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Pretrial detention: Assessing European Union Competence under Article 82(2) TFEU

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Abstract
Intuitively setting European Union (EU)-wide common standards on pretrial detention appears advisable: It strengthens fair trial standards for persons accused of criminal offences and aids cooperation among the judiciary of Member States. However, at second glance, the European Parliament and Council's competence to act appears somewhat shaky. This article examines whether the EU has competence to legislate on pretrial detention under Article 82(2) of the Treaty for the Functioning of the EU.

Keywords
pretrial detention, fair trial rights, mutual trust, mutual recognition, criminal procedure

In 2009, the European Parliament proposed adopting a directive setting common minimum rules for pretrial detention in the European Union (EU) Member States.[1] The legal basis for the proposed directive is Article 82(2) of the Treaty for the Functioning of the European Union (TFEU), which enables the European Parliament and Council to establish minimum rules to facilitate mutual recognition of judgements in criminal matters in areas of shared competence.[2] Over the past few years, the European Parliament and Council have adopted a range of directives setting common minimum standards on certain rights for individuals in criminal procedures as part of the Stockholm Programme, which outlines the Union's priorities in the area of justice, freedom and security

1. European Parliament, *Resolution of the Council of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings* [2009] OJ C 295/91.
2. *Consolidated version of the Treaty on the Functioning of the European Union* [2007] OJ C 115/01 ('TFEU'), Articles 4 and 82(2).

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for the years 2010–2014.[3] Similar to these directives, the Commission and Parliament claim common standards on pretrial detention are necessary to protect the fair trial rights of accused persons in Member States and to strengthen the mutual trust between European judiciary upon which the mutual recognition of judgements is based.[4] These two criteria must be satisfied to give the EU institutions competence to enact further standards. In addition, the principle of subsidiarity restricts action by the EU in areas of shared competence to where the proposed objectives cannot be sufficiently achieved by Member States acting alone.[5] This is generally understood as EU-level action providing a clear benefit, by reason of its scale or effects, over individual Member State action. Thus, for pretrial detention, arguably, the proposed common standards would need to provide a benefit above the existing Member State laws based on the European Convention of Human Rights standards.

Definition of pretrial detention

No coherent or comprehensively agreed definition of pretrial detention, also called preventative or remand detention, exists. While the literal meaning of 'pretrial' is 'prisoners who are untried',[6] the term is also used more expansively to include detention during different stages of the trial and appeal processes.[7] The use of different definitions by European institutions and Member States makes it extremely difficult to identify whether Member States' use of pretrial detention is reasonable or excessive. Further, the overlapping definitions mean that varying standards and consequent right protections could apply to differing groups of suspects or prisoners in each forum. The reach of the proposed directive, and the corresponding obligations of Member States, also expands or contracts depending on the definition used: If a narrower definition is used, the EU institutions' competence to legislate and enforce compliance of resultant obligations extends only to the resolution of the first trial; if a broader definition is used, the power extends to the end of the appeal phase, reaching far deeper into the States' criminal justice systems.

3. See, European Parliament, *Resolution of 25 November 2009 on the Communication from the Commission to the European Parliament and the Council – An area of freedom, security and justice serving the citizen – Stockholm programme*, P7_[2009]0090, 25 November 2009. The three adopted directives are Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings [2010] OJ L 280/1; Directive 2012/13/EU on the right to information in criminal proceedings [2012] OJ L 142/1; and Directive 2012/3/48/EU on the right of access to a lawyer in criminal proceeding and in European arrest warrant proceedings and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty OJ L 294/1 [2013].
4. European Commission, *Strengthening Mutual Trust in the European Judicial Area – A Green Paper on the Application of EU Criminal Justice Legislation in the Field of Detention* (Green Paper on Detention), COM[2011] 327, final, Brussels; European Parliament, *Report on the mid-term review of the Stockholm Programme* (2013/2014(INI)), 4 March 2014, at para. 46; European Parliament, *Written Declaration on infringement of fundamental rights of detainees in the European Union*, from MEPs, 06/2011, 14 February 2011.
5. Consolidated Version of the Treaty on European Union [2008] OJ C 115/13 ('TEU'), Article 5(3); *Protocol (No 2) on the Application of the Principles of Subsidiarity and Proportionality*, OJ C 83/206 30 March 2010.
6. A.M. van Kalmthout et al., *An introductory summary of the study: "An analysis of minimum standards in pre-trial detention and the grounds for regular review in the Member States of the EU"*, Research Group Pre-Trial Detention, Tilburg/Greifswald, 2009, JLS/D3/2007/01 ('Pre-trial Detention'), p. 15.
7. See, for example, European Commission, *Green Paper on Detention*, 2014; C. Morgenstern, 'Pre-Trial/Remand Detention in Europe: Facts and Figures and the Need for Common Minimum Standards', *ERA Forum* 9(4) (2009), pp. 527–542 and 531.

The United Nations bodies and the European Court of Human Rights (ECtHR) have followed the narrower, literal meaning of 'deprivation of liberty' of 'persons suspected of having committed offences',[8] whereas the Council of Europe and the European Commission extend 'pretrial detention' to the conclusion of the final appeal process.[9] The divergent definitions used by the ECtHR and the Council of Europe reflect the separate foci of the two institutions. The ECtHR is concerned with the protection of fair trial rights delineated in Articles 5 and 6 of the European Convention on Human Rights (ECHR). Article 5, on the right to liberty and security, provides:

> 1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> a. the lawful detention of a person after conviction by a competent court;
>
> . . .
>
> c. the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
>
> . . .
>
> 3. Everyone arrested or detained in accordance with the provisions of paragraph 1.c of this article shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.[10]

While not using the term 'pretrial detention', the separation between lawful detention in Article 5(1)(a) and (c) indicates 'pretrial detention' means detention before conviction by a court at first instance, not including detention after conviction pending final appeal.[11] According to the Court, persons cannot resort to Article 5(3) of the Convention because of detention during appeal, if their guilt has been legitimately determined pursuant to Article 6.[12] Appeals to the ECtHR, under article 5(3), are reserved for violations of 'lawful arrest or detention of a person effected for the purpose of

8. United Nations, *Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders*, Havana, 27 August to 7 September 1990. A/CONF.144/28/Rev.1, Sales No E.91.IV.2, Pre-trial Detention, at para. 2(1), p. 157; *Convention for the Protection of Human Rights and Fundamental Freed*oms, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953), as amended by Protocols Nos 11 and 14).
9. Council of Europe, *Recommendation Rec[2006]13 of the Committee of Ministers to member states on the use of remand in custody, the conditions in which it takes place and the provision of safeguards against abuse*, 974th mtg, 27 September 2006 ('Recommendation [2006] 13'), definitions at para. 1; European Commission, *Green Paper on Detention*, p. 8 and note 19.
10. *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953) (commonly known as '*European Convention on Human Rights*') ('ECHR'), Article 5.
11. European Commission, *Meeting on Minimum Standards in Pre-Trial Detention Procedures*, Borschette 1A, DG JFS: Criminal Justice, Brussels, 9 February 2009 (Ilina Taneva, COE), p. 3; see also Jeremy MB, *Human Rights and Criminal Procedure: The Case Law of the European Court of Human Rights* (Strasbourg: Council of Europe Publishing, 2009), pp. 58–110.
12. *Wemhoff v. Germany* (Application No. 2122/64) ECHR 27 June 1968.

