*With financial support from the Specific Programme Criminal Justice of the European Union*

# HANDBOOK

## PROJECT JUST/2013/JPEN/AG/4496

## PROCEDURAL RIGHTS IN EU CRIMINAL LAW

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# PART I. INTRODUCTION

## 1. Who and why should read this handbook?

**Overview**

The project "Procedural rights in EU criminal law" (JUST/2013/JPEN/AG/4496) is supported by the European Commission within the framework of the European Union's "Criminal Justice" Programme.

The project was coordinated by the Romanian Superior Council of Magistracy with significant support from the National Institute of Magistracy in the Project's implementation.

The Associate Partners were the Academy of European Law (ERA), the Italian School for the Judiciary and the Romanian National School of Clerks. The Co-beneficiary Partners were the Institut de Formation Judiciaire (IFG-IGO) from Belgium, the National Institute of Justice from Bulgaria, the National School of Judiciary and Public Prosecution from Poland, the Judicial School of the General Council for the Judiciary in Spain and the National Institute of Magistracy.

**Project's background**

The project had as premises the increased need for training in the field of EU law, human rights and international judicial cooperation. This need was previously underlined by magistrates themselves. Each year judges and prosecutors face a larger volume of cases, out of which a significant number of issues concern the settlement of disputes with transnational elements.

In this sense the project aimed at strengthening the trust and cooperation between all the participating Member States by promoting the mutual recognition among the different national legal systems involved. In order to achieve this goal, the Project's activities were designed to broaden the participants' understanding of the main European legal framework and relevant jurisprudence in the field of judicial cooperation on criminal matters, while also enhancing their legal English skills to help them in the drafting of relevant legal documents and also benefit from the use of different online tools developed at the European level in the field of judicial cooperation.

**Handbook**

This handbook was designed as a comprehensive and user friendly tool intended to help other judicial schools or any other training institutions that wish to train judges and prosecutors in the field of judicial cooperation in criminal matters. In

this sense, we tried to include in the present handbook all the useful information to enable the replication of our Project's format. Therefore, we started with a short presentation of the methodology used in the Project's implementation.

One of the main goals pursued throughout our training sessions was to maintain a fair balance between the theoretical and practical part of the activities involved. In this sense we offered the participants the chance to benefit from both comprehensive lectures as well as practice oriented training methods.

Following this principle, we were able to come up with a clear and effective format that included 6 seminars and a final conference. Each of the 6 seminars was organized in 3 days and included: lectures, linguistic trainings, moot court exercises and workshops.

The handbook is thus structured according to the above mentioned format and is divided in four parts:

- **Part I – Introduction,** includes the present introduction and a short presentation of the methodology used in the Project's implementation;

- **Part II – Seminars-format and content,** encompasses all the useful information provided throughout the 6 seminars; this part follows the structure of a seminar, being divided in 3 days, each day including the relevant materials presented during the lectures, linguistic trainings, moot court exercises and workshops;

- **Part III – Final conference,** contains useful materials provided during the Project's final conference;

- **Part IV – Conclusions,** includes the conclusions reached after the project was finalised.

We trust that the way this handbook was structured and all the information provided therein will help any professional that wishes to replicate the Project's format in the future.

Moreover, we believe that even though this handbook was mainly designed for trainers in criminal law, it will, nevertheless, serve as a useful tool for any legal practitioner interested in this field of law, as it encompasses a variety of relevant information ranging from applicable law, relevant jurisprudence, case studies and useful exercises concerning the specific Legal English terminology used in judicial cooperation.

# 2. Methodology in brief

## 1. Overview

The project ``Procedural rights in EU criminal law`` (JUST/2013/JPEN/AG/4496) is supported by the European Commission within the framework of the Specific Programme Criminal Justice of the European Union.

The Romanian Superior Council of Magistracy coordinates the project and is supported by the National Institute of Magistracy in issues related to the training activities.

The Associate Partners are the Academy of European Law (ERA), the Italian School for the Judiciary and the Romanian National School of Clerks. The Co-beneficiary Partners are the Institut de Formation Judiciaire (IFG-IGO) from Belgium, the National Institute of Justice from Bulgaria, the National School of Judiciary and Public Prosecution from Poland, the Judicial School of the General Council for the Judiciary in Spain and the National Institute of Magistracy.

## 2. Background of the project

The project has as a premise the increased need for training in the field of EU law, human rights and international judicial cooperation. This need was previously underlined by magistrates themselves. Each year judges and prosecutors face a larger volume of cases. There are a rather large range of issues related to the settlement of legal relations with foreign elements.

## 3. Concept. A new approach

Therefore, NIM has created a seminar that would integrate several types of practical exercises. Each exercise aims to position the participant in direct contact with the legal provisions. According to this format the participant is expected not only to listen, but also to search for the applicable legal provisions, to write legal documents in relation to the issue, to answer to legal practical problems and to solve issues related to criminal judicial cooperation in the European Union.

## 4. Format of the project

### 4.1. Format of the seminars

#### 4.1.1. General overview

The project includes a series of 4 – 6 seminars, repeating the same format and the same agenda. Each seminar involves about 24 judges and prosecutors coming from all the Member States partners in the project. The same number of participants is expected from each Member State (4-6 participants). All seminars involve also lawyers and clerks from Romania.

The seminars we conceived are a combination of:

- Lectures;
- Linguistic sessions;
- Moot court sessions;
- Simulated proceedings of judicial cooperation.

#### 4.1.2 Lectures

The seminar starts with lectures on the legal framework of the issues that are going to be discussed during the seminar. The basic legal concepts should be clarified for the participants before they begin to put in practice the relevant legal instruments.

The first lecture handles a general overview of the judicial cooperation instruments within the EU legislation. This lecture is concerned with the presentation of new legal instruments in the field of procedural rights (Directive 2010/64/EU, Directive 2012/13/EU and Directive 2013/48/EU).

The second lecture deals with the Charter of fundamental rights of the European Union and with the proper references of the Charter to the ECHR.

The third lecture is scheduled in the second day of the seminar. It handles the European Arrest Warrant from the perspective of the procedural rights of the requested person. The focus of the lecture is on the *ne bis in idem* principle.

#### 4.1.3. Linguistic Session

The lectures are followed by a linguistic session – a training module that has the goal to warm up the participants by using their English in the seminar's framework.

#### 4.1.4. Moot Court

The afternoon of the first day starts with a moot court sequence where a judge, a prosecutor, a lawyer and a clerk, coming from Romania, are performing in front of their colleagues.

The moot court concerns the execution of an EAW and the hearing in a Romanian court (sequence prepared by the Romanian trainers with the help of Romanian lawyers and clerks).

#### 4.1.5. Simulated Proceedings

The first day's afternoon continues with another practical exercise, simulating drafting letters of rights related to the procedural rights of the accused persons. They also have to discuss some issues related to the case studies.

The next morning, the letter of rights written by one team is checked by another team from the other room. Each team has a letter of rights from their colleagues to check. The decision on the conformity of the letter of rights, the answers and their grounds are discussed in the plenary. Also, the trainers give their feedback during the plenary session.

In the second day's seminar afternoon, the participants are also divided in teams (but they will remain in the same room), each with a task within the scope of application of the *ne bis in idem* principle according to the jurisprudence of the Luxembourg and Strasbourg courts.

#### 4.1.6. Second Linguistic Session

On the third day, there is another linguistic session focused on the meaning and content of the terms frequently used in the field of judicial cooperation in criminal matters.

#### 4.1.7. Final Lecture

The seminar ends with a lecture on the latest developments in the area, the newest tendencies, things that are yet to come. The participants need to understand the further direction of Criminal Law in the EU.

### 4.2. Final Conference

The project ends with a final conference. A number of about 120 participants should attend the final conference. It is possible to participate in one seminar and also at the final conference.

The conference should challenge the discussions from the seminars in order to offer an overview on the future of EU Criminal Law. Therefore, the final conference should try to mix lectures with case studies in order to create an interactive environment where participants can offer their feedback on the issues tackled.

### 4.3. Handbook

One of the projects deliverables is the handbook which brings together the contributions of every expert involved in the project. This handbook is first presented to the participants during the project's final conference, when each expert involved will briefly present its contribution.

The large number of participants at the final conference should offer proper feedback. Based on this feedback and with the experts' support present at the conference, all the parties involved will agree on a final version of the handbook. Participants are encouraged to express their opinions and it is highly recommended that at least one participant form each Member State could provide a useful feedback based on his national legal experience.

The materials included in the handbook can constitute valuable sources of information only if they are discussed and agreed upon by legal practitioners, judged, prosecutors, lawyers and court clerks. Only this way, the handbook will have

an important impact on the participants' future activity and will be able to become a useful tool for the legal practitioners throughout the European Union.

# PART II. SEMINARS - FORMAT AND CONTENT

## Day 1

### Chapter I – Lectures no. 1 (1h 30min)

The first lecture handles a general overview of the judicial cooperation instruments within the EU legislation. Of course, the presentation could not ignore the connection between judicial cooperation, procedural rights and the principle of mutual recognition. This lecture is also concerned with the presentation of new legal instruments in the field of procedural rights (Directive 2010/64/EU, Directive 2012/13/EU and Directive 2013/48/EU).

Moreover, it also deals with the evolution of the EU Criminal Law. The Criminal Law was initially of no concern for the European Communities. But, throughout time, the treaties were modified and the Maastricht Treaty allowed harmonisation of Criminal Law, even if in rather restrictive conditions. The Treaty of Lisbon integrated Criminal Law and the Treaty on the Functioning of the European Union included provisions concerning enhanced criminal judicial cooperation and on substantive Criminal Law.

The judicial cooperation between the Member States improved gradually and instead of the principle of mutual assistance the principle of mutual recognition began to apply. Framework decisions had a rather important contribution in this field. There are tools that are at the disposal of the judicial practitioners such as Eurojust, the European Judicial Network, ECRIS, Atlas, Compendium, and Fiches Belges.

The Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters is also an important legal instrument that was discussed in this lecture.

The focus of the presentation is on the Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings, the Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings and on Directive 2013/48/EU of the European Parliament and of the Council of 22 of October 2013 on the right of access to a lawyer in criminal proceedings 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.

These three directives were necessary in order to achieve a proper balance between the right to a fair trial of the accused person and the legal instruments issued in order to enhance criminal judicial cooperation. The practical issues regarding the implementation of these directives in national law are also analysed.

## Section 1 - Procedural rights in the European Union

Florentino-Gregorio RUIZ YAMUZA, Senior Judge, Spain

### 1.1 Context

To approach criminal procedural systems of the European Union's Member States has been sought as a desirable goal over the years, although it hasn't been always regarded as a priority since other areas of our legislation may have demanded faster and a more intense dedication. The situation has evolved in a way that has made easier and more efficient the prosecution and fight against crime at a transnational level, by using instruments of cooperation based on the principle of mutual recognition. Mutual recognition requires mutual trust and the latter comes from the confidence that all our countries shall deal with situations and problems in such a homogeneous way that allows us to rely on other Member State as if the matter was dealt with by our own national legal system.

Quite often, mutual recognition instruments present problems related to lack of mutual trust. The required high level of confidence between Member States operates under the assumption that fundamental rights are going to be observed and the principles recognised by Article 6 of the Treaty on European Union[1] and reflected in the Charter of Fundamental

[1] Consolidated version of the Treaty on European Union. Official journal of the European Union C 326/13, of 26.10.2012. (Article 6)
1. The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties. The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties.
The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions.
2. The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties.

Rights of the European Union[2] are going to be respected. Specially bearing in mind that art. 6 of the Treaty on European Union is quoted and referred to in Framework Decisions and Directives related to international cooperation in criminal matters as a basic source of European union Law not having those instruments " …the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty on European Union."[3]

Therefore, one of the ways to tackle this situation is aiming to reach common grounds for all European Union Member States making even more reliable their internal operation and even more trustable the way they are supposed to deal with fundamental rights and procedural aspects.

Besides this, the Jurisprudence from the European Court of Human Rights acts as a catalyst setting out principles and guidance for the application and observation of The Convention for the Protection of Human Rights and Fundamental Freedoms[4]. But the practise has showed us: first, hat the variety of contracting States (47 in total, being the 28 Member States of the European Union signatories to the Convention) makes the interpretation of the European Court of human Rights rather casuistic and not uniform, which at the time rises difficulties when it comes to extract general rules applicable to all contracting States; and second, that there are no ways to oblige contracting States to adapt and modify their legislation to match the requirements and requisites deriving from such a Jurisprudence.

In this context the analysis of the situation reached a point where Member States and European Institutions felt that the balance between measures facilitating prosecution and procedural rights of suspected and accused persons should be corrected, precisely because the latter was a requirement of the fair operation of mutual recognition instruments.

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3. Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.

[2] Charter of Fundamental Rights of the European Union. Official journal of the European Union C 364/1, of 18.12.2000.

[3] As an example of this, Article 1(3) Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States (2002/584/JHA). Official journal of the European Union L 190/1, of 18.7.2002.

[4] Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocols No. 11 and No. 14. Rome, 4.XI.1950. http://conventions.coe.int/treaty/en/Treaties/Html/005.htm

Despite there were no legal basis addressing Members States to tackle this initiative, Article 31 of The Treaty on European Union has been often seen as a mandate to try and quest the rapprochement of legislations in this field. Article 31 establishes that common action on judicial cooperation in criminal matters shall include: "…(a) facilitating and accelerating cooperation between competent ministries and judicial or equivalent authorities of the Member States…" and "…(c) ensuring compatibility in rules applicable in the Member States, as may be necessary to improve such cooperation…"

Being the right of suspected and accused persons to a fair trial is recognised as a fundamental right, and taking into account the context we're referring to, an initial proposal for a Council Framework Decision on procedural safeguards in criminal proceedings, was launched by the Commission in 2004, but it was blocked owing to divergent views of six national delegations, and we have to wait until year 2009 to resume this pathway, now under the legal umbrella of Lisbon Treaty[5].

Article 82(2) of the consolidated version of the Treaty of Functioning of European Union (ex Art. 31 of the Treaty of the European Union) sets out that:

" 1. Judicial cooperation in criminal matters in the Union shall be based on the principle of mutual recognition of judgments and judicial decisions and shall include the approximation of the laws and regulations of the Member States in the areas referred to in paragraph 2 and in Article 83.

The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures to:

(a) lay down rules and procedures for ensuring recognition throughout the Union of all forms of judgments and judicial decisions;

…

(d) facilitate cooperation between judicial or equivalent authorities of the Member States in relation to proceedings in criminal matters and the enforcement of decisions.

[5] Treaty of Lisbon, amending the Treaty on European Union and the Treaty establishing the European Community. Official journal of the European Union C 306/1, of 17.12.2007.

2. 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:

…

(b) the rights of individuals in criminal procedure;

…

(d) any other specific aspects of criminal procedure which the Council has identified in advance by a

decision; for the adoption of such a decision, the Council shall act unanimously after obtaining the consent of the European Parliament.

Adoption of the minimum rules referred to in this paragraph shall not prevent Member States from maintaining or introducing a higher level of protection for individuals…"

**1.2 Strengthening procedural rights of suspected and accused persons**

In this context, the Swedish Presidency of the European Union presented in July 2009 a Roadmap with a view to enhancing protection of suspected and accused persons in criminal proceedings and fostering the right to a fair trial in criminal proceedings across the Union. A draft Resolution was presented by the same Presidency on the 31st of July 2009[6] outlining the grounds and content of the Roadmap. It was adopted by the Council on the 30th of November 2009 eventually.

[6] Presidency of the Council of the EU, Roadmap with a view to fostering protection of suspected and accused persons in criminal proceedings, Brussels, 1 July 2009, document No. 11457/09, DROIPEN 53, COPEN 120.

The initiative aimed to overcome the existing impasse following the failure or the previous Commission's initiative of 2004, encouraging the European Commission to submit new legislative proposals to cover the measures included in the Roadmap, trying to give answers and solutions to those questions and problems appeared in relation with procedural rights in criminal proceedings throughout the European Union.

In November 2009 the Council adopted a Roadmap for strengthening procedural rights of suspected and accused persons[7] in criminal proceedings and invited the Commission to put forward ad hoc proposals.

The Roadmap Resolution was based on the following considerations:

1. The Convention for the Protection of Human Rights and Fundamental Freedoms constitutes the common basis for the protection of the rights of suspected or accused persons in criminal proceedings, which for the purposes of the Resolution includes the pre-trial and trial stages.

The Convention, as interpreted by the European Court of Human Rights, is an important foundation mutual trust between Member States and to strengthen such trust.

2. The area of freedom of movement and residence, within the European Union implied the removal of internal borders and the increasing exercise of the rights to freedom of movement and residence have, as a consequence, led to an increase in the number of people becoming involved in criminal proceedings in a Member State other than that of their residence. In those situations, the procedural rights of suspected or accused persons are particularly important in order to safeguard the right to a fair trial.

4. There is a need at the European Union level to guarantee a high standard of safety for citizens, and as well to tackle specific problems that can arise when a person is suspected or accused in criminal proceedings.

The Roadmap calls for specific action on procedural rights, in order to ensure the fairness of the criminal proceedings, comprising legislation as well as other measures to enhance citizens' confidence that the European Union and its Member States will protect and guarantee their rights.

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Presidency of the Council of the EU, Draft Resolution of the Council on a roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings, Brussels, 31 July 2009, document No. 12531/09, DROIPEN 78, COPEN 150.

[7] Resolution of the Council of 30th of November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings. Official journal of the European Union C 295/I, of 4.12.2009.

5. The 1999 Tampere European Council concluded that, in the context of implementing the principle of mutual recognition, work should also be launched on those aspects of procedural law on which common minimum standards are considered necessary in order to facilitate the application of the principle of mutual recognition, respecting the fundamental legal principles of Member States (Conclusion 37).

Also, the 2004 Hague Programme states that further realisation of mutual recognition as the cornerstone of judicial cooperation implies the development of equivalent standards of procedural rights in criminal proceedings, based on studies of the existing level of safeguards in Member States and with due respect for their legal traditions (point III 3.3.1.). In this light the European Commission observes that strengthening the rights of defence is vital in order to maintain mutual trust between the Member States and public confidence in the European Union.

6. To improve procedural rights of suspected and accused persons is required a step-by-step approach, ensuring overall consistency addressing a pack of future actions, while paying attention to each individual measure, so as to enable problems to be identified and addressed in a way that will give added value to each measure.

The annex of the Roadmap identifies a series of measures to be taken as the basis for future actions around six main areas in which legislative or other initiatives are desirable, each of them is accompanied by a short explanation which places us right into the Council's interpretation and understanding regarding each situation and identified needs.

A.- Translation and interpretation;

The suspected or accused person must be able to understand what is happening and to make him/herself understood. If he or she does not speak or understand the language that is used in the proceedings will need an interpreter and translation of essential procedural documents. Particular attention should also be paid to the needs of suspected or accused persons with hearing impediments.

B.- Information on rights and information about charges;

A person that is suspected or accused of a crime should get information on his/her basic rights orally or, where appropriate, in writing, e.g. by way of a Letter of Rights. Furthermore, that person should also receive information promptly about the nature and cause of the accusation against him or her. A person who has been charged should be entitled, at the appropriate time, to the information necessary for the preparation of his or her defence, it being understood that this should not prejudice the due course of the criminal proceedings.

C.- Legal advice and legal aid;

The right to legal advice (through a legal counsel) for the suspected or accused person in criminal proceedings at the earliest appropriate stage of such proceedings is fundamental in order to safeguard the fairness of the proceedings; the right to legal aid should ensure effective access to the aforementioned right to legal advice.

D.- Communication with relatives, employers and consular authorities;

A suspected or accused person who is deprived of his or her liberty shall be promptly informed of the right to have at least one person, such as a relative or employer, informed of the deprivation of liberty, it being understood that this should not prejudice the due course of the criminal proceedings. In addition, a suspected or accused person who is deprived of his or her liberty in a State other than his or her own shall be informed of the right to have the competent consular authorities informed of the deprivation of liberty.

E.- Special safeguards for suspected or accused persons who are vulnerable;

In order to safeguard the fairness of the proceedings, it is important that special attention is shown to suspected or accused persons who cannot understand or follow the content or the meaning of the proceedings, owing, for example, to their age, mental or physical condition.

F.- Pre-trial detention.

The time that a person can spend in detention before being tried in court and during the court proceedings varies considerably between the Member States. Excessively long periods of pre-trial detention are detrimental for the individual, can prejudice the judicial cooperation between the Member States and do not represent the values for which the European Union stands. Appropriate measures in this context should be examined in a Green Paper.

The so-called Stockholm Programme, provided a roadmap for European Union in the area of Freedom Security and Justice for the years 2010-14[8], and incorporated point 2.4 devoted to the Rights of the individual in criminal proceedings, in which it was stated that "The protection of the rights of suspected and accused persons in 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."

[8] The Stockholm Programme – An open and secure Europe serving and protecting citizens. Official Journal of the European Union C 115/1 of 4.5.2010.

The European Council welcomed the adoption of the Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings, which was bound to strengthen the rights of the individual in criminal proceedings when fully implemented and invited the Commission to put forward the foreseen proposals in the Roadmap for its swift implementation, to examine further elements of minimum procedural rights for suspected and accused persons, and to assess whether other issues, for instance the presumption of innocence, needs to be addressed, to promote better cooperation in this area.

In October 2010, Parliament and the Council adopted Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings[9]. In May 2012, Parliament and the Council adopted Directive 2012/13/EU[10] on the right to information in criminal proceedings (the so-called 'letter of rights'). In October 2013, Parliament and the Council adopted Directive 2013/48/EU[11] on the right to have access to a lawyer in criminal proceedings and the right to communicate upon arrest.

In June 2011, the European Commission published a Green Paper on the application of EU criminal justice legislation in the field of detention[12]. In December 2011, Parliament adopted a resolution calling for common EU standards for conditions of detention. On 27 November 2013, the Commission presented a package of legislative proposals in order to complete the roadmap on procedural safeguards. The three directives provide for reinforced measures on the presumption of innocence and the right to be present at trial, special safeguards for children suspected or accused in criminal proceedings, and provisional legal aid for suspects and accused persons.

### 1.3 Current situation in some Member States of the European Union

*Spain*

There has been a very recent reform modifying the Criminal Procedural Code, implementing the requisites derived from the Directives 2010/64/EU and 2012/13/EU. The so called Organic Act 5/2015, of 27 of April, modified the Criminal Procedural Act and the Organic Act 6/1985, of 1 of July, on the Judiciary Power.

[9] Directive 2010/64/EU of the European Parliament and the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings. Official Journal of the European Union L 280/1 of 26.10.2010.
[10] Directive 2012/13/EU of the European Parliament and the Council of 22 May 2012 on the right to information in criminal proceedings. Official Journal of the European Union L 142/1 of 1.6.2012.
[11] Directive 2013/48/EU of the European Parliament and the Council of 22 October 2013 on the right to have access to a lawyer in criminal proceedings and the right to communicate upon arrest. Official Journal of the European Union L 294/1 of 6.11.2013.
[12] Strengthening mutual trust in the European judicial area – A Green Paper on the application of EU criminal justice legislation in the field of detention. Brussels 14.6.2011 (COM) 2011 327 final

Meanwhile, as for the Directive 2013/48/EU the current situation in Spain does cover great part of the rights the Directive foresees.

Criminal procedural Code excerpt.

Rights of the accused or suspected person.

Article. 118 Right of defence from the moment the person becomes suspected or accused of having committed a crime.

Lawyer and solicitor required to exercise such a right ( Legal Aid )

Appointed ex officio is the person is under arrest.

Right to be informed according to 2012/13/EU Directive.

Article 123. Right to interpretation and translation, including sign language; can be performed via video conferencing.

Article 124, listed interpreters

Article 126 waivers' requisites.

Article 127, impaired people requirement.

Article 416, confidentiality.

Article 302, parties in criminal proceedings are entitled to gain access to the materials of the case, except in the case the file has been declare reserved ( maximum for one month )

Rights of the person deprived of liberty.

Article 505, right of the suspected or accused lawyer to get access to file documents.

Article 506. If the proceedings are under the sub iudice rule the remand order shall be notified to the person sent to prison with the grounds of such a decision depriving him of liberty, once the reserve is lifted the whole decision shall be notified.

Article 509. Incommunication of the detainee or person in pre-trial custody under exceptional circumstances for the time strictly necessary maximum five days.

Article. 520.

Detention and pre-trial custody.

- 72 hours to get the detainee in front of the Judge or release him/her.

- Information on the rights:

a. Remain silent and not to declare against himself.

b. Not to plead guilty.

c. Nominate a lawyer and request his presence investigating activities either at police or judicial level

d. Notify his detention to a third person ( and Consulate if foreigners)

e. Assistance of an interpreter.

f. Exam by a forensic doctor

Juvenile or impaired person, notifications to his legal representative and if not found or known, to the Public Prosecutor.

Lawyer to assist the arrested person within 8 hours.

Lawyer assistance:

- Request info on detainee rights and their observance.

- To raise points and questions

- To hold a private interview at the end of the questioning.

Article 520 bis. Terrorism cases.

Extension of detention period ( extra 48 hours upon Judicial resolution)

Article 523. Detainee assisted by a minister of his religion, doctor, or visited by relatives, provided it doesn't prejudice investigation

Article 524. Investigating Judge may allow the detainee to have correspondence or use means of communication.

Article 527. The person under arrest or pre-trial custody while incommunicado shall not benefit from this chapter's rights except those included in Article 520 with the following modifications:

a) A public defence counsel shall be appointed.

b) The right to interview his lawyer shall be derogated.

Article 569. Searching of a house or private dwelling or places shall be performed in the presence of the suspected or accused person or his legal representative.

*United Kingdom*

Directive 2010/64 was implemented in England and Wales on the 27th October 2013. The Criminal Procedure Rules [ part 3, rule 3.9 (5),and part 5, rule 5.4] deal with how the change was implemented.

The directive was implemented in Scotland by the Right to Interpretation and Translation in Criminal Proceedings(Scotland) Regulations 2013, which were implemented on 19th May 2014.

Directive 2013/48. The United Kingdom has not opted into this directive. However, any detainee in a police station in the UK already has a right to free and independent legal advice and has been since the Police and Criminal Evidence Act 1984.

*Germany*

Directives 2010/64 and 2012/13 are already implemented into German Law via an amendment of the existing laws. The implementing "Gesetz zur Stärkung der Verfahrensrechte von Beschuldigten im Strafverfahren" ('Law to enhance the rights of the accused in criminal proceedings') came into force on 6 July 2013 and changed §§ 187 and 189 GVG (Courts Constitution Act) and §§ 37, 114b, 136, 163a and 168b StPO (Criminal Procedure Code).

An English version of the Courts Constitution Act can be found on the Internet: http://www.gesetze-im-internet.de/englisch_gvg/index.html.

The Criminal Procedure Code: http://www.gesetze-im-internet.de/englisch_stpo/index.html.
The Directive 2013/48 has not been implemented yet.

*Finland*

Directive 2010/64 was implemented with amendments to several criminal procedure acts (amendment acts are legislation numbers 769-780/2013) and they came into force either 01.12.13 or 01.01.14.

Directive 2012/13 was likewise implemented with amendments to existing criminal procedure acts (numbers 818-825/2014) and they came into force 01.12.14.

Directive 2013/48 is not implemented yet and actually Finland's legislation already provides for legal assistance in criminal and EAW-proceedings.

Criminal Procedure Act ( English version ): http://www.finlex.fi/fi/laki/kaannokset/1997/en19970689.pdf

Criminal Investigations Act (Eng.): http://www.finlex.fi/fi/laki/kaannokset/2011/en20110805.pdf

On the right for interpretation and translation in criminal proceedings a new chapter was added to the Criminal Procedure Act (Chapter 6 A).

Chapter 6 A.

Section 2

(3) Other than Finnish-, Swedish- or Sami-speaking suspect or injured party has a right to have free interpretation during the criminal proceedings. The court must ex officio see to [this].

Section 3

Other than Finnish, Swedish or Sami-speaking suspect must be given within reasonable time a free written translation of the summons and the judgement. ... Other than Finnish, Swedish or Sami-speaking injured party must be given within reasonable time a free written translation of the judgement.

(4) The court must see to it that the suspect gets adequate information on his/her right for translation. ...

On information in Criminal proceedings there are some provisions in the Criminal Investigations Act, for example.

Chapter 4.

Section 12

(4) Persons other than those speaking Finnish, Swedish or Sami have the right in the criminal investigation to use a language that they understand and speak sufficiently, and persons using sign language have the right to use this.

The criminal investigation authority shall ensure interpretation or obtain an interpreter at State expense.

The criminal investigation authority shall ascertain whether or not the party needs interpretation.

The criminal authority shall ensure that the party receives the interpretation that he or she needs.

A person who has the skills required for the task, is honest and is otherwise suitable for the task may serve as interpreter. The criminal investigation authority shall appoint a new interpreter if legal safeguards for the party require this. The criminal investigation authority may appoint a new interpreter for the task also for another weighty reason.

Section 13 – Translation of a document (770/2013)

(1) A document or a portion thereof that is part of the criminal investigation documentation and that is essential from the point of view of the matter shall be translated in writing within a reasonable period into the language of the party referred to in section 12, if translation is necessary to ensure the right of the party.

(2) Notwithstanding the provisions in subsection 1, an essential document or a part or summary thereof may be translated verbally for a party, unless legal safeguards for the party require that the document be translated in writing.

(3) The criminal investigation authority shall ensure that the party receives sufficient knowledge of his or her right to translation of a document and if necessary shall ascertain whether the party wants the translation of a document referred to in this section. A party need not be provided with a translation of a document if the party waives his or her right to a translation.

(4) The translation referred to in this section is done at the expense of the state, unless the pre-trial investigation authority itself attends to the translation. A person who has the skills required for the task, is honest and is otherwise suitable for the task may serve as translator. The criminal investigation authority shall appoint a new translator if legal safeguards for the party require this. The criminal investigation authority may appoint a new translator for the task also for another weighty reason.

On free legal counseling Criminal Procedure Act states:

Chapter 2 — Counsel (107/1998)

Section 1 (107/1998)

(1) A person suspected of an offence has the right to self take care of his/her defence in criminal investigations and in a trial.

(2) On the request of the suspect, a defence counsel is to be appointed for him/her, if:

- he/she is suspected of or charged with an offence punishable by no less than imprisonment for four months or an attempt of or participation in such an offence; or

- he/she is under arrest or in detention.

A defence counsel is to be appointed to a suspect ex officio, when:

- the suspect is incapable of defending himself/herself;
- the suspect, who has not retained a defence counsel, is under 18 years of age, unless it is obvious that he/she has no need of a defence counsel;
- the defence counsel retained by the suspect does not meet the qualifications required of a defence counsel or is incapable of defending the suspect; or
- there is another special reason for the same.

*France*

Loi n° 2013-711 du 5 août 2013 portant diverses dispositions d'adaptation dans le domaine de la justice en application du droit de l'Union européenne et des engagements internationaux de la France.

http://www.legifrance.gouv.fr/affichLoiPubliee.do;jsessionid=906D95F688E88D433844543EB75A3C60.tpdjo13v_2?idDocument=JORFDOLE000027091970&type=expose&typeLoi=&legislature=

## Section 2 - The principle of mutual trust under the case law of the Court of Justice of the EU

Tomasz Ostropolski[13]

## 2.1 Introduction

The principle of mutual trust is often invoked in the context of judicial cooperation in criminal matters, however its normative contents does not appear crystal clear for the practitioners. This may bring about concerns, especially when it comes to reconciliation of requirements of smooth cooperation between judicial authorities from different Member States with procedural rights of persons involved in the criminal proceedings. The letter of legal instruments does not bring direct answers in this regard, and it is rather the judicial practice which was supposed to find solutions to emerging problems.

The principle of mutual trust came as a novelty compared to mechanisms inherent in traditional methods of international cooperation, to a large extent based on a discretionary assessment. Things have changed with the introduction of the principle of mutual recognition, advanced by means of political impulses provided by the European Council gathered in 1998 in Cardiff and Tampere[14]. However, the concept of mutual trust only emerged some time later. The Programme of measures to implement the principle of mutual recognition of decisions in criminal matters provided that:

> "Implementation of the principle of mutual recognition of decisions in criminal matters presupposes that Member States have trust in each others' criminal justice systems. That trust is grounded, in particular, on their shared commitment to the principles of freedom, democracy and respect for human rights, fundamental freedoms and the rule of law[15]."

Yet, for a long time, neither a concept of mutual trust, nor mutual recognition, had been anchored in a binding Treaty (the Constitutional Treaty being an unsuccessful attempt[16]) and found their normative bases only in acts of secondary law, where, in fact, mutual trust was only mentioned in preambles[17]. There was also no uniform approach to

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[14] See more: H. Nilsson, Mutual trust or mutual distrust? [in:] G. de Kerchove, A. Weyembergh (ed.), La confiance mutuelle dans l'espace pénal européen, Bruxelles 2005, p. 29.

[15] OJ C 12/10, 15.1.2001

[16] See Article I-42 of the Constitutional Treaty which was not copied in its entirety in the Treaty on Functioning of the European Union. In the latter „mutual trust" no longer accompanied „mutual recognition" in formulations contained in Articles 67 and 82.

[17] See Framework Decision 2002/584/JHA, recital 10, Framework Decision 2003/577/JHA, recital 4, Framework Decision 2006/783/HA, recital 9, Framework Decision 2008/909/JHA, recital 5. Mutual trust is also more regularly mentioned in post-Lisbon directives, see: Directive 2010/64/EU, recital 3,4,6,7,9,12, Directive2012/13/EU, recital 3,4,7, Directive 2013/48/EU, recital 4,5,6,8, Directive 2014/41/UE, recital 19.

mutual trust in the doctrine. The authors speculated if mutual trust is a pre-condition or a consequence of mutual recognition, if the first is about a relation between the Member States or only judicial authorities, and what are the core values constituting mutual trust[18]. A distinction was also made between formal trust (based in particular on membership of all the EU Member States in the ECHR) and trust in concreto (substantive trust)[19]. It was therefore of paramount importance to consolidate this concept in authoritative judicial practice, in particular that of the Court of Justice of the European Union (CJEU).

The actual meaning of mutual trust was first to be exposed by CJEU in the context of ne bis in idem rule. Later on, it was tested in practice in a mutual recognition setting, where the initial wave of enthusiasm was withheld by upcoming difficulties with European Arrest Warrants (EAW). A fairly recent challenge came from the need to reconcile the possibly overlapping jurisdictions of ECtHR and CJEU, in light of specificities of EU law, among which mutual trust featured prominently.

This paper looks into the position that CJEU has taken throughout these developments and provides examples of how practical problems have been solved in the background of the principle of mutual trust. The appendix contains references to the principle of mutual trust, as interpreted in the case law of the Polish Constitutional Tribunal and the Supreme Court.

### 2.2 Mutual trust in light of *ne bis in idem* rule

Although mutual trust was brought to a dictionary of EU law in order to to support mutual recognition, the first related challenges came to light in a remarkably different context, that of ne bis in idem rule. A prohibition of double jeopardy had been long present in international conventions[20] before it came up in the EU realm in one of the founding acts preceding the birth of the III pillar, that is Convention implementing Agreement on the gradual abolition of checks at their common borders, signed in Schengen on 14 June 1985, between Benelux, Germany and France (CISA), later integrated into the EU framework by the Treaty of Amsterdam.

[18] D. Flore, La notion de confiance mutuelle: l'alpha ou l'oméga d'une justice pénale européenne? [in:] G. de Kerchove, A. Weyembergh (ed.), La confiance mutuelle..., p. 17.
[19] J. Ouwerkerk [in:] Meijers Committee, Mutual Trust in European Asylum, Migration and Criminal. Reconciling Trust and Fundamental Rights, Utrecht 2011, p. 5.
[20] See in particular: Article 14 (7) of International Covenant on Civil and Political Rights and Article 4 of Protocol 7 to the European Convention of Human Rights and Fundamental Freedoms.

CISA was conceived to constitute one of the so-called compensating measures with the aim to remedy negative consequences of the free movement of persons. The underlying assumption was that the abolition of internal borders could facilitate transnational criminality and give rise to complex cross-border cases requiring closer judicial cooperation in order to determine the forum and nature of penal reaction.

The first joined cases (C-187/01 and C-385/01 Gözütok and Brügge) in which the Court gave its ruling against this background resulted from preliminary questions referred by German and Belgium courts. The key issue was to determine whether ne bis in idem effect is triggered in a procedure by which the prosecuting authority decides to discontinue criminal proceedings against an accused once he has fulfilled certain obligations and, in particular, has paid a certain sum of money determined by the prosecuting authority, given that no court was involved in such a procedure.

Despite a number of contrary interventions from Member States[21], the Court firmly replied that ne bis in idem rule does apply in such situations. This answer was underpinned by a famous statement:

> "(…) there is a necessary implication that the Member States have mutual trust in their criminal justice systems and that each of them recognises the criminal law in force in the other Member States even when the outcome would be different if its own national law were applied"[22].

The reasoning of the Court showed that it took mutual trust for granted and made it a self-standing concept while sidelining attempts to make it a mere function of a level of similarities between national legal systems. In this perspective, mutual trust was not subordinated to approximation of substantive and procedural law but rather made equivalent to a presumption, more or less absolute[23].

Remarkably enough, the Court did not go to lengths to refer itself to membership of the Member States in ECHR to substantiate its claim. The overriding argument was rather that Article 54 CISA dating back to 1990 had to be interpreted in light of further developments, notably the Treaty of Amsterdam, where, in Article 2, the EU set itself the objective of maintaining and developing the Union as an area of freedom, security and justice in which the free movement

[21] Point 41.
[22] Point 33.
[23] O. De Schutter, La contribution du contrôle juridictionnel à la confiance mutuelle [in:] G. de Kerchove, A. Weyembergh (ed.), La confiance mutuelle dans l'espace pénal européen, Bruxelles 2005, p. 102.

of persons is assured. According to the Court the ne bis in idem can "play a useful role in bringing about the full attainment of that objective"[24].

In its judgments relating to other aspects of ne bis in idem, the Court confirmed and broadened its understanding of the objective and scope of mutual trust which was then systematically and expressly mentioned by CJEU as the major component in building AFSJ. This embraced:

- definition of idem, as the identity of the material acts understood as the existence of a set of facts which are inextricably linked together, irrespective of the legal classification given to them or the legal interest protected[25],
- temporal scope of CISA, which should be applied for acts for which a person has already been convicted, even though the Convention was not yet in force in the state of conviction, in so far as the Convention was in force at the time of the assessment in the state in which the second proceedings were brought[26],
- proceedings by which the accused is acquitted finally because prosecution of the offence is time-barred[27],
- situations where the sentence imposed could never, on account of specific features of procedure, have been directly enforced[28].

Moreover, in one of its subsequent rulings (C-261/09 Mantello), CJEU confirmed that the interpretation given to the notion of "same acts" in CISA must be equally applied to the provisions of FD EAW (for the purpose of refusing EAW based on article 3 (2), i.e. ne bis in idem). In all the above cases mutual trust, was quoted expressly as a key factor in determining the ne bis in idem effect.

The position of CJEU was slightly different in case C-129/14 PPU Spasic, where it concluded that a clause contained in Article 54 CISA which subjects ne bis in idem to additional conditions regarding the enforcement of penalty is fully compatible with the Charter (despite the absence of "enforcement" exception in Article 50 CFR). This judgment met with some criticism on the basis that the Court "could have lost its faith in mutual recognition and mutual trust, which so far played an eminent role"[29]. The undersigned does not share this criticism and believes that this ruling does not stand in

[24] Point 38.
[25] Case C-150/05, van Straaten, see references to mutual trust in point 43.
[26] C-436/04 Van Esbroeck, see references to mutual trust in point 30.
[27] C-467/04 Gasparini, see references to mutual trust in point 30.
[28] C-297/07 Bourquain, see references to mutual trust in point 37.
[29] See: M. Wasmeier, Ne bis in idem and the Enforcement Condition: Balancing Freedom, Security and Justice? , NJECL volume 5, 2014, 04, p. 549.

the way of previous jurisprudence of the CJEU. Notably, there is no indication that the Court would refuse to recognize legal consequences of a foreign judgment for the purpose of ne bis in idem. The background of this decision was evidently different and aimed to reconcile the level of standards protected by CFR with the need for avoiding impunity. Thus, the Court has managed to confirm the scope of derogations, as set up by Article 54 CISA, without encroaching on the core of its previous jurisprudence (i.e. free movement of persons underpinned by recognition of foreign judicial decisions).

In sum, the limitations set up by CJEU to ne bis in idem effect were in fact quite narrow. Only in case C-469/03 Miraglia, the Court refused to recognize transnational legal consequences of a foreign decision on the basis that the public prosecutor has decided not to pursue the prosecution on the sole ground that criminal proceedings have been started in another Member State, without any determination as to the merits of the case. Indeed, this was quite logical, since any different judgment would run counter to the objective that the principle ne bis in idem seeks to defend.

The overall jurisprudence of the Court related to ne bis in idem has been built on a presumption of mutual trust. The position of CJEU appeared to be quite visionary and set the tone of development of judicial cooperation in criminal matters, where low progress of establishing common minimum standards could not be raised as an obstacle, given that the Court refused to make a link between the two. The side effect of the attachment of the Court to mutual trust was that, in spite of contrary efforts[30], it could have discouraged the European legislator to pursue approximation measures more vigorously. Since the Court said that the existing differences may have no bearing on recognition of legal effects of foreign judgments (for the purpose of ne bis in idem), there was no particular motivation to bring national laws closer.

### 2.3 Mutual trust and instruments of mutual recognition

As demonstrated above, mutual trust was first voiced by the Court as a component determining the scope of ne bis in idem rule in realities of free movement of persons. Only some time later, the Court seized opportunity to develop it

[30] See e.g. the Commission Communication: Towards an EU Criminal Policy: Ensuring the effective implementation of EU policies through criminal law (COM(2011) 573 final), where it asserted that: "Strengthening mutual trust Common minimum rules in certain crime areas are also essential to enhance the mutual trust between Member States and the national judiciaries. This high level of trust is indispensable for smooth cooperation among the judiciary in different Member States. The principle of mutual recognition of judicial measures, which is the cornerstone of judicial cooperation in criminal matters, can only work effectively on this basis."

in new contexts, after it started receiving first preliminary questions relating to the core of judicial cooperation in criminal matters, that is mutual recognition, and its flagship instrument – European Arrest Warrant.

Its first landmark question was referred by the Belgian Court of Arbitration in case C-303/05 - Advocaten voor de Wereld, where it had to rule on the annulment of national law implementing FD EAW. The Belgian court wanted to know if FD EAW was consistent with the Treaty insofar as a legal basis for approximation of law, principle of legality and principle of equality and non-discrimination were concerned. Arguments were raised that approximation may have wrongly taken place in an area that was not mentioned in Article 31(1)(e) Treaty on European Union (Amsterdam version), that the offences excluded from the requirement of double criminality may have not been defined in FD EAW in a clear and precise way and that persons suspected of committing those offences may have unfairly received a different treatment since verification of double criminality did not apply.

CJEU responded negatively to all those allegations. The view of the Court concerning double criminality deserves special attention. With regard to the 32 categories of offences it quoted an opinion of the Council which:

> " (…) was able to form the view, on the basis of the principle of mutual recognition and in the light of the high degree of trust and solidarity between the Member States, that, whether by reason of their inherent nature or by reason of the punishment incurred of a maximum of at least three years, the categories of offences in question feature among those the seriousness of which in terms of adversely affecting public order and public safety justifies dispensing with the verification of double criminality"[31].

That statement allowed CJEU to conclude that the differentiation made in FD EAW was objectively justified and, as such, did not infringe the principle of equality.

The Court sticked to this approach in its subsequent judgments interpreting FD EAW. In case C-192/12 PPU West CJEU decided that where a person has been subject to more than one surrender between member states pursuant to successive EAWs, the subsequent surrender of that person to a Member State other than the Member State having last surrendered him is subject to the consent only of the one which carried out that last surrender. In its reasoning the Court invoked several times mutual confidence in order to support the way of interpretation of FD EAW which would

[31] Point 57.

facilitate the surrender of requested person, in accordance with the principle of mutual recognition and the objective of the EU to become AFSJ[32].

A more recent line of jurisprudence of CJEU touched upon the core controversies around EAW which emerged at a later stage. Firstly, according to its detractors, the entire EAW scheme catered for the needs of investigating authorities while neglecting procedural rights of persons being a subject of EAW (also given that there was no EU acquis on procedural safeguards in place at that time). The second line of criticism developed along the principle of proportionality. It was claimed that some EAWs were issued to prosecute allegedly petty offences with the high costs that this procedure involved and the risk to procedural standards[33]. As a consequence, an argument was raised that an actual level of trust between the Member States is not as high as initially assumed[34].

A growing number of critical voices gave rise to a debate where the very essence of mutual trust was put into question. Some authors openly argued that:

> „(…) the next generation of the EU's criminal justice cooperation and the EAW need to recognise and acknowledge that the mutual trust premise upon which the European system has been built so far is no longer viable without devising new EU policy stakeholders' structures and evaluation mechanisms"[35].

Meanwhile, CJEU made a first breach in otherwise inviolable concept of mutual trust. This was done in an asylum case (N. S. and Others, C-411/10 and C-493/10) where it ruled that the Member States cannot automatically rely on mutual trust that their partners will observe human rights. The case concerned application of the so-called Dublin Regulation (343/2003) under systemic failures of the Greek asylum facilities. While addressing mutual confidence and a presumption of compliance, by other Member States, with fundamental rights, the Court felt obliged to alarm that "at issue here is the raison d'être of the European Union"[36]. However, it finally admitted that:

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[32] Points 53, 62.
[33] See. T. Ostropolski. The Principle Of Proportionality Under the European Arrest Warrant – with an Excursus on Poland, NJECL, Volume 5, Issue 2, 2014, p. 167, K. Weis, The European Arrest Warrant – A Victim of Its Own Success?, NJECL Volume 2, Issue 2, 2011, p. 124.

[34] See J. Ouwerkerk, Mutual Trust…, p. 41.
[35] S. Carrera, E. Guild, N. Hernanz, Europe's Most Wanted? Recalibrating Trust in the European Arrest Warrant System, CEPS Special Report, No. 76, March 2013, p. 1.
[36] Point 83.

"If there are substantial grounds for believing that there are systemic flaws in the asylum procedure and reception conditions for asylum applicants in the Member State responsible, resulting in inhuman or degrading treatment, within the meaning of Article 4 of the Charter, of asylum seekers transferred to the territory of that Member State, the transfer would be incompatible with that provision.[37]".

This led some authors to assume that this judgment will be then applied by analogy to EAW[38]. Moreover, certain national courts, rather than tacitly pre-supposing mutual trust, started to raise concerns more vocally and referred preliminary questions to CJEU, notably on issues of proportionality and fundamental rights.

One of these rulings concerned a possibility for an appeal procedure suspending execution of a decision of a judicial authority issued pursuant to FD EAW and the time limits applicable in the light of such an appeal (C-168/13 PPU Jeremy F. v. Premier Ministre). CJEU decided again that:

"The principle of mutual recognition on which EAW system is based is itself founded on the mutual confidence between the Member States that their national legal systems are capable of providing equivalent and effective protection of the fundamental rights recognised at European Union level, particularly in the Charter, so that it is therefore within the legal system of the issuing Member State that persons who are the subject of EAW can avail themselves of any remedies which allow the lawfulness of the criminal proceedings for the enforcement of the custodial sentence or detention order, or indeed the substantive criminal proceedings which led to that sentence or order, to be contested"[39].

More vivid controversies were raised by a Romanian court of appeal in case C-396/11 Radu. The national court asked CJEU, inter alia, whether an executing Member State may refuse to execute EAW where to do so would risk infringing, the requested person's rights under ECHR and CFR.

This problem had been long present in the debate on EAW scheme. The fact of the matter was that fundamental rights' violations were not expressly mentioned in FD EAW as a potential bar to surrendering a person. Such silence has

[37] Point 86.
[38] See: S. Peers, Court of Justice: The NS and ME Opinions - The Death of "Mutual Trust"? Available at: http://www.statewatch.org/analyses/no-148-dublin-mutual-trust.pdf.
[39] Point 50.

been subject to diverse interpretations[40]. Some legislators and courts have tried to use Article 1 (3) or recital 12 as an (indirect) ground for refusal which, to some extent, was tacitly endorsed even by the Commission[41]. However, this view had never been legitimised by CJEU.

The opinion of Advocate General (AG) Sharpston given in case Radu might have heralded a watershed in an approach of CJEU to the scope of mutual trust. Remarkably enough, AG did not exclude a possibility to refuse to execute EAW based on the alleged infringement of fundamental rights and provided extensive reasoning why a mere reference to grounds of refusal expressly mentioned in EAW would not be sufficient. She quoted examples of the test which was used by ECtHR in extradition cases to assess whether the risk of infringement Article 3 ECHR should not be a bar to extradition[42]. Accordingly, in her view, it should be exceptionally allowed to refuse to transfer a requested person under EAW, under a test even less stringent to that applied by ECtHR, that is where deficiencies in the trial process are such as to fundamentally destroy its fairness (albeit onus should be on the requested person)[43].

Even so, the position the Grand Chamber was different. The Court did not follow the path set out in the AG opinion and decided to embark on its well-established line of jurisprudence. Once again, it recalled that an establishment of a new simplified and more effective system for the surrender of persons under EAW seeks to contribute to the objective set for the EU to become AFSJ by basing itself on the high degree of confidence which should exist between the Member States[44].

In its ruling CJEU quoted safeguards expressly referred to in FD EAW and asserted that the executing judicial authorities cannot refuse to execute a EAW on the ground that the requested person was not heard in the issuing Member State before that arrest warrant was issued. By the same token, it confirmed that the Member States may refuse to execute such a warrant only in the cases of mandatory non-execution provided for in Article 3 FD EAW and in the cases of optional non-execution listed in Articles 4 and 4a[45].

[40] See: A. Weyembergh, Critical Assessment of the Existing FD EAW, p. I–8, Brussels 2014, available at http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/510979/IPOL-JOIN _ET(2013)510979(ANN01)_EN.pdf.
[41] See Implementation report from the Commission COM (2011) 175.
[42] Case 38411/02, Garabayev v. Russia
[43] Point 83.
[44] Point 34.
[45] Point 36, 42.

Much as this judgment was received with disappointment by some authors[46] it showed the determination of the Court to continue to consider mutual trust as the guiding principle of the entire judicial cooperation in criminal matters.

A related issue was referred to CJEU by the Spanish Constitutional Court in case C-399/11 Melloni, which asked, inter alia, whether Article 53 CFR allows the executing Member State to make the surrender of a person convicted in absentia subject to the condition that there can be a retrial in the issuing Member State, given that the safeguards relating to judgments in absentia are higher in the Spanish constitution that in Article 4a FD EAW. The Spanish court argued that Article 53 CFR allows Member States to apply higher standards of protection and, thus, to halt the application of a provision of Union law, even if it fully complies with CFR, in order to avoid any decrease in the protection of fundamental rights guaranteed by the national constitution.

The Court firmly rejected this interpretation and decided to stand continuously by its previous line. It insisted that:

> " (…) allowing a Member State to avail itself of Article 53 of the Charter to make the surrender of a person convicted in absentia conditional upon the conviction being open to review in the issuing Member State, a possibility not provided for under Framework Decision 2009/299, in order to avoid an adverse effect on the right to a fair trial and the rights of the defence guaranteed by the constitution of the executing Member State, by casting doubt on the uniformity of the standard of protection of fundamental rights as defined in that framework decision, would undermine the principles of mutual trust and recognition which that decision purports to uphold and would, therefore, compromise the efficacy of that framework decision"[47].

As such, the Melloni judgment can be considered as a return to the roots of the founding pillars of CJEU jurisprudence under Community framework where it recognized that "the validity of a Community measure or its effects within a Member State cannot be affected by allegations that it runs counter to (…) fundamental rights as formulated by the constitution of that state[48]." A similar statement might have required more courage from the Court when put in the context of AFSJ, being a field more sensitive to observance of fundamental rights, where the position of CJEU might provoke accusations of the "race to the bottom"[49] (not to mention reviving tensions with national constitutional courts). Yet, CJEU apparently believed that mutual trust is worth further investments in its jurisprudence, since giving way to

[46] See: M. Ventrella, European Integration or Democracy Disintegration in Measures Concerning Police and Judicial Cooperation? NJECL, Volume 4, Issue 3, 2013, p. 300, S. Carrera, E. Guild, N. Hernanz, Europe's Most Wanted?..., p.23.
[47] Point 63.
[48] 11/70 Internationale Handelsgesellschaft.
[49] A. Tinsley, Note on the Reference in Case C-399/11 Melloni, NJECL Volume 3, Issue 1, p. 19.

exceptions might undermine the still fragile foundations of AFSJ with its (not too many) evident success stories, such as the EAW scheme.

This approach was confirmed in a more recent judgment in the case C-27/15 PPU Lanigan. The case concerned EAW issued in December 2012 by the British authorities in respect of Francis Lanigan. The Irish High Court was not able to begin examination of Mr Lanigan's situation until 30 June 2014, following a series of adjournments resulting from procedural incidents. The examination of the case thus continued until Mr Lanigan submitted, in December 2014, that the fact that the time-limits laid down in FD EAW within which a decision on the execution of EAW is to be taken (namely, 60 days after the arrest, with a possible extension of an additional 30 days) meant that proceedings could not be continued. The High Court asked the CJEU whether the failure to observe those time-limits precludes it from taking a decision on the execution of EAW and whether Mr Lanigan may be held in custody even though the total duration of the period he has spent in custody exceeds those time-limits.

The CJEU started its ruling with its usual statement providing that FD EAW is founded on the high level of confidence which should exist between the Member States[50]. It considered that the national authorities are required to continue the execution procedure for the warrant and to take a decision on its execution, even where the time-limits prescribed have expired. To abandon the procedure in cases where the time-limits have expired would adversely affect the objective of accelerating and simplifying judicial cooperation and encourage delaying tactics. As regards the holding of the person in custody, the Court considered that no provision of FD EAW provides that the person being held in custody must be released once the time-limits have expired. Moreover, in so far as the procedure for the execution of EAW must be continued after the expiry of the time-limits, a general and unconditional obligation to release the person upon expiry of the time-limits could limit the effectiveness of the surrender system put in place by FD EAW and, consequently, obstruct the attainment of the objectives pursued by it.

Nonetheless, the Court noted that FD EAW must be interpreted in accordance with the Charter of Fundamental Rights and, in particular, the fundamental right to liberty and security. In that regard, the Court considered that a person held on the basis of EAW awaiting release can be held in custody only in so far the total duration of his custody is not excessive. In order to ensure this is not the case, the executing judicial authority (in this instance, the High Court) will be required to carry out a concrete review of the situation at issue, taking account of all of the relevant factors with a view to evaluating the justification for the duration of the procedure (including the possible failure to act on the part of the

[50] Point 28.

authorities of the Member States concerned or any contribution of the requested person to that duration). Similarly, it will be required to take account of the sentence potentially faced by the requested person or delivered in his regard, the risk of that person absconding and the fact that the requested person has been held in custody for a period the total of which greatly exceeds the time-limits stipulated in FD EAW on for the adoption of the decision on the execution of the warrant. The Court points out that if the executing judicial authority brings an end to the custody of the requested person, it is required, in accordance with FD EAW, to attach to the provisional release of that person any measures it deems necessary so as to prevent him from absconding and to ensure that the material conditions necessary for his surrender remain fulfilled for as long as no final decision on the execution of EAW has been taken. Therefore, even if its general statement on the non-absolute effect of the 100-day limit for the execution of EAW was mitigated by references to the Charter of Fundamental Rights, it is no doubt that the Court again gave primacy to mutual recognition and mutual trust over consideration of procedural safeguards.

**2.4 Institutional protection of mutual trust in light of accession of EU to ECHR**

Lastly, the defence of mutual trust was taken up by CJEU in its recent opinion 2/13 concerning accession of the EU to the ECHR. The Court gave prominence to the principle of mutual trust as one of the major characteristics of the Union law which does not allow to accept "regular" rules of jurisdiction of ECtHR, as outlined in the accession agreement submitted to CJEU. Quite remarkably, this argument was not be found either in the request for opinion referred to the Court by the Commission, or in the opinion of AG Kokott. Apparently, CJEU decided to advance its original idea to feature mutual trust as a key specificity of the Union law deserving institutional protection.

The point of departure for the reasoning of Court was a statement reaching out, inter alia, to Melloni judgment:

> „The principle of mutual trust between the Member States is of fundamental importance in EU law, given that it allows an area without internal borders to be created and maintained. That principle requires, particularly with regard to the area of freedom, security and justice, each of those States, save in exceptional circumstances, to consider all the other Member States to be complying with EU law and particularly with the fundamental rights recognised by EU law"[51].

The Court continued to deduce that when implementing EU law, Member States may be required under EU law both to presume that fundamental rights have been observed by the other Member States so that they may not demand a

[51] Point 191.

higher level of national protection of such rights by another Member State than that provided by EU law, as well as not to check whether that other State has actually observed such rights[52].

The failure of the draft Agreement to prevent the ECHR from requiring EU Member States to check one another's observance of fundamental rights, even though EU law imposes an obligation of mutual trust between those Member States, was indicated as of the reasons of the incompatibility of this Agreement with the Treaties. In view of the Court, a possible requirement of verification disregards the intrinsic nature of the EU[53].

It may be noted that the Court did not limit its statement on special position of mutual trust only to judicial cooperation in criminal matters. Indeed, it did not mention any specific field where it applies, however it did invoke its two previous rulings to support its reasoning (N. S. and Others, C-411/10 and C-493/10, Melloni, C-399/11). It may be inferred that the Court wished to restrict external control of ECtHR over the entire ASFJ, with no caveats concerning for example the field of asylum, where it had previously admitted infringements relating to fundamental rights (without, however, compromising mutual trust as a basic presumption).

**2.5 Conclusions**

CJEU presented itself as a promoter and defender of mutual trust throughout its jurisprudence in judicial cooperation in criminal matters. Its case-law provides a rich material for the practitioners, which consists in giving priority to mutual trust, as a governing principle, over speculations concerning procedural safeguards in individual cases.

The Court maintained this positive approach in spite of growing popular concerns, or even open criticism, towards EAW. The CJEU managed to provide interpretative potential of the principle of mutual trust, as a powerful component in promoting AFSJ, which was then particularly necessary in order to withhold a rising wave of opinions of mutual trust as an artificial and "imposed" phenomenon. The Court now requires that the Member States fully internalize the principle of mutual trust, as an inherent part of the legal order of the EU in a form of a self-standing presumption, not requiring any specific justification (although the gradual development of directives focused on procedural rights could have served as an additional argument).

Eventually, the Court may not be able to avoid certain nuancing while advancing mutual trust, at least in selected fields of AFSJ (as it has already done in asylum area). Nonetheless, its resolute defense merits recognition in a lingering

[52] Point 192.
[53] Point 193, 194

crisis around this concept, where CJEU remains of the few instances capable of saving AFSJ from eurosclerosis, similarly to how it helped to support the common market thanks to its judicial activism some decades ago.

APPENDIX

Selected case-law of the Polish Constitutional Tribunal and the Supreme Court relating to mutual trust (with comments of the author)

1. Judgment of the Constitutional Tribunal, 27 April 2005, P 1/05

The judgment was delivered following a reference made by the Regional Court which asked if surrendering a Polish citizen was acceptable in light of Article 55(1) of the Polish Constitution which provided in simple terms that the: "Extradition of a Polish citizen shall be prohibited". In effect, the Tribunal had to decide whether the term "extradition" covers also "surrender" on the basis of the FD EAW.

Although the Tribunal finally decided that the surrender of a Polish citizen was unconstitutional, its reasoning made obiter dicta merits close attention, since it proves its supportive attitude towards the principle of mutual recognition and the role that the EAW plays in this regard. In particular, it decided to make use of the possibility made under the Constitution to postpone the effects of the judgment until the lapse of 18 months from the date of its publication. It justified this measure not only by Article 9 of the Polish Constitution which imposes an obligation to respect international law binding upon the Republic of Poland, but also referred itself more specifically to the advantages of the EAW. It went as far as to underline that:

> "[t]he EAW is of major significance also for the proper functioning of the administration of justice in Poland, and above all for the strengthening of internal security, and therefore the assurance of its ability to function ought to constitute the highest priority for the Polish legislator judicial cooperation in criminal matters and a related high level of mutual trust between the Member States".

This judgment of the Tribunal subsequently resulted in an amendment introduced to Article 55 of the Polish Constitution, which removed a bar to surrendering Polish citizens under EAW[54].

2. Judgment of the Constitutional Tribunal, 5 October 2010, SK 26/08

In this case the Constitutional Tribunal had to set the limits of Article 55(4) of the Polish Constitution which prohibits extradition „which would violate rights and freedoms of persons and citizens". As a point of departure, the Constitutional Court shared the view of the Prosecutor General that the principle of mutual trust should prevail when interpreting the provisions on the European arrest warrant. In its view, the actual scope of application of this provision is fairly limited, however, it may be used also under EAW proceedings. This statement, though, was preceded by a proviso that:

„In the case of surrender to another EU Member State on the basis of the European arrest warrant the level of confidence in the validity of the request for surrender should be higher than in the case of surrender on the basis of a "classic" extradition request to another State which is not necessarily bound by at least the minimum level of guarantees set by the European Convention on Human Rights".

However,

„(…)in the case where it is obvious for the court adjudicating on the execution of the warrant that the person who is the subject of the warrant has not committed the act on the basis of which the European arrest warrant has been

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[54]Article 55 currently provides:

1. The extradition of a Polish citizen shall be prohibited, except in cases specified in paras 2 and 3.
2. Extradition of a Polish citizen may be granted upon a request made by a foreign state or an international judicial body if such a possibility stems from an international treaty ratified by Poland or a statute implementing a legal instrument enacted by an international organisation of which the Republic of Poland is a member, provided that the act covered by a request for extradition:
   1) was committed outside the territory of the Republic of Poland, and

   2) constituted an offence under the law in force in the Republic of Poland or would have constituted an offence under the law in force in the Republic of Poland if it had been committed within the territory of the Republic of Poland, both at the time of its commitment and at the time of the making of the request.
3. Compliance with the conditions specified in para. 2 subparas 1 and 2 shall not be required if an extradition request is made by an international judicial body established under an international treaty ratified by Poland, in connection with a crime of genocide, crime against humanity, war crime or a crime of aggression, covered by the jurisdiction of that body.
4. The extradition of a person suspected of the commission of a crime for political reasons but without the use of force shall be forbidden, so as an extradition which would violate rights and freedoms of persons and citizens.
5. The courts shall adjudicate on the admissibility of extradition.
6.

issued, as well as when the description of the act on the basis of which the said warrant has been issued is imprecise to the extent it is impossible to adjudicate on the execution of the said warrant (…)"

the EAW should be refused, in accordance with Article 55(4) of the Constitution.

Additionally, the Tribunal emphasised that the above statement should not be regarded:

„(…) as tantamount to allowing the court adjudicating on the execution of the European arrest warrant to carry out detailed proceedings to receive evidence with regard to the guilt of the person who is the subject of the said warrant"

It may be said that this judgment confirms the chief importance of the principle of mutual trust for the Polish Constitutional Tribunal, which does not, however, amount to the unconditional automaticity of surrender. The Tribunal indicated circumstances where fundamental rights and freedoms, as protected by the Polish Constitution, shall prevail. Simultaneously, it hinted that their likelihood is indeed exceptional (e.g. a manifestly erroneous EAW).

3. Judgment of the Supreme Court, 20 July 2006, I KZP 21/06

The Supreme Court on several occasions expressed its opinion on the nature of relation between the issuing and the executing state in the course of EAW proceedings. In its decision of 20 July, it dealt with a case of a 17 year old man of Polish nationality, accused of committing a murder at the Brussels Gare Centrale. Due to a minor age of this person, it was not clear if the EAW framework was applicable.

The Supreme Court decided that the EAW should be executed largely as a natural consequence of the principle of mutual trust. In the view of the Court, that is not to say that the competent Polish authority is exempt from examining whether the EAW was issued in accordance with conditions set out in FD EAW. Yet, such assessment may take place only exceptionally, and should not encompass elements requiring a substantive appraisal relating e.g. to evidence of committing an offence.

4. Judgment of the Supreme Court, 19 February 2014, IV KK 377/13

The case concerned a Slovak citizen, surrendered by Poland in EAW proceedings (one EAW was executed out of two issued by Slovakia), where a Slovak authority sought to prosecute him for an offence committed prior to his surrender, other than that for which he was surrendered (specialty rule). The Supreme Court analysed a possibility to refuse to execute a EAW, based on is invalidity claimed by a Polish court deciding on execution of this warrant.

The Supreme has repeated its previous line of jurisprudence and asserted that:

"taking into account the principle of mutual recognition, the examination of correctness of issuing EAW should be verified on an exceptional basis, and should not embrace elements of discretionary character, such as existance of a justified assumption that a person has committed an offence, but other concern issues such as a competence of a given authority to issue a warrant.

(…) Having in mind contents and meaning of the principle of mutual trust, the lawfulness of its issuing may only be possible when it is firmly established that the warrant is invalid or legally ineffective. From this point of view it is not sufficient to state that a warrant „may be invalid".

5. Judgment of the Supreme Court, 3 March 2009, I KZP 30/08

The case concerned an EAW issued by the UK after Jakub T., suspected of rape, where the English Court subsequently sentenced him to life imprisonment, with a possibility of an earlier conditional release.

The Supreme Court confirmed that Polish courts are bound by this decision, both in terms of sanction and potential early release, albeit their length is unknown in the Polish system in corresponding cases. The Supreme Court stressed in this contest that:

„The legislator made no reservations concerning the penalties exceeding the upper limit foreseen in the Polish law, which is in line with the idea of unified Europe and the principle of mutual recognition and execution of sentences in the EU, based on high level of mutual trust."

6. Judgment of the Supreme Court, 26 June 2014, I KZP 9/14

The case resulted from a request of the Polish ombudsman who wished to find out if the courts taking decisions on temporary detention under EAW are also obliged to verify a general basis of temporary arrest relating to „non-EAW" cases (i.e. a high likelihood of committing an offence), which would imply a check of a factual basis of issuing EAW, or, conversely, is an EAW itself sufficient to substantiate application of a temporary arrest.

The Supreme Court had no doubt that the court deciding upon temporary arrest under EAW scheme must not verify an evidentiary basis of the warrant, since a reception of EAW constitutes its independent (autonomous) basis. The Court asserted that:

„The EU Member States cooperate in mutual recognition of EAWs, directing themselves by a high level of mutual trust, which also embraces an existence of an evidentiary basis of the charge of committing an offence by a person sought."

## Section 3 - Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings

Florentino-Gregorio RUIZ YAMUZA, Senior Judge, Spain

### 3.1 General overview

*Background*

In the scenario we have just depicted, the Directive was adopted upon initiative of the Kingdom of Belgium, the Federal Republic of Germany, the Republic of Estonia, the Kingdom of Spain, the French Republic, the Italian Republic, the Grand-Duchy of Luxembourg, the Republic of Hungary, the Republic of Austria, the Portuguese Republic, Romania, the Republic of Finland and the Kingdom of Sweden.

Its Preamble points out a series of factors contributing to the adoption of the text, starting by the mention of European Council in Tampere of 15 and 16 October 1999, in particular point 33 thereof, the principle of mutual recognition of judgments and other decisions of judicial authorities as the cornerstone of judicial cooperation within the Union.

The necessary rapprochement of legislation would facilitate cooperation between competent authorities, and at the time the extent of mutual recognition is very much dependent on a number of parameters, which include mechanisms for safeguarding the rights of suspected or accused persons and common minimum standards necessary to facilitate the application of the principle of mutual recognition.

Although all European Union Member States are signatories to the Convention for the Protection of Human Rights and Fundamental Freedoms,, experience shows that problems still appear in relation with violations of the Convention which undermines mutual trust, that is stressed in the Preamble along with the convenience of improving the

implementation of Article 6 of the European Convention and Article 47 and 48 of the Charter of Fundamental Rights of the European Union enshrining the right to a fair trial and the respect for the right of defence[55].

The quest for common minimum standards set out in Article 82 (2) of the Treaty on the Functioning of the European Union, as minimum rules applicable in the Member States to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension, includes 'the rights of individuals in criminal procedure"

*Scope*

As for the scope of the Directive, its Preamble states that the right to interpretation and translation for those who do not speak or understand the language of the proceedings is enshrined in Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. The Directive aims to guarantee those rights corresponding to the Convention and the Charter of Fundamental Rights of the European Union, following their construction in the relevant case-law of the European Court of Human Rights and the Court of Justice of the European Union.

The Directive, addressed to European Union Member States (Article 12) relates to measure A of the Roadmap, setting out common minimum rules to be applied in the fields of interpretation and translation, being its final goal double; on one hand to ensure the right to a fair trial to all kind of persons, disregarding their legal status or nationality, and on the other, to enhance mutual trust between Members States raising confidence in the reliability and coherence of their systems regarding this matter.

Consequently, it applies both at national, for internal proceedings, and at cross border level as well; when it comes to execute an European Arrest Warrant pursuant Framework Decision 2002/584/JHA, bearing in those cases the executing Member States the costs of due and proper translation and interpretation.

Within national level, in some cases the application of the Directive is foreseen only for the appeal stage of proceedings. It occurs in relation to minor offences for those Member States where authorities other than courts having jurisdiction in criminal matters have competence for imposing sanctions, for example in traffic or other administrative matters. In such situations, it would be unreasonable to require that the competent authority ensure all the rights under

[55] According to Preamble, recital (7) " Strengthening mutual trust requires a more consistent implementation of the rights and guarantees set out in Article 6 of the ECHR. It also requires, by means of this Directive and other measures, further development within the Union of the minimum standards set out in the ECHR and the Charter."

this Directive, therefore it shall only apply where there is a right of appeal to a court having jurisdiction in criminal matters, to the proceedings before such a court.

*Brief remarks on the content*

As for the content of the Directive strictly speaking, and the catalogue of measures and rights it provides for, we can distinguish between interpretation and translation meaning, ascertaining the need for them, and challenging decisions in this area.

Pursuant recital (32) of the Preamble to the Directive, it establishes minimum rules, being the Member States able "…to extend the rights set out in the Directive in order to provide a higher level of protection also in situations not explicitly dealt with in this Directive. The level of protection should never fall below the standards provided by the ECHR or the Charter as interpreted in the case-law of the European Court of Human Rights or the Court of Justice of the European Union."

The non-regression principle is mentioned in Directive Article 8, specifically pointing out that nothing in its text shall be construed in a restrictive manner, as limiting or derogating any of the rights and procedural safeguards ensured under the Convention, the Charter or other relevant provisions of international or Member States' law which may provide a higher level of protection.

In some cases, there is an intensified duty of care for suspected or accused persons with physical impairments which affect their ability to communicate effectively. In such events, the pertinent authorities (may they be judicial, prosecution services or police) shall ensure that those persons "…are able to exercise effectively the rights provided for in this Directive, taking into account any potential vulnerability that affects their ability to follow the proceedings and to make themselves understood, and by taking appropriate steps to ensure those rights are guaranteed." (Preamble, Recital (27))

*Mechanisms ascertaining the need of interpretation and its quality*

Member States shall ensure mechanisms to ascertain whether suspected or accused persons speak and understand the language of the criminal proceedings, providing the assistance of an interpreter in the event they do not command such a language.

When determining whether the translation and interpretation is required, based on the assessment of the suspected or accused persons' knowledge of the language of the proceedings, there is a right for the concerned persons to challenge the decisions finding there is no need for interpretation; this right shall be exercised according to every

Member State's procedures of national law, disregarding the fact that the decision has been rendered in national or European Arrest Warrant proceedings.

Member States shall ensure an effective control over the adequacy and quality of the interpretation and translation, providing for the competent authorities the possibility of the replacement of the appointed interpreter when the quality of the interpretation is considered insufficient to ensure the right to a fair trial.

*Entry into force. Transposition. Report*

The Directive entered into force on twentieth day following its publication in the Official Journal of the European Union (Article 11) and should have been transposed by the 27 of October 2013, containing the adopted measures a reference to this Directive either in their very text or accompanying them on the occasion of their official publication. Member States obliged to transmit the text of those measures[56] to the Commission (Article 9).

Not all Member States have punctually transposed the Directive, as it is stated in the pertinent Report from the Commission[57], noting that 16 Member States failed to transpose and/or notify within the set deadline their implementing rules under the Directive.

Pursuant Article 10, the Commission itself shall, by 27 October 2014, submit a report to the European Parliament and to the Council; along the same line, Preamble Recital (29) providing for the evaluation of the Directive "… in the light of the practical experience gained. If appropriate, it should be amended so as to improve the safeguards which it lays down."

### 3.2 Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings and its fulfilment in Belgian Law

Isa VAN HOEYLANDT, Investigating Judge Antwerp

[56] The text adopted by each Member State can be consulted on Eur-Lex website. http//www.eur-lex.europa.eu/
[57] 31st Annual Report on monitoring the application of EU Law (2013) Brussels, 1.10.2014. COM(2014) 612 final.

On October 20th 2010 the European Parliament and Council agreed on the directive 2010/64/EU on the Right to Interpretation and Translation in criminal proceedings. The ratio legis of this directive is that common minimum rules should add to increased confidence in the criminal justice systems of all Member States. Belgium is one of the countries who took the initiative for the draft of their directive. It is a challenge to examine, if after 5 years Belgium is still a good pupil and lives fully by the rules she helped to develop.

*Contents of the directive*

A. When applicable ?

In criminal proceedings and proceedings for the execution of a European arrest warrant, from the time persons are made aware by the competent authorities of a Member State that they are suspected or accused of having committed a criminal offence until the conclusion of the proceedings[58]. It isn't applicable for an authority other than a court which jurisdiction in criminal matters for imposing sanctions in relation to relatively minor offences on conditions that there is a right to appeal to a court having jurisdiction in criminal matters.

B. Which Documents?

All documents or statements in the proceedings which are necessary for the accused to understand of to have rendered into the court's language in order to benefit of a fair trial[59]. The text of article 6 §3.e ECHR refers to an interpretation not a translation. This suggests that oral linguistic assistance may satisfy[60].

[58] Article 1 Directive nr. 2010/64/EU,20 October 2010 on the right to interpretation and translation in criminal proceedings, Official Journal of the European Union 26 October 2010, L280/4.
[59] X v. Austria, no. 6185/73, Commission decision of 29 May 1975, DR 2, pp. 68 and 70.
[60] ECHR, 7132/75, 10 March 1980, (Luedicke, Belkacem and Koç v. Germany), http://hudoc.echr.coe.int/eng?i=001-57529; ECHR, 44234/98, 24 January 2002, (Ucak v. the United Kingdom; ECH, 18114/02, 18 October 2006, (Hermi v. Italy), http://hudoc.echr.coe.int/eng?i=001-77543; ECHR, 26891/95, 14 January 2003, (Lagerblom v. Sweden), http://hudoc.echr.coe.int/eng?i=001-60884.

C. Individual Rights

Right to interpretation[61]

Member States shall ensure that suspected of accused persons who don't speak or understand the language of the criminal proceedings or persons with hearing or speech impediments are provided without delay with the interpretation during criminal proceedings before investigative and judicial authorities including during police questioning and all court hearings. Where possible appropriate communication technology such as videoconferencing, telephone or the Internet may be used[62].

When necessary for the purpose of safeguarding the fairness of the proceedings, interpretation should be available for the communication between suspected of accused persons and their legal counsels in direct connection with any questioning of hearing during the proceedings[63]. Member States shall ensure that a procedure or mechanism is in place to ascertain whether suspected of accused persons speak and understand the language of the criminal proceedings[64]. Suspected or accused persons have the right to challenge a decision finding that there is no need of interpretation and complain about the quality of the interpretation[65]. The interpretation shall be of a quality sufficient to safeguard the fairness of the proceedings[66]. The services of the interpreter must provide the accused with the effective assistance in conducting his defence and the interpreters conduct must not be of such nature as to impinge on the fairness of the proceedings[67].

[61] Article 2 Directive nr. 2010/64/EU,20 October 2010 on the right to interpretation and translation in criminal proceedings, Official Journal of the European Union 26 October 2010, L280/5.
[62] Article 2.6 Directive nr. 2010/64/EU,20 October 2010 on the right to interpretation and translation in criminal proceedings, Official Journal of the European Union 26 October 2010, L280/5.
[63] Article 2.2 Directive nr. 2010/64/EU,20 October 2010 on the right to interpretation and translation in criminal proceedings, Official Journal of the European Union 26 October 2010, L280/5.
[64] Article 2.4 Directive nr. 2010/64/EU,20 October 2010 on the right to interpretation and translation in criminal proceedings, Official Journal of the European Union 26 October 2010, L280/5.
[65] Article 2.5 Directive nr. 2010/64/EU,20 October 2010 on the right to interpretation and translation in criminal proceedings, Official Journal of the European Union 26 October 2010, L280/5.
[66] Article 2.8 Directive nr. 2010/64/EU,20 October 2010 on the right to interpretation and translation in criminal proceedings, Official Journal of the European Union 26 October 2010, L280/5.
[67] ECHR, 44234/98, 24 January 2002, (Ucak v. the United Kingdom.

Right to translation of essential documents

Within a reasonable period of time suspected or accused persons who don't understand the language of the criminal proceedings, are provided with a written translation of all the documents which are essential to ensure that they are able to exercise their right of defence and to safeguard the fairness of the proceedings[68]. Essential documents shall include any decision depriving a person of his liberty, any charge of indictment and any judgment[69]. There shall be no requirement to translate passages of essential documents which are not relevant for the purpose of enabling suspected or accused person to have knowledge of the case against him or her[70]. Suspected or accused persons should have the right to challenge this decision[71]. Also when a European arrest warrant is drawn up in a language the person who is subject to such proceedings, doesn't understand, this warrant has to be translated in a written document[72]. As an exception on the general rules in § 1,2, 3 and 6 an oral translation or oral summary of essential documents may be provided instead of a written translation on condition that such oral translation doesn't prejudice the fairness of the proceedings[73]. The right to translation of documents can be waived on condition that the suspected or accused persons have received prior legal advice or obtained full knowledge of the consequences of such a waiver and the waiver was unequivocal and given voluntary[74].

[68] Article 3.1 Directive nr. 2010/64/EU,20 October 2010 on the right to interpretation and translation in criminal proceedings, Official Journal of the European Union 26 October 2010, L280/5.

[69] Article 3.1 -3.2 Directive nr. 2010/64/EU,20 October 2010 on the right to interpretation and translation in criminal proceedings, Official Journal of the European Union 26 October 2010, L280/5.

[70] Article 3.4 Directive nr. 2010/64/EU,20 October 2010 on the right to interpretation and translation in criminal proceedings, Official Journal of the European Union 26 October 2010, L280/5.

[71] Article 3.5 Directive nr. 2010/64/EU,20 October 2010 on the right to interpretation and translation in criminal proceedings, Official Journal of the European Union 26 October 2010, L280/5.

[72] Article 3.6 Directive nr. 2010/64/EU,20 October 2010 on the right to interpretation and translation in criminal proceedings, Official Journal of the European Union 26 October 2010, L280/5.

[73] Article 3.7 Directive nr. 2010/64/EU,20 October 2010 on the right to interpretation and translation in criminal proceedings, Official Journal of the European Union 26 October 2010, L280/6.

[74] Article 3.8 Directive nr. 2010/64/EU,20 October 2010 on the right to interpretation and translation in criminal proceedings, Official Journal of the European Union 26 October 2010, L280/6.

Obligations for the Member States

Member States shall meet the costs of interpretation and translation irrespective of the outcome of the proceedings[75]. The costs of interpretation can't subsequently be claimed back from the accused[76]. However an accused may be charged for an interpreter provided for him at a hearing that he failed to attend[77]. Member States shall endeavour to establish a register or registers of independent translators and interpreters who are appropriately qualified. Those registers shall be made available to legal counsel and relevant authorities[78].Member States shall ensure that interpreters and translators be required to observe confidentiality regarding interpretation and translation[79]. Those responsible for the training of judges, prosecutors and judicial staff involved in criminal proceedings will pay special attention to the particularities of communicating with the assistance of an interpreter[80]. Every time a suspect or accused has been heard or questioned by an investigative or juridical authority with the assistance of an interpreter or oral translation or an oral summary of essential documents has been provided or the person has waived the right to translation, it will be noted that these events have occurred, using the recording procedure in accordance of the law of the Member State concerned[81].

*Case law of the court of Strasbourg since 2010*

The Directive 2010/64/EU is also based on the principles stated in article 6.3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms: Everyone charged with a criminal offence has the following minimum rights: to be informed promptly in a language which he understands and in detail of the nature and cause of the accusation against him[82] and to have the frees assistance of an interpreter if he cannot understand or speak the

[75] Article 4 Directive nr. 2010/64/EU,20 October 2010 on the right to interpretation and translation in criminal proceedings, Official Journal of the European Union 26 October 2010, L280/6.
[76] ECHR, 7132/75, 10 March 1980, (Luedicke, Belkacem and Koç v. Germany), http://hudoc.echr.coe.int/eng?i=001-57529.
[77] ECHR nr. 11311/84, 9 December 1987 (Fedele v. Germany).
[78] Article 5.2 Directive nr. 2010/64/EU,20 October 2010 on the right to interpretation and translation in criminal proceedings, Official Journal of the European Union 26 October 2010, L280/6.
[79] Article 5.3 Directive nr. 2010/64/EU,20 October 2010 on the right to interpretation and translation in criminal proceedings, Official Journal of the European Union 26 October 2010, L280/6.
[80] Article 6 Directive nr. 2010/64/EU,20 October 2010 on the right to interpretation and translation in criminal proceedings, Official Journal of the European Union 26 October 2010, L280/6.
[81] Article 7 Directive nr. 2010/64/EU,20 October 2010 on the right to interpretation and translation in criminal proceedings, Official Journal of the European Union 26 October 2010, L280/6.

[82] Article 6.3 a of the Convention for the Protection of Human Rights and Fundamental Freedoms.

language used in court."[83] By studying the case law of the five latest years, one gets more details about how the Court interprets the minimum standards set out by the Directive.

A. Baytar versus Turkey (14 October 2014)

One of the most recent judgments in relation to the right on interpretation is the case of Baytar versus Turkey[84]. Ms. Gülüstan Baytar, born in 1949 and living in Kan, was arrested twice in the same year after the staff of the prison where she visited her brother, found, during her body search, a piece of paper relating to PKK activities. Her brother was being held in prison in connection with a case related to the PKK. The first time, on 30th of April 2001, she was questioned by the gendarmes and gave a statement to the public prosecutor before the District Court on 1 of May 2001. As she was illiterate she signed the statements with her fingerprint. She was remanded in custody after being examined and she was released on 5th of July 2001. On 27th September of 2001 the State Security Court of Kan acquitted her considering her version of events to be credible. The second time, after she had been questioned, the public prosecutor called for her to be remanded in custody. The public prosecutor stated that Ms. Baytar had been reminded of her right to the assistance of a lawyer but that she had waived that right. She was brought before the District Court Judge. Finding that she didn't speak Turkish with sufficient fluency, the judge asked a member of her family who was waiting outside the courtroom to act as an interpreter. On 18th of December 2001, after the hearing, Ms Baytar remanded in custody and criminal proceedings were brought against her for membership of an illegal armed organisation and, in the alternative, for aiding and abetting such an organisation. At the various hearings Ms. Baytar was assisted by a lawyer and interpreter. On 22th of May 2002 Ms. Baytar was given a prison sentence of three years and nine months for aiding and abetting an illegal armed organisation. Three times the Court of Cassations quashed the judgment on procedural grounds. Finally Ms. Baytar was sentenced to one year and three months imprisonment for attempting to aid and abet an illegal armed organisation. Ms. Baytar complained to the Strasbourg Court that there had been no interpreter to assist her while she was in police custody and that this had entailed a violation of her right to a fair trial.

The Court reiterated in its case law that the requirements of article 6 §3.e of the Convention for the Protection of Human Rights and Fundamental Freedom are to be seen as particular aspects of the right to a fair trial guaranteed by article 6 §1 of the Convention for the Protection of Human Rights and Fundamental Freedoms. The right to the free assistance of an

[83] Article 6.3e of the Convention for the Protection of Human Rights and Fundamental Freedoms.
[84] ECHR (2e afd.) nr. 45440/04, 14 October 2014 (Baytar / Turkey), http://www.echr.coe.int. (7 January 2015).

interpreter for an accused who can't understand or speak the language used in court, applies not only to oral statements made at trial hearings but also to documentary material and pre-trial proceedings.

In this case, the court stated that: "it is not in dispute, that the applicants level of knowledge of Turkish rendered necessary the assistance of an interpreter. Both the District Court and the Trial Court decided that she needed an interpreter. The decision to waive such right can only be taken by individual who clearly understands the charges. "[85] The Court took the view that as Ms. Baytar was not able to have the questions put to her translated and was not aware as precisely as possible of the charges against her, she wasn't placed in a position where she could fully assess the consequences of her alleged waiver of her right to remain silent or her right to be assisted by a lawyer and thus to benefit from the comprehensive range of services that can be performed by a counsel. Accordingly it is questionable whether the choices made by Ms. Baytar without the assistance of an interpreter were totally informed. The Court found that this initial defect thus had repercussions for the other rights which, while distinct from the right alleged to have been breached were closely related thereto and undermined the fairness of the proceedings as a whole. Furthermore the judge apparently failed to verify the skills of the interpreter. The Court concluded that the failure to provide Ms. Baytar with a interpreter while she was in police custody entailed a violation of article 6 §3.e of the Convention, taken together with article 6 § 1.

