CONSEJO GENERAL DEL PODER JUDICIAL
ESCUELA JUDICIAL

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Red Europea de Formación Judicial (REFJ)
European Judicial Training Network (EJTN)
Réseau Européen de Formation Judiciaire (REFJ)

CURSO VIRTUAL
COOPERACIÓN JUDICIAL PENAL EN EUROPA
EDICIÓN 2010

MODULE I

UNIT 3

Strengthening mutual trust: procedural guarantees, the rights of victims and personal data protection

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SUMMARY

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I.

Judicial cooperation in the context of the European Union – evolution from the Treaty of Rome to the Treaty of Lisbon and some unique frameworks: the Tampere European Council, the Programme of Measures (based on mutual recognition) and the Stockholm Programme.

The long road already traversed by the (current) **EUROPEAN UNION** is the result of common values based on the shared wish to contribute to the creation of a **lasting peace in Europe and to improve the living conditions of the peoples (or the "European people"), by means of the creation of a common economy in particular.**

The European Union, as a genuine International Organisation, grows and is consolidated and enlarged in the same way as any other international organisation, i.e., in line with the wishes of its members. However, it does have some singular features that set it apart from many other international organisations and make it quite unique on the international stage.

Indeed, its members agreed on the possibility of creating supranational zones, delegating certain portions of the exercise of sovereign functions to Union bodies, who exercise said functions in a legitimate and autonomous manner, imposing their will on that of individual members.

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Nevertheless, this evolution on the road to progressive political integration was only possible because the trust, collaboration, shared sentiments and desire to resolve the main common concerns were also continuously enhanced and were constructed on solider, more compact foundations.

This is clearly what politics entails: without a common viewpoint with regard to the identification of shared problems and a shared desire to resolve them as efficiently as possible and acting in unison to the extent possible, the states would not have "waived" their right to exercise full sovereignty in certain spheres in favour of an external power.

It would however be a mistake to affirm (as some commentators do) that said delegation of the exercise of sovereign powers ended up weakening the states as sovereign and independent entities. Far from it. First of all, as the states are not obliged to remain in the Union indefinitely and at any price, they are free to leave whenever they wish. And secondly, because said "waiver" of sovereignty takes place under rules that have been *unanimously* adopted by the Member States, by means of the amendments to the Treaties that created and have modified this International Organisation.

At the start of this document we referred to the two central axes upon which the European Economic Communities were founded: peace in Europe and a single economy.

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At that time and in the specific context in which the **EUROPEAN COMMUNITIES** were forged, there were also other matters that were given centre stage in the European project, in particular criminal justice. This area was left, in its entirety, under the domestic jurisdiction of each Member State.

The needs arising in the sphere of cooperation in criminal matters (be they of a police or judicial nature) were dealt with in the context of the existing **multilateral and/or bilateral conventions** that linked the Member States of the European Communities, in particular, the conventions signed under the auspices of the **COUNCIL OF EUROPE, the UN** and other international organisations.

However, the objective of establishing a common economy, which required the removal of customs barriers and the suppression or lessening of the physical barriers to the free exchange of goods and the free movement of persons, capital and services, promoted the creation of an **open space**, which took the form of the creation of a Single Market.

The European Communities then came to live with a **paradox:** *(i)* on the one hand, the existence of an open space with the free movement of persons, goods or merchandise, services or capital, overcoming the old physical barriers of the former internal borders between states; *(ii)* on the other, the persistence of territorial limits to police and judicial action, by virtue of the classic **principle of territoriality**, which prevented a freedom of action in said open space.

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Some EEC states then created shared legal frameworks (**THE SCHENGEN AGREEMENT** and **THE AGREEMENT IMPLEMENTING THE SCHENGEN AGREEMENT (CAAS))** with a view to strengthening the open nature of said common space, increasing free movement and, at the same time, aimed at adopting measures (**compensatory measures**) that help combat the most serious cross-border crime, which took advantage of that open space, i.e., converting the removal of borders between states into an opportunity for crime.

The **CAAS** was not a Community legal instrument then, but rather a conventional framework that started out by involving only five states belonging to the EEC, subsequently joined by other EEC states. This took place despite the fact that other states that are not members of the Union (Switzerland, Norway and Iceland) have also joined, and despite the fact that its rules do not apply equally to all the Member States of the Union (the United Kingdom and Ireland have exception clause in relation to certain areas).

Indeed, as a counterpoint to the further opening of borders, the **compensatory measures** include advances in police cooperation and judicial cooperation.

In the context of police cooperation, it is worth indicating the possibility open to the police of one state to continue the pursuit of an offender in the

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territory of another state, provided that certain conditions are fulfilled by virtue of which said pursuit can take place, both in relation to the type of offence and the rules that must be observed in said pursuit.

