

STUDY

Requested by the LIBE committee



# **Criminal procedural laws across the European Union –**

**A comparative analysis of  
selected main differences and  
the impact they have over the  
development of EU legislation**

## **ANNEX I**

### **Country reports**

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**DIRECTORATE GENERAL FOR INTERNAL POLICIES  
POLICY DEPARTMENT FOR CITIZENS' RIGHTS AND  
CONSTITUTIONAL AFFAIRS**

**CIVIL LIBERTIES, JUSTICE AND HOME AFFAIRS**

**Criminal procedural laws across the  
European Union – A comparative  
analysis of selected main differences and  
the impact they have over the  
development of EU legislation**

**ANNEX I  
Country reports**

## **ABOUT THE PUBLICATION**

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Policy Departments provide independent expertise, both in-house and externally, to support European Parliament committees and other parliamentary bodies in shaping legislation and exercising democratic scrutiny over EU external and internal policies.

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## I. COUNTRY REPORTS ON GERMANY

### National report No 1 on the German jurisprudence

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#### I. Red line for mutual recognition: the Federal Constitutional Court's order of 15 December 2015 (identity control)

On 15 December 2015, the Bundesverfassungsgericht (German Federal Constitutional Court, in the following: "FCC") rendered a landmark decision that sets the limits of mutual recognition by the German legal order.

##### 1. Facts and main arguments of the Court

In the case at issue, the Oberlandesgericht (Higher Regional Court – in the following: "HRC") of Düsseldorf actually allowed the surrender of an American citizen to Italy, where he was sentenced in absentia to a custodial sentence of 30 years for participating in a criminal organisation and importing cocaine. The FCC quashed this decision.<sup>1</sup>

The case caused the Federal Constitutional Court to outline in a more fundamental way the relationship between the German Constitution and acts determined by Union law (here: the legal framework on the EAW).

The Federal Constitutional Court emphasized that the EU is (only) an association of states (Staatenverbund) and that the Member States remain the "masters of the treaties" (Herren der Verträge). Hence, in individual cases, the protection of fundamental rights by the Federal Constitutional Court may include review of sovereign acts determined by Union Law if this is indispensable to protecting the constitutional identity guaranteed by Art. 79 para. 3 of the Basic Law (Grundgesetz – GG). This is also known as the identity review / identity control. It is based on the Court's judgment on the Lisbon Treaty of 2009, but was first applied in practice by the present decision. Since, in the present case, it was questionable whether the complainant would have the opportunity of a new evidentiary hearing in Italy against the judgment in absentia at the appeal stage, the Federal Constitutional Court sees a violation of the principle of personal guilt (Schuldprinzip) that is rooted in the guarantee of human dignity enshrined in Art. 1 para. 1 and referred to in Art. 79 para. 3 of the Basic Law.

In consequence, the principles enshrined in Art. 1 and Art. 20 of the Basic law should be subject to constitutional review even when applying European sovereign acts such as the EAW. Art. 1(1) of the Basic Law states that Human dignity shall be inviolable, and to respect and protect it shall be the duty of all state authority. It is the most fundamental of all human rights. Art. 20 sets out the "Rechtsstaatsprinzip", i.e. the "rule of law" principle as coined by the German legal order.

The Federal Constitutional Court stressed that it is not the German implementation law on the EAW that is unconstitutional, but rather the decision of the Higher Regional Court, since it did not fully take account of the safeguards of Art. 1 of the Basic Law. Under the principle of guilt the offence and the offender's guilt have to be proven in a procedure that complies with applicable procedural rules, in particular the right to be present and to actively challenge the evidence brought forward by the prosecution service. In the court's view, an extradition for the purpose of executing a sentence passed in absentia is not compatible with these guarantees of human dignity and the rule of law if it is not absolutely clear that the defendant receives – without any discretion on the part of the courts in the requesting state – a new procedure after surrender allowing for a fresh determination of law and evidence, which may at the end also lead to the original decision being reversed.

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<sup>1</sup> Bundesverfassungsgericht, Beschluss vom 15. Dezember 2015 - 2 BvR 2735/14. The decision is annexed, together with the press release of the Court in English. For a short summary of the decision in English see *T. Wahl*, eucrim 1/2016, p. 17. Case analyses in English are provided for by: *Meyer, Frank*: From Solange II to Forever I, NJECL 2017, 277-294; *Nowag, Julian*: EU law, constitutional identity, and human dignity: A toxic mix?, Common Market Law Review 53(2016), 1441-1453; *Reinbacher, Tobias/Wendel, Mattias*: The Bundesverfassungsgericht's European Arrest Warrant II Decision, Maastricht Journal 4(2016), 702-713.

## 2. Analysis

The decision of 15 December 2015 was labelled a “judicial earthquake” or the “FCC triggering the nuclear option”. However, it leads to several interpretations, raises several open issues and its scope of / impact on the assistance that German authorities are allowed to deliver to other EU Member States is not fully clear yet (see also below III. and IV.).

### a) Which concrete principles and rights can trigger the identity review?

It can be stated that the FCC does not allow German authorities to assist other EU states if human dignity or the principles enshrined in Art. 20 GG are violated. Therefore, the defendant, in essence, must put forward arguments that a certain principle of (criminal) law is linked with human dignity or the rule of law. In its decision of 15 December 2015, the FCC explicitly indicated the principles of guilt and the fair trial as rooted in human dignity. The principle of guilt cannot be violated only in cases of in absentia decisions, but also, for instance, in case of “strict liability”.<sup>2</sup> If a legal order, such as the UK, sought assistance for an offense where the blameworthiness is not an element of crime that has to be proven, Germany would be obliged to deny a request. In this context, the FCC would deviate from case law of the ECJ or ECtHR which do not clearly consider strict liability being incompatible with the ECHR.<sup>3,4</sup> Another case could be if a person were to be held criminally liable although he/she is not charged of a certain misconduct, as it is the case of “joint criminal enterprise” under Anglo-American law.<sup>5</sup> A gap may also occur, if the German criminal law has a different yardstick as to insanity or diminished responsibility.<sup>6</sup> This could be the case, for instance, if the intensity of consuming alcohol as a ground for excluding blameworthiness is assessed differently under the German and foreign law.

Furthermore, the proportionality of sanctions imposed and provided for by foreign criminal law with regard to the specific nature and gravity of wrongdoing must pass the test of “principle of individual guilt”.<sup>7</sup>

These examples show that differences in the laws of the EU Member States need not be procedural in nature, but can also be those of substantive criminal law, as a consequence of which a refusal ground is triggered. Regarding procedural rights, the FCC had subsequently to deal with the argument that the drawing of inferences under UK law is not in line with the right not to incriminate oneself and with the presumption of innocence (for the outcome of this decision, see below III.). Also these principles were considered to be linked with Art. 1 of the German Basic Law. The presumption of innocence could also be invoked if the foreign procedural criminal law is considered incompatible with the German standards of fact-finding.<sup>8</sup> This could be the case for example, if an issuing state is requesting the surrender of a person for the purpose of enforcement of a judgment that is based on plea bargaining or other summary procedures.<sup>9</sup> German procedural law provides for rather strict rules on

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<sup>2</sup> *Satzger, Helmut*: Grund- und menschenrechtliche Grenzen für die Vollstreckung eines Europäischen Haftbefehls? – „Verfassungsrechtliche Identitätskontrolle“ durch das BVerfG vs. Vollstreckungsaufschub bei „außergewöhnlichen Umständen nach dem EuGH, in: Neue Zeitschrift für Strafrechts (NStZ) 2016, 514, 522.

