A Manifesto for European Criminal Procedure Law – A Prosecutorial Perspective

Ola Löfgren[1]

I. Introduction

The Manifesto brings a valuable contribution to further discussions on the development of European Criminal Procedure Law and the principle of mutual recognition. It is important to strike a balance between efficiency of the criminal investigation and the rights of the individuals and there is in my view room for improvement in this respect.

I will make some general remarks on the principle of mutual recognition, followed by brief comments on a few topics that are examined in the Manifesto. These are,

- Need for better knowledge and understanding of the different legal systems of the Member States – training of judges and prosecutors
- Roadmap for Procedural rights
- The rights of the individual
- Mistrust towards the prosecution authorities
- Forum shopping and parallel criminal proceedings
- Compensation for wrongful arrest in an international context.

II. Mutual recognition

The principle of mutual recognition has undoubtedly contributed to a better functioning of international cooperation in criminal matters. The principle has changed the basic *philosophy* for international cooperation. Instead of handling requests with a certain level of discretion, the decision by the issuing authority, based on a mutual recognition instrument, must not only be complied with but also within a certain period of time. One concern in the realization of this philosophy is the quality of implementation of the Framework decisions and Directives in the Member States. Either implementation is not made in time, or the implementation is not done in line with the intentions of the law makers. As an example, the diverse loyalty when implementing the time-limits for the procedure of the European Arrest Warrant (EAW), has led to an unbalanced situation regarding the obligations of the executing authorities in the Member States.

Mutual recognition cannot be *absolute*. For each instrument it has to be assessed as to what extent limitations to its application are needed. For example, the experience of the EAW does not give convincing evidence of that there is a real need to extend the possibilities not to execute an EAW. It may be that fundamental rights could

[1] Head of International Unit, Office of the Prosecutor General, Sweden; article is based on the paper presented at the Conference "European Criminal Policy Initiative – A Manifesto for European Criminal Procedure Law" on 12th June 2014 at Stockholm University.

have been inserted in the FD, but the obligations under the Treaty (TEU Art.6) and the Charter exist all the same. On the other hand, the recourse to fundamental rights as a reason not to execute an EAW must be considered alien in respect of the trust that should exist within the EU. It is, in my opinion, dubious not to execute an EAW on the basis of poor conditions in prisons in the issuing Member State. If there are prisons in the EU that do not live up to standards of fundamental rights, there is a severe problem that EU should tackle in a broader perspective.

Mutual recognition cannot be *blind*. In the practical application of the principle, there must be room for the executing authority to question the actions taken by the issuing authority, in case there is a risk for an error in the handling of a concrete case. It may be that the issuing authority made a mistake when ticking the box as a "list offence". Or the executing authority may in its possession have information that the issuing authority might not have. It could concern the identity of the suspect or serious doubts about the value of the evidence. When such a situation occurs, the executing authority often consults with the issuing authority in order to avoid obvious mistakes. In fact, the text of the Directive on the European investigation order (EIO) is an example of a practice of consultations that already take place in EAW proceedings (see Art.9:6 and Art.10:4 of the EIO Directive).

Another aspect of utmost importance for the acceptance of the principle of mutual recognition and mutual trust is a high level of professionalism within the EU. Consequently, further actions for strengthening the level and capacities of the national authorities in the Member States must be taken.

In a decentralized system for international cooperation built on direct contacts between competent national authorities, it is vital that the Member States provide national authorities with relevant methodological support. The EU handbook on the EAW is a good initiative, but in my view not enough. In addition to a general handbook, national authorities need guidance that takes into account the particularities of each legal system. In Sweden, both the Prosecution Authority and the Swedish National Courts Administration have issued national handbooks on international cooperation. These handbooks are greatly appreciated by practitioners, since they give hands-on assistance regarding how national legislation and procedures should be applied.

III. Need for better knowledge and understanding of the different legal systems of the Member States – training of judges and prosecutors

One key element for the functioning of mutual recognition and mutual trust is the knowledge of the national criminal proceedings in the other Member States. As an example, there are requests for mutual legal assistance regarding the interrogation of persons where the requesting and the requested State have different understandings of whether the person to be interrogated should be considered a witness or a suspect. Since there are different rules for hearing a witness and a suspect respectively, the treatment of the person to be heard is of importance in view of both

parties. With the knowledge of basic features of criminal proceedings in the other Member State, it is much easier to understand why the same situation is interpreted differently and as a consequence, the solution much easier to find.

IV. Roadmap for Procedural rights

The roadmap for procedural rights and the directives already finalized bring a certain harmonization regarding rights of the suspect. I agree with the Manifesto that the roadmap can only be a first step. I welcome further initiatives to examine how the rights of the suspect are taken care of in the Member States. For instance, the fact that the rules, as well as the resources and efficiency, varies between the Member States, leads from time to time to unacceptable long periods of pre-trial detention. As a consequence, some Member States are reluctant to execute an EAW in cases where the criminal investigation is not finalized and the case is ready for trial. Such an approach is, in my view, devastating for the efficiency of the EAW. If the EAW cannot be used to arrest a person at all stages of a criminal proceeding, many investigations will fail and criminals will walk free. Hence, a common approach to pre-trial detentions would certainly contribute to a better understanding between the Member States and the recourse to the trial-readiness argument would be reduced.