B. Diallo versus Sweden (5 Janaury 2010)

Another example where the principles were tested was the case of a French national Fatoumate Binta Diallo against Sweden[86].

Upon her entry to Sweden on 24th February 2006 Ms. Diallo was found in possession of 988.6 grams of heroin. She was interrogated by a customs officer. According to the report, the interview was held in French and Ms. Diallo did not wish a lawyer to be present. By a judgment of 26th May the District Court found Ms. Diallo guilty of drug trafficking. Both Ms. Diallo and the prosecutor appealed against this judgment to the Court of Appeal. The Court of Appeal heard the custom officer who did the first interview as a witness. The customs officer considered herself sufficiently skilled to conduct the interview in French which she had learned at school. She had lived in a French speaking home for eight years because her former husband was a Frenchmen and spoke French to their children. Finally Ms. Diallo was sentenced for drug trafficking nine years of imprisonment. Leave to appeal was denied by the Supreme Court.

[85] ECHR (2e section.) nr. 45440/04, 14 October 2014 (Baytar / Turkey), http://www.echr.coe.int. (7 januari 2015)
[86] ECHR, no.13205/07, 5 January 2010 (Diallo v. Sweden).

Ms. Diallo complained to the European Court of Human Rights invoking article 6 of the Convention, because she had not been provided with the assistance of an authorised interpreter during the first interview. She alleged that the first custom officer's knowledge of French was inadequate and that therefore the record of the interview was wrong and limited to a brief summary instead of a verbatim translation.

The European Court of Human Rights noted the: " the investigation stage has crucial importance for the preparation of the criminal proceedings as the evidence obtained during this stage determines the framework in which the offence charged will be considered. The assistance of an interpreter should be provided during the investigating stage unless it is demonstrated in the light of the particular circumstances of each case that there are compelling reasons to restrict this right. "[87] In this case there aren't elements indicating that the access to an interpreter was restricted systematically. The Court found the Appeal Court did exercise a sufficient degree of control of the adequacy of the custom officer's skills. The Court considered that Ms. Diallo received sufficient linguistic assistance during the first interview with the Swedish Customs. Subsequently an authorised interpreter was involved each time Ms. Diallo was heard. So the Court was unable to discern any violation of the right to a fair trial.

C. Şaman versus Turkey ( 5 April 2011)

In the case Şaman of versus Turkey[88] the Court decided that the defendants linguistic knowledge has to be balanced against the nature of the offence with which the defendant is charged and any communications addressed to him by the domestic authorities in order to assess whether they are sufficiently complex to require a detailed knowledge of the language used in court.

Ms. Sultan Şaman (°1974) of Kurdish origin was illiterate. She left Turkey when she was 12 years old. On 19th February 2004 she was taken into police custody upon intelligence reports that she was a member of the illegal organisation PKK / KONGRA-GEL. At her arrest she was in the possession of a fake identity card. According to a form dated 19th February 2004 which explained an arrested person's rights, the applicant was reminded of her right to remain silent and was informed that she could request the assistance of a lawyer. Ms. Şaman marked this form with her fingerprint and stated that she didn't want to be represented by a lawyer. On 20th February 2004 she was questioned by the police in absence of a lawyer and an interpreter and gave a detailed account of her involvement in the illegal organisation. On 21th February 2004 she was taken before the public prosecutor and was, during her questioning represented by a lawyer. She

[87] ECHR, no.13205/07, 5 January 2010 (Diallo v. Sweden).
[88] ECHR (2e section) nr. 35292/05, 5 April 2011 (Şaman v. Turkey), http://hudoc.echr.coe.int/eng?i=001-104355.

availed herself of her right to remain silent, yet the prosecutor continued asking questions. Ms. Şaman accepted that she had been using a false identity card. Before the investigating judge, in absence of a lawyer, Ms. Şaman retracted her police statement stating that it had been taking under duress. When the proceedings commenced before the Izmir State Security Court, this Court gave permission to Ms. Şaman to have the assistance of an interpreter. Finally on 26th October 2004 Ms. Şaman was sentenced to 12 years and 6 months imprisonment. In convicting her, the Court had regard to Ms. Şaman's police statement and the statements of three witnesses who had confirmed that Ms. Şaman was a member of the PKK.

In her judgement the Strasbourg Court reiterated that article 6 § 3 of the Convention also may be relevant before a case is sent to trial and so far the fairness of the trial is likely to be serious prejudiced by an initial failure to comply with its provisions. In the above mentioned case the Court decided that: "taking into account the importance of the investigation stage, the Court is not convinced that the applicant had a sufficient understanding of the questions she was being asked or that she was able to express herself adequately in Turkish, and certainly not to a level which would justify reliance on her statements as evidence against her at the trial. "[89] The Court therefore concludes that there has been a violation of article 6 § 3.e. The court also decided on the violation of article 6 § 3.c lack of assistance of a lawyer. (since this item isn't the subject of this exposé we won't review it)

D. Katritsch versus France ( 4 November 2010)

In the case of Katritsch versus France[90] the Court decided on the same principle. Mr. Vladlen Katritsch (° 1970), of Russian nationality, lived in France since February 2000 with his wife and child, who was going to school in France. Mr. Katritsch worked as a sports trainer. In October 2000 Mr. Katritsch was accused of burglary, illegal residence in France and using false documents. He was put in pretrial detention. When he appeared before the investigation judge he had the assistance of an interpreter. After the case was send to the criminal court of Compiegne, he asked to be released. His demand was rejected. He appealed at the Court of Amiens and was released. At both Courts he was assisted by an interpreter. On 3th of January the Criminal court sentenced Mr. Katritsch for the facts he was accused of to 12 months imprisonment of which 4 months with extension. Mr. Katritsch was not present at the trial. On 3th of July 2003 during a police control Mr. Katritsch was caught and notified with the judgment. He opposed against the judgment but at the trial he didn't appear. He said he was ill at that time. On 23th of September of Mr. Katritsch didn't appear in Court and wasn't

[89] ECHR (2e section) nr. 35292/05, 5 April 2011 (Şaman v. Turkey), http://hudoc.echr.coe.int/eng?i=001-104355.
[90] ECHR (5th section) nr. 22575/08, 4 November 2010 (Katritsch v. France, http://hudoc.echr.coe.int/eng?i=001-101583.

represented by a lawyer. The Court sentenced him to 1 year imprisonment of which 4 months with extension. Mr. Katritsch appealed and after several delays appeared before the Court of Appeal on 23th of October 2006 where he asked to be represented by his former lawyer and be assisted by an interpreter. On 27th November 2006 the Court of Appeal confirmed the guilt to the facts where Mr. Katritsch was accused of and sentenced him to 1 year imprisonment and interdiction to stay in France for 5 years. After the proceedings before the Court of Cassation were finished Mr. Katritsch, turned to the European Court of Strasbourg claiming that in the Court of appeal he was not represented by a lawyer or had the assistance of an interpreter and had had no assistance of a lawyer at the preparation of his defense.

The Court reiterated that the right of article 6 §3.e of the Convention to the free assistance of an interpreter is not only for oral declarations on trial but also for written documents in the pretrial phase. "The accused who cannot understand or speak the language of the proceedings has the right to the free assistance of interpreter so that every document of the proceedings which is necessary for a fair trial, are interpreted or translated to him. It is up to the domestic courts to guarantee the equitability of the proceedings, including the possible absence of translation or interpretation for the not native accused."[91] In the above mentioned case the Court took in account the living conditions of Mr. Katritsch in France since 2000 and the fact that while in prison in 2006, he filled in on his "fiche penale" that he spoke French. The Court decided that there was no violation of article 6 §3.e of the Convention.

E. Davit Hovanesian versus the Republic of Bulgaria (21 December 2010)

In the case of Mr. Davit Hovanesian versus the Republic of Bulgaria[92] the Strasbourg Court decided that there was no violation of article 6.3.e of the Convention because the declarations made by Mr. Hovanesian without an interpreter at the police station were not taken into account by the courts to found his conviction.

Mr. Davit Hovanesian (°1969), of Armenian nationality came to live in Plovdev (Bulgaria) in November 1997. He was working as a shoemaker and spoke a little Bulgarian. On 2th of September 1999 he was arrested by the police and informed that he was suspected of stabbing 2 persons with a knife. He admitted the facts and stated that he had understood what the police told him in the Bulgarian language. On 3th of September 1999 he was accused of the attempt murder of more than one person. He was informed that he had the right to be represented by a lawyer. The same day he was heard for the first time by an inspector in presence of a lawyer and an interpreter. In all proceedings Mr. Hovanesian was represented by a lawyer and had the assistance of an interpreter. On 2th of July 2002 Mr. Hovanesian was convicted

[91] ECHR nr. 32771/96, 24 September 2002 (Cuscani v. United Kingdom), §39, http://hudoc.echr.coe.int/eng?i=001-60643.
[92] ECHR nr. 318114/03 (5th section), 21 December 2010 (Hovanesian v. Bulgaria) http://hudoc.echr.coe.int/eng?i=001-102416.

to 16 years imprisonment for attempted murder. The Court of Appeal and the Court of Cassation confirmed the first judgment.

Mr. Hovanesian turned to European Court of Human Rights alleging that there was a violation of article 6 §3.e because the first 24 hours of his arrest he was questioned by the police without the assistance of an interpreter. The Court answered that: " what has to be determined is if the absence of a lawyer and an interpreter in the first 24 hours of his arrest, could have damaged the applicants right on a fair trial. As the domestic Bulgarian law doesn't take in account the attitude of the accused in the starting phase of the hearings by the police and his declarations at the police didn't serve to support his conviction, the applicant's right to a fair trial wasn't violated. "[93]

F. Conclusions

In view of the Directive 2010/64/EU we can conclude that the European Court of Human Rights decided that:

1. The right to a free assistance of an interpreter for an accused who can't understand or speak the language used in court, applies not only to oral statements made at trial hearings but also to documentary materials and pretrial proceedings[94].

2. The right to free assistance on an interpreter includes the right of interpretation or translation of every document of the proceedings which is necessary for a fair trial.[95]

3. It is up to the domestic courts to guarantee the equitability of the proceedings. They have to balance the defendant's linguistic knowledge against the nature of the offence with which the defendant is charged and any communications addressed to him by the domestic authorities in order to assess whether they are sufficiently complex to require a detailed knowledge of the language used in court.[96]

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[93]ECHR nr. 318114/03 (5th section), 21 December 2010 (Hovanesian v. Bulgaria) http://hudoc.echr.coe.int/eng?i=001-102416.
[94] ECHR (2e section.) nr. 45440/04, 14 October 2014 (Baytar / Turkey), http://www.echr.coe.int. (7 January 2015).
[95] ECHR (2e section) nr. 35292/05, 5 April 2011 (Şaman v. Turkey), http://hudoc.echr.coe.int/eng?i=001-104355
[96] ECHR (2e section) nr. 35292/05, 5 April 2011 (Şaman v. Turkey), http://hudoc.echr.coe.int/eng?i=001-104355
and ECHR (5th section) nr. 22575/08, 4 November 2010 (Katritsch v. France, http://hudoc.echr.coe.int/eng?i=001-101583.

4. The assistance of an interpreter should be provided during the investigation stage unless it is demonstrated in the light of the particular circumstances of each case that there are compelling reasons to restrict this right.[97]

5. The court has the obligation to control the adequacy of the interpretation or the interpreter's skills.[98] This control can be done according to the European Court of Human Rights by hearing the interpreter as a witness about his skills.[99]
6. Article 6 § 3 of the Convention may also be relevant before a case is sent to trial. The fairness of the trial can be serious prejudiced by an initial failure to comply with the provisions of the Convention[100].
7. The claim of violation of article 6 § 3.e of the Convention for Human Rights and Freedoms goes very often together with the claim of a violation of article 6 § 3.c of the same Convention, the right of access to a lawyer. The presence of lawyer at the hearings of his client can be a guarantee for the adequacy of the interpretation.

*The fulfilment of the directive in belgian law*

In Belgian criminal law there are several provisions where a role is given to the interpreter or translator:

A. Law on the use of languages in juridical matters (15 June 1935)

Belgium is one of the countries who took the initiative for the draft of the Directive. Due to the linguistical partition of the country - Flemish in the North, French in the South, German in Eupen and a special status for Brussels - and the historical political consequences, Belgium has already a law on the use of language in juridical matters since 1935[101].

Article 31 of this law states that in all hearings in the pre-trial phase, in pre-trial chambers and in court the defendants can chose their language for their oral declarations. If the police, prosecutor or judges don't understand the chosen language a sworn interpreter is called for. The cost of the translation is paid by the government. In the reports and minutes of the

[97] ECHR, no.13205/07, 5 January 2010 (Diallo v. Sweden).
[98] ECHR (2e afd.) nr. 45440/04, 14 October 2014 (Baytar / Turkey), http://www.echr.coe.int. (7 January 2015); ECHR, no.13205/07, 5 January 2010 (Diallo v. Sweden).
[99] ECHR, no.13205/07, 5 January 2010 (Diallo v. Sweden).
[100] ECHR (5th section) nr. 22575/08, 4 November 2010 (Katritsch v. France, http://hudoc.echr.coe.int/eng?i=001-101583.

[101] Wet van 15 juni 1935 op het gebruik der talen in gerechtszaken, B.S, 22 juni 1935.

proceedings the language used by the defendant, witnesses, experts and lawyers will be mentioned[102]. The public prosecutor uses the language of the proceedings: Flemish, French or German, dependent of the geographical place of the Court. Those rules are dictated with penalty of nullity in case they aren't obeyed.

Article 23 of the law on the use of languages in juridical matters states that the accused who has to appear before a court where the language of the proceedings is French or German and who speaks only Flemish or expresses himself better in that language, can ask that the proceedings will be held in Flemish[103]. The court can then send the case to the geographical nearest court of the same rank. The same applies to an accused who speaks only French or German in a place where Flemish is used in the proceedings.

Belgium's Supreme Court, « Hof van Cassatie or Cour de Cassation », decided in 2008 that the decision of the Court of Appeal which takes over from the written demand of the public prosecutor a quotation in French, without translation in Flemish, doesn't infringe the law concerning language in juridical matters if the quotation seems to explain a juridical rule which is formulated in Flemish[104]. In December 2014 the same Highest Court decided that a quotation in English in the written demand of the public prosecutor infringes the law on the use of languages in juridical matters and therefore the decision of the Court of Appeal which stated that the written demand of the public prosecutor was not void and wouldn't take in account the English quotations, was broken[105]. This happened in a important terrorism case. The Court of Appeal in Antwerp decided that the stipulations of the law on languages in juridical matters aren't applicable to rewritings of communications or telecommunications such as tap-conversations[106]. The point of discussion was that the tap conversations were translated by a translator who wasn't sworn in.

B. Article 47bis § 5 Code of Criminal Proceedings

« Every interrogated person who wants to use another language than that of the proceedings can or use a sworn interpreter, or can have his declaration be written by the examiner in his language or is asked to write his declaration in his own language. If the hearing is done with the aid of an interpreter his identity must be mentioned in the report. »

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[102] Article 34 Wet van 15 juni 1935 op het gebruik der talen in gerechtszaken, B.S, 22 juni 1935.
[103] Article 23 Wet van 15 juni 1935 op het gebruik der talen in gerechtszaken, B.S, 22 juni 1935.
[104] Cass. (2ek.) AR P.07.1867.N, 22 April 2008 (T.H.B., M.F.B. e.a. / WAF nv e.a.), Pas. 2008, afl. 4, 981.
[105] Cass. (2ek.) AR P.14.1048.N, 16 December 2014 (I.D.A., J.E, S.B., H.B. e.a.), http://www/cass.be (5 January 2015).
[106] Court of Appeal Antwerp, 15 July 2014 (not yet published).

Article 47bis §5 is applicable in every hearing in criminal matters. In 2013 the head Public Prosecutor of Antwerp gave in a circular letter to the police, instructions that people who due to their profession can be the victim of threats like legal interpreter or translator can be mentioned in the records without their private address. The identity card and legitimation have to be checked. In the records will be mentioned "identity and address known by drafter".

C. Article 16 §2 of the Law concerning pretrial detention[107]

Before giving an arrest warrant the investigating judge has to hear the suspect. In conformity with the provisions of the law on the use of languages in criminal matters[108], the suspect has to be heard in the language of his choice. Some Belgian criminal law specialist thinks that an investigating judge cannot refuse and decide that the suspect understands the language of the proceedings enough to be heard without an interpreter[109]. The Belgian Supreme Court decided that the suspect is to be heard in a language which the suspect understands[110]. Article 6.3 of the EU Convention stipulates: " the suspect who doesn't speak or understand the language of the proceedings." The Directive 2010/64/EU stipulates the same in article 2. If no interpreter can be found the investigating judge can call on "force majeure". He then delivers an arrest warrant without having heard the suspect but he has to motivate his decision and continue his search for the right interpreter. As soon as possible the suspect is to be heard in the language he understands. This decision was taken because the arrest warrant has to be delivered within 24 hours after the deprivation of freedom. Since the law of 13 August 2011[111], which came in to practice on the 1t January 2012, the investigation judge can order the prolongation of the term of 24 hours for another 24 hours when there are serious indications of guilt to a crime and there are special circumstances, for example: a suitable interpreter can't be found within 24 hours.

The Belgian Supreme Court (Court of Cassation) decided on 15th July 2014[112] that article 6 of the European Convention of Human Rights is not applicable in Pretrial Chambers, because this court regulates the criminal proceedings and doesn't pronounce itself on the ground of the criminal proceedings. The Directive 2010/64/EU had to be transposed in Belgian Law by 27th October 2013 and from that day on the regulations of the Directive can be called on against Belgium. In the above mentioned case the defendant asked a file of more than 8.000 pages to be translated 6 days before the

[107] Artikel 16 § 2 Wet van 20 juli 1990 op de Voorlopige Hechtenis, B.S. 14 August 1990.
[108] Wet 15 juni op het gebruik der talen in gerechtszaken, Hoofdstuk II Gebruik der talen bij het vooronderzoek en het onderzoek in strafzaken, alsmede voor de strafgerechten in eerste aanleg en voor de hoven van assisen, B.S. 22 juni 1935.
[109] VANDERMEERSCH, D., "Le mandat d' arrêt" in X. La détention préventive, Brussel, Larcier 1992, 98-150.
[110] Cass. 24 juli 1986, Rev.dr.pén.1986, 920.
[111] Article 15bis Wet van 20 juli 1990 op de Voorlopige Hechtenis.
[112] Cass. (vakantiekamer) AR.P.14.1029.N, 15 July 2014, (A.B.) Rév.dr. pén. 2015, afl. 2, 158.

Pretrial Chambers session. The Supreme Court stated that: "when the defendant asks the translation of a file during the regulation of the proceedings in Pretrial Chambers, this Court can only regulated the proceedings after the translation is added to the file in so far the judge decides that the documents of which the defendant asks the translation, are essential for the exercise of the right of defense in Pretrial Chambers. However in special circumstances, like the fact that several defendants are in pretrial detention, the lateness of the demand, the fact that the proceedings can't be split in conformity with art 3.7 of the Directive, Pretrial Chambers can regulate the proceedings without adding the translation on condition that the right of defense is not violated. "[113] The Belgian Supreme Court decided that in this case the right of the defense was appreciated because a part of the essential documents, namely the decisions on his deprivation of liberty where in the language which the defendant spoke so that he knew what chargers were against him. On the session of the Pretrial Chambers, the defendant was assisted by an interpreter, his lawyers spoke also Flemish and could make their defense orally and written in Flemish and the missing translation could be added to the file before the session of the Criminal Court.

D. Assistance of a interpreter at the "Assisenhof " or Cour d' Assises"

The "Assisenhof" or "Cour d'Assises" is in Belgium the only court where ordinary people without a juridical background have to judge as jury about the guilt or the innocence of the accused. It's used for severe crimes like manslaughter and murder.

" If the accused, the plaintive or the witness doesn't speak the language of the proceedings, the president of the court nominates an interpreter at least 21 years old and under penalty of nullity administer the oath to the interpreter that he loyally will translate everything that is said to those who speak different languages.[114] "

This is the first time certain conditions are mentioned in a law concerning the profession of legal interpreter, namely: being 21 years old and have been sworn in. The Belgian Supreme Court decided that it is forbidden to choose an interpreter from the witnesses even if the public prosecutor and the accused agree[115], but an interpreter can be a witness after he

[113] Cass. (vakantiekamer) AR.P.14.1029.N, 15 July 2014, (A.B.) Rév.dr.pén. 2015, afl. 2, 158.
[114] Article 282 Code of Criminal Proceedings.
[115] Cass. 9 Augustus 1989, Arr.Cass. 88-89, 1320.

has fulfilled his task to interpret[116]. If a witness is heard with the assistance of an interpreter and the oath is not mentioned in the judgment, the judgment is void[117].

E. Communication between a suspect or an accused and his lawyer

Article 184bis Code of Criminal proceedings regulates the situation of the destitute suspect or accused. If a suspect or an accused doesn't speak one of the languages officially used in Belgium the legal aid office appoints a solicitor who knows the language of the accused or appoints an interpreter whose fees for a maximum 3 hours will be paid by the government. In practice it will be the solicitor who appoints the interpreter and gives his name to the legal aid office. The interpreters can be chosen from the same register as used by the clerks of the courts and is kept in the record office. The suspect or accused who is deprived of his liberty is supposed to have not enough means to provide in his legal defense[118] and therefore can get the free assistance of an interpreter or translator.

The Belgian Supreme Court decided that is doesn't belong to the judge to solve the communication problem between a suspect or an accused and the lawyer which he appointed himself[119]. On this point, it seems that Belgian jurisprudence or law has still to adjust to article 2.2 of the Directive 2010/64/EU, where is stated that Member States shall ensure that, where necessary for the purpose of safeguarding the fairness of the proceedings, interpretation is available for communication between suspected or accused persons and their legal counsel in direct communication with any questioning or hearing during the proceedings or with the lodging of an appeal or other applications. The Directive doesn't make a difference between the self-chosen lawyer and the lawyer appointed by the president of the Court or the president of the Bar association.

F. Article 10 § 1.2° Law on the European Arrest Warrant

Within 24 hours after the actual deprivation of liberty and before the hearing by the investigating judge, the person who is the subject of the European Arrest Warrant, gets a declaration of his rights[120]. One of these rights is the right to have assistance of a lawyer and an interpreter. The assistance of a lawyer and a lawyer is given conformable Belgian law. Within the same 24 hours, the person is brought before the investigating judge who tells him that an European Arrest

[116] Cass. (2e k.) AR P. 0404F, 25 maart 2009 (B.B.), Rev.dr.pén 2010, afl.1, 67
[117] Cass. 25 January 2006, Pas. 2006, 22.
[118] Article 1 § 2 Order in Council, 18 December 2003.
[119] Cass. A.R. 6302, 28 January 1992, *Arr.Cass.* 1991-1992, 489.
[120] Article 10 § 1,2° Law on the European Arrest Warrant.

Warrant was issued against him, what the content of the European Arrest Warrant is and that he has the possibility to agree with the extradition and to call upon the specialty rule. The investigating judge hears the subject of the European Arrest Warrant concerning his remarks on his deprivation of liberty. In theory the subject of the European Arrest Warrant can choose his own interpreter. Because the hearing has to take place within 24 hours of the deprivation of liberty, in practice it will be the record office of the Court who will call for a sworn-in interpreter. Even when the subject of the European Arrest Warrant had his own interpreter the judge can refuse him when the interpreter is not sworn-in and screened on his trustworthiness. The same problem arises at the pretrial detention when the suspect has to be heard by the investigating judge before delivering an arrest warrant.

G. Right to translation of essential documents[121]

Article 22 of the law on languages in juridical matters stipulates that the suspect, who doesn't speak the language used in court, can ask the translation of the records, witness statements and statements of experts which are written in French, Flemish or German. The suspect has to ask it by way of a petition within eight days after he gets the indictment to appear in court. This article goes further than article 3 of the Directive 2010/64/EU but applies only to the typical Belgian situation, where a suspect speaks only one of the threes official languages.

In 2010 the Belgian Supreme Court[122] decided that article 6 § 3.e of the European Convention on Human Rights doesn't mean the accused has the right of a copy of the file in his mother language and the court didn't fail to appreciate the rights of the defense by stating that the defendant has the assistance of a solicitor who know the language of the proceedings and had the time to study the file and explain and discuss it with his client. It is questionable if this decision will stand the test of the Directive 2010/64/EU.

The right of the defense to demand that there will be a written translation in the file of statements of witnesses or experts in another official language doesn't mean that those statements, if there aren't translated, are void. The judge has to order the translation[123].

[121] Article 3 Directive nr. 2010/64/EU,20 October 2010 on the right to interpretation and translation in criminal proceedings, *Official Journal of the European Union* 26 October 2010, L280/5.
[122] Cass. (2e k.) AR P. 10.0328.N, 18 May 2010 (C.A MC G / Etablissements Cantraine sa e. a.), *Nullum Crimen* 2010, afl. 4, 245.
[123] Cass. 14 January 1997, *Arr. Cass.* 1997, 67.

*The position of the legal interpreter – translator in belgian law*

Article 282 Code of Criminal proceedings gives the most details about the conditions for being a legal interpreter namely: he or she has to be 21 years old, and he or she has to be sworn in by the President of the Court. In court decisions the identity of the interpreter and the oath formula have to be mention on penalty of nullity[124].

Article 458 of the Penal Code and article 28 of the Code of criminal proceedings state that everyone, who by their profession takes part in the investigation is compelled to secrecy. The breach of the secrecy is punishable with imprisonment up to 6 mounts and a fine of 600 Euros up to 3000 Euros.

In Belgium a national register of legal interpreters and translators is nonexistent. List of sworn interpreters and translators are available at the record office of the courts. Criteria for being on the list are not standardized, so there is no quality guaranteed on the qualifications of the interpreters or translators. In the Court of Antwerp interpreters can only be on the list if they have followed a course at the university of Louvain, campus Antwerp, Department Applied Philology and have been subjected to a morality investigation ordered by the Public Prosecutor to examine their independence, loyalty and good conduct. The university course takes 150 hours of colleges and an apprenticeship. Different law subject (penal law, juvenile law, civil law, social law, deontology of the interpreter – translator and language modules are taught. The course finishes with a multiple choice exam, a translation test for translators with the use of a dictionary, a test for interpreters in skill of interpreting from paper, without and with annotations and whispering interpret.

Article 5 § 1of the Directive 2010/64/EU stipulates that: "Member States shall take concrete measures to ensure that the interpretation and translation provided meets the quality required under article 2.8 and 3.9."[125]Namely interpretation and translation shall be of a quality sufficient to safeguard the fairness of the proceedings, in particular by ensuring that suspected or accused persons have knowledge of the case against them and are able to exercise their right of defense. Through interpretation of article 6 § 3.e of the Convention of Human Rights and Freedoms the European Court of Human Rights at Strasbourg decide that the judge has the obligation to control the quality of the interpreter's work. In the case of

[124] Article 40 Wet van 15 juni 1935 op het gebruik der talen in gerechtszaken, *B.S,* 22 juni 1935.
[125] Article 5 §1 Directive nr. 2010/64/EU,20 October 2010 on the right to interpretation and translation in criminal proceedings, *Official Journal of the European Union* 26 October 2010, L280/5.

Diallo versus Sweden[126] the court decided that such a control can be done by hearing the interpreter as a witness about his or her skills.

A Belgian manual for legal interpreters, written for in use in the university course for legal interpreters and translators, suggests that interpretation would be taken on audio and put before experts, if there is any discussion. Anyway the control has to be simple and it has to be avoided that discussion on the quality of interpretation and the control becomes a trial in a trial. A fair trial is also a trial which is finished in a reasonable time. The discussion on the quality is a factual discussion which can't be risen at the Supreme Court (Court of Cassation)[127].

Article 6 of the Directive[128] stipulates that Member States request those responsible for the training of judges, prosecutors and judicial staff involved in criminal proceedings to pay special attentions to the particularities of communicating with the assistance of an interpreter. The Belgian institute for judicial training provides training for judges and public prosecutors on hearing techniques. In that course a section on conducting a hearing with the assistance of an interpreter is included.

[126] ECHR, no.13205/07, 5 January 2010 (Diallo v. Sweden).

[127] HUYBRECHTS, L., De Europese Richtlijn betreffende het recht op vertolking en vertaling in strafprocedures en de Belgische wet en rechtspraak, *NC* 2001, afl.1, 1-7.

[128] Article 6 Directive nr. 2010/64/EU,20 October 2010 on the right to interpretation and translation in criminal proceedings, *Official Journal of the European Union* 26 October 2010, L280/5.

*Conclusions*

A. Right to interpretation

In Belgian criminal law several articles stipulates the use of an interpreter. The Directive 2010/64/EU gives the right to interpretation to suspected or accused persons who don't speak or understand the language of the criminal proceedings concerned. In Belgium an interpreter has to be used for a suspected or accused person who wants to use another language than the one of the criminal proceedings[129]. Article 282 Code of Criminal Proceedings provides also an interpreter for the plaintive, the witnesses and the experts. The right to interpretation starts from the first hearing of the suspect by the police. Moreover a suspect or accused who speaks one of the three official languages, but not the language of the proceedings concerned, can ask, in certain circumstances that his case will be transferred to a court of the same rank but where the language he speaks is used[130].

B. Right to translation

If the suspected or accused speaks one of the three official languages he can call upon article 22 of the law on the use of languages in juridical matter and demand that a written translation of the records, statements of witnesses, plaintive and experts will be joined to the file. If the accused speaks another language, he can rely on article 3, § 1 and 2 of the Directive 2010/64/EU and ask for a written translation of all documents which are essential to ensure that he is able to exercise his defense[131]. The Courts decision or judgment doesn't have to be translated.

C. Cost of translation[132]

Article 22, 31 and 33 of the law on the use of languages in juridical matters decides that the government meets the costs of interpretation and translation in the investigative phase and in the criminal proceedings.

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[129] Article 31 Wet van 15 June 1935 op het gebruik der talen in gerechtszaken, *B.S,* 22 June 1935; Article 47bis and 282 Code of Criminal Proceedings .

[130] Article 23 Wet van 15 juni 1935 op het gebruik der talen in gerechtszaken, *B.S,* 22 juni 1935.

[131] Cass. Cass. (vakantiekamer) AR.P.14.1029.N, 15 July 2014, (A.B.) *Rév.dr. pén.* 2015, afl. 2, 158.

[132] Article 4 Directive nr. 2010/64/EU,20 October 2010 on the right to interpretation and translation in criminal proceedings, *Official Journal of the European Union* 26 October 2010, L280/5.

D. Quality of the interpretation and translation[133]

In Belgium there is not yet a national register of qualified interpreters and translators. Only the Court of Antwerp put interpreters and translators on the list who followed a university course for legal interpretation and translation. There is no official professional association of legal interpreters and translators which defends their interests. Often the interpreters or translators refuse to work for the courts because the government didn't pay their invoices. The national institute for juridical training has a course for judges, public prosecutors and judicial staff involved in criminal proceedings on hearing techniques with a part on conduction a hearing with assistance of an interpreter.

Belgium is a good pupil in class when it comes to application of the Directive 2010/64/EU but not an excellent one

There are enough legal provisions to guarantee the assistance of an interpreter or translator in every stage of the proceedings, starting from the first hearing by the police. The lack of quality guarantee of the legal interpreters is still a problem which is not easy to solve. Belgium is little country but much appreciated by asylum seekers and people from all over the world who come and try to find their luck in Belgium. They speak the most divers languages, for which it is often very hard to find an interpreter. Maybe a professional association of legal interpreters and translators could help to develop criteria to guarantee the quality of interpretation but this would still be no solution for the very rare languages with which one is confronted once. An European list of legal interpreters and translators could be an idea to solve this problem. The course on hearing techniques given by the national institute for judicial training is not obligatory for investigating judges, criminal judges and public prosecutors who are already in office. The training on how to interrogate someone who doesn't speak or understand the language of the proceedings and gets assistance of an interpreter had still to be promoted amongst those colleagues.

[133] Article 5 Directive nr. 2010/64/EU,20 October 2010 on the right to interpretation and translation in criminal proceedings, *Official Journal of the European Union* 26 October 2010, L280/5.

### 3.3 Outline DIRECTIVE 2010/64/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 20 October 2010 on the right to interpretation and translation in criminal proceedings[134]

Laurentiu Sorescu

*Right to interpretation*

- provision, without delay, with interpretation during criminal proceedings before investigative and judicial authorities of suspected or accused persons who do not speak or understand the language of the criminal proceedings concerned are provided
- availability of interpretation for communication between suspected or accused persons and their legal counsel
- effective mechanism to ascertain whether suspected or accused persons speak and understand the language of the criminal proceedings and whether they need the assistance of an interpreter
- the right of the suspected or accused persons to challenge a decision finding that there is no need for interpretation and, when interpretation has been provided, the possibility to complain that the quality of the interpretation is not sufficient to safeguard the fairness of the proceedings.
- communication technology used, unless the physical presence of the interpreter is required in order to safeguard the fairness of the proceedings.
- applies to requested persons for the execution of a European arrest warrant
- sufficient to safeguard that suspected or accused persons have knowledge of the case against them and are able to exercise their right of defence.

*Right to translation of essential documents*

- provision, within a reasonable period of time, of written translation of all documents which are essential to ensure the fairness of the proceedings to suspected or accused persons who do not understand the language of the criminal proceedings

[134] Training tool for the case studies, the source of the outline are the provisions of the Directives and could be used as a way to facilitate the discussions during the workshop no. 1.

- essential documents include decision depriving a person of his liberty, any charge or indictment, and any judgment, materials relevant for the purposes of enabling suspected or accused persons to have knowledge of the case against them
- the right to challenge a decision finding that there is no need for the translation of documents or passages thereof and, when a translation has been provided, the possibility to complain that the quality of the translation is not sufficient to safeguard the fairness of the proceedings
- applies to requested persons for the execution of a European arrest warrant,
- exception : an oral translation or oral summary of essential documents may be provided instead of a written translation on condition that such oral translation or oral summary does not prejudice the fairness of the proceedings
- any waiver of the right to translation of documents shall be subject to the requirements that suspected or accused persons have received prior legal advice or have otherwise obtained full knowledge of the consequences of such a waiver, and that the waiver was unequivocal and given voluntarily
- translation of a quality sufficient to safeguard the fairness of the proceedings, in particular by ensuring that suspected or accused persons have knowledge of the case against them and are able to exercise their right of defence.

*Costs of interpretation and translation*

- met by Member States, irrespective of the outcome of the proceedings

*Quality of the interpretation and translation*

- concrete measures to ensure a proper interpretation and translation
- a register or registers of independent translators and interpreters, available to legal counsel and relevant authorities
- interpreters and translators are to observe confidentiality regarding interpretation and translation

*Record-keeping*

- when a suspected or accused person has been subject to questioning or hearings by an investigative or judicial authority with the assistance of an interpreter or when an oral translation or oral summary of essential documents has been provided , or when a person has waived the right to translation, it will be noted using the national recording procedure

## Section 4 - Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings

Florentino-Gregorio RUIZ YAMUZA, Senior Judge, Spain

### 4.1 Background

The Directive was adopted having regard to the proposal from the European Commission, being a substantial part of its background identical to that of Directive 2010/64/EU.

This way, a number of points in its preamble do coincide with that in the aforementioned Directive: the reminder of the pre-eminent position of mutual trust and mutual recognition for international cooperation in criminal matters, the importance of Article 47 of the Charter of Fundamental Rights of the European Union and Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms enshrining the right to a fair trial, and specially of Article 48(2) of the Charter guarantying respect for the rights of the defence, all of them along with the case-law of the European Court of Human Rights.

It is also quoted the need for common minimum rules (referred to in Art. 85(2) of the Treaty on the Functioning of the European Union) to increase confidence in the criminal justice systems of all Member States, leading to a more efficient judicial cooperation in a climate of mutual trust. Such common minimum rules should be established in the field of information in criminal proceedings.

In that context, the Roadmap, Stockholm Programme and Directive 2010/64/EU do appear in the Preamble, which determines in Recital (14) that the Directive, which should apply to suspects and accused persons regardless of their legal status, citizenship or nationality, relates to measure B of the Roadmap:“ It lays down common minimum standards to be applied in the field of information about rights and about the accusation to be given to persons suspected or accused of having committed a criminal offence, with a view to enhancing mutual trust among Member States.”

The same Recital clarifies that the word accusation when used in its text describes the same concept as the term 'charge' used in Article 6(1) of the European Convention on Human Rights[135]. And Recital (18) determines that the right to information about procedural rights, inferred from the case-law of the European Court of Human Rights, should be explicitly established by this Directive.

In the Preamble, Recitals (41) and (42), can be read that the Directive respects fundamental rights and observes the principles recognised by the European Charter of Fundamental Rights, seeking in particular "… to promote the right to liberty, the right to a fair trial and the rights of the defence. It should be implemented accordingly."

**4.2 General remarks**

*Scope*

Preamble, Recital (43) determines that objective of the Directive, addressed to the European Union Member States (Article 14), is establishing common minimum standards relating to the right to information in criminal proceedings, which cannot be achieved by Member States acting unilaterally, at national, regional or local level, and can therefore, by reason of its scale and effects, be better achieved at Union level.

Pursuant Preamble, Recital (19), the competent authorities should inform, either orally or in writing, suspects or accused persons promptly of their rights, as they apply under national law. The right to written information about rights on arrest provided for in the Directive applies, mutatis mutandis, to the execution of a European Arrest Warrant, (Preamble, Recital (39)), a model of the pertinent Letter of Rights is provided in Annex II of its text.

The information shall be provided as early as possible at the latest before the first official interview of the suspect or accused person by the police or by another competent authority, in order to allow the practical and effective exercise of those rights. There is no need to reiterate such an information about rights in general or regarding a particular right once it has been given "…unless the specific circumstances of the case or the specific rules laid down in national law so require." (Preamble, Recital (20))

[135] Everyone charged with a criminal offence has the following minimum rights: (a) to be informed promptly,(b) to have adequate time and facilities for the preparation of his defence; (c) to defend himself in person or through legal assistance of his choosing or via legal aid (d) to examine or have examined witnesses against; (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

As it happened with Directive 2010/64/EU, for those Authorities other than courts dealing with minor offences, related to traffic for example, the Directive applies only at the appeal stage of the proceedings taking it place in front of a court having jurisdiction in criminal matters ( Article 2.2)

Non-regression principle is enshrined as well in this Directive, both in Recitals (20) and (40) of the Preamble and Article 10, establishing that it lays down minimum rules with respect to the information on rights of suspects or accused persons, without prejudice to information to be given on other procedural rights arising out of the Charter, the ECHR, Union, International and national as interpreted by the relevant courts and tribunals which provide a higher level of protection.

The situation of being a suspected or accused person under arrest or detained is specifically defined in Recital (21) of the Preamble as to be understood to refer to any situation where, in the course of criminal proceedings, suspects or accused persons are deprived of liberty within the meaning of Article 5(1)(c) of the European Convention of Human Rights, as interpreted by the case-law of the European Court of Human Rights. The referred Article 5, sets out that " 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: …(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…"

Directive shall not interfere in the provisions of national law concerning safety of persons remaining in detention facilities (Preamble, Recital (24))

*Content*

The information to be given to the suspected and accused persons under arrest shall cover a number of aspects and shall be handed over according to some specific ways.

Ways to facilitate Information

As for the form in which the information shall be presented, Preamble, Recital (22) foresees the compulsory use of a Letter or Rights to inform suspected or accused persons arrested or detained. Such a letter shall be drafted in an easily comprehensible manner so as to assist those persons in understanding their rights and shall include basic information concerning any possibility to challenge the lawfulness of the arrest, obtaining a review of the detention, or requesting provisional release where, and to the extent that, such a right exists in national law. Every Member State when

implementing the Directive has to adopt its own Letter of Rights, including in its case other relevant procedural rights to apply at national level, notwithstanding the Directive in Annex I offers a model of Letter of Rights.

Should it be required, Member States shall ensure that the pertinent information provided is translated or interpreted into a language that suspected or accused persons under arrest understand, in accordance with the standards set out in Directive 2010/64/EU ( Preamble, Recital (25)

According to Recital 26 of the Preamble, when it comes to mentally or physically impaired people or persons with special difficulties to understand the information provided due to their youth, special attention shall be paid by the competent authorities making sure that they properly understand it.

Additionally, the access to the materials of the case should be free of charge, Preamble Recital (34), although in some cases there could national law provisions setting out fees to be paid for documents to be copied from the case file or for sending materials to the persons concerned or to their lawyer.

Extent of the information

Regarding the information itself, pursuant Preamble, Recitals (27) to (34) it shall cover procedural rights of people under arrest or detention, to the extent it may be required to enable them to prepare their defence and to safeguard the fairness of the proceedings, including those specific conditions and rules related to the right of having another person informed about the arrest or detention, according to Member States' national Law and without prejudice the due course of proceedings.

Specifically, information shall cover:

a. "A description of the facts, including, where known, time and place, relating to the criminal act that the persons are suspected or accused of having committed and the possible legal classification of the alleged offence should be given in sufficient detail,… "

b. Any changes of the accusation having the effect of modifying the position of the accused or suspected person.

c. "Documents and, where appropriate, photographs, audio and video recordings, which are essential to challenging effectively the lawfulness of an arrest or detention of suspects or accused persons in accordance with national law…" at the latest before a competent judicial authority is called to decide upon the lawfulness of the arrest or detention in accordance with Article 5(4) of the European Convention on Human Rights[136].

In general the scope and depth of the information could be summarised as that necessary to safeguard the fairness of the proceedings and in due time to allow for an effective exercise of the rights of the defence, in particular the right to challenge the lawfulness of the arrest or detention.

Notwithstanding, the access to the material evidence in possession of the competent authorities may be refused in accordance with national law under certain exceptional circumstances, referred to in Preamble Recital (32) where such access "…may lead to a serious threat to the life or fundamental rights of another person or where refusal of such access is strictly necessary to safeguard an important public interest. "

Furthermore the access to the materials of the case shall not prejudice the protection of personal data and whereabouts of protected witnesses established by Member States' national law, Preamble, Recital (33).

Finally, Directive 2012/13/EU provides for safeguards to challenge in accordance with national law, the failure or refusal of the competent authorities to provide information or to disclose materials of the case when those are pertinent pursuant the Directive. In that line Member States shall set out a specific appeal procedure, a separate mechanism or a complaint procedure.

### 4.3 Provisions

*Application*

Pursuant Article 1, the subject matter of the Directive is laying down rules concerning the right to information of suspects or accused persons, relating to their rights in criminal proceedings and to the accusation against them. It also lays down rules regarding the right to information of persons subject to a European Arrest Warrant[137] relating to their rights. In both cases we could understand that the persons to whom the Directive refers are not all facing criminal charges

[136] "4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."
[137] See Framework Decision 2002/584/JHA, Articles 11.2, 13.2, 27.3 (f) and 28.2 (b).

or subject to a request for their extradition because of a European Arrest Warrant, but only amongst them those deprived of liberty on account of arrest or detention, in the terms specified in the aforementioned Recital (21) of the Preamble and in the Annexes I and II of the Directive. But we tend to think the rights provided by this Directive shall apply, when appropriate, to all people facing criminal proceedings disregarding their personal situation, e.g. access to the materials of the case.

As it is stated in Article 2, and the same as we've already seen in connection with the Directive 2010/64/EU, the scope of the Directive covers the lapse of time from the moment persons are made aware by the competent authorities that they are suspected or accused of having committed a criminal offence until the conclusion of the proceedings, which is understood to mean the final determination of the question whether the suspect or accused person has committed the criminal offence, including, where applicable, sentencing and the appeal stage. Therefore, the same remark made above in 2.3.1 applies here as for the convenience of having this rights covered even in the enforcement phase in which arrest and detention may occur as well.

Pursuant Directive Article 8, all the information provided to suspects or accused persons in accordance with Articles 3 to 6, we are going to analyse below, shall be noted using the recording procedure specified in the law of the Member States. Having all suspects or accused persons or their lawyers the right to challenge, in accordance with Member States' national law, the possible failure or refusal of the competent authorities to provide information in accordance with this Directive.

Lastly, to obtain a proper application of the Directive, its Article 9 instructs Member States to request those responsible for the training of judges, prosecutors and judicial staff involved in criminal proceedings to provide appropriate training regarding the application and contents of the Text. In the same sense, Preamble Recital (37) " Without prejudice to judicial independence and to differences in the organisation of the judiciary across the Union, Member States should provide or encourage the provision of adequate training with respect to the objectives of this Directive to the relevant officials in Member States."

*Right to Information about rights*

Article 3 of the Directive structures the core of the Member States' obligation regarding the information to be handed over to suspected or accused persons under arrest or detention. To fulfil such obligation and allow the effective exercise of the right of defence, Member States shall provide the aforementioned persons with the relevant information concerning, at least a series of procedural rights, as they apply under national law:

- access to a lawyer;

- any entitlement to free legal advice and the conditions;

- be informed of the accusation, in accordance with Directive Article 6;

- interpretation and translation;

- remain silent.

That information shall be facilitated with due promptness, that we may construe as it shall be given as soon as possible from the very moment of the deprivation of liberty has taken place, and in an easily and understandable way. Preamble, Recital (38) assigns Member States to undertake all the necessary action to comply with this Directive; indicating that a practical and effective implementation of some of the provisions, quoting in particular information about their rights in simple and accessible language, could be achieved by different means amongst which there are non-legislative ones such as appropriate training for the competent authorities or by a Letter of Rights drafted in plain language so as to be easily understood by people without legal education.

Directive Article 3.2 pays attention to the necessary accessibility of the language in which information is presented, specially regarding people with particular needs "Member States shall ensure that the information provided for under paragraph 1 shall be given orally or in writing, in simple and accessible language, taking into account any particular needs of vulnerable suspects or vulnerable accused persons."

Finally, Preamble, Recital (35) foresees that competent authorities should keep record of the provided information, taking note of that in accordance with existing recording procedures under national law and, without that implying they should be subject to additional obligation to introduce new mechanisms or to any additional administrative burden.

*Right to information about the accusation.*

Following the same scheme set out in Directive Article 3 regarding the right of the suspected and accused persons under arrest to be informed about their rights, Article 6 provides for the right of the same persons to information about the accusation. The first thing we should note is this right concerns all kind of suspected or accused persons, not strictly to them deprived of liberty because of their arrest although Article 6 contains provisions specifically addressed to them.

People who are suspected or accused of having committed a crime do need, in order to exercise in a efficient and fair way the right of the defence, to be promptly informed about the criminal act they are suspected or accused of having committed.

The notion of promptness here unfolds in a double way, if they are under arrest such an information shall be handed over upon arrest as set out in Directive Article 3; in those cases the information shall necessarily comprehend the reasons for their arrest or detention along with the criminal act they are suspected or accused of having committed (Article 6.2). On the other hand, if persons are not arrested, we think the outline of the information, excluding those parts (if any) that legally have to be kept reserved due to peculiar reasons, shall be given at the time they have the first contact with Police forces or judicial or investigative authorities in charge of the case, otherwise the exercise of the right of defence should be hampered. Notwithstanding, Directive Article 6.3 provides otherwise establishing as the latest moment that of the submission of the merits of the accusation to a court, detailed information is provided on the accusation, including the nature and legal classification of the criminal offence, as well as the nature of participation by the accused person.

As for the extent and depth of provided information, it shall be given to arrested persons in such detail as is necessary to safeguard the fairness of the proceedings and the effective exercise of the rights of the defence; and to suspected and accused persons in general on the accusation including the nature and legal classification of the criminal offence, as well as the nature of participation by the accused person.

In the event the information provided by authorities ceases to be accurate or complete due to changes that may have occurred, Member States shall ensure that suspects or accused persons are informed promptly of any changes in the information given where this is necessary to safeguard the fairness of the proceedings (Directive Article 6.4)

*Right of access to the materials of the case.*

Directive, Article 7 deals with this right, necessarily to be observed in order to preserve the required fairness of the proceedings and the right to an effective defence, specially the possibility of challenging the lawfulness of the arrest. In this context, Directive uses the expression “Materials of the case” to refer to any documentation (we shall understand papers, hard-copies, video and audio formats, etcetera), and the access to it shall be provided free of charge.

There are two different aspects of this right as well.

In general, Article 7.2 foresees for all suspected and accused persons the access to all material evidence in the possession of the competent authorities (with the restrictions set out in Article 7.4), whether for or against suspects or

accused persons, to those persons or their lawyers in order to safeguard the fairness of the proceedings and to prepare the defence.

Such an access shall be granted in due time to allow the effective exercise of the rights of the defence and at the latest upon submission of the merits of the accusation to the judgment of a court. In case further material evidence comes into the possession of the competent authorities, additional access to it shall be granted to it in due time to allow for it to be considered.

According to Article 7.1 in relation to arrested and detained persons, deprived of liberty at any stage of the criminal proceedings, "Member States shall ensure that documents related to the specific case in the possession of the competent authorities which are essential to challenging effectively, in accordance with national law, the lawfulness of the arrest or detention, are made available to arrested persons or to their lawyers." The moment for this shall be without delay, upon arrest, and shall cover all relevant materials in possession of investigating authorities because otherwise such a right would be inevitable hampered; despite of the fact that some materials can be preserved in secrecy for the suspected and accused when there are grounds for that pursuant Article 7.4.

Paragraph 4 of Article 7, by way of derogation from paragraphs 2 and 3, sets out the following restrictions to the access to the materials of the case, provided that this does not prejudice the right to a fair trial. Such an access to certain materials may be refused where:

a. It may lead to a serious threat to the life or the fundamental rights of another person or

b. Such refusal is strictly necessary to safeguard an important public interest, such as in cases where access could prejudice an ongoing investigation or seriously harm the national security of the Member State in which the criminal proceedings are instituted.

Member States shall ensure that, in accordance with procedures in national law, a decision to refuse access to certain materials in accordance with this paragraph is taken by a judicial authority or is at least subject to judicial review.

The problem may arise as for the duration of the foreseen restriction. It is a matter to weigh interests that confront, but in the case the possible prejudice caused by the disclosure of certain parts of the materials does not

disappear we consider that criminal proceedings cannot continue depriving the suspected and accused persons of fundamental data they must know to defend themselves[138].

*Letters of Rights*

Letter of Rights on arrest

Aiming at facilitating the necessary flow of information bound for suspected or accused persons, either under arrest or not, Directive Articles 4 and 5 set up two types of Letter of Rights or documents summarizing that information and offering to those persons the occasion to know what their rights are and what their legal possibilities and entitlements are. Therefore, Letters of Rights shall be drafted in simple and accessible language following the indicative model set out in Annex I[139].

First of them is the Letter of Rights on arrest, addressed to suspects or accused persons who are arrested or detained. They shall be provided promptly which such a Letter of Rights, written in a language the arrested person knows, giving him or her the opportunity to read it sand keep it in their possession throughout the time that they are deprived of liberty (Article 5.1). Pursuant Article 5.5, "…where a Letter of Rights is not available in the appropriate language, suspects or accused persons shall be informed of their rights orally in a language that they understand. A Letter of Rights in a language that they understand shall then be given to them without undue delay."

As we said above, the word promptly shall be interpreted here without delay, upon arrest; however in many occasion whereas the oral information referred to in Article 3 shall be given immediately after the arrest or in a simultaneously with it, the Letter of Rights may be handed over once the arrested person is in the Police premises where hard copies of the Directive Annex I are available.

As for the extent of the information of the Letter of Rights, Directive Article 5.2 establishes that additionally to the information set out in Article 3 it shall contain information about the following rights as they apply under national law:

[138] In Spain, Criminal Procedural Act, Articles 302 and 505, provides for a maximum length of that situation of partial secrecy of the file and its materials for the suspected and accused person, and for the partial disclosure of those aspects strictly needed to challenge the remand in custody decision.

[139] Annex I do cover information on the following rights: A. Assistance of a lawyer/entitlement to legal aid; B. information about the accusation; C. Interpretation and translation; D. Right to remain silent; E. Access to documents; F. Informing someone else about your arrest or detention/informing your Consulate or Embassy; G. Urgent medical assistance; H. Period of deprivation of liberty.

(a) the right of access to the materials of the case;

(b) the right to have consular authorities and one person informed;

(c) the right of access to urgent medical assistance; and

(d) the maximum number of hours or days suspects or accused persons may be deprived of liberty before being brought before a judicial authority.

According to Article 5.3 it shall also include "…basic information about any possibility, under national law, of challenging the lawfulness of the arrest; obtaining a review of the detention; or making a request for provisional release."

Naturally every Member State may add to its national model of Letter of Rights the basic information they may consider essential to be known by the arrested persons, drafting their own models of Letters not necessarily identical to that of the Directive.

Letter of Rights in European Arrest Warrant proceedings

Persons who are arrested for the purpose of the execution of a European Arrest Warrant do enjoy the same right to information than detainees in national proceedings, in consequence they have to be provided promptly with an appropriate Letter of Rights containing information on their rights according to the law implementing Framework Decision 2002/584/JHA in the executing Member State.

Directive Article 5.2 stipulates that a Letter of Rights shall be drafted in simple and accessible language, offering an indicative model in Annex II[140], being its content similar to that of the Letter of Rights for national proceedings set out in Article 4, with slight variations such as information on the European Arrest Warrant, the right to ask for a hearing or to consent to the extradition. This means that the rights of every arrested person shall apply as a general rule mutatis mutandis to persons arrested on account of a European Arrest Warrant, who additionally required some supplementary information related to the transnational nature of the proceedings in which their arrest have been ordered.

*Entry into force. Transposition. Report.*

[140] A. Information about the European Arrest Warrant; B. Assistance of a lawyer; C. Interpretation and translation; D. possibility to consent; E. Hearing.

The Directive entered into force on twentieth day following its publication in the Official Journal of the European Union (Article 13) and should have been transposed by the 2 of June 2014, containing the adopted measures a reference to this Directive either in their very text or accompanying them on the occasion of their official publication. Member States obliged to transmit the text of those measures[141] to the Commission (Article 11).

Pursuant Article 12, the Commission itself shall, by 27 October 2014, submit a report to the European Parliament and to the Council; assessing the extent to which the Member States have taken the necessary measures in order to comply with this Directive, accompanied, if necessary, by legislative proposals.

### 4.4 Outline DIRECTIVE 2012/13/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 22 May 2012 on the right to information in criminal proceedings[142]

Laurentiu Sorescu

*Right to information about rights*

- prompt provision of information, orally or in writing, in simple and accessible language, taking into account any particular needs of vulnerable suspects or vulnerable accused persons, concerning :

(a) the right of access to a lawyer;

(b) entitlement to free legal advice and the conditions for obtaining such advice;

(c) the right to be informed of the accusation, in accordance with Article 6;

[141] The text adopted by each Member State can be consulted on Eur-Lex website. http//www.eur-lex.europa.eu/
[142] Training tool for the case studys, the source of the outline are the provisions of the Directives and could be used as a way to facilitate the discussions during the workshop no. 1.

(d) the right to interpretation and translation;

(e) the right to remain silent.

Written Letter of Rights on arrest in a simple and accessible language

- provided promptly to suspects or accused persons who are arrested or detained .
- opportunity to read and understand the Letter of Rights
- possession of the Letter of Rights throughout the time they are deprived of liberty
- contains information about the following rights as they apply under national law:

(a) the right of access to the materials of the case;

(b) the right to have consular authorities and one person informed;

(c) the right of access to urgent medical assistance; and

(d) the maximum number of hours or days suspects or accused persons may be deprived of liberty before being brought before a judicial authority

(e) the possibility, under national law, of challenging the lawfulness of the arrest; obtaining a review of the detention; or making a request for provisional release.

- in European Arrest Warrant proceedings an appropriate Letter of Rights containing information on their rights according to the law implementing Framework Decision 2002/584/JHA in the executing Member State.

*Right to information about the accusation*

- prompt and detailed provision with proper information about the criminal act they are suspected or accused of having committed.
- communication on the reasons for arrest or detention, including the criminal act they are suspected or accused of having committed.

*Right of free of charge access to the materials of the case*

- the availability of the documents related to the specific case in the possession of the competent authorities which are essential to challenging effectively, in accordance with national law, the lawfulness of the arrest or detention
- access at least to all material evidence in the possession of the competent authorities, in order to safeguard the fairness of the proceedings and to prepare the defence.
- access to the materials granted in due time to allow the effective exercise of the rights of the defence and at the latest upon submission of the merits of the accusation to the judgment of a court.
- access to certain materials may be refused by a decision subject to a judicial review if such access may lead to a serious threat to the life or the fundamental rights of another person or if such refusal is strictly necessary to safeguard an important public interest, such as in cases where access could prejudice an ongoing investigation or seriously harm the national security of the Member State in which the criminal proceedings are instituted.

*Remedies for failure or refusal of the competent authorities to provide information in accordance with this Directive*

- recording procedure specified in the law of the Member State concerned when information is provided to suspects or accused persons in accordance with Articles 3 to 6
- right to challenge, in accordance with procedures in national law, the possible failure or refusal of the competent authorities to provide information in accordance with this Directive.

## Section 5 - Directive 2013/48/EU of the European Parliament and of the Council of 22 of October 2013 on the right of access to a lawyer in criminal proceedings 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

Florentino-Gregorio RUIZ YAMUZA, Senior Judge, Spain

### 5.1 Background

The Directive was adopted having regard to the proposal from the European Commission, being a substantial part of its background identical to that of Directives 2010/64/EU and 2012/13/EU.

As it already occurred above regarding the two other texts we are analyzing a number of points in its preamble do coincide with that in the aforementioned Directives: e.g., the reminder of the pre-eminent position of mutual trust and mutual recognition for international cooperation in criminal matters, the importance of Article 47 of the Charter of Fundamental Rights of the European Union and Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms enshrining the right to a fair trial, and specially of Article 48(2) of the Charter guarantying respect for the rights of the defence, all of them along with the case-law of the European Court of Human Rights.

It is also quoted the need for common minimum rules (referred to in Art. 85(2) of the Treaty on the Functioning of the European Union) to increase confidence in the criminal justice systems of all Member States, leading to a more efficient judicial cooperation in a climate of mutual trust. Such common minimum rules should be established in the field of information in criminal proceedings.

Recital (1) of the Preamble quotes expressly the European Convention, the Charter and the International Covenant on Civil and Political Rights as antecedents of the texts and reminds us that experience has shown that merely

being signatories to those Instruments "…not always provide a sufficient degree of trust in the criminal justice systems of other Member States." ( Preamble, Recital (5))

In that context, the Roadmap, Stockholm Programme and Directives 2010/64/EU and 2012/13/EU do appear in the Preamble, which determines in Recital (12) that the Directive lays down minimum rules concerning: the right of access to a lawyer in criminal proceedings and in proceedings for the execution of a European arrest warrant ( in that sense the Directive shall be implemented taking into account the provisions of Directive 2012/13/EU) and 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.

Particular attention shall be paid to the standards of the European Convention of Human Rights and the Charter of Fundamental Rights, when persons are deprived of Liberty, Recitals (29) and (53), and to the case-law of the European Court of Human Rights, according to which, "…the fairness of proceedings requires that a suspect or accused person be able to obtain the whole range of services specifically associated with legal assistance" [143].

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[143] See. Murray v UK (judgment of 08.02.1996) Article 6 ECHR "will normally require that the accused be allowed to benefit from the assistance of a lawyer already at the initial stage of police interrogation".
Salduz v Turkey, 27.11.08.
The Court highlighted the importance of early access to a lawyer particularly where serious charges are involved "…as a rule, access to a lawyer should be provided as from the first interrogation of the suspect by the police".

The concurring opinion from Judge Zagrebelsky, joined by Judges Cassadeval and Türmen went beyond stating "…not only while being questioned" and that "the fairness of proceedings against an accused person who is in custody also requires that he be able to obtain (and that defence counsel to provide) the whole wide range of services specifically associated with legal assistance, including discussion of the case, organization of the defence, collection of evidence favourable to the accused, preparation for questioning, support to an accused in distress, checking his conditions of detention and so on".

Dayanan v Turkey, 13.10.09, the Court found a violation of Article 6 (3) despite the fact that the respondent had exercised his right to silence and made no admissions during his police detention.

Panovits v Cyprus,11.12.08, and Pischalnikov v Russia, 24.09.09.

Standards regarding the validity of a waiver of the right to legal assistance, noting that "the right to counsel, being a fundamental right among those which constitute the notion of fair trial and ensuring the effectiveness of the rest of the foreseen guarantees of Article 6 of the Convention, is a prime example of those rights which require the special protection of the knowing and intelligent waiver standard".

Pavlenko v Russia, 01.04.10, the Court emphasised the priority of the lawyer chosen by the suspect over a lawyer assigned to him by state authorities.

**5.2 General remarks**

*Scope*

The Directive applies to persons that become suspects or accused of having committed a crime either from the very first moment of the investigation or at a later stage after being a witness, Recital (21) specifically includes this latter situation.

As we have seen regarding the Directives analyzed above, Preamble, Recitals (16) and (17) state that minor offences not leading to sanctions implying deprivation of liberty are excluded from its ambit of application at the initial stage when they are dealt with by authorities other than Courts exercising jurisdiction in criminal matter, being for those case only applicable at the appeal stage in front of such courts.

Another exception as for this Directive, pursuant Recital (13) of the Preamble, are proceedings in relation to minor offending which take place within a prison and offences committed in a military context which are dealt with by a commanding officer that should not be considered to be criminal proceedings for the purposes of this Directive.

Nonetheless, Recital (18) stipulates that the scope of application of the Directive in respect of those minor offences should not affect the obligations of Member States to ensure the right to a fair trial following European Convention on Human Rights requirements, including obtaining legal assistance from a lawyer.

Pursuant Recital (24) in respect of certain minor offences, (we have to understand this is not the same category we have just mentioned but that including those not punished with severe penalties, and for the cases where suspects and accused persons are not to be questioned by authorities) this Directive should not prevent Member States from organising the right of suspects or accused persons to have access to a lawyer by telephone.

In accordance with Preamble, Recital (27), Member States shall make general information available (via website, leaflets at police stations or other means) to facilitate the obtaining of a lawyer by suspects or accused persons, when they are deprived of liberty. Otherwise authorities shall take no steps for them to be assisted by a lawyer if they have not themselves arranged to provided themselves with such an assistance. The suspect or accused person concerned should be able freely to contact, consult and be assisted by a lawyer.

Pursuant Preamble Recital (28), where suspects or accused persons are deprived of liberty, Member States shall ensure "…that such persons are in a position to exercise effectively the right of access to a lawyer, including by arranging for the assistance of a lawyer when the person concerned does not have one, unless they have waived that right. Such arrangements could imply, inter alia, that the competent authorities arrange for the assistance of a lawyer on

the basis of a list of available lawyers from which the suspect or accused person could choose. Such arrangements could include those on legal aid if applicable."

According to Preamble, Recital (38), the rights granted under the Directive may be temporarily derogated Member States' Law, in exceptional circumstances, with strict time limitations; not based exclusively on the type or the seriousness of the alleged offence, and without prejudicing the overall fairness of the proceedings. When derogations were authorised by a judicial authority which is not a judge or a court, the decision on authorising the temporary derogation can be assessed by a court, at least during the trial stage.

*Content*

Right to access to a lawyer

One of the axes of the Directive is the access to a lawyer. The notion of lawyer is defined in Recital (15) as any person qualified and entitled under national Law, including by means of accreditation by an authorised body, to provide legal advice and assistance to suspects or accused persons. According to Recital (19) suspects and accused persons shall have ensured by Member States the right of access to a lawyer without undue delay, in this sense we rely on the remarks already made above, and in any event, such an access shall be granted during criminal proceedings before a court, if they have not waived that right.

The suspects or accused persons' right to access to a lawyer covers a series of aspects, namely:

a. Right to meet in private with the lawyer representing them, Recital (22). Regarding the duration and frequency or those meetings they shall depend on the circumstances of the proceedings, in particular the complexity of the case and the procedural steps applicable. Member States shall ensure safety and security, in particular of the lawyer and of the suspect or accused person, in the place where such a meeting is conducted.

b. Right to communicate with the lawyer representing them, Recital (23). Such communications may take place at any stage, including before any exercise of the right to meet that lawyer. Duration, frequency and means of such communications, including videoconferencing and other communications technology, shall be arranged by Member States in order to allow the exercise of this right.

c. Right for suspects and accused persons' lawyer to be present and participate effectively when they are questioned by the police or by another law enforcement or judicial authority, including during court hearings, Recital (25). The lawyer

may, inter alia, in accordance with Member State's procedural rules, ask questions, request clarification and make statements, which should be recorded in accordance with national law.

As for the moment the Directive provision shall start to apply form, Recital (20) clarifies that questioning does not include "…preliminary questioning by the police or by another law enforcement authority the purpose of which is to identify the person concerned, to verify the possession of weapons or other similar safety issues or to determine whether an investigation should be started, for example in the course of a road-side check, or during regular random checks when a suspect or accused person has not yet been identified."; accordingly we have to assume that those activities may be carried out without the presence of a lawyer not being necessary to communicate to third persons nor authorities the detention for this purposes that necessarily has to be short.

d. Right for the lawyer to attend investigative or evidence-gathering acts, insofar as they are provided for in the national law concerned and in so far as the suspects or accused persons are required or permitted to attend, Recital (26). Such acts should at least include: identity parades, confrontations and reconstructions of the scene of a crime in the presence of the suspect or accused person. Where the lawyer is present during an investigative or evidence-gathering act, this should be noted using the recording procedure in accordance with the law of the Member State concerned.

This right to have access to a lawyer after deprivation of liberty, may be temporarily derogated under exceptional circumstances provided for in Recitals (30), (31) and (32):

1. In cases of geographical remoteness of the suspect or accused person, such as in overseas territories or where the Member State undertakes or participates in military operations outside its territory. During such a temporary derogation, the person concerned shall not be questioned nor any investigative or evidence-gathering acts be carried out. For those situations Member States should arrange for communication via telephone or video conference unless this is impossible.

2. In the pre-trial phase when there is a need, in cases of urgency, to avert serious adverse consequences for the life, liberty or physical integrity of a person. During such a temporary derogation questioning may be only performed for the sole purpose and to the extent necessary to obtain information that is essential to avert serious adverse consequences for the life, liberty or physical integrity of a person; provided suspects or accused persons have been informed of their right to remain silent and the questioning does not prejudice the rights of the defence, including the privilege against self-incrimination.

3. In the pre-trial phase where immediate action by the investigating authorities is imperative to prevent substantial jeopardy to criminal proceedings, in particular to prevent destruction or alteration of essential evidence, or to prevent interference with witnesses. During a temporary derogation questioning may be only performed for the sole purpose and

to the extent necessary to obtain information that is essential to prevent substantial jeopardy to criminal proceedings; provided suspects or accused persons that have been informed of their right to remain silent and the questioning does not prejudice the rights of the defence, including the privilege against self-incrimination.

Finally, communication between suspect and accused persons and their lawyer shall be confidential, therefore Member States shall ensure such a confidentiality without derogation, in order to allow an effective exercise of the right of the defence, without prejudice of the measures addressing the situation where there are objective and factual circumstances giving rise to the suspicion that the lawyer is involved with the suspect or accused person in a criminal offence (Preamble, Recital (33))

Pursuant Recital (34) do not result in breach of confidentiality as enshrined by the Directive the lawful surveillance of competent authorities or by operations carried out by national intelligence services to safeguard national security.

Right to have a third person informed and to communicate with him or her

Preamble, Recital (35), reads "Suspects or accused persons who are deprived of liberty should have the right to have at least one person, such as a relative or an employer, nominated by them, informed of their deprivation of liberty without undue delay, provided that this does not prejudice the due course of the criminal proceedings against the person concerned or any other criminal proceedings…"

In limited, exceptional circumstances, this right may be derogated in respect of a specific third person,

Following the right enshrined in Recital (35), Recital (36) includes the right of the suspects or accused persons deprived of liberty, to communicate without undue delay with at least one third person nominated by them. This right may be limited or deferred in view of imperative requirements or proportionate operational requirements (such as the need to avert serious adverse consequences for the life, liberty or physical integrity of a person, the need to prevent prejudice to criminal proceedings, the need to prevent a criminal offence, the need to await a court hearing, and the need to protect victims of crime).

Lastly, Preamble, Recital (37) foresees the right of suspects and accused persons who are deprived of liberty to consular assistance is enshrined in Article 36 of the 1963 Vienna Convention on Consular Relations.

Waivers

Recitals (39), (40) and (41) of the Preamble allow the suspects or accused persons to waive the Rights granted under the Directive, once they have been properly informed about the content of those rights and the consequences of the waiver, taking into account their specific conditions and situation.

Any waiver and the circumstances in which it was given should be noted using the recording procedure in accordance with the law of the Member State concerned.

Waivers can be revoked without it implying the necessity to repeat the procedural stage carried out during the period when the right concerned was waived.

European Arrest Warrant Proceedings

The Directive applies not only to national proceedings but also to those related to European Arrest Warrant, following the provisions set out in Preamble Recitals (42) to (47). We probably may miss a specific reference to extradition proceedings in general, and wonder whether Directive general provisions or those regarding European Arrest Warrant should apply in that field.

Accordingly, persons subject to a European arrest warrant ('requested persons') have the right:

- Of access to a lawyer in the executing Member State as a necessary requirement to exercise their right under Framework Decision 2002/584/JHA.

- To meet in private with the lawyer representing them in the executing Member State.

- To communicate with the lawyer representing them in the executing Member State. It should be possible for such communication to take place at any stage, including before any exercise of the right to meet with the lawyer, and by any means including videoconferencing and other communication technology.

- To be assisted by such a lawyer, participating in a hearing of a requested person by an executing judicial authority, being entitled according to executing Member State's national law, to ask questions, request clarification and make statements.

Executing Member States should arrange, when necessary having not the requested person nominated one, for the assistance of a lawyer on the basis of a list of available lawyers from which requested persons could choose.

**5.3 Provisions**

*Application*

Pursuant Article 1, the Directive subject matter is to lay down minimum rules concerning the rights of suspects and accused persons in both national criminal and European arrest warrant proceedings, being the level of protection established never below the standards provided by the Charter or by the European Convention on Human Rights, as interpreted by the case-law of the Court of Justice and of the European Court of Human Rights.

Those rights comprehend: to have access to a lawyer, to have a third party informed of the deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty.

Preamble Recital (54) stresses that the Directive sets minimum rules as for the mentioned rights that may extended by Member States in order to provide a higher level of protection.

Regarding vulnerable persons, suspects or accused, Article 13 provides for Member States to take into account their particular needs in the application of the Directive.

Article 2 of the Directive specifies its scope by determining that it shall apply to suspects or accused persons in criminal proceedings:

1. Regarding the time frame. From the time when they are made aware by the competent authorities that they are suspected or accused of having committed a criminal offence, and irrespective of whether they are deprived of liberty. It applies until the conclusion of the proceedings, meaning the final determination of the question whether the suspect or accused person has committed the offence, including, where applicable, sentencing and the resolution of any appeal.

In any event, this Directive shall fully apply where the suspect or accused person is deprived of liberty, irrespective of the stage of the criminal proceedings.

2. To persons requested following a European arrest warrant from the time of their arrest in the executing Member State in accordance with Article 10.

3. To persons other than suspects or accused persons who, in the course of questioning by the police or by another law enforcement authority, become suspects or accused persons.

4. Without prejudice to the right to a fair trial, in respect of minor offences, the Directive shall only apply to the proceedings before a court having jurisdiction in criminal matters.

" (a) where the law of a Member State provides for the imposition of a sanction by an authority other than a court having jurisdiction in criminal matters, and the imposition of such a sanction may be appealed or referred to such a court; or

(b) where deprivation of liberty cannot be imposed as a sanction."

*The right of access to a lawyer in criminal proceedings*

Enshrined in Directive Article 3, it involves a number of aspects all of which do converge to make feasible for the suspects and accused persons to exercise their rights to defence in an effective manner and in due time.

Access to a lawyer shall be provided without undue delay, from whichever of the following points in time is the earliest (Article 2.2)

"(a) before they are questioned by the police or by another law enforcement or judicial authority;

(b) upon the carrying out by investigating or other competent authorities of an investigative or other evidence-gathering act in accordance with point (c) of paragraph 3;

(c) without undue delay after deprivation of liberty;

(d) where they have been summoned to appear before a court having jurisdiction in criminal matters, in due time before they appear before that court."

The right entails for the suspects and accused persons:

(a) The right to meet in private and communicate with the lawyer representing them, including prior to questioning by the police or by another law enforcement or judicial authority.

Directive, Article 4 stipulates that communication between suspects or accused persons and their lawyer (which include meetings, correspondence, telephone conversations and other forms of communication permitted under national law) has to be confidential;

(b) The right for their lawyer to be present and participate effectively when questioned, in accordance with procedures under national law that shall not prejudice the effective exercise and essence of the right concerned. The participation of the lawyer during the questioning shall be noted using the recording procedure in accordance with the law of the Member State concerned;

(c) The right for their lawyer to attend the following investigative or evidence-gathering acts (where provided for under national law and if the suspect or accused person is required or permitted to attend the act concerned):

(i) identity parades;

(ii) confrontations;

(iii) reconstructions of the scene of a crime.

According to Directive Article 2.4, Member States shall endeavour to make general information available to facilitate the obtaining of a lawyer by suspects or accused persons. Pending a legislative act of the Union on legal aid, Preamble Recital (48) provides for Member States to apply their national law in relation to legal aid, which should be in line with the Charter, the ECHR and the case-law of the European Court of Human Rights, in the same sense Article 11.

In addition to national law provisions concerning the mandatory presence of a lawyer, Member States shall ensure that suspects or accused persons who are deprived of liberty are in a position to exercise effectively their right of access to a lawyer, unless they have waived that right following Directive Article 9.

Under exceptional circumstances derogations of this right may take place at the pre-trial stage in two events:

1. As for the assistance without delay after the deprivation of liberty, where the geographical remoteness of a suspect or accused person makes it impossible to ensure the right of access to a lawyer without undue delay after deprivation of liberty,

2. As for the rest, to the extent justified in the light of the particular circumstances of the case, where:

(a) there is an urgent need to avert serious adverse consequences for the life, liberty or physical integrity of a person;

(b) immediate action by the investigating authorities is imperative to prevent substantial jeopardy to criminal proceedings.

Pursuant Preamble, Recital (50), Member States should ensure that in the assessment of statements made by suspects or accused persons or of evidence obtained in breach of their right to a lawyer, or in cases where a derogation from that

right was authorised in accordance with this Directive, the rights of the defence and the fairness of the proceedings are respected, regarding the case-law of the European Court of Human Rights, and without prejudice to the use of statements for other purposes permitted under national law.

*The right to have a third person informed of the deprivation of liberty*

Directive, Article 5.1, sets out the obligation for Member States to ensure that suspects or accused persons deprived of liberty are able to have a person nominated by them, informed of their deprivation of liberty without undue delay if they so wish. As for the way in which such information could be conveyed, direct contact from the authorities in charge of the arrest or phone call from the very arrested person (in case such a person is the one he or she wants to communicate with) can be different forms to fulfil the duty.

Paragraph 2 of the same Article rules that in the event the suspect or accused person is a child (any person under 18 years), the holder of parental responsibility of the child shall be informed as soon as possible of the deprivation of liberty and of the reasons pertaining thereto, unless that may be contrary to the best interests of the child, in which case another appropriate adult shall be informed. It seems that, unlike adults, on one hand child don't have the opportunity to decline having a third person informed, and on the other, they can't choose who that person is, nor add a different one to those holding parental responsibility.

Recital (55) of the Preamble explains that the Directive promotes the rights of children taking into account the Guidelines of the Council of Europe on child friendly justice, "…If providing such information to the holder of parental responsibility is contrary to the best interests of the child, another suitable adult such as a relative should be informed instead. This should be without prejudice to provisions of national law which require that any specified authorities, institutions or individuals, in particular those that are responsible for the protection or welfare of children, should be informed of the deprivation of liberty of a child…"

*The right to communicate, while deprived of liberty, with third persons and consular authorities*

According to Article 6.1, suspects or accused persons who are deprived of liberty have the right, that has to be ensured by Member States, to communicate without undue delay with at least one third person, such as a relative, nominated by them. This right is additional and different from that enshrined in Article 5 and in principle should be possible to inform one person of the deprivation of liberty and to communicate with a different one. Its exercise, following Article 6.2 may be limited or deferred in view of imperative requirements or proportionate operational requirements. We think Directive is referring here to either those circumstances similar to the ones included in Article 8 justifying temporary derogations or to technical or operative difficulties.

Regarding consular authorities, Article 7 1. establishes that suspects or accused persons, deprived of liberty, who are non-nationals from the country where we are under arrest or detention, have the right to have the consular authorities of their State of nationality informed of the deprivation of liberty without undue delay and to communicate with those authorities, if they so wish. In the even those persons do have more than one nationality they have to choose which of them are to be informed and with whom they wish to communicate.

The right to communicate with consular authorities covers the right to be visited by them, "…to converse and correspond with them and the right to have legal representation arranged for by their consular authorities, subject to the agreement of those authorities and the wishes of the suspects or accused persons concerned. " (Article 7.2)

*Temporary derogations*

The foreseen temporary derogations are:

- Article 3.5. In exceptional circumstances and only at the pre-trial stage, the application of the right to access to a lawyer without undue delay after deprivation of liberty; where the geographical remoteness of a suspect or accused person makes it impossible to ensure the exercise of such a right.

- Article 3.6. In exceptional circumstances and only at the pre-trial stage, the application of the rights to meet in private and communicate with a lawyer, and have the lawyer participating in the questioning and evidence-gathering acts, to the extent justified in the light of the particular circumstances of the case:

(a) where there is an urgent need to avert serious adverse consequences for the life, liberty or physical integrity of a person;

(b) where immediate action by the investigating authorities is imperative to prevent substantial jeopardy to criminal proceedings.

- Article 5.3. Right to have a third person informed of the deprivation of liberty, whether he or she is an adult or a child in the same circumstances we have just mentioned above.

Pursuant Article 5.4. Where the derogation concerns a child Member States shall ensure that an authority responsible for the protection or welfare of children is informed without undue delay of the deprivation of liberty of the child. In the same line, Preamble, Recital (55) "…Member States should refrain from limiting or deferring the exercise of the right to communicate with a third party in respect of suspects or accused persons who are children and who are deprived of liberty, save in the most exceptional circumstances. Where a deferral is applied the child should, however, not be held

incommunicado and should be permitted to communicate, for example with an institution or an individual responsible for the protection or welfare of children."

Article 8 deals with the general conditions applying to temporary derogations indicating that any temporary derogation under Article 3.5, 3.6 or Art. 5.3 shall

1. As for their requisites:

(a) be proportionate and not go beyond what is necessary;

(b) be strictly limited in time;

(c) not be based exclusively on the type or the seriousness of the alleged offence; and

(d) not prejudice the overall fairness of the proceedings.

2. As for the procedure. Be authorised only by a duly reasoned decision taken on a case-by- case basis, either by a judicial authority, or by another competent authority on condition that the decision can be submitted to judicial review, being the reasoned decision recorded in accordance with the law of the Member State concerned.

*The right of access to a lawyer in European Arrest Warrant proceedings*

Regulated in Article 10 is to be exercised in the in the executing Member State, where requested persons shall have the following rights (Article 10.2):

(a) the right of access to a lawyer in such time and in such a manner as to allow the requested persons to exercise their rights effectively and in any event without undue delay from deprivation of liberty;

(b) the right to meet and communicate with the lawyer representing them;

(c) the right for their lawyer to be present and, in accordance with procedures in national law, participate during a hearing of a requested person by the executing judicial authority. Where a lawyer participates during the hearing this shall be noted using the recording procedure in accordance with the law of the Member State concerned.

The rights provided for in Articles 4, 5, 6, 7, 9, ( confidentiality, to have a third person informed about the deprivation of liberty, to communicate while deprived of liberty with third persons, to waive rights) and any eventual temporary

derogation under Articles 5.3 and 8, shall apply, mutatis mutandis, to European arrest warrant proceedings in the executing Member State.

Pursuant Article 10, paragraphs 4 to 6:

- The competent executing Member State authority shall, without undue delay after deprivation of liberty, inform requested persons that they have the right to appoint a lawyer in the issuing Member State. Such a lawyer has the role to assist the lawyer in the executing Member State by providing that lawyer with information and advice with a view to the effective exercise of the rights of requested persons under Framework Decision 2002/584/JHA.

- Where requested persons wish to exercise the right to appoint a lawyer in the issuing Member State and do not already have such a lawyer, the competent authority in the executing Member State shall promptly inform the competent authority in the issuing Member State, in order to, without undue delay, provide the requested persons with information to facilitate them in appointing a lawyer there.

- The right of a requested person to appoint a lawyer in the issuing Member State is without prejudice to the time-limits set out in Framework Decision 2002/584/JHA or the obligation on the executing judicial authority to decide about the surrender, within those time limits.

*Waivers*

Directive, Article 9, rules the possibility for the suspect or accused persons, without prejudice to national law requiring the mandatory presence or assistance of a lawyer, to waive the right to access to a lawyer referred to in Articles 3 and 10, where:

" (a) the suspect or accused person has been provided, orally or in writing, with clear and sufficient information in simple and understandable language about the content of the right concerned and the possible consequences of waiving it; and

(b) the waiver is given voluntarily and unequivocally."

Pursuant Article 9.2, the waiver, which can be made in writing or orally, shall be noted, along with circumstances under which it was given, using the recording procedure established by Member State's Law.

Such a waiver may be revoked subsequently at any point during the criminal proceedings, having the revocation effect from the moment it is made. Accordingly, suspects and accused persons shall be informed of the possibility of revoking the waiver (Article 9.3)

*Remedies*

Article 12, in the line with Preamble Recital (49), In accordance with the principle of effectiveness of Union law, orders Member States to ensure that suspects or accused persons both in national in criminal and in European arrest warrant proceedings, do have an effective remedy under national law in the event of a breach of the rights under this Directive.

Member States have to ensure as well ( Article 12.2) that, in criminal proceedings, "…in the assessment of statements made by suspects or accused persons or of evidence obtained in breach of their right to a lawyer or in cases where a derogation to this right was authorised in accordance with Article 3(6), the rights of the defence and the fairness of the proceedings are respected."

*Entry into force. Transposition. Report*

The Directive entered into force on twentieth day following its publication in the Official Journal of the European Union (Article 17) and should have been transposed by the 27 of November 2016, containing the adopted measures a reference to this Directive either in their very text or accompanying them on the occasion of their official publication.

Member States obliged to transmit the text of those measures to the Commission (Article 15). Preamble, Recital (56) reads: "In accordance with the Joint Political Declaration of 28 September 2011 of Member States and the Commission on explanatory documents, Member States have undertaken to accompany, in justified cases, the notification of their transposition measures with one or more documents explaining the relationship between the components of a directive and the corresponding parts of national transposition instruments. With regard to this Directive, the legislator considers the transmission of such documents to be justified."

Pursuant Article 16, the Commission itself shall, by 28 November 2019, submit a report to the European Parliament and to the Council; assessing the extent to which the Member States have taken the necessary measures in order to comply with this Directive, accompanied, if necessary, by legislative proposals.

Preamble, Recital (57) specifies that since the objectives of this Directive, "…cannot be sufficiently achieved by the Member States, but can rather, by reason of the scale of the measure, be better achieved at Union level, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 TEU. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve those objectives."

**5.4 Outline DIRECTIVE 2013/48/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 22 October 2013 on the right of access to a lawyer in criminal proceedings 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[144]**

Laurentiu Sorescu

*The right of access to a lawyer in criminal proceedings*

- in such a time and manner in order to exercise the right practically and effectively
- access without delay
- at the earliest

(a) before they are questioned;

(b) upon carrying out by of any investigating or evidence-gathering act;

(c) immediately after deprivation of liberty;

(d) in due time before they appear in court ;

[144] Training tool for the case studys, the source of the outline are the provisions of the Directives and could be used as a way to facilitate the discussions during the workshop no. 1.

- any derogation is allowed on a case-by-case basis if it is necessary, proportionate, strictly limited in time, not based exclusively on the type of the alleged offence, and does not prejudice the overall fairness of the proceedings
- does not prejudice the right to legal aid provided by any Member State
- has to be adjusted to the special needs of vulnerable suspects or accused persons

*The right of access to a lawyer includes*

- the right to meet in private and communicate with the lawyer, prior to the questioning
- the right of the lawyer to be present and participate effectively when the suspect or the accused person is questioned
- the right of the lawyer to attend (if also the suspect or accused person is allowed to attend) when identity parades, confrontations or reconstructions of the scene of crime take place
- the provision of general information by Member States in order to facilitate the access to a lawyer
- the right to exercise effectively the right of the lawyer for deprived of liberty persons (except for cases when the geographical remoteness makes impossible at the pre-trial case and in exceptional cases)
- at the pre-trial stage the right of acces to a lawyer does not include the above mentioned rights if there is an urgent need to avoid serious adverse consequences for a person or when substantial jeopardy to criminal proceedings must be avoided.