As for judicial cooperation, the solutions introduced are significant, such as the speeding-up of the classical rules in the existing conventional frameworks (Council of Europe), in areas such as mutual assistance and extradition. Meanwhile, a specific regime has been introduced for cases in which the person for whom the extradition request is issued consents to the extradition.

An information system has been designed for use as a database indicating the persons sought for arrest, the famous **SIS (SCHENGEN INFORMATION SYSTEM)**[1]**,** which is fed data from the different national authorities, via the **national SIRENE offices** and that enables the national (police) authorities to detain a person being sought whose data is included in the SIS, with a view to an extradition request being issued for said person in due course.

Later on, the Schengen *acquis* was incorporated into the ***acquis communautaire***, via the **TREATY OF AMSTERDAM**.

Thus, it is via the Treaty of Amsterdam that the new European Union[2] has

[1] At present, and keeping in mind that the classical extradition system in the context of the EU has been replaced by the European Arrest Warrant (EAW), the SIS nevertheless maintains its usefulness as a tool for transmitting EAWs.

[2] Baptised as such by the **TREATY OF MAASTRICHT**, it transformed the Communities whose link was

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been given an important new mission: the creation of a new **"AREA"**, the Area of **FREEDOM, SECURITY AND JUSTICE** (AFSJ)**.**

This is a space not only in a physical sense, due to the dismantling of borders, but also, and above all, in a symbolic sense, involving a renewal of mentalities as well as in legal and judicial terms.

Despite the existence of the four freedoms (which permitted the free movement between the territories marked by the old internal borders between the different Member States), both from a legal point of view, and in terms of their validity and the actions of the corresponding police and judicial authorities, said freedoms were exercised in the respective national territory of each state, by virtue of the classical **principle of territoriality.**

Thus, in this regard the need to create common spaces in an area that, until recently, had been the exclusive, sovereign jurisdiction of each state was considered ever more urgent and irrefutable, particularly in relation to the effective freedom of movement of persons.

But such demands were not imposed only with a view to resolving the important matter of the fight against crime. There was also a common concern with regard to how best to guarantee "identical" justice in civil

of a markedly economic nature, into an entity with a political character to which three areas of activity were attributed: an essentially community one (1st Pillar), another comprising common action in the context of Foreign Affairs (2nd Pillar) and, finally, a third sphere related to the sovereign wishes of the States and identified with intergovernmental cooperation (3rd Pillar).

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matters, whenever a European citizen was outside of his/her national territory.

The objective consisted of creating a common area (territory), in line with the overall territory of the European Union, in which judicial decisions would be equally effective, in terms of validity and enforcement, regardless of where they were issued and where they were to be applied or enforced.

A quantum leap of this kind could only be contemplated while the political construction of the Union continued, that is, achieving greater integration and tightening the ties that bind the Member States.

A major political integration undoubtedly means a greater communion of values vis-à-vis the problems of the individual, the citizen and the world.

If that greater communion or axiological adhesion is associated with the intention of establishing specific, solid, efficient legal bases in order to settle and eliminate the existing differences, to as great an extent as possible and on a supra-federal basis, conditions exist to be able to walk hand-in-hand, as mutual trust has been established.

Moreover, as with each unique, specific human relationship, we will only walk hand in hand with those we trust: our family and friends.

The creation of the AFSJ was and is grounded, therefore, in this context of

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mutual trust, consisting of elements as diverse as a pruning of the content of legal systems, judicial organisation, protection of citizens, the separation of powers, respect for fundamental rights, etc.

The first specific steps on the new road can be discerned and traced in the gradual creation of AFSJ, at the **TAMPERE EUROPEAN COUNCIL** of October 1999. This Council, consisting exclusively of Heads of State and Government, had a single agenda dealing with matters of **JUSTICE AND HOME AFFAIRS (JHA).**

One of the almost 50 Conclusions became known as the cornerstone of judicial cooperation between Member States: the **PRINCIPLE OF MUTUAL RECOGNITION.**

What is the transcendental meaning of this principle in legal terms?
This principle replaces, in matters of cooperation, the classical **"exequatur**". That is, via the **exequatur**, a foreign judicial decision had to be reviewed in order to have decisive effect, i.e., it had to be reviewed and ratified. And it was reviewed and ratified in relation to the legal system of the state in which it was sought to enforce it. In reality, a foreign decision was "nationalised" according to domestic law principles.

With mutual recognition, this **exequatur** is granted and the foreign judicial decision is valid in itself and not because it is ratified by and adapted to the legal system of the requested state.

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The recognition is identified with a formal validation, rather than a material reappraisal of the decision. Indeed, in the act of recognition, the assessment must be carried out in line with formal criteria that have been defined and accepted by all Member States, thus avoiding an assessment of the content of the decision.