<sup>3</sup> Cf. ECtHR, 30.08.2011, Appl.no. 37334/08 (G v. United Kingdom), § 27: “[...] the Court underlines that in principle the Contracting States remain free to apply the criminal law to any act which is not carried out in the normal exercise of one of the rights protected under the Convention and, accordingly, to define the constituent elements of the resulting offence. It is not the Court's role under Article 6 §§ 1 or 2 to dictate the content of domestic criminal law, including whether or not a blameworthy state of mind should be one of the elements of the offence or whether there should be any particular defence available to the accused.” See also ECtHR, 7.10.1988, Appl.No. 10519/83 (Salabiaku). The ECJ has so far also not ruled out strict liability in the criminal law context, cf., e.g., ECJ, 10.7.1990, C-326/88 (Hansen & Son), § 19. See also *Elholm, Thomas*: “Guilt/Fault”, in: *Lucifora/Mitsilegas/Parizot/Sicurella* (eds.), *General Principles for a Common Criminal Law Framework in the EU. A Guide for Legal Practitioners*, Milano 2018, Chapter 2, Section I, 2.3 and 2.4.

<sup>4</sup> For an exception made by German courts in the framework of mutual recognition of financial penalties, see below X.

<sup>5</sup> *Satzger, ibid.*

<sup>6</sup> Sections 20 and 21 of the German Criminal Code.

<sup>7</sup> *Meyer, Frank*, op. cit. (n. 1), 293.

<sup>8</sup> *Meyer, Frank, ibid.*

<sup>9</sup> *Brodowski, Dominik*: Die drohende Verletzung von Menschenrechten bei der Anerkennung Europäischer Haftbefehle auf dem Prüfstand: Die zweifelhafte Aktivierung der Verfassungsidentität durch das BVerfG und eine Kurskorrektur in der Rechtsprechung des EuGH, *Juristische Rundschau (JR)*, 2016(8), 415 (432).

these procedures. Special rules are stipulated for “plea bargaining” (officially called “negotiated agreement”) to be accepted,<sup>10</sup> so that main gaps with other legal orders may occur.<sup>11</sup>

Another issue where the identity control is triggered is the enforcement part of a sentence, i.e. prison conditions if they are considered not in line with the standards of human dignity under German law (see below IV.).

This list of concrete principles and rights which may trigger the “identity control” cannot be exhaustive, but should illustrate the potential scope of the reservation of Germany to cooperation with other EU Member States.

### **b) To which types of cooperation is the identity control applicable?**

The order of the FCC concerned the surrender of a person on the basis of the Framework Decision on the European Arrest Warrant. However, it is widely considered in legal literature that the fundamental statement of the FCC must also be applied to other types of international cooperation in criminal matters, in particular the collection of evidence abroad or the assistance in the enforcement of foreign sentences or foreign financial penalties.<sup>12</sup> Therefore, the decision of the FCC can also affect other EU mutual recognition instruments, such as the European Investigation Order, the FD on the transfer of sentences or the FD on the mutual recognition of financial sanctions.

As a rule one may state: always where German procedural legislation stipulates rather strict standards that are not complied with by the foreign legal order, a refusal of cooperation is possible. In the area of “other legal assistance”, this may concern for example the use of evidence provided for by Germany to another EU Member State when the judicial authorities/criminal courts at the forum do not respect fundamental limitations of the German legal order having repercussions to its constitution. In this context, it should be borne in mind that limitations for investigative measures are often coined by the FCC in order to make evidentiary rules compatible with the German constitution. As a consequence, providing evidence collected by telephone tapping should, in principle, be refused if the requesting authorities used material of communications of the defendant with his lawyer or a priest<sup>13</sup> or of material which touches upon “the core area of the private conduct of the defendant’s life”.<sup>14</sup>

Similarly, the transfer of a citizen to Germany to serve there a foreign sentence might be refused if the foreign judgment is based on questionable concepts of conspiracy, plea bargaining, admissibility of evidence or an intolerable amount of penalty.<sup>15</sup>

### **c) Which consequences has the identity control?**

In principle, a violation of principles or rights in the foreign legal order against the standard as defined by the FCC in its order of 15 December 2015 leads to a refusal ground, i.e. the cooperation must be stopped. A person detained for extradition purposes must be released, for example. However, in the concrete case at issue, the FCC mainly reprimanded the Düsseldorf judges for not having sufficiently investigated and established the facts of the case, but been satisfied that a new hearing with fresh determination of facts and evidence is “at least not impossible” in Italy. Therefore, the case could have been solved by clarifying the legal situation between the general prosecutor in Germany and the judicial authorities in Italy. However, since the answer from Italy remained vague, the person had to be

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<sup>10</sup> Cf. Section 257c of the German Code of Criminal Procedure (in the following: CCP). See also *Beulke, Werner: Strafprozessrecht*, 13<sup>th</sup> edition 2016, mn. 394 et seq.

<sup>11</sup> Example: under German law, the verdict of guilt, as well as measures of reform and prevention, may not be the subject of a negotiated agreement (Sec. 257c para. 2 sentence 3 CCP).

<sup>12</sup> *Meyer, Frank: Das BVerfG und der Europäische Haftbefehl – ein Gericht auf Identitätssuche*, HRRS 2016, 332, (337).

<sup>13</sup> Section 160a CCP.

<sup>14</sup> Section 100a para. 4 CCP. See for this problem further *Wahl, Thomas: Germany, Exchange of Intercepted Electronic Communication Data between Foreign Countries*, in: *Sieber, Ulrich/von zur Mühlen Nicolas (eds.)*, *Access to Telecommunication Data in Criminal Justice*, Berlin 2016, p. 590 et seq.

<sup>15</sup> *Meyer, Frank*, op cit. (n. 12).



released. It *cannot* be assessed here whether the situation changes after the recent reform of Italian national law on in absentia trials.

On the other hand, the case also shows that the FCC would have come to the same conclusion if it had applied the European rules on cooperation in case of in absentia judgments as defined by FD 2009/299/JHA and Art. 4a of the FD EAW respectively. Indeed, the FCC itself clarified in the present order that Art. 4a letter d (i) of the FD EAW requires as well that a new trial must re-examine the merits of the case including fresh determination of evidence and the possibility of the original decision reversed. The FCC further continues that it follows from said Union law (read in the light of the CFR and the case-law of the ECtHR) that the foreign courts (here: the Italian ones) cannot exercise discretion in order to grant such re-trial. As a result, the FCC states that “the requirements under Union law with regard to the execution of a European arrest warrant are not beneath those that are required by Art. 1 sec. 1 GG as minimum guarantees of the rights of the accused”.

To this end the FCC finally applied the already existing standards where the ground for refusing the EAW was already laid down by written law. Legal scholars therefore believe that an independent meaning of the “identity control” test is restricted to rather exceptional cases where a refusal ground is not stipulated positively.<sup>16</sup> However, it should be borne in mind that the legal consequences of the FCC’s jurisprudence, i.e. the final refusal of cooperation, grossly differs from the approach of the ECJ in its Aranyosi/Caldararu judgment that favours a temporal suspension (of the surrender).