*The right to confidentiality between the lawyer and the suspect or accused person*

- includes all communication between them permitted under national law

*The right to have a third person informed of the deprivation of liberty*

- without undue delay
- the holder of parental responsibility of a child or another appropriate adult

- not applicable if there is an urgent need to avoid serious adverse consequences for a person or when substantial jeopardy to criminal proceedings must be avoided (if the suspect is a child a competent authority on the protection of children should be informed)
- any derogation is allowed on a case-by-case basis if it is necessary, proportionate, strictly limited in time, not based exclusively on the type of the alleged offence, and does not prejudice the overall fairness of the proceedings

*The right to communicate, while deprived of liberty with third persons*

- without undue delay
- possible proportionate limitation or deference of this right

*The right to communicate with consular authorities*

- for non-nationals
- without undue delay
- includes the right to to be visited by consular authorities, to converse and to correspond and the right to have legal representation arranged by consular authorities

*The right to access to a lawyer in European arrest warrant proceedings*

- in such a time and manner in order to exercise the right practically and effectively and without undue delay from deprivation of liberty
- includes the right to meet in private and communicate with the lawyer, prior to the questioning
- includes the right for the lawyer to be present

- supposes the provision of information concerning the right to appoint a lawyer in the issuing Member State and the facilitation of such a right

*Remedies for the breach of rights provided by the Directive*

- right to challenge, in accordance with procedures in national law, any breach of the rights under the Directive
- even if there has been evidence obtained with the breach of the right to a lawyer, the Member States shall ensure that the rights of the defence and the right to a fair trial are respected

# Chapter II – Lecture no. 2 (1h)

The second lecture deals with the Charter of fundamental rights of the European Union and with the proper references of the Charter to the ECHR. This lecture also tries to connect the procedural rights within the framework established by the Charter and the jurisprudence of the ECHR.

The presentation allows for a short overview on the general principles of EU law. The connection between the EU Law and the ECHR is reflected in the decisions of the ECJ. Still, a problem arises from the temporary impossibility of the European Union to adhere to the ECHR, as in this moment such an accession contradicts the way ECJ interprets the Treaties. The Charter of Fundamental Rights handles issues derived from the jurisprudence of ECtHR in articles 47 to 50. The right to an effective remedy and to a fair trial is related to art. 13 and art. 6 para. 1 of the ECHR.

The presumption of innocence and the right of defence are also dealt with by articles 6 para 2 and 3 of the ECHR. The principle of legality and proportionality of criminal offences and penalties and the right not to be tried or punished twice in criminal proceedings for the same criminal offence also concerns art. 4 of the Protocol 7 to the ECHR. The risk of overlapping and the relevant jurisprudence of the two courts are also handled by this presentation.

## Section 1 - The charter of fundamental rights of the European Union and the European Convention for the Protection of Human Rights and Fundamental Freedoms, a comparative approach

Claudia JDERU

### 1.1 Origin and evolution of the Charter

Although it had long been established that fundamental rights applied as general principles of EU law, the European Council made clear when it met in Cologne in June 1999, that:

> "Protection of fundamental rights is a founding principle of the Union and an indispensable prerequisite for her legitimacy. The obligation of the Union to respect fundamental rights has been confirmed and defined by the jurisprudence of the European Court of Justice. There appears to be a need, at the present stage of the Union's

development, to establish a Charter of fundamental rights in order to make their overriding importance and relevance more visible to the Union's citizens"[145].

The European Council concluded that the scope of the Charter should include economic and social rights as well as civil and political rights:

"The European Council believes that this Charter should contain the fundamental rights and freedoms as well as basic procedural rights guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and derived from the constitutional traditions common to the Member States, as general principles of Community law. The Charter should also include the fundamental rights that pertain only to the Union's citizens. In drawing up such a Charter account should furthermore be taken of economic and social rights as contained in the European Social Charter and the Community Charter of the Fundamental Social Rights of Workers (Article 136 TEC), insofar as they do not merely establish objectives for action by the Union.

It recommended that the Charter should be drafted by a body composed of representatives of the Heads of State and Government and of the President of the Commission as well as of members of the European Parliament and national parliaments and should be presented in advance of the European Council meeting in December 2000.

The Convention agreed that the EU citizens should receive the same protection from infringements of human rights by the EU institutions as they did from their governments, all of which had ratified the ECHR, therefore decided that the Charter should duplicate the ECHR provisions. However, there were voices concerned about the relation of the Charter with the ECHR and underlined the possible confusion between rights in the ECHR and rights expressed in the Charter where they covered the same grounds but many members of the Convention considered it is time to bring certain rights "up to date". Yet it was impossible to assert that the content of the ECHR is precisely as it was when it was promulgated in 1950, given that it is a "living instrument" according to the jurisprudence of the ECtHR, and has to be interpreted in light of present day conditions to be practical and effective.

However some of the Articles of the Charter are not derived from pre-existing EU rights. For example, Article 3(2)(b), which prohibits eugenic practices, is derived from the Rome Statute of the International Criminal Court. Another example of Charter rights sourced from a non-EU legal instrument are the rights of the child under Article 24. The Charter Explanations say that this Article is based on the New York Convention on the Rights of the Child.

[145] Annex IV of the Cologne European Council Conclusions, 3 and 4 June 1999

The life of the EU Charter of Fundamental Rights began in December 2000 at the Nice European Council Summit, when the Charter was politically approved after having been solemnly proclaimed by the European Commission, the Parliament and the Council.

For nine years the Charter lived only as a declaration. The Court of Justice of the EU referred to it on a few occasions, but its presence never actually affected the outcome of any case. The Charter was never used in a controversial manner and never with clear legal implications.

The Treaty of Lisbon which entered into force on 1st December 2009 has changed the legal landscape of human rights protection in the EU. The amended Article 6(1) of the Treaty on the European Union states that:

The Union recognizes the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.

The Charter does not supersede 'general principles of law' which have been protecting human rights in EU law since the early seventies. These 'general principles' remain a distinct category because of the wording of Article 6(3) TEU:

"Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law".

**1.2 Consistency with the European Convention on Human Rights**

The preamble of the Charter explains that the Charter "reaffirms, with due regard for the powers and tasks of the Union and for the principle of subsidiarity, the rights as they result, in particular, from":

the constitutional traditions and international obligations common to the Member States;

the ECHR;

the Social Charters adopted by the EU and by the Council of Europe;

the case-law of the ECJ and of the ECtHR.

The preamble further requires the ECJ and national courts to interpret the Charter "with due regard to the explanations" prepared in the course of the Convention which drafted the Charter and "updated" in the course of the European Convention, which had agreed to the Charter becoming legally binding.

According to Article 52(3) "in so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection". Article 52(3) does not make express reference to the ECtHR's case law. Only the ECHR itself is mentioned. However, in J McB v LE (Case C-400/10 PPU J McB v LE, 5 October, [2010] ECR I 000) the CJEU held that where Charter rights are the same as those in the ECHR the Court of Justice should follow the clear and consistent jurisprudence of the ECtHR. Article 52(3) also permits EU legislation to go further than ECHR rights. Recent Commission proposals in the field of legal aid and the presumption of innocence have done so. As a consequence of the latter proposal, we may no longer be able to draw an inference from a suspect's non-cooperation or silence during criminal proceedings, although both have been held by the ECtHR to be consistent with the right to a fair trial under Article 6 of the ECHR. The result might be that there would be two standards for the presumption of innocence in Europe: one under EU and one under ECHR law. Whilst some think it desirable that the EU strengthens ECHR rights where it has the competence to do so (and its competence to do so under Title V TFEU is broad) this adds possible confusion.

### 1.3 General Provisions Governing the Interpretation and Application of the Charter the of the European Convention for the Protection of Human Rights and Fundamental Freedoms

*Application of the Charter*[146]

Article 51(1) sets out the application of the Charter:

1. The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties.

[146] See also the Final Handbook – JUDICIAL INTERACTION TECHNIQUES – THEIR POTENTIAL AND USE IN EUROPEAN FUNDAMENTAL RIGHTS ADJUDICATION, the `European Judicial Cooperation in Fundamental Rights Practice of National Courts` project (JUST/2012/FRAC/AG/2755)

The Charter is to have direct effect since it is addressed to the institutions, bodies, offices and agencies of the Union and to the member states. The Explanations clarify that the application extends to all bodies, offices and agencies set up by primary or secondary legislation in accordance with articles 15 and 16 TFEU.

The Charter also applies to the Member States only when they are implementing Union law - e.g. when national legislation transposes an EU Directive, when a public authority applies EU law or when a final decision of a national court applies or interprets EU law. It does not apply in situations where there is no link with Union law. However, it should be borne in mind that the concept of „implementing Union law", as referred to in Article 51 of the Charter, requires a certain degree of connection above and beyond the matters covered being closely related or one of those matters having an indirect impact on the other[147].

There is broad consensus that the Charter binds member states whenever they act within the scope of EU law (the phrase in fact adopted in the Explanations). This means that the Charter applies in two wider scenarios.

Firstly the ECJ has treated the phrase 'implementing Community rules' as synonymous with member state rules falling within the scope of EU law[148]. This means that where EU law is not directly applicable, as with directives (as opposed to Treaty law, regulations and decisions), and requires implementing national legislation, where a member state has relevant pre-existing legislation or introduces new legislation to give effect to the EU law, the Charter will apply to that legislation. Secondly, where a member state derogates from EU legislation, or part of legislation, the Charter will still apply in relation to the whole of the operative national law[149]. This is because the power to derogate is given by EU law and derogation can only be effective in accordance with EU law, which intrinsically must conform with rights as per articles 2 and 6 TEU.

In order to determine whether national legislation involves the implementation of EU law for the purposes of Article 51 of the Charter, some of the points to be determined are whether that legislation is intended to implement a provision of EU law; the nature of that legislation and whether it pursues objectives other than those covered by EU law, even if it is capable of indirectly affecting EU law; and also whether there are specific rules of EU law on the matter or

[147] Case C 299/95 Kremzow [1997] ECR I 2629, paragraph 16
[148] Case C-442/00 Caballero v Fondo de Garantia Salarial (Fogasa) [2002] ECR i-11915 [29] – [30]
[149] Case C-260/89 ERT v DEB [1991] ECR I-2925 where a monopoly on broadcasting that breached the freedom to provide services could not be justified by way of a treaty provision allowing for discrimination as that only applied on objective grounds of public morals, safety or health which were not present.

capable of affecting it[150]. The determinative issue is not whether a national law had itself been enacted to implement an EU instrument but whether it was being used to implement the obligations flowing from the instrument. To hold otherwise would mean that the Charter would not be applicable if a Member State chose to meet its obligations through existing legal provisions rather than enacting new, discrete provisions.

Whilst the Charter is binding upon the member states, as drafted commentators have presumed that it could not be engaged in an action against a private individual in the way that some Treaty provisions may apply (e.g. with respect to free movement, employment discrimination etc). There may be an argument to say that because the courts form part of the state that the Charter can be invoked in horizontal proceedings. It is more likely that the courts will use the Charter as an interpretative aid which will create more of an indirect horizontal effect, as they are institutions which must 'respect the rights, observe the principles and promote the application of the Charter.' The Grand Chamber of the Court of Justice of the European Union has already invoked the Charter in private proceedings[151]. In any event, even the most conservative interpretation could not deter an individual bringing an action against the state for failing to prevent the violating act of a private individual (in the exercise of a positive obligation).

*Application of the European Convention on Human Rights*

The European Convention on Human Rights which was opened for signature in Rome on 4 November 1950 and entered into force on 3 September 1953 lays down the rights and freedoms that member states undertake to secure to everyone within their jurisdiction.

The status of the ECHR in the domestic legal order may be summarized as follows:

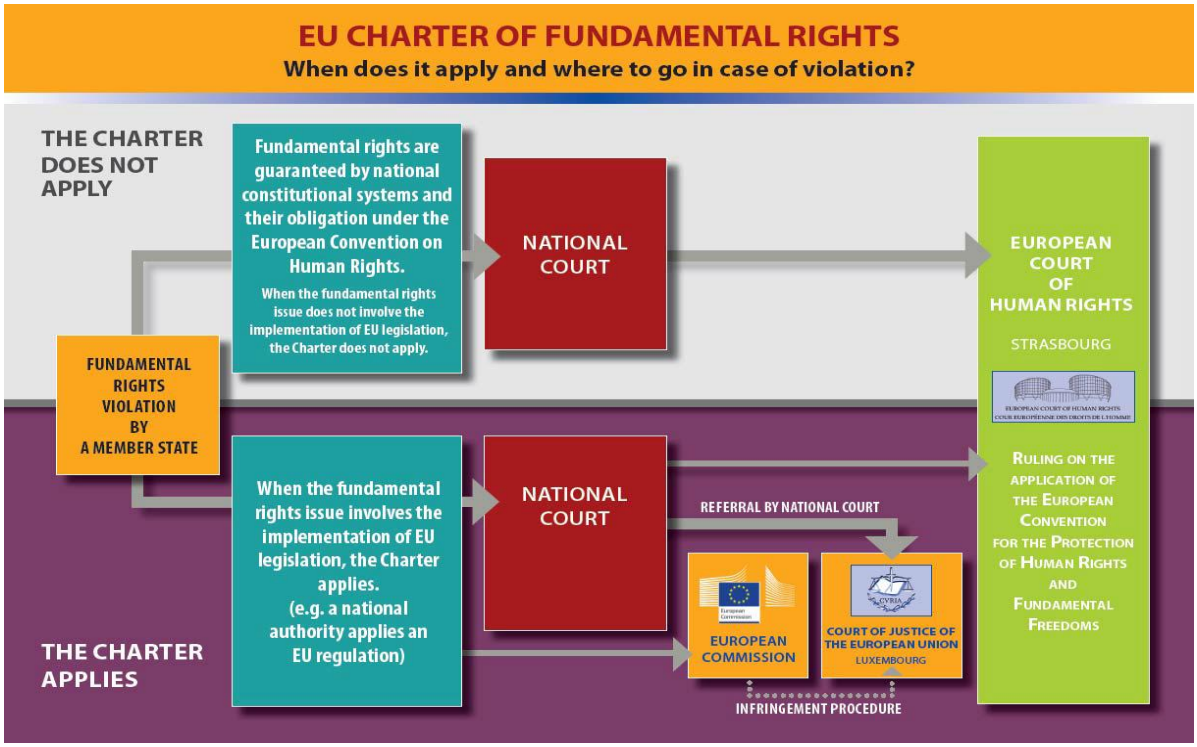
a) Some constitutions are characterized by the acknowledgment of a constitutional rank given to the ECHR in the domestic legal order, for example, Austria and the Netherlands (essentially monist states).

b) Some states are characterized by the acknowledgment of a super-legislative ranking in the domestic legal order, for example, France, Belgium, Spain and Portugal.

[150] Case C 309/96 Annibaldi [1997] ECR I 7493, paragraphs 21 to 23; Case C 40/11 Iida [2012] ECR, paragraph 79; and Case C 87/12 Ymeraga and Others [2013] ECR, paragraph 41

[151] Case C-555/07 Kucukdeveci v Swedex GmbH, 19 January 2010 (unreported) concerning employment discrimination where the Court noted that the Charter is to have the same legal value as the Treaties and that article 21(1) CFR prohibits age discrimination, and Case C-400/10 PPU Deticek v Sgueglia 5 October 2010 (unreported) where the Court specifically referred to the requirement to ensure consideration of the best interests of the child in accordance with article 24 CFR in a contact dispute between parents.

c) Other states are characterized by the acknowledgment of a legislative ranking in the domestic legal order; the Scandinavian countries and the United Kingdom.




*Source - Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – 2012 Report on the Application of the EU Charter of Fundamental Rights, COM(2013) 271*

### 1.4 The Charter and the European Court of Human Rights[152]

The first reference to the Charter came in 2001 when Judge Costa's separate opinion in Hatton and others v.UK referred to article 37 of the Charter as an example of the growing recognition of the importance of environmental rights[153]. One year later it was regarded as a eloquent argument in a joint partially dissenting opinion of Judge Sir Nicholas Bratza and Judges Fuhrmann and Tulkens that one of the prohibited grounds for discrimination is sexual orientation since a

[152] See also The Charter of fundamental rights: history and prospects in post-Lisbon Europe, EUI Working paper, Law 2011/08, David Anderson Q.C. & Cian C. Murphy, European University Institute, Italy
[153] Hatton and others v. UK, (2002)

European consensus is now emerging in this area[154]. In July 2002 the Grand Chamber expressly reffered to Article 9 of the Charter of Fundamental Rights of the European Union which departs, no doubt deliberately, from the wording of Article 12 of the Convention in removing the reference to men and women and concluded that a test of congruent biological factors can no longer be decisive in denying legal recognition to the change of gender of a post-operative transsexual[155]. In its Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Sirketi v. Ireland case the Strasbourg Court stated that „although not fully binding, the provisions of the Charter of Fundamental Rights of the European Union were substantially inspired by those of the Convention, and the Charter recognises the Convention as establishing the minimum human rights standards" and concluded that the detention and retention of the aircraft was indeed compatible with the State's obligations under ECHR, Article 1 Protocol 1. Since the impugned act consisted solely of a Member State's compliance with its legal obligations flowing from EU membership, the ECtHR examined further whether a presumption arises that the Member State complied with its ECHR commitments in fulfilling such EU obligations and whether any such presumption has been rebutted. Such a presumption could be rebutted, the ECtHR reasoned, if, in a particular case, it was found that the protection of Convention rights was manifestly deficient. In such cases, the interest of international co-operation would be outweighed by the Convention's role as a "constitutional instrument of European public order" in the field of human rights. After having examined the EU legal regime for the protection of fundamental rights in the European Community, the ECtHR held that this protection can be considered to be, and to have been at the relevant time, "equivalent" to that of the Convention system.

Another case worth mentioning in which the Charter had an important effect is Scoppola v. Italy (no.2)[156] where the Court reversed its earlier case-law, stating that the nullum crimen principle must include the retrospective application of the more lenient penalty. The Court based its change in approach on the fact that ``a consensus has gradually emerged in Europe and internationally around the view that application of a criminal law providing for a more lenient penalty, even one enacted after the commission of the offence, has become a fundamental principle of criminal law" (para. 109). The Strasbourg Court mentioned, apart from the entry into force of the American Convention on Human Rights, Article 9 of which guarantees the retrospective effect of a law providing for a more lenient penalty enacted after the commission of the relevant offence, the proclamation of the European Union's Charter of Fundamental Rights. The court in Strasbourg revealed that the wording of Article 49 § 1 of the Charter differs – and this can only be deliberate – from that of Article 7 of the Convention in that it states: "If, subsequent to the commission of a criminal offence, the law

[154] Frette v. France (2002)
[155] Christine Goodwin v. Uk (2002)
[156] Scoppola v. Italy (no.2), judgement of the Grand Chamber, 17 September 2009

provides for a lighter penalty, that penalty shall be applicable". It also mentioned the ECJ decision in the case of Berlusconi and Others, which found this principle part of the constitutional traditions common to the member States.

The Charter was also mentioned in different concurring or dissenting opinions. In Martinie v. France[157] in a concurring opinion three members of the court concluded that the applicability of art.6, civil limb, should be reconsidered in light of Article 47 of the Charter expressly mentioning that the raison d'être and justifications for the exclusion of certain categories of public servants from the guarantees of a fair trial should now be fundamentally reviewed in the light of Article 47 of the Charter of Fundamental Rights of the European Union, which provides: "Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article."

### 1.5 A brief comparison between art.47 and 48 of the Charter and article 6 of the European Convention on Human Rights

The Charter contains 54 Articles, grouped under seven Titles. Articles 47-50, under Title VI, "Justice", concern the right to an effective remedy and a fair trial, presumption of innocence and the right of defense, principles of legality and proportionality of criminal offences and penalties, and the right not to be tried or punished twice in criminal proceedings for the same criminal offence.

Article 47.Right to an effective remedy and to a fair trial

1. Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

2. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law.

3. Everyone shall have the possibility of being advised, defended and represented. Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.

According to the Explanations relating to the Charter of fundamental rights the right to 'access to court' guaranteed by Article 47 is applicable in relation to the 'rights and freedoms guaranteed by the law of the Union'. It has been consistently stated by the Court of Justice that: 'Community law … not only imposes obligations on individuals but is

[157] Martinie v. France (2006)

also intended to confer upon them rights which become part of their legal heritage. These rights arise not only where expressly granted by the Treaty, but also by reason of obligations which the Treaty imposes in a clearly defined way upon individuals as well as upon the Member States and upon the institutions of the Community.'[158]

The possibility for redress in the event of unjustified interference is thus a result of a failing of one of the duties generated by such rights on the part of another private party, a Member State or the Community institutions. The right to judicial review is thus not subsidiary to other Charter rights in the way of Article 13 of the European Convention on Human Rights. In that respect the scope of Article 47 is wider than that of Article 6 (1) of the European Convention of Human Rights.[159]

The second paragraph of Article 47 guarantees the right to a fair hearing in all proceedings of criminal, civil and administrative nature. That is one of the consequences of the fact that the Union is a community based on the rule of law as stated by the Court in Case 294/83, 'Les Verts' v European Parliament (judgment of 23 April 1986, [1986] ECR 1339). Thus the protection offered under Article 47 is wider in scope. In all other aspects the guarantees afforded by the European Convention on Human Rights apply in a similar way to the Union.

The third paragraph of Article 47 provides for the right of access to legal advice and provides for the availability for legal aid as a prerequisite to effective access to justice. Taken the Court's commitment to 'practical and effective rights' legal representation and aid may sometimes be mandatory. This is in accordance with the case-law of the European Court of Human Rights, which has consistently required that provision should be made for legal aid where the absence of such aid would make it impossible to ensure an effective remedy (ECHR judgment of 9 October 1979, Airey, Series A, Volume 32, p. 11).

Article 48. Presumption of innocence and right of defence

1. Everyone who has been charged shall be presumed innocent until proved guilty according to law.

2. Respect for the rights of the defence of anyone who has been charged shall be guaranteed.

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[158] ECJ, Case C-26/62, Van Gend en Loos v. Nederlandse Administratie der Belastingen, [1963] ECR 1 (judgment of 5 February 1963).

[159] See COMMENTARY OF THE CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION drafted by EU Network of Independent Experts on Fundamental Rights in June 2006

According to the Explanations relating to the Charter of fundamental rights Article 48 CFR is to be interpreted in accordance with article 6(2) and 6(3) ECHR which reads as follows:

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

3. Everyone charged with a criminal offence has the following minimum rights:

(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;

(b) to have adequate time and facilities for the preparation of his defence;

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

In accordance with Article 52(3), this right has the same meaning and scope as the right guaranteed by the ECHR.

Article 6(2) requires, inter alia, that when carrying out their duties, the members of a court should not start with the preconceived idea that the accused has committed the offence charged; the burden of proof is on the prosecution, and any doubt should benefit the accused. 0 Thus, the presumption of innocence will be infringed where the burden of proof is shifted from the prosecution to the defence. However, legal presumptions are not in principle incompatible with Article 6. For example, the presumption of innocence does not preclude strict liability offences in which the prosecution may not be required to prove the mens rea of the accused. According to the European Court of Human Rights` jurisprudence the drawing of inferences from the silence of the accused is not necessarily incompatible with Article 6. In John Murray v. the United Kingdom, the Court stated that, “although not specifically mentioned in Article 6 of the Convention, there can be no doubt that the right to remain silent under police questioning and the privilege against self-incrimination are generally recognized international standards which lie at the heart of the notion of a fair procedure. By providing the accused with protection against improper compulsion by the authorities these immunities contribute to avoiding miscarriages of justice and to securing the aims of Article 6. (…) It is incompatible with the immunities under consideration to base a conviction solely or mainly on the silence of the accused or on a refusal to answer questions or to give evidence himself. However, these immunities cannot and should not prevent the accused’s silence, in situations

which clearly call for an explanation from him, being taken into account in assessing the persuasiveness of the evidence adduced by the prosecution"[160]. It follows from this understanding of the right to silence that the question whether the right is absolute must be answered in the negative. The question in each particular case is whether the evidence adduced by the prosecution is sufficiently strong to require an answer.

In this context we should also mention the 27 November 2013 proposal of a Directive of the European Parliament and of the Council to ensure the right to a fair trial by setting out common minimum standards on certain aspects of the presumption of innocence and of the right to be present at trial in criminal proceedings, COM/2013/0821 final - 2013/0407 (COD).

The proposal covers the following rights:

1) The right not to be presented guilty by public authorities before the final judgment: the ECtHR established as one of the basic aspects of the principle of presumption of innocence the fact that a court or public official may not publicly present the suspects or accused persons as if they were guilty of an offence if they have not been tried and convicted of it by a final judgment.

2) The burden of proof is on prosecution and any reasonable doubts on the guilt should benefit the accused: this presupposes that a court's judgment must be based on evidence as put before it and not on mere allegations or assumptions.

According to recital 15 of the proposal for a directive "in some cases shifting the burden of proof to the defence should not be incompatible with the presumption of innocence as long as certain safeguards are guaranteed: it should be ensured that presumptions of fact or law are confined within reasonable limits, which take into account the importance of what is at stake, and that they are rebuttable, for example by means of new evidence on extenuating circumstances or on a case of force majeure". One can notice that the above mentioned recital is in accordance with the clear and consistent case law of the Strasbourg court. However this recital is deleted in the report on the proposal for a directive (COM(2013)0821 – C7 0427/2013 – 2013/0407(COD)) drawn by the Committee on Civil Liberties, Justice and Home Affairs with the justification that the reversal of the burden of proof in criminal proceedings is unacceptable. The principle that the burden of proof rests with the prosecution must be left untouched. In the same report a new recital 15a, is proposed –"The burden of proof in establishing the guilt of suspects or accused persons is on the prosecution and any

[160] John Murray v. the United Kingdom, no. 18731/91, 8 February 1996

doubt is to benefit the suspect or accused person. This is without prejudice to any obligation on the judge or the competent court to seek both inculpatory and exculpatory evidence".

Recital 19 of the said proposal for a directive which states that "the right to remain silent is an important aspect of the presumption of innocence. It should serve as protection from self-incrimination" is also amended in the report on the proposal for a directive, the amendment being "the right to remain silent is an important aspect of the presumption of innocence. It should serve as protection from self-incrimination. The right to remain silent cannot in any circumstances be used against the accused or suspected person and cannot be regarded as substantiation of the charges". The report also proposes a new amendment, 19a -"the exercise of the right to remain silent must never be taken to signify corroboration of the facts. Exercise of the right to remain silent must not be used against a suspect or accused person at any stage in the proceedings. What is more, no penalty may be imposed on a suspect or accused person who refuses to cooperate or to incriminate him or herself or who exercises the right to remain silent".

3) The right not to incriminate one-self and not to cooperate and the right to remain silent: these rights lie at the heart of the notion of a fair trial under Article 6 of the ECHR. The right not to incriminate oneself presupposes that the prosecution in a criminal case seeks to prove the case against the accused without resort to evidence obtained through methods of coercion or oppression; the right to remain silent must be ensured and any inferences drawn from the fact that suspects make use of this right should be excluded. Suspects should be promptly informed of their right to remain silent. Such information should also refer to the content of the right to remain silent and of the consequences of renouncing to it and of invoking it.

According to recital 17 of the said proposal "any compulsion used to compel the suspect or accused person to provide information should be limited. To determine whether the compulsion did not violate those rights, the following should be taken into account, in the light of all circumstances of the case: the nature and degree of compulsion to obtain the evidence, the weight of the public interest in the investigation and punishment of the offense at issue, the existence of any relevant safeguards in the procedure and the use to which any material so obtained is put. However, the degree of compulsion imposed on suspects or accused persons with a view to compelling them to provide information relating to charges against them should not destroy the very essence of their right not to incriminate one-self and their right to remain silent, even for reasons of security and public order". However this recital is deleted in the report on the proposal for a directive (COM(2013)0821 – C7 0427/2013 – 2013/0407(COD)) drawn by the Committee on Civil Liberties, Justice and Home Affairs with the justification that the idea that the authorities may use coercion in order to obtain information from a suspect or an accused person is simply unacceptable. The directive must state clearly that the use of physical or psychological violence or threats against suspects or accused persons is banned, on the grounds that it constitutes a violation of the right to human dignity and the right to a fair trial.

4) Right to be present at one's trial: the proposal lays down this right, established by the ECtHR, of an accused to be present at the trial and also establishes limited exceptions to this right, in line with the Charter, the ECHR and EU law. It provides that Member States must ensure that the right to be present applies to any trial aiming at assessing the question of the guilt of the accused person (both conviction and acquittal decisions).

Observance of the rights of the defence in all proceedings initiated against a person that are liable to culminate in a measure adversely affecting that person is a fundamental principle of Community law.

**1.6 Conclusion: Why use the Charter in criminal proceedings?**

The Charter must be interpreted in accordance with the Convention when the rights in the Charter replicate those in the Convention, such that the Convention jurisprudence can be directly imported into submissions relying upon Charter provisions;

The Charter has direct effect before all national courts whereas the member states need only have regard to the Convention, unless incorporated otherwise by national law, and often it requires an appellate decision of a national court to interpret the application of the Convention in a domestic case;

If the meaning or scope of EU law is not clear, a reference can be made to the CJEU for interpretation at any stage of the proceedings and not only after domestic remedies have been exhausted, as with an application to the ECtHR; at least until the Protocol No. 16 to the ECHR will enter into force.

The process of obtaining a determination from the Luxembourg Court is (currently) much quicker than waiting for the Strasbourg Court.

# Chapter III – First linguistic training (45 min)

Roxana CONSTANTINESCU, linguistic trainer

'*The Union has set itself the objective of maintaining and developing an area of freedom, security and justice. According to the Presidency Conclusions of the European Council in Tampere of 15 and 16 October 1999, and in particular point 33 thereof, the principle of mutual recognition of judgments and other decisions of judicial authorities should become the cornerstone of judicial cooperation in civil and criminal matters within the Union because enhanced mutual recognition and the necessary approximation of legislation would facilitate cooperation between competent authorities and the judicial protection of individual rights*.'(Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings)

The objective of 'maintaining and developing an area of freedom, security and justice' is a core objective stated in the opening words of all or most European directives in the field of judicial cooperation in criminal matters. 'Mutual recognition' based upon 'mutual trust' and 'mutual confidence', are other key concepts commonly used in the directives' wordings. These objectives can only be achieved by means of cooperation, i.e. by means of surmounting the language barrier in a multilingual Europe. The English language, as the European lingua franca of judicial cooperation, is an important tool in this process. It is therefore consequential for the members of the judicial systems involved and participating in such cooperation to be able to use this tool in an effective way, which can be an equally easy and difficult task.

When using English as a tool for judicial cooperation, one should consider two important facts. Firstly, English legal (including criminal) terminology is not always (easily) translatable into other European languages, given the peculiarities of the common law system, whose distinct features, concepts, and institutions are not to be found in any other European system. This is also the case of translations of legal concepts from any European language into English. Secondly, legal English differs from general English in a number of ways, which will be outlined below.

With respect to the first aspect, i.e. the differences between the common law system and the different European systems, translations of legal terms and phrases from and into English can be difficult. When it comes to English concepts or terms which are not translatable into other European languages, an English law dictionary will quickly do the trick, by explaining what that particular word or concept stands for. Problems emerge when one wants to use terms corresponding to concepts or institutions that do not exist as such in the English system. Most speakers' quick solution is, in that situation, to 'adapt' words from their native language to English. The situation is sometimes similar even when there are

corresponding institutions or concepts in the English system, but the speakers' tendency is the same – i.e. to adjust words form their vernacular languages, which appear to be similar (in form) to particular words in English, but the English terms mean completely different things.

The problem with such misusages of English terms is not only the improper or inadequate use of English, but also the risk of negatively affecting the communication, and hence the cooperation, since not all European languages share the similarities with the exact same words in English. For example, the term 'magistrate', used by some speakers to designate a 'member of the judiciary' (typically a judge or a prosecutor in some systems – e.g. Romania, Bulgaria, France, Italy), can be understood differently by speakers from different European states (e.g. in Spain as a senior judge, in Poland as a local authority or the city hall, in Germany as an archaic way of referring to a teacher, etc.) while in English it stands for a minor judicial officer acting as a judge in a magistrates' court, without legal qualification and sometimes doing unpaid work. Other examples include terms like 'prescription' (used by some speakers to refer to the statute of limitations or limitation period, while in English it refers to medical prescription, this being its common understanding by other European natives, who do not happen to have this 'false friend' at all), 'sentence' (which in English is only used in criminal cases, as opposed to languages like Italian, Spanish or Romania, where this term is also used in civil cases), 'instance', etc.

The second important fact mentioned above is the difference between legal English and general English. The most relevant characteristics of legal English will be briefly outlined below.

Firstly, legal English presupposed the use of technical (legal) terms, which are only employed in legal contexts ('defendant', 'hearing', 'respondent', 'judgment', 'extradition', etc.), and semi-technical terms, which have a specific meaning in legal contexts, different from the one they have in general English ('action', 'serve a document', 'procedure'). Many of these terms are illustrated and suggested for practice in the exercises below (terms strictly relating to criminal law and procedure, court language, the legal profession, criminal proceedings). Terms are not usually abbreviated, with the exception of a few acknowledged acronyms (Q.C. – Queen's Counsel).

Secondly, the vocabulary is also characterized by formality. Thus, complex prepositions ('in the event of', 'having regard to'), formal expressions ('in accordance with'), compound prepositions and adverbs ('hereby', 'herein', 'hereinafter', 'thereafter', 'thereof', etc.), as well as words belonging to a higher register ('expedite' instead of 'speed up', 'deem' instead of 'considered') are common in legal texts.

Thirdly, formality is also a feature of the morphological structures and of the syntax. The most common grammatical structures used in legal language (both in the UK and in the EU) include certain modal verbs (notably 'shall', 'may', 'should', and more rarely, but still in very formal contexts, 'can' and 'must'), the passive structures, which place the

emphasis on the result rather than the agent, formal connectors ('provided that'), as well as long and complex sentences, which are rarely to be found in general English.

The present handbook is therefore intended to point out the problematic aspects of legal English in general, and criminal terminology in particular. All these aspects mentioned above are illustrated by the exercises below, which provide a variety of means of facilitating the correct use of the legal vocabulary and the typical grammatical structures of legal English. The different designs of the exercises have the objective of improving a particular aspect or developing a particular skill. The 'matching', 'multiple choice', 'word formation', 'gap fill' and 'reading' exercises are aimed at enriching the speakers' vocabulary or at activating the passive vocabulary. Exercises dealing with particles, modal verbs or other grammatical structures are designed to improve the speakers' fluency in English. Other exercises are meant to help speakers use their language skills (including the new terms and structures acquired) in situational (work related) contexts. For purposes of effectiveness of the exercises, a key is provided at the end of the manual.

## Section 1 - General criminal terminology

I. Complete the phrases below by matching the words in the two columns. Explain, in your own words, what these phrases mean.

| | |
|---|---|
| 1. presumption | a) question |
| 2. burden | b) of liberty |
| 3. legal | c) doubt |
| 4. right | d) of proof |
| 5. arrest | e) aid |
| 6. reasonable | f) proceedings |
| 7. leading | g) of innocence |
| 8. fair | h) warrant |

9. criminal i) to a lawyer

10. deprivation j) trial

II. Complete the table below using words deriving from the ones given.

| Noun | Verb |
|---|---|
| | judge |
| decision | |
| | hear |
| proof | |
| | acquit |
| surveillance | |
| | sit |
| suspension | |
| | defend |

III. Match the words with the corresponding definition.

| |
|---|
| arson, assault, blackmail, bribery, burglary, embezzlement, extortion, forgery, hijacking, manslaughter, murder, perjury, piracy, racketeering, robbery, smuggling |

| | |
|---|---|
| | the crime of taking of property of another person by using force, violence, or intimidation |
| | the act of killing a human being without malice aforethought |
| | the giving of false evidence by a witness in criminal proceedings while under oath |
| | the crime of intentionally setting fire to a property |
| | the act of securing money, favours, etc. by the abuse of one's office or authority |

| | |
|---|---|
| | the crime of intentionally killing a person |
| | an unlawful attack upon another person, with or without battery, causing physical harm to someone |
| | the act of secretly and fraudulently taking money or property belonging to an organisation, entrusted by that organization |
| | the act of illegally entering a dwelling with the intention of stealing things |
| | the act of illegally taking goods and people into or out of the country for lucrative purposes |
| | the act of making or altering documents, objects, etc., for a deceitful or fraudulent purpose, whereby the legal rights of other persons are affected |
| | the crime of engaging in illegal activities for profit |
| | the act of giving or promising money or other valuable consideration with a view to corrupting a person |
| | the unauthorized use or reproduction of patented or copyrighted material |
| | the crime of seizing, diverting or appropriating a vehicle by force or threat of force |
| | the act of getting money or forcing someone to do something by threatening to disclose discreditable information |

IV. Complete the table below with the required forms of the words given. Then use the words in the table to make sentences.

| Verb | Noun | Adjective |
|---|---|---|
| apply | | |
| accuse | | |
| infringe | | |
| appeal | | |
| deprive | | |
| allege | | |

V. Confusing pairs. Provide definitions or explanations for the words below, emphasizing the differences between the terms in each pair.

1. theft – robbery

2. robbery – burglary

3. murder – assassination

4. kidnapping – abduction

5. forgery – counterfeit

6. libel – slander

VI. Choose the correct answer.

1. The lawyer gave him …….

a) a good advice b) some good advice c) some good advices d) some good advise

2. The ……... sentenced the accused to imprisonment.

a) counsel b) judge c) solicitor d) barrister

3. Everybody thought he was guilty, but no one could …… anything against him.

a) charge b) accuse c) claim d) prove

4. The accused was finally ……, since his guilt was not proved beyond any reasonable doubt.

b) pardoned c) put on probation c) acquitted d) detained

5. It is the responsibility of the police to …… the law.

a) enforce b) force c) bind d) compel

6. The high court judge will pass …… next week.

a) decision b) verdict c) sentence d) punishment

7. I …… to say anything before speaking to a lawyer.

a) refuse b) deny c) resist d) protest

8. He was found guilty …… trafficking in human beings.

a) with b) of c) from d) for

9. The prosecution didn't have enough …… for a realistic prospect of conviction, so the suspect had to be released.

a) proof b) evidences c) evidence d) prove

10. The accused was eventually …… of murder.

a) punished b) convicted c) condemned d) tried

11. He couldn't pay …… legal assistance, so he was provided with legal aid.

a) of b) Ø c) on d) for

12. After being charged …… embezzlement, the public official resigned.

a) for b) of c) with d) on

13. The offender could not pay …… the fine, so he was sentenced to community service instead.

a) Ø b) for c) to d)on

14. The sentence imposed by the ……. is final.

a) jury b) prosecutor c) judge d) counsel

VII. Complete the table below with nouns deriving from the verbs given. There are two nouns corresponding to each verb – one designating an event or an action, and the other a person. Then use words from the table to fill in the gaps in the sentences below.

| Verb | Noun<br><br>event/action | Noun<br><br>person |
|---|---|---|
| appeal | | |
| hear | | |
| offend | | |
| detain | | |
| rob | | |
| prosecute | | |
| try | | |
| defend | | |
| suspect | | |

1. In criminal proceedings, the burden of proof is usually on the …….

2. The ……. claimed that his right to silence had been infringed.

3. He claimed that he had been unlawfully ……..by the police.

4. Two ……. of the crime were apprehended by the police.

5. The accused has the right to communicate with his or her lawyer for the purposes of the preparation of the …….

6. The accused claimed that he had not committed the …… he was charged with.

7. A court or public official may not state that the accused is guilty if he has not been …… and convicted.

8. Pre-trial …… does not in principle violate the presumption of innocence.

9. He was apprehended by the police on reasonable …….. of having committed a serious offence.

10. He was sentenced to 5 years imprisonment for the offence of …….

11. The first instance court's decision is subject to …….

12. The …… of the suspect did not help, since he made use of his right to remain silent.

13. The …… was sentenced to community service.

VIII. False friends. Explain what the following words mean in English. Then compare them to 'false friends' in your vernacular language.

1. accusation

2. sentence

3. instance

4. magistrate

5. prescription

6. tribunal

7. to execute

IX. Before reading the text, answer the following questions:

1. What is the judge's role in a criminal trial in your country?

2. Do you have trials by jury? What is the role of the jury?

3. What sentences can a judge impose in your country?

4. Which are the factors usually considered by a judge when sentencing?

While reading the text below, choose the correct words to fill in the gaps.

Criminal Justice

(https://www.judiciary.gov.uk/about-the-judiciary/the-justice-system/jurisdictions/criminal-jurisdiction/)

Most people feel very strongly about crime, and judges and magistrates play a vital role in the criminal justice system – especially when it comes to sentencing.

Criminal (1) ..... come to court after a decision has been made by, usually the Crown Prosecution Service, to prosecute someone for (2) ..... crime. In the vast majority of cases (over 95 per cent), magistrates hear the evidence and, as a panel, make a decision on guilt or innocence. For more serious cases a district judge (Magistrates' Court) or a circuit judge in the Crown Court will hear the evidence, and in the case of the latter, this will involve a jury trial. Very serious criminal cases, such as murder and rape, may be (3) ..... by a High Court judge.

(1) a) situations b) cases c) trials d) prosecutions

(2) a) a supposed b) an accused c) an assumed d) an alleged

(3) a) managed b) judged c) seen d) heard

Both magistrates and judges have the power to imprison those (4) …… of a crime, if the offence is serious enough. But (5) …… is not the only solution; a judge or magistrate can (6) …… a community punishment, or put an individual under some sort of control order where their movements or activities are (7) ……. Although punishment is a key consideration when (8) ……., judges will also have a mind as to how a particular sentence may reduce the chances of an individual re-offending.

(4) a) sentenced b) punished c) convicted d) tried

(5) a) imprisonment b) arrest c) jail d) detention

(6) a) ask b) demand c) order d) require

(7) a) minimized b) lowered c) restricted d) decreased

(8) a) sentencing b) judging c) hearing d) trying

A judge hearing a criminal case

Before a criminal trial starts the judge will familiarise himself or herself with the details of the case by reading the relevant case papers. These include the (9) …… which sets out the charges on which the defendant is to be tried, witness (10) ……., exhibits and documentation on applications to be made by any party concerning the admissibility of (11) …… in the trial.

(9) a) prosecution b) accusation c) indictment d) paper

(10) a) declarations b) statements c) assertions d) assumptions

(11) a) evidences b) evidence c) proofs d)prove

For jury trials in the Crown Court, the judge supervises the selection and (12) …… in of the jury, giving the jurors a direction about their role in the trial of deciding the facts and warning them not to discuss the case with anyone else.

(12) a) bringing b) calling c) getting d) swearing

During the trial

Once the trial has commenced the judge (13) …… that all parties involved are given the opportunity for their case to be (14) …… and considered as fully and fairly as possible. The judge plays an active role during the trial, controlling the way the case is conducted in accordance with relevant law and practice. As the case (15) …… the judge makes notes of the evidence and decides on legal issues, for example, whether evidence is admissible.

(13) a) assures b) allows c) ensures d) permits

(14) a) presented b) delivered c) provided d) shown

(15) a) advances b) moves on c) progresses d) evolves

Once all evidence in the case has been (16) …… the judge's summing up takes place. The judge sets out for the jury the law on each of the charges made and what the prosecution must prove to make the jury sure of the case. At this stage the judge (17) …… to notes made during the course of the trial and reminds the jury of the key points of the case, highlighting the strengths and weaknesses of each side's (18) …….. The judge then gives (19) …… about the duties of the jury before they retire to the jury deliberation room to consider the verdict.

(16) a) judged b) managed c) tried d) heard

(17) a) sends b) points c) refers d) alludes

(18) a) statement b) claim c) argument d) assertion

(19) a) directions b) suggestions c) advice d) indications

Sentencing

If the jury find the (20) …… guilty then the judge will decide on an appropriate sentence. The sentence will be influenced by a number of factors: principally the (21) …… of the case, the impact that the crime has had on the victim, and relevant law especially guideline cases from the Court of Appeal. The judge will equally take into account the (22) …… and any reports and references on the defendant.

(20) a) defence b) defendant c) defender d) offender

(21) a) conditions b) circumstances c) situation d) occasion

(22) a) mitigation b) extenuation c) relief d) moderation

Can judges (23) …… pass any sentence they like?

A judge's role is not to make law, but to uphold and apply the laws made by Parliament. The laws must be interpreted and applied by the judges to different cases, and this includes guidelines on the appropriate sentence.

(23) a) give b) grant c) order d) pass

If a jury finds the defendant guilty then the judge will decide on an appropriate sentence. Magistrates can find a defendant guilty and pass sentence themselves, or send the case to Crown Court for sentencing if they feel the offence is too serious for their own sentencing powers.

Factors to consider

The sentence will be influenced by a number of factors; principally:

- the circumstances of the case
- the impact that the crime has had on the victim, and
- relevant law – especially guideline cases from the Court of Appeal.

The judge will equally take into account the mitigation, which might include difficult personal circumstances, expressions of (24)…… or a guilty (25) …….

(24) a) sorrow b) sadness c) shame d) remorse

(25) a) plead b) recognition c) admission d) plea

If an offender does admit to their crime it usually means they get a (26) …… sentence with a maximum of a third off when they admit their crime at the very earliest opportunity. The later the plea, the smaller the reduction.

(26) a) better b) shorter c) reduced d) easier

Only once the judge has (27) …… all of these factors will the appropriate sentence or punishment be pronounced.

(27) a) considered b) investigated c) questioned d) judged

Making the punishment fit the crime

One of the most important things is to make sure appropriate sentences are given for each offence – in other words, the punishment should fit the crime. To do this, judges and magistrates use sentencing (28) …….

(28) a) suggestions b) guidelines c) advice d) indications

These help them sentence offenders in a (29) ……. way. Each and every offence and every offender is different but the aim is to make sure that the way in which a judge or magistrate decides the sentence is the same.

(29) a) identical b) consistent c) equal d) different

Judges will also think about what sort of sentence would be most (30) ……. to change the offender's behaviour.

(30) a) sure b) assured c) ensured d) likely

What types of sentence are there?

There are four main types, the toughest of which is prison. This is used when a crime is so serious, or an offender's (31) ……. is so bad, no other sentence will do. Offenders will normally spend half their sentence in prison, and the rest on licence in the community.

(31) a) story b) history c) recordd) situation

For some offenders this will mean wearing an electronic tag which means they are severely restricted in where they can go. If they break the (32)……. of their licence, they can be sent back to prison for the rest of the sentence.

(32) a) contract b) agreement c) conditions d) understanding

Community sentences combine (33) ……. with activities carried out in the community, such as unpaid work to remove graffiti or clear up litter, getting treatment for drug addiction or keeping to a curfew. This is not a soft option – offenders can be made to do between 40 and 300 hours of demanding work.

(33) a) socialization b) entertainment c) punishment d) rehabilitation

(34) …… are the most common type of sentence and are for less severe offences. The amount is set by the court after considering the seriousness of offence and the offenders' ability to pay.

(34) a) Taxes b) Fines c) Fees d) Charges

Finally, we have (35) ……– these are used for the least serious offences for which the experience of being prosecuted and taken to court is thought to be punishment enough. But if an offender commits another crime within a set period, a sentence for the original offence as well as a new one can be given.

(35) a) leaves b) discharges c) removals d) reliefs

## Section 2 - Key to exercises

I. 1. – g; 2 – d; 3 – e; 4 – l; 5 – h; 6 – c; 7 – a; 8 – j; 9 – f; 10 – b.

II.

| Noun | Verb |
|---|---|
| JUDGMENT | judge |
| decision | DECIDE |
| HEARING | hear |
| proof | PROVE |
| ACQUITTAL | acquit |
| surveillance | SURVEIL |
| SITTING | sit |
| suspension | SUSPEND |
| DEFENCE | defend |

III.

| | |
|---|---|
| robbery | the crime of taking of property of another person by using force, violence, or intimidation |

| | |
|---|---|
| manslaughter | the act of killing a human being without malice aforethought |
| perjury | the giving of false evidence by a witness in criminal proceedings while under oath |
| arson | the crime of intentionally setting fire to a property |
| extortion | the act of securing money, favours, etc. by the abuse of one's office or authority |
| murder | the crime of intentionally killing a person |
| assault | an unlawful attack upon another person, with or without battery, causing physical harm to someone |
| embezzlement | the act of secretly and fraudulently taking money or property belonging to an organisation, entrusted by that organization |
| burglary | the act of illegally entering a dwelling with the intention of stealing things |
| smuggling | the act of illegally taking goods and people into or out of the country for lucrative purposes |
| forgery | the act of making or altering documents, objects, etc., for a deceitful or fraudulent purpose, whereby the legal rights of other persons are affected |
| racketeering | the crime of engaging in illegal activities for profit |
| bribery | the act of giving or promising money or other valuable consideration with a view to corrupting a person |
| piracy | the unauthorized use or reproduction of patented or copyrighted material |
| hijacking | the crime of seizing, diverting or appropriating a vehicle by force or threat of force |
| blackmail | the act of getting money or forcing someone to do something by threatening to disclose discreditable information |

IV.

| Verb | Noun | Adjective |
|---|---|---|
| apply | application | applicable |
| accuse | accusation | accused |
| infringe | infringement | infringed, infringing |
| appeal | appeal | appellate |
| deprive | deprivation | deprived |
| allege | allegation | alleged |

V. 1. the act of stealing – the act of stealing by using violent; 2. stealing by using violence – entering a dwelling/building in order to steal; 3. killing a human being with intention – killing a public figure with intention; 4. taking away a person for profit – taking away a person for purposes which do not involve profit; 5. making, adapting or imitating documents or currency – making, adapting or imitating objects, coins etc.; 6. defamation by written or representational means – defamation by oral statements.

VI. 1 – b; 2 – b; 3 – d; 4 – c; 5 – a; 6 – c; 7 – a; 8 – b; 9 – c; 10 – b; 11 – d; 12 – c; 13 – a; 14 – c.

VII.

| Verb | Noun<br><br>event/action | Noun<br><br>person |
|---|---|---|
| appeal | appeal | appellant |
| hear | hearing | - |
| offend | offence | offender |
| detain | detention | detainee |
| rob | robbery | robber |
| prosecute | prosecution | prosecutor |
| try | trial | - |
| defend | defence | defendant |
| suspect | suspicion | suspect |

1. prosecution; 2. defendant; 3. detained; 4. suspects; 5. defence; 6. offence; 7. tried; 8. detention; 9. suspicion; 10. robbery; 11. appeal; 12. hearing; 13. offender.

VIII. 1. accusation – charge, allegation of an offence; the offence charged; 2. sentence – punishment given by a judge in court to a person who has been found guilty of an offence; 3. instance – a particular situation or event, a case or occurrence of something; 4. magistrate – a justice of the peace, i.e. a minor judicial officer, usually not having legal qualifications and doing unpaid work, dealing with minor offences; 5. prescription – a direction written by the physician to the pharmacist regarding the preparation or sale of a specific medicine; 6. tribunal – in England, a specialized court,

where panels are made up of judges and professionals in the field the tribunal specializes in; 7. to execute – to perform something; to kill somebody as a form of legal punishment.

IX. (1) – b; (2) – d; (3) – d; (4) – c; (5) – a; (6) – c; (7) – c; (8) – a; (9) – c; (10) – b; (11) – b; (12) – (d); (13) – c; (14) – a; (15) – c; (16) – d; (17) – c; (18) c; (19) – a; (20) – b; (21) – b; (22) – a; (23) – d; (24) – d; (25) – d; (26) – c; (27) – a; (28) – b; (29) – b; (30) – d; (31) – c; (32) – c; (33) – d; (34) – b; (35) – b.

# Chapter IV – Moot court and the case law feedback (1h)

Claudia Jderu

This chapter handles issues concerning the connection between judicial cooperation activities such as the execution of a European Arrest Warrant and the fundamental rights of the defendant. The mock trial is a proper starting point to develop an analysis on the main issues concerning fundamental rights that are mostly raised by the defendants during extradition and during trials in which evidence from other judicial system are used. The chapter focuses on jurisprudential criteria already established by the ECtHR in the field.

Member States should refrain from participating in the infringement of human rights done by other states, even if this would lead to a refusal to execute a European Arrest Warrant or a extradition request. The reasons are rather limited and apply only in exceptional circumstances. The criteria for such a delicate evaluation are given mostly by the ECtHR judgements, Soering v. the United Kingdom, M.S.S. v. Belgium and Greece, Stapleton v. Ireland. In extradition cases, the ``flagrant denial of justice`` test applies. The transfer of the requested person should not be allowed if a ``flagrant denial of justice already took place in the requesting state or if Articles 2 or 3 of the ECtHR is going to be breached by the requesting state.

The mock trial raised also issues to right of the defendant to benefit a fair trail. The ECtHR will always have an evaluation of the overall fairness of the criminal proceedings. The result of this analysis would determine whether the right to a fair trial was infringed or not.

Much more than before, crimes have international elements. This may lead to a objective limitation of the rights of defence. Therefore, the defendant could not challenge some of the evidence. Such a situation would require the defendant to benefit counterbalancing factors, such as strong procedural safeguards. The final part of the chapter intends to offer the necessary criteria in order to avoid the breach of a fair trail when evidence obtained abroad is used in another national judicial system.

## Section 1 - The moot court „Executing an EAW. Presenting a hearing in a Romanian court"

### 1.1 Details of the case

An European Arrest Warrant has been issued by Juzgado de 1ª Instancia e Instrucción Nº 5 de Madrid on the name of the defendant Popescu Vasile.

The defendant is under an investigation in Spain for participation in a criminal organization involved in pickpocketing. He had been convicted before for pickpocketing.

He had returned in Romania for the summer holidays and was found by the police after he helped a thief which pretended to be drunk to escape the police. He is presently being held in custody on the basis of an order issued by a prosecutor from the Prosecutor's Office attached to the Court of Appeal of Constanta. The prosecutor has heard the requested person in the presence of an attorney before issuing the custody order.

The prosecutor makes a request to a judge from the Court of Appeal of Constanta to execute the European Arrest Warrant.

The Spanish authorities offered guaranties that the person is returned to Romania to serve the custodial sentence should he be convicted. The EAW has the fingerprints of the requested person attached and the Romanian authorities have performed an expertise confirming that the fingerprints belong to the defendant Popescu Vasile.

**1.2 SCRIPT**[161]

LC: The Court is now on session

Case file number 415/2/2013

Object: request of the Spanish authorities to surrender the requested person Popescu Vasile on the basis of the EAW issued by Juzgado de 1ª Instancia e Instrucción Nº 5 de Madrid for conducting criminal prosecution.

The requested person Popescu Vasile

RP: Present

A: And assisted by A., attorney at law

LC: Present and assisted

J: State your name, please, the name of your parents and the date of your birth.

RP: Popescu Vasile……

J: Have you received a copy of the EAW, Sir?

RP: Yes, I have, your Honor, the police gave me a copy.

J: Are there any preliminary questions that we need to discuss?

[161] The characters are a judge (J), a prosecutor (P), a legal clerk (LC), a requested person (RP) and an attorney (A).

A: Yes, your Honor, there are. We would like to request for these hearings to be conducted in chambers, not in public, because the image of the requested person could be damaged.

P: Your Honor, we ask for this request to be denied. The procedure for execution of an EAW is public and there is no reason to declare it secret.

J: Your request is denied. According to art. 103, § 14 law 302/2004, the procedure for execution of an EAW is public and since the requested person is not invoking any special situation in which the Court could declare secret hearings, we deny your request.

J: Prosecution Office has requested your arrest in order for us to surrender you to Spanish authorities on the basis of the EAW issued by Juzgado de 1ª Instancia e Instrucción Nº 5 de Madrid for conducting criminal prosecution. You are being pursued for participation in a criminal organization involved in pickpocketing. The Spanish authorities suspect that you are the deputy of the leader of a criminal organization that had lead a group of 20 Eastern European pickpockets in Madrid for about 1 year.

Do you understand the reason why you are here, Sir?

RP: Yes, Your Honor, I do.

J: You have the right to be assisted by an attorney and the right to consent to the surrender, in which case the decision will be final and you will be surrendered to the Spanish authorities. Do you consent to be surrendered?

RP: No, I don't, your Honor. I want to stay here, in Romania, because I am subject to discrimination in any Member State I go. I am the innocent victim of my political success in the Romanian community. I am one of the leaders of the Romanian community. My political enemies from Romania have incited some persons to say that I am a member of a criminal organization. I had the bad inspiration to say that I want to become member of the Romanian Parliament as a representative of the Romanians from Europe. And I know that all the evidence in the file had been given by my enemies. On the other hand, I have a modest fortune of about 20 million Euros because I am very intelligent person, even if I have not worked or had any commercial business. If you decide to send me back to Spain, I am also discriminated for my wealth. The Romanian Constitutions presumes that all my assets have a legal origin. Also the last decision of the Constitutional Court of Romania concerning extensive confiscation does allow the confiscation of the assets that become mine after 23 April 2012.What my enemies want is to encourage the Spanish judicial authorities to seize my wealth in order to take me down from the political fight. My only chance is not to be surrendered to Spain and to have the investigation and trial here in Romania.

I have never been involved in a criminal organization as there is no evidence to show that. I admit that I had some friends with problems. But even if they have some problems and sometimes they were caught stealing, the prejudice was inexistent since the money was given back accompanied by very sincere excuses. I have a rather common name and probably there is a mistake. Even I know three persons called Popescu Vasile which are dark haired and resemble me a lot. Also my political enemies probably also managed to have my DNA and my fingerprints and to have a fake ID on one of these Popescu Vasile that resemble me.

J: Were you in Spain in the period of time that the Spanish judicial authorities claim that you coordinated the activity of pickpockets?

RP: I was probably there. I have been living in Spain for some time since I have a lot of friends there. I only left for a short holiday in Dubai for two weeks of shopping.

J: In case you are surrendered, the Spanish authority will only have the right to prosecute and, if the case, convict you only for this crime, amongst other exceptions, you give your consent. Do you wave the specialty rule?

RP: No, Your Honor, I do not.

J: Any questions for the requested person, madam prosecutor?

P: Yes, I have, Your Honor. Would you, please, ask the requested person, whether he declared he ever lost his identity card?

J: Please, answer.

RP: No, I haven't. I thought it was much too complicated and I have been using my passport ever since.

P: Can he tell us if he has ever been fingerprinted in Spain?

RP: No, I do not believe so.

P: Then how can he explain that the Spanish authorities have his fingerprints sent over along with the EAW?

RP: I have no idea. It must be another person.

P: No more questions from the prosecution.

J: The defense has any questions?

A: We do, Your Honor. Would you, please, ask the requested person, has he ever been informed that another person is using his identity?

J: Please, answer.

RP: A friend of mine said that he saw me a few times in Ibiza in Privilege disco. After a while a discovered that 10000 Euro were spent in the disco, but I thought it was one of my children. Now I understand that someone really had my credit cards and probably a copy of my identity card. In Ibiza I go only to my favourite disco Amnesia and nowhere else.

A: Did he press charges?

RP: No, I haven't. I do not trust judicial authorities.

A: Has he ever been subpoenaed or interrogated in Spain?

RP: No, never. I had no idea I was under investigation in Spain. I didn't know there was a file against me.

A: No more questions for the defense, Your Honor.

J: Do you have anything else to tell us, Sir?

RP: No, Your Honor.

J: Read and sign your statement, please.

Are there any other questions prior to debating the prosecution request to arrest and surrender the requested person?

P: No, Your Honor.

A: We have several requests, Your Honor. First, I would, please, ask the Court to postpone the debates in order to demand further information from the Spanish authorities regarding the trial they are conducting and the way the right to a fair trial of the accused has been respected in Spain. For one thing, the Spanish authorities have never officially informed my client that he was investigated; he has never been heard by a judicial authority prior to issuing the EAW, thus breaching art. 6 par. 1 of the ECHR. My client hasn't been given access to the investigation file and his attorney, designated by the Spanish Bar, whom I have contacted a few hours ago, told me that he hasn't been able to participate at

all in the investigations conducted by the Spanish authorities as the Romanian law would allow. Furthermore, the Spanish attorney told me that he has become aware (he did not mention how) that conversation between me and the defendant phone had been tapped with the infringement of art. 8 of the ECHR. All this considered, we respectfully ask for a delay in order to make further inquiries whether the rights of the defendant from article 10 of the Directive 2013/48/EU have been infringed. Also we ask for a full translation of the investigation file from Spain before the surrender of the defendant.

P: Your Honor, we disagree. There is no reason for the time being to suspect that the right to a fair trial of the defendant has been breached by the Spanish authorities. Furthermore, art. 6 par. 1 of the ECHR is not applicable in this kind of procedure, regarding the request to execute an EAW.

J: The Court denies your request to postpone the debates. The information offered in the EAW does not give us any reason to suspect that the right to a fair trial of the defendant has been breached by the Spanish authorities, considering the limits of this right as applicable to the investigating pre-trial phase. The Spanish authorities have the right to conduct the investigations according to their national legal provisions and the requested person will have the opportunity to invoke all these issues before the Spanish authorities. The executing authority of the EAW does not have the competence to control the way the foreign authorities respect the national legal provisions nor can impose to the issuing authorities to respect the legal provisions of a different state. The competence of the executing authority is limited to formal issues, to the identity of the requested person and to the non-execution grounds as provided by art. 3 and 4 of the FD 2002/584. As far as the requested person not being heard by the Spanish authorities as a non-execution ground, the problem has already been cleared by the Court of Justice of the European Union in Radu decision against Romania, stating that in cases of EAW issued for investigations this cannot be a reason to refuse the surrender and there is no breach of art. 47, 48 of the Chart, nor of art. 6 of ECHR. The right to a full translation is a right that will be assured by the Spanish authorities according to article 3 of the Directive 2010/64/EU and it is not a reason to refuse the surrender. For these reasons, we reject your request.

Any other issues? In this case, we declare the debates open. Madam prosecutor?

P: Your Honor, we ask for the request of the Spanish authorities to be admitted and the requested person to be arrested for 29 days and surrendered to the foreign authorities. We consider that the objections regarding his identification should be dismissed since there is an expertise confirming that the person we located and presented before the Court has the same fingerprints as the ones sent over by the Spanish authorities, along with the EAW. All the other objections: the access to file, the tapping of communications, the right to a fair trial are not grounds for non-execution. Also, the defendant has the proper information concerning the investigation as he has his own lawyer which is informed properly on the investigation. We believe, though, that the surrender should be postponed until the investigation of the crime that Mr. Popescu was involved in Romania is finalized.

A: Your Honor, we respectfully ask you to dismiss the request and to refuse the execution of the EAW. First of all, my client's identity has been used by his enemies. The expertise on the fingerprints and DNA was performed in the absence of my client and is null since he did not have the opportunity to participate and have an expert proposed by him supervising the expertise. We also consider that the breach of the right to a fair trial due to omission to officially notify my client, to hear him and give him access to file is a reason to refuse the execution according to art. 4 from the FD 2002/584. Should you choose to dismiss these arguments, please consider the possibility to postpone the surrender in order for my client to be spending the summer holiday at the clubs of Mamaia since his friends will deeply miss him if he is to be arrested in Spain. You should take into account that my client is a celebrity in the clubs in Mamaia and also in Ibiza. Thank you!

RP: I have nothing else to say. Thank you!"

**1.3 Comments on the mock trial**

*General overview*

The European Arrest Warrant framework was designed to streamline procedures for the surrender of persons convicted or suspected of having infringed criminal law. The system is based on the principle of mutual recognition and a high level of confidence between Member States. Its implementation may be suspended "only in the event of a serious and persistent breach by one of the Member States of the principles set out in Article 6(1) [EU], determined by the Council pursuant to Article 7(1) [EU] with the consequences set out in Article 7(2) thereof" (Recital 10 of the of Council Framework Decision 2002/584/JHA as amended by Council Framework Decision 2009/299/JHA). Articles 3 and 4 of the Decision outline the mandatory and optional grounds upon which a Member State may refuse to execute a warrant. These grounds are generally procedural, and include whether the individual is already serving a sentence for the offence on which the warrant is based, or if the offence does not constitute an offence under the law of the executing State.

The moot court reffered expressly to the Court of Justice of the European Union's decision Radu against Romania where the Court reiterates that the EAW was put in place to facilitate a new simplified and effective system for the surrender of persons. According to the provisions contained in the Framework Decision, Member States may refuse to execute such a warrant only on the grounds provided for in Articles 3 and 4. As the fact that a warrant has been issued without the requested person having been heard by the issuing judicial authorities does not feature amongst such grounds, it cannot be the basis for refusing a warrant.

In conclusion, "Having regard to the foregoing, the answer to the first four questions and the sixth question is that Framework Decision 2002/584 must be interpreted as meaning that the executing judicial authorities cannot refuse to

execute a European arrest warrant issued for the purposes of conducting a criminal prosecution on the ground that the requested person was not heard in the issuing Member State before that arrest warrant was issued." (para. 43)

It should also be mentioned the opinion from Advocate General Sharpston where it is stipulated that the Framework decision took fundamental rights into account when enacting the Framework Decision, incorporating express references to rights in recitals 10, 12 and 13. The Decision also provided that it was not to have the effect of modifying the obligation to respect fundamental rights and legal principles as enshrined in what is now Article 6 TEU. Therefore, Article 6(1) and (3) TEU represent a "codification" of the pre-existing position and there is no argument that the Decision must be given a different interpretation with their coming into force (para.51).

However, the Advocate General made it clear that human rights principles may be considered by an executing State when considering whether to allow the warrant:

"41. While the record of the Member States in complying with their human rights obligations may be commendable, it is also not pristine. There can be no assumption that, simply because the transfer of the requested person is requested by another Member State, that person's human rights will automatically be guaranteed on his arrival there. There can, however, be a presumption of compliance which is rebuttable only on the clearest possible evidence. Such evidence must be specific; propositions of a general nature, however well supported, will not suffice."

Accordingly, a Member State could refuse to execute a warrant on the basis of non-compliance with fundamental rights. AG Sharpston recognised that such considerations fell outside of the list of grounds for refusing a warrant laid out in Articles 3 and 4, and as such it might be thought that human rights were not a valid ground for refusing a warrant:

"69. However, I do not believe that a narrow approach – which would exclude human rights considerations altogether – is supported either by the wording of the Framework Decision or by the case-law.

70. Article 1(3) of the Framework Decision makes it clear that the decision does not affect the obligation to respect fundamental rights and fundamental principles as enshrined in Article 6 EU (now, after amendment, Article 6 TEU). It follows, in my view, that the duty to respect those rights and principles permeates the Framework Decision. It is implicit that those rights may be taken into account in founding a decision not to execute a warrant. To interpret Article 1(3) otherwise would risk its having no meaning – otherwise, possibly, than as an elegant platitude."

Therefore, according to the Advocate General, a Member State may refuse to execute a warrant, but only in "exceptional circumstances". In cases involving liberty and fair trial rights the infringement must be such as fundamentally to destroy the fairness of the process.

During the moot court there were also debates on the M.S.S v Belgium and Greece ECtHR`s judgement which was seen as a ground-breaking judgement concerning the mutual trust between member states due to the following reason: the respect of fundamental rights, as encompassed in the ECHR, is prohibiting the EU Member States from blindly trusting other Member States under the Dublin II Regulation provisions. It therefore is in a certain way representing a brake to the principle of mutual trust, which is applied by the Member States under the Dublin II Regulation. It may indeed be that an expelling State's responsibilities as regards extradition/expulsion to a Contracting State have been heightened to some extent beyond those identified in Soering (see T.I. v. the United Kingdom (dec.), no. 43844/98, ECHR 2000-III as regards the Dublin Convention (European Union Convention determining the State responsible for examining applications for asylum lodged in one of the member States of the European Communities of 15 June 1990), and K.R.S. v. the United Kingdom (dec.), no. 32733/08, 2 December 2008 as regards the Dublin Regulation (Council Regulation EC/343/2003 of 18 February 2003 on establishing the criteria and mechanisms for determining the member State responsible for examining an asylum application lodged in one of the member States by a third-country national). It should be borne in mind that those cases concerned non-derogable rights under Articles 2 and 3 of the Convention. In addition, those cases concerned expulsion to another Contracting State when there were reasons to believe that the individual might be sent onwards to a third non-Contracting State (where he would be exposed to a relevant risk) without a proper examination of his claim by the intermediary (Contracting) State and, in particular, without having any proper opportunity to apply to the Court and request interim measures.

However it was pointed out the same Court's reasoning in the Stapleton v. Ireland decision where it was underlined that the same reasoning may not apply in a extradition case to a Contracting Party which has undertaken to abide by its Convention obligations and to secure to everyone within its jurisdiction the rights and freedoms defined therein.

Indeed in its Robert Stapleton v. Ireland decision on 4 May 2010, the European Court on Human Rights noted that the right to a fair trial in criminal proceedings, as embodied in Article 6, holds a prominent place in a democratic society so that the Court did not exclude that an issue might, exceptionally, be raised under Article 6 by an extradition decision in circumstances where the fugitive has suffered or risks suffering a flagrant denial of a fair trial in the requesting country (see Soering v. the United Kingdom, 7 July 1989, § 113, Series A no. 161, and Mamatkulov and Askarov v. Turkey § 88, ECHR 2005-I).

*The „flagrant denial of justice" test*

It is established in the Court's case-law that an issue might exceptionally be raised under Article 6 by an expulsion or extradition decision in circumstances where the fugitive had suffered or risked suffering a flagrant denial of

justice in the requesting country. That principle was first set out in Soering v. the United Kingdom, 7 July 1989, § 113, Series A no. 161 and has been subsequently confirmed by the Court in a number of cases (see, inter alia, Mamatkulov and Askarov, Al-Saadoon and Mufdhi v. the United Kingdom).

In the Court's case-law, the term "flagrant denial of justice" has been synonymous with a trial which is manifestly contrary to the provisions of Article 6 or the principles embodied therein (Sejdovic v. Italy [GC], no. 56581/00, § 84, ECHR 2006‑II). Although the notion has not been defined yet, the Court has nonetheless indicated that certain forms of unfairness could amount to a flagrant denial of justice. These have included:

- conviction in absentia with no possibility subsequently to obtain a fresh determination of the merits of the charge (Sejdovic v. Italy § 84);

- a trial which is summary in nature and conducted with a total disregard for the rights of the defence (Bader and Kanbor v. Sweden, § 47);

- detention without any access to an independent and impartial tribunal to have the legality the detention reviewed (Al-Moayad v. Germany, § 101);

- deliberate and systematic refusal of access to a lawyer, especially for an individual detained in a foreign country.

The Court's view is that "flagrant denial of justice" is a stringent test of unfairness. A flagrant denial of justice goes beyond mere irregularities or lack of safeguards in the trial procedures such as might result in a breach of Article 6 if occurring within the Contracting State itself. What is required is a breach of the principles of fair trial guaranteed by Article 6 which is so fundamental as to amount to a nullification, or destruction of the very essence, of the right guaranteed by that Article.

In assessing whether this test has been met, the Court considers that the same standard and burden of proof should apply as in Article 3 expulsion cases. Therefore, it is for the applicant to adduce evidence capable of proving that there are substantial grounds for believing that, if he is removed from a Contracting State, he would be exposed to a real risk of being subjected to a flagrant denial of justice. Where such evidence is adduced, it is for the Government to dispel any doubts about it (see, mutatis mutandis, Saadi v. Italy § 129).

Should the executing or surrendering State should go beyond the examination of a "flagrant denial" and determine whether there has been established a real risk of unfairness in the criminal proceedings in the issuing State?

In the same Robert Stapleton v. Ireland decision on 4 May 2010, the European Court on Human Rights answered the question in a negative manner. In the Court`s view an opposite approach would run counter to the principles established in Soering and confirmed by the subsequent jurisprudence of this Court. Secondly, the Court agrees it would be more appropriate for the domestic courts to hear and determine the applicant's complaints in relation to the alleged unfairness of the trial. As a general rule, domestic trial courts are considered better placed than this Court to assess issues of fact and of admissibility of evidence (see Windisch v. Austria, 27 September 1990, § 25, Series A no. 186; Teixeira de Castro v. Portugal, 9 June 1998, § 34, Reports of Judgments and Decisions 1998-IV). The same reasoning applies when comparing the positions of a domestic and foreign court.

It is apparent from the case-law of the Court of Human Rights that not every breach of the Convention will justify a refusal to implement an extradition order. In Dzhaksybergenov v. Ukraine, for example, it held that „reference to a general problem concerning human rights observance in a particular country cannot alone serve as a basis for refusal of extradition". In Soering v. United Kingdom, that Court held, in relation to Article 3 of the Convention, that „the decision by a contracting state to extradite a fugitive may give rise to an issue under Article 3, and hence engage the responsibility of that state under the Convention, where substantial grounds have been shown for believing that the person concerned, if extradited, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the requesting country".

*The standard of proof „beyond reasonable doubt"*

On the subject of the onus on the person bringing a challenge, the Court of Human Rights has held that the Court's examination of the existence of a risk must necessarily be a rigorous one and that it is for the applicant to produce the necessary evidence. With respect to the standard of proof required to justify a refusal to transfer, that Court held in Garabayev v. Russia that „in assessing the evidence on which to base the decision whether there has been a violation of Article 3, the Court adopts the standard of proof "beyond reasonable doubt" but adds that such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact".

*Article 3 and prison conditions, a bar on extradition?*

The ECtHR has consistently mentioned that Article 3 of the Convention enshrines one of the most fundamental values of democratic societies. The Convention prohibits in absolute terms torture and inhuman or degrading treatment or punishment, irrespective of the victim's conduct (Labita v. Italy [GC], no. 26772/95, § 119, ECHR 2000‑IV). However, ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3 of the Convention. The assessment of this minimum level of severity is relative; it depends on all the circumstances of the case, such as the

duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim. Furthermore, in considering whether a treatment is "degrading" within the meaning of Article 3, the Court will have regard to whether its object is to humiliate and debase the person concerned and whether, as far as the consequences are concerned, it adversely affected his or her personality in a manner incompatible with Article 3. Although the question whether the purpose of the treatment was to humiliate or debase the victim is a factor to be taken into account, the absence of any such purpose cannot conclusively rule out a finding of violation of Article 3 (see Peers v. Greece, no. 28524/95, §§ 67‑68 and 74, ECHR 2001-III, and Valašinas v. Lithuania, no. 44558/98, § 101, ECHR 2001‑VIII). Measures depriving a person of his liberty may often involve an inevitable element of suffering or humiliation. Nevertheless, the suffering and humiliation involved must not go beyond the inevitable element of suffering or humiliation connected with a given form of legitimate treatment or punishment.

In the context of prisoners, the Court had already emphasised in previous cases that a detained person does not, by the mere fact of his incarceration, lose the protection of his rights guaranteed by the Convention. On the contrary, persons in custody are in a vulnerable position and the authorities are under a duty to protect them. Under Article 3 the State must ensure that a person is detained in conditions which are compatible with respect for his human dignity, that the manner and method of the execution of the measure do not subject him to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention and that, given the practical demands of imprisonment, his health and well-being are adequately secured. When assessing conditions of detention, account has to be taken of the cumulative effects of these conditions, as well as of specific allegations made by the applicant (see Dougoz v. Greece, no. 40907/98, § 46, ECHR 2001-II). The length of the period during which a person is detained in the particular conditions also has to be considered (see, among other authorities, Alver v. Estonia, no. 64812/01, 8 November 2005). The extreme lack of space in a prison cell weighs heavily as an aspect to be taken into account for the purpose of establishing whether the detention conditions complained of were "degrading" from the point of view of Article 3 (see Karalevičius v. Lithuania, no. 53254/99, 7 April 2005). In cases where applicants had at their disposal less than 3 square metres of personal space, the Court found that the overcrowding was so severe as to justify of itself a finding of a violation of Article 3 of the Convention (see, among many other authorities, Sulejmanovic v. Italy, no. 22635/03, § 51, 16 July 2009; Lind v. Russia, no. 25664/05, § 59, 6 December 2007; Kantyrev v. Russia, no. 37213/02, § 50-51, 21 June 2007; Andrey Frolov v. Russia, no. 205/02, §47-49, 29 March 2007; and Labzov v. Russia, no. 62208/00, § 44, 16 June 2005). By contrast, in other cases, where the overcrowding was not as severe as to raise in itself an issue under Article 3 of the Convention, the Court noted other aspects of physical conditions of detention as being relevant for its assessment of compliance with that provision. Such elements included, in particular, the availability of ventilation, access to natural light or air, adequacy of heating arrangements, compliance with basic sanitary requirements and the possibility of using the toilet in private. Thus, even in cases where a larger prison cell was at issue – measuring in the range of 3 to 4 square metres per inmate – the Court found a violation of Article 3 since the space factor was coupled with the established lack of ventilation and lighting

(see, for example, Babushkin v. Russia, no. 67253/01, § 44, 18 October 2007; Ostrovar v. Moldova, no. 35207/03, § 89, 13 September 2005) or the lack of basic privacy in the prisoner's everyday life (see, mutatis mutandis, Belevitskiy v. Russia, no. 72967/01, §§ 73-79, 1 March 2007; Khudoyorov v. Russia, no. 6847/02, §§ 106-107, ECHR 2005‑X (extracts); and Novoselov v. Russia, no. 66460/01, §§ 32 and 40-43, 2 June 2005). Moreover, the State's obligation under Article 3 of the Convention to protect the physical well-being of persons deprived of their liberty has been interpreted as including an obligation to provide them with the requisite medical assistance (see, for instance, Hurtado v. Switzerland, judgment of 28 January 1994, Series A no. 280-A, opinion of the Commission, pp. 15-16, § 79;). The mere fact that a detainee was seen by a doctor and prescribed a certain form of treatment cannot automatically lead to the conclusion that the medical assistance was adequate. The authorities must also ensure that a comprehensive record is kept concerning the detainee's state of health and the treatment he underwent while in detention, that the diagnoses and care are prompt and accurate, and that where necessitated by the nature of a medical condition, supervision is regular and systematic and involves a comprehensive therapeutic strategy aimed at curing the detainee's diseases or preventing their aggravation, rather than addressing them on a symptomatic basis. The authorities must also show that the necessary conditions were created for the prescribed treatment to be actually followed through (see Visloguzov v. Ukraine, no. 32362/02, § 69, 20 May 2010).

According to the Report from the Commission to the European Parliament and the Council on the implementation since 2007 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States,{SEC(2011) 430 final} „it is clear that the Council Framework Decision on the EAW (which provides in Article 1(3) that Member States must respect fundamental rights and fundamental legal principles, including Article 3 of the European Convention on Human Rights) does not mandate surrender where an executing judicial authority is satisfied, taking into account all the circumstances of the case, that such surrender would result in a breach of a requested person's fundamental rights arising from unacceptable detention conditions".

The relation between the Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and national standards of fundamental rights in the field of criminal justice.

In the Melloni case, the CJEU confirmed that the fundamental constitutional principle of primacy of EU law also applies to the relationship between the Charter, on the one hand, and the national constitutional provisions on fundamental rights, on the other. A Member State may thus not invoke a provision of its constitution, even if it ensures a higher level of protection of a fundamental right than the Charter, as a ground for not applying a clear provision of EU law.

*The issue of proportionality*

It is to be underlined the fact that the executing authority does not have to carry out a review of proportionality even though it is recommended that issuing authorities review whether or not an EAW should be issued from the perspective of proportionality. The triviality of the offence in respect of which an appellant's extradition was sought and the sentence imposed were not proper factors for the executing authority to bear in mind when considering appeals against extradition: it was not open to the executing authority to say that an offence was so trivial or the sentence so disproportionate to the offence that extradition would be disproportionate.

However several aspects should be considered before issuing the EAW including the seriousness of the offence, the length of the sentence, the existence of an alternative approach that would be less onerous for both the person sought and the executing authority and a cost/benefit analysis of the execution of the EAW. There is a disproportionate effect on the liberty and freedom of requested persons when EAWs are issued concerning cases for which (pre-trial) detention would otherwise be felt inappropriate. In addition, an overload of such requests may be costly for the executing Member States. It might also lead to a situation in which the executing judicial authorities (as opposed to the issuing authorities) feel inclined to apply a proportionality test, thus introducing a ground for refusal that is not in conformity with the Council Framework Decision or with the principle of mutual recognition on which the measure is based.

## Section 2 - Feedback case study

### 2.1 Details of the case[162]

The applicant, N.V. was found guilty of transporting, together with others, from the Netherlands to Germany with the intention of ultimately shipping to Australia, psychotropic substances the trade of which is illegal in all three countries. The proceedings against the applicant were held separately from the proceedings against his co-accused, amongst whom were A., M. and the applicant's father, K. V. The suspects A. and M. were in fact put on trial in Germany. They were convicted and given prison sentences in Germany for their part in the crimes. They had both made full confessions and given detailed statements to the German prosecutors, a fact that was taken into account in sentencing.

[162] The case study follows the facts of the EctHR`s judgment in the case of Vidgen v. Netherlands, application no.29353/06, 10 July 2012

At no point throughout the criminal proceedings against him did the applicant deny that he had been involved in shipping motor car engines to his business in Sydney. However, he denied all knowledge of the use of those engines to smuggle XTC and hence any criminal intent directed towards that end. His defence was focused on this point.

Virtually all the evidence presented before the Utrecht Regional Court to prove the applicant's intent and participation in committing the offence was taken from the statements given by M. to the German prosecutors and later on to Netherlands police investigators during the pre-trial stage of the proceedings against the applicant.

The applicant had repeatedly requested to be allowed to question M. since neither he nor his counsel had been present when M. had given these statements. At a hearing on 14 May 2003 the Regional Court noted that both parties had, in the meantime, been to Germany to question the witnesses A. and M. The applicant however specified that the German investigating judge had done all the questioning and that he himself had not been able to put any questions to the witnesses. It also appeared that M. had refused to answer questions or repeat the statements he had made previously. Furthermore, the prosecutor stated that there had appeared to be a problem with the interpreter assisting the witness M. The applicant requested further questioning of the witnesses so that he would actually be able to put his own questions to them.

At the same hearing the Regional Court decided that the statements given to the German prosecutor by A. and M. would be added to the case file together with the records of their German trial.

In its judgment the Regional Court, finding that the applicant had been able to put questions to M., considered that the use in evidence of the statements given by M. in Germany did not violate the provisions of Article 6 of the Convention. The fact that M. had chosen to avail himself of his right not to testify did not alter this situation.

The applicant lodged an appeal against the judgment of the Regional Court with the Amsterdam Court of Appeal. At a hearing the Court of Appeal granted the applicant's request for A. and M. to be summoned to appear before the court so that they could be heard, given the importance of their statements and A. and M. were both questioned as witnesses at a hearing before the Court of Appeal. A. stated that he knew the applicant but in general denied ever having talked to him about the XTC. On more specific questions he invoked his right not to testify. A. also declared that everything M. had stated was a lie. M. acknowledged that he had been questioned by Netherlands police investigators and admitted that he had been convicted of perjury some years earlier. He refused however to answer any substantive questions, invoking his right not to testify in connection with pending proceedings for his extradition to the Netherlands to stand trial on a charge of participation in a criminal organisation.

Finally the Court of Appeal dismissed the applicant's appeal and later on the Supreme Court dismissed the applicant's appeal on points of law and confirmed the judgment of the Court of Appeal.

Relying on Article 6 § 1 (right to a fair trial) and Article 6 § 3 (d) (right to obtain attendance and examination of witnesses), N.V. complains that his criminal conviction had been based solely or to a decisive extent on the statements of a witness whom he had been unable to examine.

**2.2 Case study issues**

*The general principles*

The Court's primary concern under Article 6 § 1 is to evaluate the overall fairness of the criminal proceedings. In making this assessment the Court will look at the proceedings as a whole having regard to the rights of the defence but also to the interests of the public and the victims that crime is properly prosecuted and, where necessary, to the rights of witnesses. It is also observed in this context that the admissibility of evidence is a matter for regulation by national law and the national courts and that the Court's only concern is to examine whether the proceedings have been conducted fairly.

Article 6 § 3 (d) enshrines the principle that, before an accused can be convicted, all evidence against him must normally be produced in his presence at a public hearing with a view to adversarial argument. Exceptions to this principle are possible but must not infringe the rights of the defence, which, as a rule, require that the accused should be given an adequate and proper opportunity to challenge and question a witness against him, either when that witness makes his statement or at a later stage of proceedings.

Having regard to the Court's case-law, there are two requirements which follow from the above general principle. Firstly, there must be a good reason for the non-attendance of a witness. Secondly, when a conviction is based solely or to a decisive degree on depositions that have been made by a person whom the accused has had no opportunity to examine or to have examined, whether during the investigation or at the trial, the rights of the defence may be restricted to an extent that is incompatible with the guarantees provided by Article 6 (the so-called "sole or decisive rule"). The Court will examine below whether the latter rule is to be considered as an absolute rule the breach of which automatically leads to a finding that the proceedings have not been fair in violation of Article 6 § 1 of the Convention.