The decision imposes itself in its own right, although recognition may be refused according to the above-mentioned formal, pre-established conditions, which means that the principle of mutual recognition, despite leaning towards the automatic application of judicial decisions, does not imply a lack of control or examination.

Obviously, it was only possible to achieve this degree of cooperation thanks to the mutual trust that the states had built up amongst themselves and, in particular, between their judicial agents and their actions.

It is true that the distance travelled was not without obstacles and difficulties, but some important objectives have been achieved that would help promote an evolution that, while it significantly advanced the cause of cooperation, should really have reached another level at this stage.

At present, the foundations of judicial cooperation are well defined: in reality, the **TREATY OF LISBON** establishes that the cooperation is based on the

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principle of mutual recognition and the harmonisation of legislations[3]. Both vectors contribute, therefore, to forging a cooperation procedure that is more efficient, more rapid and more just.

And, moreover, it is worth highlighting that they influence each other reciprocally: the closer or more harmonised the legislations in a certain legal sphere are, the more prepared states will be to cooperate, as the legal bases in the requesting and requested states will be similar.

Since the **Tampere** agreements, we can safely say that in the panorama of cooperation in criminal matters (be it of a police or judicial nature), things were never the same again.

Indeed, and if we take the Tampere Conclusions as a starting point, a **PROGRAMME OF MEASURES**[4] for the application of the **PRINCIPLE OF MUTUAL RECOGNITION** was approved.
Measures were programmed, priorities defined and temporary objectives set.

In is in this context and under these circumstances that the **EUROPEAN ARREST WARRANT (EAW)**[5] emerged, the first legal instrument that materialised the principle of mutual recognition.

[3] See Article 82.1, of the Treaty on the Functioning of the European Union
[4] Programme of measures to implement the principle of mutual recognition of decisions in criminal matters, OJEC, C 12, 15/1/2001
[5] Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, OJEC, L 190, 18/07/2002

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The essence of the principle is enshrined in Article 1 of the Framework Decision that defines the EAW as a judicial decision rendered by a jurisdictional body of a Member State issued to another jurisdictional body of another state so that the latter directly enforces said decision in its territory.

This second jurisdictional body will enforce the EAW as if it, being a judicial decision, had been issued by the jurisdictional bodies of its own state.

The essential meaning underlying the performance or enforcement of a judicial decision from another Member State is only relatively automatic as it does not avoid a certain degree of jurisdictional examination, as the enforcing authorities do not act blindly and automatically.

It is true that the earlier "exequatur" mechanism is avoided, but even so, the **ENFORCING STATE** must observe certain analytical criteria before there can be full recognition of the decision rendered and sent by the **ISSUING STATE**.

Thus, obviously, some reasons for refusal have been established, some of which are obligatory, others discretionary, which constitute grounds for preventing the enforcement of a judicial decision of this kind.

Moreover, there are additional factors that contribute to the speeding-up, simplification and celerity in the enforcement of judicial decisions: the rule of direct contacts between competent authorities (generally speaking, the

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jurisdictional bodies); the exemption of the rule on dual criminality, as a basis for accepting cooperation, in certain types of crime; the imposition of short terms for enforcement and the use of previously defined forms.

All of this leads us to the conclusion that this legal instrument, despite the existence of some problems and other concerns[6], has been successful in replacing the traditional extradition system.

The basic element of such an important step in cooperation in criminal matters resides, then, in the principle of mutual recognition that, for its part, is inextricably linked to mutual trust. Therefore, the greater the trust, the easier it will be to apply and enforce said principle in full, granting said application the necessary guarantees in relation to the persons involved in the proceedings.

Indeed, aware of these problems, the European Union has strived to improve cooperation, particularly by introducing mechanisms that strengthen mutual trust.

[6] Some of these problems and concerns arise from legal and practical questions in the issue and enforcement of the EAW. Thus, one of the problems consists of the use of the EAW for trivial offences, alleging that the principle of proportionality should be observed (*I would like to take advantage of this opportunity to state that I believe this to be a false problem; firstly because it is not established anywhere that the EAW can only be used for serious crime and, secondly, because it is the issuing Member State that can apply said proportionality and executing Member state that must comply with the EAW thus issued*); meanwhile, one of the legal problems has to do with the internal legislations transposing the Framework Decision, as there is a significant disparity between the content in each state, particularly in relation to the range of reasons for refusal, as some Member States depart from the range defined in the Framework Decision, extending it, which entails the inclusion of more grounds for refusing cooperation; finally, some Member States, citing the law or practical grounds, reject their own citizens, acting in violation of the Framework Decision.

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We should highlight at this point that the recent **STOCKHOLM PROGRAMME (2010-2014)**[7] even selects **mutual trust** (**point 1.2.1**) as a pillar of effective cooperation.