#### **d) Is the FCC’s order a new refusal ground or does it shape the European public policy exception?**

Against this backdrop, the order of 15 December 2015 triggered a legal de-bate on the issue of whether the FCC set a new standard of a national public policy exception (a new ordre public clause) or whether the FCC follows the rules of European ordre public as foreseen by German legislator implementing Art. 1 para. 3 of the FD EAW. This leads to the further question of whether the FCC applies a different (and possibly more severe) standard for cooperation within the EU as compared to cooperation with third countries.

First of all, the following is all about a question which is at the centre of lively discussion in all jurisdictions, namely the question: to which extent can a state refuse extradition or surrender of a person because certain standards that exist in the requested state are not upheld in the requesting state. As mentioned above, this could be different substantive criminal law, other standards of criminal procedure or diverging fundamental rights standards in the “enforcement phase”, such as in detention conditions. In Germany, this question is dealt with under the heading of public policy reservation. Often, literature uses the French notion of “ordre public”.

Also the German legislator opposed the view that surrender cannot be denied although another EU Member State does not maintain certain standards. Therefore, the human rights clause in Art. 1 para. 3 FD EAW was considered a ground for refusal of ordre public to be implemented. The implementing norm, Sec. 73 Sentence 2 of the Act on International Cooperation in Criminal Matters (AICCM – Gesetz über die international Rechtshilfe in Strafsachen), applies to all mutual recognition instruments, since the human rights clause was basically reiterated in all of them. It also serves as implementation of the EIO Directive which explicitly foresees this ground for refusal in its Art. 11 para. 1 lit. f). Sec. 73 Sentence 2 AICCM reads as follows:

“Requests under Parts VIII,<sup>17</sup> IX<sup>18</sup> and X<sup>19</sup> shall not be granted if compliance would violate the principles in Article 6 of the Treaty on the European Union.”

Accordingly, German legislation foresees that the yardstick for ordre public infringements has changed, i.e. fundamental right infringements cannot be measured against the principles

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<sup>16</sup> Satzger, op cit. (n. 2), p. 521.

<sup>17</sup> Part VIII = Extradition and Transit between Member States of the European Union.

<sup>18</sup> Part IX = Assistance by Enforcement to Member States of the European Union.

<sup>19</sup> Part X = Other Legal Assistance with the Member States of the European Union.

enshrined in the national legal order (cf. Sec. 73 sentence 1 AICCM)<sup>20</sup>, but against European fundamental rights law.

In its order of 15 December 2015, the FCC, however, puts aside any norms and FD provisions. The FCC only refers to Sec. 73 sentence 2 AICCM in order to underpin that German authorities are entitled to verify foreign requests in accordance with the “directives” of Art. 1 GG. It must therefore be assumed that the FCC established an own “constitutional” refusal ground when it invokes the identity control test.<sup>21</sup> Also this approach seemingly differs diametrically from the approach of the ECJ, which concluded in the Melloni, Radu and Arranyosi/Caldararu cases that there is no additional refusal ground next to Art. 3, 4, and 4a of the FD EAW.

Furthermore, the new approach of the FCC obviously differs from its previous case law on interpreting the clause of Sec. 73 AICCM. According to the order of 15 December 2015, the rights of the Basic Law fully apply – this means that the foreign criminal proceedings or acts in the foreign state must be assessed by the requested/executing German authority against the yardstick of the Constitution’s fundamental rights.

By contrast, the FCC previously followed a rather restrictive path. In interpreting the ordre public reservation, it argued that the only insurmountable obstacle to cooperation on which the courts may base their decision is the violation of (a) the minimum standards of international law that are binding on Germany and b) the inalienable principles of German constitutional order. What is to be understood under “inalienable principles” was left to the case law of the lower courts. However, it can be stated for sure that – according to this formula – the foreign procedure and the foreign acts are not measured against the standard of the German constitution’s fundamental rights as they would apply in a purely German procedure. Instead, the standard of proof for the foreign procedure or act is much lower. One of the arguments of the Federal Constitutional Court is that in mutual assistance, especially if it is rendered on the basis of treaties under international law, the requesting state is, in principle, to be shown trust as concerns its compliance with the principles of due process and the protection of human rights.<sup>22</sup> This applies to all countries in the world, not only to mutual assistance within the EU. Until the decision of 15 December 2015, the FCC and the lower courts applied this seemingly more restrictive formula also to cooperation within the EU, irrespective of whether it was based on a mutual recognition instrument or not.

Whether the approach followed by the order of 15 December 2015 is more restrictive or not can currently not be affirmed. On the one hand, arguments must resort to the principles enshrined in Art. 79 sec. 3 GG, in particular to human dignity (Art. 1 GG) and the rule of law (Art. 20 GG). On the other hand, establishing a link with human dignity seems not a real obstacle. Indeed, the FCC does no longer downgrade fundamental guarantees of the German constitution to “inalienable principles”. The FCC shifts away from the European ordre public which should – also according to the European Court of Justice – exclusively reign the cooperation within the EU. The FCC invokes a national constitutional brake to mutual recognition and mutual trust and therefore falls back to a national ordre public – referring to the principles of the German national legal order. The FCC expressly state that “safeguarding the principle of individual guilt, which is not open to European integration, justifies and requires review according to the standards of the Basic law of the Higher Regional Court’s decision, ...”.<sup>23</sup> This can be considered a not very much European-minded part of the decision.

#### **e) In which context must the decision be seen?**

In its order of 16 September 2016 (see below III.), the FCC already mitigated the possible impacts of its landmark decision of 15 December 2015. The order of 15 December 2015 must

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<sup>20</sup> Sec. 73 Sentence 1 AICCM reads as follows: “Legal assistance and transmission of data without request shall not be granted if this would conflict with basic principles of the German legal system.”

<sup>21</sup> In this sense also *Brodowski*, op. cit. (n. 9), 431.

<sup>22</sup> See above all the so-called “India decision”, BVerfG, Beschluss v. 24.6.2003 – 2 BvR 685/03, NVwZ 2003, 1499. An English translation is available at: [https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2003/06/rs20030624\\_2bvr068503en.html](https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2003/06/rs20030624_2bvr068503en.html). A case note in English is provided for by *Nickel, Rainer*: Extradition, Human Rights and the Public Order – The ‘Extradition to India’-Decision of the FCC, German Law Journal 12(2003), p. 1241-1254.

<sup>23</sup> Emphasis added by author.

be assessed before the background of the reference for a preliminary ruling by the Higher Regional Court of Bremen in the Aranyosi and Caldaru cases (not decided by the ECJ at that time) and relevant past case law of the ECJ. The FCC seized the opportunity to establish an opposing concept to the ECJ's lines of argument, especially developed in the cases Radu and Melloni. It is a clear warning shot towards the ECJ, since German courts have been critical from the outset towards tendencies of the court in Luxembourg to prefer effectiveness of mutual assistance and to deny any refusal ground because human rights might be violated in the issuing EU Member State. The decision of the Federal Constitutional Court is to be considered as opposition against the ECJ's ruling in Melloni, in which the European Court actually ruled that measures related to EAWs cannot be made under the control of national constitutions. This would have denied any jurisdictional role of the FCC in EU extradition cases. The FCC clearly states that there are limits to the mutual recognition principle enshrined in the EAW and that German courts reserve the right as executing authority to verify fundamental rights infringements if there are sufficient grounds to believe that mutual trust is shaken. This is a further main difference compared to the concept of the ECJ as developed in Aranyosi/Caldaru: The FCC does not restrict a possible suspension of surrender to "exceptional circumstances" or a "systematic lack of human rights standards", but calls the German courts to carry out an assessment of a possible fundamental rights infringement in each individual case.<sup>24</sup>

## II. Other case law on trials in absentia

Trials in absentia remain an ongoing issue which leads to problems of recognising the enforcement of other EU Member States' judicial decision. This holds true despite the stricter rules pro recognition as introduced by the FD 2009/299. If requests are denied, the foreign criminal proceedings do not fulfil one of the alternatives of Art. 4a FD EAW as implemented in Sec. 83 para. 1 No. 3, paras. 2 and 3 AICCM.