*Whether there is a good reason for the non-attendance of a witness*

The requirement that there be a good reason for admitting the evidence of an absent witness is a preliminary question which must be examined before any consideration is given as to whether that evidence was sole or decisive. Even where the evidence of an absent witness has not been sole or decisive, the Court has still found a violation of Article 6 §§ 1 and 3 (d) when no good reason has been shown for the failure to have the witness examined. As a general rule, witnesses should give evidence during the trial and all reasonable efforts will be made to secure their attendance. Thus, when witnesses do not attend to give live evidence, there is a duty to enquire whether that absence is justified.

Finally, given the extent to which the absence of a witness adversely affects the rights of the defence, the Court would emphasise that, when a witness has not been examined at any prior stage of the proceedings, allowing the admission of a witness statement in lieu of live evidence at trial must be a measure of last resort.

*The sole or decisive rule*

(a) General considerations

The underlying principle is that the defendant in a criminal trial should have an effective opportunity to challenge the evidence against him. This principle requires not merely that a defendant should know the identity of his accusers so that he is in a position to challenge their probity and credibility but that he should be able to test the truthfulness and reliability of their evidence, by having them orally examined in his presence, either at the time the witness was making the statement or at some later stage of the proceedings.

The Court notes that the word “sole”, in the sense of the only evidence against an accused, does not appear to have given rise to difficulties. “Decisive” (or “déterminante”) in this context means more than “probative”. It further means more than that, without the evidence, the chances of a conviction would recede and the chances of an acquittal advance, a test which would mean that virtually all evidence would qualify. Instead, the word “decisive” should be narrowly understood as indicating evidence of such significance or importance as is likely to be determinative of the outcome of the case. Where the untested evidence of a witness is supported by other corroborative evidence, the assessment of whether it is decisive will depend on the strength of the supportive evidence; the stronger the corroborative evidence, the less likely that the evidence of the absent witness will be treated as decisive.

The Court accepts that it might be difficult for a trial judge in advance of a trial to determine whether evidence would be decisive without having the advantage of examining and weighing in the balance the totality of evidence that has been adduced in the course of the trial.

However, once the prosecution has concluded its case, the significance and weight of the untested evidence can be assessed by the trial judge against the background of the other evidence against the accused.

Experience shows that the reliability of evidence, including evidence which appears cogent and convincing, may look very different when subjected to a searching examination. The dangers inherent in allowing untested hearsay evidence to be adduced are all the greater if that evidence is the sole or decisive evidence against the defendant. Trial proceedings must ensure that a defendant's Article 6 rights are not unacceptably restricted and that he or she remains able to participate effectively in the proceedings. The Court's assessment of whether a criminal trial has been fair cannot depend solely on whether the evidence against the accused appears prima facie to be reliable, if there are no means of challenging that evidence once it is admitted.

For these reasons, the Court has consistently assessed the impact that the defendant's inability to examine a witness has had on the overall fairness of his trial. It has always considered it necessary to examine the significance of the untested evidence in order to determine whether the defendant's rights have been unacceptably restricted.

Traditionally, when examining complaints under Article 6 § 1, the Court has carried out its examination of the overall fairness of the proceedings by having regard to such factors as the way in which statutory safeguards have been applied, the extent to which procedural opportunities were afforded to the defence to counter handicaps that it laboured under and the manner in which the proceedings as a whole have been conducted by the trial judge.

The Court is of the view that it would not be correct, when reviewing questions of fairness, to apply this rule in an inflexible manner. Nor would it be correct for the Court to ignore entirely the specificities of the particular legal system concerned and, in particular its rules of evidence, notwithstanding judicial dicta that may have suggested otherwise. To do so would transform the rule into a blunt and indiscriminate instrument that runs counter to the traditional way in which the Court approaches the issue of the overall fairness of the proceedings, namely to weigh in the balance the competing interests of the defence, the victim, and witnesses, and the public interest in the effective administration of justice.

(b) General conclusion on the sole or decisive rule

The Court therefore concludes that, where a hearsay statement is the sole or decisive evidence against a defendant, its admission as evidence will not automatically result in a breach of Article 6 § 1. At the same time, where a conviction is based solely or decisively on the evidence of absent witnesses, the Court must subject the proceedings to the most searching scrutiny. Because of the dangers of the admission of such evidence, it would constitute a very important factor to balance in the scales, and one which would require sufficient counterbalancing factors, including the existence of strong procedural safeguards. The question in each case is whether there are sufficient counterbalancing

factors in place, including measures that permit a fair and proper assessment of the reliability of that evidence to take place. This would permit a conviction to be based on such evidence only if it is sufficiently reliable given its importance in the case.

### 2.3 Judicial cooperation in the EU and fair trail issues. Case Law by the European Court of Human Rights of Relevance for the Application of the European Conventions on International Co-Operation in Criminal Matters[163]

***A. M. v. Italy, No.: 37019/97, Judgment, 14 December 1999***

Circumstances:

Mutual legal assistance (hearing of witnesses) obtained by Italy from the United States of America.

Relevant complaints:

1. Statements made outside Italian territory cannot be read out in trial in Italy. The acts performed pursuant to the rogatory letters were invalid and maintained that the fact that they had been read out at the applicant's trial had denied him any opportunity to examine his accusers.

2. As to the possibility of seeking examination of the witnesses under the Mutual Assistance Treaty, the rogatory letters had been issued without the applicant's knowledge and, as a result, he had been unable to exercise the rights and liberties afforded by Article 14 of that Treaty.

Court's conclusions:

1. The rights of the defence are restricted to an extent that is incompatible with the requirements of Article 6 of the Convention if the conviction is based solely, or in a decisive manner, on the depositions of a witness whom the accused

[163] See Case Law by the European Court of Human Rights of Relevance for the Application of the European Conventions on International Co-Operation in Criminal Matters PC-OC (2011) 21 REV 7, found on the ECtHR`s website.

[163] Cases are presented as they are summarised in „legal summaries" on the ECtHR`s website

has had no opportunity to examine or to have examined either during the investigation or at trial. In convicting the applicant in the instant case the domestic courts relied solely on the statements made in the United States before trial and that the applicant was at no stage in the proceedings confronted with his accusers. [paras. 25 and 26]

2. It should be noted that in his international rogatory letters of 16 March 1991, the Florence public prosecutor informed the American authorities that no lawyer was to be allowed to attend the requested examinations. In addition, the Government have not produced any court decision showing how the Treaty is applied. Accordingly, it has not been established that the procedure offered the accessibility and effectiveness required by Article 14 of the Mutual Assistance Treaty. Under these circumstances, the applicant cannot be regarded as having had a proper and adequate opportunity to challenge the witness statements that formed the basis of his conviction. [paras. 27 and 28]

***Solakov v. FYROM, No.: 47023/99, Judgment, 31 October 2001***

Circumstances:

Mutual legal assistance (hearing of witnesses) obtained by FYROM from the United States of America.

Relevant complaint:

Trial in FYROM was unfair, as the applicant had been unable to cross-examine the witnesses whose statements served as the only basis for his conviction and that he had been unable to obtain the attendance and examination of two witnesses for the defence.

Court's conclusions:

All the evidence must normally be produced at a public hearing, in the presence of the accused, with a view to adversarial argument. This does not mean, however, that in order to be used as evidence statements of witnesses should always be made at a public hearing in court: to use as evidence such statements obtained at the pre-trial stage is not in itself inconsistent with paragraphs 3(d) and 1 of Article 6 of the Convention, provided the rights of the defence have been respected. As a rule, these rights require that an accused should be given an adequate and proper opportunity to challenge and question a witness against him, either when he makes his statements or at a later stage. There is no indication that the applicant or his second lawyer expressed any intention to attend the cross-examination of the witnesses in the United States. In particular, the applicant declared before the investigating judge that he had left the

decision whether or not to go to the United States to his second lawyer and that he had sufficient means to cover the travel expenses. The applicant's second lawyer never filed an application for a visa with the United States embassy and never requested the postponement of the hearing of the witnesses in case he thought he did not have sufficient time to obtain it. Moreover, the applicant's first lawyer never renewed his application for a visa. The present case can be distinguished from A.M. v. Italy where the witnesses were questioned by a police officer before trial and the applicant's lawyer was not allowed to attend their examination. [paras. 57, 60 and 63]

***Somogyi v. Italy, No.: 67972/01, Judgment ,18 May 2004***

Circumstances:

In absentia judgment issued in Italy after serving summons on the applicant in Hungary by post and his failure to appear at trial.

Relevant complaints:

1. The applicant had been convicted in his absence without having the opportunity to defend himself before the Italian courts. He had not received any information about the opening of proceedings against him, since the notice of the date of the preliminary hearing had never been served on him and the signature on the reply slip acknowledging receipt of the letter from the Rimini preliminary investigations judge was not his. as there was a reasonable doubt about the authenticity of the signature on the reply slip acknowledging receipt of the letter from the Rimini preliminary investigations judge, the Italian courts should have ordered a report from a handwriting expert in order to be able to verify whether the defendant had been informed of the charges.

2. Service of the notice concerned had not been affected in accordance with the procedure provided for in the Italo-Hungarian agreement of 1977, which was mandatory for all notifications between the signatory States; it should therefore be considered null and void.

Court's conclusions:

1. It could not be considered that the applicant's allegations concerning the authenticity of the signature were prima facie without foundation, particularly in view of the difference between the signatures he produced and the one on the return slip acknowledging receipt and the difference between the applicant's forename (Tamas) and that of the person who signed the slip (Thamas). In addition, the mistakes in the address were such as to raise serious doubts about the place to which the letter had been delivered. Article 6 of the Convention imposes on every national court an obligation to check

whether the defendant has had the opportunity to apprise himself of the proceedings against him where, as in the instant case, this is disputed on a ground that does not immediately appear to be manifestly devoid of merit. In the instant case the means employed by the national authorities did not achieve the result required by Article 6 of the Convention. As regards the Government's assertion that the applicant had in any event learned of the proceedings through a journalist who had interviewed him or from the local press, the Court points out that to inform someone of a prosecution brought against him is a legal act of such importance that it must be carried out in accordance with procedural and substantive requirements capable of guaranteeing the effective exercise of the accused's rights, as is moreover clear from Article 6§3(a) of the Convention; vague and informal knowledge cannot suffice. [paras. 70, 72, 74 and 75]

2. The Court does not consider it necessary to examine the questions concerned with application of the Italo-Hungarian agreement of 1977 or the European Convention on Mutual Assistance in Criminal Matters. It observes that it is competent to apply only the European Convention on Human Rights, and that it is not its task to interpret or review compliance with other international conventions as such. Moreover, it is not the Court's function to deal with errors of fact or law allegedly committed by a national court unless and in so far as they may have infringed rights and freedoms protected by the Convention. [para. 62]

***Marcello Viola v. Italy, No.: 45106/04, Judgment, 5 October 2006***

Circumstances:

Hearing by videoconference in a domestic trial (no mutual legal assistance in fact involved).

Relevant complaint:

The applicant had been forced to participate by videoconference in the appeal hearings.

Court's conclusions:

Although the defendant's participation in the proceedings by videoconference is not as such contrary to the Convention, it is incumbent on the Court to ensure that recourse to this measure in any given case serves a legitimate aim and that the arrangements for the giving of evidence are compatible with the requirements of respect for due process, as laid down in Article 6 of the Convention. The applicant's participation in the appeal hearings by videoconference pursued legitimate aims under the Convention, namely, prevention of disorder, prevention of crime, protection of witnesses and victims of offences in respect of their rights to life, freedom and security, and compliance with the "reasonable time" requirement in judicial proceedings. [paras. 67 and 72]

***Van Ingen v. Belgium, No.: 9987/03, Judgment, 13 May 2008***

Circumstances:

Mutual legal assistance obtained (hearings, selected copies from an investigation file) by Belgium from the United States.

Relevant complaints:

The applicant claimed that the Court that sentenced him in 2002 had denied the prosecutor's request to have the court proceedings reopened in order to submit new documents issued by US authorities and argued that the Court had reached that decision without having had the opportunity to examine those documents. He claimed that, in the context of a fair trial, it is impossible for a court to judge the well-foundedness of a request to reopen proceedings if it hasn't examined the available documents

Court's conclusions:

Although the applicant is not required to establish that his defence suffered as a result of the Court of appeals' refusal to reopen the proceedings to allow the prosecutor to adduce new evidence, he must however establish the relevance of this evidence in the context of the criminal charge brought against him. Assuming that some of the evidence might not have been identical to the evidence that was in the Belgian file and that it was only disclosed after it was sent by the Government to the Court in September 2007, the applicant only acquired knowledge of that evidence on that date. It is obvious that the applicant could not, under such circumstances, establish before Belgian courts that the examination of that evidence could prove relevant for his defence. He could however have established that before the Court. Yet, the applicant does not indicate how the new evidence would have assisted in changing the verdict issued against him by Belgian courts if it had been adduced in the proceedings before them. [paras. 32 and 33]

***Rantsev v. Cyprus and Russia, No.: 25965/04, Judgment, 7 January 2010***

Circumstances:

Mutual assistance requested by Russia from Cyprus.

Relevant complaint:

The Russian authorities should have applied to the Cypriot authorities under the Legal Assistance Treaty to initiate criminal proceedings, as the applicant had requested. Instead, the Russian authorities merely sought information

concerning the circumstances of Ms. Rantseva's death. His repeated requests that Russian authorities take statements from two Russian nationals resident in Russia were refused as the Russian authorities considered that they were unable to take the action requested without a legal assistance request from the Cypriot authorities.

Court's conclusions:

Ms. Rantseva's death took place in Cyprus. Article 2 of the Convention does not require member States' criminal laws to provide for universal jurisdiction in cases involving the death of one of their nationals. Accordingly, unless it can be shown that there are special features in the present case which require a departure from the general approach, the obligation to ensure an effective official investigation applies to Cyprus alone. For an investigation into a death to be effective, member States must take such steps as are necessary and available in order to secure relevant evidence, whether or not it is located in the territory of the investigating State. The Court observes that both Cyprus and Russia are parties to the Mutual Assistance Convention and have, in addition, concluded the bilateral Legal Assistance Treaty. These instruments set out a clear procedure by which the Cypriot authorities could have sought assistance from Russia in investigating the circumstances of Ms. Rantseva's stay in Cyprus and her subsequent death. In the absence of a legal assistance request, the Russian authorities were not required under Article 2 of the Convention to secure the evidence themselves. [paras. 243, 244 and 241]

***Zhukovskiy v. Ukraine, No.: 31240/03, Judgment, 3 March 2011***

Circumstances:

Mutual assistance requested by Ukraine from Russia.

Relevant complaint:

The prosecutor had been present during the questioning of the witnesses in Russia, while the applicant's representative had not been.

Court's conclusions:

The domestic authorities examined different ways of obtaining the statements and opted for the questioning of the witnesses in Russia through the international legal assistance mechanism. Such a solution, to which the defence did not object, could be found reasonable. However, in the circumstances of the case it led to the situation in which the applicant found himself convicted of a very serious crime mainly on the basis of evidence given by witnesses none of whom were

present during his trial in Ukraine. The domestic courts did not hear the direct evidence of these witnesses and the applicant had no opportunity to cross-examine them. Being aware of difficulties in securing the right of the applicant to examine the witnesses in the present case, the Court considers that the available modern technologies could offer more interactive type of questioning of witnesses abroad, like a video link. The domestic authorities on their part had at least to ensure that they were informed in advance about the date and place of hearing and about questions formulated by the domestic authorities in the present case. Such information would give the applicant and his lawyer reasonable opportunity to request for clarifying or complementing certain questions that would deem important. [paras. 45 and 46]

***Stojkovic v. France and Belgium, No.: 25303/08, Judgment, 27 October 2011***

Circumstances:

French letter of request to Belgium requesting that the applicant be questioned as a "legally assisted witness" in the presence of an attorney.

Relevant complaint:

The applicant claimed that there was a violation of his defence rights as he had been questioned as a "legally assisted witness" by Belgian police without an attorney being present. He argued that an accusation cannot be based on evidence obtained through coercion or pressure and that the interest of Justice required that he should have been assisted by an attorney.

Court's conclusions:

The applicant's interview was conducted in accordance with the procedural regime applicable in Belgium, which provided for the questioning of all persons without any difference in treatment, whether or not there were any suspicions against them. The interview resulted exclusively from the execution of the letter of request. In that letter of request, the judge expressly stipulated that the applicant should be heard as a "legally assisted witness". That stipulation demonstrated, as required by French law, that there was evidence against the applicant which it made it plausible that he might have taken part in the perpetration of the offences. The interview had important repercussions on the applicant's situation so that there was a "criminal charge against him" which implied that he should have benefited from the protection offered under Article 6§1 and 6§3 of the Convention. While the restriction of the right concerned was not caused by French authorities, it was their duty to ensure that such a restriction did not compromise the fairness of the proceedings. The legal regime of the interview did not exempt the French authorities from verifying that it had been conducted in accordance with fundamental principles deriving from fair trial. Under Article 1 of the Convention, it was for the French authorities to ensure

that the acts carried out in Belgium had not been in breach of the rights of the defence and thus to verify the fairness of the proceedings under their supervision. [paras. 51 through 55]

***Fąfrowicz v. Poland, No.: 43609/07, Judgment, 17 April 2012***

Circumstances:

The applicant has been convicted in Poland on the basis of a statement of JH (present in the United States of America), whose presence in Poland has not been ensured by the trial court.

Relevant complaint:

The applicant's defence rights had been unduly curtailed as he could not cross-examine JH. The trial court had known JH's address in the USA but had not taken any action to secure his presence.

Court's conclusions:

The trial court cannot be blamed for having failed to request international judicial assistance since it has not been established that the court knew JH's address in the USA. [para. 56]

***Damir Sibgatullin v. Russia, No.: 1413/05, Judgment, 24 April 2012***

Circumstances:

Conviction of a Russian national in Russia for crimes committed in Uzbekistan. Russia had requested Uzbekistan to serve the summons to trial in Russia on witnesses in Uzbekistan but they failed to appear for various reasons and, therefore, their statements from pre-trial proceedings were read instead.

Relevant complaint:

The applicant insisted that the only direct evidence implicating him in the crimes he had been found guilty of was the statements by the witnesses in Uzbekistan. Therefore, it was important for the trial court to hear the witnesses in person and to provide the applicant with an opportunity to cross-examine them.

Court's conclusions:

The Court is not convinced by the Government's argument that if the applicant had stayed in Uzbekistan he could have had an opportunity to take part in confrontation interviews with the prosecution witnesses, and there could accordingly have been no issue as regards the witnesses' absence from the trial. Furthermore, in the Court's view, there can be no question of waiver by the mere fact that an individual could have avoided, by acting diligently, the situation that led to the impairment of his rights. The conclusion is more salient in a case of a person without sufficient knowledge of his prosecution and of the charges against him and without the benefit of legal advice to be cautioned on the course of his actions, including on the possibility of his conduct being interpreted as an implied waiver of his fair trial rights. The Court reiterates that the applicant was only notified in person of the criminal proceedings against him upon his arrest in Russia in November 2003. It thus could not be inferred merely from his status as a fugitive from justice, which was founded on a presumption with an insufficient factual basis, that he had waived his right to a fair trial. The Court notes that the Regional Court did not have information explaining the reason for the absence of five of the eleven witnesses from the prosecution list. In fact, the trial court was not even aware whether the witnesses had been summoned. It also appears that it never received a response from the Uzbek authorities regarding Mr. A.'s attendance. The Regional Court, nevertheless, proceeded with the reading out of the depositions by those five witnesses and Mr. A., having noted that attempts to obtain their presence had already taken six months. While the Court is not unmindful of the domestic courts' obligation to secure the proper conduct of the trial and avoid undue delays in the criminal proceedings, it does not consider that a stay in the proceedings for the purpose of obtaining witnesses' testimony or at least clarifying the issue of their appearance at the trial, in which the applicant stood accused of a very serious offence and was risking a lengthy prison term, would have constituted an insuperable obstacle to the expediency of the proceedings at hand. The Regional Court excused the remaining witnesses, considering their absence to be justified either in view of their personal circumstances or because Uzbek officials had been unsuccessful in their attempts to find them. Regard being had to the circumstances of the case, the Court has serious doubts that the decision to accept the explanations and to excuse the witnesses could indeed be accepted as warranted. It considers that the Regional Court's review of the reasons for the witnesses' absence was not convincing. Whilst such reasons as inability to bear the costs of travel to Russia, poor health or a difficult family situation are relevant, the trial court did not go into the specific circumstances of the situation of each witness, and failed to examine whether any alternative means of securing their depositions in person would have been possible and sufficient. It also does not escape the Court's attention that under the relevant provisions of the Russian law witnesses were afforded a right to claim reimbursement of costs and expenses, including those of travel, incurred as a result of their participation in criminal proceedings. The Court is concerned with the Regional Court's failure to look beyond the ordinary means of securing the right of the defence to cross-examine witnesses, for instance by setting up a meeting between the applicant's lawyer and witnesses in Uzbekistan or using modern means of audio-visual communication to afford the defence an opportunity to put questions to the witnesses. Furthermore, while the Court understands the difficulties

encountered by the authorities in terms of resources, it does not consider that reimbursing travel costs and expenses to the key witnesses for them to appear before the trial court would have constituted an insuperable obstacle. [paras. 47, 55 and 56]

***Tseber v. Czech Republic, No.: 46203/08, Judgment, 22 November 2012***

Circumstances:

Conviction on the basis of interrogation of a witness (in the presence of a judge) before pre-trial proceedings formally commenced and without presence of the (future) accused person and/or his lawyer.

Relevant complaint:

The applicant complained did not have the opportunity to examine the main witness for prosecution and, therefore, did not receive a fair trial.

Court's conclusions:

The impossibility to locate a witness could constitute, under certain conditions, a fact justifying admissibility of such depositions in a trial even though the defence could not question them in any stage of the proceedings. For the admissibility of using such evidence, the authorities must take positive measures to enable the accused person to examine or have examined witnesses against them; namely, they must actively search for these witnesses. To assess whether the positive measures taken by the national authorities are sufficient or not, the Court takes into consideration whether they had done everything that could be reasonably expected of them to locate the witness in question and whether they had not lacked diligence in their attempts to ensure their presence at the trial. In other words, it must be examined whether the absence of the witness at the trial is attributable to the national authorities. [para. 48]

# Chapter V – Workshop no. 1 and feedback (1h 45min-day 1; 2h-day2)

Laurentiu Sorescu

## Section 1 - Case study 1 on corruption

### 1.1 Basic questions concerning case study 1 on corruption

What are the main rights of the defendant during the investigation?

- The right to be informed of the accusation
- The right to remain silent
- The right to legal and loyal administered evidence
- The access to the file when art. 5 par. 3 of the ECHR is involved

Can the access to the file of the defendant be limited? When and on which grounds?

The access to the file can be limited for the defendant during investigation, but not when art. 5 par. 3 of the Convention applies.

The defendant cannot be convicted mainly on the basis of evidence hidden from him.

When is the right to an interpreter mandatory?

The right to an interpreter is mandatory when the defendant does not understand or cannot speak the language of the trial. The interpreter should also provide his services when the defendant communicates with his legal counsel. Also the interpreter should help the defendant become aware of the main documents from the criminal file.

### 1.2 Details of the case

On the 22nd of August 2009 Mr. D was summoned to the Financial Division of the Bucharest Police headquarters. The police officer in charge of a tax evasion case, Mr. O, asked Mr. D to about the role of Mr. A in the management of Company X. Mr. D had been the administrator of Company X, which was under investigation for illegally asking and obtaining the return of the value-added tax for fictitious import-export transactions involving walnuts.

After the hearing, Mr. O went with Mr. D outside the office, where Mr. D offered Mr. O a bribe of 3000 euro in order to avoid any investigation of Mr. D and Mr. A.

After this discussion, Mr. O went to the Bucharest District Prosecutor's Office and filed a report about the bribe. A case was opened and the prosecutor asked the judge of rights for a wiretapping authorization for the mobile phone of Mr. D. Interception of communications was then set up in the office of Mr. O for the next meeting between Mr. D and Mr. O. An additional authorization for wearing a wire on the body of Mr. O was also issued.

On the 24th of August, Mr. O called Mr. D in order to get him to make an additional statement on the 5th of September. Immediately after this discussion with Mr. O, Mr. D called Mr. A and informed him that the Mr. I's illness was going to be cured with the help of only 6 European doctors.

At 10 o'clock, on the 26th of August, Mr. D arrived at Mr.O's office, who asked him if the proposal was still available. Mr. D said he would prefer to discuss the matter anywhere else and he suggested they should go to a bar nearby. They went then to the bar, where Mr. D gave Mr. O 6 500-euro bills. As soon as the money was given, the prosecutor and three policemen stepped in.

Mr. D refused to make any statement and asked for the presence of his lawyer, Mr. A. The prosecutor informed Mr. D that an order had been issued to take him to the Districtual Prosecutor's Office headquarters. Mr. D refused to comply unless his lawyer was going to come with him.

Mr. D was allowed to use his mobile phone to call Mr. A, who said that he was on holiday with his family in Maramures county and that it will take him ten hours by car to arrive in Bucharest. Mr. A asked to be informed via the phone about the charge and the evidence against Mr. D. The prosecutor informed Mr. A only that Mr. D was charged with bribing a public official, and refused to give any further details.

Mr. D refused to sign anything and said he was framed and that the prosecutor and the policemen should be very careful in their future actions. He also claimed that what he had said was a joke, but that he would make sure that the public will find out about this judicial abuse. As Mr. D refused to go to the prosecutor's office, he was handcuffed and brought in.

A public defender was called to provide legal aid to Mr. D. The prosecutor allowed the lawyer to talk with Mr. D in a separate room but Mr. D's handcuffs were not removed. Mr. D went to a window where he showed his handcuffed hands to his friends who were already gathered in front of the prosecutor's office. One of Mr. D's friends posted a photo of the handcuffed Mr. D on Facebook and asked for his immediate release.

Mr. D told the public defender, Mr. P, that he wanted a proper defence. Mr. P informed Mr. D that he would do his best, although he barely managed to pass the bar exam and that this was one of his first corruption cases.

The prosecutor informed Mr. D that he was being investigated for bribing Mr. O and that he was a suspect in this regard. Mr. P asked for the suppression of all evidence because Mr. D had been entrapped as the bribe proposal came from Mr. O, who had coerced him to give that money in order to avoid any further investigation. Mr. D said that he was innocent and that he was not certain that Mr. P's request was the right defence in his case.

Mr. P also required full access to the investigation file and together with Mr. D promised that a full statement would be given afterwards. The prosecutor refused to allow him access to the file. During the hearing Mr. P was called by Mr. A, who informed him that the prosecutor probably had recorded a discussion between Mr. D and Mr. A. Mr. P told the prosecutor that Mr. A should had been informed about this by a judge because such right is guaranteed by the last part of art. 139 paragraph 4 of the Criminal Procedure Code.

The prosecutor told Mr. P and Mr. D that all requests of the defence would be analyzed as soon as possible. At 18 o'clock, the prosecutor issued a custody order for Mr. D. As soon as a copy was given to Mr. D, Mr. A arrived at the prosecutor's office and discussed with his client.

At 19 o'clock, the prosecutor invited Mr. D and Mr. A in his office and told them that that a decision was taken to prosecute Mr. D, who was now a defendant. Furthermore, the prosecutor informed Mr. D that he has the right to make a statement as a defendant. Mr. A and Mr. D refused to sign anything, and the former filed for a recusal of the prosecutor because the right to defence had been infringed due to a biased investigation. The prosecutor had said in the presence of two policemen and of Mr. A and Mr. D that he was convinced that Mr. D was guilty of bribing a public official and that an arrest warrant should be issued. The prosecutor rejected the recusal request.

The prosecutor then lodged with the competent judge of rights a request to place Mr.D in pre-trial detention. Prior to the hearing before the judge, the lawyer was given full access to the investigation file for an hour. Then, at the beginning of the hearing, Mr. A asked for more time in order to prepare an adequate defence, and informed the court that the request to arrest Mr. D was null because Mr. D needed a Hungarian interpreter as he did not understand Romanian. Furthermore, the lawyer asked the judge for a full translation of the investigation file in Romani and in Hungarian before the judge would decide on the arrest.

On the same day, the prosecutor, on the basis of evidence gathered as a result of telephone tapping and a search at the residence of Mr. I, decided to apply for the arrest of Mr. I for the bribing of Mr. O. An arrest warrant and a European Arrest Warrant were then issued.

Mr. I was found in an EU Member State and refused to be sent to Romania because his rights had been infringed by the Romanian judicial system, which in his opinion could not ensure a fair trial. He asked for a translation of the European Arrest Warrant in Romani language because he claimed he was not able to read properly in Romanian.

Mr. I also applied for asylum. His lawyer produced reports from human rights NGOs concerning the discrimination of Roma people by Romanian judicial authorities. Also, Mr. I's lawyer gave the court video recordings of hundreds of hours of TV shows unveiling the unfairness of the Romanian judicial system. Mr. I's lawyer also asserted that:

- he had not received a full copy of the investigation file even if this request had been made to the Romanian judicial authorities;

- he had not been properly informed in regard to his rights in accordance with the Romanian Code of Criminal Procedure;

- he had not been assisted during the hearing on the execution of the EAW by a proper Romani interpreter since the latter did not speak the Romani dialect spoken by the defendant's family ;

- he had no chance to a fair trial regarding the arrest warrant since the judge of rights who issued the arrest warrant had also issued a search warrant of his residence and had illegally allowed the recording of discussions between lawyers and their clients;

- well-known personalities from Romania had explained that he was an innocent victim of the judicial system.

**1.3 Issues to be solved:**

A. Please draft an adequate letter of rights for Mr. D, in compliance with the relevant EU rules and the jurisprudence of the ECHR.

B. Please draft an adequate letter of rights for Mr. I, in compliance with the relevant EU rules and the jurisprudence of the ECHR on European Arrest Warrant proceedings.

Comments on issues to be solved

The participants to the workshop would draft these letters of rights without using the models, annexes to the Directive 2012/13/EU on the right to information in criminal proceedings. They should also use their national Criminal

Procedure Code and Criminal Code. Each Member State has a different way of notification of rights. Each Member State could decide on a certain legal qualification of a certain criminal act. The specific contents of the accusation could depend on the legal definition of a certain crime in a certain legal system. Even if there are uniform rules on procedural rights, the way these rights are put into practice in each national legislation could differ. The essence of the letter of rights is to be drafted taking to account the national implementations of the directive mentioned above, but with the goal of ensuring the minimal standard provided at the EU level. Therefore we encourage the participants to talk about their national legal rules. This way we enhance mutual cooperation and better understanding of the national rules that apply in the field of procedural rights.

The case-law offers the possibility of discussing national approaches to the pre-trial due process [164]:

- the entrapment defence;
- the interception of conversations between the defendant and his lawyer (as criteria in this field had been established by the ECtHR in the decisions Zagaria v. Italy of 27.11.2007, Kopp v. Switzerland of 25.03.1998 and Aalmoes and other v. Netherlands of 25.11.2004) ;
- the legal national framework that allows the limitation of the freedom of a person in order to lead that person to the office of the investigator (infringements could appear in this field as did in the cases of the ECtHR Iustin Robertino Micu v. Romania of 13.01.2015 and Valerian Dragomir v. Romania of 16.09.2014)
- the possibility of limiting the right of the defendant to a chosen lawyer (when the lawyer is in a potential conflict of interest or when the lawyer is not able to be present);
- the effective defence made by the public defender;
- the recusal of the prosecutor and the infringement of the right to a ''fair'' investigation;
- the proper amount of time needed for an effective defence for the arrest warrant proceedings;
- the request of a interpreter of a certain dialect of a language (the goal of the interpretation and translation is mentioned by paragraph 22 of the Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings);
- the issue of the asylum in the framework of the EAW in the context of alleged discrimination and fair trial infringement;
- the issue of access to the investigation file;

[164] For details on this legal concept Harold A. Ashford and D. Michael Risinger, resumptions, Assumptions, and Due Process in Criminal Cases: A Theoretical Overview, The Yale Law Journal Vol. 79, No. 2 (Dec., 1969), pp. 165-208.

- allegged breaches of rights during investigation in the requesting state.

**1.4 Issues to be discussed:**

a. What rights does the defendant have during the investigation in your national legal system?

Comments

The rights of the defendant may be very different at national level. There Criminal law and criminal procedural law are strongly related to the sovereignty of the state.

Each Member State has its own dynamic equilibrium between the rights of the defendant and the obligation of the judicial authorities to find out the truth in a certain criminal case. Each state has a different criminal background and a certain vision concerning their international public order.

Still minimal rights of the defendant have been in place as a direct consequence of the jurisprudence of the ECtHR. But the content of the rights can be rather different at national level.

b. Which are the rules that apply to the defendant's right to an interpreter according to your national legal system?

Comments

The rights to defence cannot be effective if the defendant cannot understand the accusation and his procedural rights. And the content of the right to interpreter can be rather different between Member States. There are Member States that could offer the possibility of persons belonging to some ethnic minorities to speak in court their own language.

Any defendant prefers to speak in his own native language. The defendant should be allowed to communicate as easy as possible. And his native language is the most adequate for a proper defence. A defendant could not be fluent in the language of the investigation.

Usually an individual knows the language of the country he lives in. And the judicial authorities start from this hypothesis. If the judicial authorities notice that the defendant barely speaks in the language of the investigation, they should appoint a translator.

Each state has a number of citizens of a different ethnic origin. And persons that belong to this minority would prefer to speak in their usual day-to-day language. And if a defendant wants to speak Hungarian of Romani, the investigators should appoint a translator to allow for this right to be put into practice.

There can be case when an abuse of rights could occur. There were cases when a person would want a translator without knowing the required language. If a certain person had studies in a certain country and also had given an exam in that language, one can suppose that that person knows that language.

Anyway, it is a relative presumption that a person knows a certain language. And there were cases at the level of the ECtHR that established criteria for a knowing whether this right is respected. In the Hermi case

The right for translation of the important documents o the file is required in order to facilitate the defence of the defendant. The defendant should also have the option to give any desired statements, to communicate with his defence attorney and to read and understand the evidence. And this is possible only if he is able to fully exercise his rights with the help of an interpreter.

c. When is the access to the case file adequate according to the relevant EU rules and the ECtHR jurisprudence?

Comments

As a result of the jurisprudence of the ECtHR one can speak at this moment about a real right to a ‘’due’’ investigation in a reasonable time.

The right to information in criminal proceedings includes the right of access to the materials of the case.

The departure points concerning the access to the file are paragraphs 30-36 of the Preamble and art. 7 of the Directive 2012/13/EU on the right to information in criminal proceedings.

Every defendant has a potential access to the investigation file. Access to the file is mandatory granted when a decision on the deprivation of liberty of the defendant should be taken by the judge. Still there are materials that can be secret to the defendant, but these should not be ,,essential to challenging effectively, in accordance with national law, the lawfulness of the arrest or detention”.

During investigation the access can be limited, but the access should be granted when the merits of the accusation are judged by the court.

In the European Union the rules concerning the access to the file during investigation are different. An unlimited access to the investigation file could be harmful for the proper gathering of evidence. The moment when the full access is granted could be given differs from Member State to Member State.

d. Would you execute the European Arrest Warrant for Mr. I?

Comments

There are issues concerning the right to a “due” investigation that could have the potential to lead to the refusal of executing the EAW. Mr. I asserted that he is discriminated and that there are empirical data (opinions) that a fair trial is not possible in his country. The basis of the analysis should start from the provisions of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States.

The reasons of refusal to surrender are limited. The requested person has access to a limited amount of documents. The goal of the hearing concerning the surrendering is not to examine the fairness of the investigation from another Member State. Even if the evidence in one Member State is gathered in a totally different manner, always the materials should be compliant to the national Criminal Procedure Code of that investigation.

The issue of the dialect is related to the goal of the recognition of the right to translation and interpretation. Paragraph 20 of the Preamble to the Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings mentions the goal of the guarantee. Interpretation and translation are provided in the native language of the suspected or accused persons or in any other language that they speak or understand in order to allow them fully to exercise their right to defence, or in order to safeguard the fairness of the proceedings. If one person speaks a dialect, one could assume that the official language could be effective. There could also be cases when the dialect could be so different that the suspect of the defendant cannot understand. But these issues should be decided from case to case by the judicial authorities.

The criteria on the effective right to interpretation and translation could be deducted from paragraphs 90-91 of the ECtHR decision Hermi v. Italy. In this case, the applicant stated that he could speak Italian and that he understood the content of the charge and the evidence. The applicant had been also living in Italy for at least ten years and could provide the details in Italian concerning facts related to the accusation. The judicial authorities should have ,,sufficient reason to believe that the applicant was capable of grasping the significance of the notice informing him of the date of the hearing and that it was not necessary to provide any translation or interpretation.” The suspect or defendant should have sufficient command of the procedural language. Anyway if the suspect or defendant is not a national, one can assume that an interpreter or a translator is needed.

## Section 2 - Case study 2 on Euro-counterfeiting

**2.1 Basic questions concerning case study 2 on euro-counterfeiting**

What are the main rights of the defendant during trial according to Article 6 of the ECHR?

During trial the defendant has

- the right to a court
- the right to a public hearing
- the right to be presumed innocent
- the right to adequate time and facilities for the defence
- the right to a legal counsel
- the right fo call and question witness
- the right to an interpreter
- the right of equality of arms

What are the right of the legal counsellor in a criminal trial?

- the right to take part in the investigation
- the right to access to the file
- the right to contact the defendant
- the right to make requests and to call for the administration of evidence
- the right to remove from evidence the information exchanged between the lawyer and the legal counsellor

**2.2 Details of the case**

On the 23rd of September 2014, Mr. Anton, a well-known businessman, offered a local musician, Mr. Platinum, 50000 euro (100 bills of 500 euro) for the contribution to his political campaign, regarding the election process for the position of President of Romania. This amount was the price for the songs Mr. Platinum wrote and performed in the presidential campaign, provided that his reputation would help Mr. Anton to become president.

The money was handed out to Mr. Platinum in a large envelope. The musician informed Mr. Anton that he was going to use the money for the purchase of a Ferrari he would use during Christmas time.

Mr. Anton lost the elections. In an interview given afterwards to a national newspaper, Mr. Anton mentioned that Mr. Platinum was to be blamed for his failure. Mr. Anton also asked Mr. Platinum to pay him back the sum of 50000 euro.

On the 23rd of December 2014, Mr. Platinum went to the local Ferrari dealer and opened the envelope in order to pay a part of the price of the car with the money received from Mr. Anton. Mr. Platinum found in the envelope 100 bills which were held together by a paper band with the name of Romanian Interregional Bank. When the paper band was opened, Mr. Platinum found out that the word "SPECIMEN" was written on all the bills.

He went straight to the nearest police station in Bucharest, where he filed a criminal complaint against Mr. Anton. He also handed over the police a DVD with a recording of a discussion between him and Mr. Anton from the 23rd of September 2014. The recording was made with a special device hidden in the tie of Mr. Platinum. However, Mr. Platinum could not hand over the device because it was stolen from him.

The mobile phone of Mr. Anton was tapped according to a warrant issued by the judge of rights. From a discussion between Mr. Anton and another person (identified as Mr. Popescu) resulted that Mr. Popescu had given Mr. Anton 1000 parrots and that the parrots could not be taken to the zoo in order to be deposited. Mr. Popescu assured Mr. Anton that he would take back the parrots and he would give the money back.

The prosecutor asked and obtained from the competent judge of rights a search warrant for the residence of Mr. Anton. On the 24th of December, the police entered the residence of Mr. Anton. He refused to allow the police to enter his house and the police entered by force. Mr. Anton required the search to be stopped in order for his lawyer to be allowed to participate. He wanted to leave the residence as he had an important business meeting. The police refused to allow Mr. Anton to leave because the prosecutor had issued an order to bring him to the prosecutor's office after the search ended. The police asked Mr. Anton before the search to hand over 900 bills of fake euro. Mr. Anton said that he had no counterfeited euro.

The lawyer of Mr. Anton, Mr. Ionescu, announced the police that he wanted the search to be postponed because he would not arrive in two hours (deadline mentioned by article 159 paragraph 9 of the Criminal Procedure Code), but in three hours. The prosecutor allowed Mr. Anton to choose another lawyer, but Mr. Anton refused. The prosecutor decided to begin the search. A safe has been found and Mr. Anton was asked to open it. Mr. Anton refused and the prosecutor, as the safe could not be removed or opened otherwise, decided to open it with dynamite. Mr. Anton decided then to open the safe and 900 fake euro bills were found inside.

Mr. Ionescu arrived at the residence of Mr. Anton and asked for the evidence to be removed from the case file since Mr. Anton had been coerced to open the safe. Mr. Anton had the possibility to discuss with Mr. Ionescu in one of the rooms of the residence of Mr. Anton for 20 minutes. A policeman was present, but confidentiality was assured. The policeman had headphones and listened to some dance music during the conversation between Mr. Ionescu and Mr. Anton.

Mr. Anton and his lawyer, Mr. Ionescu, were invited after the search to the prosecutor's office. Mr. Anton was informed that he is suspect of deception as he gave fake money in exchange for the services of Mr. Platinum. Mr. Anton asked to see the case file.

As the prosecutor refused to give access to the file, Mr. Anton decided not to make any statement, but afterwards he was convinced by the prosecutor, against his lawyer's advice.

Mr. Anton declared that he did not know the money was fake and that he simply received the banknotes from Mr. Popescu, put them in the envelope and gave them to Mr. Platinum. Mr. Ionescu refused to ask any question even if the prosecutor allowed him to do so and decided not to sign the statement of Mr. Anton.

The prosecutor issued a custody order against Mr. Anton. Mr. Anton asked to inform his mistress about his custody and the place where he will be held during custody. He also informed the prosecutor that he must discuss urgently with the love of his life (which he cannot marry as a divorce would seriously affect his business) because they had a bad fight the day before and that he must tell her on the phone how much he loves her. The prosecutor informed him that his lawyer has the possibility to communicate all the desired information to his mistress. Mr. Anton and his lawyer informed the prosecutor that this is an abuse of the prosecutor since article 210 of the Criminal Procedure Code allows Mr. Anton to communicate with whomever he wanted during custody.

As Mr. Anton was also a citizen of W., Mr. Ionescu and Mr. Anton asked the embassy of W. to be informed about the custody. The prosecutor advised Mr. Anton not to attract the attention of the embassy of W. Mr. Anton agreed that it probably would not be a wise thing to do. Mr. Anton had participated at a political gathering against the supreme leader of W. and he was sentenced to death for treason because he spoke against the teachings of the supreme national leader. Mr. Ionescu insisted that the embassy should be informed as Mr. Anton was not very convinced that such a communication would or would not be adequate. The prosecutor decided not to inform the embassy.

Another search took place at the residence of Mr. Popescu, where 2000 fake euro bills and devices designed to counterfeit Euro have been found.

An arrest warrant and a European Arrest Warrant were issued on the name of Mr. Popescu.

Mr. Popescu was found in one of the EU Member State and refused to be surrendered to Romania. He refused to be defended by a local lawyer and asked the local court to allow a Romanian lawyer, Mr. Ionescu, to defend him. Mr. Ionescu took a flight and arrived in due time for the hearing proceeding concerning Mr. Popescu. Still the executing state appointed a local lawyer to assist Mr. Popescu in the proceedings concerning the executing of the EAW.

At the request of Mr. Popescu, a two hour meeting took place between the requested person and the two lawyers.

The executing judicial authority refused to allow Mr. Ionescu to be present at the hearing. The local lawyer claimed that Mr. Popescu should have had an interpreter of Romanian language throughout the entire proceedings since Mr. Popescu was not able to speak the language of the court (even if Mr. Popescu had a job in that Member State).

**2. 3 Topics to be solved**

A. Please issue a Letter of Rights for Mr. Anton

B. Please issue a Letter of Rights for Mr. Popescu on the basis of a European Arrest Warrant.

Comments

This case also should allow the drafting of a letter of rights without the models, annexes to the Directive 2012/13/EU on the right to information in criminal proceedings. The participants have a brief discussion on the legal classification of the crimes. They also have to take into account the possible legal classification in their national legislation. The letter of rights could have specific elements at the level of any Member State beyond the minimum level of information required at the EU level. One could also discuss if one should mention in the letter of rights details concerning the evidence that was gathered. The legal and loyal administration of evidence could be discussed upon since:

- the original recording device of the conversation between Mr. Platinum and Mr. Anton could not be found;
- the search warrant without the presence of the lawyer ;
- the forced opening of the safe of Mr. Anton (as a result of the threat of the prosecutor that dynamite is going to be used);
- the statement made by the defendant at the advice of the prosecutor;

There are also topics related to the letter of rights such as the right to inform about the custody the mistress and the embassy of W. One cannot ignore that the right to inform is related to the protection of the defendant from the possible abuse of the state. It is arguable whether a personal communication on issues that are not related to the investigation should be under the protection of EU Law. Still, the wording of the legal provisions should not allow the judicial authorities to decide upon the content of the communication.

The executing of the EAW raises issues concerning the participation of a foreign lawyer in a hearing before another court. It arguable whether a foreign lawyer can make a n effective defence. One should also take

into account the purpose of the right to have a lawyer in the framework of the surrendering procedure. The lawyer should try to make the defence on formal grounds in order to avoid the surrendering. The need of interpreter is also arguable if the requested person has a job in that Member State.

**2.4 Topics to be discussed**

a. What are the rights of the lawyer in your national legislation? Are those compliant to the EU and ECHR legal framework?

Comments

The role of the lawyer in the criminal trial is becoming day by day more important. A good defence starts from the beginning of the investigation. A lawyer highly involved in the investigation offers the defendant more options.

b. What are the rights of the defendant in your national legislation? Are those compliant to the EU and ECHR legal framework?

Comments

All Member States have managed to get a minimal level of rights for the defendants. Still, every judicial tradition has its own way of protecting the rights of the defendant. Some could be more formal, with procedural rights above the level required at the level of the EU and from the jurisprudence of ECtHR, as a liberal approach on the rights on the defendant is taken. Other more conservative legal systems allow the defendant to have effective procedural rights, but allow more freedom to judicial authorities in the field of gathering evidence.

c. How can the rights provided by the Directives 2012/13/EU, 2010/64/EU, 2013/48/EU be limited in your national legislation?

Comments

The rights are related to right to a fair trial guaranteed to the defendant. But most rights could be limited if the restrictions are necessary and proportionate. If in a certain case the Directives mentioned are not helpful, the judicial authorities should always take into account that any criminal trial should be fair a whole, even if some restrictions have

been made. And a good standard for this is the ECthr case Al Khawaja and Tahery v. United Kingdom of 15 December 2011.

d. When is an interpreter or a translator designated in your national legislation? Who can be interpreter or translator? Is an interpreter necessary when the lawyer can also be an interpreter for the defendant?

Comments

As the defendant is a foreigner, the interpreter should be given. The defendant could refuse a interpreter if there are sufficient date that he has a proper command of the language of the judicial authorities. In normal circumstances (when urgent measures are not to be taken) an interpreter should be an authorized one. Even if the lawyer is a fluent speaker of a certain language an interpreter is useful in order to allow the lawyer to focus on the defence, not on the interpretation.

## Day 2

# Chapter VI – Lecture no. 3 (1h 30min)

The third lecture is scheduled in the second day of the seminar. It handles the European Arrest Warrant from the perspective of the procedural rights of the requested person. The focus of the lecture is on the ne bis in idem principle. This principle is also discussed in the framework of the workshops that follow this presentation. The lecture starts with a short overview on the European Arrest Warrant. It deals with the main features, the general concerns, the scope and the grounds for refusal (as the ne bis in idem principle is such a barrier for executing the European Arrest Warrant).

The procedural aspects are also important as they raise issues concerning the authority in charge of executing the warrant, the authorities that can file a request and the forms of request. The presentation needs to discuss the Human Rights issues that appear rather seldom in the field of executing a European Arrest Warrant. Of particular interest are the cases when a flagrant denial of justice appears or when the requested person suffers any other infringement of the rights guaranteed by the ECHR.

The proportionality issue is also important as the European Arrest Warrant should not be issued for petty crimes, even if the legal framework would allow such a request. The lecturer also makes a brief analysis of all the case law of the ECJ related to the scope of the ne bis in idem principle in EU Law. The legal framework of the principle's applicability in the EU Law is also analysed, because the fear to bear another criminal proceeding in another Member State could act as a barrier to the free movement of persons. No person should be subjected to another criminal proceeding only because it has decided to enjoy the right to free movement in the European Union.

## Section 1 - The European Arrest Warrant from the perspective of procedural rights of the requested person. The principle of *ne bis in idem*

Javier Frauca Azcona[165]

### 1.1 The ne bis in idem principle

Ne bis in idem principle expresses the notion that no one should be criminally prosecuted more than once for the same offence. We might find several examples of this principle in different legal instruments:

- Article 54 of the Convention for the Implementation of the Schengen Agreement.
- Article 4, paragraph1 of the 1984 Seventh Protocol to the European Convention on Human Rights.
- Articles 3 and 4 EAW Framework decision.

The principle of ne bis in idem is a fundamental principle of law, which bars prosecution, trial and punishment repeatedly for the same offence. Although it has long been regarded as an undisputed rule of domestic criminal justice, the principle was not recognised at international level. However, the traditional non application of the ne bis in idem has been progressively questioned on the basis of legal consequences deriving from some international conventions and the statutes of international criminal law tribunals.

The principle is couched in various terms according to the international, regional or national instrument we focus on. The ne bis in idem has been developed in EU law from a domestic into a transnational fundamental right and represents a truly European added value in comparison to international law.

The principle of ne bis in idem implies that the same individual should not face two or even more criminal proceedings for having committed the same material fact. If it is not questioned at the domestic level but it is clear that it runs against the States' sovereignty demands. In order to comply with the rule, States shall either waive their jurisdiction or adjudicate it on the basis of a supranational duty.

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[165] Senior Judge, Spain

Nonetheless, the double jeopardy rules is in fact incorporated into several frameworks: Council of Europe Conventions, EU instruments, the Schengen Agreement, among other international instruments. However, this means that the multiplicity of sources, especially where contemporarily applicable and where not linked by connection tools, leads to extreme fragmentation as well as to legal uncertainty.

The first reason why multiple prosecutions may occur within different States is merely up to the national legal orders. In establishing rules on exercising jurisdiction States may consider relevant not only the locus commissi delicti, but also other elements. For example, they could believe that the offender and victim's nationality are worthy too.

This scenario has been even worsened since some international instruments have set up the principle of extra-territoriality, meaning that 'every State might claim jurisdiction over offences, even if those offences have no direct effect on the asserting State, therefore demanding no nexus between the State assuming jurisdiction and the offence itself

**1.2 The principle and its links with EU law**

The principle of ne bis in idem has been shifted to the transnational level within the European Union by Article 54 of the Convention implementing the Schengen Agreement (CISA), which stipulates that 'a person whose trial has been finally disposed of in one Contracting Party may not be prosecuted in another Contracting Party for the same acts provided that, if a penalty has been imposed, it has been enforced, is actually in the process of being enforced or can no longer be enforced under the laws of the sentencing Contracting Party'. This international law instrument was integrated into the framework of EU law as part of the of the Schengen acquis and has become binding and applicable between the Member States.

Ne bis in idem is more specifically referred to in EU criminal law instruments, such as the Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the Surrender Procedures between Member States and the Council Framework Decision of 30 November 2009 on Prevention and Settlement of Conflicts of Exercise of Jurisdiction in Criminal Proceedings. The ne bis in idem principle has also been laid down in Article 50 of the Charter of Fundamental Rights of the European Union, which stipulates that 'no one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law". The explanatory memorandum provided by the drafters of the Charter clarified that 'in accordance with Article 50, the ne bis in idem applies not only within the jurisdiction of one State but also within the jurisdictions of several Member States.

**1.3 *Ne Bis In Idem:* sources and case law**

The EU legal framework with regard to the ne bis in idem rule is quite fragmented. Beyond special rules on double jeopardy, dealing with the European ne bis in idem mainly means referring to either article 54 of the CISA or to article 50 of the Charter. Likewise, article 3 and 4 of the Framework Decision on the European Arrest Warrant as well as article 4 of the 7thProtocol of the ECHR are at stake.

*Article 54 CISA*

A person whose trial has been finally disposed of in one Contracting Party may not be prosecuted in another Contracting Party for the same acts provided that, if a penalty has been imposed, it has been enforced, is actually in the process of being enforced or can no longer be enforced under the laws of the sentencing Contracting Party.

The Convention Implementing the Schengen Agreement is a 'check and balance' body of law. As it entered into force, the Contracting Parties acknowledged the flaws that would have stemmed from a borderless area, inter alia the increase of cross-border crimes. Nonetheless, in a single area it would have been unconceivable that the same individuals had been subject to a double prosecution or even served a double sanction for the same offence. Therefore, the State Parties agreed on a provision establishing an international ne bis in idem norm.

However, it would be pointless reasoning about article 54 of the Schengen Convention without incorporating into the same analysis the interpretation given by the ECJ. Due to more than a dozen preliminary rulings, started with the pivotal Gözütok and Brügge judgment, nowadays we find a pretty clear picture of the principle content.

Once again, it fell to the European Court of Justice to fill the legal vacuum concerning many relevant legal points, related to the scope of the principle.

Since that there is no provision establishing 'any harmonisation, or at least the approximation, of the criminal laws of the member States relating to procedures whereby further prosecution is barred', the ECJ tried to shape the mutual trust into a concept making MSs mutually recognise their own legal systems. Walking this path, the Court generally proposed a 'pro free movement' approach, by considering the freedom of movement precisely as the 'object and purpose of Article 54 CISA'.

*The ídem concept (same acts)*

When the material scope of article 54 CISA is dealt with, the issue at stake is what shall be meant by the phrase 'the same acts'. In essence, the duplication required by the provision to be applied should turn around terms for comparison

that have to be somehow the same. This is why the Court has not focused its evaluation on the legal qualifications that each MS attributed to criminal facts. Rather, it has minded the concrete acts that made the offender twice accountable.

The 'import-export' cases are the milestone as to the interpretation of the idem element. By analysing the conduct of drug trafficking among different MSs, the Court found itself to evaluate one material act constituting import from a certain State and simultaneously export to another. May it be considered as 'same acts' within the meaning of article 54 CISA? The Luxembourg Court had the first chance to answer this question in the Van Esbroeck case (9-03-2006), and it took a position henceforth never abandoned. It stated that:

(…)the only relevant criterion for the purposes of the application of that article of the CISA is identity of the material acts, understood as the existence of a set of concrete circumstances which are inextricably linked together (…) in time, in space and by their subject matter

Moreover ,the appraisal shall be'(…) irrespective of the legal classification given to them or the legal interest protected (…)As to the drug trafficking offence , the Court affirmed that, in principle, drug import/export has to be intended as 'same acts' for the purposes of the Schengen Convention as they are theoretically identical act, but seen from different points of view.

The Court went further in the Kraaijenbrink ruling(18-07-2007). It concerned a money laundering offence, 'consisting in holding in one Contracting State the proceeds of drug trafficking and, second, in the exchanging at exchange bureaux in another Contracting State of sums of money having the same origin. While the national court before which the second criminal proceedings are brought finds that those acts are linked together by the same criminal intention, the first charged Mr Kraaijenbrink with just the first part of his conduct. Required to answer whether the proceedings might fall within the scope of article 54,the ECJ warned the referring Court against confusing the subjective link with the objective one. The fact that the competent national authorities consider these acts linked together by the same criminal intention is not sufficient to qualify them as same acts.

*The meaning of 'finally disposed of'*

What kind of decisions is relevant for the purpose of article 54 CISA?

The extension reach of the bis element was firstly drawn in the Gözütok and Brügge ruling. Mr Gözütok and Mr Brügge proceedings were both discontinued even without a court's intervene. However, they had to fulfil certain obligations and, in particular, pay a certain sum of money, in return for a faster and less onerous proceeding as well as a

less serious penalty. In attaching importance to the real effect of such settlements the Court disregarded the circumstance that MS have different legal arrangements in establishing such a sort of dispute resolution.

Another essential decision by the ECJ is the Van Straaten ruling. Still following the reasoning of free movement, the Court appraised that there is no reference within article 54 to exclude acquittals from the final decisions category. In particular, Mr Van Straaten was acquitted for lack of evidence. As the AG pointed out, the acquittal is per se an exercise of State's ius punendi, whereas it decides to bar 'any subsequent step' pursuant to an analysis of 'the merits'. However, the content of the expression 'the merits' depends 'on the grounds of the decision, some intrinsic to the defendant and others extrinsic.

What about a referring Court not facing the merits of the case, but simply discontinuing the proceeding on the basis of procedural grounds?

The ECJ dealt with such an issue in two cases, Miraglia (10-03-2005) and Gasparini. In the first case, Dutch and Italian prosecutions were being jointly investigating Mr Miraglia for international drug trafficking. Due to the fact that Italy brought action against Mr Miraglia, the Dutch prosecutor's office did not even initiate a criminal proceeding, so the merits were not explored at all. Later, the Netherlands, requested to gather judicial assistance to the Italian authorities, denied it on the assumption that there was "a final decision of a court" precluding, pursuant to Article 225 of the Netherlands Code of Criminal Procedure, any prosecution in respect of the same criminal acts and any judicial cooperation with foreign authorities. Therefore, Italy made a reference to the ECJ, asking whether a decision, took just on the basis of procedural grounds without any referral to the merits, might represent a final disposition of a case for the purpose of article 54 CISA. Indeed, the Court acknowledged such an impasse. If the judicial authorities of one Member State declare one case to be closed, because the Public Prosecutor has decided not to pursue the prosecution on the sole ground that criminal proceedings have been started in another Member State against the same defendant and for the same acts, without any determination whatsoever as to the merit of the case, this is not a final judgement for the purposes of Article 54 CISA. Therefore the ne bis in idem does not apply.

In the Gasparini judgement (28-09-2006) the Court applied for the first time the principle even if there was no assessment of the merits of the case, stating that an acquittal on the ground that prosecution of the offence is time-barred is still to be regarded as a final statement binding the other MS.

What about those cases in which an order suspends a proceeding before charging somebody?

In 2008,the ECJ assessed whether an order, that had been issued by a police authority after examining the merits of the case brought before it, (…)at a stage before the charging of a person suspected of a crime and that had

suspended criminal proceedings may amount to one of those decisions needed for the bis. The Court, by recalling its previous and consistent case law, reminded that a decision may be regarded as final only if it 'definitely bars further prosecution'. This was not the case of Mr Turanský. Under the Slovak Code of Criminal Procedure, police orders such as that in question do not prevent a new proceeding from being opened for the same facts. Therefore, Mr Turanský's position was not 'finally disposed of' as article 54 of the Schengen Convention requires.

What about in absentia proceedings?

The issue was dealt with in the Bourquain case (11-12-2008), a judgement that arouses interest also from other points of view, as it will be later assessed. The Luxembourg Court held that there is no reason for those proceedings issued in absentia to be put out of the scope of application of article 54. To this end, it does not matter if, under the domestic law of the deciding authority –France, the in absentia proceedings may be reopened at any time if the convicted person reappears. In essence, how in absentia proceedings are regulated at national level do not involve their recognition as final decisions by the other MS, which should mutually trust their legal systems even when inspired by diametrically opposite values. In an area, like the AFSJ, the lack of harmonisation among the MSs' regimes of in absentia proceedings cannot be a stumbling block to the superior interest of the free movement.

The enforcement condition contained in the Article is satisfied when it is established that, at the time when the second criminal proceedings were instituted against the same person in respect of the same acts as those which led to a conviction in the first Contracting State, the penalty imposed in that first State can no longer be enforced according to the laws of that State

### 1.4 Article 4 of the 7th Protocol to the ECHR

1. No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State.

2. The provisions of the preceding paragraph shall not prevent the reopening of the case in accordance with the law and penal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case.

3. No derogation from this Article shall be made under Article 15 of the Convention.

Article 4 of the 7th Protocol has a huge limit. It is confined by its own wording to the domestic walls. It does not safeguard individuals from being twice prosecuted in case of trans-border crime. It 'simply' forces the Contracting Parties to respect the double jeopardy rule within their legal system. The scope of application of this provision is limited to the national level, that is to say to trial or punishment in one and the same state, while other Council of Europe conventions, including the European Convention on Extradition (1957), the European Convention on the International Validity of Criminal Judgments (1970) and the European Convention on the Transfer of Proceedings in Criminal Matters (1972), govern the application of the principle at international level.

Article 4 of Protocol No.7 ECHR prohibits the repetition of criminal proceedings if they have been concluded by decision that has acquired the force of res judicata.

The European Court of Human Rights (ECtHR) drew in the case Nikitin v. Russia from Article 4 Protocol No.7 ECHR an interesting distinction between three different guarantees provided by the ne bis in idem principle: the right not to be liable to be tried twice, the right not to be tried twice and the right not to be punished twice.

The Court has also reached a remarkable result in the interpretation of the idem as a factual element. Before the judgement of the Grand Chamber in Zolotukhin, the case law on the notion of 'the same offence' was contradictory and several different approaches to the interpretation of idem were to be identified. This resulted from the differences among the ne bis in idem rules in the legal systems of the Member States of the Council of Europe

The Zolotukhin case represents a clear departure from the earlier jurisprudence of the Court. The case concerned a Russian national who had disorderly behaved to several public officials. After he had served three days' detention for the administrative offence of 'minor disorderly acts', he had been prosecuted and tried for the criminal offences of 'disorderly acts', 'use of violence against a public official' and 'insulting a public official' on the basis of the same behaviours.

Zolotukhin lodged an application against the Russian Federation with the Court, which was declared partly admissible. He complained under Article 4 of Protocol No. 7 that he had been prosecuted twice in connection with the same offence.

The Court held unanimously that there had been a violation of the aforementioned provision. In the judgement it has been expressly recognised that ``the existence of a variety of approaches to ascertaining whether the offence for which an applicant has been prosecuted is indeed the same as the one of which he or she was already finally convicted or acquitted engenders legal uncertainty and is incompatible with a fundamental right, namely the right not to be prosecuted twice for the same offence``.

The Court underlined the need for a dynamic and evolutive approach to the notion of the 'same offence' and in this perspective analysed the international instruments incorporating the non bis in idem principle. The Court opted for a broad and factual reading of the word "offence" in the text of Article 4 of Protocol No.7 ECHR and reiterated 'that the Convention must be interpreted and applied in a manner which renders its rights practical and effective, not theoretical and illusory', since 'it is a living instrument which must be interpreted in the light of present-day conditions'. Moreover, 'the provisions of an international treaty such as the Convention must be construed in the light of their object and purpose and also in accordance with the principle of effectiveness'.

The legal approach to the 'offence' was held to be too restrictive on the rights of the individual and susceptible of undermining the guarantee enshrined in Article 4 of Protocol No. 7 rather than rendering it practical and effective as required by the Convention. Therefore, 'Article 4 of Protocol No. 7 must be understood as prohibiting the prosecution or trial of a second "offence" in so far as it arises from identical facts or facts which are substantially the same'.

**1.5 Framework decision on the EAW**

ARTICLE 3

Grounds for mandatory non-execution of the European arrest warrant

The judicial authority of the Member State of execution (hereinafter 'executing judicial authority') shall refuse to execute the European arrest warrant in the following cases:

(…)

2. if the executing judicial authority is informed that the requested person has been finally judged by a Member State in respect of the same acts provided that, where there has been sentence, the sentence has been served or is currently being served or may no longer be executed under the law of the sentencing Member State;

ARTICLE 4

Grounds for optional non-execution of the European arrest warrant

The executing judicial authority may refuse to execute the European arrest warrant:

(…)

2. where the person who is the subject of the European arrest warrant is being prosecuted in the executing Member State for the same act as that on which the European arrest warrant is based;

3. where the judicial authorities of the executing Member State have decided either not to prosecute for the offence on which the European arrest warrant is based or to halt proceedings, or where a final judgment has been passed upon the requested person in a Member State, in respect of the same acts, which prevents further proceedings;

(…)

5. if the executing judicial authority is informed that the requested person has been finally judged by a third State in respect of the same acts provided that, where there has been sentence, the sentence has been served or is currently being served or may no longer be executed under the law of the sentencing country;

**1.6 Jurisprudence of the Luxembourg Court on the ``ne bis in idem `` principle**

*C-261/09, Mantello, 16 November 2010 (Article 3(2) concept of "same acts"*

In the Mantello case, the Court and AG supported the idea of a relationship between the two provisions that would share the same rationale. On the one hand, article 54 allows who has already been finally judged to move freely within the Schengen area, without running the risk of further prosecutions for the same fact. Similarly, article 3 of the FD guarantees his/her stay in another MSs from an EAW execution. Therefore, the latter provision would seem to 'work (…) towards the same objective as Article 54 of the CISA'. Such a link, the Court stated, justifies an interpretation of the notion of 'same acts' in compliance with the ECJ's case law concerning article 54 of the Schengen Convention and, in particular, the idem element. Nevertheless, the means by which they operate are different. The EAW creates an obstacle to the execution of a cooperation request, while article 54 prevents the exercise of jurisdiction .However, as to the Court's reasoning such an aspect does not matter. Further, the ECJ recalled that the notion of 'same acts' could not have a meaning according to a whatsoever national law. In order to guarantee a uniform application of the principle of ne bis in idem within the EU, it shall have an autonomous meaning, and it coincides with that of article 54 CISA ,as interpreted by the Court itself.

Another profile suggested by the Mantello case concerns what the 'final judgment' category comprehends. The reference has been made in the course of the proceedings brought before the Oberlandesgericht Stuttgart (Germany) on the execution of an EAW issued by Italy. The German Court had received a request from the Tribunal of Catania for the surrender of an Italian national, accused of having unlawfully imported narcotic from Germany to Italy. The person object of the mandate had already been tried in Italy for participation into a criminal organization the purpose of which was illicit

trafficking in such drugs. The Italian authorities were already in possession of all the information concerning the importation of narcotics from Germany, but for tactical reasons relating to their investigation, decided not to provide the relevant information and evidence to the Court and to institute criminal proceedings on that basis. In such a case, both according to Italian and German law the person was considered as having already been tried on those acts. The German court then wondered if this is the same interpretation to be given to the expression "final judgment on the same acts" contained at Article 3(2) of the EAW FD. If this assumption was correct, it wondered if there was room for refusing the request. The questions referred to the ECJ were then as following:

Is the concept of same acts as referred in Article 3(2) to be interpreted according to the law of the issuing Member State, the law of the executing Member State or is it an autonomous Union law concept?

In the case at stake, considering that the authorities of another Member State had all the relevant information and evidence but nonetheless decided not to prosecute, can the person be considered as having been tried on the same acts for the purposes of application of Article 3(2) FD?

The court stated that the EAW FD is meant to introduce a new system replacing extradition in the context of EU where mutual trust is established between MS. In such a framework the interpretation of the concepts of "same acts" as mentioned in the FD cannot be left to the discretion of the judicial authorities of each Member State on the basis of their national law, as this would jeopardize the Uniform application of EU law. The Court stressed that the same concept is present at Article 54 of the CISA (Convention Implementing the Schengen Agreement), and that in that context it has been interpreted as referring to the nature of the acts, encompassing a set of concrete circumstances which are inextricably linked together, irrespective of the legal classification given to them or the legal interest protected. .

The Court then continued in saying that the question in the case at stake is more related to the concept of "final judgement" than to the one of "same acts". This first idea implies that either prosecution in respect of those acts is finally barred, or that the person has been finally acquitted. As in the case at stake Italian authorities had clearly stated that the facts upon which the EAW was based had not been object of the trial, there are no possibilities for the German authority to refuse the surrender on the base of Article 3(2) FD.

Therefore, the fact that the Italian authorities, requested to give further information about the nature of the decision concerned, 'expressly stated that, under the Italian law, the accused had been finally judged would have been sufficient for the German colleagues.

*C-396/11 Radu, 29 January 2013 (Grounds for refusal of execution of a EAW issued for the purpose of prosecution)*

The request was made in proceedings relating to the execution in Romania of four EAWs issued by the German authorities against Mr Radu, a Romanian national, for the purposes of prosecution in respect of acts of aggravated robbery. The referring court asked the Court of Justice of the European Union (CJEU) whether the EAW FD, read in the light of Articles 47 and 48 of the Charter of Fundamental Rights of the European Union (Charter) and of Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), must be interpreted as meaning that the executing judicial authorities can refuse to execute a EAW issued for the purposes of conducting a criminal prosecution on the ground that the issuing judicial authorities did not hear the requested person before that arrest warrant was issued.

Under Article 1(2) of the EAW FD, the Member States are in principle obliged to act upon a EAW. According to the provisions of the EAW FD, the Member States may refuse to execute such a warrant only in the cases of mandatory non-execution provided for in Article 3 thereof and in the cases of optional non-execution listed in Articles 4 and 4a .

Furthermore, the executing judicial authority may make the execution of a EAW subject solely to the conditions set out in Article 5. Admittedly, under Article 4a, the infringement of the rights of the defence during a trial which has led to the imposition of a criminal sentence in absentia may, under certain conditions, constitute a ground for non-execution of a EAW issued for the purposes of giving effect to a custodial sentence. By contrast, the fact that the EAW has been issued for the purposes of conducting a criminal prosecution, without the requested person having been heard by the issuing judicial authorities, does not feature among the grounds for non-execution of such a warrant as provided for by the provisions of the EAW FD. Contrary to what Mr Radu argues, the observance of Articles 47 and 48 of the Charter does not require that a judicial authority of a Member State should be able to refuse to execute a EAW issued for the purposes of conducting a criminal prosecution on the ground that the requested person was not heard by the issuing judicial authorities before that arrest warrant was issued. An obligation for the issuing judicial authorities to hear the requested person before such a EAW is issued would inevitably lead to the failure of the very system of surrender provided for by the EAW FD and, consequently, prevent the achievement of the area of freedom, security and justice, in so far as such an arrest warrant must have a certain element of surprise, in particular in order to stop the person concerned from taking flight.

In any event, the European legislature has ensured that the right to be heard will be observed in the executing Member State in such as way as not to compromise the effectiveness of the EAW system. Thus, it is apparent from Articles 8 and 15 of the EAW FD that, before deciding on the surrender of the requested person for the purposes of prosecution, the executing judicial authority must subject the EAW to a degree of scrutiny. In addition, Article 13 provides that the requested person has the right to legal counsel in the case where he consents to his surrender and, where

appropriate, renounces his entitlement to the speciality rule. Furthermore, under Articles 14 and 19, the requested person, where he does not consent to his surrender and is the subject of a EAW issued for the purposes of conducting a criminal prosecution, is entitled to be heard by the executing judicial authority, under the conditions determined by mutual agreement with the issuing judicial authorities.

On these grounds, the CJEU ruled that Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, as amended by Council Framework Decision 2009/299/JHA of 26 February 2009, must be interpreted as meaning that the executing judicial authorities cannot refuse to execute a European arrest warrant issued for the purposes of conducting a criminal prosecution on the ground that the requested person was not heard in the issuing Member State before that arrest warrant was issued.

Opinion of the Advocate General

The deprivation of liberty and forcible surrender of the requested person that the European arrest warrant procedure entails constitutes an interference with that person's right to liberty for the purposes of Article 5 of the Convention and Article 6 of the Charter. That interference will normally be justified as 'necessary in a democratic society' by virtue of Article 5(1)(f) of the Convention. Nevertheless, detention under that provision must not be arbitrary. To avoid being arbitrary, such detention must be carried out in good faith; it must be closely connected to the ground of detention relied on by the executing judicial authority; the place and conditions of detention should be appropriate; and the length of the detention should not exceed that reasonably required for the purpose pursued. Article 6 of the Charter falls to be construed in the same way as Article 5(1) of the Convention.

The competent judicial authority of the Member State executing a European arrest warrant can refuse the request for surrender without being in breach of the obligations authorised by the founding Treaties and the other provisions of European Union law, where it is shown that the human rights of the person whose surrender is requested have been infringed, or will be infringed, as part of or following the surrender process. However, such a refusal will be competent only in exceptional circumstances. In cases involving Articles 5 and 6 of the Convention and/or Articles 6, 47 and 48 of the Charter, the infringement in question must be such as fundamentally to destroy the fairness of the process. The person alleging infringement must persuade the decision-maker that his objections are substantially well founded. Past infringements that are capable of remedy will not found such an objection.

The competent judicial authority of the State executing a European arrest warrant cannot refuse the request for surrender on the ground that the State issuing the European arrest warrant has failed to transpose or fully to transpose or has incorrectly transposed the Framework Decision without being in breach of the obligations authorised by the founding Treaties and the other provisions of European Union law

*C-399/11, Melloni (Article 4a(1) - Decisions rendered at the end of proceedings in which the person concerned has not appeared in person*

The request for a preliminary hearing was made by the Spanish Tribunal Constitucional in proceedings between Mr. Melloni and the public prosecution concerning the execution of a EAW issued by the Italian authorities for the execution of a prison sentence handed down by judgment in absentia against Mr. Melloni. It concerned the interpretation and, if necessary, the validity of Article 4a(1) of the EAW FD. It also asked the Court of Justice of the European Union (CJEU) to examine, if necessary, the issue of whether a Member State may refuse to execute a EAW on the basis of Article 53 of the Charter of Fundamental Rights of the European Union ('the Charter') on grounds of infringement of the fundamental rights of the person concerned guaranteed by the national constitution.

Mr Melloni opposed surrender to the Italian authorities, contending, first, that at the appeal stage he had appointed another lawyer, revoking the appointment of the two previous lawyers, despite which notice was still being given to them. Second, he contended that under Italian procedural law it is impossible to appeal against sentences imposed in absentia, for which reason the execution of the European arrest warrant should, where appropriate, be made conditional upon Italy's guaranteeing the possibility of appealing against that judgment.

The first question of the Tribunal Constitutional referred to the CJEU was whether Article 4a(1) of the EAW FD must be interpreted as precluding the executing judicial authorities, in the circumstances specified in that provision, from making the execution of a EAW issued for the purposes of executing a sentence conditional upon the conviction rendered in absentia being open to review in the issuing Member State. The CJEU stated that the Member States are in principle obliged to act upon a EAW. The executing judicial authority may make the execution of a EAW subject solely to the conditions set out in the EAW FD. In that regard, Article 4a(1) of the EAW FD precludes the judicial authorities from refusing to execute a EAW issued for the purpose of executing a sentence in a situation where the person concerned has not appeared in person at the trial where, having been made aware of the scheduled trial, he gave a mandate to a legal counsellor to defend him at the trial and was in fact defended by that counsellor. The CJEU accordingly considered that the wording, scheme and purpose of that provision precludes the executing judicial authorities (Spain) from making the execution of a EAW conditional upon the conviction rendered in absentia being open to review in the Member State that issued the arrest warrant (Italy). The EU legislature has opted to provide an exhaustive list of the circumstances in which the execution of a EAW issued in order to enforce a decision rendered in absentia must be regarded as not infringing the rights of the defence. That approach is incompatible with any retention of the possibility for the executing judicial authority to make that execution conditional on the conviction in question being open to review in order to guarantee the rights of defence of the person concerned.

The second question to the CJEU was whether Article 4a(1) of the EAW FD is compatible with the requirements deriving from the right to an effective judicial remedy and to a fair trial, provided for in Article 47 of the Charter and from the rights of the defence guaranteed under Article 48(2) of the Charter. The CJEU considered that Article 4a(1) of the EAW FD is compatible with the right to an effective judicial remedy and to a fair trial and the rights of the defence as recognised under the Charter. Although the right of the accused to appear in person at his trial is an essential component of the right to a fair trial, that right is not absolute. The accused may waive that right in a manner attended by certain safeguards. That provision thus sets out the circumstances in which the person concerned must be deemed to have waived his right to be present at his trial.

The third question was whether Article 53 of the Charter must be interpreted as allowing the executing Member State to make the surrender of a person convicted in absentia conditional upon the conviction being open to review in the issuing Member State, in order to avoid an adverse effect on the right to a fair trial and the rights of the defence guaranteed by its constitution. The CJEU observed that Article 53 of the Charter, which states that nothing therein is to be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, inter alia, by the Member States' constitutions, does not allow a Member State to make the surrender of a person convicted in absentia conditional upon the conviction being open to review in the issuing Member State, in order to avoid an adverse effect on the right to a fair trial and the rights of the defence guaranteed by its constitution. However, to make the surrender of a person subject to such a condition, a possibility not provided for under the EAW FD, by casting doubt on the uniformity of the standard of protection of fundamental rights as defined in that framework decision, would undermine the principles of mutual trust and recognition which that decision purports to uphold and would, therefore, compromise its efficacy. That Framework Decision reflects the consensus reached by all the Member States regarding the scope to be given under EU law to the procedural rights enjoyed by persons convicted in absentia who are the subject of a EAW.

On these grounds, the Court of Justice of the European Union ruled that:

1. Article 4a(1) of the EAW FD, must be interpreted as precluding the executing judicial authorities, in the circumstances specified in that provision, from making the execution of a EAW issued for the purposes of executing a sentence conditional upon the conviction rendered in absentia being open to review in the issuing Member State.

2. Article 4a(1) of the EAW FD is compatible with the requirements under Articles 47 and 48(2) of the Charter of Fundamental Rights of the European Union.

3. Article 53 of the Charter of Fundamental Rights of the European Union must be interpreted as not allowing a Member State to make the surrender of a person convicted in absentia conditional upon the conviction being open to

review in the issuing Member State, in order to avoid an adverse effect on the right to a fair trial and the rights of the defence guaranteed by its constitution.

*C - 187/01 & C- 385/01, Gözütok and Brügge, 11 February 2003*

The ne bis in idem principle laid down in Article 54 CISA also applies in the case where a Public Prosecutor of a Member State discontinues criminal proceedings brought in that State, without any involvement of a court, once the accused has fulfilled certain obligations and, in particular, has paid a certain sum of money determined by the Public prosecutor.

The extension reach of the bis element was firstly drawn in the Gözütok and Brügge rulings. Indeed, in 2003 the Court held the out-of-court settlement final disposition of the cases within the meaning of article 54 CISA. Differently from how the instrument of plea bargaining works in some MSs, like Italy, Mr Gözütok and Mr Brügge' proceedings were both discontinued even without a court's intervene. However, they had to fulfil certain obligations and, in particular, pay a certain sum of money, in return for a faster and less onerous proceeding as well as a less serious penalty. In attaching importance to the real effect of such settlements, the power to bar further proceedings, the Court disregarded the circumstance that MSs have different –if they do have –legal arrangements in establishing such a sort of dispute resolution. It believed that differences between MSs' legal systems should be overcome by mean of the trust they mutually put in their systems. Otherwise, in a context where no harmonisation of systems is required, the object and purpose of the Schengen Convention –the ensuring of the freedom of movement –would be frustrated by the mere acknowledgement of existing divergences. Such an outcome would simply be unconceivable in a single Area of Freedom, Security and Justice.

Facts of the case Gozutok: Turkish citizen accepts transaction offered by Dutch public prosecution by paying a certain amount of money in a case of drug trafficking. Later on he was arrested in Germany and convicted for drug dealing. Mr Gozutok and the prosecution appealed this sentence and the case was closed on the grounds that the dutch decision was binding for the german authorities.

Facts of the case Brugge: German citizen charged in Belgium for aggression. He was summoned in Belgium but the German prosecutor proposed him a friendly agreement by paying an amount of money, after having known that the case was closed in Germany. The Belgian court supended the proceeding and referred to the ECJ if the Belgian prosecution might be entitled according to art 54 to summon and trial a German citizen for the same facts that had led to the closing of the proceeding after paying a certain amount of money

*C - 469/03, Miraglia, 10 March 2005 (not a final judgement)*

If the judicial authorities of one Member State declare one case to be closed, because the Public Prosecutor has decided not to pursue the prosecution on the sole ground that criminal proceedings have been started in another Member State against the same defendant and for the same acts, without any determination whatsoever as to the merit of the case, this is not a final judgement for the purposes of Article 54 CISA. Therefore the ne bis in idem does not apply. The principle ne bis in idem, enshrined in article 54 of the Convention implementing the Schengen Agreement between the governments of the Benelux, Germany and France of the gradual abolition of checks at their common borders , does not fall to be applied to a decision of the judicial authorities of one Member state declaring a case to be closed after the public prosecutor has decided not to pursue the prosecution on the sole ground that criminal proceedings have been started in another member state against the same defendant and for the same acts, without any determination whatsoever as to the merits of the case

Facts of the case;In connection with an investigation conducted by the Italian and Netherlands authorities in cooperation, Mr Miraglia was arrested in Italy under an order issued by the Italian examining magistrate of the Tribunale di Bologna. He was charged with having organized the transport to Bologna of heroin, an offence laid down by and punishable under the Italian Criminal Code .The examining magistrate of the Tribunale di Bologna committed Mr Miraglia to be tried for that offence and decided to replace his detention in prison by house arrest.

Criminal proceedings in respect of the same criminal acts were instituted concurrently before the Netherlands judicial authorities, Mr Miraglia being charged with having transported heroin from the Netherlands to Italy. The defendant was arrested on that charge by the Netherlands authorities.

The criminal proceedings against Mr Miraglia were closed on 13 February 2001 without any penalty or other sanction's being imposed on him. In those proceedings the Netherlands public prosecutor did not initiate a criminal prosecution of the defendant. It is apparent from the file before the Court that that decision was taken on the ground that a prosecution in respect of the same facts had been brought in Italy.

The Public Prosecutor's Office of the Rechtbank refused the request for judicial assistance made by the Public Prosecutor's Office of the Tribunale di Bologna, taking as its ground the reservation formulated by the Kingdom of the Netherlands with regard to Article 2(b) of the European Convention on Mutual Assistance in Criminal Matters, given that the Rechtbank had 'closed the case without imposing any penalty'. The Italian Public Prosecutor requested the Netherlands judicial authorities to provide information about the outcome of the criminal proceedings against Mr Miraglia

and the way in which the proceedings had been settled in order to assess their significance for the purposes of Article 54 of the CISA. The Netherlands Public Prosecutor informed his Italian counterpart that the criminal proceedings against Mr Miraglia had been stayed, but did not supply information considered sufficient by the Italian court conquering the order made and its content. The Netherlands Public Prosecutor stated that it was 'a final decision of a court' precluding, pursuant to Article 255 of the Netherlands Code of Criminal Procedure, any prosecution in respect of the same criminal acts and any judicial cooperation with foreign authorities, unless new evidence should be produced against Mr Miraglia. The Netherlands judicial authorities added that any request for assistance made by the Italian State would run foul of Article 54 of the CISA.

According to the Italian court, the Netherlands authorities decided not to prosecute Mr Miraglia on the ground that criminal proceedings against the defendant had in the meantime been instituted in Italy for the same criminal acts. That assessment is ascribable to the 'preventive' application of the principle ne bis in idem.

*C - 436/04, Van Esbroek, 9 March 2006*

The relevant criterion for the application of the ne bis in idem principle is that there is identity of material acts, understood as the existence of a set of facts which are inextricably linked together in time, in space and by their subject-matter, irrespective of the legal classification given to them or the legal interest protected. There is no need for any harmonisation in criminal law or criminal procedure of the Member States. If this is the case, the ne bis in idem applies.

The ne bis in idem principle thus necessarily implies that the Contracting States have mutual trust in their criminal justice systems and that, since there is no harmonisation of national criminal laws, each of them recognises the criminal law in force in the other Contracting States even when the outcome would be different if its own national law were applied. The definitive assessment of the identity of the material acts belongs to the competent national courts which are charged with the task of determining whether the material acts at issue constitute a set of facts which are inextricably linked together in time, in space and by their subject-matter.

It follows that punishable acts consisting of exporting and importing the same narcotic drugs and which are prosecuted in different Contracting States to the CISA are, in principle, to be regarded as 'the same acts' for the purposes of Article 54, the definitive assessment in that respect being the task of the competent national courts.

Facts of the case; Mr Van Esbroek, a Belgian national, was sentenced, by the Court of First Instance of Bergen (Norway), to five years' imprisonment for illegally importing, narcotic drugs (amphetamines, cannabis, MDMA and

diazepam) into Norway. On 27 November 2002, a prosecution was brought against Mr Van Esbroek in Belgium, as a result of which he was sentenced, by judgment of 19 March 2003 of the Antwerp Criminal Court in Belgium, to one year's imprisonment, in particular for illegally exporting the above listed products from Belgium on 31 May 1999. That judgment was upheld by judgment of 9 January 2004 of the Antwerp Court of Appeal.

Both of those courts applied Article 36(2)(a) of the Single Convention on Narcotic Drugs, according to which each of the offences enumerated in that article, which include the import and export of narcotic drugs, are to be regarded as a distinct offence if committed in different countries. The defendant lodged an appeal on a point of law against that judgment and pleaded infringement of the ne bis in idem principle, enshrined in Article 54 of the CISA

*C - 467/04, Gasparini and others, 28 September 2006*

The ne bis in idem principle applies in respect of a decision of a court of a Contracting State, made after criminal proceedings have been brought, by which the accused is acquitted finally because prosecution of the offence is time-barred. What is relevant is the final character of the decision not its content. There is no need of having harmonization or approximation of the criminal laws of the Member States relating to procedures whereby further prosecution is barred. The Court grounds its reasoning on the text of the FD which actually distinguishes the two hypotheses, of refusal of surrender because prosecution is precluded for being time-barred (Article 4(4)) and the situation in which surrender has to be precluded because the person has been finally judged in respect to the same acts (Article 3(2)), making it clear that the first case does not fall outside of the scope of the ne bis in idem. The Court further specifies that the ne bis in idem applies only to persons whose trial has been finally disposed. It does not apply to goods to be in free circulation in national territory solely because a criminal court of another Contracting State has found, in relation to the same goods, that prosecution for the offence of smuggling is time-barred.