bringing him before the competent legal authority on reasonable suspicion of having committed an offence', not for broader fair trial concerns pursuant to Article 6(1).[13] In contrast, the Council of Europe, which condensed the Court's diverse case law on detention into one comprehensive advisory instrument, Recommendation (2006) 13 on 'remand in custody', aims at better standards of treatment and safeguards for the widest range of detainees possible. It consequently broadly defines such detention as 'any period of detention of a suspected offender ordered by a judicial authority prior to conviction', including any period after conviction where the convicted person is awaiting their final sentence or confirmation of conviction after appeal.[14]

In reference to common standards on pretrial detention, the European Commission also uses the broader notion of all prisoners who have not been finally judged.[15] The Commission justifies using the expanded definition as it conforms to standard Member State practice. This rationalization is unconvincing, however, for two reasons: Firstly, most Member States do not have specific definitions of pretrial detention in their national legislation,[16] meaning no standardized 'practice' on use of detention exists among the 29 jurisdictions. Secondly, the need for coherency in developing EU law supports using the ECtHR's definition, especially given the proposed accession of the Union to the ECHR and the specific incorporation of this Convention into the general principles of law by Article 6(3) of the Treaty of the European Union (TEU).[17] This suggests that the Commission's adoption of the broader definition is either an attempt to extend common standards to as many detainees as possible or to extend its competence for action as far as possible. This absence of a standardized definition makes not only collecting accurate EU-wide statistics on detention of non-resident EU nationals and determining what standards already exist in Member States problematic but also further muddies the waters surrounding the limits of EU competence. Given, the above analysis, this article uses the narrower definition of pretrial detention, extending only to the resolution of the first trial, in assessing EU competence to act.

European standards on pretrial detention

Over the past 5 years, the EU has adopted a range of directives setting common minimum standards for certain procedural rights as part of the Stockholm Programme.[18] The directives adopted under Article 82(2) of the TFEU, which include the right to interpretation and translation, right to information and access to a lawyer,[19] reflect a shift from a predominantly security-centric

13. *Wemhoff v. Germany*, p. 20 [as regards Article 5(3) of the Convention].
14. Council of Europe, *Recommendation Rec[2006] 13*, definitions at para. 1.
15. European Commission, *Green Paper on Detention*, p. 8 and note 19.
16. A.M. van Kalmthout et al., *Pre-Trial Detention*, p. 49.
17. Council of Europe, *Accession by the European Union to the European Convention on Human Rights*, June 2010. Available at: http://www.echr.coe.int/Documents/UE_FAQ_ENG.pdf (accessed 25 January 2017), pp. 2, 6; TEU, Article 6(2)-(3).
18. Several further directives have been proposed: *Proposal for a directive of the European Parliament and of 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; *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; *Proposal for a directive of the European Parliament and of the on provisional legal aid for suspects or accused persons deprived of liberty and legal aid in European arrest warrant proceedings* COM[2013] 824 final.
19. Directive on the right to interpretation and translation in criminal proceedings 2010/64/EU [2010] OJ L 280/1; Directive 2012/13/EU on the right to information in criminal proceedings [2012] OJ L 142/1; Directive 2012/3/48/EU on the right of access to a lawyer in criminal proceeding and in European arrest warrant proceedings, and on the right to

to more citizen rights-based approach to criminal policy.[20] During this time the Parliament, Council and Commission have repeatedly championed the need for minimum standards on detention before trial across the EU. The principal reason given is that, firstly, excessive pretrial detention interferes with the human rights of accused persons and, secondly, that these diverging human rights standards among Member States can negatively affect mutual trust. The Commission, based on the right to liberty and security enshrined in Article 5 ECHR, proposes the adoption of two common standards: length of detention before trial and the regularity of review of the grounds for detention.[21] Detention standards are a related but separate issue to pretrial detention procedures that similarly can affect mutual trust between European judiciary. The issue of quality of housing and services is not considered in this article as it relates to Article 3 ECHR on inhuman and degrading treatment. Consequently, it is not an issue of 'criminal procedure' exercised by judicial actors falling under the ambit of Article 82(2) TFEU, and an assessment of EU competence would be based on different considerations.

The increasing use of pretrial detention as an automatic measure by Member States for suspects not residing in the prosecuting State interferes with two fundamental presumptions that limit State power: the presumption of innocence and the right to liberty. Within the criminal justice system, the presumption of innocence prevents an accused person being declared or treated as guilty before a court ruling.[22] European human rights law has gone beyond the general prohibition on arbitrary detention found in international law,[23] to explicitly listing the grounds under which persons may be lawfully detained before trial.[24] While detention before trial is a necessary by-product of States' effectively and legitimately ensuring the functioning of criminal courts, the grounds for detention, being likely recidivism or absconding, must be strictly interpreted and applied.[25] The ECtHR has developed extensive case law over the years elaborating the rules and restrictions for deprivation of liberty flowing from Article 5 ECHR, which has been further codified in the Council of Europe's non-binding *Recommendation (2006) 13 on the use of remand in custody*. Six main principles emerge from the ECtHR case law which would provide the basis for proposed EU common standards.

Grounds for detention

In the *Smirnova* case, the Court summarizes the four 'basic acceptable reasons', aligned to international standards, which it accepts for detention before trial: The risk the accused will fail to

have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty [2013] OJ L 294/1.

20. M. Kaiafa-Gbandi, 'The Importance of Core Principles of Substantive Criminal Law for a European Criminal Policy Respecting Fundamental Rights and Rule of Law', *European Criminal Law Review* 1(1) (2011), pp. 7–34 and 8.
21. European Commission, *Green Paper on Detention*, pp. 9–10.
22. Case C-344/08, *Criminal Proceedings Against Tomasz Rubach* [2009] ECR I-7033, at para. 31.
23. International Covenant on Civil and Political Rights (ICCPR), opened for signature 1 December 1966, 999 UNTS 171 (entry into force 23 March 1976), Article 14(1)(2) and (5); United Nations General Assembly, United Nations Standard Minimum Rules for Non-custodial Measures (Tokyo Rules), A/RES/45/110, 14 December 1990; see also, United Nations Centre for Human Rights, *Human Rights and Pre-trial Detention, Professional Training Series No. 3* (Geneva: United Nations Centre for Human Rights, 1994), p. 1.
24. ECHR, Article 5(1)(c).
25. Organization for Security and Co-operation in Europe (OSCE), *The Law and the Practice of Restrictive Measures: The Justification of Custody in Bosnia and Herzegovina* (2008), pp. 7–8. (Sarajeveo: OSCE, 2008)

appear for trial; the risk the accused, if released, would take action to prejudice the administration of justice; or commit further offences; or cause public disorder.[26]

Prompt judicial control

Persons detained on suspicion of having committed a criminal offence must be brought promptly before a judge or judicial officer.[27] Detention before being charged or brought before a court is not an automatic violation of Article 5(3), if the arrested person is 'promptly' released before judicial intervention was possible. However, in *Brogan*, the Court held the flexibility of the term 'prompt' is very limited, and any detention in excess of four days will violate Article 5(3),[28] and shorter periods can also breach the promptness requirement if an earlier hearing was possible.[29]

Non-discrimination against foreigners

Merely being a foreigner does not create a presumption in favour of detention. The European Court has held a range of independent factors must be assessed to determine the danger of absconding, including the accused's character, morals, assets, links to the prosecuting state and international contacts.[30] Protocol no. 12 to the ECHR also prohibits discrimination by any public authority on any ground such as race, colour, national or social origin, association with a national minority or other status.[31]

Use of alternatives

The Court has interpreted Article 5(3), which provides everyone arrested or detained is entitled to trial within a reasonable time or to release pending trial, as creating an obligation on authorities to consider measures alternative to detention to ensure appearance at trial. Justification for any detention must be convincingly demonstrated by the authorities.[32]

