

## GAPS AND INCONSISTENCIES IN LEGAL PROTECTION IN EU CRIMINAL LAW

CM1502

# Inconsistent legal protection in mutual recognition instruments

*The current body of EU criminal law offers inconsistent and incomplete legal protection to European citizens. Shortcomings are found in the procedural safeguards in instruments of mutual recognition, the proposal on a European Public Prosecutor's Office and the criteria used to decide on criminalization of conduct at the EU level. In light of an expert meeting held at the European Parliament in January 2015, the Meijers Committee publishes three short notes on gaps and inconsistencies in the legal protection offered by EU criminal law. This first note concerns the need to reform existing mutual recognition instruments that overlap but also contradict each other and to strengthen judicial review.*

### Introduction

In the past few years, **significant steps have been taken to strengthen procedural safeguards for persons suspected and accused** in criminal proceedings throughout the European Union. Further steps are expected in the post-Stockholm era. At the same time, there is a broad political and academic consensus that the consolidation of previously passed legislation in the field of procedural rights in criminal proceedings needs more attention. **Current consolidation efforts appear to focus on the adequate implementation of EU legislation at the Member State level, and the effective exercise of procedural rights in practice.** The Meijers Committee supports these ambitions, as adequate legal protection needs to be provided equally in national and transnational cases in order to counterbalance the intrusive powers of law enforcement. However, in order to realize these ambitions, it is recommended that the following inconsistencies should be dealt with: A) **inconsistencies in overlapping mutual recognition instruments**, and B) **inconsistencies regarding the exercise of procedural rights in practice.**

### Inconsistencies throughout overlapping mutual recognition instruments

Procedural safeguards for the individual are generally included in the various instruments that apply the principle of mutual recognition to a variety of judicial decisions and judgments. As explained below, it may happen that **different instruments apply to the same judicial decision at the same time, while these instruments differ in the exact content of legal protection.** As a result, according to the Meijers Committee, there are cases in which the level of protection depends on the legal instrument chosen, without justification.

The following examples illustrate the potential consequences of such inconsistencies.

#### *Example 1: The double criminality requirement*

In cases where a judge imposes certain restrictions or prohibitions on a convicted person, Framework Decision 2008/947/JHA and Directive 2011/99/EU may apply simultaneously. For example, this is the case when a judge imposes an obligation on an offender to avoid contact with his victim, or the prohibition on entering certain areas. Such measures fall under the definition of a protection order (Art. 2 Directive 2011/99/EU), but – since they may also be imposed as part of a

conditional or suspended sentence – at the same time they constitute probation measures in the sense of FD 2008/947/JHA.

While Art. 10(1)(c) of the Directive leaves the executing Member State an option to refuse recognition in cases where a foreign protection measure relates to an act that does not constitute a criminal offence under its own law, the Framework Decision prohibits, in principle, the executing Member States from verifying double criminality if the underlying offence is on the well-known list of offences (Art. 10). **Thus, depending on which instrument is chosen, the level of legal protection differs for the same measure.**

*Example 2: Limitations on the possibility of adapting foreign criminal sanctions*

Another inconsistency occurs in the same situation as described under example 1 (where a probation measure falls under the scope of both FD 2008/947/JHA and Directive 2011/99/EU). Both instruments enable the executing Member State to adapt the foreign probation measure/protection order. **However, while the possibility to adapt is limited under the Framework Decision – the adapted sanction may never be longer or more severe than the original sanction (Art. 9) – the Directive does not restrict the executing Member State on this point.**

*Example 3: Fundamental rights exception*

Both Framework Decision 2002/584/JHA (on the European Arrest Warrant) and Directive 2014/41/EU (on the European Investigation Order) cover the seizure or transfer of property at the request of the issuing Member State. However, whereas the **EIO Directive (Art. 11(1)(f)) provides an optional ground for refusal** when there are substantial grounds for believing that the execution of such a seizure would be incompatible with Art. 6 TEU and the Charter on Fundamental Rights, the **EAW Framework Decision contains no such fundamental rights exception** (see art. 29).

These examples concern situations that are covered by more than one mutual recognition instrument. In some cases, the applicability of an instrument may simply depend on whether either the victim or a government authority submits a request or issues a warrant to have a judicial decision recognized and executed in another Member State. **As a consequence, the level of legal protection becomes arbitrary.** The examples above warrant the scrutiny of divergences in the level of legal protection throughout mutual recognition instruments in light of the interests of the defendant. Such scrutiny should include an assessment of variations in situations where instruments overlap, and consideration of whether such variations could be justified in light of such principles as the principle of legality, social reintegration, and lex mitior. **If they are found to be unjustified, then coherent solutions should be introduced by way of a horizontal measure applicable to all mutual recognition instruments.**

Inconsistencies in the effective exercise of procedural rights

On the road to strengthening procedural safeguards in cross-border investigations and prosecutions, inadequate attention seems to be paid to the effective exercise of rights in practice. **In cross-border cases in particular, it often remains unclear which of the Member States involved is responsible for guaranteeing the effective exercise of procedural safeguards, with the likely result that neither Member State takes responsibility.** Suspects or convicts are in danger of falling between two stools.

For example, if Member State A seeks the surrender of a suspected person by issuing a European Arrest Warrant to Member State B, this decision will not necessarily be subject to judicial review of the merits (including the degree of suspicion) and proportionality of the arrest. The EAW Framework

Decision allows Member States to appoint a public prosecutor or a police officer as the competent ‘issuing judicial authority’ (see Art. 6(1).) If Member State B arrests the person sought on the basis of the EAW and this person is to remain in detention pending the decision on surrender, the EAW Framework Decision only permits Member State B to conduct a very limited test of the proportionality and lawfulness of the EAW issued by Member State A. Due to the principle of mutual recognition, Member State B is generally obliged to execute the EAW and transfer the person sought to Member State A. **As a result, the lawfulness of pre-trial detention in surrender proceedings may not automatically be subject to full judicial review, in either the issuing or the executing Member State.**

In a genuine area of freedom, security and justice, the Meijers Committee cannot conceive of any justification for such gaps in the exercise of Union-wide procedural rights and judicial protection. As a solution, **the Committee proposes to create common rules to allocate who is responsible for guaranteeing procedural rights in situations of cross-border cooperation, including clear rules on the allocation of responsibilities for judicial review of such cooperation measures.**

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This note is part of a series of papers on legal protection in EU criminal law:

**CM1502 Inconsistent legal protection in mutual recognition instruments**

**CM1503 Legal Protection and the future European Public Prosecutor’s Office**

**CM1504 Inconsistencies in applied grounds for adopting Union-wide criminal prohibitions**

## About

*The Meijers Committee is an independent group of legal scholars, judges and lawyers that advises on European and International Migration, Refugee, Criminal, Privacy, Anti-discrimination and Institutional Law. The Committee aims to promote the protection of fundamental rights, access to judicial remedies and democratic decision-making in EU legislation.*

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Contact info:

Louis Middelkoop

Executive secretary

[l.middelkoop@commissie-meijers.nl](mailto:l.middelkoop@commissie-meijers.nl)

+31(0)20 362 0505

Please visit [www.commissie-meijers.nl](http://www.commissie-meijers.nl) for more information.