By order of 5 February 2015, the Higher Regional Court of Stuttgart denied the execution of an EAW from Romania since the then rules of the Romanian criminal procedure law on providing the defendant with a retrial (Art. 522) are not considered in line with the requirements of Sec. 83 AICCM.<sup>25</sup> The HRC of Stuttgart argued that it is not clear from the Romanian law whether the person concerned is conferred a retrial or an appeal without discretion by the Romanian courts.<sup>26</sup> Since Romanian law stipulates that the trial may not be considered as a trial in absentia when the person concerned was summoned (not necessarily in person, but "orderly" sufficed<sup>27</sup>), the requirements of Union law (Art. 4a para. 1 lit a) i) FD EAW) are not met.<sup>28</sup> The court added that a diplomatic assurance from the Romanian authorities that a retrial is guaranteed and the rights of the person concerned are maintained cannot replace the legislation in place.

By order of 27 April 2017, the Higher Regional Court of Karlsruhe denied recognition of an EAW for the purpose of execution of sentence imposed in Romania since the defendant was imprisoned in Germany and was therefore prevented from attending the trial in Romania.<sup>29</sup> The fact that the defendant was connected to the main hearing via videoconferencing link cannot replace the personal attendance required by Union law. Also other alternatives of Art. 4a FD EAW and Sec. 83 AICCM were not given in the present case that would have allowed an exception from denying surrender because of the in absentia trial. In particular, the

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<sup>24</sup> Böhm, in: Ahlbrecht/Böhm/Esser/Eckelmanns, Internationales Strafrecht, 2nd. ed. 2018, mn. 1066.

<sup>25</sup> OLG Stuttgart, Beschluss vom 05. Februar 2015 – 1 Ausl 6/15.

<sup>26</sup> A case of escape from trial was obviously not given in the present case.

<sup>27</sup> This means that a summoning would also be valid if the defendant was summoned by deposit or by publication, which is not sufficient according to the HRC of Stuttgart.

<sup>28</sup> It should be noted that Romania meanwhile changed its law, however the legal situation as to whether the defendant is guaranteed a retrial without obstacles remains uncertain according to German practice. The situation is considered similar with regard to the Netherlands, Poland, and Italy (overview at Böhm, in: Ahlbrecht/Böhm/Esser/Eckelmanns, Internationales Strafrecht, 2nd. ed. 2018, mn. 1042, 1043).

<sup>29</sup> OLG Karlsruhe, Beschl. v. 27.4.2017, Ausl 301 AR 35/17.

Romanian authorities failed to prove that the defendant appointed a lawyer to represent him at the trial (Sec. 83 para. 2 No. 3 AICCM).<sup>30</sup>

Problematic are cases where the defendant was only partly present at the trial. In this context, the Higher Regional Court of Cologne had to deal with the constellation where a defendant attended a part of the trial in the Netherlands, but was expelled to Belgium as an "unwanted foreigner", although the trial in Rotterdam/the Netherlands continued. He did not attend the rest of the trial, but was continuously represented by a defence lawyer. The Rotterdam court finally sentenced him to 5 years of imprisonment because of attempted homicide, bodily injury, and hostage-taking. The HRC of Cologne declared the Dutch request for surrender inadmissible since the sentence was imposed by a trial in absentia.<sup>31</sup> The HRC argued that the defendant was neither summoned in person for the remaining meeting dates nor did he frustrate his presence through flight in the knowledge of the proceedings. It further cannot be to the detriment of the defendant that he did not apply for a suspension of his status as "unwanted foreigner" in order to get the opportunity to attend the remaining trial meetings. The HRC finally released the defendant from extradition detention. However, the HRC clarified that it would not consider a ground for refusal if the defendant was only absent in a meeting pronouncing a judgment without any substantial assessment of evidence.

It is therefore not that much that German views on the right to be present at trial (which is in fact stipulated in the CCP as a duty to be present) differ with other legal orders that are more lenient to proceed without the attendance of the defendant, but rather an issue for foreign criminal legal orders to bring in line their national law with the European standards as defined in FD 2009/299 and the case law of the ECtHR.<sup>32</sup>

It often happens in practice that the accused was not summoned in person since he/she has already moved to a place in the European Union other than his home country. Moving within the European Union is also not recognized by German courts as "frustrating the trial through flight" since this exception provided for by said Sec. 83 para. 2 No. 2 AICCM requires a willful conduct to escape justice.<sup>33</sup>

In a recent decision, the Higher Regional Court of Munich accepted the recognition of a trial in absentia conducted against the defendant in the Netherlands.<sup>34</sup> It was inter alia questioned whether the Dutch judgment was sufficiently served to the defendant, so that he was able to request an appeal with-in the applicable time frame. Under German criminal procedure law the full judgment must be notified by service from the part of the criminal court. Under the law of the Netherlands, it suffices if the prosecution service hands over a "notice of judgment" summarizing the essential contents of the judgment. The Munich court stated that the "notice of judgment" under Dutch law has the same legal effect than a notification of the judgment by service from a German court. According to the HRC of Munich, it further suffices to trigger the exception under Art. 4a para. 1 lit. c) ii) FD EAW if the notification contains at least the "most relevant passages" of the sentence.

In recent time, cases increasingly occur where procedures take place in the issuing state which put into effect suspended sentences on probation. The question is whether the provisions implementing FD 2009/299 apply and whether the right to a fair hearing (Art. 6 ECHR) are infringed if the person does not attend the proceedings revoking the suspension of a sentence. The case law of the HRCs distinguishes: if the revocation is made in a judgment, the provision of Art. 83 AICCM implementing the FD 2009/299 apply. If the revocation is made by separate order (as it is the regular case), the HRCs assess whether

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<sup>30</sup> According to German practice the appointment of a defence lawyer ex officio by the State is not sufficient, unless this defence is conducted under the express will of and after consultation with the defendant (*Böhm*, in: Ahlbrecht/Böhm/Esser/Eckelmans, Internationales Strafrecht, 2nd. ed. 2018, mn. 1037).

<sup>31</sup> OLG Köln, Beschl. v. 8.6.2015 – 6 AusIA 29/15-25 = Strafverteidiger (StV) 2016, 239.

<sup>32</sup> See further *Wahl, Thomas*, „Fair Trial and Defence Rights“, in: Lucifora/Mitsilegas/Parizot/Sicurella (eds.), General Principles for a Common Criminal Law Framework in the EU. A Guide for Legal Practitioners, Milano 2018, Chapter 4, Section I, 2.2.2 and Section II, 2.2 with further references to the national laws of seven EU Member States.