Review of detention

Detained persons have the right under Article 5(4) ECHR to actively seek review of their detention even when the initial detention was lawful,[33] and proceedings must be adversarial and ensure 'equality of arms' between the parties.[34] Automatic review of lawfulness only satisfies Article 5(4) if conducted 'speedily' and at 'short intervals'. For pretrial detention, these intervals must be of a 'strictly limited duration', the court finding that maximum intervals of two months was compatible with Article 5(4) but over 3 months to be 'unreasonable'.[35]

26. *Smirnova v. Russia* (Application Nos 46133/99 and 48183/99) ECHR 24 July 2003, at para. 59.
27. ECHR, Article 5(3).
28. *Brogan v. the United Kingdom* (Application Nos 11209/84, 11234/84, 11266/84 and 11386/85) ECHR 29 November 1988, at para. 58–62; See also, *McKay v. the United Kingdom* (Application No. 453/03) ECHR 3 October 2006, at para. 33.
29. *Ipek v. Turkey* (Application Nos. 17019/02 and 30070/02) ECHR 3 February 2009, at para. 37.
30. *W v. Switzerland* (Application No. 14379/88) ECHR 26 January 1993, at para. 33.
31. *Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 2000, CETS No 177 (entered into force 1 April 2005), Article 1(1) and (2).
32. *Idalov v. Russia* (Application No. 5826/03) ECHR 22 May 2012, at para. 140.
33. *Rakevich v. Russia* (Application No. 58973/00) ECHR 28 October 2003, at para. 43.
34. *Reinprecht v. Austria* (Application No. 67175/01) ECHR 15 November 2005, at para. 31(c).
35. *Abdulkhakov v. Russia* (Application No. 14743/11) ECHR 2 October 2012, at paras 209 and 213.

Length of detention

The presumption of innocence requires pretrial detention to not exceed a reasonable time, with respect for individual liberty being balanced against genuine public interest requirements. Reasonable suspicion of having committed an offence can only justify the initial period of detention.[36] While there is no fixed time frame for legitimate maximum detention, reasonableness must be assessed according to the special features of each case. However, the Court has held pretrial detention extending into several years to be unreasonable.[37] Quasi-automatic prolongation of detention contravenes Article 5(3).[38]

Justifications for EU action on pretrial detention

The official European Parliament and Commission documents on pretrial detention detail two explicit reasons for setting common minimum standards under Article 82(2) TFEU.[39] Firstly, the increased number of non-resident EU citizens detained in Member States,[40] and, secondly, the potential for diverging human rights standards to undermine mutual trust and consequently interfere with mutual recognition of judicial decisions.[41] In the 2009 Resolution on the Stockholm Roadmap, the Council stated that excessively long periods of pretrial detention can 'prejudice judicial cooperation between the Member States and do not represent the values for which the European Union stands'.[42] The Commission notes that despite the obligations to both comply with ECHR standards as well as to ensure the EU Charter is respected when applying EU Law, 'doubts' exist about the

36. *McKay v. the United Kingdom*, at para. 45.
37. See, for example, *Hadade v. Romania* (Application No. 11871/05) ECHR 24 September 2014, at paras 101–111.
38. *Tase v. Romania* (Application No. 29761/02) ECHR 10 June 2008, at para 40.
39. See, for example, European Parliament, Resolution on a Roadmap for strengthening procedural rights, pp. 3, 6 and 8; European Commission, Green Paper on Detention, 2014; European Parliament, Written Declaration on infringement of fundamental rights of detainees in the European Union 2011; European Parliament, Resolution of 25 November 2009 on the Communication from the Commission to the European Parliament and the Council – An area of freedom, security and justice serving the citizen – Stockholm programme, P7_[2009]0090, 25 November 2009, at para. 112.
40. See, for example, European Parliament, *Resolution on a Roadmap for Strengthening Procedural Rights*, pp. 3, 6 and 8; European Commission, *Detention Green Paper* 2014; European Parliament, *Written Declaration on Infringement of Fundamental Rights of Detainees in the European Union* 2011; European Parliament, *Resolution of 25 November 2009 on the Communication from the Commission to the European Parliament and the Council – An Area of Freedom, Security and Justice Serving the Citizen – Stockholm Programme*, P7_[2009]0090, 25 November 2009, at para. 112.
41. Interference with the free movement of persons within the European Union (EU), arguably flowing from the discriminatory preventative detention standards applied to residents and non-residents, has not been used as an argument in favour of legislating, and consequently is not considered in this article. For an analysis of the free movement principle applied to victims' rights, see J. Öberg, 'Subsidiarity and EU Procedural Criminal Law', *European Criminal Law Review* 5 (2015), pp. 19–45 and 29–31; The potential for the inadequate protection of fundamental fair trial rights in some Member States to deter EU citizens from exercising their right to move and reside freely within the EU, and the corresponding need for approximation across the EU was highlighted in the European Commission, Impact Assessment accompanying the Proposal for a Directive of the European Parliament and of the Council the Right to Information in Criminal Proceedings, COM[2010] 392 final, Brussels 20 July 2010. However, its absence as an issue in the corresponding impact assessments for access to a lawyer and legal aid indicates it ceased to be considered a major ground for EU-level action.
42. European Parliament, *Resolution of the Council of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings* [2009] OJ C 295/91, annex.

way these standards are upheld across the EU.[43] Consequently, the Parliament has repeatedly called for EU action to prevent continued human rights abuses.

Similar to the existing defence rights directives, the EU proposes Article 82(2) TFEU as the appropriate head of power for a directive on pretrial detention standards. However, *unlike* the three existing directives, Member States have generally rejected the need for the proposed standards on detention and have questioned the legitimacy of Union-level action.[44] Consequently, action on implementing the directive has stalled despite widespread support from civil society groups, academic experts, bar associations and the EU bodies.[45] Calls for action on minimum procedural standards to safeguard suspect rights highlight the need to counterbalance the initially lopsided focus of the EU in criminal law, which has concentrated on substantive criminal law provisions and prosecution-aiding instruments.[46] However, as minimum standards commonly act to benefit individuals and limit government power, civil society and academic support for action have predominantly not assessed whether the EU institutions have competence to act.

Harmonization means the 'convergence of the legal practice of the various legal systems based on a common standard'.[47] Mutual recognition, while formally undefined, entails Member States recognizing the validity of judicial decisions from other Member States. While mutual recognition was originally conceived as an alternative to harmonization, the latter is increasingly viewed as being a necessary precondition for the smooth functioning of the former.[48] The official 'objective' of harmonizing pretrial detention standards espoused by the Commission is to strengthen mutual trust, and hence, mutual recognition within the area of freedom, security and justice.[49]

Article 82(2) TFEU

Article 82(2) TFEU enables the EU to establish minimum and enforceable standards on the rights of individuals in criminal procedures. However, Article 82(2) does not provide a carte blanche for action but imposes certain limitations on union-level action:

> 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

43. European Commission, *Green Paper on Detention*, p. 3; Charter of the Fundamental Rights of the European Union [2012] OJ C 326/391.
44. European Commission, *Analysis of the Replies to the Green Paper on the Application of EU Criminal Justice Legislation in the Field of Detention* ('Analysis of Replies to Detention Green Paper'), Available at: http://ec.europa.eu/justice/newsroom/criminal/opinion/110614_en.htm (accessed 25 January 2017).
45. See submissions to the European Commission's *Green Paper on Detention*, Available at: http://ec.europa.eu/justice/newsroom/criminal/opinion/110614_en.htm (accessed 25 January 2017).
46. See, for example, L. van Puyenbroeck and G. Vermuelen, 'Towards Minimum Procedural Guarantees for the Defence in Criminal Proceedings in the EU', *International and Comparative Law Quarterly* 60(4) (2011), pp. 1017–1038; S. Peers, *EU Justice and Home Affairs Law* (Oxford: Oxford University Press, 2011); V. 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* 31(1) (2012), pp. 319–372; R. Letschert and C. Rijken, 'Rights of Victims of Crime: Tensions between an Integrated Approach and a Limited Legal Basis for Harmonization', *New Journal of European Criminal Law* 4(3) (2013), pp. 226–255.
47. A. Klip, *European Criminal Law: An Integrative Approach*, 2nd ed. (Cambridge: Intersentia, 2011), p. 23.
48. V. Mitsilegas, 'The Constitutional Implications of Mutual Recognition in Criminal Matters in the EU', *Common Market Law Review* 45(5) (2006), pp. 1277–1311 and 1280.
49. European Commission, *Green Paper on Detention*, p. 2.

> 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:
>
> . . .
>
> (b) the rights of individuals in criminal procedure.

Three accumulative limitations on EU competence are obvious from the wording of Article 82(2) itself: Firstly, it must be a 'criminal matter'; secondly, the matter must have a 'cross-border dimension'; and finally, the common standard must be 'necessary to facilitate mutual recognition'.

Article 5(3) TEU – the principle of subsidiarity

The principle of subsidiarity further confines when the EU can take action within areas of shared competence; legitimating Union-level legislation only when the proposed objectives cannot be sufficiently achieved by Member States individually.[50] Defined in Article 5(3) of the 'TEU', the principle permits Union action:

> . . . [o]nly if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at the central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at the Union level.

Different from Article 82(2), the subsidiarity principle does not regulate the Union's competence to act, but whether it *should* act in an area of shared competence, providing an extra overlay of protection for Member State sovereignty.[51] *Protocol (No 2) on the Application of the Principles of Subsidiarity and Proportionality* (Protocol (No. 2)) to the Lisbon Treaty replaced the 1997 Protocol on Subsidiarity, which had implemented the approach to subsidiarity agreed on at the 1992 European Council in Edinburgh. Despite being replaced by Protocol (No. 2), the 1997 guidelines for determining whether EU action is warranted remain relevant. The guidelines stipulate that the EU can exercise its competence to legislate on pretrial detention if it satisfies one or more of the following criterion implied within the subsidiarity requirement:

> i) The issue has transnational aspects that cannot be satisfactorily regulated by Member State action or
>
> . . .
>
> iii) Union level action would produce clear benefits by reason of its scale or effects compared with individual Member State action.

Protocol (No. 2) further specifies that the principle of subsidiarity must apply to all draft legislative acts, and the benefit of the proposed legislation must be justified by a detailed assessment of the financial impacts, administrative costs and implications for existing Member State rules.[52]

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50. TEU, Article 5(3).
51. Klip, *European Criminal Law*, p. 35.
52. *Protocol (No. 2) on the Application of the Principles of Subsidiarity and Proportionality*, OJ C 83/206 30 March 2010, Article 5.

Limitations on EU action in criminal procedure

To gain power to act, the Union must first displace the presumption that a policy or initiative remains with the Member State – 'as close as possible to the citizen'.[53] The limitations imposed by both Article 82(2) and the subsidiarity principle can be condensed into an accumulative three-step test for whether the EU has competence and whether it should exercise it: Firstly, does the matter have a cross-border dimension or transnational aspect that cannot be satisfactorily regulated by the Member States alone (transnational)? Secondly, are common EU minimum standards on pretrial detention necessary to ensure mutual recognition (necessity)? This must be applied to all aspects of pretrial detention: maximum length of detention, regular review by judicial authority and right of appeal. Finally, would mutual recognition be better achieved through common EU standards than Member State standards or action (clear benefits)?[54] These tests can be applied to assess whether the grounds for the proposed action meet the criteria inherent within Article 82(2), being 'cross-border dimension' and 'facilitation of mutual recognition', and furthermore whether Union-level common standards on pretrial detention provide a 'clear benefit' to accused persons in criminal procedures over individual action by Member States, being the existing legislative standards incorporating the requirements of the ECHR standards. Failing these tests would undermine the legal basis for a directive on pretrial detention and expose the EU action to allegations of 'creeping competences'.

The cross-border or transnational aspect criterion

The EU institutions commonly cite the excessive detention before trial of EU nationals in Member States of which they are non-residents as grounds for establishing common minimum standards on pretrial detention. While Article 82(2) explicitly restricts the establishment of common standards to criminal matters with a 'cross-border dimension', the Union has legislated under this power on procedural criminal issues for both transnational and purely domestic proceedings.[55] Similar to the impact assessments for the already adopted defence rights directives,[56] the Green Paper only explicitly defends harmonization of cross-border matters arising from cases concerning the surrender of suspects under the European Arrest Warrant (EAW) system. Despite this, the Green Paper anticipates minimum standards applying to all pretrial detainees in Member States because of the impracticality of partial harmonization and potential human rights concerns.

The grounds provided to justify this action are, firstly, the European Commission, in its impact assessments on the Stockholm Roadmap directives, has highlighted the impracticality of applying such standards only in cross-border cases. It argues that such an approach will lead to 'dual requirements' for domestic criminal justice systems, creating confusion for authorities and wasting

53. *Protocol (No. 2) on the Application of the Principles of Subsidiarity and Proportionality*, OJ C 83/206 30 March 2010.
54. For a similar formulation for the final step, see Mike Thomas (Legal Advisor), *Subsidiarity: Assessing an EU Proposal*, House of Lords, November 2011, p. 3.
55. The Union has extended its competence to act in all the Stockholm defence rights directives to purely domestic criminal matters.
56. The impact assessment for the right to legal aid, for example, states 'while Art 82(2)(b) refers to cross-border proceedings . . . it has been decided that a precise, ex ante categorization of criminal proceedings as cross-border or domestic is impossible'. European Commission, *Impact Assessment accompanying the Proposal for Measures on Legal Aid for Suspects or Accused Persons in Criminal Proceedings*, COM[2013] 824 final, Brussels, 27 November 2013, p. 27.

resources, and would further result in effective 'reverse discrimination' against Member States' own nationals by creating two separate classes of defendants in criminal proceedings, with nationals receiving less rights protection than non-resident Member State nationals.[57] The Commission argues this will lead to an 'unreasonable differentiation' and to the detriment of the protection of fundamental rights.[58] If common standards are then discriminatively applied by judicial officers to favour non-residents, this argument would carry some weight. However, the original primary justification for introducing EU-wide standards was that judicial officers were automatically labelling non-residents as being a flight risk. In most jurisdictions, judges disproportionately prescribe detention for non-residents rather than using less intrusive measures such as bail, house arrest or confiscation of identity documents which are commonly used for residents.[59]

A second justification provided by the Commission is that, unlike civil proceedings, the cross-border element in criminal proceedings is not always immediately apparent, often only transpiring at a later stage, such as during collection of evidence or after suspect flight.[60] While the practical justifications for comprehensively applying EU-wide common standards to all pretrial detainees are valid, the Green Paper – similar to the impact assessments for the other procedural rights introduced under Article 82(2) – does not explain how such action is supported by the literal meaning of the text *or* the intention of the drafters of the TFEU (purposive approach).[61]