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[7] Published in the OJEU, C 115, 04/05/2010

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II.
ENHANCING TRUST FACTORS

The existence of procedures and procedural rules, in the sphere and the context of a criminal investigation or procedure, is due to the need to guarantee the citizens involved in said investigations, that the state (exercising the ***ius puniendi***) will not investigate or apply penalties or punishments in a purely arbitrary or discretionary fashion, citing any kind of criterion or ***raison d'État.***

Over the centuries, certain safeguarding principles and rules have emerged from doctrine and case law designed to protect those involved in the trial, especially those that were liable to be convicted or at least classed as suspects.

These principles and rules were consolidated in the national legal systems, not only via doctrine and case law, but also via legislative profusion, appearing in many cases in the **BASIC LAWS (CONSTITUTIONS)** of certain states[8].

Moreover, at the same time as this internal consolidation was verified, on an international level there was also an adherence to certain principles that, in this way, were universalised, being enshrined in the main **LEGAL**

[8] See, for example, Article 32 of the Constitution of the Portuguese Republic of 1976.

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INSTRUMENTS in this field from the principal International Organisations, such as the **UNITED NATIONS and the COUNCIL OF EUROPE.**

At present, the presence of an axiological wealth in this sphere is indisputable. Nevertheless, the praxis in each state with regard to the manner in which citizens exercise said principles and the manner in which the competent authorities apply them differs widely.

It is clear that the *acquis* of said principles has not always had the same scope or the same expansion or breadth throughout the history of criminal law, and it is also true that often, due to more or less specific crises in the field of security, there have undoubtedly been setbacks.

In the previous section we referred, at the end, to the existence of problems and concerns particularly in relation to the execution of the European Arrest Warrant.

However, in the sphere of cooperation in criminal matters in the European Union, particularly in the cooperation based on the application of the principle of mutual recognition, it is important to highlight the problems surrounding the **FUNDAMENTAL RIGHTS** involved in criminal procedure.

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What this aspect essentially highlights is the absence of a true common "**JURISDICTIONAL GUARANTEE**" in the European Union, consisting of a minimum set of rights and guarantees in criminal proceedings.

It is generally alleged that the absence of such a set of rights constitutes an obstacle to the establishment of a higher degree of cooperation, as the competent jurisdictional bodies of a state will tend, or will be tempted, in practice, to have **less trust** in the system of another state whose legal system they consider inferior to their own one when it comes to the protection of fundamental rights.

This means that, in the absence of such a common framework (although the situation has been improved with the adoption of the **CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION** and its binding nature, pursuant to the **TREATY OF LISBON**[9]), said protection will vary from one state to the next, not only depending on a greater recognition and establishment in positive law, but also in line with the actual, effective observance of the same in practice by all the authorities that have to work and act in a particular cooperation procedure.

The paradox is obvious: on the one hand, a (cooperation) procedure that is supposed to become more and more common (the idea of a "European"

[9] Article 6.1 of the Treaty on European Union, Treaty of Lisbon version.

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procedure) and, on the other, a protection of fundamental rights that is still inherently national.

But, evidently, it is impossible to radically affirm that nothing has been done. The advances are significant, although insufficient, on the one hand, and even illogical on the other.

In reality, today's European Union has verified an increasing recognition of the application of fundamental rights, largely via the **CASE LAW OF THE COURT OF JUSTICE OF THE EUROPEAN UNION**[10]**.**

The Treaty of Lisbon, on the other hand, represents a quantum leap, particularly due to the fact that it links joining the EU to the **EUROPEAN CONVENTION ON HUMAN RIGHTS**.

However, it is well known that it is not just that all the Member States of the EU that are signatories of the Convention, thus adopting that legal asset as an internal rule, they are also obliged to interpret said text in line with the case law of the **EUROPEAN COURT FOR HUMAN RIGHTS**.

I am also referring to the legal value of the Charter of Fundamental Rights of the EU, something that is expressly recognised in the Treaty of Lisbon today.

[10] This is its name by virtue of the Treaty of Lisbon. It was previously known as the Court of Justice of the European Communities.

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It is, however, in the context of the administration of justice by the Courts and the Administration, particularly in the context of the actions of the police forces, where problems arise, beyond mere solemn and high-sounding declarations.

And in this context, the work of the European Union is characterised by a failure, the degree of which varies in the case of each state. It is this failure that the European Union is now gradually seeking to address.

In 2004, the European Commission presented a proposal for a **FRAMEWORK DECISION**[11] with a view to approving a basic set of rights, applicable in each Member State, in any criminal proceedings and in the procedures involving cooperation in criminal matters.