<sup>33</sup> OLG Stuttgart, Beschluss vom 9. 1. 2008 - 3 Ausl. 134/07 = NStZ-RR 2008, 175; *Böhm*, in: Ahlbrecht/Böhm/Esser/Eckelmans, Internationales Strafrecht, 2nd. ed. 2018, mn. 1033, 1035.

<sup>34</sup> OLG München, Beschl. v. 3.3.2016, 1 AR 5/16; critical to this approach however, *Böhm*, op. cit. (n. 33), mn. 1038.

the proceedings infringe the *ordre public* clause of Sec. 73 sentence 2 AICCM (see above I.2.d). Although German procedural law requires that, if the court has to decide on a revocation of suspension of sentence because of a violation of conditions or instructions, it shall give the convicted person an opportunity to be heard orally (Sec. 453 para 1 sentence 3 CCP), German courts accept the revocation of the suspension of the sentence on probation without the person concerned being heard when he/she is not available, because he/she moved away without notifying the new address.<sup>35</sup> However, a violation of Art. 6 ECHR is considered if the authorities in the issuing state knew that the person concerned moved to Germany and summoning could have been served there under his/her new address.<sup>36</sup>

### **III. Follow up to the identity control order I: Order of the FCC of 6 September 2016**

After the ground-breaking “identity control” decision of 15 December 2015 (above I.), the FCC refined the extent of the necessary control over foreign mutual legal assistance requests in two subsequent cases. Both cases concern the EAW. The first one deals with the right not to incriminate oneself, the second one tackles the currently imminent issue of detention conditions (cf. below IV.).

#### **1. Facts of the case and main arguments**

As indicated above, the FCC – by its order of 15 December 2015 – seemed to have opened “Pandora’s box”. In comparison with the above-mentioned more severe procedural hurdles of previous *ordre public* complaints, defendants now have only to find something in the criminal law or criminal procedure law of another EU country which seems not in line with parallel German concepts or with discrepancies to European standards as defined by the ECtHR. They then must substantially lay down the legal deficits of this country and link them with a criminal law principle which is part of human dignity in the sense of the German constitution.

So did a German defence lawyer in a case that dealt with a European Arrest Warrant from the UK. The client (a Croatian) was sought by the British authorities of having shot a man in Herfordshire in 1993. In 2016, the defendant was arrested in Berlin and the Higher Regional Court of Berlin declared extradition permissible. In its constitutional complaint, the defendant mainly argued that if he were extradited to the UK, section 35 of the Criminal Justice and Public Order Act of 1994 might be applied. He claimed that this section allowed the court and the jury to draw inferences from his silence to his guilt. In his opinion, this conflicted with the status of the accused’s right to remain silent in the German legal order and affected the constitutional identity.

Indeed, the FCC initially took up the defendant’s arguments, when it issued preliminary injunctions that temporarily suspended the surrender until the final decision on the constitutional complaint. In these injunctions the judges in Karlsruhe uttered doubts whether the UK law is in line with the guarantees of Art. 1 of the German Constitution.<sup>37</sup>

In the final decision of 6 September 2016, the FCC reiterated its viewpoints of December 2015.<sup>38</sup> In particular, it confirmed that, in the case at issue, it considers the presumption of mutual trust to be shaken since there are factual indications that the minimum requirements laid down by the Basic law are not complied with. The Court further clarified that the right not to incriminate one-self - the principle *nemo tenetur se ipsum accusare* - is rooted in human dignity and then explains the main German standards of the right to silence. It concludes that the drawing of adverse inferences from the defendant’s silence, at least where the accused entirely refused to make a statement on the substance of the case, diminishes the value of human dignity.

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<sup>35</sup> OLG Celle, Beschl. v. 14. März 2012 – 1 Ausl 4/12 = OLGSt IRG § 81 Nr. 1.

<sup>36</sup> OLG Karlsruhe, Beschl. v. 4.8.2017, Ausl 301 AR 64/17.

<sup>37</sup> BVerfG, Beschl. v. 6.5.2016 – 2 BvR 890/16 = HRRS 2016 Nr. 517.

<sup>38</sup> BVerfG, Beschl. v. 6.9.2016 – 2 BvR 890/16 = StV 2017, 241. A press release in English is available at: <https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2016/bvg16-065.html>. For a short summary of the decision in English see T. Wahl, *eu crim* 3/2016, pp. 132-133.

Although this part of the order seems the reader to come to the conclusion that future cooperation with the UK might be put on hold, the FCC turns around and conjures up a different concept. Accordingly, extradition is only impermissible if the core content of the right not to incriminate oneself as an inherent part of human dignity is affected. The core content is seen infringed, for instance, where an accused is induced by means of coercion to incriminate him- or herself. In contrast, the core content is not affected when the silence can be used as evidence under certain circumstances and be used to the defendant's detriment, as it is the case with Sec. 35 of the Criminal Justice and Public Order Act 1994.

The FCC puts forward mainly three arguments:

First, the treatment of silence as possible evidence only creates indirect pressure which does not reach the same level of seriousness as coercion;

Second, reference is made to Sec. 38 of the British Act, which clarifies, that silence cannot be the only means of evidence for conviction;

Third, and more general: Declaring extradition per se impermissible only because a right is not guaranteed in the procedural law of the requesting state in the same way as it is the case in German procedural law due to constitutional requirements would be too farreaching.

## 2. Analysis

On the one hand, the FCC does not succumb to the temptation to extend its control power too far. The FCC perceived that cooperation within the EU would be at risk in general, if the constitutional complaint had been declared well-founded on the basis of its order of 15 December 2015. The FCC, therefore, found a way to mitigate the consequences of the "identity control order" by introducing a new requirement, i.e. to limit the denial of mutual recognition if the core content of a principle (linked to human dignity) is infringed. The FCC embarked upon a more reconciliatory path, possibly also having in mind the latest judgment of the ECJ in the cases *Aranyosi/Caldararu*. This can be interpreted as a sign to strengthen mutual trust in the EU.

On the other hand, the decision bears further legal uncertainty. The mental leap from seriously considering a violation of Sec. 35 of the British Act of 1994 against the *nemo tenetur* principle as enshrined in the German Constitution towards giving green light to extradition is hardly understandable. In any event, the practitioner is left with the difficulty to detect the "core content" of human dignity for every procedural safeguard. Judges at the Higher Regional Courts – in Germany the first and sole competent courts to decide on extradition cases, including the EAW – may wonder whether they must carry out an identity review in each case, and if yes, to which extent.

Ultimately, the identity review seems to be an empty threat, which was only made, as mentioned above, in order to tease the judges in Luxembourg.<sup>39</sup> In this context, one should take into account that the FCC once more comes to the same results even if the European standard is applied: At the end of the order of 6 September 2016, the FCC concludes that the drawing of inferences does also not violate Art. 6 ECHR because the ECtHR backed the British provisions in various past judgments (e.g. in *Murray*).<sup>40</sup>

## IV. Follow up to the identity control order II: order of the FCC of 18 August 2017

On 18 August 2017, the FCC issued a preliminary injunction (einstweilige Anordnung) against a decision of the Higher Regional Court of Hamburg that ordered the surrender of a defendant

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<sup>39</sup> Similar to this opinion: *Gaede, Karsten*, Grundrechte im europäischen Strafverfahren: Sorgfalt statt Kollektivvorbehalt, Editorial Strafverteidiger (StV) 2016, issue 5, I; *Wegner, Kilian*, Menschenunwürdiger Strafprozess im Vereinigten Königreich? – Neues von der Verfassungsidentitätskontrolle, in: *juwiss.de/39-2016*

<sup>40</sup> ECtHR, 8 February 1996, Appl. No. 18731/31. For the compliance with Directive 2016/343, see *Cras, Steven/Erbeznik, Anze*: The Directive on the Presumption of Innocence and the Right to Be Present at Trial, *eu crim* 2016, 25, 32.

to Romania. As a result, surrender is currently suspended until the final decision on the defendant's constitutional complaint.<sup>41</sup>

## 1. Facts of the case and main arguments

The complaint concerns the surrender of a Romanian national to Romania for the purpose of prosecution. The defendant reprimands the HRC for having insufficiently taken into account that the detention conditions that he has to face in Romania do not comply with the standards of the ECHR and that the refusal ground of an infringement of human dignity in accordance with the identity control decision of the FCC must be applied.