'Cross-border' mutual recognition. One approach to stretching EU competence beyond straightforward cross-border criminal matters is to shift where the 'cross-border dimension' emphasis is placed in Article 82(2). In trying to align the literal meaning of the article with the expanded application of the Stockholm defence rights directives, the House of Lords' EU Committee concluded that minimum criminal procedural rules are not limited to cases *with* a cross-border dimension but rather that the rules should facilitate mutual recognition that *has* a cross-border dimension.[62] The Committee's approach was to move the 'cross-border dimension' from 'criminal matter' to 'mutual recognition'. However, this construction does not make strong logical or practical sense as mutual recognition is inherently 'cross border'. The concept of 'mutual recognition' (discussed below) requires the, in principle, automatic acceptance (or 'free movement') of

57. See also, S. Aa, 'Post-Trial Victims' Rights in the EU: Do Law Enforcement Motives Still Reign Supreme?' *European Law Journal* 21(2) (2014), pp. 239–256 and 253.
58. See, for example, European Commission, *Impact Assessment accompanying the Proposal for a Directive on the Rights of Access to a Lawyer and of Notification of Custody to a Third Person in Criminal Proceedings*, COM[2011] 326 final, Brussels, 8 June 2011, p. 23.
59. See Member State responses to the *Green Paper on Detention.* Available at: http://ec.europa.eu/justice/newsroom/criminal/opinion/110614_en.htm (accessed 25 January 2017).
60. See Member State responses to the *Green Paper on Detention*.
61. The European Court of Justice has standardly taken a purposive, also called teleological, approach to statutory interpretation. This emphasizes that the text should be interpreted in light of an instrument's object and purpose, rather than purely examining the literal meaning of the text. This approach is taken because of the multiple official languages of the European Union, making a predominantly textual approach unworkable. However, this does not mean the ordinary meaning of the provision, as emphasized in a textualist approach, should be completely ignored if incongruent with the instrument's purpose, but rather that the meaning which gives best effect to the object and purpose should be assumed. Further, when the meaning is ambiguous resort can be had to the preparatory works of the instrument to gauge the intention of the drafters. See also, the Vienna Convention on the Interpretation of Treaties, Articles 31 and 32.
62. House of Lords European Union Committee, *The European Union's Policy on Criminal Procedure*, 30th Report of Session 2010–2012, HL Paper 288, 26 April 2012, p. 21.

judicial decisions made in one Member State by another Member State.[63] As the European Court of Justice held in *Vinkov v. Nachalnik Administrativno-nakazatelna deynos*:

> (. . .) [the] principle can, by definition, only relate to cross-border proceedings concerning the recognition and enforcement of a decision in a Member State other than that in which the decision was issued.[64]

Thus, there is no sense in which mutual recognition can take place without a 'cross-border dimension' already being present. The suggested emasculation of 'cross-border dimension' effectively allows harmonization of any criminal procedural rule if such harmonization will make judges feel better about their neighbouring judicial systems.

Peers similarly suggests that the drafters' use of 'dimension', as opposed to the more restrictive 'implication' in the civil law power, indicates the head of power is not limited to actual cross-border proceedings but to where there is a '*degree of likelihood* that the rules in question will have a particular impact on cross-border proceedings'.[65] But again this interpretation entails that the EU can legislate on any topic affecting mutual recognition so long as the proposed rules could affect a proceeding that might also have a cross-border element. An example makes this clearer:

> Austria does not provide interpreters for the regional, non-official language Y; the accused is an Austrian national who allegedly assaulted another Austrian national with a knife. The accused posted the knife to his friend in Bulgaria. Judges involved in a mutual recognition request in Bulgaria are concerned about the lack of interpretation facilities as the accused's mother tongue is Y. Mutual trust is undermined. The EU has power to legislate that interpretation must be provided in all non-official regional languages within Member States.

Thus, under Peers' interpretation, the EU has competence to harmonize any aspect of procedural criminal law. Given these multiple possible interpretations of 'cross-border dimension', the preparatory works of the TFEU can be consulted to clarify the role of 'cross-border dimension' within Article 82(2). The final report of the working group on 'Freedom, Security and Justice' to the European Convention recommends 'the creation of a legal basis' for common rules 'to the extent that such rules relate to procedures with transnational implications *and* are needed to ensure the full application of mutual recognition of judicial decisions' (italics added).[66] The separate emphasis on 'transnational implications' indicates the power was not meant to extend to purely domestic cases but only situations where mutual trust is undermined in matters that already have a cross-border dimension. While the drafters have not specified how broadly 'implications' itself is to be understood, the statement by the treaty's drafters lends

63. European Commission, *Communication from the Commission to the Council, and European Parliament: Mutual Recognition of Final Decisions in Criminal Matters*, COM[2000] 495 final, Brussels, 26 July 2000, p. 1.
64. Case C-27/11, *Vinkov v. Nachalnik Administrativno-nakazatelna deynos*, judgement of 7 June 2012.
65. Peers, *EU Justice and Home Affairs Law*, p. 670. Cf. G. Corsterns 'Criminal Justice in the Post-Lisbon Era' in C. Barnard and O. Odudu, eds., *Cambridge Yearbook of European Legal Studies*, vol. 13 (Oxford: Hart Publishing, 2011), (procedural Criminal law: approximation of laws).
66. European Convention, Final Report of Working Group X 'Freedom, Security and Justice', CONV 426/02. Brussels, 2 December 2002. Available at: http://ec.europa.eu/dorie/fileDownload.do;jsessionid=jnNhSsLhpnYDKPry2skMFcscfkWGZcfhnrr1TYhGyK1qNcJ16BCk!-1903217843?docId=284323&cardId=284323 (accessed 25 January 2017), p. 11. No ECJ cases could be found explicitly defining 'cross-border dimension'.

support to an interpretation requiring a 'cross-border dimension' to be present in the criminal case itself; rather than the cross-border nature of mutual recognition being sufficient to satisfy this criterion.

The transnational aspect. Irrespective of the limiting force of 'cross-border dimension' in Article 82(2), the restriction of 'transnational aspect' inherent in the subsidiarity principle means the harmonized rules should 'concern or have strong implications for cross-border judicial cooperation'.[67] In assessing the limiting force of the subsidiary principle, de Búrca notes the 'transnational aspect that cannot be satisfactorily regulated by Member State action' does not justify harmonization on any topic with a cross-border element but is restricted to issues with significant cross-border effects or implications, such as cross-border environmental pollution. The mere existence of a cross-border effect is not a sufficient ground for action but needs to be balanced against potentially negative side-effects on domestic standards, processes and democracy.[68] European treaties provide a 'constitution-like' function for the EU regulating the extent of supranational action. The willingness and desire of both Member States and the Union authorities for EU-level action on an issue does not make such action appropriately legally grounded. The EU's competence to legislate on purely domestic proceedings was originally a major stumbling block to States accepting the 2004 omnibus instrument on procedural rights in 2007,[69] and while Member States have been less concerned by the EU's 'creeping competence' in the Stockholm Programme's step-by-step approach,[70] the Commission's expansive approach to procedural standards has not been without some recent criticisms. In a 2014 policy document on European legislation, the Netherlands indicated it will seek to wind-back this trajectory during its 2016 presidency, refocusing EU action on cross-border cases.[71] Thus, a coherent and stable economic and political union relies on all union-level action being based properly in their powers granted under the treaties. Given the chosen demarcation between national and supranational action, justifying action on practicality or general rights protection rather than tying it closely to the stipulated legal bases could result in accusations of creeping competences and open the legality of directives to legal challenge.[72]