Facts of the case ;According to the Audiencia Provincial de Málaga (Provincial Court, Málaga), there is evidence that, at some unspecified time in 1993, the shareholders and directors of the company Minerva agreed to import through the port of Setúbal (Portugal) lampante (refined) olive oil from Tunisia and Turkey, which was not declared to the customs authorities. The goods were then transported in lorries from Setúbal to Málaga (Spain). The defendants devised a system of false invoicing to create the impression that the oil came from Switzerland.

The Audiencia Provincial de Málaga further states that the Supremo Tribunal de Justiça (Supreme Court of Justice, Portugal), in a decision on an appeal against a judgment of the Tribunal de Setúbal, found that the lampante olive oil imported into Portugal originated on ten occasions in Tunisia and on one occasion in Turkey and that a lesser quantity

than was actually imported was declared to the Portuguese customs authorities. The Supremo Tribunal de Justiçia acquitted two of the defendants in the case before it, on the ground that their prosecution was time-barred. They are both also being prosecuted in the main proceedings The Audiencia Provincial de Málaga explains that it has to rule on whether an offence of smuggling can be found or whether, on the contrary, no such offence can be found having regard to the binding force of the judgment of the Supremo Tribunal de Justiça or to the fact that the goods were in free circulation in the Community.

Opinion of the Advocate General

I –At the present stage of development of European Union law, Article 54 of the Convention implementing the Schengen Agreement is to be interpreted as meaning that a national court is bound by a decision adopted in criminal proceedings by a court in another Member State that a prosecution is time barred only if

(a) that decision is final under national law,

(b) the proceedings in the other Member State have involved consideration of the merits of the case; and

(c) the material facts and the defendant(s) are the same in the proceedings before both courts.

It is for the national court to decide whether those conditions are satisfied in a particular case. Where they are satisfied, further proceedings against the same defendant on the basis of the same material facts are precluded and the national court may not, by broadening the scope of its examination, call in question any findings of fact in the first decision.

Since Article 54 of the Convention implementing the Schengen Agreement applies only where the same defendant is concerned, it does not prevent individuals from being prosecuted in one Member State by virtue of the fact that criminal proceedings arising out of the same facts, but involving different individuals, were discontinued in another Member State because prosecution for the alleged offence was time-barred.

(a) The answer to question 3 is applicable irrespective of whether the criminal court in the first Member State has decided that alleged facts have not been proved or whether it has declared prosecution for the offence(s) in question to be time-barred under its national criminal rules.

(b)Unlawful importation and subsequent sale of the same goods are not the‘same acts’ for the purposes of Article 54 of the Convention implementing the Schengen Agreement unless they are inextricably linked together in time, in space and by their subject-matter. It is for the national court to decide whether those conditions are satisfied in a particular case.

*C - 150/05, Van Straaten and others, 28 September 2006*

The ne bis in idem principle applies in the case of a decision of the judicial authorities of a Contracting State by which the accused is acquitted finally for lack of evidence. As a matter of fact, Article 54 of the Convention makes no reference to the content, if acquitting or condemning, of the judgement that has become final. Facts of the case:Mr Van Straaten was prosecuted in the Netherlands for importing heroin from Italy into the Netherlands on or about 26 March 1983, together with A. Yilmaz, having a quantity of approximately1 000 grams of heroin at his disposal in the Netherlands during or around the period and possessing firearms and ammunition in the Netherlands in March 1983. By judgment of the-Hertogenbosch District Court, Netherlands Mr Van Straaten was acquitted on the charge of importing heroin, finding it not to have been legally and satisfactorily proved, and convicted him on the other two charges, sentencing him to a term of imprisonment of 20 months.

In Italy, Mr Van Straaten was prosecuted along with other persons, for possessing and exporting to the Netherlands on several occasions together with Mr Karakus Coskun, a significant quantity of heroin, totaling approximately 5 kilograms. By judgment delivered in absentia by the Tribunale ordinario di Milano (District Court, Milan, Italy), Mr Van Straaten and two other persons were sentenced to a term of imprisonment of 10 years, fined ITL 50 000 000 and ordered to pay the costs.

The main proceedings are between, first, Mr Van Straaten and, second, the Netherlands State and the Italian Republic. The national court refers to an alert regarding Mr Van Straaten the legality of which is at issue in those proceedings, and which the national court examines in the light of the CISA. By order made on 16 July 2004, the Italian Republic was summoned to appear in the proceedings.

Before the national court, the Italian Republic rejected Mr Van Straaten's claims that, by virtue of Article 54 of the CISA, he should not have been prosecuted by or on behalf of the Italian State and that all acts connected with that prosecution were unlawful. According to the Italian Republic, no decision was given on Mr Van Straaten's guilt by the judgment of 23 June 1983, in so far as it concerns the charge of importing heroin, since he was acquitted on that charge. Mr Van Straaten's trial had not been disposed of, within the meaning of Article 54 of the CISA, as regards that charge. The Italian Republic further submitted that, as a result of the declaration as referred to in Article 55(1)(a) of the CISA which it had made, it was not bound by Article 54 of the CISA, a plea which was rejected by the national court.

Opinion Advocate General

A person's trial has been "disposed of" within the meaning of Article 54 of the Convention implementing the Schengen Agreement if after assessment of the evidence, that person is acquitted on the ground that the charges alleged have not been established .In order to assess whether the acts are the same it is necessary:

— to have regard to the essence of the acts prosecuted in both sets of proceedings, irrespective of their legal classification and the principles or interests which punishment of that person protects in the legal systems of the Contracting States or in those in which the Schengen acquis applies; and

— to define "acts" as a set of inextricably linked circumstances, for which purpose it is necessary to consider whether they display unity in time and space, and in the intention of the perpetrator, and it is irrelevant that, in both sets of proceedings, the person benefiting from the ne bis in idem principle might appear with different co-defendants.

It falls to the national court to determine, in accordance with the foregoing criteria, whether the possession of a consignment of heroin in Italy, transporting it to the Netherlands and possession, in the latter State, of some or all of that consignment, constitute "the same acts".

*C - 288/05, Kretzinger, 18 July 2007*

The ne bis in idem principle applies in the case of a suspended custodial sentence, which penalises the unlawful conduct of a convicted person. As a matter of fact, this constitutes a penalty within the meaning of Article 54 of the Convention. It must be regarded as "actually in the process of being enforced" as soon as the sentence has become enforceable and during the probation period. Subsequently, once the probation period has come to an end, the penalty must be regarded as "having been enforced" within the meaning of that provision. It does not apply if the defendant was for a short time taken into police custody and/or held on remand pending trial and that detention would count towards any subsequent enforcement of the custodial sentence under the law of the State in which judgement was given. In that case the penalty does not have to be regarded as "having been enforced"

Facts of the case: Mr Kretzinger transported cigarettes from countries that were not members of the European Union, which had previously been smuggled into Greece by third parties, by lorry through Italy and Germany, bound for the United Kingdom. They were not presented for customs clearance at any point. The lorry containing the first consignment, was seized by officers of the Italian Guardia di Finanza. The Corte d'appello di Venezia imposed on Mr Kretzinger in absentia a suspended custodial sentence of one year and eight months. It found him guilty of an offence of importing into Italy and being in possession of 6 900 kilograms of contraband foreign tobacco and an offence of failing to

pay the customs duty relating to that tobacco. That judgment has become final under Italian law.The lorry transporting a second consignment was again stopped by the Italian Guardia di Finanza. Aware of those judgments by the Italian courts, the Landgericht Augsburg sentenced Mr Kretzinger to one year and ten months' imprisonment in respect of the first consignment and one year's imprisonment in respect of the second.

Whilst indicating that the two final sentences imposed in Italy had not yet been enforced, the Landgericht Augsburg rejected the notion that there was any procedural impediment under Article 54 of the CISA. According to that court, although the same two smuggled consignments of cigarettes formed the factual basis of the two convictions in Italy and of its own decisions, that article was not applicable

Opinion Advocate General

The phrase 'the same acts' in Article 54 of the CISA refers to identity of material facts, understood as a set of concrete circumstances which are inextricably linked together in time, in space and by their subject-matter. The determination of whether the facts in the main proceedings are so linked is a matter for the competent national court. However, where a defendant intended from the outset to transport smuggled goods from their point of entry to a final destination in the Community in a single operation, any successive crossings of internal borders in the course of that operation may, in principle, be regarded as acts which are inextricably linked for that purpose.

a)A custodial sentence, the enforcement of which has been suspended provided that, during a fixed period of time, the offender respects certain conditions set in accordance with the law of the State in which judgment was given, is a penalty that has been enforced or is actually in the process of being enforced within the meaning of Article 54 of the CISA and, provided the other conditions under that provision are met, gives rise to the application of the principle of ne bis in idem enshrined in that article.

b) Periods spent by a defendant in police custody and/or on remand pending trial in one Member State are not to be considered as a penalty that has been enforced or that is actually in the process of being enforced for the purposes of Article 54 of the CISA, unless those periods are at least equal to any term of imprisonment imposed by the sentence finally disposing of the trial in relation to which the defendant has been in police custody or in remand.

c) The concept of enforcement for the purposes of Article 54 of the CISA is not affected by the fact that a Member State in which a defendant has been sentenced by a final and binding judgment under national law may at any time issue a European arrest warrant for the surrender of that defendant so as to enforce that sentence under the Council Framework Decision on the European arrest warrant and the surrender procedures between Member States.

d) The concept of enforcement for the purposes of Article 54 of the CISA is not affected by the fact that, under Article 5(1) of the Framework Decision, the judicial authorities of the executing Member State are not required automatically to execute a European arrest warrant issued to enforce sentence imposed upon conviction after a trial in absentia.

Where, under the legal system of the sentencing Member State, a decision reached following a trial in absentia definitively bars further criminal proceedings, that decision finally disposes of the trial for the purposes of Article 54 of the CISA, provided that the trial complied with the requirements of Article 6 EU and general principles of Community law guaranteeing respect for fundamental rights as enshrined in the European Convention on Human Rights and Fundamental Freedoms.

*C - 367/05, Kraaijenbrink, 18 July 2007*

The principle of ne bis in idem does not apply if two decisions concern the following facts: on one side having held in one Contracting State the proceeds of drug trafficking and, on the other, in the exchanging sums of money also originating from such trafficking, at exchange bureaux in another Contracting State. The fact that the competent national authorities consider these acts linked together by the same criminal intention is not sufficient to qualify them as same acts.

Article 54 of the Convention implementing the Schengen Agreement must be interpreted as meaning that:

–The relevant criterion for the purposes of the application of that article is identity of the material acts, understood as the existence of a set of facts which are inextricably linked together, irrespective of the legal classification given to them or the legal interest protected;

–Different acts consisting, in particular, first, in holding in one Contracting State the proceeds of drug trafficking and, second, in the exchanging at exchange bureaux in another Contracting State of sums of money also originating from such trafficking should not be regarded as 'the same acts' within the meaning of that article merely because the competent national court finds that those acts are linked together by the same criminal intention; –It is for that national court to assess whether the degree of identity and connection between all the facts to be compared is such that it is possible, in the light of the said relevant abovementioned criterion, to find that they are 'the same acts' within the meaning of the said Article 54.

Facts of the case: Ms Kraaijenbrink, a Dutch national, was sentenced by judgment of a Dutch Court to a suspended six month term of imprisonment for several offences under Article 416 of the Netherlands criminal Code ofreceiving and handling the proceeds of drug trafficking.

By judgment a Belgian court sentenced Ms Kraaijenbrink to two years' imprisonment for committing several offences under Article 505 of the Belgian Criminal Code by exchanging in Belgium between November 1994 and February 1996 the proceeds of drug trafficking operations in the Netherlands.

Both those courts considered that Ms Kraaijenbrink could not rely on Article 54 of the CISA. They considered that the offences of receiving and handling the proceeds of drug trafficking committed in the Netherlands and the money laundering offences in Belgium resulting from that trafficking must be regarded in that State as separate offences.

*C - 297/07, Bourquain, 11 December 2008*

Article 54 establishing the ne bis in idem principle applies in cases in which a person has been tried by a Contracting Party exercising its jurisdiction beyond the territory to which the Convention applies.

Article 54 establishing the ne bis in idem principle applies in cases in which a person has been tried in absentia provided that there has been a final disposal of the trial by a Contracting Party. However the sole fact that the proceedings in absentia would, under the national law governing the proceedings in question, have necessitated the reopening of the proceedings if the person concerned had been apprehended while time was running in the limitation period applicable to the penalty, does not, in itself, mean that the conviction in absentia cannot be regarded as a final decision within the meaning of article 54.

The enforcement condition contained in the Article is satisfied when it is established that, at the time when the second criminal proceedings were instituted against the same person in respect of the same acts as those which led to a conviction in the first Contracting State, the penalty imposed in that first State can no longer be enforced according to the laws of that state.

Facts of the case; a German citizen member French Foreign legion shots dead another german soldier while trying to desert in Algeria. He flees to the RDA; however criminal proceedings were started in the Federal Republic of Germany but at that time an amnesty had been granted in France and the enforcement of the sentence was time barred

Opinion Advocate General

Article 54 of the Convention of 19 June 1990 implementing the Schengen Agreement must be interpreted as meaning that a person whose trial has been finally disposed of in one State cannot be prosecuted in another for the same acts, where, under the law of the State in which he was convicted, the penalty imposed on him could never be enforced.

*C - 491/07, Turansky, 22 December 2008*

A suspension decision does not, under the national law of that State, definitely bar further prosecution, and therefore does not preclude new criminal proceedings, in respect of The ne bis in idem principle does not apply when an authority of a Contracting State, after examining the merits of the case, makes an order, at a stage before the charging of a person suspected of a crime, suspending the criminal proceedings, where the the same acts, in that State.

The ne bis in idem principle enshrined in art 54 of the convention implementing the Schengen agreement, which aims to ensure that a person is not prosecuted for the same acts in the territory of several contracting states on account of his having exercised his right to freedom of movement does not fall to be applied to a decision by a authority of a Contracting State, after examining the merits of the case brought before it, makes an order, at a stage before the charging of a person suspected of a crime, suspending the criminal proceedings, where the suspension decision does not, under the national law of that State, definitively bar further prosecution and therefore does not preclude new criminal proceedings, in respect of the same acts, in that State.

Therefore, a decision of a police authority which, while suspending criminal proceedings, does not under the national law concerned definitively bring the prosecution to an end, can-not constitute a decision which would make it possible to conclude that the trial of that person has been 'finally disposed of' within the meaning of Article 54 of the abovementioned Convention.

*C-129/114, Spasic 27-05-2014*

Article 54 of the Convention Implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, signed on 19 June 1990 and entered into force on 26 March 1995, which makes the application of the ne bis in idem principle subject to the condition that, upon conviction and sentencing, the penalty imposed 'has been enforced' or is 'actually in the process of being enforced', is compatible with Article 50 of the Charter of Fundamental Rights of the European Union, in which that principle is enshrined.

2. Article 54 of that convention must be interpreted as meaning that the mere payment of a fine by a person sentenced by the self-same decision of a court of another Member State to a custodial sentence that has not been served is not sufficient to consider that the penalty 'has been enforced' or is 'actually in the process of being enforced' within the meaning of that provision.

Facts of the case: Mr Spasic, a Serbian citizen, was prosecuted by German authorities for fraud committed in Italy on German citizens. Mr Spasic was arrested in Hungary on the base of an EAW issued by Austrian authorities for similar offences. He was surrendered to Austria and later the German authorities issued a EAW. The Italian authorities sentenced him, suspended the sentence and later revoked the suspension. Later on he was surrendered by the Austrian authorities to the German authorities. Mr Spasic claimed he could not be prosecuted in Germany for the acts committed in Milan

Opinion advocate general

(1) As EU law stands at present, the application of the execution condition laid down in Article 54 of the Convention Implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders constitutes a proportional and therefore justified — for the purpose of Article 52 of the Charter — interference with the fundamental right not to be tried or punished twice in criminal proceedings for the same criminal offence enshrined in Article 50 of the Charter:

– in cases falling within the scope of Article 4(2) of Protocol No 7 to the European Convention on the Protection of Human Rights and Fundamental Freedoms, signed in Strasbourg on 22 November 1984, as amended by Protocol No 11 since the entry into force of that protocol on 1 November 1998,

– where the Member States are required to punish acts under international law and

– where the measures applicable under EU law are not sufficient to prevent impunity.

It is for the referring court to determine whether the latter situation arises in the present case.

(2) The condition laid down in Article 54 of the Convention Implementing the Schengen Agreement is not fulfilled where the accused has been sentenced, in accordance with the law of the Contracting State, to a penalty composed of two independent parts, namely a custodial sentence and a fine, and only the fine has been enforced, whereas the other penalty has neither been enforced nor is actually in the process of being enforced, but may still be enforced under the laws of the sentencing Member State.

# CHAPTER VII – Workshop no. 2 and feedback (2h 45min)

## Section 1 - The protection against double jeopardy in the European Court of Human Rights' jurisprudence

Claudia Jderu

**1.1 Relevant and comparative international law**

Article 4 of Protocol No. 7 to the Convention reads as follows:

"1. No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State.

2. The provisions of the preceding paragraph shall not prevent the reopening of the case in accordance with the law and penal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case.

3. No derogation from this Article shall be made under Article 15 of the Convention."

Article 50 of the Charter of Fundamental Rights of the European Union

"No one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law."

Article 54 of the Convention Implementing the Schengen Agreement of 14 June 1985

"A person whose trial has been finally disposed of in one Contracting Party may not be prosecuted in another Contracting Party for the same acts provided that, if a penalty has been imposed, it has been enforced, is actually in the process of being enforced or can no longer be enforced under the laws of the sentencing Contracting Party."

Article 14 para.7 of the International Convenant on Civil and Political Rights

"No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country."

Article 8 para.4 of the American Convention on Human Rights

"An accused person acquitted by a nonappealable judgment shall not be subjected to a new trial for the same cause"

**1.2 Territorial application**

The wording of Article 4 of Protocol No. 7 restricts its application to the national level. In the case of Atilla GÖKALP v. Poland and Jaime Eduardo CARDONA GIRALDO v. Poland (decision 11 September 2012 the Court has rejected as manifestly ill founded the request of the applicant for failure to meet this condition.

However, it should be noted that the scope of some international instruments extends to retrial in a second State or before an international tribunal. For instance, the Statute of the International Criminal Court contains an explicit exception to the ne bis in idem principle as it allows for prosecution where a person has already been acquitted in respect of the crime of genocide, crimes against humanity or war crimes if the purpose of the proceedings before the other court was to shield the person concerned from criminal responsibility for crimes within the jurisdiction of the International Criminal Court (Article 20).

**1.3 Compatibility *ratione materiae*, criteria for application of article 4 of protocol no. 7**

The criteria that must be satisfied in order for Article 4 of Protocol No. 7 to be applicable are the existence of a duplication of proceedings both criminal in nature and the conclusion of the first criminal proceedings by a final decision of acquittal or conviction.

(i) Proceedings concluded by a final decision

The aim of Article 4 of Protocol No. 7 is to prohibit the repetition of criminal proceedings that have been concluded by a final decision (see Franz Fischer v. Austria, no. 37950/97, § 22, 29 May 2001, and Gradinger v. Austria,

23 October 1995, § 53, Series A no. 328-C). According to the Explanatory Report on Protocol No. 7, which itself refers back to the European Convention on the International Validity of Criminal Judgments, a decision is final "if, according to the traditional expression, it has acquired the force of res judicata. This is the case when it is irrevocable, that is to say when no further ordinary remedies are available or when the parties have exhausted such remedies or have permitted the time-limit to expire without availing themselves of them". This approach is well established in the Court's case-law (see Sergey Zolotukhin v. Russia [GC], no. 14939/03, § 107, ECHR 2009).

(ii) Second set of proceedings

The ne bis in idem principle relates to the second set of proceedings, those which are instituted after a defendant has been finally convicted or acquitted. This position finds support in the Explanatory Report on Protocol No. 7, which, as regards Article 4, states that "[t]he principle established in this provision applies only after the person has been finally acquitted or convicted in accordance with the law and penal procedure of the State concerned".

One important thing to mention is the fact that Article 4 of Protocol No. 7 does not necessarily extend to all proceedings instituted in respect of the same offence (see Falkner v. Austria (dec.), no. 6072/02, 30 September 2004). Its object and purpose imply that, in the absence of any damage proved by the applicant, only new proceedings brought in the knowledge that the defendant has already been tried in the previous proceedings would violate this provision (see Zigarella v. Italy (dec.), no. 48154/99, ECHR 2002-IX (extracts)).

(a) Whether the proceedings were criminal in nature?

**(i)** General principles

The notion of "penal procedure" in the text of Article 4 of Protocol No. 7 must be interpreted in the light of the general principles concerning the corresponding words "criminal charge" and "penalty" in Articles 6 and 7 of the Convention respectively (see Haarvig v. Norway (dec.), no. 11187/05, 11 December 2007; Göktan v. France, no. 33402/96, § 48, ECHR 2002-V; Malige v. France, 23 September 1998, § 35, Reports 1998 VII; and Nilsson v. Sweden (dec.), no. 73661/01, ECHR 2005 XIII).

Indeed in its judgment in the case of Göktan v. France (no. 33402/96, § 48, ECHR 2002-V) concerning Article 7 of the Convention and Article 4 of Protocol No. 7, the Court held that the notion of penalty should not have different meanings under different provisions of the Convention. Likewise, in the decision in the case of Manasson v. Sweden (no. 41265/98, 8 April 2003), it was concluded that proceedings involving tax surcharges were "criminal" not only for the purpose of Article 6 of the Convention, but also for the purpose of Article 4 of Protocol No. 7 to the Convention.

The Court reiterates that the legal characterisation of the procedure under national law cannot be the sole criterion of relevance for the applicability of the principle of ne bis in idem under Article 4 § 1 of Protocol No. 7. Otherwise, the application of this provision would be left to the discretion of the Contracting States to a degree that might lead to results incompatible with the object and purpose of the Convention (see for example Storbråten v. Norway (dec.), no. 12277/04, ECHR 2007-... (extracts), with further references). The Court's established case-law sets out three criteria, commonly known as the "Engel criteria" (see Engel and Others v. the Netherlands, 8 June 1976, Series A no. 22), to be considered in determining whether or not there was a "criminal charge". The first criterion is the legal classification of the offence under national law, the second is the very nature of the offence and the third is the degree of severity of the penalty that the person concerned risks incurring. The second and third criteria are alternative and not necessarily cumulative. This, however, does not rule out a cumulative approach where separate analysis of each criterion does not make it possible to reach a clear conclusion as to the existence of a criminal charge (see Jussila v. Finland [GC], no. 73053/01, §§ 30-31, ECHR 2006-XIV; and Ezeh and Connors v. the United Kingdom [GC], nos. 39665/98 and 40086/98, §§ 82-86, ECHR 2003-X).

The first criterion is of relative weight and serves only as a starting-point. If domestic law classifies an offence as criminal, then this will be decisive. Otherwise the Court will look behind the national classification and examine the substantive reality of the procedure in question.

In evaluating the second criterion, which is considered more important (Jussila v. Finland [GC], § 38), the following factors can be taken into consideration:

– whether the legal rule in question is directed solely at a specific group or is of a generally binding character (Bendenoun v. France, § 47);

– whether the legal rule has a punitive or deterrent purpose (Öztürk v. Germany, § 53);

– whether the proceedings are instituted by a public body with statutory powers of enforcement (Benham v. the United Kingdom [GC], § 56);

– whether the imposition of any penalty is dependent upon a finding of guilt (ibid.);

– how comparable procedures are classified in other Council of Europe member States (Öztürk v. Germany, § 53).

The third criterion is determined by reference to the maximum potential penalty for which the relevant law provides (Campbell and Fell v. the United Kingdom, § 72; Demicoli v. Malta, § 34).

The fact that an offence is not punishable by imprisonment is not in itself decisive, since the relative lack of seriousness of the penalty at stake cannot divest an offence of its inherently criminal character (Nicoleta Gheorghe v. Romania, § 26).

**(ii)** Application of the general principles,

Disciplinary proceedings:

The following disciplinary proceedings were not considered criminal:

- disciplinary proceedings resulting in the compulsory retirement of a civil servant (Moullet v. France (dec.))
- dispute concerning the discharge of an army officer for breaches of discipline (Suküt v. Turkey (dec.)),
- disciplinary proceedings against a police investigator resulting in her dismissal (Nikolova and Vandova v. Bulgaria, § 59)
- disciplinary proceedings for professional misconduct against a judge of the Supreme Court resulting in his dismissal (Oleksandr Volkov v. Ukraine, §§ 92-95
- measures ordered by a court under rules concerning disorderly conduct in proceedings before it (contempt of court) are considered to fall outside the ambit of Article 6 because they are akin to the exercise of disciplinary powers (Ravnsborg v. Sweden, § 34; Putz v. Austria, §§ 33-37). However, the nature and severity of the penalty can make Article 6 applicable to a conviction for contempt of court classified in domestic law as a criminal offence (Kyprianou v. Cyprus [GC], §§ 61-64, concerning a penalty of five days' imprisonment) or a regulatory offence (Zaicevs v. Latvia, §§ 31-36, concerning a penalty of three days' administrative detention).

Administrative, tax, customs and competition-law proceedings

The following administrative offences may be considered criminal:

- road-traffic offences punishable by fines or driving restrictions, such as penalty points or disqualifications (Lutz v. Germany, § 182; Schmautzer v. Austria; Malige v. France);
- minor offences of causing a nuisance or a breach of the peace (Lauko v. Slovakia; Nicoleta Gheorghe v. Romania, §§ 25-26);
- offences against social security legislation (failure to declare employment, despite the modest nature of the fine imposed: see Hüseyin Turan v. Turkey, §§ 18-21);

- an administrative offence of promoting and distributing material promoting ethnic hatred, punishable by an administrative warning and the confiscation of the publication in question (Balsytė-Lideikienė v. Lithuania, § 61).

Any reference to the "minor" nature of the acts does not, in itself, exclude its classification as "criminal" in the autonomous sense of the Convention, as there is nothing in the Convention to suggest that the criminal nature of an offence, within the meaning of the Engel criteria, necessarily requires a certain degree of seriousness (see Ezeh, cited above, § 104).

(b) WHETHER THE OFFENCES FOR WHICH THE APPLICANT WAS PROSECUTED WERE THE SAME (IDEM)?

The Court acknowledged in the case of Sergey Zolotukhin v. Russia (see Sergey Zolotukhin v. Russia [GC], no. 14939/03, §§ 81-84, ECHR 2009) the existence of several approaches to the question of whether the offences for which an applicant was prosecuted were the same. The Court presented an overview of the existing three different approaches to this question. It found that the existence of a variety of approaches engendered legal uncertainty incompatible with the fundamental right not to be prosecuted twice for the same offence. It was against this background that the Court provided in that case a harmonised interpretation of the notion of the "same offence" for the purposes of Article 4 of Protocol No. 7. In the Zolotukhin case the Court thus found that an approach which emphasised the legal characterisation of the two offences was too restrictive on the rights of the individual. If the Court limited itself to finding that a person was prosecuted for offences having a different legal classification, it risked undermining the guarantee enshrined in Article 4 of Protocol No. 7 rather than rendering it practical and effective as required by the Convention. Accordingly, the Court took the view that Article 4 of Protocol No. 7 had to be understood as prohibiting the prosecution or trial of a second "offence" in so far as it arose from identical facts or facts which were substantially the same. It was therefore important to focus on those facts which constituted a set of concrete factual circumstances involving the same defendant and inextricably linked together in time and space, the existence of which had to be demonstrated in order to secure a conviction or institute criminal proceedings.

The Court set out the relevant principles in that respect in the case of Sergey Zolotukhin v. Russia ([GC], no. 14939/03, 10 February 2009). The relevant passages read as follows:

"(a) Summary of the existing approaches

70. The body of case-law that has been accumulated throughout the history of application of Article 4 of Protocol No. 7 by the Court demonstrates the existence of several approaches to the question whether the offences for which an applicant was prosecuted were the same.

71. The first approach, which focuses on the "same conduct" on the applicant's part irrespective of the classification in law given to that conduct (idem factum), is exemplified in the Gradinger judgment. In that case Mr Gradinger had been criminally convicted of causing death by negligence and also fined in administrative proceedings for driving under the influence of alcohol. The Court found that although the designation, nature and purpose of the two offences were different, there had been a breach of Article 4 of Protocol No. 7 in so far as both decisions had been based on the same conduct by the applicant (see Gradinger, cited above, § 55).

72. The second approach also proceeds from the premise that the conduct by the defendant which gave rise to prosecution is the same, but posits that the same conduct may constitute several offences (concours idéal d'infractions) which may be tried in separate proceedings. That approach was developed by the Court in the case of Oliveira (cited above), in which the applicant had been convicted first of failing to control her vehicle and subsequently of negligently causing physical injury. Her car had veered onto the other side of the road, hitting one car and then colliding with a second, whose driver had sustained serious injuries. The Court found that the facts of the case were a typical example of a single act constituting various offences, whereas Article 4 of Protocol No. 7 only prohibited people from being tried twice for the same offence. In the Court's view, although it would have been more consistent with the principle of the proper administration of justice if the sentence in respect of both offences had been passed by the same court in a single set of proceedings, the fact that two sets of proceedings were at issue in the case in question was not decisive. The fact that separate offences, even where they were all part of a single criminal act, were tried by different courts did not give rise to a breach of Article 4 of Protocol No. 7, especially where the penalties were not cumulative (see Oliveira, cited above, §§ 25-29). In the subsequent case of Göktan the Court also held that there had been no violation of Article 4 of Protocol No. 7 because the same criminal conduct of which the applicant had been convicted constituted two separate offences: a crime of dealing in illegally imported drugs and a customs offence of failing to pay the customs fine (see Göktan, cited above, § 50). This approach was also employed in the cases of Gauthier v. France ((dec.), no. 61178/00, 24 June 2003) and Öngün v. Turkey ((dec.), no. 15737/02, 10 October 2006).

73. The third approach puts the emphasis on the "essential elements" of the two offences. In Franz Fischer v. Austria (no. 37950/97, 29 May 2001), the Court confirmed that Article 4 of Protocol No. 7 tolerated prosecution for several offences arising out of a single criminal act (concours idéal d'infractions). However, since it would be incompatible with this provision if an applicant could be tried or punished again for offences which were merely "nominally different", the Court held that it should additionally examine whether or not such offences had the same "essential elements". As in Mr Fischer's case the administrative offence of drunken driving and the crime of causing death by negligence while "allowing himself to be intoxicated" had the same "essential elements", the Court found a violation of Article 4 of Protocol No. 7. It also pointed out that had the two offences for which the person concerned was prosecuted only overlapped slightly, there would have been no reason to hold that the defendant could not be prosecuted for each of them in turn. The same

approach was followed in the case of W.F. v. Austria (no. 38275/97, 30 May 2002) and Sailer v. Austria (no. 38237/97, 6 June 2002), both of which were based on a similar set of circumstances.

74. Since the introduction of the concept of "essential elements", the Court has frequently referred to it in the follow-up cases. In Manasson the "essential element" distinguishing the taxation-law contravention from the criminal-law offence was found to be "the applicant's reliance on the incorrect information contained in the books when submitting his tax returns" (see Manasson, cited above). Similarly, in Bachmaier, the Court noted that the special aggravating element of drunken driving had been established only in one set of proceedings (see Bachmaier v. Austria (dec.), no. 77413/01, 2 September 2004).

75. In a series of cases involving tax-related offences, two taxation offences were found to differ in their criminal intent and purpose (see Rosenquist, cited above). The same two distinctions were found to be relevant in the cases of Storbråten and Haarvig, both cited above.

76. A different set of "essential elements" featured in the Court's analysis in two Austrian cases. In Hauser-Sporn it held that the offence of abandoning a victim and the offence of failing to inform the police about an accident differed in their criminal intent and also concerned different acts and omissions (see Hauser-Sporn v. Austria, no. 37301/03, §§ 43-46, 7 December 2006). In Schutte the "essential element" of one offence was the use of dangerous threat or force as a means of resisting the exercise of official authority, whereas the other concerned a simple omission in the context of road safety, namely the failure to stop at the request of the police (see Schutte, cited above, § 42).

77. Finally, in its most recent decision on the subject the Court determined that the two offences in question had different "essential elements" in that they were distinguishable in terms of their gravity and consequences, the social value being protected and the criminal intent (see Garretta v. France (dec.), no. 2529/04, 4 March 2008).

(b) Harmonisation of the approach to be taken

78. The Court considers that the existence of a variety of approaches to ascertain whether the offence for which an applicant has been prosecuted is indeed the same as the one of which he or she was already finally convicted or acquitted engenders legal uncertainty incompatible with a fundamental right, namely the right not to be prosecuted twice for the same offence. It is against this background that the Court is now called upon to provide a harmonised interpretation of the notion of the "same offence" – the idem element of the non bis in idem principle – for the purposes of Article 4 of Protocol No. 7. While it is in the interests of legal certainty, foreseeability and equality before the law that the Court should not depart, without good reason, from precedents laid down in previous cases, a failure by the Court to

maintain a dynamic and evolutive approach would risk rendering it a bar to reform or improvement (see Vilho Eskelinen and Others v. Finland [GC], no. 63235/00, § 56, ECHR 2007‑II).

79. An analysis of the international instruments incorporating the non bis in idem principle in one or another form reveals the variety of terms in which it is couched. Thus, Article 4 of Protocol No. 7 to the Convention, Article 14 § 7 of the United Nations Covenant on Civil and Political Rights and Article 50 of the Charter of Fundamental Rights of the European Union refer to the "[same] offence" ("[même] infraction"), the American Convention on Human Rights speaks of the "same cause" ("mêmes faits"), the Convention Implementing the Schengen Agreement prohibits prosecution for the "same acts" ("mêmes faits"), and the Statute of the International Criminal Court employs the term "[same] conduct" ("[mêmes] actes constitutifs") . The difference between the terms "same acts" or "same cause" ("mêmes faits") on the one hand and the term "[same] offence" ("[même] infraction") on the other was held by the Court of Justice of the European Union and the Inter-American Court of Human Rights to be an important element in favour of adopting the approach based strictly on the identity of the material acts and rejecting the legal classification of such acts as irrelevant. In so finding, both tribunals emphasised that such an approach would favour the perpetrator, who would know that, once he had been found guilty and served his sentence or had been acquitted, he need not fear further prosecution for the same act (see paragraphs 37 and 40 above).

80. The Court considers that the use of the word "offence" in the text of Article 4 of Protocol No. 7 cannot justify adhering to a more restrictive approach. It reiterates that the Convention must be interpreted and applied in a manner which renders its rights practical and effective, not theoretical and illusory. It is a living instrument which must be interpreted in the light of present-day conditions (see, among other authorities, Tyrer v. the United Kingdom, 25 April 1978, § 31, Series A no. 26, and Christine Goodwin v. the United Kingdom [GC], no. 28957/95, § 75, ECHR 2002‑VI). The provisions of an international treaty such as the Convention must be construed in the light of their object and purpose and also in accordance with the principle of effectiveness (see Mamatkulov and Askarov v. Turkey [GC], nos. 46827/99 and 46951/99, § 123, ECHR 2005‑I).

81. The Court further notes that the approach which emphasises the legal characterisation of the two offences is too restrictive on the rights of the individual, for if the Court limits itself to finding that the person was prosecuted for offences having a different legal classification it risks undermining the guarantee enshrined in Article 4 of Protocol No. 7 rather than rendering it practical and effective as required by the Convention (compare Franz Fischer, cited above, § 25).

82. Accordingly, the Court takes the view that Article 4 of Protocol No. 7 must be understood as prohibiting the prosecution or trial of a second "offence" in so far as it arises from identical facts or facts which are substantially the same.

83. The guarantee enshrined in Article 4 of Protocol No. 7 becomes relevant on commencement of a new prosecution, where a prior acquittal or conviction has already acquired the force of res judicata. At this juncture the available material will necessarily comprise the decision by which the first "penal procedure" was concluded and the list of charges levelled against the applicant in the new proceedings. Normally, these documents would contain a statement of facts concerning both the offence for which the applicant has already been tried and the offence of which he or she stands accused. In the Court's view, such statements of fact are an appropriate starting-point for its determination of the issue whether the facts in both proceedings were identical or substantially the same. The Court emphasises that it is irrelevant which parts of the new charges are eventually upheld or dismissed in the subsequent proceedings, because Article 4 of Protocol No. 7 contains a safeguard against being tried or being liable to be tried again in new proceedings rather than a prohibition on a second conviction or acquittal (compare paragraph 110 below).

84. The Court's inquiry should therefore focus on those facts which constitute a set of concrete factual circumstances involving the same defendant and inextricably linked together in time and space, the existence of which must be demonstrated in order to secure a conviction or institute criminal proceedings."

(b.1) Is it relevant that one or both of the proceedings have been finalised before the Sergey Zolotukhin judgment which is a depart from precedents laid down in previous cases on the matter?

The question was raised in the case of Lucky Dev v. Sweden (27 November 2014) where the Court stated that the Zolotukhin case was introduced with the Court in April 2003 and concerned events that had taken place in 2002 and 2003. Accordingly, in so far as the Court changed or modified its approach on issues concerning ne bis in idem when it delivered its judgment in February 2009, it did so in relation to factual circumstances which, by then, were six to seven years old. Generally, if events in the past are to be judged according to jurisprudence prevailing at the time when the events occurred, virtually no change in case-law would be possible. While the Court acknowledged that, at the time of the criminal proceedings against the applicant, there had been an earlier decision relating to double proceedings in Swedish tax matters which concluded that a complaint concerning similar circumstances was manifestly ill-founded, it decided that the case must nevertheless be determined with regard to the case-law existing at the time of the Court's examination.

(c) Whether there was a final decision?

The Court repeatedly stated that the aim of Article 4 of Protocol No. 7 is to prohibit the repetition of criminal proceedings that have been concluded by a "final" decision (see Franz Fischer v. Austria, no. 37950/97, § 22, 29 May 2001; Gradinger v. Austria, 23 October 1995, § 53, Series A no. 328-C; and Sergey Zolotukhin v. Russia [GC], cited above, § 107). According to the Explanatory Report to Protocol No. 7, which itself refers back to the European Convention on the International Validity of Criminal Judgments, a "decision is final 'if, according to the traditional

expression, it has acquired the force of res judicata. This is the case when it is irrevocable, that is to say when no further ordinary remedies are available or when the parties have exhausted such remedies or have permitted the time-limit to expire without availing themselves of them'". This approach is well entrenched in the Court's case-law (see, for example, Nikitin v. Russia, no. 50178/99, § 37, ECHR 2004-VIII; and Horciag v. Romania (dec.), no. 70982/01, 15 March 2005).

Decisions against which an ordinary appeal lies are excluded from the scope of the guarantee contained in Article 4 of Protocol No. 7 as long as the time-limit for lodging such an appeal has not expired. On the other hand, extraordinary remedies such as a request for reopening of the proceedings or an application for extension of the expired time-limit are not taken into account for the purposes of determining whether the proceedings have reached a final conclusion (see Nikitin v. Russia, cited above, § 39). Although these remedies represent a continuation of the first set of proceedings, the "final" nature of the decision does not depend on their being used. It is important to point out that Article 4 of Protocol No. 7 does not preclude the reopening of the proceedings, as stated clearly by the second paragraph of Article 4.

(c.1) The nature of the decisions adopted in the first set of proceedings

In practice the term `judgment` is necessarily interpreted with some flexibility. In Oliveira v. Switzerland the principle applied even though the first judgment which sentenced the applicant to a fine of 200 CHF had been issued by the Zürich police magistrate's office, an authority which could not be seen as a judge. However the judgment which was in fact a transactional fine became final as the applicant failed to ask for a trial before a court.

In my view the question must be addressed in view of the second element, the final character of a decision. It will depend upon the way in which the domestic law deals with the decision in question. If the national law allows for the proceedings to be reopened, after a decision not to prosecute has been made, that decision does not fall to be considered as `final` in the sense of the Convention. However if the domestic law says that the decision is `final` it ought to be regarded as an acquittal within the meaning of the international guarantee.

(i) The withdrawal of charges by the prosecutor

The Court has repeatedly held that the discontinuance of criminal proceedings by a public prosecutor does not amount to either a conviction or an acquittal, and that therefore Article 4 of Protocol No. 7 finds no application in that situation (see Smirnova and Smirnova v. Russia (dec.), nos. 46133/99 and 48183/99, 3 October 2002, and Harutyunyan v. Armenia (dec.), no. 34334/04, 7 December 2006).

A similar approach has been adopted in the case of Wassdahl v. Sweden (decision, 29 November 2005) where the Court observed that the preliminary investigation against the applicant on suspicion of aggravated tax fraud or tax fraud

using falsified documents was discontinued by the prosecutor as he found that it could not be shown that the applicant had committed any crime. Thus, in the Court's view, it cannot be said that the applicant has been finally acquitted as no court of law has ruled on the matter and the investigation, theoretically, could be re-opened. Consequently, the applicant cannot claim to have been punished twice and the principle of ne bis in idem has therefore not been breached.

However the European Court of Justice' approach on the matter is the opposite as mentioned in the Gözütök/Brügge (C-187/01; C-318/01) cases. According to its reasoning the exact nature of the body disposing of a case is not material to the issue of final disposal as long as a state actor in the criminal justice system avails itself of its ius puniendi and does not negotiate the mode of disposal with the defendant. Article 54 of the CISA [ne bis in idem], the objective of which is to ensure that no one is prosecuted on the same facts in several Member States on account of his having exercised his right to freedom of movement, cannot play a useful role in bringing about the full attainment of that objective unless it also applies to decisions definitively discontinuing prosecutions in a Member State, even where such decisions are adopted without the involvement of a court and do not take the form of a judicial decision.

Moreover, the court emphasised that application of the ne bis in idem principle in this way was not dependent on member states having harmonised their criminal laws: … nowhere in Title VI of the Treaty on European Union relating to police and judicial cooperation in criminal matters … is the application of Article 54 of the CISA made conditional upon harmonisation, or at least the approximation, of the criminal laws of the Member States relating to procedures whereby further prosecution is barred … there is a necessary implication that the Member States have mutual trust in their criminal justice systems and that each of them recognises the criminal law in force in the other Member States even when the outcome would be different if its own national law were applied.

(ii) Does the verdict of "conviction or acquittal" have to be mentioned in the operative part of the judgment or it is sufficient to be placed in the reasoning?

In the Gradinger v. Austria case the applicant has first been charged with causing death by negligence. He was convicted but found guilty only of the ordinary offence not of the qualified offence of being intoxicated to a degree of a minimum of 0.8%0. The fact that the court had rejected the qualification and the more sesious offence was regarded as being tantamount to an acquittal although it is not even mentioned in the operative part of the judgement and despite the fact that only the operative part of a judgment can attain the quality of res judicata, not the reasoning.

(iii) Will the decision to be accorded finality have to be based on a (cursory) review of the merits of a case? How far will purely procedural decisions leading to the termination of a case come within the scope of Article 4 of Protocol No. 7?

For Article 4 of Protocol No. 7 to apply, the defendant must first have been acquitted or convicted by a final ruling. For a ruling to be regarded as res judicata for the purposes of Article 4 of Protocol No. 7, it is not sufficient for it to be a final ruling which is not subject to appeal: it must constitute a final conviction or acquittal.

In accordance with the rule of international law stated in Article 31 of the Vienna Convention, a treaty must be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. The protection afforded by Article 4 of Protocol No. 7 is thus limited to the extent that this provision prohibits a second prosecution or punishment only in the case of persons who have already been "finally acquitted or convicted" (in French: "acquitté ou condamné par un jugement définitif").

According to the joint concurring opinion of judges Spielmann, Power-Forde and Nussberger in the case of Margus v. Croatia the deliberate choice of words of Article 4 of Protocol No. 7 implies that an assessment has been made of the circumstances of the case and that the guilt or innocence of the defendant has been established. An amnesty does not correspond to either of these situations since it consists in erasing from legal memory some aspect of criminal conduct by an offender. It may be granted by various means, not always taking the form of a judicial decision. Hence, such a measure does not necessarily presuppose the holding of a trial in the course of which evidence is produced for and against the accused and an assessment of his or her guilt is made.

However according to the joint concurring opinion of judges Ziemele, Berro-Lefevre and Karakaş in the same case "the words "finally convicted or acquitted" may be understood in their technical sense. In the sphere of criminal law these terms concern final acquittal or final conviction after assessment of the facts of a given case and establishment of the accused's guilt or innocence. In this sense a conviction is to be understood as a verdict of guilty and an acquittal as a verdict of not guilty. But it cannot be excluded that the words "finally acquitted or convicted" could be interpreted in a broader sense. There are decisions which might be seen as having the same legal effect as final acquittals even though they do not presuppose an assessment of the accused's guilt or innocence. Amnesty is an act of erasing from legal memory some aspect of criminal conduct by an offender, often before prosecution has occurred and sometimes at later stages. One feature which is common to acquittal in the ordinary sense and amnesty is that they both amount to absolution from criminal responsibility. Compared with the discontinuance of criminal proceedings by a prosecutor (which is not in conflict with the ne bis in idem principle), amnesty may nevertheless appear to demonstrate a higher degree of presumption of guilt."

(d) Whether there was a duplication of proceedings (bis)?

Article 4 of Protocol No. 7 prohibits the repetition of criminal proceedings that have been concluded by a "final" decision. Article 4 of Protocol No. 7 is not only confined to the right not to be punished twice but extends also to the right not to be prosecuted or tried twice (see Franz Fischer v. Austria, cited above, § 29). Were this not the case, it would not have been necessary to add the word "punished" to the word "tried" since this would be mere duplication. Article 4 of Protocol No. 7 applies even where the individual has merely been prosecuted in proceedings that have not resulted in a conviction. The Court reiterates that Article 4 of Protocol No. 7 contains three distinct guarantees and provides that no one shall be (i) liable to be tried, (ii) tried or (iii) punished for the same offence (see Nikitin v. Russia, cited above, § 36).

Article 4 of Protocol No. 7 clearly prohibits consecutive proceedings if the first set of proceedings has already become final at the moment when the second set of proceedings is initiated (see for example Sergey Zolotukhin v. Russia [GC], cited above).

As concerns parallel proceedings, Article 4 of Protocol No. 7 does not prohibit several concurrent sets of proceedings. In such a situation it cannot be said that an applicant is prosecuted several times "for an offence for which he has already been finally acquitted or convicted" (see Garaudy v. France (dec.), no. 65831/01, ECHR 2003-IX (extracts)). There is no problem from the Convention point of view either when, in a situation of two parallel sets of proceedings, the second set of proceedings is discontinued after the first set of proceedings has become final (see Zigarella v. Italy (dec.), no. 48154/99, ECHR 2002-IX (extracts)). However, when no such discontinuation occurs, the Court has found a violation (see Tomasović v. Croatia, cited above, § 31; Muslija v. Bosnia and Herzegovina, no. 32042/11, § 37, 14 January 2014; Nykänen v. Finland, cited above, § 52; and Glantz v. Finland, cited above, § 62).

The Court had acknowledged in this connection that it might sometimes be coincidental which of the parallel proceedings first becomes final, thereby possibly creating a concern about unequal treatment. However, in view of the margin of appreciation left to High Contracting Parties, it falls within their power to determine their own criminal policy and the manner how their legal system is organised. The High Contracting Parties are free to develop their criminal policy and legal system in accordance with their applicable international obligations, in particular the Convention and its Protocols (see mutatis mutandis Achour v. France [GC], no. 67335/01, § 44, ECHR 2006-IV). It appears that in Finland the case-law and the legislation have already been modified accordingly. (Glantz v. Finland, judgement of20 May 2014)

However, the Court had also found in its previous case-law (see R.T. v. Switzerland (dec.), no. 31982/96, 30 May 2000; and Nilsson v. Sweden,) that although different sanctions (suspended prison sentences and withdrawal of driving licences) concerning the same matter (drunken driving) have been imposed by different authorities in different proceedings, there has been a sufficiently close connection between them, in substance and in time. In those cases the

Court found that the applicants were not tried or punished again for an offence for which they had already been finally convicted in breach of Article 4 § 1 of Protocol No. 7 to the Convention and that there was thus no repetition of the proceedings.

The criteria to establish whether there is a sufficient close connection between proceedings are whether the sanctions are imposed by different authorities without the proceedings being in any way connected: whether both sets of proceedings follow their own separate course and become final independently from each other, whether neither of the outcomes of the proceedings is taken into consideration by the other court or authority in determining the severity of the sanction, whether is there any other interaction between the relevant authorities.

**1.4 The exceptions - the reopening of the case**

a) the reopening of the case in accordance with the law and penal procedure of the State concerned

Where domestic law does not provide for such a possibility, the ECHR could not be invoked. The exception only serves to diminish the state's obligations but does not create a basis for any individual rights.

In its case law the ECtHR has examined whether the power to reopen the case „was exercise by the authorities so as to strike, to the maximum extent possible, a fair balance between the interest of the individual and the need to ensure the effectiveness of the system of criminal justice". This approach highlights the central importance of the ne bis in idem principle as a fundamental human right and its function as a guarantee of legal certainty.

In Nikitin v. Russia the ECtHR observed that Article 4 of Protocol No. 7 draws a clear distinction between a second prosecution or trial, which is prohibited by the first paragraph of that Article, and the resumption of a trial in exceptional circumstances, which is provided for in its second paragraph. Article 4 § 2 of Protocol No. 7 expressly envisages the possibility that an individual may have to accept prosecution on the same charges, in accordance with domestic law, where a case is reopened following the emergence of new evidence or the discovery of a fundamental defect in the previous proceedings.

The right to a fair trial includes, although not expressly stipulated in the text of Article 6, the demand that final court judgments may not be disputed, based on the rule of law and the effectiveness of the right to a court. The Court based this interpretation of Article 6 upon the argumentation that the protection of Article 6 would be illusory if it did not demand respect for final judicial rulings. The ECtHR has stated that "one of the fundamental aspects of the rule of law is the principle of legal certainty, which requires, among other things, that where the courts have finally determined an issue, their ruling should not be called into question." (Ryabykh c. Russia, 24 July 2003, par.51). The Court has also explained

that the rule of law requires respect for finality of judicial decisions because the reversal of final judicial decisions would undermine the confidence of the public in the judiciary.

This principle underlines that no party is entitled to seek a review of a final and binding judgment merely for the purpose of obtaining a rehearing and a fresh determination of the case. Higher courts' power of review should be exercised to correct judicial errors and miscarriages of justice, but not to carry out a fresh examination. The review should not be treated as an appeal in disguise, and the mere possibility of there being two views on the subject is not a ground for reexamination. A departure from that principle is justified only when made necessary by circumstances of a substantial and compelling character (see Ryabykh v. Russia, no. 52854/99, § 52, ECHR 2003-IX). The reopening may only be exercised for the correction of miscarriages of justice may not be an appeal in disguise and may not take place for the sole reason that there are two views on the subject. Jurisdictional errors in principle are only open to correction by way of supervisory review when the review is intended to rectify an error of fundamental importance to the judicial system.

However an unlimited time-frame for lodging an application for supervisory review against a procedural decision that had become final cannot be considered normal from the point of view of observance of procedural time-limits, compliance with the requirements of procedural clarity, and foreseeability of the conduct of the proceedings in the criminal cases, which are matters of major importance under Article 6 § 1 of the Convention.

b) According to the Protocol the reopening of proceedings is possible in two cases: when there are new or newly discovered facts and where there was a fundamental defect in the first proceedings.

b1) New Facts

According to the Explanatory Report of the Protocol no.7 the term "new or newly discovered facts" includes new means of proof relating to previously existing facts. It must be added that only new facts which could not be known at the first trial can justify a retrial. The potential for abuse would be too great if the prosecution could withhold certain facts in reserve so as to keep open the option of a retrial in the event that the first attempt at securing a conviction failed. Nor would it be consistent with the spirit of the protection against double jeopardy if the prosecution were able to subsequently repair their own negligence.

b2) Fundamental Defect

Fundamental defects can be characterized as defects which result in the trial appearing as a travesty of justice. The Court could fiind a violation if the domestic legislation allowed for cases to be reopened in situations of relatively insignificant defects at trial. In Bujnita v. Moldova the Court has stated that, “although a mere possibility to re-open a criminal case is

prima facie compatible with the Convention, including the guarantees of Article 6, certain special circumstances may reveal that the actual manner in which such a review was used impaired the very essence of the right to a fair trial. In particular, the Court has to assess whether, in a given case, the power to launch and conduct the request for annulment proceedings were exercised by the authorities so as to strike, as far as possible, a fair balance between the interests of the individual and the need to ensure the effectiveness of the system of criminal justice (see, mutatis mutandis, Nikitin, cited above, §§ 54-57).

In the instant case, the request for annulment was initiated by the Deputy Prosecutor General. In the opinion of the Prosecutor General's Office, the first-instance and cassation courts had not observed the provisions of the CCP and had wrongly assessed the evidence and thereby reached the conclusion that the applicant had not had forcible intercourse with the victim.

The Court notes that the grounds for the re-opening of the proceedings were based neither on new facts nor on serious procedural defects, but rather on the disagreement of the Deputy Prosecutor General with the assessment of the facts and the classification of the applicant's actions by the lower instances. The Court observes that the latter had examined all the parties' statements and evidence and their original conclusions do not appear to have been manifestly unreasonable. In the Court's view, the grounds for the request for annulment given by the Deputy Prosecutor General in the present case were insufficient to justify challenging the finality of the judgment and using this extraordinary remedy to that end. The Court, therefore considers, as it has found in similar circumstances (see, for instance, Savinskiy v. Ukraine, no. 6965/02, § 25-27, 28 February 2006), that the State authorities failed to strike a fair balance between the interests of the applicant and the need to ensure the effectiveness of the criminal justice system".

However the conclusion may be different if the applicant himself had solicited the supervisory review of the final decision of the national court.

In its Fadin v. Russia judgement the Strasbourg Court stated that "it is not disputed between the parties that the application for supervisory review was lodged by the Deputy Prosecutor-General on 12 November 1999, and the decision in issue was quashed by the Supreme Court of Russia on 7 December 1999 in accordance with the applicant's request. Furthermore, the scope of the subsequent re-examination entirely corresponded to the one requested, that is the case was fully re-examined. The Court considers that, being the initiator of the supervisory review, the applicant cannot claim to be a victim of the alleged breach of the principle of legal certainty".

## Section 2 - Case law related to the *ne bis in idem* principle

Atanas Atanasov[166]

### 2.1 Case study related to EU Law

*The case law*

Atanas Atanasov

The Sofia City Public Prosecution Office filed an indictment with the Sofia City Court against the Spanish citizen A. B., accusing him of the criminal offense pursuant to Article 343 (1), item c) in conjunction to Article 342 (1) of the Criminal Code of Bulgaria – Causing death by negligence while driving in violation of traffic rules. According to the indictment, around 00:20 on 31 July 2003 A. B. was driving his Citroën Xara motor car with registration plate numbers XXX ZZZ along the Autovía A-30 (Murcia – Albacete, Spain), between kilometers 265 and 264, when the car struck and killed the Bulgarian citizen C. D. who having been crossing the carriageway. A. B. was charged with violation of Article 45 of the General Traffic Regulations of the Kingdom of Spain as he was driving the car at a speed of 120 km per hour using the low beam headlights of the car which disabled himself to stop the car safely within the zone of illumination.

While examining the case file, the reporting judge of the Sofia City Court found that the investigation of the same accident, held in Spain, had been terminated by the competent investigating judge from the Albacete Court of Inquiry. According to the decision for termination of the criminal proceedings carried out in Spain, the investigated circumstances have not constituted a crime as the driver A. B. was travelling with a speed in the limit set for the motorway and he was unable and was not obliged to foresee the appearance of C. D. on the carriageway.

The reporting judge of the Sofia City Court rendered an order for termination of the criminal proceedings referring to the provisions of Article 50 of the Charter of Fundamental Rights of the European Union (the Charter). The Sofia City Court reporting judge stated that pursuant to the principle of non bis in idem enshrined in Article 50 of the Charter, the accused A. B. cannot be tried by the Bulgarian judicial authorities for the deed which is factually identical to the act that had already been found to be a crimeless, according to the Spanish investigating judge's decision for termination of the investigation carried out in Spain. According to the order of the Sofia City Court reporting judge, the criminal proceedings

[166] Judge at Sofia City Court, Bulgaria.

held in both EU member states, Bulgaria and Spain have had the same subject matter: whether or not A. B., as a driver of the car which struck and killed C. D. is culpable for the accident and thus Article 50 of the Charter shall be applied.

The counsel of the heirs of C. D. appealed before the Sofia Appellate Court the order for termination of the criminal proceedings issued by the Sofia City Court reporting judge. The appellant held that only judgments and court decisions issued in foreign country which had passed an exequatur procedure could be recognized and enforced by the Bulgarian judicial authorities and the decision of the investigating judge for termination of the investigation held in Spain did not have automatic effect or authority in itself for Bulgaria. The appellant argued that Article 50 of the Charter is irrelevant to the criminal proceedings held in Bulgaria and Spain in view of the fact that no sentence had been passed by a Spanish court. The appellant held that only in cases when an accused person is convicted or acquitted with a verdict rendered by EU member state court the non bis in idem principle is applicable to criminal proceedings carried out in another member state. The appellant also stated that there was not identity between the legal classification of the offences subject matters of the criminal proceedings held in both countries since only in the indictment filed by the Bulgarian public prosecutor the crime had been concretized as a criminal offense pursuant to Article 343 (1), item c) in conjunction to Article 342 (1) of the Criminal Code of Bulgaria while the investigation in Spain had been carried out not for a specified crime. According to the appellant, the accused A. B. was charged with violation of Article 45 of the General Traffic Regulations of the Kingdom of Spain only in the framework of the proceedings held in Bulgaria and the Spanish judicial authorities during its investigation did not decide upon whether or not such violation had been committed by A. B. The appellant proposed that the order of the Sofia City Court reporting judge be annulled and the case returned for trying.

*Comments on the case law*

Article 50 of the Charter of Fundamental Rights of the European Union is a directly applicable provision according to Article 51 (1) and prevails over the provisions of the national legislation which demand passing of an exequatur procedure for recognition and enforcement of judicial decisions issued by foreign authorities. Article 50 of the Charter of Fundamental Rights of the European Union establishes the right not to be prosecuted, sued or convicted twice for the same offence as a fundamental right pursuant to Article 6 (1) of the Treaty of the European Union which is directly linked to the principle of mutual recognition of judgments and judicial decisions enshrined in Article 69A (1) of the Treaty on European Union.

The non bis in idem principle applies not only to procedures ended with a sentences for conviction or acquittals but also whereby further prosecution is barred at a previous stage of the criminal proceedings (C187/2001 & C385/01, C-469/03, C-398/12). For application of the principle there has to be a final decision of competent authorities of another EU member

state for termination of the criminal proceedings (C-261/09, C491/07) against the same person and the same offence, which decision is rendered following a detailed investigation.

The relevant criterion for the purposes of the application of that article is identity of the material acts, understood as the existence of a set of facts which are inextricably linked together, irrespective of the legal classification given to them or the legal interest protected – Judgment 28 September 2006, C-150/2005 Van Straaten and others. See also C-436/04, C-467/04, C-288/05, C-367/05.

*Workshop 2 Case study ne bis idem*

Tomasz Ostropolski

QUESTIONS:

Please answer the following questions, based on the contents of Article 50 of Charter of Fundamental Rights and Article 54 of the Convention Implementing the Schengen Agreement and the corresponding case-law of the Court of Justice of the European Union (quoted below).

1. Is exequatur procedure a pre-conditon to apply the ne bis in idem principle?
2. Does the ne bis in idem principle apply only in relation to court judgments or also to decisions of a public prosecutor?
3. Does the ne bis in idem principle apply only to decisions establishing a guilt of a person, or does it also apply to acquittals rendered by a court, or decisions of a public prosecutor, based on merits, by which there is no ground to refer a case to the court?
4. Does it matter for the application of the ne bis in idem principle that the legal classification of the conduct of A.B. was different in proceedings carried out in Spain and in Bulgaria?
5. On the basis of the replies to questions referred to above, would you respond positively to the request from the appellant that the order of the Sofia City Court should be annulled and the case should be returned for trying?

RELEVANT PROVISIONS:

Article 50 – Charter of Fundamental Rights

No one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law.

Article 54 Convention implementing the Schengen Agreement

A person whose trial has been finally disposed of in one Contracting Party may not be prosecuted in another Contracting Party for the same acts provided that, if a penalty has been imposed, it has been enforced, is actually in the process of being enforced or can no longer be enforced under the laws of the sentencing Contracting Party

Explanations relating to the Charter of Fundamental Rights (OJ C 303/17, 14.12.2007)

„Although they do not as such have the status of law, they are a valuable tool of interpretation intended to clarify the provisions of the Charter".

In accordance with Article 50, the 'non bis in idem' rule applies not only within the jurisdiction of one State but also between the jurisdictions of several Member States. That corresponds to the acquis in Union law; see Articles 54 to 58 of the Schengen Convention and the judgment of the Court of Justice of 11 February 2003, C-187/01 Gözütok [2003] ECR I-1345, Article 7 of the Convention on the Protection of the European Communities' Financial Interests and Article 10 of the Convention on the fight against corruption. The very limited exceptions in those Conventions permitting the Member States to derogate from the 'non bis in idem' rule are covered by the horizontal clause in Article 52(1) of the Charter concerning limitations. As regards the situations referred to by Article 4 of Protocol No 7, namely the application of the principle within the same Member State, the guaranteed right has the same meaning and the same scope as the corresponding right in the ECHR.

CASE-LAW COURT OF JUSTICE OF THE EUROPEAN UNION:

Joined Cases C-187/01 and C-385/01 Gözütok and Brügge (11 February 2003)

The ne bis in idem principle, laid down in Article 54 of the Convention implementing the Schengen Agreement also applies to procedures whereby further prosecution is barred, such as the procedures at issue in the main actions, by which the Public Prosecutor of a Member State discontinues criminal proceedings brought in that State, without the involvement of a court, once the accused has fulfilled certain obligations and, in particular, has paid a certain sum of money determined by the Public Prosecutor.

Case C-469/03 Miraglia (10 March 2005)

The principle ne bis in idem, enshrined in Article 54 of the Convention implementing the Schengen Agreement does not fall to be applied to a decision of the judicial authorities of one Member State declaring a case to be closed, after the Public Prosecutor has decided not to pursue the prosecution on the sole ground that criminal proceedings have been started in another Member State against the same defendant and for the same acts, without any determination whatsoever as to the merits of the case.

Case C-150/05 Van Straaten (28.09.2006)

Article 54 of the Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, signed on 19 June 1990 in Schengen, must be interpreted as meaning that the relevant criterion for the purposes of the application of that article is identity of the material acts, understood as the existence of a set of facts which are inextricably linked together, irrespective of the legal classification given to them or the legal interest protected; (…)

The ne bis in idem principle, enshrined in Article 54 of that Convention, falls to be applied in respect of a decision of the judicial authorities of a Contracting State by which the accused is acquitted finally for lack of evidence.

Case C-391/07 Turansky (22.12.208)

In order to assess whether a decision is 'final' for the purposes of Article 54 of the CISA, it is necessary first of all to ascertain, that the decision in question is considered under the law of the Contracting State which adopted it to be final and binding, and to verify that it leads, in that State, to the protection granted by the ne bis in idemprinciple.

Case C-398/12 M. (05.06.2014)

Article 54 of the Convention implementing the Schengen Agreement, must be interpreted as meaning that an order making a finding that there is no ground to refer a case to a trial court which precludes, in the Contracting State in which that order was made, the bringing of new criminal proceedings in respect of the same acts against the person to whom that finding applies, unless new facts and/or evidence against that person come to light, must be considered to be a final judgment, for the purposes of that article, precluding new proceedings against the same person in respect of the same acts in another Contracting State.

**2.2 Case study related to ECtHR jurisprudence[167]**

Claudia Jderu

On the morning of 4 January 2002 Mr. Z was taken to police station no. 9 of the Department of the Interior for the purpose of establishing how he had managed to take his girlfriend Ms P. into a restricted military compound.

At the police station Mr. Z remained first in the office of the passport service. He was drunk and verbally abusive towards the passport desk employee Ms Y. and the head of the road traffic department Captain S. Mr. Z ignored the rebukes and warnings issued to him. After pushing Captain S. away and attempting to leave, he was handcuffed. The police officers considered that the applicant's conduct amounted to the administrative offence of minor disorderly acts.

Mr. Z was taken to the office of Major K., the head of the police station. Major K. drafted a report on the applicant's disorderly conduct which read as follows:

"This report has been drawn up by Major K., head of police station no. 9, to record the fact that on 4 January 2002 at 9.45 a.m. Mr. Z, who had been brought to police station no. 9 with Ms P., whom he had taken into the closed military compound unlawfully, uttered obscenities at police officers and the head of [unreadable], did not respond to rebukes, ignored requests by police officers to end the breach of public order, attempted to escape from police premises and was handcuffed, that is to say, he committed the administrative offences set out in Articles 158 and 165 of the RSFSR Code of Administrative Offences."

Captain S. and Lieutenant-Colonel N. were also present in the office while Major K. was drafting the report. Mr. Z became verbally abusive towards Major K. and threatened him with physical violence. He again attempted to leave and overturned a chair.

After the report was completed Mr. Z was placed in a car to be taken to the regional police station. The driver Mr L., Major K., Lieutenant-Colonel N. and Ms P. rode in the same car. On the way Mr. Z continued to swear at Major K. and threatened to kill him for bringing administrative proceedings against him.

Administrative conviction of Mr. Z

[167] The case study follows the facts of the EctHR`s judgment in the case of Sergey Zolotukhin v. Russia (GC), application no.14939/03, 10 February 2009

On 4 January 2002 the District Court found the applicant guilty of an offence under Article 158 of the Code of Administrative Offences, on the basis of the following facts:

"Z. swore in a public place and did not respond to reprimands."

Mr. Z was sentenced to three days' administrative detention. The judgment indicated that the sentence was not amenable to appeal and was immediately effective.

Criminal prosecution of the applicant

On 23 January 2002 a criminal case was opened against Mr. Z on suspicion of his having committed "disorderly acts, including resisting a public official dealing with a breach of public order" – an offence under Article 213 § 2 (b) of the Criminal Code – on 4 January 2002 at the police station. On the following day Mr. Z was taken into custody. On 1 February 2002 two further sets of proceedings were instituted against Mr. Z on other charges.

On 5 April 2002 Mr. Z was formally indicted. The relevant parts of the charge sheet read as follows:

"On the morning of 4 January 2002 Mr. Z was taken to police station no. 9 for elucidation of the circumstances in which his acquaintance Ms P. had entered the territory of the closed military compound. In the passport office at police station no. 9 Mr. Z, who was inebriated, flagrantly breached public order, expressing a clear lack of respect for the community, and began loudly uttering obscenities at those present in the passport office, namely Ms Y., a passport official in the housing department of military unit 25852, and Captain S., head of the road traffic department in police station no. 9; in particular, he threatened the latter, in his capacity as a police officer performing official duties, with physical reprisals. Mr. Z did not respond to Captain S.'s lawful requests to end the breach of public order; he attempted to leave the premises of the passport office, actively resisted attempts to prevent his disorderly conduct, offered resistance to Captain S., pushing him away and pulling out of his reach, and prevented the passport office from operating normally.

Hence, through his intentional actions Mr. Z engaged in disorderly acts, that is to say, a flagrant breach of public order expressing clear disrespect towards the community accompanied by a threat to use violence, combined with resisting a public official dealing with a breach of public order; the above amounts to the offence set out in Article 213 § 2 (b) of the Criminal Code.

As a result of his disorderly behaviour, Mr. Z was taken to the office of Major K., head of police station no. 9, who was present in his official capacity, so that an administrative offence report could be drawn up. K., in performance of his official duties, began drafting an administrative offence report concerning Mr. Z, under Articles 158 and 165 of the RSFSR Code of Administrative Offences. Mr. Z, seeing that an administrative offences report was being drawn up concerning him,

began publicly to insult K., uttering obscenities at him in his capacity as a police officer, in the presence of Lieutenant-Colonel N., assistant commander of military unit 14254, and Captain S., head of the road traffic department in police station no. 9, thus intentionally attacking the honour and dignity of a police officer. Mr. Z deliberately ignored Major K.'s repeated requests to end the breach of public order and insulting behaviour. Mr. Z then attempted to leave the office of the head of the police station without permission and kicked over a chair, while continuing to direct obscenities at Major K. and to threaten him with physical reprisals.

Hence, Mr. Z intentionally and publicly insulted a public official in the course of his official duties, that is to say, he committed the offence set out in Article 319 of the Criminal Code.

After the administrative offence report had been drawn up in respect of Mr. Z, he and Ms P. were placed in a vehicle to be taken to the regional police station. In the car, in the presence of Ms P., Lieutenant-Colonel N., assistant commander of military unit 14254, and the driver L., Mr Z. continued intentionally to attack the honour and dignity of Major K., who was performing his official duties, uttering obscenities at him in his capacity as a police officer and thus publicly insulting him; he then publicly threatened that he would cause violent death to Major K., the head of police station no. 9, for bringing administrative proceedings against him.

Hence, by his intentional actions, Mr Z. threatened to use violence against a public official in connection with the latter's performance of his official duties, that is to say, he committed the crime set out in Article 318 § 1 of the Criminal Code.

On 2 December 2002 the District Court delivered its judgment. As regards the offence under Article 213 § 2, the District Court acquitted the applicant for the following reasons:

“On the morning of 4 January 2002 in ... police station no. 9 [the applicant], in an inebriated state, swore at ... Ms Y. and Mr S., threatening to kill the latter. He refused to comply with a lawful request by Captain S. ..., behaved aggressively, pushed S. away and attempted to leave. Having examined the evidence produced at the trial, the court considers that [the applicant's] guilt has not been established. On 4 January 2002 [the applicant] was subjected to three days' administrative detention for the same actions [characterised] under Articles 158 and 165 of the Code of Administrative Offences. No appeal was lodged against the judicial decision, nor was it quashed. The court considers that there is no indication of a criminal offence under Article 213 § 2 (b) in the defendant's actions and acquits him of this charge.”

The District Court further found the applicant guilty of insulting a State official under Article 319 of the Criminal Code. It established that Mr. Z. had sworn at Major K. and threatened him while the latter had been drafting the report on the administrative offences under Articles 158 and 165 in his office at the police station. Major K.'s statements to that effect

were corroborated by depositions from Captain S., Lieutenant Colonel N. and Ms Y., who had also been present in K.'s office.

Finally, the District Court found Mr. Z. guilty of threatening violence against a public official under Article 318 § 1 of the Criminal Code. On the basis of the statements by Major K., Lieutenant Colonel N. and the applicant's girlfriend it found that, after the administrative offence report had been finalised, the applicant and his girlfriend had been taken by car to the district police station. In the car the applicant had continued to swear at Major K. He had also spat at him and said that, once released, he would kill him and abscond. Major K. had perceived the threat as a real one because the applicant had a history of abusive and violent behaviour.

On 15 April 2003 the Regional Court, in summary fashion, upheld the judgment on appeal.

Mr. Z complained under Article 4 of Protocol No. 7 that, after he had already served three days' detention for disorderly acts committed on 4 January 2002, he had been tried again for the same offence.

# Day 3

## Chapter VIII – Second linguistic training (2h)

### Section 1 - The vocabulary of judicial cooperation in criminal matters; procedural rights

I. Fill in the gaps with near-synonyms of the words in brackets.

1. The introduction of the programme states that …… (reciprocal) recognition is 'designed to …….. (consolidate) cooperation between Member States but also to enhance the protection of individual rights'.

2. The implementation of the principle of mutual recognition presupposes that Member States have …… (confidence) in each other's criminal justice systems.

3. The European Council …… (emphasized) the non-exhaustive character of the Roadmap, by inviting the Commission to examine …… (supplementary) elements of minimum procedural rights for suspected and accused persons, and to …… (evaluate) whether other issues, for instance the presumption of innocence, need to be addressed, in order to promote better cooperation in that area.

4. Member States should ensure that there is a procedure or mechanism in place to …… (confirm) whether suspected or accused persons speak and understand the language of the criminal proceedings and whether they need the …… (help) of an interpreter.

5. The suspected or accused persons or the persons subject to proceedings for the execution of a European Arrest Warrant should have the right to …… (dispute) the finding that there is no need for interpretation.

6. The right to interpretation and translation shall apply to persons from the time that they are made …… (conscious) by the competent authorities of a Member State, by official …… (communication) or otherwise, that they are suspected or accused of having committed a criminal offence until the …… (completion) of the proceedings, which is understood to mean the …… (eventual) determination of the question whether they have committed the offence.

7. The possibility to complain that the quality of the interpretation is not …… (enough) shall be ensured by Member States to …… (secure) the fairness of the proceedings.

8. Any …… (relinquishment) of the right to translation of documents referred to in this Article shall be subject to the requirements that suspected or accused persons have received …… (previous) legal advice.

9. Member States shall ensure that interpreters and translators be required to …… (respect) confidentiality regarding interpretation and translation provided under this Directive.

10. Questioning may be carried out for the …… (unique) purpose and to the extent necessary to obtain information that is essential to …… (prevent) serious …… (negative) consequences for the life, liberty or physical integrity of a person.

11. Member States should also be …… (allowed) to derogate temporarily from the right of access to a lawyer in the pre-trial …… (stage) where immediate action by the investigating authorities is imperative to prevent substantial …… (danger) to criminal proceedings.

12. Member States may …… (restrict) or …… (delay) the exercise of that right in view of imperative requirements or proportionate operational requirements.

13. This Directive …… (maintains) the fundamental rights and principles recognized by the Charter, including the …… (interdiction) of torture and inhuman and degrading treatment.

14. The State …… (violated) an accused's right of silence when it sought to …… (force) him to produce bank statements to customs investigators.

II. Fill in the gaps with words deriving from the ones given in brackets, using the clues provided.

1. Article 82(2) of the Treaty on the Functioning of the European Union provides for the …… (establish, noun) of minimum rules …… (apply, adj.) in the Member States so as to facilitate mutual …… (recognize, noun) of …… (judge, noun, pl.) and judicial decisions and judicial cooperation in …… (crime, adj.) matters having a cross-border dimension.

2. This Directive should ensure that there is free and adequate linguistic …… (assist, noun), allowing suspected or accused persons who do not speak or understand the language of the criminal proceedings …… (full, adv.) exercise their right of …… (defend, noun) and safeguarding the …… (fair, noun) of the proceedings.

3. Member States shall ensure that suspected or accused persons who do not speak or understand the language of the criminal proceedings concerned are provided, without delay, with …… (interpret, noun) during criminal proceedings before …… (investigate, adj.) and judicial authorities, including during police questioning, all court …… (hear, noun, pl.) and all necessary interim …… (hear, noun, pl.).

4. In some Member States an authority other than a court having jurisdiction in criminal matters has …… (competent, noun) for imposing sanctions other than …… (deprive, noun) of liberty in relation to …… (relative, adv.) minor offences.

5. Where the law of a Member State provides for the …… (impose, noun) of a sanction regarding minor offences by such an authority and there is either a right of appeal or the …… (possible, noun) for the case to be otherwise referred to a court having jurisdiction in criminal matters, this Directive should therefore apply only to the proceedings before that court following such an appeal or …… (refer, noun).

6. During questioning by the police or by another law …… (enforce, noun) or judicial authority of the suspect or accused person or in a court hearing, the lawyer may, inter alia, in accordance with such proceedings, ask questions, request …… (clarify, noun) or make …… (state, noun, pl.), which should be recorded in accordance with national law.

7. In cases of geographical …… (remote, noun) of the suspect or accused person, such as in overseas territories or where the Member State undertakes or participates in military operations outside its territory, Member States are permitted to derogate …… (temporary, adv.) from the right of the suspect or accused person to have access to a lawyer without …… (due, adj., neg.) delay after deprivation of liberty.

8. Any such temporary …… (derogate, noun, pl.) should be …… (proportion, adj.), should be strictly limited in time, should not be based …… (exclusive, adj.) on the type or the …… (serious, noun) of the alleged offence, and should not prejudice the overall fairness of the proceedings.

9. Where a …… (defer, noun) is applied the child should be permitted to communicate, for example with an institution or an individual responsible for the …… (protect, noun) or welfare of children.

10. In accordance with the Joint Political Declaration of 28 September 2011 of Member States and the Commission on …… (explain, adj.) documents, Member States have undertaken to …… (company, verb), in justified cases, the notification of their …… (transpose, noun) measures with one or more documents explaining the relationship between the components of a directive and the corresponding parts of national …… (transpose, noun) instruments.

11. With regard to this Directive, the …… (legislate, noun for person) considers the …… (transmit, noun) of such documents to be justified.

12. Where suspects or accused persons are arrested or detained, information about applicable …… (procedure, adj.) rights should be given by means of a written Letter of Rights drafted in an easily …… (comprehend, adj.) manner as to assist those persons in understanding their rights.

13. The Letter of Rights should include basic information concerning any possibility to challenge the …… (lawful, noun) of the arrest, obtaining a review of the …… (detain, noun), or requesting provisional …… (release, noun) where, and to the extent that, such a right exists in national law.

14. That right does not entail the obligation for Member States to provide for a specific appeal procedure, a separate mechanism, or a …… (complain, noun) procedure in which such …… (fail, noun) or …… (refuse, noun) may be challenged.

15. In the …… (recover, noun) of assets from an accused or third party, there may be a …… (reverse, noun) of the burden of proof in the …… (assume, noun) that the assets are the proceeds of crime, which the owner of the assets must rebut, or there is a …… (reduce, noun) in the standard of proof to the balance of probabilities, rather than the usual test of proof beyond …… (reason, adj.) doubt.

16. The prosecution must prove its case without resort to evidence obtained through …… (coerce, noun) or …… (oppress, noun).

III. Fill in the gaps with antonyms of the words in brackets.

1. This Directive should set …… (maximum) rules. Member States should be able to …… (restrict) the rights set out in this Directive in order to provide a …… (lower) level of protection also in situations not …… (implicitly) dealt with in this Directive.

2. Member States should endeavour to make general information available, for instance on a website or by means of a leaflet that is available at police stations, to …… (hinder) the obtaining of a lawyer by suspects or accused persons.

3. …… (Weakening) mutual trust requires detailed rules on the protection of the procedural rights and guarantees arising from the Charter and from the ECHR.

4. Common minimum rules should lead to …… (increased) confidence in the criminal justice systems of all Member States.

5. …… (General) conditions and rules relating to the right of suspects or accused persons to have another person informed about their arrest or detention are to be determined by the Member States in their national law.

6. This Directive …… (violates) fundamental rights and …… (infringes) the principles recognized by the Charter.

7. Suspects or accused persons or their lawyers should have the right to challenge, in accordance with national law, the possible …… (success) or …… (acceptance) of the competent authorities to provide information or to …… (conceal) certain materials of the case in accordance with this Directive.

8. Member States shall ensure that access is …… (denied) to all material evidence in the possession of the competent authorities.

9. The accused may …… (accept) to answer questions and to produce evidence.

10. The prosecution must prove that the accused acted in a certain way and the accused must show that there is an …… (guilty) explanation for his actions.

IV. Insert the appropriate particles.

| |
|---|
| across, as, before, between, by, for, from, in, into, of, on, to, under, with, without |

1. On 29 November 2000, the Council, in accordance …… the Tampere Conclusions, adopted a programme of measures to implement the principle …… mutual recognition of decisions …… criminal matters.

2. This Directive draws …… the Commission proposal …… a Council Framework Decision …… the right to interpretation and to translation …… criminal proceedings.

3. Where the law of a Member State provides …… the imposition of a sanction regarding minor offences by such an authority and there is a right of appeal …… a court having jurisdiction in criminal matters, this Directive should therefore apply …… the proceedings …… that court following such an appeal.

4. …… the purposes of the preparation …… the defence, communication …… suspected or accused persons and their legal counsel in direct connection …… any questioning or hearing during the proceedings, or …….. the lodging of an appeal or other procedural applications, such as an application …… bail, should be interpreted when necessary in order to safeguard the fairness of the proceedings.

5. In proceedings …… the execution …… a European arrest warrant, the executing Member State shall ensure that its competent authorities provide persons subject …… such proceedings who do not speak or understand the language of the proceedings …… interpretation in accordance with this Article.

6. Interpretation provided …… this Article shall be …… a quality sufficient to safeguard the fairness of the proceedings, in particular …… ensuring that suspected or accused persons have knowledge …… the case against them and are able to exercise their right of defence.

7. …… prejudice to judicial independence and differences …… the organization of the judiciary …… the Union, Member States shall request those responsible for the training of judges, prosecutors and judicial staff involved …… criminal proceedings to pay special attention …… the particularities of communicating …… the assistance of an interpreter so as to ensure efficient and effective communication.

8. Nothing in this Directive shall be construed …… limiting or derogating …… any of the rights and procedural safeguards that are ensured …… the European Convention for the Protection of Human Rights and Fundamental Freedoms.

9. Member States shall bring …….. force the laws, regulations and administrative provisions necessary to comply …… this Directive by 27 October 2013.

10. The extent of the mutual recognition is very much dependent ..... a number of parameters, which include mechanisms ..... safeguarding the rights of suspects or accused persons and common minimum standards necessary ..... facilitate the application of the principle of mutual recognition.

11. This Directive should be implemented taking ..... account the provisions of Directive 2012/13/EU, which provide that suspects or accused persons are provided promptly ..... information concerning the right of access to a lawyer.

12. The term 'lawyer' in this Directive refers to any person who, in accordance with national law, is qualified and entitled, including ..... means of accreditation ..... an authorized body, to provide legal advice and assistance ..... suspects or accused persons.

13. In respect ..... certain minor offences, this Directive should not prevent Member States ..... organizing the right of suspects or accused persons ..... have access to a lawyer ..... telephone.

14. The obligation to respect confidentiality not only implies that Member States should refrain ..... interfering ..... or accessing such communication but also that, where suspects or accused persons are deprived ..... liberty or otherwise find themselves in a place ..... the control of the State, Member States should ensure that arrangements ..... communication uphold and protect confidentiality.

15. Pending a legislative act of the Union ..... legal aid, Member States should apply their national law in relation ..... legal aid, which should be in line ..... the Charter, the ECHR and the case-law of the European Court of Human Rights.

V. Supply the negative forms of the words in italics, by adding negative prefixes. Then use these negative words in sentences of your own.

1. Mutual recognition of decisions in criminal matters can operate effectively only in a spirit of trust in which not only judicial authorities but all actors in the criminal process consider decisions of the judicial authorities of other Member

States as equivalent to their own, implying not only trust in the adequacy of other Member States' rules, but also trust that those rules are correctly applied.

2. Common minimum rules should lead to increased confidence in the criminal justice systems of all Member States, which, in turn, should lead to more efficient judicial cooperation in a climate of mutual trust.

3. Such procedure or mechanism implied that competent authorities verify in any appropriate manner, including by consulting the suspected or accused persons concerned, whether they speak and understand the language of the criminal proceedings.

4. The provisions of this Directive that correspond to rights guaranteed by the ECHR or the Charter should be interpreted and implemented consistently with those rights, as interpreted in the relevant case-law of the European Court of Human Rights and the Court of Justice of the European Union.

5. Member States shall ensure that suspected or accused persons have the possibility to complain that the quality of the translation is not sufficient to safeguard the fairness of the proceedings.

6. Confidentiality of communication between suspects or accused persons and their lawyers is key to ensuring the effective exercise of the rights of the defence and is an essential part of the right to a fair trial.

7. Executing Member States should make the necessary arrangements to ensure that requested persons are in a position to exercise effectively their right of access to a lawyer in the executing Member State.

8. Such arrangements, including those on legal aid if applicable, should be governed by national law.

9. The prosecution, law enforcement and judicial authorities should therefore facilitate the effective exercise by such persons of the rights provided for in this Directive, for example by taking into account any potential vulnerability that affects their ability to exercise the right of access to a lawyer.

10. This Directive applies to suspects or accused persons in criminal proceedings from the time when they are made aware by the competent authorities of a Member State, by official notification or otherwise, that they are suspected or accused of having committed a criminal offence.

VI. Turn the following sentences into the Passive Voice.

1. One should interpret communication between suspected or accused persons and their legal counsel in accordance with this Directive.

2. Member States should grant suspects or accused persons access to a lawyer during criminal proceedings before a court.

3. Member States should ensure that suspects or accused persons have the right for their lawyer to be present and participate effectively when the police or by another law enforcement or judicial authority questions them.

4. In accordance with the principle of effectiveness of Union law, Member States should put in place adequate and efficient remedies to protect the rights that this Directive confers upon individuals.

5. This Directive applies to suspects or accused persons in criminal proceedings from the time when the competent authorities of a Member State makes them aware, by official notification or otherwise, that they are suspected or accused of having committed a criminal offence.