Despite being considered a minimalist proposal, as its aim consisted of adopting a lowest common denominator, the negotiations gradually reduced the form and content of the proposed rights.

Even so, this minimalist proposal did not prosper and was rejected by the **COUNCIL OF JUSTICE AND HOME AFFAIRS in June 2007.**

Here we should recall that the set of guarantees to which it referred was the following: (i) **right to information**; (ii) **right to legal aid;** (iii) **right to an interpreter**; (iv) **right to translation; and** (v) **right to a letter of rights**.

[11] See COM (2004) 328, 28/04/2004

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This failure was obviously not encouraging for public opinion or for the professionals in the judicial system, as it cast doubt on the authenticity and veracity of the European Union's concern in relation to the protection of fundamental rights.

It can thus be affirmed that, instead of an enhancement or consolidation of the "trust" being installed, a sceptical feeling in this regard had been installed or enhanced.

THE SWEDISH PRESIDENCY readdressed the matter, defining a new work methodology that was considered effective: advancing gradually, step by step, and not all at once in relation to fundamental rights.

a) Undoubtedly, some of the most important fundamental rights in a procedural sense are the rules (guarantees or rights) regarding suspects and accused persons in criminal proceedings.

Here we find rights such as **the right to information, the right to free legal aid (when a party cannot appoint its own defence lawyer), the right to translation, the right to an interpreter, the right to a contradictory procedure, the right to examine evidence, the right to be present at any proceedings that may affect a person's legal status, the right to appeal, the right to an impartial court, etc.**

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Generally speaking, these rights are contemplated in the internal legal systems (criminal procedure). However, in many cases, and at present in the context of procedures in international cooperation in criminal matters, those rights/guarantees are either not directly applied, *tout court*, because such application is not envisaged in the procedure, or, *maxime*, because they are prohibited by internal legislation, or even because there is a restrictive interpretation in relation to the application of the same.

Meanwhile, neither the set of rights or the level of application are identical in the different legal systems, as some recognise more rights than others.

And this reality places obstacles in the way of cooperation procedures, leading to **mistrust** between states, and the idea persists that the legal system of another state can never be as good as one's own.

As mentioned earlier, one of the steps took the form of a proposal of the **European Commission** regarding procedural guarantees. The proposal contained some of the basic rights and guarantees in the sphere of criminal investigation or procedure.

Over the years, the proposal was adapted and adjusted. Being a delicate political sphere, it is understandable that the states expressed their reservations and raised problems during negotiations, but a minimum platform of guarantees was agreed and it was assumed that it would be

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approved by the EU.

Indeed, there was a majority that was in favour of guarantees regarding information, legal aid, translations, interpretation and the letter of rights.
In June 2007, at the JHA Council during the German Presidency, the states were however unable to reach an agreement (a unanimous one) on the minimum text.

Politically speaking, this **non-agreement** was considered a failure and many critics pointed out how quick the EU was to adopt measures of a restrictive nature and in the area of security, but showed itself to be slower or more cautious when it came to fundamental rights.

From a legal point of view, this act implied the subsistence of one of the obstacles that hindered or, at least, did not help judicial cooperation. This obstacle consisted of the persistence of mistrust in relation to cooperation, as the Member States often are not prepared to cooperate with other Member States when they harbour reservations about their legal systems or the manner in which they protect suspects, accused persons or even victims, in the context of criminal procedure/the process of cooperation in criminal matters.

This legal instrument, with a European scope, was designed to introduce a relative legislative harmonisation, albeit along minimalist lines, as a result of the calls made in the **TAMPERE EUROPEAN COUNCIL** and the **HAGUE PROGRAMME.**

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When the Swedish Presidency resumed work, it defined a working methodology in which it separated the negotiations for each right analysed, so that each one could be approved independently. The matter was considered once again, in political terms, with top billing, and was enshrined in the Treaty of Lisbon.

The **STOCKHOLM PROGRAMME (2010-2014)**[12], approved just recently, also highlights the importance of approving a legal instrument on this area.

Thus, in point no. 1 it highlights the priority given to the development of an **AREA OF FREEDOM SECURITY AND JUSTICE.** We will point out the priority given to the fundamental rights below, affirming that the **AFSJ** must above all be **a single space for the protection of fundamental rights and freedoms.**

In point no. 2 - ***a Europe built on fundamental rights*** – it invokes the contribution of the **Case Law of the Strasbourg and Luxembourg Courts** for the creation of a uniform system of human and fundamental rights.

It is, however, in point no. 2.4 – ***Rights of the individual in criminal proceedings*** – where the Stockholm Programme sets out a new dimension in procedural rights. It does so in a very direct fashion:

"***The protection of the rights of suspected and accused persons in***

[12] Published in the OJ, C 115, 04/05/2010

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criminal proceedings is a fundamental value of the Union, which is essential in order to maintain mutual trust between the Member States and public confidence in the Union.

