



Protecting the fair trial rights of mentally disordered defendants in criminal proceedings: Exploring the need for further EU action



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ABSTRACT

Using the new legal basis provided by the Lisbon Treaty, the Council of the European Union has endorsed the 2009 Procedural Roadmap for strengthening the procedural rights of suspected or accused persons in criminal proceedings. This Roadmap has so far resulted in six measures from which specific procedural minimum standards have been and will be adopted or negotiated. So far, only Measure E directly touches on the specific issue of vulnerable persons. This Measure has recently produced a tentative result through a Commission Recommendation on procedural safeguards for vulnerable persons in criminal proceedings. This contribution aims to discuss the need for the introduction of binding minimum standards throughout Europe to provide additional protection for mentally disordered defendants.^[1] The paper will examine whether or not the member states adhere to existing fundamental norms and standards in this context, and whether the application of these norms and standards should be made more uniform. For this purpose, the procedural situation of mentally disordered defendants in Belgium and England and Wales will be thoroughly explored. The research establishes that Belgian law is unsatisfactory in the light of the Strasbourg case law, and that the situation in practice in England and Wales indicates not only that there is justifiable doubt about whether fundamental principles are always adhered to, but also that these principles should become more anchored in everyday practice. It will therefore be argued that there is a need for putting Measure E into practice. The Commission Recommendation, though only suggestive, may serve as a necessary and inspirational vehicle to improve the procedural rights of mentally disordered defendants and to ensure that member states are able to cooperate within the mutual recognition framework without being challenged on the grounds that they are collaborating with peers who do not respect defendants' fundamental fair trial rights.^[1] Throughout this contribution the term 'defendant' will be used, and no difference will be made in terminology between suspected and accused persons. This contribution only covers the situation of mentally disordered adult defendants.

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1. Introduction

As early as 2003, the European Commission (the Commission) suggested that member state authorities should consider a defendant's potential vulnerability during the earliest stages of criminal proceedings, and take appropriate measures to ensure the fairness of these proceedings (European Commission, 2003). Over ten years later, the Commission finally seems to be ready to embark on a mission to provide a sufficient level of procedural protection to vulnerable defendants, by introducing minimum protection standards for this population throughout Europe. The weapon of choice newly selected for this matter might seem like a bit of a dud, as it is an inherently non-binding

recommendation (European Commission, 2013b). Nonetheless, it constitutes a formal EU instrument with an influential position for the protection of vulnerable defendants.

In order to outline the potential of the Commission's recent work in this area for mentally disordered defendants, it is necessary to take a closer look at the recent European developments that lie at the origin of the work. In addition to the renewed interest the European Union (EU) has shown in this population, the Strasbourg institutions have elaborated on the contours of fair trial rights for mentally disordered defendants.

This contribution aims to discuss the necessity for this mission to introduce binding minimum standards throughout Europe to provide additional protection for mentally disordered defendants in criminal proceedings. The paper will examine whether or not the member states adhere to the existing fundamental norms and standards in this context, whether the actual application of the existing norms and standards should be made more uniform and, lastly, whether and, if so, how the Commission Recommendation connects to all of this.

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¹ Throughout this contribution the term 'defendant' will be used, and no difference will be made in terminology between suspected and accused persons. This contribution only covers the situation of mentally disordered adult defendants.

For this purpose, the procedural situation of mentally disordered defendants both in Belgium and in England and Wales will be thoroughly explored against this backdrop. The legal systems of these countries encapsulate differing traditions for the procedural position of defendants. On the one hand, the Belgian legal system is situated within a continental civil law legal tradition. The pre-trial aspects of criminal procedure there have an inquisitorial nature. The legal system in England and Wales, on the other hand, derives from common law principles that require the prosecution to be situated in an adversarial context. As a result, this legal tradition inherently puts more emphasis on the importance of individual procedural rights (Jörg, Field, & Brants, 1995; Reichel, 2005; Vander Beken & Kilching, 1999). By examining the position of mentally disordered defendants in criminal proceedings in these distinctive jurisdictions, the contribution will be able to draw conclusions that are valid at both national and European levels.

2. Evolutions from Brussels

At the Tampere Council of 1999 (European Council, 1999), the EU adopted the principle of mutual recognition (MR) as the bedrock for judicial cooperation. The introduction of this concept for criminal matters symbolises the member states' commitment to accept the differences between their respective criminal justice systems and to cooperate in spite of these differences. Obviously, such a cooperation framework strongly depends on a common level of trust, since it requires the recognition and execution of judicial decisions made in other member states without a national judicial test of their lawfulness or legitimacy (Vermeulen & van Puyenbroeck, 2011). The aftermath of the 9/11 attacks in 2001 provided the perfect climate for progress in the area of judicial and police cooperation within the established MR framework. The decision of the Tampere Council was therefore given practical expression in the criminal law context in a well-structured twenty-four measure programme adopted in 2001 (Council of the European Union, 2001) that has placed mutual recognition high on the EU's justice and home affairs agenda ever since. Nonetheless, the battle against cross-border criminality in general, and terrorism in particular, implied that the European criminal policy was primarily aimed at facilitating prosecution (Anderson, 2008; Cape, Hodgson, Prakken, & Spronken, 2007). The adoption of the Framework Decision on the European Arrest Warrant (EAW) (Council of the European Union, 2002) was a striking example of this.