6. National law or procedures may regulate the exercise of the rights laid down in this Article.

7. A judicial authority or another competent authority may authorize temporary derogations under Article 5(3) only on a case-by-case basis on condition that one can submit the decision to judicial review.

8. Member States shall ensure that the competent authorities take into account the particular needs of vulnerable suspects and vulnerable accused persons in the application of this Directive.

VII. Insert the appropriate modal verbs.

1. Suspected or accused persons …… be able, inter alia, to explain their version of the events to their legal counsel, point out any statements with which they disagree and make their legal counsel aware of any facts that …… be put forward in their defence.

2. Member States should ensure that control ..... be exercised over the adequacy of the interpretation and translation when the competent authorities have been put on notice in a given case.

3. Since the objective of this Directive, namely establishing common minimum rules, ..... be sufficiently achieved by the Member States and ..... therefore, by reason of its scale and effects, be better achieved at Union level, the Union ..... adopt measures in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union.

4. Common minimum rules ..... lead to increased confidence in the criminal justice systems of all Member States.

5. The Roadmap emphasizes that the order of the rights is only indicative and thus implies that it ..... be changed in accordance with priorities.

6. Where the law of a Member State provides in respect of minor offences that deprivation of liberty ..... be imposed as a sanction, this Directive ..... therefore apply only to the proceedings before a court having jurisdiction in criminal matters.

7. Member States ..... make practical arrangements concerning the duration and frequency of the meetings between suspects or accused persons and their legal counsel.

8. When the competent authorities envisage making such a temporary derogation in respect of a specific third person, they ..... firstly consider whether another third person, nominated by the suspect of accused person, ..... be informed of the deprivation of liberty.

9. Member States ..... ensure that where a temporary derogation has been authorized under this Directive by a judicial authority which is not a judge or a court, the decision on authorizing the temporary derogation ..... be assessed by a court, at least during the trial stage.

10. More effective prosecution achieved by mutual recognition ..... be reconciled with respect for rights.

11. Security and public order ..... justify the suppression of rights.

12. A few Member States indicated that evidence obtained where the obligation of respecting the right to silence had not been met ..... be regarded as inadmissible. Others stated that failure to advise an accused of his rights ..... constitute an offence or a ground of appeal against conviction.

13. The national court …… conclude that the accused is guilty merely because he chooses to remain silent.

14. The accused …… be treated as not having committed any offence until the State, through the prosecuting authorities, adduces sufficient evidence to satisfy an independent and impartial tribunal that he is guilty.

15. The waiver, which …… be made in writing or orally, shall be noted, as well as the circumstances under which the waiver was given, using the recording procedure in accordance with the law of the Member State concerned.

16. Member States …… communicate to the Commission the text of the measures of national law which they adopt in the field covered by this Directive.

VIII. Choose the correct connectors.

1. Where appropriate communication technology such as videoconferencing, telephone or the Internet may be used, …… the physical presence of the interpreter is required in order to safeguard the fairness of the proceedings.

a) if b) unless c) even if d) even though

2. As an exception to the general rules established in the previous paragraphs, an oral translation or oral summary of essential documents may be provided instead of a written translation …… such oral translation or oral summary does not prejudice the fairness of the proceedings.

a) on condition that b) in the event that c) by condition that d) to the end that

3. …… the suspect or accused person is a child, the holder of parental responsibility should be notified as soon as possible after the child's deprivation of liberty and should be provided with the reasons thereof.

a) on condition that b) where c) whereas d) whereby

4. Member States should ensure that suspects or accused persons have the right for their lawyer to be present and participate effectively when they are questioned by the police or by another law enforcement or judicial authority, including during court hearings. Such participation should be in accordance with any procedures under national law which

may regulate the participation of a lawyer during questioning of the suspect or accused person by the police or by another law enforcement or judicial authority, including during court hearings, …… such procedures do not prejudice the effective exercise and essence of the right concerned.

a) so that b) given that c) such that d) provided that

5. Suspects or accused persons have the right for their lawyer to attend investigative or evidence-gathering acts, …… they are provided for in the national law concerned.

a) so as b) so that c) insofar that d) insofar as

6. Member States would not need to take active steps to ensure that suspects or accused persons who are not deprived of liberty will be assisted by a lawyer …… they have not themselves arranged to be assisted by a lawyer.

a) even if b) if not c) if d) unless

7. …….. a lawyer participates during questioning, the fact that such participation has taken place shall be noted using the recording procedure in accordance with the law of the Member State concerned.

a) whether b) although c) though d) where

8. This Directive applies to suspects or accused persons in criminal proceedings from the time when they are made aware by the competent authorities of a Member State, by official notification or otherwise, that they are suspected or accused of having committed a criminal offence, and …… they are deprived of liberty.

a) irrespective of whether b) irrespectively if c) irrespective of if d) irrespectively whether

9. Without undue delay after being informed that a requested person wishes to appoint a lawyer in the issuing Member State, the competent authority of that Member State should provide the requested person with information to facilitate the appointment of a lawyer in that Member State. Such information could, for example, include a current list of lawyers, or the name of a lawyer on duty in the issuing State, …… can provide information and advice in European arrest warrant cases.

a) which b) what c) who d) whom

10. Where suspects or accused persons are deprived of liberty, Member States should make the necessary arrangements to ensure that such persons are in a position to exercise effectively the right of access to a lawyer,

including by arranging for the assistance of a lawyer when the person concerned does not have one, ..... they have waived that right.

a) unless b) if c) whether d) even if

11. This Directive applies until the conclusion of the proceedings, ..... is understood to mean the final determination of the question whether the suspect or accused person has committed the offence, including, where applicable, sentencing and the resolution of any appeal.

a) what b) which c) that d) that

12. Suspects or accused persons should be able to waive a right granted under this Directive ..... they have been given information about the content of the right concerned and the possible consequences of waiving that right.

a) provided for b) provided that c) providing for d) providing that

13. ..... the objective of this Directive, namely establishing common minimum standards relating to the right to information in criminal proceedings, cannot be achieved by Member States acting unilaterally, at national, regional or local level, and can therefore, by reason of its scale and effects, be better achieved at Union level, the Union may adopt measures in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union.

a) where b) if c) for d) since

14. ..... allow the practical and effective exercise of those rights, the information should be provided promptly in the course of the proceedings and at the latest before the first official interview of the suspect or accused person by the police or by another competent authority.

a) so as to b) so as that c) in order to d) in order that

15. In 2005, The Commission adopted a Communication on mutual recognition of judicial decisions in criminal matters and the strengthening of mutual trust between Member States ..... it concluded that reinforcing mutual trust was the key to the smooth operation of mutual recognition.

a) whereof b) whereas c) whereby d) wherein

16. Guidance is found in the case-law of the European Court of Human Rights …… what constitutes the presumption of innocence.

a) as to b) as for c) as d) as in

IX. Reading comprehension.

A. Before reading the text below, answer the following questions.

1. Are police abuses frequent in your country? Explain.

2. Has your country been fined for abuses by the police?

3. Do you agree with the idea that policemen should wear body cameras in order for abuses to be prevented? Provide arguments.

Human Rights Court

Switzerland fined for police abuse

Sep 24, 2013 - 17:46


Geneva police were accused of mishandling a routine identity check in 2005

(Keystone)

The European Court of Human Rights has ruled that the case of a Geneva man who experienced police abuse during a 2005 identity check was not handled correctly by Swiss authorities and amounted to “inhumane treatment”.

Switzerland was ordered to pay the man damages amounting to nearly €25,700 ($31,600) – €15,700 for “material prejudice”, €4,000 for “moral prejudice” and €6,000 for fees and expenses.

The man, originally from Burkina Faso, was stopped by two Geneva police officers in May 2005 for a routine identity check during which he says the officers beat him with batons and yelled racist remarks and death threats. He bit the men to force them to let him go and suffered a broken clavicle as a result of the abuse.

He issued a complaint to Swiss justice authorities, but it was dismissed.

"The amount of force used to control the plaintiff was disproportionate," the judges in Strasbourg declared, remarking that the man "was not armed with dangerous objects" and that the police officers' use of batons "was therefore unjustified".

Diverging opinion

The European Court of Human Rights also ruled that the Swiss justice system introduced unwarranted delays in handling the case and did not avail itself of an independent account of what happened, other than the police report.

However, the court did not rule on the alleged racist behaviour of the police officers, as "there was no evidence on the record to support the plaintiff's allegations".

The Swiss judge on the court, Helen Keller, disagreed with the majority opinion, stating in a diverging opinion that "the two police officers reacted in an appropriate manner: they forced the plaintiff to the ground to immobilise him and see whether he was armed. In my opinion, the force used was absolutely necessary and proportionate".

Switzerland has three months to appeal the decision, although the court is not required to accept an appeal.

swissinfo.ch and agencies

Body cameras appear on police radar

By Thomas Stephens

Feb 10, 2015 - 17:00


Smile! Not everyone is so happy to be caught on police cameras and end up in a database

(Keystone)

Following riots in Zurich and Bern and allegations of police violence in the United States, talk has increased in Switzerland of making officers wear body cameras. swissinfo.ch looks at the legal and ethical challenges of this technology.

On December 12, 2014, around 200 masked leftwing radicals clashed with police in central Zurich, setting fire to cars and bins. Seven policemen were injured and hundreds of thousands of francs worth of damage were caused.

"Violence towards police has increased massively over the years," Max Hofmann, general secretary of the Swiss Police Officers Federation, told swissinfo.ch. "In 2000, we had 774 incidents – violence or threats against officers. In 2013, there were 2,776."

Cantonal police forces already use cameras to film sporting events and demonstrations or any other event with large crowds and the potential for violence. But Reto Nause, head of security for the city of Bern, which saw violent protests most recently in 2013, wants to go one step further: so-called body cams.

"I believe that during difficult police operations body cameras can help gather evidence and document the course of events better. They can also that a police officer has acted disproportionately," Nause told swissinfo.ch.

He pointed out that the public could also benefit from such cameras, which can be attached to an officer's helmet, glasses, shoulder or chest. "The question of proportionality obviously works on both sides. This would be a new evidence-gathering tool that could provide more clarity."

In the US, the body camera debate recently heated up following two controversial civilian deaths at the hands of police officers:

Positive experience

The few studies carried out into body-worn cameras suggest they reduce – but obviously do not eliminate – abuse.

Body cams were introduced to the police force of Rialto, California, in February 2012. A randomised control study published a year later found that the number of complaints had dropped by 88% and police officers had used force nearly 60% less often.

As the New York Times observed, "when force was used, it was twice as likely to have been applied by the officers who weren't wearing cameras during that shift".

Elsewhere, German police in Frankfurt have worn €1,500 (CHF1,533) body cams since 2013. They are limited to using them in certain hot spots – such as areas with a lot of nightlife – and only during certain times; in addition, they have to announce that they are using them before they turn them on, and there is no sound.

Police commissioner Julie Rettenmeyer says police controls have run more peacefully since the introduction of the cameras.

Concerns

But not everyone is convinced. “Body cams violate a person’s private sphere, filmed by the police without permission. They are also to be rejected on data protection grounds,” Katrin Meyer from Augenauf (eyes open), an independent citizens’ rights organisation, told swissinfo.ch.

“Instead of putting cameras on helmets, police chiefs should look for ways of dismantling racism, sexism, xenophobia and uncontrolled aggression in the police force. And also how police officers who want to complain about their violent colleagues can get encouragement, protection and suitable first points of contact.”

Amnesty International is more open to body cams, admitting they could be a means of proving or refuting accusations of excessive police violence, but says it is very concerned by the trend of “technical upgrading” seen in many police forces.

“There’s always the basic question of proportionality: does the new means lead to the desired goal, and is the resulting restriction of personal rights really desirable in order to reach this goal?” Stella Jegher from the human rights organisation’s Swiss section told swissinfo.ch.

“The use [of these cameras] must in any case be limited to a very narrow framework, both for the individuals or units that are given them and also the occasions on which they can be used and for how long.”

In this respect, Nause agrees. “I think a patrol officer walking through the old town of Bern filming everything would be going too far.”


A police officer in Los Angeles demonstrates a video feed into his mobile phone from a camera attached to his glasses

(Keystone)

Cantonal issue

Data protection and transparency are two of the hottest issues when it comes to the use of police cameras.

“Body cams […] simply enable the police and other state institutions to gather more data and more control over the population,” Meyer said.

The situation is further complicated in Switzerland because each of the country’s 26 cantons sets its own surveillance laws.

In Bern, police cameras can only be used at large public events such as football matches or political demonstrations. In theory body cams can already be used at these events – and only these events – if the police commander orders it, says Markus Siegenthaler, data protection officer for canton Bern.

"If the police commander gives the word, it's just a technical question of where on the body to wear them. But in order to make it like Frankfurt – where police can wear body cams in hot spots at certain times – it would be necessary for the cantonal lawmakers to expand the remit and create a corresponding regulation in our police law," he told swissinfo.ch.

It is possible that the public would then have the final say if the decision were challenged in a referendum.

As for concerns about innocent members of the public being caught on camera, Siegenthaler said this was already the case for cameras monitoring stations, government buildings, prisons or other public buildings.

"The lawmakers solved this by saying the images could only be analysed by the police if there's an incident – and then only during the exact timeframe of the incident. Otherwise the pictures can be stored for a limit of 100 days," he said.

He gives the example of someone famous or in the public eye who is caught on camera stumbling half-drunk across a square. "That is in no way a matter for criminal law. The pictures have been recorded, but they cannot be viewed unless – at that very moment – something criminally relevant happens, for example the person is attacked," he explained.

Working group

Hofmann says the Swiss Police Officers Federation has launched a body cam working group "so that if the politicians reach a decision – possibly without consulting us – we'll be ready with facts and arguments".

The group has already held its first meeting, but Hofmann does not know when its conclusions will be presented.

"We are prepared to hold a discussion about body cams, but we are demanding that the politicians involve us in the debate, otherwise we'll be against them on principle," he said, explaining that the federation's members have concerns about always being on camera.

"That's not acceptable – you can't record a colleague the whole time."

Siegenthaler concludes that the question facing lawmakers is: “do we want body cams, and in which framework do we want them?”

“From a basic constitutional and data protection point of view, it is possible to implement such a tool. In Bern we currently do not have a legal basis for body cams, but we could create one.”

US debate

On December 1, 2014, US President Barack Obama announced a $75 million (CHF68 million) plan to help police departments buy 50,000 body cameras. This came a week after a state grand jury decided not to indict a white officer in Ferguson, Missouri, for shooting to death an unarmed black teen, Michael Brown, in August 2014. This sparked protests and debates about excessive force, racial bias in policing and the use of body cams. This incident was not captured on camera.

Obama’s plan, which requires congressional approval, calls for departments to undergo training, receive guidance on best practices from the Department of Justice and submit a plan of use for approval. Civil rights and civil liberties advocates are wary of the lack of a federal enforcement plan.

On July 17, 2014, a white police officer in New York put an unarmed black man, Eric Garner, in a chokehold while attempting to take him into custody on charges of selling illegal cigarettes. Garner went into cardiac arrest and died. Despite the incident being captured on camera, on December 3 a grand jury decided not to indict the police officer.

swissinfo.ch

B. Reading comprehension exercise.

Answer the following questions:

1. What was the abuse Switzerland was fined for?

2. What did the plaintiff complain about?

3. What arguments did the policemen bring in their defence?

4. Why did the European Court of Human Rights rule that the Swiss state had to compensate the plaintiff?

5. What did the remedy consist in?

6. How did the issue of policemen wearing cameras arise? Where in what context?

7. For what purposes are cameras worn in Switzerland?

8. How are body cameras used in Germany?

9. What problem are the body cameras supposed to solve?

10. What is the downside of body cameras according to certain citizens' rights organisations?

C. Vocabulary exercise.

Provide synonyms/near-synonyms or explanations for the following words or phrases.

1. damages

2. fees

3. Police officers yelled racist remarks.

4. The complaint was dismissed.

5. plaintiff

6. The Court ruled in favour of the plaintiff.

7. allegations

8. diverging opinion

9. damage

10. gather evidence

11. rebut accusations

12. The body camera debate heated up.

13. ways of dismantling racism

14. to expand the remit

15. The decision not to indict the officer sparked protests.

16. racial bias

## Section 2 – Key exercises

I. 1. mutual, strengthen; 2. trust; 3. underlined, further, assess; 4. ascertain, assistance; 5. challenge; 6. aware, notification, conclusion, final; 7. sufficient, safeguard; 8. waiver, prior; 9. observe; 10. sole, avert, adverse; 11. permitted, phase, jeopardy; 12. limit, defer; 13. upholds, prohibition; 14. infringed, compel.

II. 1. establishment, applicable, judgments, criminal; 2. assistance, fully, defence, fairness; 3. interpretation, investigative, hearings, hearings; 4. competence, deprivation, relatively; 5. imposition, possibility, referral; 6. enforcement; clarification, statements; 7. remoteness; temporarily, undue; 8. derogations, proportional, exclusively, seriousness; 9. deferral, protection; 10. explanatory, accompany, transposition, transposition; 11. legislator; transmission; 12. procedural, comprehensible; 13. lawfulness, detention, release; 14. complaint, failure, refusal; 15. recovery, reversal, assumption, reduction, reasonable; 16. coercion; oppression.

III. 1. minimum, extend, higher, explicitly; 2. facilitate; 3. strengthening; 4. decreased; 5. specific; 6. respects, observes; 7. failure, refusal, disclose; 8. granted; 9. refuse; 10. Innocent.

IV. 1. with, of, in; 2. on, for, on, in; 3. for, to, to, before; 4. for, of, between, with, with, for; 5. for, of, to, with; 6. under, of, by, of; 7. without, in, across, in, to, with; 8. as, from, under; 9. into, with; 10. on, for, to; 11. into, with; 12. by, by, to; 13. of, from, to, by; 14. from, with, of, under, for; 15. on, to, with.

V. 1. ineffectively, distrust, inadequacy, incorrectly; 2. Inefficient; 3. incompetent, inappropriate; 4. inconsistently, irrelevant; 5. impossibility, insufficient; 6. inessential unfair; 7. Unnecessary; 8. illegal, inapplicable; 9. invulnerability, inability; 10. unaware, unofficial.

VI. 1. Communication between suspected or accused persons and their legal counsel should be interpreted in accordance with this Directive. 2. Suspects or accused persons should be granted access to a lawyer during criminal proceedings before a court. 3. Member States should ensure that suspects or accused persons have the right for their lawyer to be present when they are questioned by the police or by another law enforcement or judicial authority. 4. In accordance with the principle of effectiveness of Union law, Member States should put in place adequate and efficient remedies to protect the rights that are conferred upon individuals by this Directive. 5. This Directive applies to suspects or accused persons in criminal proceedings from the time when they are made aware by the competent authorities of a Member State, by official notification or otherwise, that they are suspected or accused of having committed a criminal offence. 6. The exercise of the rights laid down in this Article may be regulated by national law or procedures. 7. Temporary derogations under Article 5(3) may be authorized only on a case-by-case basis by a judicial authority or another competent authority on condition that the decision can be submitted to judicial review. 8. Member States shall ensure that the particular needs of vulnerable persons and vulnerable accused persons are taken into account in the application of this Directive.

VII. 1. should, should; 2. can; 3. cannot, can, may; 4. should; 5. may; 6. cannot, should; 7. may; 8. should, could; 9. should, can; 10. must; 11. cannot; 12. might, might; 13. cannot; 14. must; 15. can; 16. shall.

VIII. 1 – b; 2 – a; 3 – b; 4 – d; 5 – d; 6 – c; 7 – d; 8 – a; 9 – c; 10 – a; 11 – b; 12 – b; 13 – d; 14 – c; 15 – c; 16 – a.

IX. B. Reading comprehension exercise.

Suggested answers: 1. Inhumane treatment during identity check. 2. He complained about having been mistreated during a police identity check carried out incorrectly, as a result of which he was badly injured. 3. The policemen claimed that the plaintiff had reacted violently during the security check, and as a result they had to defend themselves. 4. The Court ruled in favour of the plaintiff since the evidence suggested that he had not been armed, and the reaction of the policemen was disproportionate. 5. The remedy consisted in damages, both for financial loss and for

the psychological suffering, and an amount of money to cover for the fees and expenses. 6. The issue arose in the context of increasing police abuses, in the context of debates in the US, where police officers had not been indicted for violent treatment resulting in the suspect's death. 7. They are used to film sporting events, demonstrations and other events that involve large masses and have a high potential for violence. 8. Body cameras can only be used in certain hot spots, and only during certain times. Moreover, the police officers have to announce that they are using them before turning them on. 9. They are supposed to prevent police abuse and to ensure the observance of human rights by the police. 10. According to such organisations, the use of body cameras can affect citizens' right to privacy.

C. Vocabulary exercise.

1. money paid to compensate for the injury, harm or loss caused; 2. amount of money paid for professional services; 3. Police officers shouted racist remarks. 4. The complaint was rejected/not admitted. 5. the party in a civil trial who brings an action against a defendant, usually claiming he/she has sustained a damage entitling him/her to seek a remedy; 6. The Court decided in favour of the plaintiff. 7. Accusations; 8. dissenting opinion; 9. harm, injury or loss, entitling a person to claim damages; 10. collect evidence; 11. oppose accusation by contrary proof, argue that accusations are not true; 12. The body camera debate intensified. 13. ways of unveiling/uncovering racism; 14. to extend the scope of application or use; 15. The decision not to indict the officer generated/brought about protests. 16. a preconceived or unreasoned tendency, feeling or opinion against people of a different race, supporting or opposing a person in an unfair way, based solely on the person's race.

# Chapter IX - Future developments on procedural rights in the European Union (1h)

## Section 1 - European Union Criminal Law: where do we stand and where do we head for. Five questions and one finding

Juan Carlos da Silva Ochoa[168]

SUMMARY: 1. How proper is it to speak of 'European Union Criminal Law'? 2. Criminal Law without a Constitution? 3. How effective is EU Criminal Law? 4. Where are the sources of Criminal Law to be found within the European Union legal order? 5. How fair is EU Criminal Law? 6. European Union Criminal Law in the making: the result of a double dialogue.

### 1.1 How proper is it to speak of 'European Union Criminal Law'?

In the aftermath of the great disaster of 1939-1945 Europe created two main transborder systems to prevent self-destruction in the future. The first one was established in 1949 and was directly devoted to promote human rights, democracy and the rule of law, and has presently 47 member states, covering 820 million citizens. The second one, now 28 member states and 400 million people strong, originated in 1951, and its goal was limited to coordination of economic policies in strategic sectors.

However, in practice it is this second one, these days under the denomination of European Union (EU), which at the time of its inception and for many years later had no connection with either human rights or criminal proceedings, the one that has turned to be the main driving force behind the creation of a pan-European penal legal order. It would be unfair not to add that the Council of Europe has helped immensely to the setting of the foundations of this new law, especially through the casework of its European Court of Human Rights. The Strasbourg Court, interpreting several provisions of the 1959 European Convention of Human Rights and of its additional protocols, and assessing compliance of national criminal legislation and judicial decisions of the Member States with the Convention, has been able to provide

[168] Senior Judge, Spain.

a sound basis to list and define the standards according to which a European Criminal Law could be identified. Other conventions within the Council's framework have widened the scope.

In principle, the European Community was not competent neither in the field of Criminal Law nor in that of Criminal Procedural Law. This statement is to be found in a decision of the European Court of Justice[169]. For the largest part of EU history Criminal Law has not been a common policy.

In fact, Criminal Law entered the EU scene rather late: it was first mentioned in the 1992 Maastricht Treaty as part of the third pillar, devoted to Justice and Home Affairs. The 1997 Amsterdam Treaty refined the attempt and introduced the key concept of 'freedom, security and justice', around which everything is turning from them. The 1999 Tampere Council and the 2004 Hague Programme (designed to strengthen freedom, security, and justice within the then 25 member states) helped to set the notion of 'mutual recognition' as 'cornerstone' of the new policy, importing an internal market formula based on the notion of mutual trust from the then existing first pillar. The entry into force in 2009 of the Lisbon Treaty meant the merging of the three pillars[170], the extension of the decision procedures to the area of freedom, security and justice (AFSJ) and the extension of the European Court of Justice jurisdiction in this area.

**1.2. Criminal Law without a Constitution?**

Criminal Law and Constitutional Law are closely related. Constitutional Law in the western tradition is the result of the fight for the rule of law, which up to a considerable degree can be identified by the process of enshrining in the Constitution certain rights of the individual as fundamental and setting precise limits as to by what public institutions and under which circumstances these rights can be restricted. In its development, it also imposes positive obligations on these institutions to promote rights through legislation and administrative action. In this sense, it is undisputable that the most relevant restrictions derive from the exercise of the power to investigate and sanction criminal activity. In fact the most severe deprivations from the rights to property, privacy, communication or even personal freedom, inter alia, can only be adopted in the course of criminal proceedings. No other legal instrument contains sanctions more constraining than the Criminal Code; and no other legal instrument is more dependent on the Constitution than the Criminal Procedural Code. In fact, history shows that the fight for constitutional regimes equals the pursue of guarantees in criminal proceedings. Criminal Law, either substantial or procedural, cannot be imagined without a Constitution inspiring its development and setting its limits.

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[169] Commission v Council (C-173/03), 13 September 2005, paragraph 47, quoting its own case-law in Case 203/80 Casati [1981] ECR 2595, paragraph 27, and Case C-226/97 Lemmens [1998] ECR I-3711, paragraph 19.

[170] DA SILVA, Juan Carlos: El Tratado de Lisboa, tres consideraciones sobre un espacio común de libertad, seguridad y justicia; in: Revista Aranzadi Unión Europea, año XXXV, número 10, octubre 2009.

However, no Constitution exists for the European Union. Is it possible to accept the existence a EU Criminal Law forgetting this plain fact?

There has been a wide discussion on the topic of European Constitutional Law; it can be useful to have a look at the most recent developments. The question is nowadays linked with what is known as the 'democratic deficit' within the European Union, or the idea that the governance of the EU, up to some extent, lacks democratic legitimacy. The notion initially appeared in order to criticize the transfer of legislative powers from national institutions (directly representative via elections) to the Council of the EU (which does not represent the people nor acts in a transparent manner, both aspects identified as legitimacy-conferring mechanisms). The creation of a EU Parliament directly elected tried to fight back this situation, although criticism remains as long as it does not have powers comparable to those of national legislatures. In this sense it has been argued that a clear and radical choice is to be made in relation with a Constitution for the EU. As long as a considerable number of state competences from the Member States have been vested upon EU institutions the only alternative is either relocating back the competences where legitimacy remains (in the Member States, which have constitutions that ensure electoral origin and accountability of their decision making institutions) or providing legitimacy where competences have been placed (in the EU, for which a European Constitution will be needed). Nevertheless, as people and territory, together with state power, are the elements that define the political basis for a Constitution, a couple of apparent mistakes have been recently pointed out. First, it would be a factual mistake to assume that there is no such a thing as the 'European people'; developments like the result of recent elections in Greece would show that decisions in one of the Member States affect directly not only other Member States but the Union itself. Second, it would be a legal mistake to assume that one people is needed to create a Constitution; in fact it is the Constitution the driving force behind the creation of 'the people', that 'constitutes' the 'community of citizens' (as contrary to the 'mass').

This view, which is exemplified here in one of its more recent formulations[171], calls for some criticism. In the first place, the argument provided to support the existence of one European people does not seem to be decisive (elections in countries out of the EU sometimes have an impact upon it and its members; elections in a Member State are often irrelevant for the Union). On the other hand, logical thinking suggests both statements cannot be supported at the same time: if the European people already exist there is no need to wait for a European Constitution to create it. From the legal point of view the question can be better focused if the concept of 'people' is more accurately defined. What is generally understood as the foundation needed for a shared legal order is a common basis of persons who share perceptions and

[171] ROUSSEAU, Dominique: La construction constitutionnelle du peuple européen, Revue de l'Union Européenne, n. 590, Juillet-Aôut 2015.

values that can be reflected in the Law, particularly when it deals with fundamental rights, as is the core subject of Criminal Law. In other words, a European Criminal Law is feasible as long as there are shared ideas and feelings about what has to be done by public authorities when using Criminal Law. The right question is therefore: do we have that in Europe?

For the purpose of this discussion it is certainly helpful, in the first place, to consider the case law of the European Court of Human Rights. Although it does not have what is essential for a judicial institution (the power to impose solutions in conflicts, as long as the implementation of their opinions remains in the hands of national authorities) it has the authority to identify and define principles shared by the European legal community. Deriving them from the text of international instruments (especially those elaborated within the framework of the Council of Europe) but also extracting rules to interpret and complement them from the Constitutional law of the European countries and from their legal traditions, it has set a corpus of doctrine, continuously improved, that has pervaded national legislation and judicial decisions. The key to this success lies largely in the fact that national judges do not regard Strasbourg decisions as containing rules alien to the rationale of their local legal orders; on the contrary, even when these rules do not exist as such in the text of the law they are used to enforce, they can look at them as a natural result of pursuing a reasonable interpretation of that law. This can only be achieved because there is a common basis in the way fundamental rights are conceived within the Europe[172].

On the other hand, when we look at the more restricted area of EU Law we find that the Court of Justice has also developed and extensively used legal principles[173]. Again, these principles come from different sources, and although not all of them are of the same relevance, some can easily be identified as having constitutional rank because of their direct connection with fundamental rights. A blatant example of an article in the old EEC Treaty having constitutional dimension was Article 5[174]. Originally, solving disputes within the framework of the European Economic Communities did not seem to call for an intensive use of legal principles or fundamental rights; but once the Court defined them as a new legal order, different from both that of International Law ('direct effect' and 'primacy' of EU Law being the main reasons for this) and

[172] The European Court of Human Rights defined, many years ago, the Convention as 'constitutional instrument of the European public order' in the 1995 Loizidou case –paragraph 75-.
[173] Literature on this topic is extensive; a recent approach: FABIO NICOLOSI, Salvatore: The contribution of the Court of Justice to the codification of the founding values of the European Union, Revista de Derecho Comunitario Europeo, N. 51, 2015, pp. 613-643.
[174] TEMPLE LANG, John: Community constitutional law: Article 5 EEC Treaty, 27 Common Market Law Review (1990) 645: The caselaw of the Court based wholly or partly on Article 5 is not only important for government lawyers and civil servants. It includes the most important principles of Community law as far as national courts are concerned. The rule that national courts must grant remedies for breach of Community law rules which are as effective as those for corresponding breaches of national law, and which are effective to protect Community law rights fully, notwithstanding any contrary rule of national law, is of immense importance.

the Law of Member States, it was plain that principles and rights were needed to adjudicate cases properly and to set limits to what the Council and the Commission could do when discharging their duties according to the Treaties[175]. According to the European Court of Justice fundamental rights form an integral part of the general principles of law whose observance the Court ensures. For that purpose, the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international instruments for the protection of human rights on which the Member States have collaborated or to which they are signatories. In that regard, the European Convention for the Protection of Human Rights and Fundamental Freedoms has special significance. Respect for human rights is therefore a condition of the lawfulness of Community acts, and measures incompatible with respect for human rights are not acceptable in the Community. And therefore, (t)he Community judicature must, therefore, in accordance with the powers conferred on it by the EC Treaty, ensure the review, in principle the full review, of the lawfulness of all Community acts in the light of the fundamental rights forming an integral part of the general principles of Community law (…)[176].

Once this direction taken, and in accordance with the progressive increase of powers of the European institutions, the need of a comprehensive set of rules concerning fundamental rights, elaborated by the EU, was felt. Nowadays, the EU Charter of Fundamental Rights lists the civil, political, social and economic EU rights listed under the headings of Dignity, Freedoms, Equality, Solidarity, Citizens' Rights, and Justice, with specific principles which apply to specific groups such as older people, children and people with disabilities. These rights are derived from a number of sources including existing EU Law, the Social Charters of the EU and the Council of Europe, the European Convention on Human Rights and the constitutional traditions of the member states[177]. The Treaty of Lisbon gives the Charter the same legal value as the main treaties. The Charter applies to the EU institutions and to the Member States (when they are implementing EU law, and this poses some problems for Criminal Law Courts that will have to be examined later). Of course, all the Member States are parties to the European Convention on Human Rights, but what is new after Lisbon is that it allows for the EU itself to accede to that Convention. Although the Charter does not extend the application of EU law or give the EU

[175] The EU being an autonomous legal order is a very early doctrine, established by the Court of Justice of the EU already in early 60s in the famous Costa v. E.N.E.L case, when the Court said: 'By contrast with ordinary international treaties , the EEC Treaty has created its own legal system, which , on the entry into force of the Treaty, became an integral part of the legal systems of the Member States and which their courts are bound to apply. By creating a Community of unlimited duration, having its own institutions, its own legal capacity and capacity of representation on the international plan, and more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the states to the Community, the Member States have limited their sovereign rights, albeit within limited fields, and have created a body of law which binds both their nationals and themselves. ….the law stemming from the Treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question' (Costa v. ENEL /Case 6/64).

[176] 2013, Kadi, paragraph 5.

[177] The European Court of Justice has quoted its own jurisprudence as having constitutional dimension (e.g.: 1986, Les Verts).

any new area of competence it plays a key role in identifying one of the essential contents of a Constitution. According to the traditional MONTESQUIEU's inspired formula in Article 16 of the 1798 Declaration of the Rights of Man and of the Citizen 'Toute Société dans laquelle la garantie des Droits n'est pas assurée, ni la séparation des Pouvoirs déterminée, n'a point de Constitution'. EU Treaties have so far established what the powers of EU institutions are; now the circle is completed with a Charter that has the same legal force as the Treaties.

Therefore, although the EU may have no formal Constitution, it would be misleading to conclude that there is no such a thing as Constitutional Law within the EU. Historically linked with the state, Constitutional Law adopts at the present time a new profile in the EU, showing that, contrary to what we are used to, Constitutional Law can be conceived beyond the borders of state law[178]. Even if the result could be something different to what we are used to see in this field; but something that, after all, is the result of what has been called the 'European constitutional heritage'. Although in contrast with formal constitutionalisation of the EU structure, this heritage exists and allows identifying principles both in the field of fundamental rights and in that of constitutional organization[179]. Because, in the words of HABERMAS, the challenge behind this argument about the EU Constitution is not rather to invent something but mainly to preserve the main democratic achievements of European nations-states beyond their own limits[180].

**1.3 How effective is EU Criminal Law?**

Developments in the direction of a real common space for criminal judicial decisions can be found in the way in which courts of law react towards each other. The need to obtain help in order to reach a court decision or in order to implement it is not limited to the European Union. Courts have always had to address counterparts in a different state, above all in those areas in which a foreign element is likely to be found. Of course, as people and business within the European space get more and more interconnected this need has made itself especially conspicuous. As has been repeatedly reminded both globalisation and increasing mobility across the EU create new opportunities for cross-border crime. The traditional answer to this need comes under the shape of mutual assistance.

Mutual legal assistance (MLA) in criminal matters aims at gathering and/or exchanging information in an effort to allow criminal proceedings to be conducted, through mechanisms for requesting and obtaining evidence for criminal

[178] BONNET Baptiste: De l'art du changement: Le Droit Constitutionnel Européen ou la rencontre des mondes, Revue de l'Union Européenne, n. 590, Juillet-Aôut 2015.
[179] PIZZORUSSO Alessandro: Il patrimonio costituzionale europeo, Il Mulino, 2002.
[180] 'Le défi ne consiste pas à inventer quelque chose, mais à conserver les grandes réalisations démocratiques des États-nations européennes, par-delà leurs propres limites', in HABERMAS Jürgen: Pourquoi l'Europe a-t-elle besoin d'un cadre constitutionnel?, Cahiers de l'Urmis, 7, 2001 ( can be found here: http://urmis.revues.org/10).

investigations and prosecutions. It can also be used to for the purpose of enforcing court decisions. The usual mechanism is 'letters rogatory' for mutual legal assistance; and the traditional way to conduct business goes from the requesting court through the Ministry of Justice to the Foreign Affairs Ministry of the requesting state to be transmitted via diplomatic channels to its counterpart in the requested state, where the process is reproduced down to the court which can provide assistance, according to the judicial organization there. This takes time and makes it difficult to adjust the request to new developments in the case, if they arise. And there is ample room for refusing assistance.

The practice of MLA developed from this rigid system of letters rogatory, and it is not unusual these days to find mutual assistance requests directly sent to the designated 'central authorities' within each state. In contemporary practice, such requests are still largely made on the basis of reciprocity although may also be made pursuant to bilateral and multilateral treaties that obligate up to certain extent countries to provide assistance.

A third step is constituted by simplified forms of mutual assistance, making it more expedient according to the level of connection between the respective legal orders. The Council of Europe has provided the framework behind the different multilateral treaties that implement mutual assistance in Europe. The basic instrument here is still the 1959 European Convention on Mutual Assistance in Criminal Matters, ratified by all 47 member states of the Council of Europe, and its additional protocols. The MLA Convention allows for application of other conventions, treaties and agreements on specific aspects of mutual assistance in a given field (such as service of documents etc.); and Article 26(3) allows for concluding treaties and agreements supplementing it and, therefore, MLA must be applied in accordance with such conventions, treaties and agreements. The EU has added to this framework with an agreement between EU countries that enables more fluid cooperation: the Convention on Mutual Assistance in Criminal Matters from 2000, which strengthens cooperation between judicial, police and customs authorities.

Generally speaking, cooperation according to the MLA system is based upon international conventions, which derive from two main ideas. First, the principle of sovereignty, that explains why conventions incorporate safeguards to ensure that the requested state can refuse cooperation on diverse grounds; second, the principle of heterogeneity of legal orders, which imposes a systemic distrust in foreign legal systems, considered to be hard to harmonize with national proceedings or different in the level of procedural guarantees. It is true, however, that there is a so called "second generation" of MLA instruments (such as the 1985 Council of Europe Convention on the Transfer of Sentenced Persons) that foresee a mechanism for the so called 'transmission of resolutions'. But the basic principles remain the same; and the foreign judicial decision is only implemented once (and if) it is adapted and transformed into a national decision.

In contrast to this, in the EU mechanisms for MLA are being progressively replaced by mutual recognition instruments, as these two aforementioned principles seem progressively incongruous with its objectives and acquis. Member States have surrendered part of their sovereignty to achieve a common decision ground on fields that were

regarded essential to recognize state power, and their legal orders become more and more homogeneous. Although their national criminal law systems are different, they share a common set of principles and offer equivalent solutions to questions that are in most cases very similar.

The ASFJ promotes a European judicial area, which has to be understood as unified space throughout which court decisions can freely circulate and be effective, according to the well assumed precedents of free movement of persons, capitals and goods[181]. The basis is in the principle of mutual trust, which entails the assumption that foreign judicial decisions are basically equivalent to national ones, as decisions from one city court are equivalent to those of another inside the borders of any given country.

In the EU the system adopts the version of a selective –non absolute- interoperability (to be understood as the ability of a system to work with or use the parts or elements of another system). This happens in two ways: a) it is only applicable to certain types of court decisions (although the number is increased by any new instrument passed by the EU lawmaker); b) court decisions are recognized not per se, but as long as they are incorporated to a title with executive force, harmonized and common (even in its physical appearance) for all courts within the Union. It has to be added that this system still allows for a certain margin of appreciation on the part of the court that is addressed with the executive title, as long as it still has some grounds to refuse recognition. But these grounds are no longer to be found in the municipal legal order of the recognizing court: they are listed exhaustively in the EU applicable instrument. And the interpretation of that instrument is the sole responsibility of the EU Court of Justice, to ensure all national judges are using uniform concepts. Recognition, thus, is not automatic; but in practice results are very similar. And when problems arise in connection with concrete national legal requirements to comply with, the system shows a remarkable ability to react efficiently, as we shall discuss later.

We find here a system that allows for considerable advantages compared with that of traditional MLA: direct contact between courts against diplomatic channels, real possibilities to react expediently and provide effectiveness and enforcement, residual grounds not to recognize foreign court decisions. Recognition is guaranteed by the uniform configuration of national laws of the requisites to transmit decisions (as defined in framework decisions and directives) with which Member States are to comply when adapting their procedural rules, with the result of these requisites being the same in all national procedural codes. Therefore, competences between the issuing court and the recognizing court

[181] ORDOÑEZ, David: El espacio europeo de libertad, seguridad y justicia después del Tratado de Lisboa: legitimidad democrática y control judicial, in MOLINA DEL POZO, Carlos and PIZZOLO, Calogero, La Administración de Justica en la Unión Europea y en el Mercosur, Eudeba, Buenos Aires, 2011.

are functionally distributed. There is a single process to achieve results from a judicial decision, but two courts are called upon to ensure it, at the stage of recognition and at the stage of execution. In the first, the addressed court cannot enter neither into the merits nor into the proceedings that result in the decision; in the second, the addressed court cannot execute but in the terms contained in the addressed decision and cannot modify it even if circumstances vary (although it can inform the issuing court and wait for its reaction). As long as the transmitted decision is considered similar to any other from a local jurisdiction, remedies against it are the same as those against national decisions.

As advanced, all this is based upon the idea of mutual trust, or the existence of a legal common ground among local legal orders of Member States, despite their divergences, which are regarded as non-essential. It inspires legislation from national parliaments and it helps in the task of legal interpretation by the courts. At the same time it is based in a second principle, namely equivalence, which represents the implementation of the principle of trust at procedural level. Procedural guarantees in different legal systems are acknowledged as basically identical, and differences in proceedings –despite being easily identifiable- are not considered to jeopardize fairness and due process of law. Therefore, recognizing courts are in a position to act when confronted with a foreign decision as they would in the face of a national one. The body of framework decisions and directives regulating procedural rights in EU Law contains the catalogue of decisions that can cross borders without obstacles because they are 'equivalent decisions'[182].

This system is incorporated in Article 82.1 of the TFEU in the following terms: judicial cooperation in criminal matters in the Union shall be based on the principle of mutual recognition of judgments and judicial decisions.

**1.4 Where are the sources of Criminal Law to be found within the European Union legal order?**

When analysing Criminal Law rules within the EU legal order an unavoidable task is to question where do these rules come from, because the answer will help to understand their meaning and purpose. This question can be answered in two different ways.

A. On the one hand it is legitimate to discuss what the interests these rules protect, as provisions in the law are to be interpreted taking into account their goal.

1. Looking back at their development process, the first idea connecting EU and penal law arises from the concept of protection of European Community interests. According to its classical formulation by the Court of Justice, (i)t should be

[182] DE JORGE, Luis Francisco: La Cooperación judicial penal en la UE: aproximación a una teoría general del reconocimiento mutuo; Revista Aranzadi Unión Europea, n. 4 (2015).

observed that where Community legislation does not specifically provide any penalty for an infringement or refers for that purpose to national laws, regulations and administrative provisions, Article 5 of the Treaty requires the Member States to take all measures necessary to guarantee the application and effectiveness of Community law. For that purpose, whilst the choice of penalties remains within their discretion, they must ensure in particular that infringements of Community law are penalized under conditions, both procedural and substantive, which are analogous to those applicable to infringements of national law of a similar nature and importance and which, in any event, make the penalty effective, proportionate and dissuasive[183]. These three features (discretion as to the means, analogy and effectiveness as to the results) constitute what is known as the 'principle of assimilation' (a version of the principle of loyalty, of widespread application to the enforcement of any common policy), meaning the obligation under EU Law to ensure protection for EU interests is equivalent or 'assimilated' to that of national interests. This was the first modality for national penal rules deriving from a rule of European Law.

An example of how this works in practice can be found in the so-called 'protection of EU public money', inscribed now in Articles 310(6), 325, 85 and 86 of the TFEU. Commission police statements define protection of taxpayers' money in a context of budgetary austerity and the fight against misuse of EU public money as a priority for the Union. This priority is reflected in the Lisbon Treaty which sets out an obligation, and corresponding legal bases, to act for the protection of EU financial interests, including by means of criminal law. According to the Commission there is ample room for improvement in Criminal Law because of shortcomings in the national legal frameworks for the protection of public money: EU rules, hampered as they are by the incomplete and inadequate transposition of the Convention on the protection of the financial interests, have had little impact. Consequently, Member States' judicial authorities use their traditional national criminal law tools to fight crime against the EU budget: there are different ways and means to tackle a single reality. This is hardly appropriate for the complex cases which by their nature go beyond the national context and require more than a national response[184].

2. The second reason why national authorities have to co-operate establishing Criminal Law rules derives from the idea of implied competences of the EU. The concept is used in the field of international relations of the EU in connection to its ability to conclude international agreements. But from here it has evolved into what be called an internal version. Although neither criminal law nor the rules of criminal procedure fall within the Community's competence, according to the EU Court

[183] C-68/88, Commission of the European Communities v Hellenic Republic, paragraphs 23 and 24.
[184] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the protection of the financial interests of the European Union by criminal law and by administrative investigations. An integrated policy to safeguard taxpayers' money COM/2011/0293 (available here: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52011DC0293).

–in a seminal and well known leading case- this finding does not prevent the Community legislature, when the application of effective, proportionate and dissuasive criminal penalties by the competent national authorities is an essential measure for combating serious environmental offences, from taking measures which relate to the criminal law of the Member States which it considers necessary in order to ensure that the rules which it lays down on environmental protection are fully effective[185]. Therefore, although at the time of this case there was no European explicit competence to establish criminal rules against environmental crime, Council Framework Decision 2003/80/JHA of 27 January 2003 on the protection of the environment through criminal law was considered compatible with Treaty provisions because these had to be interpreted in a way that they vested upon EU institutions an implicit competence to legislate in the field of Criminal Law, provided they satisfy that such legislation is needed for the protection of the environment, which is a common policy in the Treaty.

The second cornerstone was laid by the Court two years later. In this case an important clarification was provided: 'the determination of the type and level of the criminal penalties to be applied' is to be considered excluded from the scope of Community competence[186]. However, it remained less clear what the extent of this implicit competence was to be understood (the case dealt both with transport and environmental policies, but the Court only relied on consideration of this later, as in the precedent case).

3. Lastly, the competence can be explicitly written in the text of the Treaties. In this case we find an autonomous power to enact Criminal Law, both substantial and procedural. It is what happens nowadays in Articles 82 and 83 of the TFEU. We shall examine these later.

B. On the other hand, it is possible to look at the question of which source of law the European penal rule is formulated. This will have some points in common with the previous way to address the problem; but it also shows some differences that help to understand things better.

[185] Commission v Council (C-173/03), 13 September 2005, paragraph 48.

[186] Commission v. Council (C- 440/05), 23 Oct. 2007, paragraph 70.

National legal systems of Criminal Law usually consist of three different sets of rules: some deal with definitions of criminal offences and sanctions attached to them; some prescribe how investigative and adjudicating authorities have to discharge their duties; finally, some set up institutions and bodies and vest upon them powers to enforce or help to enforce Criminal Law. A similar pattern can be found in EU Criminal Law.

1. Regarding substantive law, it is possible to differentiate between indirect sources, such as sectorial instruments and


implied competences, as discussed above; and a direct source, namely Article 83 of the TFEU.

On what has been denominated sectorial instruments, there are different types of them in which it is possible to find rules that Member States have to comply with when drafting their criminal legislation. For example, when the Council adopted 2002/629/JHA Council Framework Decision of 19 July 2002, on combating trafficking in human beings, it imposed obligations on Member States such as: a) to include in their penal codes as criminal offences the conducts that it describes (the recruitment, transportation, transfer, harbouring, subsequent reception of a person, including exchange or transfer of control over that person) under the circumstances that it details (using coercion, force or threat, deceit or fraud, abusing authority or of a position of vulnerability, or mediating payments or benefits); b) making instigation, aiding, abetting and attempt also punishable; c) by providing punishments by terms of imprisonment with a maximum penalty that is not less than eight years where it has been committed in any of the circumstances listed; d) determination of the cases in which legal persons are liable and the sanction to be imposed; e) in which cases each state will have jurisdiction to prosecute and to convict; f) what rights have to be recognized for the victims. Thus, the EU legislator is deciding on most of the contents of national penal provisions in this field, as long as the play field of the traditional –internal- criminal law maker is severely restricted. And –in this example- it was happening ten years before Lisbon.

After Lisbon, the leading rule is in Article 83 of the TFEU, according to which the EU may, by means of directives, establish minimum rules concerning the definition of criminal offences and sanctions in areas which: a) are of particularly serious crime; and, b) have a cross-border dimension (resulting from the nature or impact of such offences or from a special need to combat them on a common basis). These areas are expressly identified as: terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organized crime. There is a possibility to update this list 'on the basis of developments in crime'.

2. On procedural law, a similar division can be established, the direct source being Article 82.2 of the TFEU; and as indirect sources the co-operation agreements and conventions among Member States to facilitate MLA, Schengen acquis interpretation by the European Court of Justice and the EU Charter of Fundamental Rights.

Article 82.2 also provides for the EU competence, this time only by means of directives, to establish minimum rules: a) to the extent necessary to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation; b) in criminal matters having a cross-border dimension; and, c) taking into account the differences between the legal traditions and systems of the Member States. Matters likely to fall under this common denominator are: a) mutual admissibility of evidence between Member States; b) the rights of individuals in criminal procedure; c) the rights of victims of crime; d) any other specific aspects of criminal procedure which the Council has identified in advance. It is important that it is expressly foreseen that adoption of these minimum rules shall not prevent Member States from maintaining or introducing a higher level of protection for individuals.

In what regards indirect sources, co-operation instruments contain rules to harmonize and approximate Procedural Criminal Law. The two most recent examples for this can be found in Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters and in Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union. However, the most relevant instrument to quote here is still Council Act of 29 May 2000 establishing, in accordance with Article 34 of the Treaty on European Union, the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union.

Schengen acquis interpretation is relevant because this was the only field before Lisbon in which the Court of Justice had any jurisdiction to decide on the meaning of EU rules concerning Criminal Procedural Law. Judgements in this field allow us to anticipate what will be the direction of case law now that the division between pillars has been abolished and the Court is competent to adjudicate in the AFSJ. The most clear example is the case-law on ne bis in idem, in which a series of judgments interpret the principle as defined in Article 54 of the Convention implementing the Schengen Agreement: of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany

and the French Republic on the gradual abolition of checks at their common borders: 'A person whose trial has been finally disposed of in one Contracting Party may not be prosecuted in another Contracting Party for the same acts provided that, if a penalty has been imposed, it has been enforced, is actually in the process of being enforced or can no longer be enforced under the laws of the sentencing Contracting Party'[187]. The reality is that such a simple rule, which any judge would in principle feel familiar with and regard as identifiable in terms of national law, widely varies in its interpretation in the different Member States. A look at national case law shows that the idea of what has to be understood by each of the elements of the definition is usually diverse. The task of forging a European concept of ne bis in idem is called to be extremely relevant because the right not to be tried or punished twice in criminal proceedings for the same criminal offence has been included as Article 50 of the Charter of Fundamental Rights[188]. When dealing with a legal provision subject to the uniform interpretation of the Charter, national judges will have to implement the common concept of ne bis in idem, irrespective of what is understood as such under national law[189].

3. Finally, a number of various instruments set up the functioning of ancillary institutions such as Eurojust, the future European Public Prosecution Office, the European Judicial Network, the specialized networks (on joint investigation teams, genocide crimes against humanity and war crimes, cooperation between assets recovery offices and corruption), and other (the European Police Office –Europol-, the European Anti-Fraud Office –OLAF-, the Council's Joint Situation Centre –with competences not restricted to this area-, or the European Agency for the Management of Operational Cooperation at the External Borders –Frontex, again with only a fraction of its mission connected with the enforcement of Criminal Law-).

Considering these different sources and their contents it is possible to conclude that the structure and subject matter of EU Criminal Law is conforming more and more to what we are used to see under national legislations; and that the fragmentary, piecemeal approach is losing ground in favor of a more comprehensive area of legislation.

**1.5 How fair is EU Criminal Law?**

The field we have so far covered provides some ground to allow conclusions on the question of efficiency of the new European Criminal Law, or its ability to pursue its goal, namely to ensure a common space of justice within the EU

[187] Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders.
[188] 'No one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law.'
[189] C-617/10, Åklagaren v. Hans Åkerberg Fransson, 26 February 2013.

irrespective of national borders. But because of the discussed connection between Criminal Procedural Law and fundamental rights it is as well relevant to consider up to what extent it helps preserving fairness of proceedings.

It is important not to forget that effective cooperation in the field of procedural law was largely incentivized by threats derived from terrorist attacks suffered by the United States of America on September 11, 2001. After this date fight against terrorism was placed high in EU agenda, the nature of this crime making judicial cooperation among states indispensable. In this context, the decision to set up the European Arrest Warrant was linked to international conjuncture. It has been pointed out that in this fight against terrorism two important risks concur, namely the creation of a kind of 'Security Criminal Law' from a material point of view and the arguable weakening of guarantees derived from some of those procedural measures[190].

Among us, a common European procedural law based mainly in the principle of efficiency has raised alarms from various and very different sides.

Among the ranks of extreme political Euroscepticism, new criminal procedural rules have been criticized in the most severe terms: 'The mess which the EU innovations have made of our extradition system is the first sinister sign of the grave dangers stemming from the utopian idea of a single EU legal system. Our liberties are being steadily and systematically undermined, replaced with the Orwellian 'freedom, security and justice' of the EU. It is high time to say a clear 'no' to this dangerous nonsense. It is time to return to the reliable guarantees of real freedom, real security and real justice. The ones we in this country enjoyed for centuries. The ones we so complacently have been taking for granted. Today, like so many times in the past, we have to stand up and fight for our freedom, our security, our justice – lest we lose them forever'[191].

As it can be seen, the European Arrest Warrant is the legal instrument principally responsible for inflaming criticisms. Even respected NGOs have led campaigns against its indiscriminate use. Fair Trials International has produced a briefing paper setting out four key reforms to the European Arrest Warrant Framework Decision with the aim

[190] '(…) these post-September 11 laws, when viewed as a whole, represent a broad and dangerous expansion of government powers to investigate, arrest, detain, and prosecute individuals at the expense of due process, judicial oversight, and public transparency. (…) Many of the counterterrorism laws also contain changes to procedural rules—which are designed to ensure that the justice system provides due process—that jeopardize basic human rights and fair trial guarantees.' Human Rights Watch: 2012 Report 'In the Name of Security. Counterterrorism Laws Worldwide since September 11' (also available here: https://www.hrw.org/sites/default/files/reports/global0612ForUpload_1.pdf).

[191] See the report 'Freedom, Security & Justice? or The Creation of a European Union Police State', by UKIP Gerard Batten MEP – quote is from page 46- (available here: http://www.ukipmeps.org/uploads/file/batten-creation-eu-police-state.pdf)

to a more effective, efficient and just extradition system, improvements in mutual trust between EU Member States, and financial savings. The proposed reforms set out include: the need for a proportionality test to stop the misuse of EAWs for minor offences; deferred surrender until the prosecution in the issuing State is trial-ready; and a requirement on issuing States to remove EAWs where surrender has been refused on proper grounds by another State[192].

Criticism has also been addressed from the academic world; among others a number of scholars from different universities in several European countries have signed 'A Manifesto on European Criminal Procedure Law', intended as 'an evaluation tool that can be used to evaluate new proposals for European legislation with an influence on criminal law'. By their analysis they remind the European legislator that 'the laws of criminal procedure and mutual legal assistance, which recently have increasingly been shaped by Union legislation, must adhere to the highest standards of the rule of law and must continuously guarantee fundamental rights, notwithstanding the fact that in this area of law various interests of states, societies and individuals have to be balanced'. Adding that '(b)eing aware that effective criminal justice is a basic prerequisite for peaceful coexistence in any society, the undersigned emphasize that the inevitable clash with the fundamental rights of those persons against whom the proceeding is conducted or who are otherwise affected by it may not, however, be resolved one-sidedly in favor of the criminal prosecution (…)'. Therefore they demand the following: a) limitation of mutual recognition, through the rights of the individual, the national identity and ordre public of the Member States and the principle of proportionality; b) balance of public interest in criminal prosecution, the Member State's interest in preserving the national identity, and the affected citizens' interests are all balanced on the basis of the principle of proportionality; c) respect for the principle of legality and judicial principles in European criminal proceedings; d) preservation of coherence with substantive criminal law, which it is supposed to enforce; e) observance of the principle of subsidiarity, according to which the national legislator should have priority over the Union legislator to the extent that the Member State can deal with a given issue, so that citizens will be brought closer to decision making on questions of criminal procedure law.; f) compensation of deficits in the European criminal proceeding providing for safety mechanisms in each respective legal instrument[193].

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[192] It can be found here: http://www.fairtrials.org/documents/EAW_EP_own_initiative_legislative_report.pdf.
FTI shows on its website examples in which the use of the EAW resulted in fundamental rights severely affected. FTI is UK charity funded by law firms, barristers chambers and the European Commission

[193] European Criminal Policy Initiative: 'A Manifesto on European Criminal Procedure Law', published in various languages in ZIS 12/2009, and available online at: http://www.zis-online.com/dat/artikel/2009_12_383.pdf.
Financially supported by the European Commission, the European Criminal Policy Initiative is formed by 14 criminal law professors from 10 Member States 'to provide an in-depth analysis of the previous and proposed legal acts aimed at harmonising the substantive criminal laws of the Member States and at the same time to develop principles for a European policy on criminal procedure'. A list of the ECPI members can be found at the end of the Manifesto.

The EU is not absent from this debate nor does it disregard protection of rights and fairness of proceedings as derived from the use of common instruments by national jurisdictions. The Court of Justice has had the opportunity to consider remedies to be implemented by local judges to balance the principle of mutual recognition. And the Commission is seeking to propose legislation to meet the demands for more guarantees in this field; a good example for this is the 2011 Green Paper 'Strengthening mutual trust in the European judicial area - A Green Paper on the application of EU criminal justice legislation in the field of detention', aimed at exploring the extent to which detention issues following a criminal offence impact on mutual trust, and consequently on mutual recognition and judicial cooperation generally within the European Union. Acknowledging that detention conditions and prison management are the responsibility of Member States, the Commission showed interested in this issue because of the central importance of the principle of mutual recognition of judicial decisions for the area of freedom, security and justice. The call for contributions resulted in a large number of them from Member State's and international institutions as well as from civil society, non-governmental organizations and professional bodies[194].

In what regards Luxembourg jurisprudence, the instrument most often coming under the scrutiny of the Court has been the FD 2001/220/JHA on the standing of victims in criminal proceedings. The Court has constantly reminded that that the provisions of the Framework Decision must be interpreted in such a way that fundamental rights are respected[195].

An issue of importance related to these cases was the extension of the principle of direct effect of Framework Decisions passed under the provisions of the third pillar. The relevant judgment here is Pupino[196]. Its doctrine is basically the same that was well known for Directives in EC Law; what is new is the emphasis on non-retroactivity stating that this principle prevents criminal liability of persons who contravene the provisions of a framework decision being determined or aggravated on the basis of such a FD alone, independently of an implementing law (para 44 and 45). It ratifies what the Court had already said in Berlusconi and others[197]: a) where a Directive imposes the obligation to establish sanctions and the Member State does not implement it, even if the sanctions are well defined (i.a., as to the description of the punishable conduct and the punishment to be imposed) the individual cannot be sanctioned (in what constitutes an exemption to the general principles of primacy and conforming interpretation); b) if the Member State does not implement the Directive correctly (because the new national law is against EU law) the most favorable law has to be enforced by

[194] To be found at: http://ec.europa.eu/justice/newsroom/criminal/opinion/110614_en.htm
[195] E.g.: Case C-105/03, Pupino, 16 June 2005, paragraph 59; Case C-404/07, Katz, 9 October 2008, paragraph 48; Cases C-483/09 and C-1/10, Gueye et Sameron Sanchez, 15 Sept. 2010, paragraph 55; case C-79/11, M.X., 21 December 2011, paragraph 43.
[196] Quoted in the previous footnote
[197] C-387/02, C-391/02 en C-403/02, Silvio Berlusconi, Sergio Adelchi en Marcello Dell'Utri e.a., 3 May 2005

national courts (again an exception, this time on the basis of the principle of non-retroactivity and application of the most favorable penal law). Principles that as a rule are regarded by the Court as unavoidable to ensure uniform application and effectiveness of EU law yield in the face of the protection of individual rights, within the framework of Criminal Law.

But perhaps the most relevant case-law regarding criminal proceedings is the one in connection with the EAW, which as has been mentioned is the most controversial instrument and better represents what the consequences of mutual recognition may mean. The Court has adopted a clear position in favor of individual rights in the interpretation of several of its clauses. Thus in Advocaten[198] reaffirmed that according to Article 34(2)(b) TEU, Framework Decisions may be adopted only for the purpose of approximation of the laws and regulations of the Member States; and that the EAW FD, in so far as it sets aside verification of the requirement of double criminality for the offences listed therein, is compatible with Article 6(2) of the EU, and, more specifically, with the principle of legality in criminal proceedings and with the principle of equality and non-discrimination. In Kozlowski[199] the Court clarified what is to be understood under 'staying in' and 'resident' of the executing State used in Art. 4, paragraph 6 of the FD, definitions that cannot be left to the assessment of each Member State but must be given an autonomous and uniform interpretation (paragraphs 41-43). In Wolzemburg[200] and Lopes Da Silva[201] ruled that Dutch and French laws were incompatible with the FD as long as they established different regimes for the surrender of own nationals and nationals of other Member States for the purposes of execution of a custodial sentence imposed by final judicial decision.

Radu[202] is a case in which the Court essays to reconcile automatic recognition and human rights, as the matter in question (issuing judicial authorities not hearing the requested person before the EAW was issued) does not constitute a ground for refusal in the FD: 'The competent judicial authority of the Member State executing a European arrest warrant can refuse the request for surrender without being in breach of the obligations authorised by the founding Treaties and the other provisions of European Union law, where it is shown that the human rights of the person whose surrender is requested have been infringed, or will be infringed, as part of or following the surrender process. However, such a refusal will be competent only in exceptional circumstances. In cases involving Articles 5 and 6 of the Convention and/or Articles 6, 47 and 48 of the Charter, the infringement in question must be such as fundamentally to destroy the fairness of the process. The person alleging infringement must persuade the decision-maker that his objections are substantially well founded. Past infringements that are capable of remedy will not found such an objection' (paragraph 97).

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198 C-303/05, ASBL Advocaten voor de wereld, 3 May 2007
199 C- 66/0817, Szymon Kozlowski, 17 July 2008
200 C-123/08, Wolzemburg, 6 October 2009
201 C-42/11, Lopes Da Silva Jorge, 5 September 2012
202 C-396/11, Ciprian Vasile Radu, 29 January 2013

Melloni[203] is a touchstone regarding human rights, and a case which reveals some of the contradictory issues that need fine tuning in the near future. The Spanish Constitutional Court addressed the European Court of Justice to seek interpretation of several provisions in the FD and the Charter of Fundamental rights. The Court answered: a) Article 4a(1) of FD precludes national judicial authorities from making the execution of a EAW conditional upon the conviction in question being open to review, in order to guarantee the rights of defence of the person requested under the warrant; b) Article 4a(1) of FD is compatible with the requirements deriving from the right to an effective judicial remedy and to a fair trial, provided for in Article 47 of the Charter and from the rights of defence guaranteed under Article 48(2) of the Charter; c) Article 53[204] of the Charter must not be interpreted as allowing the executing Member State to make the surrender of a person convicted in absentia conditional upon the conviction being open to review in the issuing Member State, in order to avoid an adverse effect on the right to a fair trial and the rights of the defence guaranteed by its constitution. The result is that although Mr. Melloni would not have been surrendered according to national procedure rules it had to be surrendered following EU rules.

This seems to be in compliance with the principles of primacy and mutual trust[205]. But it could seem to be in contrast with the rule according to which EU Criminal Procedural law cannot entail a decrease in the level of protection for individuals already in force in national law or to increase it[206]. This principle is expressly identified as 'non-regression clause' in the latest Criminal Procedure directives in the following terms: 'Nothing in this Directive shall be construed as limiting or derogating from any of the rights and procedural safeguards that are ensured under the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Charter of Fundamental Rights of the European Union, other relevant provisions of international law or the law of any Member State which provides a higher level of protection'[207]. The difference of this clause when compared with the wording of Article 53 of the Charter lies in the inclusion of the higher level of protection contained in national law. Anyhow, this benchmark is absent from the EAW FD.

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[203] C-399/11, Melloni, 26 February 2013

[204] 'Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union, the Community or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions.'

[205] Quoted as the basis for the Court's response in paragraphs 58-59 and 63, respectively

[206] Article 82.2 TFEU: Adoption of the minimum rules referred to in this paragraph shall not prevent Member States from maintaining or introducing a higher level of protection for individuals.

[207] Article 8, Directive 2010/64/EU of 20 October 2010 of the European Parliament and of the Council on the right to interpretation and translation in criminal proceedings; Article 10, Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings; Article 14, DIRECTIVE 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings 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

The national rule that precludes surrender when the individual has no right to challenge the conviction in absentia adds in the direction of a high degree of protection for individual rights. It can be argued that the principle of trust in the way other jurisdictions –inside the EU- carry out proceedings makes this safeguard redundant. But in the case that came under the scrutiny of the EU Court, the national rule precluding surrender was not connected with distrust in foreign courts but with a general principle in Spanish law according to which no enforcement is possible of a conviction in absentia to imprisonment for two years or more, irrespective of the fact what court –national or not- the decision comes from. The basis for the discussion would be different if the safeguards against in absentia convictions were to be enforced only against foreign court decisions.

However, the Court is following a consistent line in this field: although the principle of effectiveness of EU Criminal Law can be suspended in certain cases in favor of individual rights (such as in Pupino and in Berlusconi et al. cases), the principle of automatic recognition will normally overrule allegations concerning the protection of individual guarantees (save in very exceptional situations, such as those of the Radu case). And the rationale is clear: if recognition is to be challenged what is in danger is mutual trust (and the feasibility of a common judicial area, as recognized in Article 82.1 of the TFEU). That is why incorporation of the 'non-regression clause' is reserved to those directives that deal with guarantees to be enforced by Member States that do not affect mutual recognition. However, two critical points have to be retained: there are situations in which grounds for non-recognition are not connected with lack of mutual trust; mutual trust is jeopardized by a fact that cannot be ignored and that is at the basis of the criticism against recognition, namely that procedural guarantees are not completely equivalent in terms of safeguarding individual rights throughout the EU.

On the side of the EU lawmaker there are also some reactions to the consequences of the pressure which is applied on national courts by the principle of mutual recognition. Strong line instruments as the EAW are being recently counterbalanced by others more focused on guarantees. And some of these try to react against some undesired consequences derived from expedient surrender via the EAW. Statistics show that there is a tendency on the part of some courts to decide in favor of deprivation of liberty before trial when the investigated person is a foreigner, possibly on the grounds of his/her possibilities to abscond. As the EAW provides for a fast mechanism to have suspects surrendered, the combination of both facts has shown that in some jurisdictions non-resident EU citizens end up in pre-trial detention on grounds and for periods that may rightly be considered unfair. Council Framework Decision 2009/829/JHA of 23 October 2009 offers alternatives to pre-trial detention to be implemented by the courts of the state in which the

investigated person is residing, at the request of the court of criminal investigation [208]. This piece of legislation clearly tries to face some of the hardest criticism on the EAW that has been considered above and to restore balance between efficiency and guarantees.

**1.6 European Union Criminal Law in the making: the result of a double dialogue.**

The singularity of the European legal order lies mainly in the fact that, by contrast to what happens at the national level, its substance is formed by common principles and values extracted from outside, that emerge as the constitutional basis of the Union; and that EU law performs the role of inspiring and orienting national legislation in a circular movement that finds new formulations and enriches the process of defining its foundations[209]. In this sense, it represents a continuous dialogue among legal orders, traditions and practices.

At the same time, when EU Law in seen in practice, in the process of being identified and formulated, another singularity arises: the law maker is not alone in the limelight; the law interpreter and enforcer prominently shares the center of the stage. Dialogue between jurisdictions has been responsible for the largest part of the task of providing sense to the European legal order. The doubts and the alternatives that national judges have had to face when ensuring the effectiveness of the law and the way in which they have formulated them together with the possible answers have given the chance for the European Court to fill with life the limitations in the letter of the Treaties. As PIZZORUSSO has noted, the only source of EU Law independent from compromises among Member States and completely relying in constitutional common traditions, is the Court case law[210].

In the field of Criminal Law the expansion of EU legislation and the consolidation of the jurisdiction of the European Court of Justice have brought changes in the adjudication of cases by national judges. Whereas is the past Criminal Law used to be regarded as a field remote from EU intervention, more and more crime definitions, penalties and

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[208] Council Framework Decision 2009/829/JHA of 23 October 2009 on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention. Paragraph 5 of the preamble states: As regards the detention of persons subject to criminal proceedings, there is a risk of different treatment between those who are resident in the trial state and those who are not: a non-resident risks being remanded in custody pending trial even where, in similar circumstances, a resident would not. In a common European area of justice without internal borders, it is necessary to take action to ensure that a person subject to criminal proceedings who is not resident in the trial state is not treated any differently from a person subject to criminal proceedings who is so resident.

[209] BONNET, Baptiste, quoted above, p.458

[210] 'Allo stato attuale, pertanto, la sola componente del diritto europeo che non trae origine exclusivamente dagli accordi fra gli stati –e che non ha quindi carattere essenzialmente eteronomo- è rappresentata dal diritto giurisprudenziale ellaborato dalla Corte di giustizia, nell'ambito del quale il riconoscimento delle tradizione constituzionale comuni agli stati membri come "principi generali del diritto comunitario" ha un ruolo di particolare rilievo' (PIZZORUSSO Alessandro: Il patrimonio costituzionale europeo, Il Mulino, 2002, p. 182).

procedural rules derive from harmonizing instruments. The direct relationship of these matters with fundamental rights and the entry into force of the European Charter of Fundamental Rights entails technical difficulties that may seem unfamiliar for some national judges. Criminal offences incorporated into the Penal Codes or the Penal Procedure Codes via implementation of EU rules have to comply with EU principles such as effectiveness and mutual recognition, and therefore are to be interpreted in coherence with rights in the Charter irrespective of what is provided for in the national constitution. Indeed, as the example provided by case law on the Schengen acquis shows, the same fundamental right may have a different meaning from one jurisdiction to another; accordingly, the coherence of EU Law demands a common definition for rights in the Charter, irrespective of the national jurisdiction called to enforce them. The outcome is that a different concept, contents and limits for the same fundamental right may exist for different provisions in the penal codes of each country, depending on whether their origins are purely national or European[211]. And this is something that is being achieved by the case law.

As discussed above, the respect for individual rights is an issue that will come up consistently before the courts which have to decide in everyday cases. The reluctance of the European Court of Justice to consider new lines of interpretation for the principle of mutual recognition is understandable taking into account what is at stake, and how clearly the lawmaker has drafted instruments for judicial cooperation in criminal matters (above all, the EAW). However, some decisions help keeping confidence in future developments, as a reflection of how recent instruments are stressing the need to improve not only efficiency but also guarantees. The situation has led to consistent criticism[212] and national judges are called to play a major role to play in approximating the mind of the Luxembourg Court to what is actually happening in palaces of justice around the EU.

All these facts call for the deepening of the dialogue between national courts and the European Court of Justice; both are dependent on each other. The former to obtain decisions on the validity or the interpretation of EU rules they need to enforce the law in cases pending before them; the later to discharge the best part of its mission, because in most cases it will continue to be for the national judges to give the Luxembourg Court the possibility to declare the law through

[211] For a more detailed discussion on this, DA SILVA, Juan Carlos: El Juez Penal Europeo en los tiempos del Tratado de Lisboa; in: Noticias de la UE, Nº 291, 2009, p. 105-116.

[212] E.g.: '(…) it might be asked following the recent judgement of the European Court of Human Rights in M.S.S. v. Belgium and Greece whether the EU might need to treat JHA cooperation differently again from other areas of EU law in some respects, not to restore the discredited era of intergovernmentalism, but to weaken the near-absolute rule of mutual trust which prevails in JHA matters, and to commit greater resources to ensuring that the EU measures in this area which aim to secure the human rights of persons are actually being carried out'. PEERS Steve, Mission accomplished? EU Justice and Home Affairs Law after the Treaty of Lisbon, Common Market Law Review 48: 661-693, 2011, p.693.

preliminary rulings. In the understanding that, at the end of the day, both share the responsibility of being European jurisdictions and have therefore a specific role to play in the development of EU law.

# PART III. FINAL CONFERENCE

Claudia Jderu

Laurențiu Sorescu

## Section 1 - General remarks

The goal of the final conference was to discuss upon the possible evolution of the EU Criminal Law. Although there were a lot of interesting possible new ideas on the move, we have to stick with those that were closely related to our topic.

We had to explain to the participants the need to much more European integration in this field. We also had to let them know that even if there no common EU rules concerning some issues, the principles are enshrined in the jurisprudence of the ECtHR.

The conference had to be the next step from the seminars. The seminars have dealt with the issue of rules concerning procedural rights already in place and with practical issues that could derive from them. The conference handled also the issue of procedural rights of the victims and also further procedural rights that are to be granted to the accused persons.

We had to take into account that a proper balance is needed between crime control throughout the European Union and procedural rights of the accused persons. Even in theory this balance is hard to get. In practical cases it is a little bit much complicated to obtain the balance than in theory.

The conference started with a short overview on procedural rights. The minimal procedural standards of the accused persons in the EU have a good starting point from the jurisprudence of the ECtHR. Even if the accession to the ECHR is at this moment in stand-by, the Charter is pursuant to the principles developed by the ECtHR. The Charter has the legal value of the treaties and could be invoked by the citizen of the EU.

Starting from the principles laid down in the Charter and from the jurisprudence of the ECtHR, as the Treaty of Lisbon allowed, were enacted Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings, Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings and Directive 2013/48/EU on the

right of access to a lawyer in criminal proceedings 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 that is why the conference started with the presentation of these legal instruments.

The presentation made by Mr. Juan Carlos Da Silva tried to draft an overview image of the procedural rights appeared as a need to balance the existence of the European Arrest Warrant and to enhance better mutual cooperation and mutual trust between judicial authorities throughout the European Union.

The level of the procedural rights can differ throughout the European Union. There were discussions concerning these issues between participants. The participants admitted that the national legal framework was harmonized, but there are many practical problems at national level.

There are issues concerning the rights of the accused persons that are treated rather divergent.

In Italy, the handcuffs should be removed in front of the judge. The defendant can ask if he is investigated. The answer is always there is no communicable crime (even if the defendant i sunder investigation). The access to the file is granted at the end of the investigation. There are problems with the interpretation of the criminals that come from Nigeria since they speak a special type of English, the Pidgin. They have problems finding translators because the language is spoken only in little communities and all the speakers are linked to that community. The suspects, before the reform of 1999, never spoke to the prosecutor as they had not the opportunity. Now an indictment can be issued only if the defendant had the chance to make a statement. The investigators should announce the lawyer of the suspect that a search is going to be made, but they do not have to wait for him in order to begin the search.

There is an objective assessment of the quality of the interpretation. An interpreter is not needed when the suspect has a job that involves a proper command of Italian.

In Poland, when someone becomes accused person, he has to come to the office of the prosecutor in order for a letter of rights to be given to him. In Warsaw, they had a big case with a lot of suspects in which they could not find enough authorized interpreters. They took students of that language from the university and they used them in order to ensure translation. It was the only possibility they had in order to be able to have all the papers done to ask for arrest warrants in the period of 48 hours of the custody order.

In Bulgaria, the lawyer has the right to assist when the suspect is questioned, but not when a witness is questioned. Also, the access to the file is possible only at the end of the investigation. The judicial authorities have a problem in finding interpreters of Dutch. They had also a problem with a letter of rights send through a letter rogatory in

Germany. The colleagues from Germany misunderstood the request of the Bulgarian judicial authorities as they believed they were asked to force the accused person to speak. In fact, the Bulgarian judicial authorities only asked for the letter of rights to be signed and that a statement should be taken only if the suspect wants. They had a case with a Bulgarian citizen with Arabic origins. They gave him an interpreter even if he had to pass a Bulgarian language exam in order to get the Bulgarian citizenship. If someone says he does not understand Bulgarian, one has to ensure an interpretation in the requested language. They cannot use as evidence a recording made without the approval of the judge. So a crime cannot be proven with recordings made by a private party. The recordings should be made only by an agent of the state on the basis of a prior authorization of the judge.

In Bulgaria, there is no access to the investigation file if the defendant is not under arrest. You can deny during the investigation the right of the lawyer to assist if this is in the interest of the enquiry. There is no possibility of recusal of the prosecutor.

In Spain, a search can be done if the potential suspect gives his voluntary consent without the authorization of the judge. At searches the legality is guaranteed by the secretary, a special employee that does that. The accused person has access to the file only if he is under arrest. There is no possibility of recusal of the prosecutor.

There are practical problems at national level, especially when one has to ensure proper translation and interpretation and to inform properly in a language she understands about the accusation. There are cases when the right to interpretation should be ensured without any available authorized interpreters. There were cases when large numbers of accused persons were under investigation for crimes such as hooliganism or organized crime. There are circumstances when interpreters are not available. The solutions should be adequate to the urgency of the cases. There were cases when Moldavian citizen asked in front of the Romanian courts for interpreters of Russian even if the official language of Moldova is Romanian. There were times when the interpreter of Russian tried to communicate in Russian with the Moldavian citizen and the conclusion was that the defendant had no previous knowledge of Russian. There are cases when foreign citizen had good command of the language of the proceedings, but chose to have interpreters in order to have time to answer to the questioning of the judicial authorities. There are circumstances when the defendant knows that there is only one interpreter for an entire Member State and therefore they invoke that the interpretation is not adequate. For example, in Romania there were Chinese defendants that asserted that the interpreter had no proper command of Mandarin, even if he was also a professor of Chinese at the university. The solution would be in this case to apply a presumption. One can normally suppose that the interpretation done by an official interpreter is effective. The recording of the hearing would be useful to allow afterwards the defendant to rebut the presumption (if the rebuttal is not possible at the moment when the improper interpretation had been asserted).

There are even problems regarding the applicability of the provisions concerning the right to information and the right to translation and interpretation throughout the European Union that were noticed by the German judicial authorities in the case C 216/14 (Gavril Covaci).

In the Covaci case, a Romanian citizen was caught by the German police driving a motor vehicle without civil insurance. He presented the police a forged green card in order to prove the insurance. Against Mr. Covaci was issued a provisional decision of the court. The provisional decision became final if Mr. Covaci chooses not to lodge an objection to it. Still, as Mr. Covaci had no residence in Germany, clerks of the court were nominated to receive any document concerning the criminal proceedings, including the provisional decision. Therefore, it appeared a potential problem concerning the applicability of the EU Law.

`` 21 In the present case, the Traunstein Public Prosecutor's Office requested that the penalty order be served on Mr Covaci through the persons authorised to accept service and, moreover, that any written observations of the person concerned, including an objection lodged against that order, should be in German.

22 First, the Amtsgericht Laufen (Local Court, Laufen), before which the application for the penalty order concerned in the main proceedings was made, is uncertain whether the obligation, arising from Paragraph 184 of the Law on the judicial system, to use German for the drafting of an objection lodged against such an order is consistent with the provisions of Directive 2010/64, under which free linguistic assistance is to be provided to accused persons in criminal proceedings.

23 Secondly, the referring court has doubts as to the compatibility of the procedures for service of that penalty order with Directive 2012/13, and in particular with Article 6 thereof, which requires each Member State to ensure that, at the latest on submission of the merits of the accusation to a court, detailed information is provided on the accusation.

24 In those circumstances the Amtsgericht Laufen decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'1. Are Articles 1(2) and 2(1) and (8) of Directive 2010/64 to be interpreted as precluding a court order that requires, under Paragraph 184 of the Law on the judicial system, accused persons to bring an appeal only in the language of the court, here in German, in order for it to be effective?

2. Are Articles 2, 3(1)(c) and 6(1) and (3) of Directive 2012/13 to be interpreted as precluding the accused from being required to appoint a person authorised to accept service, where the period for bringing an appeal

begins to run upon service on the person authorised and ultimately it is irrelevant whether the accused is at all aware of the offence of which he is accused?'

The opinion of the Advocate General Bot delivered on 7 May 2015 proposed the criteria to solve the issues in the case. Still the court decided to follow only the second answer to the questions and delivered a restrictive interpretation on the first one.

The Advocate General Bot made an outline of the issued raised by the Amtsgericht Laufen

``. This reference for a preliminary ruling gives the Court a first opportunity to interpret two directives adopted on the basis of Article 82(2) TFEU. That provision forms the legal basis for the adoption of minimum rules to facilitate the mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension. In particular, point (b) of the second subparagraph of Article 82(2) TFEU permits the European Parliament and the Council of the European Union to adopt minimum rules concerning the rights of individuals in criminal procedure.

2. The two directives whose interpretation is being sought are Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings (2) and Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings. (3)

3. The first question will give the Court an opportunity to clarify the scope of the right to interpretation and translation where an appeal is brought against a penalty order in a language other than the language of the proceedings.

4. The second question seeks to ascertain whether or not German legislation which provides for a mechanism by which penalty orders are served on a person authorised to accept service, after which they are forwarded by ordinary post to the person accused, (4) satisfies the requirements laid down by Directive 2012/13 and in particular the right to be informed of the accusation, provided for in Article 6 of that directive.``

The limits of the directives are also mentioned in the opinion of the Advocate General Bot:

28. Directives adopted on the basis of Article 82 TFEU must be interpreted having regard to the objectives of the area of freedom, security and justice, in particular the objectives of judicial cooperation in criminal matters.

29. Under Article 82(1) TFEU, judicial cooperation in criminal matters is based on the principle of mutual recognition of judgments and judicial decisions. It is also clear from point (b) of the second subparagraph of Article 82(2) TFEU that, in order to facilitate mutual recognition and police and judicial cooperation in criminal matters, the Union legislature may enact minimum rules concerning the rights of individuals in criminal procedure.

30. It is plain that these rules, which are referred to as 'minimum' but actually relate to major principles governing, inter alia, the rights of the defence and respect for the right to a fair hearing, from which the Member States may not derogate, are intended to establish or strengthen mutual trust, the basis for mutual recognition, which has itself been elevated to become a cornerstone of the construction of the area of freedom, security and justice.

The advocate general noticed that it is difficult to accept that a linguistic obstacle should hinder a person to appeal as:

``41. This linguistic obstacle is encountered throughout the proceedings. Thus, interpretation or translation services cannot be dispensed with when an appeal is brought against a judicial decision, so that the intention to object, expressed in the language known to the accused person, is stated in the language of the proceedings."

The advocate general noticed that the issue of translation in the present case is not related to a document issues by a judicial authority, but to a document issued by the defendant. Still, one needs to examine the applicability to the right of translation even to this kind of documents.

49. A document which initiates an appeal such as the objection to a penalty order at issue in the main proceedings has the particular feature of being a document of criminal procedure produced by the accused person for the competent courts, and not a document produced by those courts for the accused person. The question raised by the referring court therefore requires us to assess the extent to which the right to linguistic assistance applies to this kind of document.

50. Article 1 of Directive 2010/64 establishes the right to linguistic assistance in criminal proceedings. More precisely, that directive protects, on the one hand, the right to the assistance of an interpreter and, on the other, the right to the assistance of a translator, and devotes a specific article to each of them, with the aim of consolidating protection. (11) This approach differs from that taken by the ECHR which, in Article 6(3)(e) thereof,

establishes only the right to the assistance of an interpreter, the European Court of Human Rights having extended that right to the translation of certain procedural documents. (12)

51. There is no doubt, in my view, that a document which initiates an appeal falls within the scope of Directive 2010/64, which the European Union legislature intended to be particularly broad, that is to say, covering the entire duration of criminal proceedings.

The applicability of the right to translation even to an appeal lodged by the defendant is recognized by the advocate general Bot, in the framework of the Article 2 of the Directive 2010/64.

59. The problem of linguistic assistance for the purposes of an appeal being brought by an individual against whom a judgment has been delivered in criminal proceedings should therefore be examined in the light of Article 2 of that directive.

60. Article 2 establishes the right to interpretation. It provides for the assistance of an interpreter during the entire criminal proceedings where the suspected or accused person does not speak or understand the language of the proceedings. Unlike Article 3 of Directive 2010/64, linguistic assistance under Article 2 of that directive may be requested by the defence 'not only in order to understand, but also to be understood'.

61. Where the accused person is unable to communicate in the language of the proceedings, he is therefore entitled to interpretation services so that statements made in a language of which he has a command, whether orally, in writing, or possibly in sign language, if he is hearing impaired or speech impaired, are translated into the language of the proceedings.

62. Consequently, Article 2 of Directive 2010/64 is applicable both in respect of statements or documents intended for the defence and in respect of statements or documents produced by the defence addressed to the competent judicial authorities.

63. Furthermore, as has been explained, it is clear from the wording of Article 1(2) of that directive that the right to linguistic assistance has broad application and that free interpretation services may be requested by the defence throughout the duration of the proceedings, including when an appeal is brought.

64. In addition, although assistance may be provided by an interpreter at hearings, the wording of Article 2(1) of Directive 2010/64 makes clear that such assistance is certainly not confined to that oral stage of criminal proceedings. The assistance of an interpreter can therefore be requested at the procedural stage where an appeal is brought against a judgment delivered in criminal proceedings.

65. This interpretation is confirmed by the wording of Article 2(2) of that directive, which provides for interpretation being freely available for communication between suspected or accused persons and their legal counsel.