After having sought additional information from Romanian judicial authorities and after having obtained assurances from the Romanian Ministry of Justice, the HRC mainly argued that the size of the cells<sup>42</sup> will meet the necessary conditions, so that Art. 3 ECHR is not violated. Although the HRC observed that the prisons in Romania are severely overcrowded, it argued that improvements have been made since 2014 (in particular by establishing an ombudsman with control and intervention rights as well as extending legal protection of prisoners) which leads to the fact that no real risk of inhuman or degrading treatment can be acknowledged. In this context, the HRC referred to the judgment of the ECJ in case *Aranyosi/Caldararu* and argued that national judicial authorities are, in principle, obliged to enforce EAWs. "Exceptional circumstances" that may limit mutual recognition cannot be discerned in the present case. Furthermore, the HRC put forward the argument of the proper functioning of criminal justice. A refusal of surrender would lead to the defendant not being punished for his wrongdoing and ultimately to Germany becoming a "safe haven" for criminals.

By contrast, the defendant argued that the HRC put too much emphasis on the size of prison cells, but did not recognize other circumstances, including furniture in cells (that cannot be taken into account when assessing the size of detention rooms), the different enforcement regimes in Romania, locking times, etc. In sum, the minimum limits for cell space as set by the ECtHR are not reached in the Romanian prisons.

The FCC decided to issue a preliminary injunction in order to avert severe disadvantages on the defendant's fundamental rights until the principal proceedings of his constitutional complaint. It held that the constitutional complaint is neither manifestly inadmissible nor unfounded.

The FCC reiterates its lines of arguments on the identity control. In particular, it points out that the principle of mutual trust is shaken if there are factual indications that the requirements – that are absolutely essential for the protection of human dignity – will not be met if the requested person is extradited. The FCC further argues that the guarantee of human dignity (Art. 1 GG) conferred to prisoners sets limits to the capacity and arrangement of detention rooms. The FCC then reiterates its case law on the way detainees must be

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<sup>41</sup> BVerfG, Beschl. v. 18.8.2017 – 2 BvR 424/17 = HRRS 2017 Nr. 832. The order is available in the Internet (in German) at: [https://www.bverfg.de/SharedDocs/Entscheidungen/DE/2017/08/rk20170818\\_2bvr042417.html](https://www.bverfg.de/SharedDocs/Entscheidungen/DE/2017/08/rk20170818_2bvr042417.html). Meanwhile, the FCC took the final decision in the case. By order of 19 December 2017 (BVerfG, Beschluss des Zweiten Senats vom 19. Dezember 2017 - 2 BvR 424/17 - Rn. (1-61), it ruled that the CJEU's case law on the problem at issue, as developed in the *Aranyosi/Căldăraru* case, is incomplete, and, therefore, the HRC of Hamburg had to make a new reference for preliminary ruling. This reference was meanwhile brought up. The case is referred to as C-128/18 (*Dorobantu*) at the CJEU. The final decision of the FCC is available in the Internet at: [https://www.bverfg.de/e/rs20171219\\_2bvr042417.html](https://www.bverfg.de/e/rs20171219_2bvr042417.html) (in German). A press release is available both in German ([https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/DE/2018/bvg18-003.html?jsessionid=A462BD449A4632A34668A74D561EC771.2\\_cid393](https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/DE/2018/bvg18-003.html?jsessionid=A462BD449A4632A34668A74D561EC771.2_cid393)), and English (<https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2018/bvg18-003.html>). A summary of the decision of 19 December 2017 as well of the reference of the HRC Hamburg to the CJEU in English is provided by *Wahl*, *eucri*m 1/2018, pp. 32-33. For the reference for a preliminary ruling of the HRC Hamburg see also the comment in English by *Anna Oehmichen* at: <https://www.linkedin.com/pulse/higher-regional-court-hamburg-requests-preliminary-ruling-oehmichen/?published=t>.

<sup>42</sup> At least 3m<sup>2</sup> in a more severe enforcement regime, 2m<sup>2</sup> in case of a regime of daily release.

treated. In this context, it emphasizes that the assessment of whether Art. 1 GG is infringed is dependent on an overall picture of the factual circumstances that determine the detention conditions. This includes not only the size of the floor area per prisoner, but also the situation of sanitary facilities and the times prisoners have to spend in individual cells.

The FCC states that it must decide in the principal proceedings whether the HRC met its obligation of having sufficiently established the facts which may impose a threat to Art. 1 GG. It already raised doubts whether the prison conditions on the basis of the information gathered so far are beyond the fundamental rights standards.

## 2. Analysis

The case on prison conditions leads to the FCC's second opportunity<sup>43</sup> to take a follow-up decision on the basis of the developed identity control concept. Similar to its initial decision of 15 December 2015, the complaint is mainly about the instance court not having fully assessed all circumstances that may lead to an infringement of human dignity. Or in other words: the HRC did not sufficiently clear up the facts of the case on the basis of which it had to decide on a fundamental right's infringement. As a result, the HRC may be blamed for not having struck the right balance between the interests of prosecution and the protection of fundamental rights in EAW proceedings. In particular, the judges of the Federal Constitutional Court put into question the HRC's argument that the functioning of justice should prevail over the protection of fundamental rights. The fact that treatment of prisoners is part of human dignity, however, is not in dispute in this case.

It is not submitted that the decision may come into conflict with the line of arguments of the ECJ put forward in its *Aranyosi/Caldararu* judgment. Beside its case law on the requirements of detention conditions under Art. 1 GG, the FCC further refers to the case law of the ECtHR,<sup>44</sup> in order to underpin its viewpoint that even the parallel European standards (Art. 3 ECHR, Art. 4 CFR) are not met in the present case. Therefore, the FCC also invokes the European *ordre public* and it is likely that the FCC comes to the same result when it applies both its national standard (identity control under Art. 1 GG) and the European standard (interpretation of Art. 3 ECHR in accordance with the ECtHR case law) as in its previous two decisions of 15 December 2015 and 6 September 2016.

For its decision, the FCC is able not only to resort to the information given by the Romanian authorities, but also to information provided for by the German Ministry of Justice that gathered additional material on the legal and factual situation on prison conditions in Romania. Furthermore, the Administrations of Justice of the federal states (*Landesjustizverwaltungen*) informed the FCC about case law of its HRCs regarding the refusal of surrender because of prison conditions in other EU Member States (see also V.).

