPPO and where the safeguards relevant for legal certainty are somewhat further elaborated on.¹³⁰

7 Conclusion

This article has shown that legal certainty within the area of freedom, security and justice encompasses many different aspects. Common for these is today that the focus has somewhat shifted to putting the individual in the centre. This is positive, but at the same time it can be concluded that legal certainty and especially the rights of the individual still need to be focused on. Legal certainty should have a stronger role within the area, and there are many issues to resolve for this to take place. Instruments focusing on legal certainty being initiated later than the respective repressive ones, the overall focus on effective crime combatting and the sometimes ad hoc nature of EU criminal law all influence the role of legal certainty.

Mutual recognition and cooperation generally is state driven and has state interests as a main focus. Newer instruments and areas have a slightly lesser state interest, but mutual recognition should nevertheless not in any case undermine the protection of human rights nor should it lead to Member States avoiding responsibility for fundamental human rights. Mutual recognition should not enable Member States to misuse instruments and rely on effectiveness to the detriment of the suspected or accused person. Measures increasing minimum procedural rights or the rights of victims are good examples of this. The EU should strive for a higher protection of minimum procedural rights and through this for a higher protection of legal certainty. This should by no means result in adoption of a lower standard than before, nor accepting lower standards than what a Union today should strive for. This applies for the rights of the victim, which need to be taken seri-

¹²⁹ Rule 7 (judicial control) of the model rules for the procedure of the EPPO, available on the webpage of the project: <http://www.eppo-project.eu/> (last visited 19.2.2014) and see also Ligeti (ed.), *Towards a prosecutor for the European Union* (vol. 1, Hart Publishing 2013).

¹³⁰ Rule 1 (status and competence) of the model rules as well as rules 8 to 19 under chapter 2 of the model rules, regulating general rules on procedural safeguards and evidence.

ously in a European perspective and especially in situations resulting from cross-border proceedings.

The proposal on the EPPO shows that emphasis is still on the effectiveness of crime combatting and from the mutual recognition and harmonisation instruments it can be concluded that these do not today represent a coherent system at the EU level. Legal certainty and equality of arms should be two of the main focuses of the EPPO, and this institution should not further emphasise only effective crime combating. Effective protection of the financial interests of the EU is important, but the balance of the system should be kept in mind. These examples show the complexity of EU criminal law and the importance of safeguarding legal certainty aspects in all of these areas.

The Commission has recently issued a communication on a new EU framework to strengthen the rule of law.¹³¹ The Commission has defined the principles expressing the core meaning of the rule of law as common values of the EU as:

*Those principles include legality, which implies a transparent, accountable, democratic and pluralistic process for enacting laws; legal certainty; prohibition of arbitrariness of the executive powers; independent and impartial courts; effective judicial review including respect for fundamental rights; and equality before the law...*¹³²

This definition of the rule of law is very similar to the one of legal certainty used in this article. Some positive development could be seen already earlier, but focus as of March 2014 seems to be even more on legal certainty, or the rule of law, as the Commission labels this. The Commission continues by stating that '[t]his means that respect for the rule of law is intrinsically linked to respect for democracy and for fundamental rights: there can be no democracy and respect for fundamental rights without respect for the rule of law and vice versa. Fundamental rights are effective only if they are justiciable.'¹³³ What the Commission proposes, in brief, is a new framework for the rule of law, which main purpose is to address threats to the rule of law. These are to be of a systemic nature and this new framework is to be added to the existing EU procedures available within Union law today.¹³⁴

This is interesting and an up-to-date reaction by the Commission. This seems positive for legal certainty and its role becoming more fundamental within the area of freedom, security and justice, which is well motivated. Legal certainty should be better prioritised

¹³¹ Communication from the Commission to the European Parliament and the Council A new EU Framework to strengthen the Rule of Law, COM(2014) 158 final, 11.3.2014.

¹³² COM(2014) 158 final p. 4, emphasis included in the original text.

¹³³ Ibid. p. 4.

¹³⁴ These are the infringement procedure in art. 258 TFEU and the preventive and sanctioning mechanisms in art. 7 TEU. See also the Annexes to the Communication from the Commission to the European Parliament and the Council A new EU Framework to strengthen the Rule of Law, COM(2014) 158 final, annexes 1 and 2, 11.3.2014.

within the area of freedom, security and justice and the whole area should be more balanced. The focus on the new framework for the rule of law adds an impetus for a better future in this respect. Peers has however commented on this communication and although being relatively positive, also stated that ‘there are no specific overriding themes that would bring together the EU’s future JHA plans into a coherent system.’¹³⁵ The lack of coherence in the system can obviously impact negatively on legal certainty within the area of freedom, security and justice, and only the future can show us which position legal certainty gains.

¹³⁵ Peers, Analysis The next multi-year EU Justice and Home Affairs programme, Views of the Commission and the Member States of 12.3.2014, available at <http://www.statewatch.org/analyses/no-238-new-jha-programme.pdf> (last visited 13.3.2014).