66. Under that provision, in so far as necessary for the purpose of safeguarding the fairness of the proceedings, suspected or accused persons may be provided with interpretation services for communication with their legal counsel in connection with 'the lodging of an appeal or other procedural applications'.

67. I cannot see any reason to prevent an accused person who does not have a lawyer from also being able to benefit from interpretation for the purposes of bringing an appeal against a judgment delivered in criminal proceedings.

68. A penalty order, which is issued after a simplified criminal procedure, is a judicial decision against which the accused person may lodge an objection without the assistance of legal counsel, in writing or by making a statement recorded by the registry of the court which made the order. If conventional proceedings had been brought against Mr Covaci, in which he had the assistance of a lawyer, he could have been provided with free interpretation services for the purposes of bringing an appeal against the judgment delivered against him.

69. In my view, if the right to free interpretation when an appeal is brought were to be contingent on assistance being provided by a lawyer that would seriously impair the exercise of the rights of defence of an accused person who wishes himself to carry out procedural acts.

70. The purpose of Directive 2010/64 is conducive to an interpretation to the effect that an accused person who does not have a command of the language of the proceedings must be able to bring an appeal in a language of which he has a command against a judgment delivered in criminal proceedings and to be provided with the assistance of an interpreter with a view to the translation of that appeal into the language of the proceedings.

71. In that regard, recital 17 in the preamble to that directive clearly states that the directive seeks to 'ensure that there is free and adequate linguistic assistance, allowing suspected or accused persons who do not speak or understand the language of the criminal proceedings fully to exercise their rights of defence and safeguarding the fairness of the proceedings'.

72. From that perspective, the full exercise of the rights of the defence requires, first, that the accused person is able to lodge an appeal in a language of which he has a command against a judgment delivered in criminal proceedings and, second, that he is provided with the assistance of an interpreter to translate that appeal into the

language of the proceedings. In other words, in connection with bringing an appeal, the interpretation of the intention of the accused person to challenge his conviction is achieved by the translation of that appeal into the language of the proceedings.

73. The intervention of an interpreter will allow the accused person to set out to the competent judicial authority his arguments and his grounds of defence or, in the words of the European Court of Human Rights, 'to defend himself, notably by being able to put before the court his version of the events'. (14) The lodging of an appeal against a judgment delivered in criminal proceedings permits the accused person to explain the reasons why that judgment is open to challenge. To deny him the assistance of an interpreter in bringing such an appeal would impair, or even nullify, the exercise of the rights of defence enjoyed by that person.

Still the ECJ decided otherwise.

However, to require Member States, as suggested inter alia by Mr Covaci and the German Government, not only to enable the persons concerned to be informed, fully and in their language, of the facts alleged against them and to provide their own version of those facts, but also to take responsibility, as a matter of course, for the translation of every appeal brought by the persons concerned against a judicial decision which is addressed to them would go beyond the objectives pursued by Directive 2010/64 itself.

39 As is also apparent from the case-law of the European Court of Human Rights, compliance with the requirements relating to a fair trial merely ensures that the accused person knows what is being alleged against him and can defend himself, and does not necessitate a written translation of all items of written evidence or official documents in the procedure (European Court of Human Rights, *Kamasinski v. Austria*, 19 December 1989, § 74, Series A no. 168).

40 Consequently, the right to interpretation provided for in Article 2 of Directive 2010/64 concerns the translation by an interpreter of the oral communications between suspected or accused persons and the investigative and judicial authorities or, where relevant, legal counsel, to the exclusion of the written translation of any written document produced by those suspected or accused persons.

41 With respect to the situation at issue in the main proceedings, it is apparent from the documents before the Court that the penalty order provided for under German law is adopted on the basis of a *sui generis* procedure. That procedure provides that the only possibility the accused person has of obtaining a trial *inter partes*, in which he can fully exercise his right to be heard, is to lodge an objection against that order. That objection, which can be submitted in writing or, where it is lodged orally, directly at the registry of the competent court, is not subject to the

obligation to state reasons, must be lodged within a particularly short period of two weeks from service of that order and does not require the mandatory involvement of a lawyer, since the accused person can submit it himself.

42 Accordingly, Article 2 of Directive 2010/64 ensures that a person in a situation such as that of Mr Covaci can obtain the free assistance of an interpreter, if that person himself orally lodges an objection against the penalty order of which he is the subject at the registry of the competent national court, so that that registry records that objection, or, if that person lodges an objection in writing, can obtain the assistance of legal counsel, who will take responsibility for the drafting of the appropriate document, in the language of the proceedings.

The second questions was answered by using the reasoning from the opinion of the Advocate General as:

``112. It should be made clear, however, that if it is to be regarded as fully consistent with the right to be informed of the accusation, one of the purposes of which is to permit the individual against whom a criminal conviction has been ordered to bring an appeal against that conviction, the German mechanism by which an authorised person is appointed to accept service of a penalty order, after which that order is sent by ordinary post to the accused person by the authorised person, cannot have the effect of shortening the irreducible period of two weeks within which that person must lodge an objection against the order.

The ECJ ruled in the Covaci case that:

``**1) Articles 1 to 3 of Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings must be interpreted as not precluding national legislation such as that at issue in the main proceedings which, in criminal proceedings, does not permit the individual against whom a penalty order has been made to lodge an objection in writing against that order in a language other than that of the proceedings, even though that individual does not have a command of the language of the proceedings, provided that the competent authorities do not consider, in accordance with Article 3(3) of that directive, that, in the light of the proceedings concerned and the circumstances of the case, such an objection constitutes an essential document.**

2) **Articles 2, 3(1)(c) and 6(1) and (3) of Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings must be interpreted as not precluding legislation of a Member State, such as that at issue in the main proceedings, which, in criminal proceedings, makes it mandatory for an accused person not residing in that Member State to appoint a person authorised to accept service of a penalty order concerning him, provided that that accused person does in fact have the benefit of the whole of the prescribed period for lodging an objection against that order.**

There are many differences between Member States in the field of procedural rights of the accused persons, such as those between the notification of procedural rights in the German Procedural Law and other Member States. Probably in such cases the only solution would be for the ECJ to issue rulings similar to the one in the Covaci case in order to ensure a proper applicability of the Directives that could be in a potential conflict with national procedural laws.

When the basis of the European system of protection was laid down, the main goal was to avoid for a further mass-scale infringement of human rights in Europe. The citizen needed to be protected from the state and only legal substantive and procedural guarantees were able to do that. Trust in the judicial system and in the judicial authorities was to be restored and a key point to this system was the guarantee of the fair trial of the accused person. In time, the need for procedural rights at EU level concerned also the victims of crimes. The victims of article 3 and 8 of the ECHR have a right to an adequate investigation. The state should always refrain from actions that would infringe the substantial rights guaranteed by article 3 and 8 of the ECHR. Also the state should take reasonable measures to avoid for a person to become a victim of article 2, 3 or 8 of the ECHR.

The presentation made by Mr. Atanas Atanasov showed the gradual evolution of the rights of the victim in the European Union. As there was a need to protect persons that travelled throughout the European violent crimes and ensure for them similar rights as the victims that were nationals, a framework decision had to define the concept of victim and entitle the victims to procedural rights. The presentation handled also the current framework concerning procedural rights of victims. At this moment, the victims have special rights in the European Union. And there is a need for further procedural rights of victims in the European Union. One should always speak about a proper balance between the prosecution and defense. Still the trend in international criminal law is to get the procedural rights of the victims in a proper balance in proper balance with the rights of the defendant.

After the general presentation of the rules that apply to victims throughout the European Union, a national example was needed. Therefore, it followed a presentation of the procedural rights of the victims in Belgium made by Mrs.

Isabella Van Hoeylandt. It seems that one can even speak in Belgium about the active role of the victim in the pre-trial phase in the criminal proceedings.

Another important issue in European criminal law is the connection between the fundamental rights and the ne bis in idem principle. The free movement of persons allows them to practice forum shopping between the judicial systems of Member State. Still, the fact that a person had decided to exercise his right to free movement should not lead to the reopening of a criminal proceeding already closed in another Member State. The ne bis in idem principle had been widely analysed in the decisions of the ECJ and short remarks on the important decisions have been made. The presentation could not ignore the fact that in the field of competition law the right of defense has a certain value, as the right to legal counsel involves even the protection of the communication between the independent lawyer and the investigated company.

The work-shops at the end of the first day focused on six issues agreed by the experts to be important for the further evolution of EU Criminal Law.

Each concept allowed a proper discussion between participants starting from case studies. The participants were divided into 12 groups. Each trainer had to coordinate one or two groups. All the groups solved all the six cases. Each group was asked to nominate a spokesman in order to give feedback for a specific case study (groups 1 and 2 for case study 1, group 3 and 4 for case study 2, groups 5 and 6 for case study 3, group 7 and 8 for case study 4, group 9 and 10 for case study 5, group 11 and 12 for case study 6)

The second day begun with the feedback from the workshop. Each trainer acted as a moderator for the groups he worked with a day before. The moderator and the spokesperson tried to have a feedback of the case study and they opened discussions in the plenary in which the other participants were welcomed to take part.

## Section 2 - Victim`s procedural rights

### 2.1. EU LEGAL INSTRUMENTS ON THE RIGHTS OF VICTIMS OF CRIME

Atanas Atanasov

*The EU legislation on the victims' rights from a historical perspective*

The current EU legal framework on victims' rights has been preceded by longstanding legislative efforts aiming at recognition of eligibility of victims to be compensated for the injuries suffered and establishment of standards for their role victim within the criminal proceedings.

Some of the first EU law initiatives in the area of the rights of victims were launched in the 80's when this issue was addressed as well by other international organizations as the United Nations and the Council of Europe[213]. The European Parliament with its Resolution on compensation for victims of acts of violence, adopted on 13 March 1981, stated that the Commission should draw up a directive on compensation using public funds of victims of violent crimes regardless their nationality. On 12 September 1989 the European Parliament adopted Resolution on victims of violence[214] where again called on the Commission to prepare a draft directive requiring the Member States to harmonize their legislation on financial compensation for victims of violent crimes.

The elaboration of instruments legally binding EU member states to ensure compensation of victims of crime and to harmonize their procedural rights was really triggered after entry into force of the Treaty of Amsterdam. With regard to implementation of this treaty and addressing the question of victim support, institutions of the EU issued some very important documents preparing the relevant legislation: Vienna Action plan of the Council of the European Union and the European Commission[215]; Communication to the European Parliament, the Council of the EU, and the Economic and Social Committee on 'Crime victims in the EU: Reflections on standards and actions'[216]; The conclusions of the European council meeting in Tampere[217].

On the basis of the abovementioned documents, on 15 March 2001 the Council of the EU adopted the Framework Decision 2001/220/JHA on the standing of victims in criminal proceedings[218]. This Framework decision was the first EU legislative act which gave definition of a "victim" as a legal term, determined the standards of the procedural rights of victims and stipulated obligations to the member states to provide assistance and support to victims of crime.

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213 Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power of the UN /1985/, European Convention on the Compensation of Victims of Violent Crimes of the Council of Europe /1983/; Recommendation No R (85) 11 of the Committee of Ministers to Member States on the Position of the Victim in the Framework of Criminal Law and Procedure /1985/; Recommendation No R (87) 21 of the Committee of Ministers to Member States on Assistance to Victims and the Prevention of Victimisation /1987/.

214 OJ C 256, 9.10.1989, p. 32.
215 OJ C 19, 23.01.1999.
216 COM (1999) 349 final.
217 http://www.europarl.europa.eu/summits/tam_en.htm.
218 OJ L 082, 22.03.2001, p. 0001 – 0004.

Pursuant to Art. 1(a) of the Framework Decision 2001/220/JHA "victim" shall mean a natural person who has suffered harm, including physical or mental injury, emotional suffering or economic loss, directly caused by acts or omissions that are in violation of the criminal law of a Member State. In comparison to the definition of a "victim" given by the UN in its Declaration of basic principles of justice for victims of crime and abuse of power, the EU Framework Decision did not consider as victims those who collectively, together with other persons, were affected by a crime, e. g., by an environmental or a financial crime. Besides, the Framework Decision did not include in the circle of victims the immediate family members or other heirs of the direct victim as contrasted with the UN declaration. Except for the definition of a "victim", in this Framework Decision was explained the meaning of some other key terms as "criminal proceedings", "proceedings" in a broad sense, "victim support organization" and "mediation in criminal cases".

One of the most important attainments of the Framework Decision 2001/220/JHA was the establishment of obligation to the EU member states for approximation of the existing rules and practices regarding the standing and main rights of victims in criminal proceedings. The rights of victims promulgated by the Framework Decision were: a right to respect and recognition at all stages of criminal proceedings (Art. 2); a right to be heard during proceedings and to provide information (Art. 3); a right to receive relevant information about their rights and the support and protection they can obtain and information about the progress of the case (Art. 4); a right to have legal advice available (Art. 6); a right to be protected at the various stages of procedure (Art. 8); a right to reimbursement of expenses incurred as a result of participation as parties or witnesses in criminal proceedings (Art. 7). Nevertheless in the preamble of the Framework Decision 2001/220/JHA was emphasized that its provisions do not impose obligations to the member states to ensure treatment of victims in a manner equivalent to that of a party of proceedings (Recital 9).

Of great practical importance is the interpretation of the provisions of Articles 2, 3 and 8 (4) of the Framework Decision 2001/220/JHA given by the European Court of Justice in the Pupino decision[219]. According to the Court of Justice, these provisions 'must be interpreted as meaning that the national court must be able to authorise young children, who, as in the case, claim to have been victims of maltreatment, to give their testimony in accordance with arrangements allowing those children to be guaranteed an appropriate level of protection, for example outside the trial and before it takes place'. The Pupino case was significant as in its judgment the European Court of Justice created a rule that the Member states national courts are required to interpret national law 'as far as possible, in the light of the wording and purpose of a framework decision in order to attain the objectives it pursues'.

[219] C-105/03, 16 June 2005.

Another part of the Framework Decision 2001/220/JHA was dedicated to stipulation of obligations to the EU member states to provide support and assistance to victims of crimes and to ensure that victims are entitled to receive compensation. The right of victims to compensation in the course of criminal proceedings from the offender or from the state was promulgated in Art. 9 of the Framework Decision. The other prescribed duties to the EU member states were: to improve cooperation between themselves in order to facilitate the more effective protection of victims' interests in criminal proceedings (Art. 12); to encourage specialist services and victim support organizations (Art. 13); to promote mediation in criminal cases and to take into consideration agreements between the victim and the offender (Art. 10); to minimise the difficulties in exercising of procedural rights of victims residing in a state other than the one where the crime has committed (Art. 11).

The EU member states were obliged to implement the most of the provisions of Framework Decision 2001/220/JHA by 22 March 2002 (Art. 17). In its reports of 2004 and 2009[220] on the implementation measures taken by the Member states the European Commission assessed as insufficient the extent to which the Framework Decision had been transposed. The final report of 20 April 2009 concluded that no Member state had fully implemented all articles of the Framework Decision on the standing of victims in criminal proceedings. The Commission reported as well that many provisions of the Framework Decision had been transposed by way of non-binding instruments, and thus it was not possible to be assessed their practical application. The general conclusions of the report pointed out that the then EU legislation had not been effective in establishing minimum standards on the victims' rights within the Union.

A new legal base for achieving common EU standards on victims' rights has been in effect after the Treaty of Lisbon. Article 82(2) of the Treaty on the Functioning of the EU provides for the establishment of minimum rules applicable throughout the Union to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension, particularly with regards to the rights of victims of crime. On 10 June 2011 the Council of EU endorsed the Roadmap for strengthening the rights and protection of victims, in particular in criminal proceedings[221] ('the Budapest roadmap'). The roadmap supported and built upon the EU Commission proposals for a package of measures on victims of crime. The following measures were indicated in the Budapest roadmap:

- A Directive replacing Council Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings;

[220] COM (2004) 54 i; COM (2009) 166.
[221] OJ C 187, 28.06.2011, p. 1.

- Recommendation or Recommendations on practical measures and best practices in relation to the Directive set out in Measure A;
- A Regulation on mutual recognition of protection measures for victims taken in civil matters;
- Review of Council Directive 2004/80/EC of 29 April 2004 relating to compensation to crime victims;
- Dealing with specific needs of victims.

The current EU legislation in criminal matters relating to victims of crime encompasses three basic areas:

- Strengthening victims' rights in the EU – here the most important legal instrument is the Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA[222];
- Right to continue to benefit from protection measures when moving to another Member state – to ensure the exercising of this right in the EU area of criminal justice the Directive 2011/99/EU on the European Protection Order[223] has been adopted;
- Right to compensation - this right is ensured by the provisions of the Directive 2004/80/EC relating to compensation to crime victims[224].

*The Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA*

The legislative package on victims' rights adopted in 2011 by the Commission[225] included a proposal for a Directive establishing minimum standards on the rights, support and protection of victims, replacing the 2001 Framework Decision. The Directive 2012/29/EU (The Victims Rights' Directive) was adopted by the European Parliament and the Council on 25 October 2012 and came into force on 15 November 2012. The deadline for transposition of the Directive has been set for 16 November 2015.

[222] OJ L 315, 14.11.2012, p. 57 - 73.
[223] OJ L 338, 21.12.2011, p. 2 – 18.
[224] OJ L 261, 6.08.2004, p. 15 – 18.
[225] COM (2011) 274.

The new Directive on victims' rights directly binds the Member states to transpose its provisions. Compared to the Framework Decision 2001/220/JHA, the Directive 2012/29/EU expands the definition of "victim" as includes in it family members of a person whose death was directly caused by a crime[226]. The comparison between these two legal instruments also shows that the Directive more precisely defines the scope and content of victims' rights enshrined; establishes a new procedural right to victims; imposes to the Member states harder obligations to provide support and assistance to crime victims and to identify vulnerable victims; determines a set of protection measures toward victims.

Systematically the first victims' right promulgated by the Directive 2012/29/EU is the right to information (Art. 3 – 7). In fact these articles establish a range of victims' information rights: a right to receive accessible and understandable information; a right to receive relevant information from the first contact with authorities; a right to get written acknowledgment of their complaint; a right to receive information about the progress of their case; a right to interpretation and translation.

The provisions of Art. 3 of the Directive oblige the Member states to ensure that communications between their competent authorities and victims are given "in simple and accessible language, orally or in writing" as victims to understand and to be understood during these interactions. Art. 3 also provides victims with the right to be accompanied by a person of their choice in the first contact with a competent authority, unless this would by contrary to the victims' interests or the course of proceedings may be prejudiced.

The Directive, in particular Art. 4, determines the scope of the information which victims are entitled to receive: information related to their procedural rights, including how to file a complaint; what is their role in the criminal proceedings; how to claim legal aid and to seek compensation and reimbursement of their expenses; and the support and protection they can obtain. Article 4 of the Directive also specifies that the competent authorities are obliged to provide this information without delay, from their first contacts with victims.

An important information right is enshrined in Art. 5 of the Directive 2012/29/EU – the right of victims, when reporting a crime, to receive a written acknowledgment of their complaint, describing the basic elements of the offence and including a file number and the time and place for reporting of the crime. Another essential information right is set out in the Art. 6 of the Victims' Rights Directive – the victims' right to receive information about their case. According to this

[226] Art. 2 of the Directive defines as "Family members" also non-married partners. It is important, as well, that according to Art. 2(2) the Member states can limit the number of family members who may benefit from the rights set out in the Directive and may prioritise which family members are entitled to exercise these rights.

latter provision, victims should be informed about a decision to end the investigation, not to prosecute their case or the time and place of the trial and the nature of the criminal charges as well victims should be notified when the offender is released or has escaped detention. Art. 6 also stipulates that the Member states, in accordance with victims' role in the relevant national criminal justice system and upon their request, should provide them information about further progress of the case and the final judgment in the trial. It should be noted that Art. 6(4) obliges competent national authorities to respect the wish of victims as to whether or not receive information, unless the provision of that information is due to the entitlement of the victim to active participation in the criminal proceedings.

To ensure real possibilities for victims to exercise the abovementioned information rights and to enable their adequate participation in criminal proceedings, Art. 7 of the Directive sets out the right of victims to receive interpretation and translation when they do not understand or speak the language of the criminal proceedings. The Member states' competent authorities are obliged to provide interpretation and translation to victims, upon request and in accordance with their procedural role under the relevant national law.

As mentioned above, some of the articles of the Directive 2012/29/EU establishing victims' information rights refer to the role of the victim in the relevant criminal justice system. This role and possibility for victims to participate actively in criminal proceedings vary across Member states[227]. However, the Directive establishes minimum standards of victims' basic procedural rights in criminal proceedings. These standards are enshrined in articles 10 to 17 of the Directive 2012/29/EU related to right of victims: to be heard; to review a decision not to prosecute their case; to safeguards for restorative justice services; to legal aid; to be reimbursed for expenses; to recovery of property; to decision on compensation and rights of victims residing in another Member state to file a complaint in country of their choice.

The right of victims to be heard is promulgated in Art. 10 of the Directive which stipulates obligation to the Member states to ensure that victims may be heard during criminal proceedings and may provide evidence with a special provision regarding due precaution during hearings of child victims. As explained in the Preamble of the Directive, the right of victims to be heard should be considered to have been fulfilled if they are permitted to make statements or explanations in writing[228].

For the first time on EU level the Directive 2012/29/EU, in Art. 11, establishes the right of victim to a review of a decision of competent national authority not to prosecute. To be enabled to exercise this right, victims are provided also

[227] Recital 20 (preamble) of the Directive 2012/29/EU.
[228] Recital 41 (preamble).

with the right to be informed about such decision (Art. 11(4)). The right of victims to ask for a review a decision not to prosecute their case under the Directive refers to decisions taken by law enforcement authorities or investigative judges or prosecutors, but not to the court decisions[229]. Pursuant to Art. 11 (5) of the Directive victims are excluded as well from the right to a review of a prosecutor's decision not to prosecute resulting in an out-of-court settlement, unless such right is provided by national law. According to Art. 11(4) of the Victims' Rights Directive, a decision not to prosecute should be reviewed, upon request of victim, by a different authority to that which has taken the original decision, unless this decision has been made by the highest prosecuting authority, in which case the review may be carried out by the same authority.

Also for the first time at EU legal level the Directive 2012/29/EU establishes standards for providing restorative justice services in order to safeguard the victims participating in such processes from secondary and repeat victimization, intimidation and retaliation (Art. 12). These standards include consideration the interests and needs of the victim; providing the victim with full and unbiased information about these services; voluntarily participation of the victim and the offender in the process and in arriving at an agreement; confidentiality of restorative justice processes in principle. The Directive requires also Member states to provide "save and competent" restorative justice services to victims.

The Victims' Rights Directive enshrines also a range of other victims' procedural rights, which are important instrumental to the effective protection of their interests as parties to criminal proceedings or their property rights. Such procedural rights are: the right to legal aid to those victims who have the status of parties to criminal proceedings (Art. 13); the right to reimbursement of expenses incurred as a result of victims' active participation in the proceedings (Art. 14); the right to return of property which is seized in the course of criminal proceedings and which is no longer required for the purposes of the proceedings (Art. 15); the right to obtain adequate compensation by the offender in the course of criminal proceedings or in other legal proceedings under national law (Art. 16).

Art. 17 of the Directive 2012/29/EU includes rules which facilitate victims residents in a Member state other than that where the crime was committed and rules which prevent conflicts of exercise of jurisdiction in such cases. This article provides a right of victims to file a complaint in country of their choice: the country of their residence or the country where the offence was committed and with a view of this choice the respective Member states are obliged to transmit the complaint and the victim's statement, including the use of video conferencing or telephone conference.

Apart from the information and procedural rights of victims, the Directive 2012/29/EU establishes minimum standards for support services, protection measures and recognition of victims with specific protection needs. The right to

[229] Recital 43 (preamble).

access of victims to support services; obligations to Member states to facilitate such access; and the scope of support services to be provided to victims are proclaimed by Art. 8 and Art. 9 of the Directive. In Chapter 4, Articles 18 to 24 of the Victims' Rights Directive are established stronger and more concrete obligations to Member states regarding protection needs of crime victims. According to the Directive, the following protection measures shall be available to victims: prevention measures to avoid secondary and repeat victimization, from intimidation and from retaliation; measures to protect the dignity of victims during their examination as witnesses; physical protection of victims and their family members (Art. 18); measures to enable avoidance of contact between victims and the offender within premises where criminal proceedings are conducted; separate waiting areas for victims in new court premises (Art. 19); special procedural safeguards: interviews of victims without delay and avoiding unnecessary and excessive interviews and medical examinations; right of victims to be accompanied by legal representative or another person of their choice during criminal investigations (Art. 20); appropriate measures to protect the privacy, integrity and personal data of victims during criminal proceedings and by self-regulatory measures of the mass media (Art. 21).

Furthermore the Directive 2012/29EU stipulates that victims should be individually assessed as to be determined their specific protection needs and in Art. 22 are formulated the criteria for such assessment and are indicated certain vulnerable categories of victims[230]. The Directive also sets out a range of special protection measures to be applied toward victims with specific protection needs during criminal investigations: interviews carried out in appropriate designed or adapted premises; interviews carried out by special trained professionals; the same persons to be engaged in conduction with all interviews with the victim during the investigation; in cases of sexual, gender-based or domestic violence the conducting interviews persons to be of the same sex as the victim (Art. 23(2)). Other special protection measures are provided for victims with specific protection needs regarding their participation in court proceedings: measures to avoid visual contact between victims and offenders during court sessions; measures allowing victims to be heard without being present; measures to avoid unnecessary and irrelevant questioning concerning the victim's private life; measures for restricting publicity of particular hearings (Art. 23(3)). In addition to these measures, Art. 24 of the Victims' Rights Directive provides special protection measures for child victims: audiovisual recording of all interviews with the child victim during criminal investigations and use of the records as evidence in criminal proceedings; appointment of a special representative or a lawyer for child victims if occurs a conflict of interest between the child and the holders of parental responsibility.

[230] Victims who have suffered considerable harm due to the severity of the crime; victims who have suffered a crime committed with a bias or discriminatory motive which could be related to their personal characteristics; victims whose relationship to and dependence on the offender make them particularly vulnerable; victims of terrorism, organised crime, human trafficking, gender-based violence, violence in a close relationship, sexual violence, exploitation or hate crime; victims with disabilities; child victims.

In its Chapter 5 the Directive 2012/29/EU stipulates obligations to Member states to provide training of practitioners, including of judges and prosecutors, in order to increase their awareness of the needs of victims. Member states are obliged also to develop cooperation and coordination of services between themselves to improve the access of victims to the rights set out in the Directive.

*The Directive 2011/99/EU on the European Protection Order*

Another important legal instrument which enables protection of crime victims to be extended across the EU is the Directive 2011/99/EU on the European Protection Order. The Directive on the European protection order was adopted by the European Parliament on 13 December 2011 by the European Parliament. The deadline for transposition of the Directive expired on 11 January 2015.

The Directive on the European protection order (EPO) establishes a mechanism for execution on the territory of a Member state of measures for protection of a crime victim imposed by authorities of another Member state in the framework of criminal proceedings[231]. The mechanism is based on the principle of mutual recognition of judgments in criminal matters as a European protection order issued in the issuing Member state should be recognized and enforced by the competent authorities of the executing Member state. The necessity for mutual recognition of judgments imposing protection measures occurs when the victim, exercising the right of free movement within the EU, moves or has moved to another Member state where the same victim wants to be effective the measures for her or his protection.

Protection measures within the meaning of Art. 2(2) of the Directive 2011/99/EU are decisions in criminal matters by a competent authority of the issuing state, which include one or more of the prohibitions or restrictions referred to in Art. 5[232] towards a person causing danger in order to protect a protected person against a criminal act which may endanger his life, physical or psychological integrity, dignity, personal liberty or sexual integrity. These protection measures might be adopted as precautionary measures during the pre-trial phase of criminal proceedings or during the trial or be imposed upon the conviction of the offender. The measures may be imposed for protection of all victims irrespective of the type of the crime.

[231] The recognition and execution of protection measures in civil matters among Member states is a subject matter of Regulation (EU) № 606/2013 of the European Parliament and of the Council of 12 June 2013 – OJ L 181, 29.06.2013.
[232] These prohibitions are: a prohibition from entering certain localities, places or defined areas where the protected person resides or visits; a prohibition or regulation of contact, in any form, with the protected person, including by phone, electronic or ordinary mail, fax or any other means; a prohibition or regulation on approaching the protected person closer than a prescribed distance.

As opposed to the other instruments of mutual recognition in criminal matters[233], the competent authorities of the issuing state are not able to issue European protection order ex officio, neither at the public prosecutor request. Only the protected persons or their legal representative can request for issuing of an EPO either to the competent authority of the issuing state or to the competent authority of the executing state (Art. 6(2)-(3)). When a request is submitted in the executing state its competent authorities are obliged to transfer without delay the request to the competent authority of the issuing state.

Pursuant to Art. 6(1) of the Directive the competent to issue EPO authority of the issuing state should consider the length of the period of the stay of the protected person in the other Member state and the seriousness of the need for protection in that state. The issuing authority is also obliged to hear the person causing danger and to inform him about his right to challenge the protection measure if that person has not been granted these rights in the procedure leading to the adoption of the protection measure. The competent authority of the issuing state should notify the protected person of a decision rejecting request for issue of EPO and about the available legal remedies against such decision.

The European protection order should be issued in the standard form set out in Annex I of the Directive 2011/99/EU and transmitted directly to the competent authority of the executing state by means which leaves a written record allowing its authenticity to be established (Art. 8). The competent authority of the executing state is obliged, according to Art. 9 of the Directive, without delay to recognise the EPO and to adopt provided in its national legislation protection measures available in a similar case. The measures applied by the competent authority of the executing state may be provided by its criminal, civil or administrative laws even though the protection measures prescribed in the EPO are adopted during the criminal proceedings carried out in the issuing state. Art. 9(2) of the Directive requires that the protection measures adopted by the issuing state should correspond "to the highest degree possible" to the originally adopted measures for protection. The competent authority of the executing state is obliged to inform the person causing danger, the competent authority of the issuing state and the protected person of the measures adopted and of the consequence of a breach of these measures under national law.

After adoption of protection measures following recognition of an EPO, the competent authority of the executing state is competent to apply its national law in the event of a breach of one or more of the adopted measures (Art. 11). The

[233] Council Framework Decision 2002/584/JHA on the European arrest warrant (OJ L 190, 18.07.2002); Council Framework Decision 2003/577/JHA on the execution in the European Union of orders freezing property or evidence (OJ L 196, 02.08.2003); Council Framework Decision 2005/214/JHA on mutual recognition to financial penalties (OJ L 76, 22.03.2005); Council Framework Decision 2006/783/JHA on mutual recognition to confiscation orders (OJ L 328, 24.11.2006), etc.

competent authority of the executing state is obliged to notify the competent authority of the issuing state of any breach of the measures taken on the basis of the EPO.

The competent authority of the issuing state has competence to take decisions concerning renewal, review, modification, revocation and withdrawal of the protection measures included in the EPO and in such cases the competent authority of the executing state should be informed without delay of the decision taken in the issuing state (Art. 13). If the competent authority of the issuing state has taken a decision to revoke or withdraw the EPO, the competent authority of the executing state must discontinue the execution of the adopted measures. In case of modification of the protection measures by the competent authority of the issuing state, the competent authority of the executing state may modify the adopted measures or refuse to apply the modified by the issuing authority protection measures when they do not correspond to the referred in Art. 5 of the Directive or the modified EPO does not meet the requirements as to form and content set out in Art. 7.

Aside from the abovementioned grounds for discontinuation of the execution of an EPO in the executing state, its competent authority may terminate the enforcement of the adopted protection measures if the protected person has left the territory of the executing state and no longer will reside or stay there or the maximum term of duration of the adopted measures under the national law of the executing state has expired. The Directive 2011/99/EU obliges the competent authority of the executing state to inform the protected person, if it is possible, and the competent authority of the issuing state of the decision related to discontinuation of the protection measures (Art. 14(2)). The Directive also provides consultations to be conducted between the competent authorities of the executing and issuing states before discontinuation of measures on the grounds of expiration of their maximum term of duration under the law of the executing state in order to be identified whether there is a continuing need for protection (Art. 14(3)).

The grounds for non-recognition of an EPO are enshrined in Art. 10(1) of the Directive and all of them are optional. According to this article, recognition and execution of an EPO may be refused if it is not complete or has not been completed within the time limit set by the competent executing authority; if the protection measures adopted by the issuing state do not include one or more of those three referred to in Art. 5; in case of lack of double criminality of the act to which the protection measures relate; amnesty occurred or statute of limitations expiration under the law of the executing state; immunity of the person causing danger under the law of the executing state; age of criminal irresponsibility of the person causing danger under the law of the executing state; possible contravention of the ne bis in idem principle; if the offence to which the protection measure relates has been committed, wholly or for a major or essential part, within the territory of the executing state. In case of non-recognition of the EPO the competent authority of the executing state is obliged to inform the issuing state and the protected person of the refusal and of available legal remedies against it.

The Directive 2011/99/EU also contains provisions on priority in recognition of an EPO; consultations between the competent authorities of the issuing state and the executing state; languages and translation; costs resulting from the application of the Directive and relationship with other agreements, arrangements and international legal instruments (Art. 15 to 20).

*The Directive 2004/80/EC relating to compensation to crime victims*

As mentioned above, there are provisions of the Framework Decision 2001/220/JHA on the standing of victims in criminal proceedings and of the Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime which promulgate the right of victims to be compensated for the injuries suffered[234]. A particular legal instrument which is dedicated to this victims' right is the Council Directive 2004/80/EC of 29 April 2004 relating to compensation to crime victims. The deadline for transposition of the Directive expired on 1 January 2006.

The Directive 2004/80/EC obliges the EU Member States to establish schemes on compensation to victims of violent intentional crimes committed in their respective territories. According to Art. 12(2) of the Directive the national rules providing these schemes should guarantee fair and appropriate compensation to victims. The compensation provided by the Member states through their national schemes should be available to victims regardless their country of residence.

The Directive 2004/80/EC also creates a mechanism for cooperation between the authorities of Member states for the transmission of applications of victims for compensation in cross-border situations. According to this mechanism victims of a crime committed outside their Member State of habitual residence are eligible to submit their application for compensation to an authority in their own Member State (assisting authority), where also victims can get help with practical and administrative formalities. The assisting authority is obliged to transmit the application directly to the authority in the Member State where the crime was committed (deciding authority), which is responsible for assessing the application and paying out the compensation.

*Case-law of the European Court of Justice on procedural rights of victims:*

C-105/03; C-467/05; C-79/11

[234] Art. 9 of the Framework Decision 2001/220/JHA and Art. 16 of the Directive 2012/29/EU.

Case-law of the European Court of Human Rights concerning victims:

E. and Others v. the United Kingdom (Application № 33218/96, 26 november 2002 )

Kontrová v. Slovakia (Application № 7510/04, 31 May 2007);

B. v. the Republic of Moldova (Application . 61382/09 16 July 2013);

Bjakaj and Others v. Croatia (Application № 74448/12,18 September 2014);

*Bulgarian Criminal Code on the rights of the victims*

According to the definition contained in Art. 74 (1) of the Criminal procedure code of Bulgaria, a 'victim' is a natural person who has suffered psychological, physical, or emotional harm or economical damage, caused by a criminal offence. Art. 74 (2) of the Criminal procedure code stipulates that victims are also the family members of those deceased as a direct result of a crime.

The victims' rights enshrined in the Bulgarian Criminal procedure code are: the right to receive relevant information of their rights within the criminal proceedings and of the progress of the case; the right to be protected including their family members to be protected too; the right to appeal any prosecutors' or courts' decision which terminates or suspends the criminal proceedings; the right to participate in the criminal proceedings as civil claimants and/or private prosecutors; the right to counsel.

The Bulgarian Criminal procedure code provides certain measures of protection to be applied during criminal proceedings toward victims of crime. The measures of protection of victims laid down in the Criminal procedure code include prohibiting the accused to approach the victim, or to contact in any form with the victim, or to enter certain localities, places or defined areas where the victim resides or visits. These protection measures may be imposed by the court upon a request of the victim or the public prosecutor. In case of violation of a protection measure, the court is competent to impose a measure of remand for the accused or if so has already been done, it shall be substituted for a more restrictive one. A violation of a protection measure is also a crime pursuant to Art. 296(1) of the Criminal code of Bulgaria.

**2.2. Case study on victims' procedural rights**

Mrs. and Mr. Watson have been married for ten years, and they have a nine-year-old girl. Since the start of their marriage, Mr. Watson has been beating his wife. He is a notorious alcoholic and is unemployed. Sometimes, when very drunk, Mr. Watson threatens his wife that he will stab her to death sooner or later, because she is cheating on him with other men.

The wife has filed numerous domestic-violence complaints with the local police. However, because Mr. Watson has been threatening her with murder if he goes to jail, she has withdrawn every single complaint.

On December 26, Mrs. Watson went to work. Her husband got very drunk and tried to convince the daughter to play with him a sexual game. She refused at first, but then her father threatened he would kill her mother if she continued to say no. When Mrs. Watson got home, the girl told her what had happened, after which Mrs. Watson informed her husband that she will file for divorce. Mr. Watson told her she would die slowly and in pain if she ever did that, and then punched her lightly and gave her a very light cut with the tip of a knife. Mrs. Watson then went to the local police to file another criminal complaint.

Afterwards, she was met in the parking lot by her husband, who put his hands around her throat, telling her that her time had come. He then punched her in the face. The assault was eventually stopped by three policemen, and an investigation was opened into the incident. The prosecutor sought an arrest warrant, but the judge of freedom and liberties refused, because Mr. Watson produced witnesses claiming his wife is cheating on him and is filing criminal complaints solely to get the child. Mr. Watson was then put under judicial control and forced to live in another flat that he owned in the same city. During the investigation, Mr. Watson followed his wife on her way to work and sent her threatening text messages from an unknown number.

Mrs. Watson asked to be placed under protection, which was granted. In court, Mr. Watson requested to have a confrontation with the wife and the daughter, which was allowed. During the confrontation, both the wife and the child started crying when seeing her father, subsequently changing their statements made during the investigation. Furthermore, Mrs. Watson recognized that she likes to be hit in public and that her husband is innocent.

**Questions:**

a) What are Mrs. Watson's rights?

b) Is there a need for specific protection?

c) Would Mr. Watson's right to a fair trial be infringed if he were not allowed to see or to personally question his wife and his daughter?

d) Was the hearing of the child proper? How should the court have proceeded?

e) Are the wife and the daughter victims under articles 2 or 3 ECHR?

f) What would you answer to the above questions according to your national law?

**Instructions:**

During the workshop we refer mainly to Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime. (The EU Member States must implement the provisions of the Directive into their national laws by 16 November 2015). The need for protection will be analyzed starting with Directive 2011/99/EU on the European Protection Order. The discussion concerning the defendant's right to a fair trial will begin with the 2002 ECtHR S.N. v Sweden decision. This decision will also be a good starting point for the discussion on the proper hearing of the child. The analysis concerning the potential infringement of article 3 of the ECHR will begin by discussing briefly the ECtHR case of X and Y v Netherlands.

As each of the participants will have the national legislation available, a brief analysis of the national solution to the questions will take place.

**2.3. Comments on the case study on victims' procedural rights**

**a. What are Mrs. Watson's rights?**

Firstly it was established that Mrs. Watson is a **victim** according to Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime, in the sense of art.2 par.1 let. a of the above mentioned Directive as she is a natural person who has suffered harm, including physical, mental or emotional harm or economic loss which was directly caused by a criminal offence.

According to the same directive Mrs. Watson has the following rights:

**a.1. the right to understand and to be understood -**the Directive seeks to ensure that victims — based on their **personal characteristics** (e.g. gender, disability, age, maturity, relationship to or dependence on the offender) — understand and can make themselves understood during criminal proceedings (linguistically or otherwise) and that authorities **pro-actively assist** victims to do so throughout criminal proceedings.

**a.2. the right to receive information from the first contact with a competent authority -** similar to the common law concept of '**Bill of Rights**', which would list rights to be provided by Member States without the request of the victim; **from the first contact with the competent authorities** - first contact can be made when the victim reports a crime at the police station, but also when in contact with the police at the scene of crime without the victim having made a formal complaint (link to Article 8). Contact with the authorities also includes helpline phone calls and online/ internet contacts; '**without unnecessary delay**' - a victim is informed as soon as he/she meets a competent official and can reasonably absorb such information. The extent or details of information may vary depending on the specific needs and personal circumstances of the victim and the type or nature of the crime and that additional details can also be provided later. The practical effectiveness of the Directive could be improved by ensuring that the authorities (police, prosecutors and judges) keep the victim informed **continuously** during the course of proceedings, where necessary and appropriate. The provision or sharing of information under Article 4 should not be confused with disclosing information related to the criminal investigation or from the case file, which is not required by the Article.

**a.3. the right of victims when making a complaint**: the right to be provided with **at least a written acknowledgment** that a formal complaint has been made, containing the basic elements of the criminal offence; **the right to get linguistic assistance from the authorities free of charge** - the notion 'linguistic assistance' is more flexible than the stricter requirement for translation and interpretation in Article 7. Thus, a victim may be assisted under Article 5 by a person who speaks his/her language but who is not an official interpreter if this is deemed appropriate by the competent authorities, respecting the proper conduct of criminal proceedings and confidentiality. With regard to linguistic assistance, there are examples where a family member, friend or member of the community is used to help with interpreting when a victim is making a complaint.

**a.4. the right to receive information about their case;** all victims must be notified of their right to receive information related to (a) a decision to end criminal proceedings (including the reasons for this) and (b) the time and place of the trial and the nature of the charges. Once they are aware of such rights, victims can then receive such information if they so request; only victims with a 'role' in the relevant criminal justice system will be notified of their right to receive (a) the final judgment (and its reasons) and (b) information about the state of criminal proceedings (unless this would adversely affect the case). Again, victims will receive this information upon request. information can be communicated to the victim orally or in writing, including through electronic means, to the last known correspondence or e-mail address. Simply posting the information on the authority's official website would not be enough to ensure that victims receive the requested information (except for exceptional cases). all victims shall be '**offered the opportunity to be notified**' of the offender's release or escape from detention and any protection measures available, at least when there is danger or identified risk of harm to the victim, unless there is an identified risk of harm to the offender as a result. **The Directive does not introduce the right for victims to lodge an appeal against a decision on releasing the offender, nor the right to be heard in the release procedure before the competent authorities.**

**a.5. the right to access victim support services -** support should be available from the earliest possible moment after a crime has been committed, irrespective of whether it has been reported. Equally, victims may require support both during proceedings and for an appropriate period thereafter, depending on the victim's individual needs. Victims, and their family members, have the right to access confidential specialist support services free of charge in accordance with their specific needs. Support may be provided by governmental or non-governmental organisations, on a professional and/or voluntary basis; a victim's access to support is neither dependent on having made a formal complaint regarding the crime, nor conditional on the authorities launching a criminal investigation.

**a.6. the right to be heard** - all victims have an opportunity to provide information, views or evidence throughout criminal proceedings.

**a.7. rights in the event of a decision not to prosecute -** limited to victims with a formal role in the criminal justice systems and the procedural rules for carrying out such a review are governed by national law; at least victims of serious

crime have the right to a review of a decision not to prosecute. The review must be carried out by a person or authority other than whoever made the original decision. If the highest prosecuting authority took the decision not to prosecute, the review may be carried out by the same authority, but it should not be the same official.

**a.8. the right to safeguards in the context of restorative justice services -** restorative justice services encompass a range of services: victim-offender mediation, family group conferencing and sentencing circles and where such services are provided, safeguards are in place to ensure the victim is not further victimised as a result of the process.

**a.9. the right to legal aid**

**a.10. the right to reimbursement of expenses -** as a minimum, only necessary expenses should be reimbursed to the extent that the victim is obliged or requested by the competent authorities to be present and actively participate in criminal proceedings. The core of this Article focuses on travel expenses and loss of earnings

**a.11. the right to decision on compensation from the offender in the course of criminal proceedings** - only deals with compensation from the offender, and not from the State; information about how and under what conditions victims can access compensation must be provided at first contact with competent authorities.

**a.12. the right to protection -** requires Member States to ensure that a wide range of protection measures is available to protect victims and their family members from secondary and repeat victimisation, intimidation and retaliation. It also requires Member States to protect victims and their family members from physical, emotional and psychological harm.

**a.13. the right to avoid contact between the victim and offender -** requires that contact be avoided in all premises involved in criminal proceedings (i.e. including police stations, prosecutors' offices and court premises) and that all new court premises have to designate separate waiting areas for victims.

**a.14. the right to protection of victims during criminal investigations -** the purpose is to prevent secondary victimisation of all victims — not just vulnerable victims.

**a.15. the right to protection of privacy**

It was also mention that according to the same Directive victims with a formal role in proceedings, on request have also **the right to interpretation and translation**; it is free of charge and for a broad set of procedural actions: it covers contacts with investigative and judicial authorities from first interview/hearing throughout investigation to trial. 'information essential to the exercise of rights' is covered by the minimum list in Art. 6(1) (a): 'at least any decision ending the criminal proceedings related to the criminal offence suffered by the victim, and upon the victim's request, reasons or a brief summary of reasons for such decision, except in the case of a jury decision or a decision where the reasons are confidential in which cases the reasons are not provided as a matter of national law; oral translation or oral summary of essential documents instead of a written translation 'provided it does not prejudice the fairness of the proceedings', meaning that the rights of victims to interpretation and translation must in all cases be safeguarded. Unlike the Interpretation and Translation Directive, the Victims' Directive does not require Member States to allow victims to challenge the quality of translation/interpretation.

**b. Is there a need for specific protection?**

Due to the repetitive nature of the domestic violence, the chances of repeat victimization by the hands of the same offender are high. These victims remain under a constant threat and especially for these victims protection against the

offender is of maximum importance. Protection against the offender can be achieved by physical incapacitation of the offender – detention or imprisonment or by protection orders. Protection orders can be defined as:

*Any decision, provisional or final, adopted by a civil, criminal or administrative court or other judicial authority, imposing rules of conduct (obligations or prohibitions) on a person causing danger with the aim of protecting another person against an act which may endanger his life, physical, sexual or psychological integrity, dignity, or personal liberty*.

Next to protection against the offender, victims are also in need of protection against secondary victimization or victimization due to their participation in the criminal procedure.

During the workshop we also mention the Directive 2011/99/EU on the European Protection Order its *rationale* being that the protection orders are not limited to the territory of the state in which the orders were imposed, because that would put victims in a no-win situation: either their freedom of movement was limited or they had to relinquish their protection against the offender. With the introduction of the EPO, victims who crossed borders would no longer have to choose, because their protection orders would be recognized across the European Union. .

**c. Would the right of Mr. Watson to a fair trial be infringed if he is not allowed to see or to personally question his wife and his daughter?**

According to Article 6 § 3(d) of th European Convention on fundamental rights and liberties "*Everyone charged with a criminal offence has the following minimum rights: (…) (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; (…)*"

The term "witness" has an autonomous meaning in the Convention system, regardless of classifications under national law (Damir Sibgatullin v. Russia, § 45; S.N. v. Sweden, § 45) Where a deposition may serve to a material degree

as the basis for a conviction, it constitutes evidence for the prosecution to which the guarantees provided by Article 6 §§ 1 and 3(d) of the Convention apply (Kaste and Mathisen v. Norway, § 53; Lucŕ v. Italy, § 41). The term includes a co-accused (see, for example, Trofimov v. Russia, § 37), **victim**s (Vladimir Romanov v. Russia, § 97) and expert witnesses (Doorson v. the Netherlands, §§ 81-82). We also mention the general principles on the right to examine or have examined witnesses, as mentioned in ECtHR`s judgment Al-Khawaja and Tahery v. the United Kingdom, GC, §§ 118-147 and as referred in the Guide on the right to a fair trial, art.6 criminal limb, found on the ECtHR`s website.

### (1) *General principles*[235]

*„Article 6 § 3(d) enshrines the principle that, before an accused can be convicted, all evidence against him must normally be produced in his presence at a public hearing with a view to adversarial argument. Exceptions to this principle are possible but must not infringe the rights of the defence, which, as a rule, require that the accused should be given an adequate and proper opportunity to challenge and question a witness against him, either when that witness makes his statement or at a later stage of proceedings.*

*There are **two requirements** which follow from the above general principle. **First**, there must be a **good reason for the non-attendance** of a witness. **Secon**d, when a conviction is based **solely or to a decisive degree** on depositions that have been made by a person whom the accused has had no opportunity to examine or to have examined, whether during the investigation or at the trial, the rights of the defence may be restricted to an extent that is incompatible with the guarantees provided by Article 6 (the so-called "sole or decisive rule") (Al-Khawaja and Tahery v. the United Kingdom [GC], § 119). Having regard to the place that the right to a fair administration of justice holds in a democratic society, any measures restricting the rights of the defence should be strictly necessary. If a less restrictive measure can suffice then that measure should be applied. The possibility for the accused to confront a material witness in the presence of a judge is an important element of a fair trial (Tarău v. Romania, § 74; Graviano v. Italy, § 38).*

[235] Guide on the right to a fair trial, art.6, criminal limb, to be found on ECtHR`s website, pag 47-49

### *(2) Duty to make a reasonable effort in securing attendance of a witness*

*The requirement that there be a good reason for the non-attendance of a witness is a preliminary question which must be examined before any consideration is given as to whether that evidence was sole or decisive. When witnesses do not attend to give live evidence, there is a duty to enquire whether their absence is justified (Al-Khawaja and Tahery v. the United Kingdom [GC], § 120; Gabrielyan v. Armenia, §§ 78, 81-84).*

*Article 6 § 1 taken together with § 3 requires the Contracting States to take positive steps to enable the accused to examine or have examined witnesses against him (Trofimov v. Russia, § 33; Sadak and Others v. Turkey (no. 1), § 67). In the event that the impossibility of examining the witnesses or having them examined is due to the fact that they are missing, the authorities must make a reasonable effort to secure their presence. However, impossibilium nulla est obligatio; provided that the authorities cannot be accused of a lack of diligence in their efforts to afford the defendant an opportunity to examine the witnesses in question, the witnesses' unavailability as such does not make it necessary to discontinue the prosecution (Gossa v. Poland, § 55; Haas v. Germany (dec.); Calabrň v. Italy and Germany (dec.); Ubach Mortes v. Andorra (dec.)).*

### *(3) Duty to give reasons for refusal to hear a witness*

*Although it is not the Court's function to express an opinion on the relevance of the evidence produced, failure to justify a refusal to examine or call a witness can amount to a limitation of defence rights that is incompatible with the guarantees of a fair trial.*

### *(4) Reliance on witness testimony not adduced in court*

*It may prove necessary in certain circumstances to refer to depositions made during the investigative stage (Lucŕ v. Italy, § 40), for example, when a witness has died (Mika v. Sweden (dec.), § 37; Ferrantelli and Santangelo v. Italy, §*

*52) or has exercised the right to remain silent (Vidgen v. the Netherlands, § 47; Sofri and Others v. Italy (dec.); Craxi v. Italy (no. 1), § 86), or when reasonable efforts by the authorities to secure the attendance of a witness have failed (Mirilashvili v. Russia, § 217). 312. Given the extent to which the absence of a witness adversely affects the rights of the defence, when a witness has not been examined at any prior stage of the proceedings, allowing the admission of a witness statement in lieu of live evidence at trial must be a measure of last resort (Al-Khawaja and Tahery v. the United Kingdom [GC], § 125). If a witness was unavailable for adversarial examination for good reason, it is open to a domestic court to have regard to the statements made by the witness at the pre-trial stage, if these statements are corroborated by other evidence Article 6 § 3(d) only requires the possibility of cross-examining witnesses whose testimony was not adduced before the trial court in situations where this testimony played a main or decisive role in securing the conviction (see Kok v. the Netherlands (dec.); Krasniki v. the Czech Republic, § 79). However, the fact that a conviction is based solely or to a decisive extent on the statement of an absent witness would constitute a very important factor to weigh in the scales and one which would require* ***sufficient counterbalancing factors****, including the existence of strong procedural safeguards. The question in each case is whether there are sufficient counterbalancing factors in place, including measures that permit a fair and proper assessment of the reliability of that evidence to take place. This would permit a conviction to be based on such evidence only if it is sufficiently reliable given its importance in the case (Al-Khawaja and Tahery v. the United Kingdom [GC], § 147).*

### *(5) Witnesses in sexual abuse cases*

*Criminal proceedings concerning sexual offences are often conceived of as an ordeal by the victim, in particular when the latter is unwillingly confronted with the defendant. These features are even more prominent in a case involving a minor. In the assessment of the question whether or not in such proceedings an accused received a fair trial, the right to respect for the private life of the alleged victim must be taken into account. Therefore, in criminal proceedings concerning sexual abuse, certain measures may be taken for the purpose of protecting the victim, provided that such measures can be reconciled with the adequate and effective exercise of the rights of the defence. In securing the rights of the defence, the judicial authorities may be required to take measures which counterbalance the handicaps under which the defence labours (Aigner v. Austria, § 37; D. v. Finland, § 43; F. and M. v. Finland, § 58; Accardi and Others v. Italy (dec.); S.N. v. Sweden, § 47; Vronchenko v. Estonia, § 56).*

*Having regard to the special features of criminal proceedings concerning sexual offences, Article 6 § 3(d) cannot be interpreted as requiring in all cases that questions be put directly by the accused or his or her defence counsel,*

*through cross-examination or by other means (S.N. v. Sweden, § 52; W.S. v. Poland, § 55). The accused* ***must be able to observe the demeanour of the witnesses under questioning and to challenge their statements and credibility*** *(Bocos-Cuesta v. the Netherlands, § 71; P.S. v. Germany, § 26; Accardi and Others v. Italy (dec.); S.N. v. Sweden, § 52).*

*327.* ***The viewing of a video recording of a witness account cannot be regarded alone as sufficiently safeguarding the rights of the defence where no opportunity to put questions to a person giving the account has been afforded by the authorities*** *(D. v. Finland, § 50; A.L. v. Finland, § 41)".*

**d. Has the hearing of the little child been properly conducted? What should have been done by the court?**

According to the **Guidelines of the Committee of Ministers of the Council of Europe on child friendly justice** (adopted by the Committee of Ministers on 17 November 2010 at the 1098th meeting of the Ministers' Deputies) in all judicial and non-judicial proceedings or other interventions, children should be protected from harm, including intimidation, reprisals and **secondary victimisation**. Special precautionary measures should apply to children when the alleged perpetrator is a parent, a member of the family or a primary caregiver. Judges should respect the right of children to be heard in all matters that affect them or at least to be heard when they are deemed to have a sufficient understanding of the matters in question. Means used for this purpose should be adapted to the child's level of understanding and ability to communicate and take into account the circumstances of the case. Children should be consulted on the manner in which they wish to be heard. The right to be heard is a right of the child, not a duty on the child. Interview methods, such as video or audio-recording or pre-trial hearings in camera, should be used and considered as admissible evidence. Audiovisual statements from children who are victims or witnesses should be encouraged, while respecting the right of other parties to contest the content of such statements. **Direct contact, confrontation or interaction between a child victim or witness with alleged perpetrators should, as far as possible, be avoided unless at the request of the child victim. Children should have the opportunity to give evidence in criminal cases without the presence of the alleged perpetrator**.

**e. Are Ms. Watson and her daughter victims according to article 2 or 3 of the ECHR?**

According to ECtHR`s jurisprudence Article 2 issues can arise even although no actual death has occurred. An individual who finds that his right to life is directly threatened may also claim to be a "victim", for the Court has accepted that a violation of the right to life can be claimed not only in relation to those whose lives have actually been lost, but also by those whose have received death threats and those who have been victims of attempts to kill, whether by state or non-state actors. A violation may also be alleged by an individual who has been the subject of an attempted homicide.

As for Article 3 the Court reiterates that ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum is relative: it depends on all the circumstances of the case, such as the nature and context of the treatment, its duration, its physical and mental effects and, in some instances, the sex, age and state of health of the victim (see Costello‑Roberts v. the United Kingdom, 25 March 1993, § 30, Series A no. 247‑C and Kudła v. Poland [GC], no. 30210/96, § 91, ECHR 2000‑XI).

Article 1 of the Convention, taken in conjunction with Article 2 or Article 3, imposes on the States positive obligations to ensure that individuals within their jurisdiction are protected against all forms of life threatening acts and all forms of ill-treatment prohibited under Article 3, including where such acts or treatment is administered by private individuals. This obligation should include effective protection of, inter alia, an identified individual or individuals from the criminal acts of a third party, as well as reasonable steps to prevent life threatening acts or ill-treatment of which the authorities knew or ought to have known.

The scope of the positive obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities. Not every claimed risk to life or ill-treatment, therefore, can entail for the authorities a Convention requirement to take operational measures to prevent that risk from materialising. For a positive obligation to arise, it must be established that the authorities knew or ought to have known at the time of the existence of a real and immediate risk of ill-treatment or to the life of an identified individual from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk. Another relevant consideration is the need to ensure that the police exercise their powers to control and prevent crime in a manner which fully respects the due process and other guarantees which legitimately place restraints on the scope of their action to investigate crime and bring offenders to justice, including the guarantees contained in Articles 5 and 8 of the Convention

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Furthermore, both Article 2 and Article 3 require that the authorities conduct an effective official investigation into the alleged life threatening act or ill-treatment even if such act or treatment has been inflicted by private individuals (see M.C. v. Bulgaria, no. 39272/98, § 151, ECHR 2003‑XII, and Denis Vasilyev v. Russia, no. 32704/04, §§ 98-99, 17 December 2009). For the investigation to be regarded as "effective", it should in principle be **capable of leading to the establishment of the facts of the case and to the identification and punishment of those responsible**. This is **not an obligation of result**, but one of means. In cases under Articles 2 and 3 of the Convention where the effectiveness of the official investigation has been at issue, the Court has often assessed whether the authorities reacted promptly to the complaints at the relevant time. Consideration has been given to the opening of investigations, delays in taking statements and to the length of time taken for the initial investigation (see Denis Vasilyev, cited above, § 100 with further references; and Stoica v. Romania, no. 42722/02, § 67, 4 March 2008).

**Interference by the authorities with the private and family life** may become necessary in order to protect the health and rights of a person or to prevent criminal acts in certain circumstances. To that end States are to maintain and apply in practice an adequate legal framework affording protection against acts of violence by private individuals.

The Court also mentioned that there seems to be no general consensus among States Parties regarding **the pursuance of the criminal prosecution against perpetrators of domestic violence when the victim withdraws her complaints**. Nevertheless, there appears to be an acknowledgement of the duty on the part of the authorities to **strike a balance between a victim's Article 2, Article 3 or Article 8 rights in deciding on a course of action**. In this connection, having examined the practices in the member States, the Court observes that there are certain factors that can be taken into account in deciding to pursue the prosecution:

**– the seriousness of the offence;**

**– whether the victim's injuries are physical or psychological;**

**– if the defendant used a weapon;**

**– if the defendant has made any threats since the attack;**

**– if the defendant planned the attack;**

**– the effect (including psychological) on any children living in the household;**

**– the chances of the defendant offending again;**

**– the continuing threat to the health and safety of the victim or anyone else who was, or could become, involved;**

**– the current state of the victim's relationship with the defendant and the effect on that relationship of continuing with the prosecution against the victim's wishes;**

**– the history of the relationship, particularly if there had been any other violence in the past; and**

**– the defendant's criminal history, particularly any previous violence.**

It can be inferred from this practice that the more serious the offence or the greater the risk of further offences, the more likely that the prosecution should continue in the public interest, even if victims withdraw their complaints.

**f) What would you answer to the above, according to your national law?**

As each of the participants had the national legislation available, a brief analysis of the national solution to the questions has taken place.

## Section 3 - Presumption of innocence

### 3.1. Overview on the concept of presumption of innocence

The presumption of innocence is the first protection of the defendant against the arbitrary action of the state. The presumption of innocence is strongly related to the other procedural rights. As it is highly important for the fairness of the criminal proceedings, there is a rather developed jurisprudence of the ECHR in this field.

The presumption of innocence is an ``assumption or legal fiction`` as ``we pretend that a person who has officially been charged with a crime has not committed that crime. The presumption of innocence, in other words, requires

the judicial system to treat the person as if he were innocent, even though there exists a strong suspicion backed by reliable evidence that the person committed a crime. The presumption of innocence prohibits state officials from acting in such a way as to indicate or suggest that the defendant is in fact guilty (although they subjectively know that he probably is guilty)``.[236]

The presumption of innocence is the right of the defendant not to be publicly presented as the person that has committed the crime before a final decision of a court. This does not mean that the public should not be informed about the investigation. The judicial authorities have to be careful not to present the defendant as he is already considered to be convicted.

Any investigation involves some limitation of the rights of the investigated person. But the defense can be effective if the state has no procedural advantage. It is much easier for the state to organize social pressure to get one person to be convicted. The individual is, normally, in a disadvantage to the state. The judicial authorities have the experience and the means to proper investigate an individual. An individual has only himself and a lawyer. That is why we have a higher standard of proof for the investigators than for the defendant.

The procedural aspect of the presumption of evidence is also related to the burden of proof. It is impossible to define what the proper evidence is to get a conviction. But when we cannot use a mathematical calculus, we can use abstract concept such as the proof of the guilt "beyond any reasonable doubt".

The presumption of innocence is not only related to the standard of proof or to the obligation of the authorities to abstain from asserting a person's guilt. The presumption of innocence has a rather complex framework. The court should be objective when examining the guilt of the defendant and should not write the decision in an offensive way. The defendant enjoys the right against self – incrimination, the standard of proof beyond reasonable doubt and the right to be treated with respect by all public officials. [237]

The presumption of innocence had been developed as a result of the jurisprudence of the ECtHR built around article 6 (2) of ECHR. Another legal provision on the issue of presumption of innocence is article 48 of the Charter of the

[236] Thomas Weigend, Assuming that the Defendant Is Not Guilty: The Presumption of Innocence in the German System of Criminal Justice, Criminal Law and Philosophy, Volume 8, Issue 2, June 2014, p. 287.
[237] Marcus Ulvang, Criminal and Procedural Fairness : Some Challenges to the Presumption of Innocence, Criminal Law and Philosophy, Volume 8, Issue 2, June 2014, p. 469.

European Union. The two articles have the same content as " everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law."

The present legal framework concerning the minimal procedural rights has to be supplemented by a common applicability of the presumption of innocence. Even if the rules should already have been created by the jurisprudence of the ECtHR, new minimal legal provision should be in place at national level.

Therefore, The European Commission issued the 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. The proposal reached a final compromise text between the Presidency of the Council of the European Union and the European Parliament on the 29th of October 2015.[238]

Article 2 mentions the scope of the Directive. As there is no agreement throughout the EU on the issue concerning the criminal liability of moral persons, the Directive shall apply only to natural persons. The Directive applies from the moment a person is suspected or accused of having committed a criminal offence until the moment when a final decision concerning the accusation is definitive.

Article 3 generates a EU Law obligation for all Member States to treat suspects or accused persons as innocent until a final decision on merits is given. According to the law a person is guilty only if an independent court decided on the merits of the case and the defendant had the opportunity to have an appeal according to article 4 from Protocol no. 7 of the ECHR.

Article 4 handles the issue of prejudicial statements. Member States should take measures when a public official breaches the presumption of innocence. Any public official should avoid referring to a suspect as a convicted person. The limits of the infringement of the presumption of innocence are strictly established. The presumption of innocence is not infringed if the accused person was arrested or if the assets of the accused persons are freezed. The prosecution is allowed to take all the necessary steps to prove the guilt of the accused person. Any judicial or competent authorities can take measures based only on a suspicion that the suspect committed the crime. Public authorities are allowed to disseminate information concerning the criminal proceedings if such a measure is strictly necessary, in the interest of the investigation or it is required by the other public interest.

[238] For details on the compromise provisions of the proposal see http://data.consilium.europa.eu/doc/document/ST-13471-2015-INIT/en/pdf.

Article 4a deals with the obligation of Member States to avoid presenting the suspects as guilty through the use of measures of physical restraint. The use of physical restraint measures is allowed if such a measure is required for specific reasons. These reasons are strictly limited to grounds relating to security, to the avoidance of absconding the accused person or to the forbiddance of contact with third persons.

Article 5 handles the issue of burden of proof in criminal matters. The prosecution always bears the burden of proving that a certain persona is guilty. The trial court has the possibility to try to find the truth even if these finding powers would lead to evidence against the defendant. Presumptions can be used to shift the burden of proof to the defendant. The presumptions should be important enough to rebut the presumption of innocence. The defendant should always have the opportunity to rebut the presumptions built by the prosecutor. The rebuttal of the presumption could be done with evidence enough to raise a reasonable doubt on the guilt of the defendant. The reasonable doubt on the gilt of the defendant will always lead to an acquittal decision.

Presumption of innocence is strongly related to the right not to incriminate oneself and not to cooperate and also to the right to silence, rights mentioned in articles 5 and 6. Breaching these rights would normally lead to the exclusion of evidence, unless the overall fairness of the proceedings is not breached. The option of the defendant to exercise these rights will never be used as evidence or even as a simple presumption against the defendant. The evidence that has an existence independent of the suspect could be used if the judicial authorities have legal compulsory powers. The right to silence when questioned is effective as there is an obligation of the competent authorities to inform promptly the defendant about this right. The consequences of renouncing and of invoking the right to silence will be made clear to the defendant. The right to silence is guaranteed to the defendant only in relation to the offence he is accused of having committed. The judicial authorities are allowed to take into account when sentencing the cooperative behaviour of the defendant. Member States are allowed in minor offences proceedings not to question the defendant if this is pursuant to the right to a fair trial.

### 3.2.Case study on presumption of innocence

On April 1, 2015, Ms. Ionescu was getting back from school and was waiting for the bus to go home. A car stopped and Mr. Innocent, a former colleague, offered to give her a ride home, which she accepted and got into the car. After a while, Ms. Ionescu noticed that the car was taking another route than usual one. She asked Mr. Innocent about this, but she was told it was only a short detour. Mr. Innocent then stopped the car near a corn field. She got out of the car and tried to run. However, Mr. Innocent caught her, punched her a few times and immobilized her. Five other of Mr. Innocent's friends arrived, and they all raped Ms. Ionescu. Afterwards, she was taken home and told not to say anything to anyone, otherwise she would be killed.

Ms. Ionescu immediately filed a complaint with the local police, and an investigation was opened. After evidence was gathered, all six men were arrested for 6 months and then released on parole. After the finish of the investigation, the trial is ongoing.

**Questions:**

a) Can a press campaign infringe an accused's presumption of innocence?

b) Does a prejudicial statement by a public official before the indictment infringe the presumption of innocence?

c) Is the presumption of innocence infringed if the defendants have been arrested for 6 months?

d) Does a potential jail sentence breach the presumption of innocence if all of the defendants claim that the victim had consented to sexual intercourse?

e) What would you answer to the above, according to your national law?

**Instructions:**

Regarding the press campaign against the defendant, the ECtHR judgement *Pullicino v Malta* is relevant. Nevertheless, the impact of the press campaign differs if the solution is given by jurors or by professional judges. For the evaluation of the statements made by public officials, please think of *Garycki v Poland* and *Daktaras v Lithuania*. For the evaluation of evidence in a rape case, please analyze *S.N. v Sweden*. Regarding the link between the right to liberty and the presumption of innocence, *Clooth v Belgium* and *Letellier v France* are particularly relevant.

As each of the participants will have the national legislation available, a brief analysis of the national solution to the questions above will be made.

### 3.3. Comment on the case study on presumption of innocence

#### a. Can a press campaign infringe the presumption of innocence of the accused persons?

The Court accepts that, in certain cases, a virulent press campaign can adversely affect the fairness of the trial and involve the State's responsibility (see *Jespers v. Belgium*, no. 8403/78, Commission decision of 15 October 1980, Decisions and Reports 22, p. 100). This is so with regard to the impartiality of the court under Article 6 § 1 as well as with

regard to the presumption of innocence embodied in Article 6 § 2 (see *Ninn-Hansen v. Denmark* (dec.), no. 28972/95, ECHR 1999-V, and *Anguelov v.Bulgaria* (dec.), no. 45963/99, 14 December 2004).

**b. Does a prejudicial statement made by a public official before any person is accused infringe the presumption of innocence?**

In *Minelli v. Switzerland* the Court stated that the presumption of innocence will be violated if a judicial decision concerning him reflects an opinion that he is guilty without the accused's having been previously proved guilty according to the law, and without his having had the opportunity of exercising his rights of defense. In the case of *Allenet de Ribemont v. France* the Court goes further and considers that the presumption of innocence may be infringed not only by a court or a judge but also by other public authorities. The Court stated that: "*Press campaigns may entail a breach of Art. 6, but the accused has to show that the media attention affected the impartiality of the court. Moreover, if a judge makes statements, which reflect an opinion that the accused is guilty, before he is found guilty, the presumption of innocence will be violated, as well*." An example of violation of the presumption of innocence by the public authorities is *Butkevicius v. Lithuania* where the Chairman of the national Lithuanian Parliament made a declaration of the applicant's guilt. In *Ribemont v. France*, Mr. Ribemont's was referred to by some of the highest ranking officers in the French police as the instigator of a murder without any qualification or reservation. In its Judgment the Court considered such a declaration as declaration of the applicant's quilt which encouraged the public to believe that he is guilty and prejudged the assessment of the facts by the competent judicial authority which was actually a truly violation of Article 6(2) of the ECHR.

Also in *Khuzhin and others v. Russia*, 13470/02, 23 October 2008 the Court observed that a few days before the scheduled opening of the trial in the applicants' case, a State television channel broadcast a talk show, in which the investigator dealing with the applicants' case, the town prosecutor and the head of the particularly serious crimes division in the regional prosecutor's office took part. The participants discussed the applicants' case in detail with some input from the show's presenter and the alleged victim of their wrongdoings. Subsequently the show was aired again on two occasions during the trial and once more several days before the appeal hearing. As regards the contents of the show, the Court noted that all three prosecution officials described the acts imputed to the applicants as a "crime" which had been committed by them … Their statements were not limited to describing the status of the pending proceedings or a

"state of suspicion" against the applicants but represented as an established fact, without any qualification or reservation, their involvement in the commission of the offences, without even mentioning that they denied it. In addition, the town prosecutor Mr Zinterekov referred to the applicants' criminal record, portraying them as hardened criminals, and made a claim that the commission of the "crime" had been the result of their "personal qualities" – "cruelty and meaningless brutality". In the closing statement he also mentioned that the only choice the trial court would have to make would be that of a sentence of an appropriate length, thus presenting the applicants' conviction as the only possible outcome of the judicial proceedings. The Court considered that those statements by the public officials amounted to a declaration of the applicants' guilt and prejudged the assessment of the facts by the competent judicial authority.

However, not only public statements, or a decision can be seen as premature declarations of guilt; certain actions or treatment may also bear inferences of guilt that are inconsistent with the presumption of innocence. For instance a particular security arrangement during trial might do so, such as showing the accused person to the public in prison garments during bail proceedings, or detaining them during the trial in a barred dock (such as a metal cage with a barred ceiling) surrounded by hooded and armed security guards

It is also important that the prohibition on public statements encompasses imagery, visual and audio footage.

**c. Is the presumption of innocence infringed if the defendants have been arrested for 6 months?**

No, pretrial detention does not infridge *eo ipso* the presumption of innocence. Under the Court's case-law, continued detention can be justified only if there are specific indications of a genuine requirement of public interest which, notwithstanding the presumption of innocence, outweighs the rule of respect for individual liberty (see, among other authorities, *W. v. Switzerland*, 26 January 1993, Series A no. 254-A). Until his conviction, the accused must be presumed innocent, and the purpose of the provision under consideration is essentially to require him to be released provisionally once his continuing detention ceases to be reasonable.

**d. Does a potential sentencing to jail of all the defendants breach the presumption of innocence if only the victim claims that she was raped and all the defendants say that they had the consent of the victim?**

In *M.C. v. Bulgaria* judgment (application no. 39272/98), 04.12.2003 the Court reiterated that, under Articles 3 and 8 of the Convention, Member States had a positive obligation both to enact criminal legislation to effectively punish rape and to apply this legislation through effective investigation and prosecution.

The Court then observed that, historically, proof of the use of physical force by the perpetrator and physical resistance on the part of the victim was sometimes required under domestic law and practice in rape cases in a number of countries. However, it appeared that this was no longer required in European countries. In common-law jurisdictions, in Europe and elsewhere, any reference to physical force had been removed from legislation and/or case-law. Although in most European countries influenced by the continental legal tradition, the definition of rape contained references to the use of violence or threats of violence by the perpetrator, in case-law and legal theory, it was lack of consent, not force, that was critical in defining rape.

The Court also noted that the Member States of the Council of Europe had agreed that penalising non-consensual sexual acts, whether or not the victim had resisted, was necessary for the effective protection of women against violence and had urged the implementation of further reforms in this area. In addition, the International Criminal Tribunal for the former Yugoslavia had recently found that, in international criminal law, any sexual penetration without the victim's consent constituted rape, reflecting a universal trend towards regarding lack of consent as the essential element of rape and sexual abuse. As Interights had submitted, victims of sexual abuse - in particular, girls below the age of majority – often failed to resist for a variety of psychological reasons or through fear of further violence from the perpetrator. In general, law and legal practice concerning rape were developing to reflect changing social attitudes requiring respect for the individual's sexual autonomy and for equality. Given contemporary standards and trends, Member States' positive obligation under Articles 3 and 8 of the Convention requires the penalisation and effective prosecution of any non-consensual sexual act, even where the victim had not resisted physically.

In the above mentioned case the applicant alleged that the authorities' attitude in her case was rooted in defective legislation and reflected a practice of prosecuting rape perpetrators only where there was evidence of significant physical resistance. In the absence of case-law explicitly dealing with the question, the Court considered it difficult to arrive at safe general conclusions on the issue. However, the Bulgarian Government were unable to provide copies of judgments or legal commentaries clearly disproving the applicant's allegations of a restrictive approach in the prosecution of rape. Her claim was therefore based on reasonable arguments which had not been disproved.

The presence of two irreconcilable versions of the facts obviously called for a context-sensitive assessment of the credibility of the statements made and for verification of all the surrounding circumstances. Little was done, however, to test the credibility of the version of events put forward by P. and A. – even the assertion that the applicant, aged 14, had started caressing A. minutes after having had sex for the first time in her life with another man – or to test the credibility of the witnesses called by the accused or the precise timing of the events. Neither were the applicant and her representative able to question witnesses, whom she had accused of perjury. The authorities had therefore failed to explore the available possibilities for establishing all the surrounding circumstances and did not assess sufficiently the credibility of the conflicting statements made.

The reason for that failure appeared to be that the investigator and prosecutor considered that a "date rape" had occurred, and, in the absence of "direct" proof of rape such as traces of violence and resistance or calls for help, that they could not infer proof of lack of consent and, therefore, of rape from an assessment of all the surrounding circumstances. While the prosecutors did not exclude the possibility that the applicant might not have consented, they adopted the view, in the absence of proof of resistance, that it could not be concluded that the perpetrators had understood that the applicant had not consented. They did not assess evidence that P. and A. had deliberately misled the applicant in order to take her to a deserted area, thus creating an environment of coercion, or judge the credibility of the versions of the facts proposed by the three men and witnesses called by them.

The Court considered that the Bulgarian authorities should have explored all the facts and should have decided on the basis of an assessment of all the surrounding circumstances. The investigation and its conclusions should also have been centred on the issue of non-consent. Without expressing an opinion on the guilt of P. and A., the Court found that the effectiveness of the investigation of the applicant's case and, in particular, the approach taken by the investigator and

the prosecutors fell short of Bulgaria's positive obligations under Articles 3 and 8 of the Convention - viewed in the light of the relevant modern standards in comparative and international law - to establish and apply effectively a criminal-law system punishing all forms of rape and sexual abuse.

**e) What would you answer to the above, according to your national law?**

As each of the participants had the national legislation available, a brief analysis of the national solution to the questions has taken place.

## Section 4 - Vulnerable suspects

### 4.1. Overview on the concept of vulnerable suspects

Normally a defendant should have no problem in being able to defend himself or to understand the accusation and his rights. Usually, the defendant is not deprived of liberty and bears no hindrance in the fully exercise of his rights.

There are cases when there could be some restrictions to the freedom of the defendant. If the defendant is deprived of his liberty, the ability to defend himself is limited. There are also cases when the defendants are naturally restricted in their rights, such as the accused persons that are children or that are mentally deficient.

Special safeguards are to be introduced by the Proposal for a Directive of the European Parliament and of the Council on procedural safeguards for children suspected or accused in criminal proceeding. Special minimum rules on accused children are needed since it is much difficult for a child to have an effective exercise of his procedural rights, even if these rights are guaranteed at the level of the European Union and by the jurisprudence of the ECtHR. There is a special concern on protecting the right to life, to dignity, to freedom and for private life of a person at a very vulnerable moment in life. Even if the child is convicted for committing a certain crime, the main goal is to get him to be reintegrated

afterwards into society. There are also international standards that inspired the establishment of these specific safeguards for minor at the EU level. [239]

Article 1 mentions that the Directive intends to establish minimum rules concerning the rights of children accused of having committed a crime. In a similar way as those other directives in the field of procedural rights, the Directive will be related also to guaranteeing rights to the requested person on the demand for an execution of a European Arrest Warrant.

According to the Article 2, children are persons under the age of 18 at the time when they are suspected or accused of having committed a criminal offence until the end of the conclusion of the proceedings. The Directive shall not apply to other categories on vulnerable suspects since it would be rather difficult to get to a unanimous opinion at the level of the EU on the definition of this type of persons. The standard age mentioned by the Directive is well chosen in order to get a better protection of children, even if at national level the age of criminal responsibility is different. The special guarantees ensured in the criminal trial for minors shall not apply to other type of proceedings that have a different nature, even if the child is considered to have committed an offence.

Article 4 deals with the right of prompt information of rights and with the necessity of adapting the already existing model of Letter of Rights to the new specific rights granted to a children suspect. A child has supplementary rights than an adult. The problem on the information on the rights is related to the ability of the juvenile offender to stand trial. [240] Even if the child is able to understand his rights, further rights are needed in order to ensure the right to an effective trial.

Article 5 involves the holder of parental responsibility in the criminal trial. He shall have all the information concerning the rights of the child mentioned by article 4 (article 5). The holder of parental authority is going to be replaced by another adult if it is in the best interest of the child. An appropriate adult is allowed to contact the child and to decide on the best possible defence. The holder of parental responsibility will also have the right to access to the court hearings involving the child, according to article 15. The holder of parental responsibility is a guarantee and also an important support for preparing a proper defence and in order to allow the further integration of the criminal child into the society.

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[239] For a brief overview of this international standards see Josine Junger-Tas, Trends in International Juvenile Justice, p. 525-526 in Josine Junger – Tas, Scott H. Decker (eds.) International Handbook of Juvenile Justice, Springer, 2006.

[240] For details on the competence of the juvenile delinquents to stand trial see Dana Royce Baerger, PhD, JD, Eugene F. Griffin, PhD, JD, John S. Lyons, PhD, and Ron Simmons, PsyD, Competency to Stand Trial in Preadjudicated and Petitioned Juvenile Defendants, The Journal of the American Academy of Psychiatry and the Law, Volume 31, Number 3, 2003, p. 314-320.

Even if an adult supports the child suspect in his defence, a lawyer is going to assist the child throughout the criminal proceedings as the child is not allowed to defend himself (article 6). An effective legal aid counsel should also be granted (article 18). The standards of evaluating the defence should be higher than for a normal defendant. The judge should have the option to replace a legal counsel that fails to ensure a proper defence even the legal counsel was paid and chosen by the holder of parental responsibility.

Every child, even one that is accused of a crime, has special needs and should enjoy the right to an individual assessment (article 7). Any decision of the judicial authorities should take into account that the defendant child requires to be protected, educated and to be socially integrated. The individual evaluation of the child is going to consider the personality, maturity and the economic and social background of the child and be done before an indictment is issued. An individual assessment might not be necessary if this is not proportionate with the circumstances of the case. There are special problems and needs of the child that cannot be understood by the judge or by the prosecutor. The assessment should be taken as early as possible in order to allow the judicial measures appropriate to the particularities of the child to be taken.

A child deprived of liberty shall have the right to a medical examination in order to evaluate his capacity to take part in any measures in relation to the criminal trial (article 8). The medical impact of some restrictive measures could be damaging for the further development of the juvenile delinquent and the proportionality of these measures should take into account also the medical examination.

The medical examination can help to evaluate whether the child can be subject to questioning (article 9). A child is much vulnerable than an adult and much prone to be influenced in order to renounce his rights. If the child is deprived of liberty, the hearing is going to be audio-visually recorded. Usually the recording should be done for all the children, with some proportionate exceptions in the field of petty crimes. Questions will always be adapted to the child in order to avoid any degrading treatment.

Children could be more easily influenced by adults and could not understand what the proceeding is about. There is a caricature that is rather expressive on this issue. The judge (wearing a wig) asks the defendant child `Do you

comprehend the serious ramifications of these proceedings?` and the child answers `Er… Yes, Santa`[241]. Even if this is a joke, there could be cases when the child would not understand his rights, even if he is criminally responsible.

Article 10 handles the issue of right to liberty. Any deprivation of liberty is going to be as limited as possible. One can understand that there are circumstances when the age, the personality of the child and the nature of the offence could justify a short period of deprivation of liberty. A court will periodically review the necessity of deprivation of liberty before the sentencing. Such measures should be taken only in special cases, when only such an intervention would be appropriate.

Article 11 is a direct consequence of the principle that deprivation of liberty of a minor should be a last resort measure. Therefore this article provides alternative measures to arrest. If it would be in the interest of the child, the freedom of movement will be restrained and therapeutical or educational measures should be taken. The child should be allowed to have the option possibility to continue his psychological development in proper conditions, even if he has committed a rather serious offence.

Article 12 handles the specific conditions of deprivation of liberty as these are to be detained normally in separate spaces than adults. Detention of a child imposes special obligation to the Member State. The final end of detention is the future integration in the society. The child should mentain his family ties, should have the possibility to be properly educated and should have an adequate physical and psychological development.

Article 13 states the necessity of timely and diligent treatment of cases involving children. These kind of criminal proceedings will be dealt with urgently and in an appropriate manner to the particularities of the child. Article 6 paragraph 1 of the ECHR was breached in the case T. v. the United Kingdom of 16 december 1999. Two ten years boys abducted and bettered to death a two-year-old boy. The ECtHR (para. 85) acknowledged that ` in respect of a young child charged with a grave offence attracting high levels of media and public interest, it would be necessary to conduct the hearing in such a way as to reduce as far as possible his or her feelings of intimidation and inhibition`. The circumstances in which the trial took place increased the discomfort of the applicant, `exposed to the scrutiny of the press and of the public` and `the formality and ritual of the Crown Court must at times seemed incomprehensible and intimidating for a child of eleven` (para. 86 of the decision). An adolescent psychiatrist prepared a report for the applicant and found ` that the post-traumatic stress disorder suffered by the applicant, combined with the lack of any therapeutic work since the offence, had

[241] Caricature drawn by S. Roth in Gail Hubble, Juvenile defendants: taking the human rights of the children seriously, Alternative Law Journal, Volume 25, Issue 3, June 2000, p. 116.

limited his ability to instruct his lawyers and testify adequately in his own defence (see paragraph 11 above). Moreover, the applicant in his memorial states that due to the conditions in which he was put on trial, he was unable to follow the trial or take decisions in his own best interests (see paragraph 17 above).` Therefore, the ECtHR considered that the applicant was unable to participate effectively in the proceedings and the fairness of the trail was breached.

The delinquent child needs a special protection of privacy (article 14). The public should not normally assist to such proceedings. The name and images of the child and his family should be protected. The information that could lead to the identification of the child should not be disclosed. In the case of the ECtHR, T. v. the United Kingdom of 16 december 1999, the judge allowed the publication of the name of the applicant. That that lead to the public knowledge of the name and photograph of the applicant as newspapers published all the relevant information concerning the applicant (even if afterwards another injunction restraining the publication of any detail that could lead to the identification was issued).

The child has a special right to appear in person at the trial (article 16). Member States shall take all necessary measures to ensure that the defendant child is present. Even if the child refused to be present, he has the right to a new trial which may lead to the reversal of the original decision. This is another derogatory measure from those that apply to adults. It is a justified exception since the decision not be present at the trial could very seldom not be a very rational one since the defendant is a child. The child should be protected from a conviction that was the consequence of his incapacity to make proper judicial judgements.[242]

Article 17 provides for a mandatory applicability of the rights of the child in the framework of European arrest warrant proceedings. The competent authorities in the executing Member States will ensure that the child enjoys the rights and shall also take also the necessary measures to limit the deprivation of liberty.