V. The rights of the individual

1. The suspect

It is not self-evident how far-reaching the rights of the suspect should be. The pan-European minimum standard for specific suspects' rights could, therefore, be a suitable way forward to obtain a common understanding in this field.

The Manifesto criticizes that the procedural rights for the suspect intervene too late. This may be true to a certain extent. On the other hand, there must be room for a criminal investigation to take place even if the suspect is not immediately informed about it. A certain level of surprise must be granted to law enforcement agencies, e. g. when performing a house search or an arrest of the suspect.

An important part of a State governed by the rule of law is the right of the suspect to a review of the actions that are taken within a criminal investigation. At the same time, not all decisions can reasonably be allowed to be challenged during the course of the criminal investigation. An unlimited right to appeal could completely ruin the possibilities of performing a criminal investigation with a successful outcome.

The absence of an unlimited right to appeal during the course of the investigation must however be balanced by a control system, whereby independent institutions such as the *Justitieombudsman* or the Justice Ombudsman have the possibility to scrutinize the actions by state officials. The mere fact that the actions may become

subject to scrutiny is reducing the risk of wrongful actions by the State towards the individual. A common EU standard for such a control system would be beneficial for the mutual trust between the Member States.

2. Victim

The victim of a crime sometimes has to accept that the proceedings do not take place in the country of his or her origin. More can be done to improve the position of the victim in a cross border investigation and prosecution. The Manifesto enumerates typical needs of the victim, but it does not elaborate further on this topic. One solution that would reduce the negative consequences for the victim would be the increased use of video conferencing, through which the victim could be heard. Such a development would be promoted by an increased knowledge of such among practitioners as well as the availability of sufficient technical means and appropriate legal conditions.

VI. Mistrust towards the prosecution authorities

It is becoming more and more frequent with complaints from the defense on lack of information regarding the content of the criminal investigation. The perception of the defense is that the national authorities, with support from Eurojust and Europol, share information of which only selected parts are presented to the defense and the suspect. A problematic area and a possible source for this conflict, is the divergent rules in the Member State on disclosure of information. Hence, common principles within the EU for rules regarding disclosure of information would be desirable. Such principles would not be easy to realize though, since this is an area where harmonization could jeopardize the coherence of the national criminal justice systems. The creation of an EU defense organization, as suggested in the Manifesto, could be beneficial for a better understanding between the prosecution authorities and the defense.

VII. Forum shopping and parallel criminal proceedings

According to the Manifesto there is a risk that the prosecution authorities use the differences in the national legal systems and circumvent the rights of the suspect (forum shopping). The Manifesto is of the opinion that a decision on where to prosecute could in some cases be based on factors such as the expected severity of the punishment and the likelihood of conviction. Such a risk for forum shopping is, in my view, exaggerated.

From the point of view of efficiency and possible success of the criminal investigations and prosecutions, it is important that the Member States have rules on jurisdiction that allow for flexibility. In complex cases, including multiple crimes and suspects in different Member States and third countries, it is not self-evident as

to how the situation should be handled. In my experience however, when deciding on where to investigate and to prosecute, the priority is set on how to manage the case, not to find the most optimal result in terms of years of imprisonment. Nevertheless, I agree that a common set of rules for the choice of jurisdiction would be an advantage.

Eurojust is, in fact, of the same opinion. In 2003, Eurojust had already considered this issue and published Guidelines on deciding which Jurisdiction should prosecute (published in the Eurojust Annual Report 2003). The Guidelines give directions on what to consider when deciding on where to investigate and prosecute. Factors to be taken into account are for instance: where the majority of the criminality occurred, the location of the accused, the possibilities for surrender/extradition and the possible attendance of the victims. Furthermore, the Guidelines stipulates that the decision should not be based on trying to avoid legal obligation and that prosecutors should not seek to prosecute cases in jurisdictions where the penalties are higher.

The Manifesto criticizes the Framework Decision on conflicts of jurisdiction[2] and considers it to be a potential invitation to forum shopping. This criticism is unfair in my opinion. The objective of the FD is to increase the possibilities for the national authorities to be aware of parallel proceedings in order to avoid unnecessary effort and concentrate the criminal proceedings and avoid infringements of the principle of ne bis in idem. It is, in my view, obvious that contacts between national authorities in different countries should be further promoted, not suppressed.

VIII. Compensation for wrongful arrest in an international context

Most important in a civil democracy based upon the rule of law is that no innocent man or woman is convicted for having committed a crime. The same principle should also apply to persons that are arrested. However, it happens that a suspect that has been arrested is subsequently released and the investigation terminated without prosecution. In such a situation the released person is normally compensated for the deprivation of liberty. It is crucial for the credibility of the principle of mutual recognition that this principle is maintained in an international context as well. There is, for the moment, no common understanding in the EU on who should be responsible for the compensation, the issuing or the executing state.

IX. Final remark

I share several of the concerns raised in the Manifesto. What would be interesting and important for the future is to find the link between the theoretical concerns and what is going on in practice. It is important to find concrete examples on where the

[2] Framework Decision 2009/948/JHA of 30 November 2009, on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings.

development of EU criminal procedure law based on mutual recognition has led to detrimental treatment of individuals. In doing so, it must be taken into account that such treatment may not have its roots in the implementation of the principle of mutual recognition.