## V. Other case law on detention conditions

Detention conditions is currently the most serious issue that poses a possible obstacle to cooperation between Germany and other EU Member States. Whereas in 2014 surrender because of detention conditions was refused in one case, the number of refusals increased to 40 in 2016.<sup>45</sup>

There is a bulk of recent case law of Higher Regional Courts. However, it can be observed that the case law is not uniform. This demonstrates that there are legal uncertainties that could not be sufficiently dispelled by the ECJ's decision in *Aranyosi/Caldararu*. By contrast, the decision seems to have nourished more problems, when the Court states that surrender is possible in "exceptional circumstances" and:<sup>46</sup>

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<sup>43</sup> After the order of 6 September 2016 – case 2 BvR 890/16.

<sup>44</sup> ECtHR, 20. October 2016, *Muršić ./. Croatia*, Appl. no. 7334/13, § 124; ECtHR, 10. January 2012, *Ananyev et al. ./. Russia*, Appl. nos. 42525/07 and 60800/08; ECtHR, 22. October 2009, *Orchowski ./. Poland*, Appl. No. 17885/04, § 123.

<sup>45</sup> Süddeutsche.de, 20.9.2017 „17 Häftlinge auf 30 Quadratmetern“, < <http://www.sueddeutsche.de/politik/eu-haftbefehl-haeftlinge-auf-quadratmetern-1.3675711> >, accessed 3 January 2017.

<sup>46</sup> ECLI:EU:C:2016:198, § 94.



“Consequently, in order to ensure respect for Article 4 of the Charter in the individual circumstances of the person who is the subject of the European arrest warrant, the executing judicial authority, when faced with evidence of the existence of such deficiencies that is objective, reliable, specific and properly updated, is bound to determine whether, in the particular circumstances of the case, there are substantial grounds to believe that, following the surrender of that person to the issuing Member State, he will run a real risk of being subject in that Member State to inhuman or degrading treatment, within the meaning of Article 4”.

It is questionable whether the expected final decision of the FCC in its case 2 BvR 424/17 (see above IV.) is able to give a clear guidance.

HRCs seem mainly unsure to which extent clarification of facts is necessary and/or whether (diplomatic) assurances can (still) be the basis for their judicial decisions. Furthermore, case law of the HRCs differ as to the consequences of the order, i.e. whether the surrender can be declared admissible in a concrete case or whether the surrender must be declared “inadmissible at the moment.”

From the bulk of case law,<sup>47</sup> only some examples can be given here.

### **1. Romania**

In the subsequent decision after the preliminary ruling of the ECJ in the Caldararu case, the HRC of Bremen ordered the repeal of the warrant against Caldararu.<sup>48</sup> The HRC argued that – in accordance with the requested examination by the ECJ – it asked for additional information from the Romanian authorities. The Romanian authorities informed that the defendant is likely to be placed in a correctional facility located nearby his domicile and that this facility was initially designed for 330 prisoners, but is currently occupied with 659 prisoners. The HRC states that, as a consequence, each prisoners has a personal space available of approx. 2m<sup>2</sup>, so that an infringement of Art. 4 CFR is in place.

In two, soundly reasoned decisions of 2 and 31 March 2017, the Higher Regional Court of Celle refused surrender of individuals to Romania as well. The first case concerned an EAW for the purpose of execution of a sentence of 1 year of imprisonment for driving without license,<sup>49</sup> and the second an EAW for the purpose of execution of a sentence of 3 years and 9 months imprisonment for robbery.<sup>50</sup> In both cases the HRC found that detention conditions in Romania in the concrete cases do not meet the requirements in line with the European ordre public (Sec. 73 sentence 2 AICCM, Art. 6 para. 3 TEU, Art. 3 ECHR). The HRC refers first to the case law of the ECJ in Aranyosi/Caldararu and states that an assessment of a possible inhuman or degrading treatment necessitates two steps: (1) a general and abstract risk of inhuman/degrading prison conditions; (2) a real risk in the individual case.

The HRC then affirms the general concern of inhuman detention conditions in Romania (first requirement). In this context, the court refers to other recent case law of HRCs that declared surrender to Romania inadmissible because of the situation of prison conditions. Regarding the second requirement, i.e. which detention conditions the person concerned would expect in the concrete case, the HRC of Celle deeply deals with the different enforcement regimes in Romania based on information obtained from the Romanian authorities. It then concludes however, that the conditions for the form of semi-open detention that the defendant presumably must expect do not meet the standards set by the ECtHR in the *Muršić* and *Lazar* cases. Hence, the assessment of the HRC is mainly based on this ECtHR case law. In this context, the HRC of Celle stresses in its decision of 31 March 2017 that the relevant ECtHR case law is the guiding yardstick for the required examination of the criteria of human and non-degrading prison conditions. The HRC reasons that this approach is the most modest way of not interfering too much into national systems since each national system has its peculiarities and finds its own way of balancing the various interests at stake.

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<sup>47</sup> Overview at: *Böhm*, op cit. (n. 24), mn. 1062 et seq.

<sup>48</sup> See press release of the Hanseatisches Oberlandesgericht in Bremen of 10.6.2016.

<sup>49</sup> OLG Celle, Beschl. v. 2.3.2017 – 1 AR (Ausl) 99/16.

<sup>50</sup> OLG Celle, Beschl. v. 31.3.2017 – 2 AR (Ausl) 15/17.

This approach differs from a decision of the Higher Regional Court of Hamburg of 3 January 2017 that stated that the lines of argument of the ECtHR are partly detrimental to the EU principles of mutual trust and mutual recognition.<sup>51</sup>

In conclusion, the Higher Regional Court of Celle assessed that in the given case the floor space of the detention cell is already below 3m<sup>2</sup>, as a result of which the presumption of inhuman and degrading treatment is fulfilled in accordance with the ECtHR case law. The cumulative requirements for compensating the scarce allocation of personal space that could rebut this presumption according to the ECtHR case law were not detailed by the Romanian authorities, so that no other decision than refusing surrender could be taken.

The decisions of the HRC of Celle of March 2017 serve as a good guidance for other courts on how to examine objections against prison conditions in other EU Member States. The HRC particularly stresses that:

- The assessment necessitates two steps;
- The decision cannot be based only on the explanations of the official authorities;
- The whole likely process of the execution of the concrete sentence must be considered, and not only one enforcement regime;
- Higher importance to the functioning of criminal justice than to human treatment of convicted persons cannot be attributed (in contrast to the HRC of Hamburg).<sup>52</sup>

In this context, the Higher Regional Court of Munich expressly follows the approach of the HRC of Celle. In an order of 13 April 2017, the HRC of Munich confirmed that the main point of reference is the landmark judgment of the ECtHR in *Muršić*.<sup>53</sup> In the present case, the defendant was sought by the Romanian authorities for the purpose of execution of a sentence of 1 year and 1 month imprisonment on account of a pub brawl. The Munich Court concluded that it results from the supplementary information by the issuing authorities that the person sought will be placed in shared cells in which he has only a personal floor space of 2m<sup>2</sup>. Since this placement is expected not to be of a temporary nature, the minimum standards as required by the ECtHR are not fulfilled. The Munich court considers that in this case, further possible compensatory measures are irrelevant.

By order of 22 December 2016, the HRC of Celle ruled that even the transfer back to the executing Romanian authority is banned if the detention conditions do not comply with the European *ordre public*.<sup>54</sup> In the case at issue, a Romanian national was surrendered from Romania to Germany subject to the condition that he will serve a custodial sentence in Romania. The HRC found that the European public policy reservation (*European ordre public*) can even override conditions set by the requested state in international cooperation.