The European Council therefore welcomes the adoption by the Council of the Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings, which will strengthen the rights of the individual in criminal proceedings when fully implemented. That Roadmap will henceforth form part of the Stockholm Programme".

In this regard, the Council invites the Commission to put forward the proposals contained in the **ROADMAP**[13] so that they are swiftly implemented and to examine further elements of minimum procedural rights.

At present, two of these important rights are set for final approval[14], in political terms, in the form of Directives of the European Parliament and the Council, after which they will be adopted in legal terms, published in the OJEU and then transposed into internal law as necessary to ensure a proper adoption of the legal, regulatory or administrative provisions depending on the need of each Member State to give the Directives full effect.

Thus, in the various whereas of the (initiative) for the **Directive on the right**

[13] See Resolution of the Council of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings, OJEU, C 295, 04/12/2009.
[14] The Directive on the right to translation and interpretation was passed by the JHA Council in October 2010.

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to translation and interpretation[15], reference is made to the importance of the judicial protection of the rights of the individual for judicial cooperation, based on the principle of mutual recognition (*see whereas nos. 1 and 2*).

Moreover, it refers to how the application of this principle presupposes that the Member States trust the systems of the other States (*whereas no. 3)* and that mutual recognition can only operate effectively in a spirit of confidence in which everyone (judicial authorities and participants in the criminal process) considers that the decision of authorities in other Member States are equivalent to those of their own state (*whereas no. 4*)

As the right to a fair trial (Article 6 of the European Convention on Human Rights and Article 47 of the EU Charter of Fundamental Rights) and the rights of the defence (Article 48 of the Charter) were already enshrined, it is recognised that mutual trust requires a more coherent application of the rights and guarantees established in Article 6 of the European Convention on Human Rights (*whereas nos. 5 and 7).*

It is in these circumstances that the right to translation and interpretation in criminal process and in the procedures corresponding to the execution of an EAW is thus recognised and enshrined (Article 1 of the proposed Directive).

Meanwhile, the Proposal for a **Directive on the right to information**[16]

[15] See doc. PE-CONS 27/10; DROIPEN 68, COPEN, 143; CODEC 604, 24/09/2010
[16] See COM (2010) 392, final, 20/07/2010

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regulates the right of suspects and accused persons to receive information on their rights and on the criminal indictments made against them.

b) On the protection of the victim

Another factor which we must address here as a positive element that has contributed to the enhancement of trust resides in the treatment afforded to the victim, particularly in the context of the criminal proceedings themselves, although not only in this field, but in the context of a global statute for victims of crimes.

It is no secret that criminalist theories on the repression and punishment of crime have, for a long time, centred almost exclusively on the penalty imposed on the criminal, as a means of reparation to the state, as holder of the *ius puniendi* and victim of the crime, in an abstract sense.

As a criminal-legal more had been infringed, and as it was the state that defined said legal mores, the victim was therefore the state.

In recent decades these theories were modified, as a more precise definition of the actual victims of crime emerged, i.e., for each specific offender there was a particular victim, a citizen, and not just the state, as a collective of all citizens.

The Council of Europe was a pioneer in legal work regarding the protection of the victims of crime, particularly the more serious forms of crime,

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adopting different instruments (Conventions and Recommendations), above all in the context of financial reparation for damages suffered as a result of the offence.

At this point I should also cite the legal regimes introduced by Portugal in its criminal legislation in relation to the role of victims in the criminal process itself.

Indeed, while it is true that, virtually everywhere, the victim has some sort of role in criminal proceedings, it is a purely residual role, namely that of supplying evidence in the process. The leading role is adopted almost exclusively by the Public Prosecutor.

However, Portugal has granted the victim a more relevant role and in certain cases not only can it adopt a different position to that of the Public Prosecutor, such as in the case of a private prosecution, it can also appeal even if the Public Prosecutor decides not to.
This special standing was given the name of "**Assistant**" in the criminal process.

However, the European Union too, and in this particular case due largely to the work done by Portugal in its Presidency of the EU in 2000, has attributed a strengthened role to the victims, granting them more importance in the criminal process.
In this regard, it is important to highlight the role of the Commission, both in

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studying the subject matter and proposing solutions in this field, based on the action plan regarding the area of freedom, security and justice of 1998, which envisaged "*a comparative survey of victim compensation schemes, and the feasibility of taking action within the Union*" within five years, as "*The number of people (EU and non-EU country nationals living in the Union) travelling, living or studying in another EU country, and who are therefore potential victims of crimes committed in a country other than their own, is steadily increasing*"[17] .