### 4.2. Case study on vulnerable suspects

Mr. Angel is 15 years old. He is a national champion in boxing and karate. He enjoys watching violent videos posted on the internet. On May 1, 2014, he watched with a friend a video in which a youngster hits and renders unconscious a person walking on the street. The video is accompanied by a challenge to other youngsters to make as many persons as possible unconscious from a single punch or kick. Mr. Angel thought he is able to beat the online record

[242] Even if the child would have the ability to stand trial, for details on the fitness to stand trial see Ronald Roesch, Derek Eaves, Rebecca Sollner, Marie Normandin, William Glackman, Evaluating Fitness to Stand Trial, A Comparative Analysis of Fit and Unfit Defendants, International Journal of Law and Psychiatry, volume 4, 1981, p. 145-157.

and went out with his friends on the streets. In three days he punched and kicked seven persons, but only managed to make three of them lose consciousness.

Mr. Angel's father approves of his son's actions and gave a statement to the local press that his son is a very good fighter and a worthy son. Mr. Angel's legal counsel claimed that the child was frightened and acted each time under self-defense. Because of this, Mr. Angel decided to replace his lawyer in order to get another one who would claim that he has the right as a warrior to fight anyone seen as threatening to him or to his friends.

Mr. Angel refused to give any statements. He is charged with seven crimes of battery and is under judicial control. Mr. Angel refused to be present to his trial, for fear of missing out on his daily trainings.

Mr. Angel was eventually sentenced to the maximum penalty for first minor defendant, more precisely to 6 months of daily assistance under article 120 of the Criminal Code. Daily assistance consists of a minor's obligation to follow a schedule set by the Probation Service, which contains the timetable and conditions for conducting activities as well as the prohibitions imposed on the minor.

**Questions:**

a) Is an individual assessment necessary during the investigation?

b) Should the holder of parental responsibility be replaced?

c) Should Mr. Angel's lawyer be replaced?

d) Should Mr. Angel be forced to attend his own trial?

e) What would you answer to the above, according to your national law?

**Instructions:**

The necessity of the individual assessment, the mandatory presence of a minor at the trial and the possibility of replacement of the holder of parental responsibility will be analyzed according to the national law of the participants. The issue regarding the replacement of the lawyer by the court should be addressed in light of *Lagerblom v Sweden*.

### 4.3. Comments concerning the case study on vulnerable suspects

#### a) Is an individual assessment necessary during the investigation?

In 2008, the Council of Europe adopted the European Rules for Juvenile Offenders subject to Sanctions or Measures ('the European Rules') setting out important principles to be followed by states in their treatment of juveniles. These include a requirement that the imposition and implementation of sanctions or measures be based on the best interests of the juvenile, be subject to the principle of proportionality, i.e. depend on the gravity of the offence committed, and take account of the child's age, physical and mental well-being, development, capacities and personal circumstances. The principles require that measures be tailored to individual young people, implemented without undue delay and follow the principle of minimum intervention.

According to Article 7 of the Proposal for a Directive of the European Parliament and of the Council on procedural safeguards for children suspected or accused in criminal proceedings a child suspected or accused in criminal proceedings has the right to an individual assessment. The individual assessment should be carried out at an appropriate stage of the proceedings and at the latest before the indictment. It should be recorded in accordance with national law.

#### b) Should the holder of parental responsibility be replaced?

The concept "parental responsibility" covers the duties and rights to take care of the child's person and property. This includes a responsibility to ensure that the child has shelter, food and clothes as well as a responsibility for the child's upbringing. It includes the responsibility to look after the child's property, if any. It also includes the right to represent the child legally.

The persons having parental responsibility of a child can be referred to as "holders of parental responsibility". In most cases, the parents of the child have this responsibility. However, if the parents are deceased or no longer capable or authorised to take care of their child, a guardian can be appointed to represent the child. The guardian can be a relative, a third person or an institution. The revocation of parental responsibilities can only be ordered as the most extreme emergency measure if no other alternative exists to protect against a specific and genuine threat to the child's interests.

Prior to the revocation of parental responsibilities, a less severe option is the furnishing of assistance with child rearing, e.g. advice on child rearing, therapeutic measures, placement with a child-minder, nursery, children's clinic, or with foster parents.

### c) Should Mr. Angel's lawyer be replaced?

According to Article 6 of the 2013/0408 (COD) Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on procedural safeguards for children suspected or accused in criminal proceedings „*Member States shall ensure that children are assisted by a lawyer throughout the criminal proceedings in accordance with Directive 2013/48/EU. The right to access to a lawyer cannot be waived. The right to access to a lawyer shall also apply to criminal proceedings that may lead to the final dismissal of the case by the prosecutor after the child has complied with certain conditions*". We also mention the general principles on the right to legal assistance as referred in the Guide on the right to a fair trial, art.6 criminal limb, found on the ECtHR`s website.

*„(C) Legal assistance*[243]

*284. The right of everyone charged with a criminal offence to be effectively defended by a lawyer is one of the fundamental features of a fair trial (Salduz v. Turkey [GC], § 51). As a rule, a suspect should be granted access to legal assistance from the moment he is taken into police custody or pre-trial detention (Dayanan v. Turkey, § 31).*

*The right of an accused to participate effectively in a criminal trial includes, in general, not only the right to be present, but also the right to receive legal assistance, if necessary (Lagerblom v. Sweden, § 49; Galstyan v. Armenia, §*

[243] Guide on the right to a fair trial, art.6 criminal limb, found on the ECtHR`s website, pag.44-47

*89). By the same token, the mere presence of the applicant's lawyer cannot compensate for the absence of the accused (Zana v. Turkey [GC], § 72).*

*285. The right to legal representation is not dependant upon the accused's presence (Van Geyseghem v. Belgium [GC], § 34; Campbell and Fell v. the United Kingdom, § 99; Poitrimol v. France, § 34). The fact that the defendant, despite having been properly summoned, does not appear, cannot – even in the absence of an excuse – justify depriving him of his right to be defended by counsel (Van Geyseghem v. Belgium [GC], § 34; Pelladoah v. the Netherlands, § 40; Krombach v. France, § 89; Galstyan v. Armenia, § 89).*

*286. The right of everyone charged with a criminal offence to be defended by counsel of his own choosing is not absolute (Meftah and Others v. France [GC], § 45; Pakelli v. Germany, § 31). Although, as a general rule, the accused's choice of lawyer should be respected (Lagerblom v. Sweden, § 54), the national courts may override that person's choice when there are relevant and sufficient grounds for holding that this is necessary in the interests of justice (Meftah and Others v. France [GC], § 45; Croissant v. Germany, § 29). For instance, the special nature of the proceedings, considered as a whole, may justify specialist lawyers being reserved a monopoly on making oral representations (Meftah and Others v. France [GC], § 47).*

*287. For the right to legal assistance to be practical and effective, and not merely theoretical, its exercise should not be made dependent on the fulfilment of unduly formalistic conditions: it is for the courts to ensure that a trial is fair and, accordingly, that counsel who attends trial for the apparent purpose of defending the accused in his absence, is given the opportunity to do so (Van Geyseghem v. Belgium [GC], § 33; Pelladoah v. the Netherlands, § 41).*

*288. As with other fair-trial rights it is possible for an accused to waive his right to legal assistance (Pishchalnikov v. Russia, § 77). However, before an accused can be said to have implicitly, through his conduct, waived such an important right under Article 6, it must be shown that he could reasonably have foreseen what the consequences of his conduct would be. Additional safeguards are necessary when the accused asks for counsel because if an accused has no lawyer, he has less chance of being informed of his rights and, as a consequence, there is less chance that they will be respected (Pishchalnikov v. Russia, § 78).*

*(E) Practical and effective legal assistance*

*296. Article 6 § 3(c) enshrines the right to "practical and effective" legal assistance Bluntly, the mere appointment of a legal-aid lawyer does not ensure effective assistance since the lawyer appointed may die, fall seriously ill, be prevented for a protracted period from acting or shirk his duties (Artico v. Italy, § 33).*

*297. The right to effective legal assistance includes, inter alia, the accused's right to communicate with his lawyer in private. Only in exceptional circumstances may the State restrict confidential contact between a person in detention and his defence counsel (Sakhnovskiy v. Russia [GC], § 102). If a lawyer is unable to confer with his client and receive confidential instructions from him without surveillance, his assistance loses much of its usefulness (S. v. Switzerland, § 48; Brennan v. the United Kingdom, § 58). Any limitation on relations between clients and lawyers, whether inherent or express, should not thwart the effective legal assistance to which a defendant is entitled (Sakhnovskiy v. Russia [GC], § 102). To tap telephone conversations between an accused and his lawyer (Zagaria v. Italy, § 36) and to obsessively limit the number and length of lawyers' visits to the accused (Öcalan v. Turkey [GC], § 135) represent further possible breaches of the requirement to ensure effective assistance.*

*298. However, a Contracting State cannot be held responsible for every shortcoming on the part of a lawyer appointed for legal-aid purposes or chosen by the accused (Lagerblom v. Sweden, § 56; Kamasinski v. Austria, § 65). Owing to the legal profession's independence, the conduct of the defence is essentially a matter between the defendant and his representative; the Contracting States are required to intervene only if a failure by counsel to provide effective representation is manifest or is sufficiently brought to their attention (Kamasinski v. Austria, § 65; Imbrioscia v. Switzerland, § 41; Daud v. Portugal, § 38). State liability may arise where a lawyer simply fails to act for the accused (Artico v. Italy, §§ 33, 36) or where he fails to comply with a crucial procedural requirement that cannot simply be equated with an injudicious line of defence or a mere defect of argumentation (Czekalla v. Portugal, §§ 65, 71)".*

**d) Should Mr. Angel be forced to attend his own trial?**

According to Article 16 of the 2013/0408 (COD) Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on procedural safeguards for children suspected or accused in criminal proceedings „*Member States shall ensure that children are present at the trial. Member States shall ensure that where children were not present at the trial resulting in a decision on their guilt, they shall have the right to a procedure in which they have the right to participate and which allows a fresh determination of the merits of the case, including examination of new evidence, and which may lead to the original decision to be reversed*".

If children are not present during the trial, their rights of defence are at stake. The defendants are in such case neither able to give their version of the facts to the Court, nor are they able to present evidence accordingly. They might therefore be found guilty without having had the opportunity to rebut the grounds for such a conviction.

The right to be present at trial, or being able to waive such right after having been informed of it, is indispensable for the exercise of the rights of defence.

Article 16 provides that Member States must ensure that the right to be present applies to any trial aiming at assessing the question of the guilt of the accused person (both conviction and acquittal decisions) in line with ECHR case-law. The presence of the child at this moment in the criminal proceedings is of particular importance given the consequences that moment could have.

Neither the letter nor the spirit of Article 6 of the Convention prevents a person from waiving of his own free will, either expressly or tacitly, the entitlement to the guarantees of a fair trial. However, such a waiver must, if it is to be effective for Convention purposes, be established in an unequivocal manner and be attended by minimum safeguards commensurate with its importance. In addition, it must not run counter to any important public interest (see *Hermi v. Italy* [GC], § 73; *Sejdovic v. Italy* [GC], § 86). Before an accused can be said to have implicitly, through his conduct, waived an important right under Article 6 of the Convention it must be shown that he could reasonably have foreseen what the consequences of his conduct would be (*Hermi v. Italy* [GC], § 74; *Sejdovic v. Italy* [GC], § 87).

**e) What would you answer to the above, according to your national law?**

As each of the participants had the national legislation available, a brief analysis of the national solution to the questions has taken place.

# Section 5 - Legal aid

## 5.1. Overview on the legal aid issue

*Introduction*

There is a need to legal aid in order not to have an unfair trail in place. Even if the formal requirements of a fair trail are completed, the defendant could not understand what happened to him and why he had been punished.

One cannot ignore the fact that there are standards on legal aid issued by the United Nations. The United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice System[244] provides in full detail the rules and principles that apply to a proper exercise of this fundamental right.

Legal aid can be offered when it is in the interest of justice to do so. The right to defence is not all about the proper help of the defendant in the judicial battle with the prosecutor. The legal counsel is also a guarantee himself as the lawyer can observe with an expert eye the work of the investigators.

The legal basis for the right to defence is article 6 paragraph 3 letter c of the ECHR. The accused persons has the right to defend himself in person or through legal assistance. The legal assistance may be of his own choosing or, if he has not sufficient means to pay for legal assistance, a free given assistance. Free legal assistance will be given only when the interests of justice require.

The expertise and the resources of the investigators need to be balanced out in order to get the equality of arms between the accused person and the prosecutor. The suspect has the right to defend himself and can choose to defend himself. But there are cases when mandatory defence must be granted. And this could be done even if the consent of the accused person is not given. A legal counsel allows the accused person to choose the best judicial decisions.

The legal aid must be granted at the beginning of the investigation, as the accused person is most vulnerable then. [245]

[244] https://www.unodc.org/documents/justice-and-prison-reform/UN_principles_and_guidlines_on_access_to_legal_aid.pdf

The interest of justice imposes legal aid in certain cases. A person deprived of liberty always needs a legal representation. There are other criteria to assessing legal aid, but this is the only one that indicated a clear need of legal assistance.

Therefore, the European Commission has issued a Proposal for a Directive of the European Parliament and of the Council on provisional legal aid for suspects or accused persons deprived of liberty and legal aid in European arrest warrant proceedings.

The mandatory presence of a lawyer is required in order to raise the level of the minimal rights granted to the accused person and in order to enhance the trust in the framework of executing the EAW. The requested person will also benefit legal aid during the investigation when he returns in the requesting state. The legal aid should always be effective as the ECtHR always guarantees rights that are not theoretical or illusory, but practical and effective.

The accused person should be informed that he has the right of access to a lawyer. The new Directive makes the necessary future step and introduces the minimal right to legal aid. The right of access to a lawyer includes the right to legal aid if this is in the interest of justice.

The legal aid should be given provisionally before any questioning. The Directive allows that the right to legal aid is given to suspects or accused persons deprived of liberty. The legal aid is to be given before the decision on the necessity of legal aid is taken. The suspect or the accused person has the option to ask for legal aid if they want, according to article 4.

The second goal of the Directive is to ensure granting legal aid until the moment a decision of surrendering a requesting person is given. The criteria for the legal aid are those pursuant to the jurisprudence of the ECtHR, the lack of financial means and the interests of justice.

*ECtHR case law on legal aid*

A. Benham v. United Kingdom, 10 June 1996

The applicant complained that he was not legally represented in the framework of a criminal charge. There was a legal-aid scheme available to the applicant, but that did not include a mandatory legal aid. Where deprivation of liberty is

[245] As the ECtHR acknowledged in in the decision Nechiporuk and Yonkalo v. Ukraine of 21 April 2011, par. 262.

at stake, the rule is that the interests of justice call for legal representation. The ECtHR decided that the penalty was severe (the possible penalty was three months detention) and that the applicable law was complex. The ECtHR considered that the interests of justice demanded for free legal representation in order for the applicant to get a fair hearing. There was a violation of the right to defence.

B. Lagerblom v. Sweden, 14 January 2003

The applicant complained he could not choose his attorney. The right to choose the legal counsel is not absolute. The wishes of the accused person can be overridden when "there are relevant and sufficient grounds for holding that it is necessary in the interests of justice ". There is no such right as to have the public legal counsel replaced.

The defence is a matter between the accused and his counsel. The judicial authorities ''are required to intervene if a failure by public defence counsel to provide effective representation is manifest or sufficiently brought to their attention." Still, the State cannot be held responsible for every shortcoming on the conditions the legal aid is ensured.

ECtHR found that it would be "unreasonable, in view of the general desirability of limiting the total cost of legal aid, that national authorities take a restrictive approach to requests to replace public defence counsel once they have been assigned to a case and have undertaken certain activities." In order to replace the public defence counsel there should be evidence that effective legal assistance was not provided or was manifestly bad provided. There was no violation of the right to defence.

C. Artico v. Italy, 13.05.1980

In this case, the public defence counsel was not available for the accused person. A judge acknowledged that legal aid was needed in the case as it was in the interests of the justice. The public defence lawyer, appointed by the judge, refused to do his work because he claimed that his task was very demanding and onerous. A lawyer could have helped Mr. Artico to clarify his defence. It was plausible that a lawyer could have convinced the judges that the statutory limitation would apply to Mr. Artico. A prejudice is not required in order to admit a violation of the right to an effective defence. The national judges should have not been passive when they noticed a lack of defence.

D. Kamasinski v. Austria, 19.12.1989

Mr. Kamasinski was not pleased with the defence made by his appointed legal aid counsel. The applicant mentioned that his lawyer did not attend the indictment hearing, made only brief visits during investigation and was not aware of the evidence in the investigation file. Also he asserted that the lawyer had a very poor performance in court. The ECtHR mentioned that ,, the conduct of defence is essentially a matter between the defendant and his counsel, whether counsel be appointed under a legal aid scheme or be privately financed". The competent national authorities must intervene only if the legal aid counsel fails to provide an effective representation.

The applicant asked the judges repeatedly for his legal aid counsel to be replaced, but his requests were rejected. The national authorities were not unreasonable to do that because the lawyer visited the applicant nine times, filed motions for evidence to be administered and lodged a complaint against the decision to remand in custody issued against the applicant.

**5.2. Case study on legal aid**

On September 3, 2014, Mr. Lungulescu was walking through a local park. He sees a women dressed very elegant carrying a large expensive purse. Mr. Lungulescu approaches the lady, punches her in the face and snatches her purse. The victim starts shouting after the burglar and Mr. Lungulescu is caught red-handed by a local police patrol. Mr. Lungulescu is brought to the police station. A report was drafted by the policemen that caught Mr. Lungulescu. Mr. Lungulescu was informed that he has the right to a lawyer and that he has the right not to say anything. Mr. Lungulescu chooses to give a full statement in the report about his crime. Mr. Lungulescu got a public legal counsel and afterwards he was informed of his rights and put into custody for 24 hours. Mr. Lungulescu refused to give any other statement, but informed the police and his lawyer that he sticks to what he said in the first statement. Mr. Lungulescu was sent in front of the judge in order for an arrest warrant to be issued. In front of the judge of freedoms and liberties Mr. Lungulescu said that he is innocent and that he got the purse from another person as a gift. Still, Mr. Lungulescu got arrested.

During the investigation the public legal aid counsel visited Mr. Lungulescu a few times and asked for a confrontation between Mr. Lungulescu and the victim. He claimed Mr. Lungulescu was innocent and requested for two friends of Mr. Lungulescu to be heard in order to prove that the crime was committed by a man called Paul. The prosecutor refused to hear the friends or Mr. Lungulescu as witnesses.

Mr. Lungulescu asked during the judgment to have the public legal counsel replaced. He claimed he had no proper defence because the lawyer was not able to get him out of arrest. Also Mr. Lungulescu asserted that he did not trust that the defence is effective.

**Questions:**

a) Is the defence of Mr. Lungulescu effective?

b) What would be the criteria for a proper public defence?

c) Should the public legal counsel be replaced if the defendant has requested?

d) Is there any violation of the right to legal aid?

e) Which would be the answer, according to your national law, to the questions above?

**Instructions:**

The criteria for assessing the effective defence will be provided by the decisions of the ECtHR in cases Kamasinski v. Austria and Sannino v. Italy.

As each of the participants will have the national legislation available, a brief analysis of the national solution to the questions will take place.

### 5.3. Comments concerning the case study on legal aid

#### a) and b)

**Is the defence of Mr. Lungulescu effective? What would be the criteria for a proper public defence?**

The guarantees in paragraph 3 of Article 6 are specific aspects of the right to a fair trial in criminal proceedings set forth in paragraph 1 of the same Article. Read as a whole, Article 6 of the Convention guarantees the right of an accused to participate effectively in a criminal trial. In general this includes not only the right to be present, but also the right to receive legal assistance, if necessary, and to follow the proceedings effectively. Such rights are implicit in the very notion

of an adversarial procedure and can also be derived from the guarantees contained in sub-paragraphs (c) and (e) of Article 6 § 3.

*(E) Practical and effective legal assistance*[246]

*296. Article 6 § 3(c) enshrines the right to "practical and effective" legal assistance Bluntly, the mere appointment of a legal-aid lawyer does not ensure effective assistance since the lawyer appointed may die, fall seriously ill, be prevented for a protracted period from acting or shirk his duties (Artico v. Italy, § 33).*

*297. The right to effective legal assistance includes, inter alia, the accused's right to communicate with his lawyer in private. Only in exceptional circumstances may the State restrict confidential contact between a person in detention and his defence counsel (Sakhnovskiy v. Russia [GC], § 102). If a lawyer is unable to confer with his client and receive confidential instructions from him without surveillance, his assistance loses much of its usefulness (S. v. Switzerland, § 48; Brennan v. the United Kingdom, § 58). Any limitation on relations between clients and lawyers, whether inherent or express, should not thwart the effective legal assistance to which a defendant is entitled (Sakhnovskiy v. Russia [GC], § 102). To tap telephone conversations between an accused and his lawyer (Zagaria v. Italy, § 36) and to obsessively limit the number and length of lawyers' visits to the accused (Öcalan v. Turkey [GC], § 135) represent further possible breaches of the requirement to ensure effective assistance.*

*298. However, a Contracting State cannot be held responsible for every shortcoming on the part of a lawyer appointed for legal-aid purposes or chosen by the accused (Lagerblom v. Sweden, § 56; Kamasinski v. Austria, § 65). Owing to the legal profession's independence, the conduct of the defence is essentially a matter between the defendant and his representative; the Contracting States are required to intervene only if a failure by counsel to provide effective representation is manifest or is sufficiently brought to their attention (Kamasinski v. Austria, § 65; Imbrioscia v. Switzerland, § 41; Daud v. Portugal, § 38). State liability may arise where a lawyer simply fails to act for the accused (Artico v. Italy, §§ 33, 36) or where he fails to comply with a crucial procedural requirement that cannot simply be equated with an injudicious line of defence or a mere defect of argumentation (Czekalla v. Portugal, §§ 65, 71)".*

[246] Guide on the right to a fair trial, art.6 criminal limb, found on the ECtHR`s website, pag.44-47

**c) Should the public legal counsel be replaced if the defendant has requested?**

It is true that Article 6 § 3 (c) entitles an accused to be defended by counsel "of his own choosing". Nevertheless, and notwithstanding the importance of a relationship of confidence between lawyer and client, this right cannot be considered to be absolute. It is necessarily subject to certain limitations where free legal aid is concerned. When appointing defence counsel the courts must certainly have regard to the accused's wishes but these can be overridden when there are relevant and sufficient grounds for holding that this is necessary in the interests of justice (see the Croissant v. Germany judgment cited above, p. 33, § 29).

Similarly, Article 6 § 3 (c) cannot be interpreted as securing a right to have public defence counsel replaced (see, among other authorities, *Östergren v. Sweden*, application no. 13572/88, Commission decision of 1 March 1991, Decisions and Reports 69, p. 198, at p. 204, and *Erdem v. Germany* (dec.), no. 38321/97, 9 December 1999, unreported).

However, the appointment of defence counsel does not necessarily settle the issue of compliance with the requirements of Article 6 § 3 (c). Although the conduct of the defence is essentially a matter between the accused and his counsel, the competent national authorities are required to intervene if a failure by public defence counsel to provide effective representation is manifest or sufficiently brought to their attention in some other way. Nevertheless, a State cannot be held responsible for every shortcoming on the part of a lawyer appointed for legal aid purposes.

In *Daud v. Portugal* judgment (no. 22600/93, 21 April 1998) the Court noted that the first officially assigned lawyer, before reporting sick, had not taken any steps as counsel for Mr Daud, who tried unsuccessfully to conduct his own defence. As to the second lawyer, whose appointment the applicant learned of only three days before the beginning of the trial at the Criminal Court, the Court considered that she did not have the time she needed to study the file, visit her client in prison if necessary and prepare his defence. The time between notification of the replacement of the lawyer (23 January 1993) and the hearing (26 January 1993) was too short for a serious, complex case in which there had been no judicial investigation and which led to a heavy sentence. The Supreme Court did not remedy the situation, since in its

judgment of 30 June 1993 it declared the appeal inadmissible on account of an inadequate presentation of the grounds. Mr Daud consequently did not have the benefit of a practical and effective defence as required by Article 6 § 3 (c).

In the case of *Sannino v. Italy*, (30961/03, 27 April 2006), the Court observed that on 18 January 1999 Mr G., the lawyer chosen by the applicant, withdrew from the case … Mr B., the lawyer appointed by the court to represent the applicant, was informed of the date of the next hearing, but not of his appointment… That omission on the part of the authorities partly explained Mr B.'s absence, which led to the situation complained of by the applicant, namely, the fact that at each hearing he was represented by a different replacement lawyer … There was nothing to suggest that the replacement lawyers had any knowledge of the case. However, they did not request an adjournment in order to acquaint themselves with their client's case. Nor did they ask to examine the defence witnesses whom the District Court had given the applicant's first two lawyers leave to call … Admittedly, the applicant, who until 2 November 1999 had attended a lot of hearings, never informed the authorities of the difficulties he had been having preparing his defence … The applicant also failed to get in touch with his court-appointed lawyers to seek clarification from them about the conduct of the proceedings and the defence strategy. Nor did he contact the court regis try to ask about the outcome of his trial. However, the Court considered that the applicant's conduct could not of itself relieve the authorities of their obligation to take steps to guarantee the effectiveness of the accused's defence. The above-mentioned shortcomings of the court-appointed lawyers were manifest, which put the onus on the domestic authorities to intervene. However, there is nothing to suggest that the latter took measures to guarantee the accused an effective defence and representation so the Court concluded that there had been a violation of Article 6 of the Convention.

d) **Is there any violation of the right to legal aid?**

(D) Legal aid[247]

[247] Guide on the right to a fair trial, art.6 criminal limb, found on the ECtHR`s website, pag.44-47

*"289. The third and final right encompassed in Article 6 § 3(c), the right to legal aid, is subject to two conditions.*

*290. First, the accused must show that he lacks sufficient means to pay for legal assistance. He need not, however, do so "beyond all doubt"; it is sufficient that there are "some indications" that this is so or, in other words, that a "lack of clear indications to the contrary" can be established (Pakelli v. Germany, § 34).*

*291. Second, the Contracting States are under an obligation to provide legal aid only "where the interests of justice so require". This is to be judged by taking account of the facts of the case as a whole, including not only the situation obtaining at the time the decision on the application for legal aid is handed down but also that obtaining at the time the national court decides on the merits of the case (Granger v. the United Kingdom, § 46).*

*292. In determining whether the interests of justice require an accused to be provided with free legal representation the Court has regard to various criteria, including the seriousness of the offence and the severity of the penalty at stake (Benham v. the United Kingdom [GC], § 60; Quaranta v. Switzerland, § 33; Zdravko Stanev v. Bulgaria, § 38). In principle, where deprivation of liberty is at stake, the interests of justice call for legal representation (Benham v. the United Kingdom [GC], § 61; Quaranta v. Switzerland, § 33; Zdravko Stanev v. Bulgaria, § 38).*

*293. As a further condition of the "required by the interests of justice" test the Court considers the complexity of the case (Quaranta v. Switzerland, § 34; Pham Hoang v. France, § 40; Twalib v. Greece, § 53) as well as the personal situation of the accused (Zdravko Stanev v. Bulgaria, § 38). The latter requirement is looked at especially with regard to the capacity of the particular accused to present his case – for example, on account of unfamiliarity with the language used at court and/or the particular legal system – were he not granted legal assistance (Quaranta v. Switzerland, § 35; Twalib v. Greece, § 53).*

*294. When applying the "interests of justice" requirement the test is not whether the absence of legal aid has caused "actual damage" to the presentation of the defence but a less stringent one: whether it appears "plausible in the particular circumstances" that the lawyer would be of assistance (Artico v. Italy, § 34-35; Alimena v. Italy, § 20).*

*295. Notwithstanding the importance of a relationship of confidence between lawyer and client, the right to be defended by counsel "of one's own choosing" is necessarily subject to certain limitations where free legal aid is concerned. For example, when appointing defence counsel the courts must have regard to the accused's wishes but these can be overridden when there are relevant and sufficient grounds for holding that this is necessary in the interests of justice (Croissant v. Germany, § 29; Lagerblom v. Sweden, § 54). Similarly, Article 6 § 3(c) cannot be interpreted as securing a right to have public defence counsel replaced (Lagerblom v. Sweden, §§ 55, 59). Furthermore, the interests of justice cannot be taken to require an automatic grant of legal aid whenever a convicted person, with no objective*

*likelihood of success, wishes to appeal after having received a fair trial at first instance in accordance with Article 6 (Monnell and Morris v. the United Kingdom, § 67)*".

Mere dissatisfaction with the manner in which the lawyer runs the case, or minor errors or defects in the lawyer's work, is unlikely to lead to a situation in which the State is obliged to intervene. In *Kamasinski v Austria*, the applicant complained about the quality of his legal aid lawyer. However, the applicant's lawyer took a number of steps prior to the trial, including visiting the applicant in prison, lodging a complaint against the decision to remand in custody, and filing motions for the attendance of witnesses. Although the lawyer's work could be criticized, the ECtHR held that the circumstances of his representation did not reveal a failure to provide legal assistance as required by Article 6(3) or a denial of a fair hearing under Article 6(1) of the ECHR.

However, in certain circumstances the ECtHR has held that the poor or defective work of the lawyer can amount to a "manifest failure". In *Czekalla v Portugal*, the legal aid lawyer failed to comply with a "simple and purely formal" rule when lodging an appeal. As a result the appeal was dismissed. The applicant was in a particularly vulnerable position, as a foreigner who did not speak the language of the courts, and he faced a lengthy prison sentence.

**e) What would you answer to the above, according to your national law?**

As each of the participants had the national legislation available, a brief analysis of the national solution to the questions has taken place.

## Section 6 - The right to be present at one`s trial

### 6.1. Overview on the right to be present at one`s trial

Usually the criminal trial takes place with the presence of the accused person. The accused is present when he has the option to exercise his rights. The law offers the possibility to investigate and to sentence a person in absentia.

The defendant could choose to flee in order to have afterwards the option of retrail. On the other hand, we should always consider that a person could not find out whether she is under investigation. If a person changes her address during trial and she was never officially informed about the accusation, a right to retrial should be in place. There could be objective grounds that get the person not to know about a pending criminal trial.

The judicial authorities must make all reasonable efforts in order to ensure the presence of the accused person during the investigation and the criminal trial. Summonses are issued and investigations concerning the whereabouts of the defendant should be made.

During the investigation, the enquiry concerning the suspect are necessary in order to have the official notification on the accusation and to offer the suspect the access to the investigation file before issuing the indictment. During the trial the court should issue summons or get the police to check the whereabouts of the defendant.

The jurisprudence of the ECtHR imposes a retrail when a person was sentenced in absentia. Only as an exception, the retrial is excluded if there is evidence that the defendant gave up his right to be present at trial. The renouncement of the right to be present is considered in relation with the criteria established by the relevant Framework Decision and the jurisprudence of the ECtHR.

One does not recognise and would not recognise the right for the reopening of the proceedings for a convict that escaped from the judgement. [248] Such a person has no such right recognised by the ECtHR. Escaping the judgement implies giving up the right to be present at the judgement of the case.

In Romanian Law the deadline to ask for the reopening of the trail will pass certainly from the moment the sentence is executed by the arrest of the convict on the territory of Romania or by surrendering the convict by the foreign competent authorities or from the moment the convict finds out that a criminal fine applied to him.[249]

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[248] Iulius- Cezar Dumitrescu, The reopening of the criminal trial in the case of in absentia judgement of the convicted person, in the framework of the present and future regulation, Dreptul no.2/2010, p. 194.

[249] For an analysis of the regulation of this institution and of the retrial of a person as a result of the extradition see Leontin Coraş,The reopening of the criminal trial for in absentia judgement of the convicted person – solution for the retrial after extradition, Dreptul no. 11/2009, p. 160-165; Dumitru Rebegea, The proceedings of retrial of the convicted or judged in absentia, in the case of extradition, Dreptul no. 10/2008, p. 190-194; Iulius- Cezar Dumitrescu, The reopening of the criminal trial in the case of in absentia judgement of the convicted person, in the framework of the present and future regulation, Dreptul no. 2/2010, p. 191-198.

Article 466 of the Romanian Criminal Code mentions the criteria in order to consider a convict subject to a judgement in absentia. This standing offers him the right to ask for a reopening of the trial. The convict should be:

- a person that had no knowledge of the trial ;
- a person that knew about the trial, but had a reason for to be absent from the judgement and was not able to inform the court that he could not be present.

The right to fair trial is guaranteed only if the accused person can be present in front of the court in order to defend himself, to ask questions and to make statements in his defence. The judgement in absentia is fair when the presence of the absence of the defendant would lead to the unlimited postponing of the case, especially when the defendant has a guilt in relation to his absence (Commission of Human Rights, decision of 8.07.1978).[250] The judicial authorities need to be diligent enough in order to control the reason of the absence of the defendant. If the judicial authorities asserts that the defendant fled the country, one need to have evidence in order to prove this. The right to a fair trial is not infringed if the defendant chooses to leave the territory of that state while the trial is pending (Hany v. Italy of 06.11.2007). [251] Therefore, that person will not have the right to retrial.

One can reopen the criminal trial if the court is informed of the decision of the accused person to be present. The criminal trial can be continued without the presence of the person, but that person has the opportunity to ask for the reopening of the criminal trial. An example for this can be the case Medenica v. Switzerland (final 12.12.2001 and issued at 14.06.2001).[252] The convict in this case could not be present at the trial as a consequence of an interdiction of leaving the territory of another state. One can have a fair trial in this case without the presence of that person, but he has the possibility to ask for a retrial. A hearing by using a video conference is an option. Another option, if the courts are rather close, would be to guarantee that the accused person would not flee by having police escort from the borders to the courts and back.

The decision of the defendant not to be present at the trial should be clear. The defendant must be officially informed on the accusation. [253]

[250] For details see Radu Chiriţă, The right to a fair trial, Universul Juridic Publishing, Bucharest, 2008, p. 325.
[251] For details see Radu Chiriţă, The right to a fair trial, Universul Juridic Publishing, Bucharest, 2008, p. 325.
[252] Radu Chiriţă, The right to a fair trial, Universul Juridic Publishing, Bucharest, 2008, p. 326.
[253] Radu Chiriță, The right to a fair trial, Universul Juridic Publishing, Bucharest, p. 327.

There might be cases when the defendant already had access to the investigation file and where he was under an obligation not to leave the town. In this case a retrail will not be allowed because the defendant is presumed to have renounced his right to be present (as a direct consequence of the decision ECtHr from the case Demebukov v. Bulgariei of 28.02.2008).[254]

The refusal of the retrial with the breach of art. 6 paragraph 1 leads to an illegal detention of the defendant (ECtHR decision Stoichkov v. Bulgaria of 24.03.2005). [255]

The right to judgement in absentia [256] is guaranteed by the article 6 paragraph 1 of the ECHR. The option of the defendant to be present is also guaranteed by the letters c), d) of the paragraph 2 of the article 6 from the ECHR. The defendant could this way defend himself and to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.

According to the Framework Decision 2009/299/JAI[257], the right to retrial is not given if a person in due time was personally summoned and informed about the moment and the place for the trial, or had received, through other means, an official notification about it. It should be clearly established that the person knew about the trial and also that she was informed that a judicial decision can be issued if she is not present.

The right to a retrial is also not available to the convict that was aware of the scheduled trial and had given a mandate to a legal counsellor, who was either appointed by the person concerned or by the State and who was indeed defended by that counsellor at the trial. The last situation when the retrial is denied concerns the convict that, after being served with the decision and being expressly informed about the right to a retrial or to an appeal, which may lead to the original decision being reversed, did not request a retrial or appeal within the applicable time frame.

This right to be present at one's trial should also be guaranteed through the new provisions from the Proposal of the European Parliament and of the Council on strengthening of certain aspects of the presumption of innocence and of

[254] Mihail Udroiu, Ovidiu Predescu, Nicoleta Miulescu, Judgement in absentia, Dreptul no. 6/2009, p. 240.
[255] Radu Chiriţă, The right to a fair trial, Universul Juridic Publishing, Bucharest, p. 329
[256] There is also a Recommendation of the Commity of the Ministers of the Counseil of Europe (75) 11 of 21 March, source of soft law with a reflection in the Framework Decision on in absentia judgement; for details concerning this soft law Mihail Udroiu, Ovidiu Predescu, Nicoleta Miulescu, idem, p. 238.
[257] Official Journal of the European Union L 81, 27.3.2009.

the right to be present at trial in criminal proceedings[258]. Chapter III of this new Directive should deal with the issue of judgement in absentia. The provisions are similar to those recognised before by the EU Law on the"test of the person judged in absentia". The right to be present at one's trial is not going to be related to the applicability of certain framework decisions as this right should become a general guarantee embedded in the EU Criminal Law. Articles 8 and 9 of the new directive would allow to the person judged in absentia to have a new trial.

This new trial is in fact a new judgement of the case since it would permit a fresh determination of the merits of the case and the examination of new evidence. One can have a trial in the absence of the defendant if he was informed in due time of the trial and of the consequences of a non-appearance. The second possibility of trial in absentia is when the defendant was informed of the trial and a mandated lawyer (appointed by the defendant or by the State) represented the defendant. The trial that is dealt with in the framework of these two circumstances mentioned above leads to an enforceable decision against the concerned person.

There are cases when the localisation of the defendant is not possible and a national legal system allows for a in absentia judgement. The decision is enforceable only if there is a legal national remedy for the defendant to such a in absentia proceedings, such ar the right to a new trial. This type of legal remedy should always allow a fresh determination of the merits of the case, that could lead to the reversal of the original decision. The defendant sentenced in absentia shall have the right to participate in the new proceedings and to benefit all the rights of defence. Also the right to a fair trial of the defendant shall be facilitated as he will also benefit the right to have new evidence examined.

[258] That reached the final compromise text of 29 October 2015 mentioned above in the section concerning the presumption of innocence.

### 6.2. Case study on the right to be present at one's own trial

Mr. Sweet was involved in a mass scale misrepresentation. Mr Sweet was the president of a financial institution that functioned as a Ponzi scheme. After he found out that a criminal complaint has been filed at the police, he fleed the territority on which he committed the crime and got in a state that had no extradition treaty with the place of the crime. The case in which Mr. Sweet was involved was largely discussed in the national mass-media. Most of the persons involved in the misrepresentation received harsh penalties. An arrest warrant in absentia was issued against Mr. Sweet. The family of Mr. Sweet appointed him a well-known for the defence in the trial. Mr. Sweet was also sentenced to seven years imprisonment.

Mr. Sweet received money by bank transfer from Mr. B as Mr. Sweet informed Mr. B that otherwise he will tell the mass-media all about the implication of Mr. B in the scam. On the 1st of June 2014 Mr. Sweet was extradited and he asked for a retrial. The extradition was not conditioned by retrial.

**Questions:**

a) Is Mr. Sweet a person judged *in absentia*?

b) Which would be the exceptions that would not lead to a retrial?

c) Is the absence at trial of a person arrested *in absentia* sufficient not to lead to a retrial?

d) If we consider that Mr. Sweet is judged in absentia, is his detention legitimate?

e) Which would be the answer, according to your national law, to the questions above?

**Instructions:**

The criteria for assessing the need for retrial should be discussed starting from the cases Maliki v. Italy of the United Nations Human Rights Committee and Colozza v. Italy of the ECtHR. Also in order to analyse the decision of the

defendant to give up his right to be present the case one should take into account the judgment of the ECtHR, Demebukov v. Bulgaria.

For the refuse of retrial in relation one cannot ignore the judgment of the ECtHR Stoichkov v. Bulgaria.

As each of the participants will have the national legislation available, a brief analysis of the national solution to the questions will take place.

### 6.3. Comments concerning the right to be present at one's own trial

#### a) Is Mr. Sweet a person judged in absentia?

The Committee of Ministers in Resolution 75 (11) of 21 May 1975 made recommendations to the governments of member states relating to proceedings in the absence of the accused.

According to this text no one may be tried without having first been effectively served with a summons in time to enable him to appear and to prepare his defence, unless it is established that he has deliberately sought to evade justice. The summons must state the consequences of any failure by the accused to appear at the trial. Where the court finds that an accused person who fails to appear at the trial has been served with a summons, it must order an adjournment if it considers personal appearance of the accused to be indispensable or if there is reason to believe that he has been prevented from appearing. The accused must not be tried in his absence, if it is possible and desirable to transfer the proceedings to another state or to apply for extradition.

The European Convention on the International Validity of Criminal Judgments of 28 May 1970 contains a definition of "judgment rendered *in absentia*" as being any judgment rendered by a court in a Contracting State after criminal proceedings at the hearing of which the sentenced person was not personally present.

However within the meaning of the convention the following are considered as judgments rendered after a hearing of the accused:

a any judgment in absentia which have been confirmed or pronounced after opposition by the person sentenced;

b any judgment rendered in absentia on appeal, provided that the appeal from the judgment of the court of first instance was lodged by the person sentenced.

Without being present, it is difficult to see how that person could exercise the specific rights set out in sub-paragraphs (c), (d) and (e) of paragraph 3 of Article 6, i.e. the right to "defend himself in person", "to examine or have examined witnesses" and "to have the free assistance of an interpreter if he cannot understand or speak the language used in court". The duty to guarantee the right of a criminal defendant to be present in the courtroom ranks therefore as one of the essential requirements of Article 6 (*Hermi v. Italy* [GC], §§ 58-59; *Sejdovic v. Italy* [GC], §§ 81 and 84).

**b) Which would be the exceptions that would not lead to a retrial?**

Although proceedings that take place in the accused's absence are not of themselves incompatible with Article 6 of the Convention, a denial of justice nevertheless occurs where a person convicted *in absentia* is unable subsequently to obtain from a court which has heard him a fresh determination of the merits of the charge, in respect of both law and fact, where it has not been established that he has waived his right to appear and to defend himself or that he intended to escape trial (*Sejdovic v. Italy* [GC], § 82).

Neither the letter nor the spirit of Article 6 of the Convention prevents a person from waiving of his own free will, either expressly or tacitly, the entitlement to the guarantees of a fair trial. However, if it is to be effective for Convention purposes, a waiver of the right to take part in the trial must be established in an unequivocal manner and be attended by minimum safeguards commensurate to its importance; furthermore, it must not run counter to any important public interest (see *Hĺkansson and Sturesson v. Sweden*, judgment of 21 February 1990, Series A no. 171-A, p. 20, § 66 and *Poitrimol v. France*, judgment of 23 November 1993, Series A no. 277-A, pp. 13-14, § 31).

The Court has held that before an accused can be said to have implicitly, through his conduct, waived an important right under Article 6 of the Convention it must be shown that he could reasonably have foreseen what the consequences of his conduct would be.

Furthermore, a person charged with a criminal offence must not be left with the burden of proving that he was not seeking to evade justice or that his absence was due to force majeure. At the same time, it is open to the national

authorities to assess whether the accused showed good cause for his absence or whether there was anything in the case file to warrant finding that he had been absent for reasons beyond his control.

In Colozza v. Italy judgment (no.9024/80, 12 February 1985) the Court considered that the case did not concern an accused who had been notified in person and who, having thus been made aware of the reasons for the charge, had expressly waived exercise of his right to appear and to defend himself. The Italian authorities, relying on no more than a presumption …, inferred from the status of "latitante" which they attributed to Mr Colozza that there had been such a waiver. In the Court's view, this presumption did not provide a sufficient basis. Examination of the facts did not disclose that the applicant had any inkling of the opening of criminal proceedings against him; he was merely deemed to be aware of them by reason of the notifications lodged initially in the registry of the investigating judge and subsequently in the registry of the court. In addition, the Court considered the attempts made to trace him inadequate. In conclusion, the Court did not consider that the material before the Court disclosed that Mr Colozza waived exercise of his right to appear and to defend himself or that he was seeking to evade justice.

In the case of Sejdovic v. Italy [GC], (no.56581/00, 1 March 2006) the Court considered that it has not been shown that the applicant had sufficient knowledge of his prosecution and of the charges against him. It was therefore unable to conclude that he sought to evade trial or unequivocally waived his right to appear in court … *"In so far as the Government referred to the possibility for the applicant to apply for leave to appeal out of time … the applicant would have encountered serious difficulties in satisfying one of the legal preconditions for the grant of leave to appeal, namely in proving that he had not deliberately refused to take cognisance of the procedural steps or sought to escape trial. The Court has also found that there might have been uncertainty as to the distribution of the burden of proof in respect of that precondition … Doubts therefore arise as to whether the applicant's right not to have to prove that he had no intention of evading trial was respected… Moreover, the applicant, who could have been deemed to have had "effective knowledge of the judgment" shortly after being arrested in Germany, had only ten days to apply for leave to appeal out of time. There is no evidence to suggest that he had been informed of the possibility of reopening the time allowed for appealing against his conviction and of the short time available for attempting such a remedy. These circumstances, taken together with the difficulties that a person detained in a foreign country would have encountered in rapidly contacting a lawyer familiar with Italian law and in giving him a precise account of the facts and detailed instructions, created objective obstacles to the use by the applicant of the remedy provided for in Article 175 §2 of the CCP …104. It follows that the remedy provided for in Article 175 of the CCP did not guarantee with sufficient certainty that the applicant would have the opportunity of appearing at a new trial to present his defence …105. In the light of the foregoing, the Court considers that the applicant,*

*who was tried in absentia and has not been shown to have sought to escape trial or to have unequivocally waived his right to appear in court, did not have the opportunity to obtain a fresh determination of the merits of the charge against him by a court which had heard him in accordance with his defence rights. 106. There has therefore been a violation of Article 6 of the Convention in the instant case*".

**c) Is the absence at trial of a person arrested in absentia sufficient not to lead to a retrial?**

No, unless the factual circumstances allow us to draw the conclusion that the person arrested in absentia has waived his right to appear and to defend himself or that he intended to escape trial.

**d) If we consider that Mr. Sweet is judged in absentia, is his detention legitimate?**

In the case of Stoichkov v. Bulgaria, (no.9808/02, 24 March 2005), after concluding that the applicant was convicted in absentia, the Court stated that in order for the proceedings leading to his conviction to not represent a "denial of justice", he should have had the opportunity to have them reopened and the merits of the rape charges against him determined in his presence. "*When the applicant requested reopening on the basis of the new Article 362a of the CCP in February 2001 – approximately one year after his arrest –, the Supreme Court of Cassation refused, essentially on the ground that the case-file of the original proceedings had been destroyed in 1997, which, in its view, rendered a rehearing impossible in practice … In this connection, it is noteworthy that the applicant subsequently requested the restoration of the case file by the Pernik District Court, but has apparently received no reply to his request …. The applicant was thus deprived of the possibility to obtain from a court, which has heard him, a fresh determination of the merits of the charges on which he was convicted.*

*58. The Court therefore considers that the criminal proceedings against the applicant, coupled with the impossibility to obtain a fresh determination of the charges against him from a court which had heard him, were manifestly contrary to the principles embodied in Article 6. Therefore, while his initial deprivation of liberty in February 2000 may be deemed justified under Article 5 §1 (a), having been effected for the purpose of enforcing a lawful sentence, it ceased to be so after 19 July 2001, when the Supreme Court of Cassation refused reopening of the proceedings*".

**e) What would you answer to the above, according to your national law?**

As each of the participants had the national legislation available, a brief analysis of the national solution to the questions has taken place.

## Section 7 - The ne bis in idem principle and the conflict of jurisdictions

### 7.1. Overview on the issue of conflict of jurisdictions

Ne bis in idem principle and rules on conflicts of jurisdiction express a single aim: as a matter of fact, prevent the risk of two or more parallel proceedings on the same facts towards the same person displays a way to protect person`s freedom. In other words, limit multiple prosecutions and prevent repetition of a trail arrived at its final decision responds to legal order consistency requirements as well as to persons` liberty rights.``[259]

A single criminal proceeding seems to be the best solution for the Member States and for the individual. In the European Union concurrent criminal proceedings are always possible. The criteria for establishing competence are multiple and this would lead inevitably to conflict of jurisdiction. Forum shopping can be a successful legal practice, used

[259] Clara Tracogna, Ne bis in idem and conflicts of jurisdiction in the European area of liberty, security and justice, Lex et Scientia, Juridical Series, Nr. XVIII, vol. 2/2011, p. 55

both by judicial authorities and also by the criminals. The competent jurisdiction could be the one that serves best the interest of the investigation or the one that is the most favourable for the defendant.[260]

As the European Public Prosecutor is an institution on the point of being created, a group of experts have drafted a project of rules of criminal substantive and procedural law that should support the activity of the European Public Prosecutor. These rules, with a final version in 2000, have also mentioned rules in order to solve the potential conflict of jurisdiction. Article 26 paragraph 2 mentions the criteria in order to determine the competent court. ''Each case is judged in the Member State which seems appropriate in the interest of the efficient administration of justice, any conflict of jurisdiction being settled according to the rules hereafter (article 28). The principal criteria for the jurisdiction are as follows:

a) the State where the greater part of the evidence is found;
b) the State of residence or of nationality of the accused (or the principal person accused);
c) the State where the economic impact of the offence is the greatest.''

Still these criteria are not as clear as they should be. And the ''evidence criteria" is not accepted in all Member States.[261]

On the other hand, article 9 paragraph 2 of the Council Framework Decision of 13 June 2002 on combating terrorism (2002/475/JHA) mentions another order and criteria for determining competence. [262]

'' When an offence falls within the jurisdiction of more than one Member State and when any of the States concerned can validly prosecute on the basis of the same facts, the Member States concerned shall cooperate in order to decide which of them will prosecute the offenders with the aim, if possible, of centralising proceedings in a single Member State.

[260] For details on this risk of forum shopping see Gert Vermeulen, New Developments in EU Criminal Policy regarding Cross-Border Crime, p. 138 in Petrus C. Can Duyne, Klaus von Lampe, Nikos Passas (eds.), Upperworld and Underworld in Cross-Border Crime, Wolf Legal Publishers, Nijmegen, 2002.
[261] Gert Vermeulen, Tom Vender Beken, Soetekin Steverlynck, Stefan Thomaes, Finding the best place for prosecution, Maklu, Antwerpen- Apeldoorn, 2002, p. 26.
[262] Zerk, Jennifer A. 2010. "Extraterritorial jurisdiction: lessons for the business and human rights sphere from six regulatory areas." Corporate Social Responsibility Initiative Working Paper No. 59. Cambridge, MA: John F. Kennedy School of Government, Harvard University, p. 132-133.

To this end, the Member States may have recourse to any body or mechanism established within the European Union in order to facilitate cooperation between their judicial authorities and the coordination of their action. Sequential account shall be taken of the following factors:

- the Member State shall be that in the territory of which the acts were committed,

- the Member State shall be that of which the perpetrator is a national or resident,

- the Member State shall be the Member State of origin of the victims,

- the Member State shall be that in the territory of which the perpetrator was found."

The main principles for determining the competent jurisdiction is territoriality, nationality, passive personality, protective and universal.[263] Each of these criteria can enhance the competence of a state, even if the crime was not committed on the territory of that state or produced no effect on that state. States want to avoid their nationals to do certain crimes abroad, intend to protect their nationals or their national security outside their national borders or aim to punish crimes against humanity.[264]

There are also the criteria for establishing the competent authority mentioned by the European Convention on the Transfer of Proceedings in Criminal Matters of 1972.

Article 8 paragraph 1 of this Convention mentions the adequate criteria in order to determine transfer of proceedings.

'' A Contracting State may request another Contracting State to take proceedings in any one or more of the following cases:

- if the suspected person is ordinarily resident in the requested State;

- if the suspected person is a national of the requested State or if that State is his State of origin;

[263] Mitsue Inasumi, Universal Jurisdiction in Modern International Law: Expansion of National Jurisdiction for Prosecuting Serious Crimes under International Law, 2005, Intersentia, Utrecht, p. 21
[264] For details see idem, p. 22-30.

- if the suspected person is undergoing or is to undergo a sentence involving deprivation of liberty in the requested State;

- if proceedings for the same or other offences are being taken against the suspected person in the requested State;

- if it considers that transfer of the proceedings is warranted in the interests of arriving at the truth and in particular that the most important items of evidence are located in the requested State;

- if it considers that the enforcement in the requested State of a sentence if one were passed is likely to improve the prospects for the social rehabilitation of the person sentenced;

- if it considers that the presence of the suspected person cannot be ensured at the hearing of proceedings in the requesting State and that his presence in person at the hearing of proceedings in the requested State can be ensured;

- if it considers that it could not itself enforce a sentence if one were passed, even by having recourse to extradition, and that the requested State could do so.

Article 11 of this Convention allows the requested State to refuse the transfer:

- if it considers that the grounds on which the request is based under Article 8 are not justified;

- if the suspected person is not ordinarily resident in the requested State;

- if the suspected person is not a national of the requested State and was not ordinarily resident in the territory of that State at the time of the offence;

-if it considers that the offence for which proceedings are requested is an offence of a political nature or a purely military or fiscal one;

- if it considers that there are substantial grounds for believing that the request for proceedings was motivated by considerations of race, religion, nationality or political opinion;

- if its own law is already applicable to the offence and if at the time of the receipt of the request proceedings were precluded by lapse of time according to that law;

-if its competence is exclusively grounded on Article 2 and if at the time of the receipt of the request proceedings would be precluded by lapse of time according to its law, the prolongation of the time-limit by six months under the terms of Article 23 being taken into consideration;

-if the offence was committed outside the territory of the requesting State;

-if proceedings would be contrary to the international undertakings of the requested State;

-if proceedings would be contrary to the fundamental principles of the legal system of the requested State;

-if the requesting State has violated a rule of procedure laid down in this Convention.

The need to solve conflict of jurisdiction in criminal matters is also mentioned in the article 82 (1) b of the Treaty on the Functioning of the European Union[265] as ''the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures to prevent and settle conflicts of jurisdiction between Member States".

Therefore, common rules on the conflict of jurisdiction should be created. There are common rules on the ne bis in idem principle. Still the positive conflict of jurisdiction should be avoid as early as possible.

The EU Commission has issued a Green Paper on Conflicts of Jurisdiction and the Principle of ne bis in idem in Criminal Proceedings in order to consult all interest parties on this issue. At this moment the conflict can be avoided through direct consultation or by using the national members of the Eurojust in order to avoid parallel proceedings to be opened.

As the ne bis in idem principle applies, the proceedings that end first will be the one that counts if it is on the merits on the case, even if all the available evidence have not been gathered. Any interested party could try to choose the best forum to protect her best interest.

The same crime could be prosecuted in two or more Member States as at least two principles of jurisdiction may apply. A second prosecution can end only if there is a decision on the merits of the case in another Member State. If the case includes at least one external element such as a foreign defendant or a foreign victi or a crime that produces effect in other Member State, the chance could influence the outcome of the proceedings.

[265] Pedro Caeiro, Jurisdiction in criminal matters in the EU : negative and positive conflicts and beyond, Kritische Vierteljahresschrift fur Gesetzgebung und Rechtwissenschaft (KritV), vol. 93, no. 4 (2010), p. 366-367.

The EU Commission intends to create a proper system for allocating cases to the proper jurisdiction. Only one jurisdiction should be competent, even if one or more investigations could be opened at national level.

The mechanism should include a mandatory system to exchange information on the proceedings and also the best criteria in order to determine the best place for prosecution and judgement.

If this could occur, the circumstances in C-469/03 Miraglia (Judgment 10 March 2005) could become a rule as " The principle ne bis in idem, enshrined in Article 54 of the Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, signed on 19 June 1990 at Schengen, does not fall to be applied to a decision of the judicial authorities of one Member State declaring a case to be closed, after the Public Prosecutor has decided not to pursue the prosecution on the sole ground that criminal proceedings have been started in another Member State against the same defendant and for the same acts, without any determination whatsoever as to the merits of the case.'' The Shengen database could be a useful instrument for introducing data concerning parallel proceedings. Also in all Member State should exist a legal ground related to the avoidance of parallel proceedings. This legal ground should lead to a refusal to open an investigation or to a stop of a pending prosecution.

It should be of no interest if the Member State adheres to the principle of legality or to the principle of opportunity since the reason that stops the prosecution will be provided by the law.

The first step in order to establish the competent authority is to identify and contact all interested authorities. The exchange of information on the case should be done in a limited period of time. It should be possible to identify the other Member States that could be competent for investigating the same facts, defendant and victim.

If there are at least two Member States interested to prosecute, the best place should be chosen. The transfer of proceedings when a parallel investigation could be inserted as a temporary stop of future or pending prosecution. The purpose of the ne bis in idem principle is also to avoid a new prosecution on same facts if another investigation had ended. And such a view is the best way to avoid getting to such unwanted outcome.

Eurojust is a natural mediator for any dialogue concerning the competence on a case between potential judicial competent authorities.

The ideal solution is to be able to establish at least the undisputed criteria for determining a leading jurisdiction. Consensus will still be hard to get. In order to use all the potential criteria, a decision on jurisdiction should be made to the end of the investigation. Still it is not desirable to run parallel proceedings up to that point. The necessary date for getting

the adequate jurisdiction could be gathered rather fast. But, if the main criteria at national level is ‘’the best place to gather evidence”, the decision could be made at the end of the investigation.

A list of common criteria for determining competence in a binding legal document is to be desired, but it would be rather difficult to get since competence is an issue too close to the sovereignty of Member States.

The only solution for getting as close as possible to the outcome of avoiding parallel proceedings was Council Framework Decision 2009/948/JHA of 30 November 2009 on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings.

The Framework decision intends to do a minimal harmonization of the legislation of the Member States on conflicts of jurisdiction in criminal matters. This is the only way the resources for prosecutions could be much better managed. A single proceeding is also beneficial for the parties involved in the proceedings, as their resources would be concentrated in only one Member State.

Recital 3 mentions that the main goal of the Framework Decision is to prevent parallel criminal proceedings on ‘’same facts’’. The infringement of ‘’ne bis in idem ‘’principle should be avoided from the start of the all potential investigations.

Recital 4 considers the first step in order to avoid parallel criminal proceedings. Direct consultations should take place in order to achieve a consensus. If this is not possible, a referral of the case to the Eurojust could be adequate.

Recital 5 mentions the minimal grounds for contact between two potential competent authorities. There should be reasonable grounds to believe that another proceeding concerning same facts and the same person are already being conducted. There could be mainly three reasons to think that another investigation is opened. The suspect could invoke that he is subject to parallel criminal proceedings. A request for mutual legal assistance could disclose a parallel criminal proceeding. Also from the Schengen Information System could be useful for such information.

Recital 6 specifies the information that should be mandatory exchanged for the purposes of the Framework Directive. The person concerned should be identified, the nature of the investigation and the stage of the parallel proceedings.

Recital 9 makes a proper connection between the practice on conflict of jurisdiction developed by Eurojust and the needed criteria for establishing the best jurisdiction for the case. The College of Eurojust issued Annex A to the Annual Report 2003- ‘’Eurojust Guidelines, , Making the Decision - "Which Jurisdiction Should Prosecute?" as a result of

a seminar held in November 2013 with practitioners in order to take the best decision on this issue. The main criteria would be:

- the place where the major part of the criminality occurred;

- the place where the majority of the loss was sustained;

- the location of the suspected or accused person ;

- the capacity of one competent Member State for securing the surrender or extradition from other jurisdictions;

- the nationality or residence of the suspected or accused person;

- significant interests of the suspected or accused person;

- significant interests of victims and witnesses;

- the admissibility of evidence;

- the avoidance of any delays;

- the potential of the penalty to reflect the seriousness of the offence;

- the potential to recover the proceeds of crime;

- the resources and costs of prosecuting.

Recital 11 informs that Member States can waive or exercise jurisdiction only if they wish. Only if a consensus on a single criminal proceeding had been reached, Member States are to stop their own criminal proceedings. In fact, there is no obligation to choose the best place to conduct the investigations and to renounce to the own competence to prosecute and judge a case. Even if the parallel proceedings would finally lead to a breach of the ne bis in idem principle as one decision is final, Member States are allowed to do so.

Recital 14 mentions the needed implication of Eurojust in solving the conflict of jurisdiction between Member States. Eurojust has the competence of assisting judicial authorities in solving conflicts of jurisdiction. Eurojust is most useful when through direct communication an agreement had not been reached. Anyway Eurojust has to be informed of

all the case where conflicts of jurisdiction have arisen or are likely to arise. That case may be referred to Eurojust if at least one competent authority involved in the direct consultations considers such an action adequate.

Recitals 15 and 16 disclose that the Framework Decision is a last resort legal instrument. The Framework Decision is without prejudice to proceedings under the European Convention on the Transfer of Proceedings in Criminal Matters, signed in Strasbourg on 15 May 1972. Also if more flexible instruments or arrangements are in place between Member States, they should prevail over this Framework Decision.

Recital 17 makes a proper connection between the Framework Decision and the right of the accused person to ask for the most favourable jurisdiction. Any national provision that allows the individual to argue to be prosecuted in a certain jurisdiction is not affected.

The objective of the Framework Decision is mentioned by article 1. It aims mostly at promoting a closer cooperation between the competent authorities in order to get to improve the efficient and proper administration of justice. Situations where the same person is subject to parallel criminal proceedings in different Member States should be prevented and consensus should be reached in order to avoid adverse consequences arising form such parallel proceedings.

Article 2 defines the scope of the Framework Decision. There should be rules in order to allow the contact between the competent authorities in order to confirm parallel proceedings on the same fact and the same person. Prior to the contact, there should be a direct exchange of information in order to identity the parallel proceedings.

Article 3 specifies the useful concepts for the applicability of the Framework Decision. The parallel proceedings are criminal proceeding (pre-trial and the trial phases), which are conducted in two or more Member States concerning the same facts involving the same person. The competent authorities are the ones that are competent to carry out any criminal proceedings. The consensus needed to obtain a single competent jurisdiction assumes that there is at least one contacting authority and a contacted authority. The ‘contacting authority’ is the competent authority of a Member State, which contacts a competent authority of another Member State to confirm the existence of parallel proceedings. The ‘contacted authority’ means the competent authority which is asked by a contacting authority to confirm the existence of parallel criminal proceedings.

According to article 4, the competent authorities should be determined by the Member States in order to facilitate their direct contact.

The details on the obligation of contact are included in article 5. If during a criminal proceeding some data show that there could be a parallel proceeding opened in another Member State, a contact between the competent authorities should be initiated. An explicit confirmation is needed in order to get to the next stage of the procedure, direct consultation between the competent authorities. Contact is not necessary if the competent already are already informed about the existence of parallel proceedings.

Article 6 specifies the conditions of reply. The reply to the contact should be in a reasonable time limit. The reply should be urgent if a suspect or an accused person is deprived of liberty.

The details needed for establishing whether parallel criminal proceedings are opened are provided by article 8. The request to confirm the existence of another criminal proceedings on the same fact should include:

- the identification of the contacting authority;
- a description of the facts and circumstances;
- relevant details about the suspect or accused person and about the victims, if there are any;
- the stage that has been reached in the criminal proceedings;
- information about provisional detention or custody of the suspected or accused person, if applicable.

Article 9 handles the minimum information to be provided in response. The response should mention if the criminal proceedings are conducted in respect of some of the same facts and if the same persons are involved, the contact details of the competent authority and the stage of these proceedings. If a final decision has been reached, the response will also include the nature of that final decision.

Article 10 deals with the obligation to enter into direct consultations. The goal of the consultations is to get to a concentration of the criminal proceedings in one Member State. The competent authorities shall provide the necessary informations, including on the procedural measures

Article 11 shows the true nature of the Framework Decision. There are no established criteria in order to determine the best competent authority. Consensus should be obtained considering the facts, the merits of the case and all the relevant factors. The relevant factors do not have a hierarchy and there is no mandatory order to be taken into account.

It is rather difficult for a Member State to accept to be forced to give up to prosecute or to judge a certain criminal case. The dialogue between competent authorities and the mediation of the Eurojust are good starting points.

Probably the beginning of the harmonization in the field of competence will be the creation of the European Public Prosecutor. There are established criteria for determining the competent court and any problems of interpretation will be solved by the European Court of Justice. But still the field will be rather limited and up to that point the competent authorities shall be trusted to take the best decision through a rational consensus.

### 7.2. Study case on the conflict of jurisdiction and on the *ne bis in idem* principle

Mr. Bigspender is the head of a criminal organization that handles international drug traffic, human trafficking and cybercrime. The head of the organization has Italian and Romanian nationality. The members of the criminal organization have assets in Germany, Hungary, Austria and Spain. The head of the organization has Italian and Romanian nationality. His lieutenants have different nationalities and have residences in more than one EU Member State.

Mr. Bigspender decides to organize a special division of his criminal organization in order to steal expensive watches and jewelry from luxury shops. This division managed to steal from 50 shops from Belgium, Andorra, Austria, Croatia, Slovenia and United Kingdom. Also a part of the criminal organization is involved in stealing well known pictures from Denmark.

The training of the criminal organization is done in Portugal and Poland. The criminal organization is also involved in bank robberies in Holland. They have a well organised network of beggars and pickpockets from Eastern Europe in France, Italy and Spain. The money is mostly laundered through Cyprus, Czech Republic and Romania.

**Questions:**

a) Which jurisdiction should be competent to prosecute the members of the criminal organization?

b) Which criteria chosen for the competent jurisdiction should prevail?

c) Which would be the most adequate jurisdictions if it is not possible to reach a consensus?

d) Which is going to be the best place to gather evidence?

e) Which would be the answer, according to your national law, to the questions above?

**Instructions:**

In order to determine the best jurisdiction to handle the investigation, an excerpt of the European Convention on the Transfer of Proceedings in Criminal Matters, issued in Strasbourg, on 15.V.1972 would be used. Also the criteria

established by the Annual Report of 2003 of Eurojust and those in the Appendix II (Guiding Principles of Corpus Juris of 2000) to the Green Paper on criminal –law protection of the financial interests of the Community and the establishment of a European Prosecutor.

As each of the participants will have the national legislation available, a brief analysis of the national solution to the questions will take place.

### 7.3. Comments concerning the case study on the conflict of jurisdictions and on the *ne bis in idem* principle

Currently, there are no binding rules at EU level which adequately deal with conflicts of jurisdiction in criminal matters while proceedings are ongoing. The current EU provisions neither require Member States to take concrete steps to avoid/solve conflicts of jurisdiction cases nor do they provide for a procedure/mechanism which would assist them in dealing with such questions. National authorities are free to institute their own parallel prosecutions on the same cases.

The only legal barrier is the principle of *ne bis in idem*, laid down in Articles 54-58 of the Convention Implementing the Schengen Agreement ("CISA" or Schengen Convention). However, this principle does not prevent conflicts of jurisdiction while multiple prosecutions are ongoing in two or more Member States and can lead to a situation of "first come first served" in terms of preference given to which ever jurisdiction can take a final decision first. The *ne bis in idem* principle can only come into play, by preventing a second prosecution on the same case, if a final decision which bars a further prosecution (res judicata) has terminated the proceedings in a Member State.

During the workshop, we mentioned the Green Paper On Conflicts of Jurisdiction and the Principle of ne bis in idem in Criminal Proceedings and presented the steps to be taken in order to establish the most appropriate jurisdiction to prosecute a case which raises issues of conflicts of jurisdiction.

Step 1: identification and information of “interested parties”.

National authorities of a Member State which have initiated or are about to initiate a criminal prosecution note that the case demonstrates significant links to another Member State. They inform the competent authorities of that other Member State, in due time. The obligation applies to prosecuting authorities, and/or to other judicial/ investigating or law enforcement authorities depending on the particular characteristics of the criminal justice systems of the Member States. The informed authorities indicate their interest in prosecuting the case in question, to be declared within a fixed time period. However, the system could also allow for reactions outside the deadline on an exceptional basis. If no Member State expresses an interest, the initiating State could continue with the prosecution of the case without further consultation – unless new facts change the picture.

Step 2: consultation/discussion

The competent authorities interested in prosecuting the same case should be able to examine together the question of the “best place” to prosecute the case. Means of communication – direct contacts/Eurojust/other Union mechanisms of assistance – i.e. European judicial network.

Early consensus could be met on the choice of the most appropriate jurisdiction to prosecute a case which raises issues of conflicts of jurisdiction. National authorities will close or halt their proceedings voluntarily (or will refrain from initiating proceedings), while another authority would initiate or continue with its proceedings on the case. Competent authority now charged with prosecution would proceed under national law.

A binding agreement could be secured. This would ensure legal certainty and avoid the reopening of a debate on jurisdiction. An EU model agreement could be established which could, inter alia, provide common rules for the denunciation of such agreements.

Step 3: dispute settlement/mediation

If agreement can not be reached, a dispute mechanism will be necessary. Structured dialogue between the interested parties would allow for an objective consideration of the interests involved.

Where a consensus is reached in step 3, the competent authorities should then have the same options as in step 2 - voluntary halting of proceedings in some Member States with a view to prosecution in another one, or conclusion of a binding agreement.

Identification of criteria is crucial to both a voluntary or mandatory regime and such criteria could be territoriality, the place of habitual residence of the suspects / defendants, the location of defence evidence, costs of preparing a defence, language.

However sentencing powers, compensation or confiscation regime are examples of factors which should not be included within the criteria. In addition, the fact that the statute of limitations in the "most appropriate jurisdiction" has already expired should be irrelevant. This would prevent a practice of 'forum shopping' by the prosecuting authorities, and the risk of forum selection being unfair or abusive and thereby undermining the process and the legitimacy of the identified jurisdiction to adopt the proceedings.

We have also discussed on the criteria that are used for requesting transfer of proceedings, according to the European Convention on the Transfer of Proceedings in Criminal Matters, issued in Strasbourg, on 15.V.1972.

During the debates, the Framework Decision 2002/465/JHA on joint investigation teams (OJ L 162 20.06.2002) was also mentioned pointing out the advantages of using a JIT:

- Ability to share information directly between JIT members without the need for formal requests
- Ability to request investigative measures between team members directly, dispensing with the need for Letters Rogatory. This applies also to requests for coercive measures
- Ability for members to be present at house searches, interviews, etc. in all jurisdictions covered, helping to overcome language barriers in interviews, etc.

- Ability to co-ordinate efforts on the spot, and for informal exchange of specialised knowledge
- Ability to build and promote mutual trust between practitioners from different jurisdictions and work environments.
- A JIT provides the best platform to determine the optimal investigation and prosecution strategies
- Ability for Europol and Eurojust to be involved with direct support and assistance
- Ability to apply for available EU, Eurojust or Europol funding Participation in a JIT raises awareness of the management and improves delivery of international investigations

## Section 8 - Short overview of the feedback given by the participants

Concerning the first case, the participants agreed that there is a need for special protection of victims in the case study as one has to take into account the extraordinary circumstances of victims of domestic violence and sex crimes.

Case II leads to the conclusion that the authorities of the state should never encourage a press campaign against an accused person. As it results from the case of the ECtHR, Pullicino v. Malta, a press campaign is not by itself a breach to the presumption of innocence. Still, the prosecutor can say his opinion but only within the limits of his legal functions. Just informing the public on the accusation does not infringe the presumption of innocence. One cannot say that ,,the quilty person had been caught and he will be sentenced to 7 years``. One could say that a suspect has been identified and it occurs the risk of being sentenced. In Italy and Romania there are guides concerning the information that could be delivered to the public opinion in order not to breach the presumption of innocence.

One cannot say that a six months period of preemptive arrest is a breach to the presumption of innocence. Concerning the evidence required for sentencing in a rape trial, the court is not bound to believe the defendant or the victim. The credibility of a person is much more important than the number of statements. Also it is not mandatory to have a certain type of evidence in order to sentence a defendant, because the limitation of the evidence would lead to a breach of article 8 of the ECHR.

Case III involves normally an assessment of the juvenile delinquent as soon as possible, even if according to some national laws the assessment is not mandatory during investigation. The father cannot be replaced only on the basis of the assertions that he is proud that his son has beaten up a few persons. The juvenile delinquent should be present at the trial. Even if he is not present, he should have the right to a retrial even if the normal conditions for the reopening of the proceedings are not fulfilled.

Case IV lead to the conclusion that the defense was effective. There were opinions that the defence was not effective as the defendant was arrested on the statements given without the presence of a lawyer. The legal counsel cannot be replaced only on the basis of the requirement of the defendant. The public defended should be replaced only if the did something that is in contradiction with the principles of an effective defence. The lawyer should be present at the beginning of the proceedings. In all the Member States there are circumstances when the presence of a lawyer is mandatory. At the beginning of the investigation, the defense was not effective because Mr. L was a suspect, but was not given the rights normally given to a suspect. Some participants even estimated that the lawyer had not enough time to prepare the defense. In Artico v Italy there was a formal appointment of a lawyer and that lead to a lack of effective defense. Confidence is essential in the relationship between the lawyer and the client if the lawyer is a chosen one. Confidence is also important for the legal aid, but it is not essential. The lack of confidence is essential if the lack of confidence is the result of the lack of interest of the legal counsel. One cannot ignore in the case that the first statement was given without a lawyer and that the request to change the lawyer was denied. A new legal counsel should be granted if there is a conflict between the lawyer and the defendant. In Spain, the council of the bar decides on the issue of changing the lawyer. If there was a mistake at the police station as the statement of the suspect was given in the absence of a lawyer, the legal counsel should insist on the exclusion of evidence or in requesting for a new statement to be made.

The fifth case was not given an unanimous solution. There were participants that decided that the judicial authorities should refuse the retrial only if they have strong evidence that the defendant had a direct contact with his chosen lawyer. Others said that there was enough proof that the defendant refused to take part in the trial as he was aware of all the details concerning the judicial proceedings.

Concerning the sixth case on the conflict of jurisdiction, the Italian participants asseted that Italy would not accept the whole transfer of the proceedings for the criminal activity that took place outside Italy. The unanimous decision was that the Romanian authorities should be able to prosecute and judge all the criminal activity of the organized group. It should be taken into account the essential criminal activities, not the accessory ones. Also the right to be sentenced in a reasonable time and the least lengthy investigation are important criteria. There is always the option of ending as fast as possible the proceedings concerning a part of the criminal activity in order to have the certainty that the members of the criminal organization would not try to escape the potential execution of the penalty.

The practical approach of the conference was enhanced by the presentation of procedural rights in practice in Italy, Spain and Romania. Each expert tried to explain the issues concerning procedural rights starting from their own practical experience.

At the end of the conference Mr. Juan Carlos Da Silva made a presentation concerning the present and future problems concerning the EU criminal procedural rights.

As the project had the goal of creating a handbook, there was also a presentation of the handbook with a short overview of it made by the present expert that worked on the handbook. The participants agreed that there is a need of outlining the main issues in the field of procedural rights, in order to increase mutual trust and criminal judicial cooperation at the level of the European Union.

## Section 9 - Conclusions

The final conference offered the participants an overview of the future of EU Criminal Law.

The issue of further procedural rights was of high interest for the participants to the final conference. This fact was reflected in the feedback they gave during the final conference. All participants referred to the problems raised in practice by the legal concepts discussed upon at the final conference. They also contended the importance of these legal concepts in building a solid judicial cooperation.

The theoretical approach at the beginning of the final conference offered a good starting point for further discussion. The participants were deeply involved during the lectures. Practical issues were raised by them. Therefore, plenary analysis of these issues took place in the framework of an interactive approach between the lecturers and the participants. From time to time, the lecturers opened brief discussions for the participants in order to have a smooth connection with the next theoretical issue.

Most of the participants were aware of the legal instruments and of the legal concepts that were presented during the final conference. They all agreed that the final conference deepened their previous knowledge and encouraged them to develop an enhanced cooperation with their colleagues from other Member States.

Another valuable element of the final conference was the presence of lawyers and clerks. Thus, the point of view of the defender or of the victim was also considered. The court clerks mentioned some practical problems they encountered in their work related to the legal concepts discussed upon at the final conference.

Using practical cases during the final conference to better understand the relevant legal concepts was a fast and efficient learning tool. The participants had to look for the right rules, had to discuss upon the relevant jurisprudence of the ECtHR and of the European Court of Justice and were required to speak with their colleagues about the way that a certain situation is handled in different national judicial systems. The case studies were excellent opportunities to share knowledge concerning their legal judicial systems and to decide upon the best solution according to the EU legal framework and to the jurisprudence of the ECtHR.

The presentation of practical cases from Italy, Spain and Romania related to procedural rights was also welcomed by the participants.

The final lecture referred to the latest developments in the area of procedural rights and opened the discussion for futher discussion between legal practitioners.

The final conference also allowed proper final feedback from the participants in order to get the best possible version of the handbook. The materials included in the handbook are valuable sources of information because they were agreed upon by legal practitioners, judged, prosecutors, lawyers and court clerks. That is why we consider the handbook to be a useful tool for the legal practitioners throughout the European Union.

# PART IV - CONCLUSIONS

The Project's success was guaranteed by the use of innovative training methods, a relevant and well-structured content and by the international dimension assured through the presence of both participants and experts from different Member States.

**The Training Methods used – Best practice dissemination**

Previous projects developed in the area of judicial cooperation in criminal matters have focused on training magistrates on the content of the Framework - Decisions and other legal instruments. We felt that although judges and prosecutors were already familiarized with the relevant European law, they needed to focus more on the practical implementation of such provisions. Therefore, the project aimed to explore the already existing practice throughout common training of different multinational legal practitioners in order to better implement the relevant European legal instruments.

At the same time, the focus of the project was the presentation of several new instruments, such as: the provisions of Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings, of Directive 2012/13/EU on the right to information in criminal proceedings and of Directive 2013/48/EU on the right of access to a lawyer in criminal proceedings 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.

Given the novelty of this domain and the new judicial training standards established at the European level as a result of the EU Commission's recommendation and best practices developed[266], we decided to design a practice-oriented project with a strong linguistic component, while also implementing an inter-professional dimension.

[266] Final report of the EU Commission financed project "Tender JUST/2012/JUTR/PR/0064/A4 – Implementation of the Pilot Project – European Judicial Training"- Lot 1 "Study on Best Practices in training of judges and prosecutors"

**Practice-oriented approach**

Sometimes judicial authorities are expected to apply legal instruments even when these do not envisage a clear solution to a certain practical situation. The legal practitioners have to find an efficient way for applying these legal provisions to real life circumstances. Some cases entail the application of principles developed at the national level or from the jurisprudence of the European Court of Human Rights and the European Court of Justice.

Our experience in judicial training proved that one of the most efficient working methods is "learning by doing". This is why we decided to structure the Project's activities by integrating both practical and theoretical sessions. The lecturers were meant to provide the participants with information they need in order to solve the practical cases during the workshops.

The theoretical presentation at the beginning of each seminar and of the final conference always offered a good starting point for further discussions. The active involvement of the participants during the lectures resulted from their questions and genuine interest in discovering the practice and specificity of other judicial systems while also sharing their own national experiences. All throughout the lectures, an interactive dialogue between the experts and the participants was achieved. This approach generated brief discussions that helped smoothen the connection with the following theoretical issues.

Using practical cases to better understand the legal instruments constituted a fast and efficient learning tool. Participants had to identify the applicable law, were expected to draft different legal documents related to EU Criminal Law and were asked to exchange views with their colleagues on certain situation solved differently at national level.

While drafting letters of rights and during the debates triggered during the case studies' analysis, participants enjoyed the opportunity to share their knowledge and decide upon the best solution according to the EU legal framework and the jurisprudence of ECtHR.

Another practice-oriented exercise was the moot court session that illustrated how a hearing on the execution of an European Arrest Warrant is dealt with in a Romanian court. The participants were thus able to identify any similarities and differences between their national criminal proceedings. The debriefing session, that followed the moot court, allowed the participants to share their own experiences and to explain how these procedures are applied in their countries. Also this was a good opportunity for participants to discuss and try to come up with better and innovative solutions on the issues at

stake. This exercise leads to the strengthening of the mutual trust between participants - actors in the common effort for building a more efficient judicial cooperation.

The training's practice-orientated approach was highlighted in the positive feedback received.

**Linguistic component**

One of the Project's goals was to enable the direct communication between trainers and participants and between participants themselves. Therefore, no translation was provided during the seminars, as all the activities were conducted in English.

The seminars combined the training on legal instruments (the legal component) with the training on linguistics and judicial cooperation vocabulary (the linguistic component). Each seminar has two modules of linguistic training, covered by a linguist expert.

During this particular session, participants had the opportunity to use concepts related to criminal law and criminal procedure while also using formal vocabulary and common grammar rules that apply to legal English structures. As a result, participants highly appreciated the usefulness of these exercises, as they improved their communication skills for future work related situations. Another positive outcome of this linguistic training, pointed out by the participants, was the enrichment of their vocabulary in the field of judicial cooperation in criminal matters.

**Inter-professional dimension**

The project brought together representatives of different legal professions such as judges, prosecutors, lawyers and court clerks from several European Union Member States.

According to the feedback received, this format offered the advantage of delivering unitary knowledge. Moreover, each of the Project's activities took into account the perspective of both lawyers and court clerks. Discussions from multiple points

of view were therefore encouraged. The court clerks gave examples of problems they encountered in their work when applying EU Criminal Law provisions.

Therefore, the presence of lawyers and court clerks constituted an added value to the project, since they were deeply involved in the project and eager to share their perspectives. They participated also in the moot court exercise, being asked to perform their specific role. This helped increase the impact of this particular exercise.

**The International dimension of the Project**

The international dimension constituted a crucial element for the projects successful outcome. Having participants and experts from different Member States guaranteed the equal representation of the different judicial systems present in the partner countries.

The case studies used during the workshops were also built around complex situations involving different international elements, which created the proper context for triggering a judicial cooperation procedure.

One cannot build a mutual trust only through the use of legal instruments. The project enabled the participants to better understand the different legal systems of other Member States. There were moments when the participants and the expert from one Member State acted as national team in order to clarify some practical issues that were discussed during the seminars.

Participants learned that the main procedural issues encountered during the criminal proceedings coincided. Problems such as a proper interpretation of certain legal concepts or solving claims concerning infringements of human rights raised by defendants constitute common issues raised in all the states represented in the project.

All this aspects - inherent to an international approach - laid the premises for a constructive debate based on an exchange of best practices developed at national level. Participants contended this knowledge enrichment that will undoubtable facilitate their future judicial cooperation endeavours.

**The Content of the training activities**

One of the Project's strengths was the legal framework chosen as the core element of the training curricula. All participants agreed upon the importance of accurately understanding and properly applying the provisions of Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings, of Directive 2012/13/EU on the right to information in criminal proceedings and of Directive 2013/48/EU on the right of access to a lawyer in criminal proceedings 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.

The opening lecture – a short presentation of the evolution of EU Criminal Law - helped participants understand the stages of legal development in this field. The way that the European Court of Justice influenced the creation of EU Criminal Law is also important in order to be able to apply in daily activities the jurisprudence of this court. The participants agreed that EU Criminal Law is a very useful tool for protecting the rights and freedoms of all European citizens, while also granting the full implementation of the free movement of persons and ensuring a proper legal protection for accused persons and for victims of crime.

Perpetrators must be brought to justice in a due process manner even when they benefit from the free movement of persons, which creates practical difficulties for the judicial authorities. The participants stressed out the problems encountered when managing the increasing need for gathering evidence in another Member State or when trying conduct a joint investigation. In order to be able to better fight against serious crimes and to avoid the use of free movement of persons by criminals as a means of absconding criminal responsibility, an enhanced judicial cooperation is needed.

In this sense, participants agreed that a stronger focus should be laid on direct cooperation between judicial authorities. Joint investigation teams should be used more often and the Eurojust should play a bigger role in order to avoid conflicts of jurisdiction and the infringement of the `*ne bis in idem principle*`.

Furthermore, given the importance of international tools provided by Eurojust, the European Judicial Network, ECRIS, Atlas, Compendium, Fiches Belges, the experts decided to provide the participants with detailed presentations and interactive exercises related to the use of these instruments.

Another focal point in the agenda was the lecture concerning the connection between the Charter of fundamental rights of the European Union and the jurisprudence of ECHR. This lecture enabled the participants to understand how the rights guaranteed by the Charter and by the jurisprudence to the ECJ should be applied in their daily work.

Equally useful was the lecture on the procedural rights of the requested person when executing an European Arrest Warrant, which helped participants better deal with issues relating to human rights in this context. The participants showed a particular interest for cases where a flagrant denial of justice could appear or where the requested person

asserts any other infringement of the rights guaranteed by ECHR. Practical issues related to the principle of `*ne bis in idem*` in the framework of the European Arrest Warrant have also been discussed.

The latest developments in the area of procedural rights were presented during the final lecture.

The project represented a good opportunity for participants to see how the balance between the need to gather evidence and to find out the truth in criminal cases and procedural rights works in practice. The training activities were highly effective as this type of project encouraged an interactive approach.

**The Project's activities**

The three pillars (innovative training methods, relevant and well-structured content and international dimension) were reflected in all the project's activities: six seminars, final conference and the Project's Handbook.

As mentioned in the previous sections, the seminars represented a blending of theory and practice and implied an active involvement of all participants representing different legal professions and coming from all the Project's partner States.

Also, the three pillars can be easily identified in the final conference's format: regardless of the high number of participants, maintaining the practice oriented and interactive character of the training constituted a priority. This was reflected in the structure of the conference which included not only lectures but also workshops and national reports.

In order to allow the dissemination of this Project's format as an example of best practice in the field, one of the envisioned outcomes was the elaboration of a handbook that would offer all the elements and learning materials needed in order replicate the training concept. . The materials included in the handbook are a valuable source of information because they were agreed upon by legal practitioners, judged, prosecutors, lawyers and court clerks.

The final conference created the environment where participants could offer a feedback on the handbook. The handbook initiative was supported by all the participants as being a useful tool for legal practitioners all throughout the European Union.