The necessity criterion

The EU's competence to establish minimum rules for pretrial detention also depends on the necessity of such rules. Article 82(2) provides the Parliament and Council may establish minimum rules to 'the extent necessary to facilitate mutual recognition of judgments and judicial

67. J. Öberg, 'Subsidiarity and EU Procedural Criminal Law', p. 7.
68. G. de Búrca, *Reappraising Subsidiarity's Significance after Amsterdam, Harvard Jean Monnet Working Paper, 7/99*, (Cambridge: Harvard Law School, 2000), pp. 24–25.
69. Council of the European Union, Press Release, 2897th Council mtg, 12–13 June 2007, Luxembourg, C/07/125, at para. 37; See also European Commission, *Proposal for a Council Framework Decision on the right to interpretation and translation in criminal proceedings (Impact Assessment),* COM[2008] 338 final, Brussels, 8 July 2009, p. 53.
70. Puyenbroeck and Vermuelen also highlight the inconsistent nature of Member State objection to the European Union legislating on purely domestic matters, such as on common definitions of terrorist offences and trafficking in persons sentences: see, 'Towards Minimum Procedural Guarantees for the Defence in Criminal Proceedings in the EU', p. 136.
71. Ministry of Foreign Affairs (the Netherlands), *Testing European legislation for subsidiarity and proportionality – Dutch list of points for action* [2014], 1 and 11.
72. Ministry of Foreign Affairs (Netherlands), p. 1, for an accusation of 'creeping competences'.

decisions and police and judicial cooperation'. Despite the Tampere Council labelling mutual recognition as a 'cornerstone' of European criminal law, it is not officially defined.[73] The concept was 'borrowed' from the creation of the Single Market to replace the 'cumbersome' international treaty mechanism for judicial cooperation,[74] and, similar to its function for goods, services and people, mutual recognition is now expected to ease the circulation of judicial decisions in criminal law.[75] The principle relies on, and actually instructs, Member States to mutually trust each other's criminal legal systems, both the adequacy of the rules and their correct application.[76] Thus, in principle, Member States are prohibited from double-checking a request by another Member State under a mutual recognition instrument: in the context of pretrial detention this means, States may not refuse a surrender request under the EAW based on the requesting States' inadequate pretrial detention procedures. Unless poor detention standards reach the threshold of inhuman or degrading treatment under Article 3 ECHR,[77] Member States are prevented from refusing a surrender request where they suspect human right violations may occur in the requesting State.[78] However, despite the quasi-mandatory nature of mutual recognition, diverging standards for fair trial and the rights of the accused still exist between Member States, and as the Green Paper on Detention highlights, mutual recognition instruments will not function properly if Member States are reluctant to recognize the decisions of other Member States' authorities because the pretrial detention procedures in the requesting States are inadequate.

The Green Paper warns that forcing judges to balance 'detention-related deficiencies' against their 'high confidence' in other Member States' legal systems acts to erode mutual trust and the efficacy of mutual recognition instruments.[79] Thus, raising the standards of all Member States to an acceptable level through minimum common rules is the proposed method to increase confidence in neighbouring States criminal justice systems.[80] While raising standards is the logical response to Member State concerns, it is not envisaged for the functioning of the mutual recognition principle, as mutual recognition assumes 'mutual trust' as a given, rather than a value built between Member State judiciary because of proven mutual high standards. This unspoken paradox requires the EU to introduce minimum rules but guides against conducting an empirical investigation into their necessity. In the context of pretrial detention, a two-step test could be used to determine the necessity of such rules for mutual recognition of EAW surrender requests: Firstly, are the minimum rules proposed in response to actual and

73. European Parliament, *Tampere European Council 15 and 16 October 1999 Presidency Conclusions*, 1999, para. [33]; Klip, *European Criminal Law*, p. 362.
74. European Commission, *Communication from the Commission to the Council, and European Parliament: Mutual Recognition of Final Decisions in Criminal Matters*, COM[2000] 495 final, Brussels, 26 July 2000, p. 1.
75. R. Letschert and C. Rijken, 'Rights of Victims of Crime: Tensions between an Integrated Approach and a Limited Legal Basis for Harmonization', *New Journal of European Criminal Law* 4(3) (2013), p. 243.
76. Directives 2010/64/EU, 2012/13/EU and 2012/3/48/EU, preamble: at paras 3–4.
77. See, for example, *Orchowski v. Poland* (Application No. 17885/04) ECHR 22 January 2010, at para. 135.
78. Framework Decision 2002/584 of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, OJ 2002, L 190/1 ('*Framework Decision on European Arrest Warrant*'), Articles 3 and 4.
79. European Commission, *Green Paper on Detention*, p. 5. The Green Paper states,

    > [e]ven where refusal is not the outcome, the 'high level of confidence between Member States' (cited as the basis of the EAW system in recital 10 of the Framework Decision) is eroded where judicial authorities must repeatedly weigh this confidence against acknowledged detention-related deficiencies.

80. Directives 2010/64/EU, 2012/13/EU and 2012/3/48/EU, preamble: at para. 10; Klip, *European Criminal Law*, p. 483.

documented obstacles to mutual recognition?;[81] and secondly, will the minimum rules genuinely strengthen mutual trust?

As Mitsilegas succinctly explains, 'EU competence to legislate on the rights of the defence is thus not self-standing but conditional upon the need to demonstrate that defence rights are necessary for mutual recognition'.[82] The first question concerning documented obstacles can only partially be answered through examining refusal decisions by Member State judges on surrender requests under the EAW, as the principle of mutual recognition creates a presumption of mutual trust. The principle instructs judges to assume other Member States' judicial systems are equivalent to their own, trusting in both the adequacy and application of procedural rules.[83] This effectively stymies judges from refusing EAW surrender requests based on human rights or fair trial considerations (except Article 3 ECHR violations). Thus, to establish the necessity of common minimum rules for pretrial detention, a qualitative and quantitative study would first need to be conducted by the Commission interviewing judges across the 29 jurisdictions.[84] Further, this study would have to assess whether mutual trust between judges is affected only by the existence of sufficient rights protections 'on the books' or also the practices of other Member States' criminal justice systems 'in action'. While some assessment has been conducted at the EU level around how diverging standards for pretrial detention affect mutual trust, such as the Green Paper on pretrial detention, the focus has been on official government responses rather than on the judiciary's practical experiences.

Member state perspectives: Mutual trust. The Green Paper commissioned responses from Member States on whether different practices on maximum detention periods and regular review of detention between the Member States could constitute an obstacle to mutual confidence and whether there was merit in establishing minimum rules on these matters.[85] Member States predominantly denied that differences in pretrial detention were negatively affecting mutual trust between the States, suggesting the minimum rules proposed do not correlate to actual and documented obstacles to mutual recognition. However, it should be noted that the official Member State responses do not necessarily reflect the views of their judicial actors but could also be driven by political considerations. The Member State responses are summarized as follows:[86]

i. The majority of States rejected the position that pretrial detention standards were an obstacle to mutual recognition, with only seven States recording that different practices could interfere with mutual trust (Spain, Bulgaria, Sweden, Estonia, Slovenia, Czech Republic and the Romanian Senate).