Thus, and taking the initiative proposed by the Portuguese Republic as a point of reference and starting point in this regard[18], on the occasion of its Presidency of the EU, the "Justice and Home Affairs" Council, meeting on 15

[17] The general guidelines for the solution to be adopted established the following:
"Prevention of victimisation
One of the main ways of preventing victimisation is to make information circulate, especially at points throughout the transport infrastructure network (airports, stations, underground stations, etc.). Some EU countries have set up special services for foreign crime victims. In general, the Commission is advocating the exchange of best practices between EU countries and the development of appropriate training for staff.
Assistance to victims
Most EU countries have services offering some kind of first aid to crime victims. However, travellers may need a broader range of assistance than locals (e.g. language, social and psychological support). Assistance is provided by the police, social services or NGOs. Europe-wide cooperation has increased through associations, and the European Forum for Victims' Services has formulated guidelines on victims' rights. The police play an important role as they are often the first contact for victims. However, language and lack of information may present problems for victims, especially if they wish to lodge a complaint or obtain additional assistance. The Commission suggests introducing minimum standards for the reception of victims so that they can obtain the information and, if necessary, the assistance they need. This could be done by setting up a network of EU assistance services to deal with language, information and training problems, which are often related.
Standing of victims in the criminal procedure
It is difficult for foreign victims to follow proceedings concerning them at a distance. There are a number of solutions that should be adopted generally, such as fast-track procedures and the acceptance of statements submitted in advance or from abroad. In general, victims should be able to receive appropriate assistance so that they can follow the progress of the case, be treated with consideration and have the right to protection of their private life. Swifter procedures for the restitution of stolen property should be introduced. In certain cases, the development of mediation systems could speed up the process and improve the handling of complaints.
Compensation
This aspect will be looked at in the context of the implementation of the action plan on freedom, security and justice. To reduce disparities between EU countries, the Commission is proposing that they ratify the 1983 European Convention on the Compensation of Victims of Violent Crimes (Council of Europe) and examine ways of speeding up compensation. Other measures could also be adopted to help victims obtain compensation and to develop cooperation between EU countries with a view to facilitating claims procedures".

[18] **OJEC, C 243, 24/08/2000**

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and 16 March 2001, adopted **COUNCIL FRAMEWORK DECISION, 2001/220/JHA, OF 15 MARCH 2001, on the standing of victims in criminal proceedings**[19]**.**

In line with the Tampere Conclusions (no. 32), the Framework Decision gives the victim greater legal protection and better defends his/her interests, regardless of the Member State in which the victim finds him- or herself. To that end, the Member States should harmonise their legal and regulatory provisions in relation to the sphere of criminal proceedings in order to guarantee the following victim's rights:

- Access to any information of relevance for the protection of their interests, from the start of the proceedings.
- The possibility to participate in the proceedings as a victim and to have access to legal aid, free of charge if necessary.
- Access to proper means of interpretation and communication.
- The right to be heard in the proceedings and to supply evidence.
- A suitable level of protection for the victims of crime and their families in relation to the safety and protection of their privacy.
- The right to compensation.
- The right to the reimbursement of legal costs.

With the approval of this Framework Decision, the idea was for Member

[19] **OJEC, L 82, 22/03/2001**

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States to approximate their laws and regulations to the extent necessary to attain the objective of affording victims of crime a high level of protection, (*whereas no. 4 of the Framework Decision*). And whereas no. 8 outlines the object and scope of said harmonisation: *"The rules and practices as regards the standing and main rights of victims need to be approximated, with particular regard to the right to be treated with respect for their dignity, the right to provide and receive information, the right to understand and be understood, the right to be protected at the various stages of procedure and the right to have allowance made for the disadvantage of living in a different Member State from the one in which the crime was committed*".

Nowadays, although this recognition can be applied to all victims of crime in general, there is a group of victims that merits particular care and attention: **the victims of gender-based violence**.

Indeed, the Framework Decision states that particularly vulnerable victims receive specific treatment (Article 2.2 of the Framework Decision).

It is therefore no surprise that an initiative emerged in the European Union, in the context of the protection of the victim in general, and taking into account that "*In a common area of justice without internal borders, it is necessary to ensure that the protection provided to a person in one Member State is maintained and continued in any other Member State to which the person moves or has moved*" (whereas no. 5), subscribed by twelve Member States, regarding the **European Protection Order**[20]**.**

The Directive "*should be applied and enforced in such a way that the protected person*

[20] See OJEU, C 69, 18/03/2010

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receives the same or equivalent protection in the executing State as he would have received if the protection measure had been issued in that State ab initio*, thus avoiding any discrimination.*" (whereas no. 8).