The downside of this prosecution-oriented focus was that the effects of intensified European cooperation on the procedural rights of defendants were largely neglected. Large-scale studies clearly demonstrate that the member states do not all protect the procedural position of defendants to the same extent (Spronken & Attinger, 2005; Spronken, Vermeulen, de Vocht, & van Puyenbroeck, 2009). The protection of individuals' procedural rights may therefore be affected by the application of (a) different legal system(s). As a result, a debate was initiated on the introduction of minimum standards that would achieve an acceptable level of procedural protection for all member states so that they could trust one another (Brants, 2005).

The fact that the levels of trust regarding the protection of procedural rights within the EU needed to be increased was first officially accepted in 2004, when an ambitious Proposal for a Framework Decision on certain procedural rights in criminal proceedings throughout the EU (the 2004 Proposal) was adopted (European Commission, 2004). After years of (political) disagreement, the 2004 Proposal was eventually abandoned in 2007 for two main reasons. First, member states seemed to be divided on the question of whether the EU was (sufficiently) competent to legislate on purely domestic proceedings or should restrict its legislation to cross-border cases (see the press release on the 2807th Session of the Council on 12th and 13th June 2007, p. 37). Secondly, it was argued that the rights were too vague and that their threshold was too low, or that the proposal would have added little value to the existing protections

under the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). The European Commission, however, remained convinced of the need for EU action on this subject, and a study carried out for the Commission between 2007 and 2009 (Vernimmen-Van Tiggelen & Surano, 2009) showed that almost all practitioners involved in cross-border proceedings considered an instrument of this sort to be essential. In recent years, the EU has further strengthened its ambition for the introduction of EU-wide minimum procedural rights. Using the new legal basis provided by the Lisbon Treaty,² the Council endorsed a Roadmap to strengthen the procedural rights of suspected or accused persons in criminal proceedings (the Procedural Roadmap) (Council of the European Union, 2009) as the foundation for future action. The Procedural Roadmap was later incorporated into the 2009 Stockholm Programme (European Council, 2010); this programme sets out the EU's priorities concerning justice, freedom and security for the period between 2010 and 2014. The intention of the 2004 Proposal and of the Procedural Roadmap was first and foremost to ensure that existing fundamental norms and standards would be adhered to by all member states (Council of the European Union, 2009, Recitals 1 and 2).

On a European level, the protection of a defendant's rights in criminal proceedings was/is primarily based on the ECHR, on its Protocols and on the case law promulgated by the European Court of Human Rights (ECtHR). Although the rights conferred by the ECHR are recognised in EU law as a constituent element of the general principles of the Union's law³ and of the Charter of Fundamental Rights of the EU,⁴ it was agreed in the Procedural Roadmap that there is room for further action to ensure the full implementation and respect for these standards, as well as, if appropriate, to expand the existing standards or to make their application more uniform (Council of the European Union, 2009, Recital 2). The results of the studies mentioned above also raise serious doubts as to whether the practice in all member states corresponds with the ECHR standards. Vermeulen and van Puyenbroeck (2011, pp. 1018–1019) clearly state that "The ECHR is implemented to very differing standards in the Member States and there are many violations. The number of applications is growing every year and the ECtHR is seriously overloaded. (...) Moreover, Member States have not always amended their legislation to adapt them to the condemnatory judgements of the ECtHR, which, in essence, are not of an enforceable nature. (...) The fundamental question, however, relates to whether the procedural rights provided for by the ECHR are effectively implemented in the EU Member States. At this point, an important distinction should be made between the mere legal recognition of these rights in the criminal justice systems of the Member States and their (effective) implementation in everyday practice."

Minimum standards would hence help to avoid the risk of a member state refusing to cooperate because it has established that another member state does not pay sufficient respect to (fundamental) procedural norms and standards. In addition, clear and uniform minimum procedural standards implemented in all member states⁵ would make it easier for defendants to claim that their right to a fair trial will be or has been affected, since it may prove difficult in practice for an

² Article 82 of the Treaty on the Functioning of the European Union (TFEU) makes it possible to adopt minimum standards to strengthen the procedural rights of citizens of the EU.

³ The general principles of EU law have been developed by the Court of Justice in order to assist in the interpretation of EU law and in the testing of its validity.

⁴ Charter of Fundamental Rights of the European Union. OJ C/364, 18.12.2000. Some of the rights set out in the Charter correspond directly to those in the ECHR. Articles 4 and 47 of the Charter cover the prohibition of torture and inhuman or degrading treatment or punishment, and the right to an effective remedy and to a fair trial. These correspond to Articles 3 and 6 of the ECHR.

⁵ It may be argued that a strict reading of Article 82 of the TFEU implies that the EU does not have the competency to introduce minimum standards in a purely domestic context, but only has the ability to adopt minimum standards in cross-border criminal proceedings and to the extent necessary to facilitate mutual recognition. Until now, however, the minimum standards that have already been adopted have been applied in merely domestic contexts, and it may be expected that this will be the case for all minimum standards envisaged by the Procedural Roadmap.

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