81. See R. Lööf, 'Shooting from the Hip: Proposed Minimum Rights in Criminal Proceedings throughout the EU', *European Law Journal* 12(3) (2006), pp. 421–430 and 426.
82. V. 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* 31(1) (2012), pp. 319–372 and 365.
83. See Directive 2012/13/EU on the right to information in criminal proceedings [2012] OJ L 142/1, preamble, at para. 4.
84. For some preliminary work on this topic see, J. Sievers, 'Managing Diversity: The European Arrest Warrant and the Potential of Mutual Recognition as a Mode of Governance in EU Justice and Home Affairs', in *EUSA Tenth Biennial International Conference*, 17–19 May 2008, Montreal, Canada.
85. European Commission, 'Analysis of Replies to Detention Green Paper', 2014.
86. This summary is based on my analysis of each of the Member States replies, rather than the Commission document. Interestingly, the Commission summary of the Member States replies misrepresents the position of several States (Estonia, Austria, Spain, Belgium, the Netherlands, Czech Republic and Italy), rendering qualified statements about the need for improved national standards as support for harmonization.

ii. One State supported the establishment of common rules on both maximum time limits for detention and regular review (Romanian Senate; (Estonia recommended EU-level discussions)) and a further four States supported the adoption of standards on regular review only (Bulgaria, Sweden, Finland; and Italy (suggested standards might be useful)).
iii. Fourteen States did not support the adoption of any common rules for pretrial detention (Austria, Spain, Belgium, the Netherlands, Czech Republic, Poland, Denmark, Ireland, France, United Kingdom, Germany, Latvia, Portugal and Malta), as the variations within detention rules are based on their historically developed legal systems, and do not negatively affect judicial cooperation.
iv. Several States recommended extreme caution in establishing common rules, noting the potential substantive effect on criminal justice systems.
v. Denmark and Poland stated the EU did not have competence to address issues of pretrial detention under the Article 82(2)(b) TFEU, as it would require extensive unification of Member State criminal proceedings. This position was supported by the German Association of Judges.

The responses of Member States, while not necessarily representing the views of judicial actors in their criminal justice systems, does not support the Commission's claim that diverging standards on pretrial detention is undermining mutual trust and consequently mutual recognition to an extent sufficient to justify the adoption of binding rules. The Member State responses to action on pretrial detention, in contrast to the adopted defence right directives, also highlight a deeper concern with adopting EU legislation on the basis of 'mutual recognition': The directives' success depends on Member States support for the action, not on whether diverging standards in Member States is genuinely undermining mutual trust among judges. The absence, in the impact assessments of the Stockholm directives, of a systematic and detailed examination of how Member State protection of each fair-trial right is affecting judicial decisions, further highlights that the Commission is not primarily motivated by developing harmonized rules based on actual need.

The clear benefits criterion

The EU's competence to adopt a directive on pretrial detention rests on whether minimum rules can reduce the excessive use of pretrial detention in Member States beyond the efficacy of the existing ECHR standards.[87] This requires Union-level action to produce clear benefits by reason of its scale or effects when compared to Member State action, as substantiated by qualitative and quantitative indicators. Two interrelated factors are generally overlooked when justifying extra legislative standards. Firstly, whether the satisfactory transposition of standards into national legislation equates with actual adherence to the standards in practice by Member States;[88] and secondly, given all Member States must already incorporate the ECHR into their domestic law, and apply it, along with the Charter, when implementing Union law, what clear benefit will further minimum rules provide above the existing Article 5 ECHR standards. Thus, in determining

87. The proposed standards would focus on length of pretrial detention and regularity of review, see European Commission, *Green Paper on Detention*, pp. 9–10; As described in the second section, these standards correlate to the principles developed by the ECtHR regulating detention before trial.
88. R. Letschert and C. Rijken, 'Rights of Victims of Crime', p. 233.

whether a clear benefit exists, existing Member State laws should be compared to the six main principles emerging from the ECtHR case law as set out in section two of this article.

Member state compliance with ECHR standards. Three resources were used to obtain a broad overview of Member State legislation and detention rates concerning pretrial detention. The Green Paper on Detention requested information from Member States regarding the existing rules in each country and whether EU minimum rules on maximum length of, and regular review of grounds for, pretrial detention would improve mutual confidence between States. Twenty-two Member States and over 50 international organizations, universities, civil society groups and non-government organizations, responded to the paper and their submissions were subsequently collated by the Commission.[89] Prior to the Green Paper's release, the Commission had already funded a comprehensive study of the minimum legislative standards and standard practice on pretrial detention in EU Member States, conducted by the Tilburg and Greifswald Universities under the supervision of Professor van Kalmthout.[90] Lastly, the Council of Europe also releases yearly statistics on detention rates in Contracting Party jurisdictions, including all EU States.[91]

Grounds for detention

All Member States reported their national legislations required release of an accused if no overriding reason for retaining a person in custody remains.[92] The legal grounds for detention in Member States are, risk of absconding (all States), risk of interference with the course of justice (all States except Bulgaria, Estonia, Greece and Ireland), risk of reoffending (all States), serious threat to public order (France, the Netherlands, Portugal and Romania), gravity of the offence (Austria, Denmark, Germany, Latvia and Lithuania), severity of penalty (Poland) and other (Bulgaria, Denmark, Greece and Portugal).[93] All States except Hungary require 'reasonable suspicion' that an offence of a certain threshold has been committed, however, the terminology for that 'suspicion' varies depending on the language and the legislative tradition. Four States, Cyprus, Malta, Estonia and the United Kingdom, do not require the offence to carry a penalty of imprisonment.[94]

Prompt judicial control

Detention in all States can only be applied following a judicial order. All States prescribe a maximum time for appearance before, and decision by, a judge, varying between 24 h and 7 days. However, some jurisdictions only stipulate the maximum period of detention before appearance before a judicial body, not the handing down of the actual decision. The length of maximum periods before judicial review does not necessarily correlate to excessive pretrial detention rates:

89. The Green Paper, summary of replies and submissions are all available online. Available at: http://ec.europa.eu/justice/newsroom/criminal/opinion/110614_en.htm (accessed 25 January 2017).
90. European Commission, *Meeting on Minimum Standards in Pre-Trial Detention Procedures*, 2014.
91. Council of Europe Annual Penal Statistics ('SPACE'), *Space I – Prison Populations: Survey 2013*, M. Aebi and N. Delgrande (eds.), (Strasbourg: Council of Europe, 2014). Statistics for 2013 were the most recent available at the time of writing. Publisher: Strasbourg: Council of Europe, 2014).
92. European Commission, 'Analysis of Replies to Detention Green Paper', p. 9.
93. Kalmthout et al., *Pre-trial Detention*, p. 61.
94. Op. cit., p. 56.

Luxembourg has a short maximum period (24 h)[95] but one of the highest foreign pretrial detention rates (41.6% of prison population).[96] Similarly, Ireland has the longest maximum period (24 h, 7 days)[97] but a relatively low pretrial detention rate (14.4%).[98]

Non-discrimination against foreigners

In all States, except Luxembourg and Greece, the legislation does not discriminate between residents and non-residents in awarding pretrial detention. In Greece, a person accused of committing a felony (i.e. an indictable offence) may be detained if he or she does not have a fixed Greek address, irrespective of any evidence of intention to abscond and so forth.[99] Similarly, in Luxembourg, the standard for applying preventative detention is lower for non-residents (custodial sentence plus serious indications of guilt) than residents (2-year custodial sentences plus evidence of intention to abscond, interfere with evidence or commit further crimes). Despite this, the average rate of pretrial detention of foreigners was higher than that for residents in 23 States (of 25 States with available data) in 2013.[100] However, in only 16 States was the average pretrial detention rate for foreigners higher than the average prison rate. Thus, despite largely compliant legislation, discriminatory award of pretrial detention against non-residents is still taking place in practice.