As there seems to be a general consensus among criminal law experts at present on the importance of the victim and his/her role in criminal proceedings, it is easy to conclude that the greater the standing granted to victims in national legal systems, above all in the materialisation of the provisions of the above-mentioned Framework Decision, the more effective cooperation in criminal matters will be.

c. Protection of personal data

Another factor that it is worth highlighting when analysing its role as a positive factor in enhancing trust between Member States and citizens in relation to "**European criminal justice"** refers to another right of the individual: the right to protection of personal data.

I use the term "European criminal justice" here on purpose and with the following intention: to highlight the current reality in relation to the pillars of cooperation in criminal matters today: the existence of a crime and the need for the involvement, throughout any criminal procedure, of different competent bodies, of a police and/or judicial nature, that may belong to various states, but whose collaboration is essential in order to duly discover the perpetrators of a crime and present evidence, ensure the collaboration of witnesses, the victim, experts, etc.

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There will be an increasing accumulation of elements contributing to the same procedure, which will begin in a certain state, but be processed with the contribution of all those authorities.

However, the rules on intervention and participation in the same procedure, the different stages of which take place in different legal spaces, increasingly require elements that become shared to a greater degree, with a view to ensuring that the procedure is coherent and even safeguard its validity, as said procedure will consist of the accumulation of addenda belonging to different legal systems.

These motives led the EU to construct two main pillars for cooperation: the principle of mutual recognition and legislative harmonisation. These two main axes have been granted full recognition in the Treaty of Lisbon as the basic pillars supporting judicial cooperation in criminal matters **(Article 82.1 of the Treaty on the functioning of the European Union).**

Point 2 of Article 82 states "*To the extent necessary to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension, the European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules. Such rules shall take into account the differences between the legal traditions and systems of the Member States. They shall concern:*

a) mutual admissibility of evidence between Member States;

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b) the rights of individuals in criminal procedure;

c) the rights of victims of crime"

Thus, as far as the rights of the individual in criminal proceedings are concerned, the work of the EU had already begun even before the Treaty of Lisbon was approved.

We have already seen part of said work when analysing the rights of suspects and accused persons in criminal proceedings.

But the rights of individuals go beyond this field. In reality, there are many more persons who participate in the process and some of their individual rights are also recognised, in particular those of the witnesses, victims, experts, other collaborators in the process, etc.

In the specific case of investigations in which two or more Member States are involved, it is obviously necessary to exchange and transfer data on the persons involved in the cross-border procedures.

For this reason, the protection of personal data has constituted one of the cornerstones in the sphere of the fundamental rights that the EU has striven to protect.

Thus, the EU approved **COUNCIL FRAMEWORK DECISION 2008/977/JHA, of 27 November 2008 on the protection of personal**

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data processed in the framework of police and judicial cooperation in criminal matters.[21]

Given the need for the transnational exchange of data, ensuring a high level of protection of the personal data of individuals requires common provisions (see whereas no. 16 of the Framework Decision).

Indeed "*The exchange of personal data within the framework of police and judicial cooperation in criminal matters, notably under the principle of availability of information as laid down in the Hague Programme, should be supported by clear rules enhancing* **mutual trust** *between the competent authorities and ensuring that the relevant information is protected in a way that excludes any discrimination in respect of such cooperation between the Member States while fully respecting fundamental rights of individuals*." (whereas no. 5 of the Framework Decision).

III. Conclusions

The main pillar of judicial cooperation in criminal matters is the principle of mutual recognition, defined as the cornerstone at the Tampere European Council and reiterated in the Treaty of Lisbon, for which legislative harmonisation is necessary.

The principle of recognition "is decreed" legally speaking in the regulatory instruments adopted in the European Union and incorporated into the internal legislation of each Member State.

[21] Framework Decision published in the OJEU, L 350, 30/12/2008.

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However, mutual recognition has one inherent factor that must precede it: mutual trust, comprising elements as diverse as the pruning of the content of the legal systems, judicial organisation, the protection of the citizen, the separation of powers, respect for fundamental rights, etc.
But with the adoption of the principle of mutual recognition, trust is achieved.

And emerging as factors that further enhance trust (and the achievement thereof), we have, among other things, the theme of the procedural rights of suspects or accused persons, the protection of the victim and the protection of personal data.

Nevertheless, we must not forget that there are other fields that can also contribute to the enhancement of this trust and, as such, to the improvement of cooperation.

Indeed, certain common rules on, for example, trials by default or the presumption of innocence or the principle of *ne bis in idem*, would undoubtedly help reach that objective.

Finally, it is also essential for said enhancement that the participating professionals (judges, prosecutors and police) be duly trained, as set out in the Treaty of Lisbon.

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This is the direction in which the European Union has been working, contributing with the adoption of instruments that entail the harmonisation of minimum rules in said spheres, with a view to facilitating mutual recognition, or creating operational or common training structures, thus improving the general parameters of judicial cooperation in criminal matters.

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