Use of alternatives

Member States generally acknowledge that detention should be a measure of last resort.[101] All States possess a range of alternatives to detention, including bail, house arrest, electronic monitoring, ban on leaving the territory of the State, obligation to report to authorities at regular intervals, confiscation of identification documents, instructions to live at a particular address, written promise and supervision by a probation officer. Several Member States highlighted the difficulty in applying these measures in practice.[102] Outside of the United Kingdom and Ireland, where a presumption in favour of release exists, bail is rarely used because it is perceived as discriminating against the poor who cannot afford financial guarantees.[103]

Review of detention

All States have legislative provisions fulfilling the objectives of review, but varying as to how, when, how often and by whom review should take place. Twenty States provide for automatic review; however, automatic review can become a purely bureaucratic process rather than a genuine assessment of need. The shortest period before initial review is 5 days (Belgium) and the longest is 6 months (Hungary, Greece and Estonia). Some States maintain a discretionary review system. In

95. Op. cit., p. 53.
96. SPACE, *Prison Populations*, p. 99.
97. Kalmthout et al., *Pre-Trial Detention*, p. 53.
98. SPACE, *Prison Populations*, p. 99.
99. LEAP, *Stockholm's Sunset*, 2014, p. 121; Kalmthout et al., *Pre-Trial Detention*, pp. 90–91.
100. SPACE, *Prison Populations*, pp. 90–91 and 99.
101. Kalmthout et al., *Pre-Trial Detention*, p. 51.
102. European Commission, 'Analysis of Replies to Detention Green Paper', p. 20.
103. Op. cit., p. 2.

22 States, the accused can actively apply to the court for review of detention.[104] Automatic review or short durations between reviews again do not necessarily correlate to low pretrial detention rates, again highlighting non-legislative factors as relevant to ensure low detention rates.

Length of detention

Most ECtHR case law concerns appeals against excessive duration of pretrial detention. All States, except Belgium, Finland, Luxembourg, Malta, Hungary and Sweden, have maximum time restrictions on detention.[105] However, the laws vary as to whether the restriction extends to the beginning of trial (12 States) or conclusion of trial (12 States). Romania and Slovakia are the only States that have limits for both pre- and during trial. Some States also determine maximum length of detention relative to the gravity of the offence. Further, the maximum limits can be, and often are, easily extended following a request by prosecutors.[106] However, maximum limits do not necessarily translate into shorter detention periods. Sweden and Finland both have relatively short average detention periods, 6 weeks and 3.5 months, respectively, despite not having maximum pretrial detention periods.[107] In contrast, several European States with statutory maximum pretrial detention periods still have high pretrial detainee numbers.[108]

Comparing the legislative standards on pretrial detention against detention rates in Member States reveals the gap between defence right protection 'in the books' and 'in action'. The above analysis of Member State responses to the Green Paper on Detention and the Tilburg/Greifswald report shows States' criminal procedural laws are already largely compliant with Article 5(3) ECHR 'in the books'. While some improvement of domestic laws could definitely be achieved through common rules setting, for example, maximum limits on detention before review, excessive pretrial detention, particularly of non-resident EU nationals, is primarily caused by inappropriate application of the existing laws by judges and judicial authorities 'in action'.[109] Thus, additional common standards are unlikely to substantively improve the procedural rules within States' criminal justice systems, and thus provide a clear benefit above the existing individual Member State approaches based on the ECHR. Further, as indicated by the Member State response to the Green Paper, it is unlikely that Member States with well-functioning systems would welcome the requirement to implement extra legislative safeguards where no measureable data exist that support a corresponding higher standard of rights protection.

104. Kalmthout et al., *Pre-Trial Detention*, pp. 65–69.

105. See Member States replies for each State, available at: European Commission, *Strengthening Mutual Trust in the European Judicial Area–A Green Paper on the Application of EU Criminal Justice Legislation in the Field of Detention*, Public consultation (16 July 2013). Available at: http://ec.europa.eu/justice/newsroom/criminal/opinion/110614_en.htm (accessed 25 January 2017).

106. Fair Trials International, *Detained Without Trial: Fair Trials International's Response to the European Commission's Green Paper on Detention*, October 2011, Appendix 2: Pre Trial Detention Comparative Research, see Member State summaries; LEAP, *Stockholm's Sunset,* annex, pp. 67–149.

107. Kalmthout et al., *An Analysis of Minimum Standards in Pre-Trial Detention and the Grounds for Regular Review in the Member States of the EU: Sweden*, 10; Finland, *Finish Ministry of Justice Reply*, 20 November 2011, *Green Paper on Detention*, p. 8. The European average (COE Contracting Parties) is 8 months: SPACE, *Prison Populations*, p. 2.

108. See, for example, Italy (37.1%), Cyprus (41.8%), Estonia (58.6%) and the Netherlands (46.3): SPACE, *Prison Populations*, p. 99.

109. See the Member State summaries which provides experience of lawyers working in several Member State criminal law systems, Legal Experts Advisory Panel ('LEAP'), *Stockholm's Sunset: New horizons for Justice in Europe*, March 2014.

Despite this EU-level common rules do provide one clear advantage over existing Member State laws: given criminal procedure common standards are implemented via directives and thus have direct effect,[110] affected persons may seek redress if these procedural rights are violated by their State directly before a domestic court; and further, disputes over interpretation of the directives can be taken directly to the European Court of Justice without the applicant having to first exhaust all domestic remedies, as with the ECtHR.[111] However, what advantage this will actually bring again depends on the quality of judicial practice and access to justice within Member States.

Conclusion

Articles 82(2) TFEU and 5(3) TEU set clear limitations on EU power in criminal procedural law that must be displaced before the Commission and Parliament gain competence to act. This article used a three-step test to examine the basis for the European Commission and Parliament competence to take action in an area of shared competence revealing that, given the excessive use of pretrial detention of non-residents arises from judicial practice rather than inadequate laws, further common standards are not necessary for the mutual recognition of judicial decisions nor will provide a clear benefit over existing individual Member State action. The comparison of Member States replies to the Green Paper suggests that the 'clear benefit' from extra standards necessary to justify EU-level action in an area of shared competence needs to be actually at the level of improved judicial practice, not law-making. Thus, mutual trust and mutual recognition is likely to be better achieved through non-legislative judicial training, including measures such as judicial exchanges and liaison.[112]

What path the EU will eventually take to reduce pretrial detention, particularly the discriminatory treatment of foreigners, is unclear. The European Parliament has continued to issue communications and recommendations on the need for common standards to prevent human rights abuses. In contrast, the Commission, in a January 2015 'Notice to Members' concerning discrimination against foreign defendants in Malta, stated it was shifting its focus from establishing common rules on detention to improving implementation of the existing detention-related mutual recognition instruments, following lack of support among Member States for strong legislative intervention at the Union level.[113] What this recent shift in focus by the European Commission does highlight is the risk in promoting and adopting directives under Article 82(2) TFEU without first properly assessing whether the Union has competence to do so. While seeking to improve the rights of accused persons in criminal proceedings is commendable, the success of the existing directives to date has primarily rested on Member State support rather than genuine need, likely improvements or a solid legal basis. Thus, introducing further defence rights directives without grounding them properly in the power-giving treaties will ultimately result in wasted resources. In addition, it also hinders the development of a consistent European criminal procedural law as Member States have to date only selectively supported harmonization of standards in certain areas, not holistically across all areas of criminal procedure.

110. European Commission, *The Direct Effect of European Law*, EUR-Lex – II457 – EN, 14 January 2015.
111. European Commission, *The Direct Effect of European Law*, 2015.
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Author's note

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