By order of 5 July 2017, the Higher Regional Court of Nurnberg stopped a surrender to Romania and stated that – because of the prison conditions - sur-render to Romania is “inadmissible at the moment” (“*derzeit unzulässig*”).<sup>55</sup> The decision is mainly based on the information given by the Romanian authorities regarding the enforcement regimes. The HRC mainly bases its decision on the size of the detention cell and the information about the process of daily enforcement measures in Romanian correctional facilities. It concluded that neither in case of close nor open correctional facilities the space of the detention cell meets the European standards as set by the ECtHR.

## 2. Bulgaria

Regarding conditions for pre-trial and execution of prison sentences in Bulgaria, the Higher Regional Court of Dresden referred to the conflict with basic principles of the German legal system and declared surrender of a person in-admissible who was sought via EAW for the

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<sup>51</sup> OLG Hamburg, Beschl. v. 3.1.2017 – Ausl 81/16. This is the underlying decision that led to the constitutional complaint before the FCC (see further IV.).

<sup>52</sup> See also *Mühlenfeld, Leonhard: jurisPR-StrafR 12/2017 Anm. 3.*

<sup>53</sup> OLG München, Beschl. v. 13.4.2017 – 1 AR 126/17.

<sup>54</sup> OLG Celle, Beschl. v. 22.12.2016 – 1 AR (Ausl) 59/16.

<sup>55</sup> OLG Nürnberg, Beschl. v. 5.7.2017 – 2 Ausl AR 14/17.

purpose of execution of a sentence of 1 year imprisonment for theft of wood with a value of 123 EUR.<sup>56</sup> In its order of 11 August 2015, the HRC of Dresden mainly argued that the Bulgarian judicial authorities are currently not able to provide an assurance that the person concerned is placed in a correctional facility that meets the standards of Art. 3 ECHR. Hence, the HRC of Dresden mainly resorts to the assurances. Accordingly, assurances must be attributed great importance, however they must be concrete and reliable.<sup>57</sup>

Similarly, the Higher Regional Court of Celle ruled by order of 16 December 2014 that surrender to Bulgaria is currently not permissible, if the person concerned is likely to be detained in the correctional facility of Varna as long as it is not guaranteed that the shortcomings as detailed in a 2012 report by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT; see: CPT/Inf (2012) 33) are not rectified.<sup>58</sup>

In the same way, the Higher Regional Court of Berlin declared surrender to Bulgaria not permissible.<sup>59</sup> The HRC mainly referred to the CPT report as well. It further stated that the Bulgarian authorities had not distinguished in their response to the Berlin authorities request for additional information between pre-trial detention and detention for enforcement of sentence. However, the HRC considered this gap irrelevant in the given case.

In a case before the HRC of Munich, the Munich State Attorney<sup>60</sup> proposed that surrender to Bulgaria could be declared admissible, since he will set two conditions to Bulgaria: (1) placement of the person sought into a specific correctional facility where minimum standards would be maintained; (2) possibility of visits of diplomatic or consular staff to the facility and the prisoner. The HRC of Munich did not follow these arguments and declared surrender to Bulgaria inadmissible.<sup>61</sup> It argued that the Bulgarian authorities did not give a diplomatic assurance that the minimum standards for prison conditions will be met in accordance with public statements of the CPT. Furthermore, the HRC observed that it is true that in case of surrender of own nationals or residents German courts sometimes request the issuing state to place the persons into a specific correctional facility, e.g. in the pre-trial phase of criminal proceedings, however this approach cannot be transferred to the situation when minimum standards of prison conditions are not guaranteed in the issuing state at all (both in pre-trial and in the execution phase of a sentence).

### 3. Hungary

In a case decided by the Higher Regional Court of Karlsruhe on 25 May 2017, the defendant objected its surrender to Hungary because of prison conditions. The HRC hold that it would consider surrender to Hungary possible, if the Hungarian authorities had taken up the following conditions: <sup>62</sup>

- Designation of the concrete correctional facility in which the person sought would be accommodated after his surrender, during the pre-trial phase, and during the execution phase;
- Assurance that the space and further arrangement of the detention conditions in the concrete correctional facility during pre-trial and a potential subsequent imprisonment is in line with the minimum standards of Art. 3 ECHR;
- Detailed description of the detention conditions in the concrete correctional facility, in particular as regards the number of cells, the total amount of in-mates, space and

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<sup>56</sup> OLG Dresden, Beschl. v. 11.8.2015 – OLG Ausl 78/15.

<sup>57</sup> Whether this approach is upheld in view of the judgments of the ECtHR in *Muršić* and case law of the FCC – all after the order of the HRC of Dresden – remains questionable.

<sup>58</sup> OLG Celle, Beschl. v. 16.12.2014 – 1 Ausl 33/14.

<sup>59</sup> KG, Beschl. v. 15.4.2015 - (4) 151 AuslA 33/15 (36/15).

<sup>60</sup> State Attorney, also called „General Prosecutors“ (*Generalstaatsanwalt*) are the prosecution service at the level of the Higher Regional Courts in Germany. They are responsible for preparing the decision on admissibility of an EAW request, for granting the EAW and for organizing the factual surrender of the person concerned or his/her release from extradition detention respectively.

<sup>61</sup> OLG München, Beschl. v. 14.12.2015 –1 AR 392/15.

<sup>62</sup> OLG Karlsruhe, Beschl. v. 26.04.2017 (unpublished).

design of cells, sanitary and medical facilities;

- Information of whether the defendant is likely to be placed in other detention centres during imprisonment; in the affirmative, assurance is required that also this further prisons meet the European minimum standards.

In the case at issue, the HRC observed that the Hungarian judicial authorities had not replied in detail to its posed conditions.<sup>63</sup> Instead, the reply contained general information on the work in progress in order to bring in line the current situation of detention conditions with the relevant case law of the ECtHR against Hungary. The HRC concluded that in the event when the issuing state is currently trying to eliminate a current obstacle to surrender (here: maintenance of European minimum standards regarding detention conditions), but is not able to do so in due time, the surrender must be declared “inadmissible for the moment”. In its further reasoning, the HRC refers to both the ECJ judgment in *Aranyosi/Caldararu* and the FCC’s case law on the limits of mutual recognition under the identity review (above I.). The HRC ordered the release of the defendant from extradition detention in Germany.

In contrast, the HRC of Dresden declared surrender to Hungary admissible in an order of 13 July 2015 and rejected the argument of insufficient detention conditions in Hungary.<sup>64</sup> In the case at issue, a Czech national had to serve a rest of 6 months of imprisonment in Hungary for trafficking in human beings. The HRC of Dresden did not request such detailed assurance than the HRC of Karlsruhe (see above). Instead, the court was satisfied with the assurance by the Hungarian authorities that the defendant will be detained in a prison that meets the standards of the ECHR and the UN standard minimum rules for the treatment of prisoners of 12 February 1987. It further called upon the Hungarian authorities to assure that the defendant has remedies by means of which he can complain about detention conditions before Hungarian courts. In particular, the Dresden court did not ask for placement of the individual in a concrete correctional facility, but left it up to the State Attorney to do so. However, this possibility together with the assumption that also the Czech Republic as home country of the defendant may keep an eye on the situation in Hungary satisfied the HRC of Dresden to give precedence to mutual recognition.

The HRC of Hamm also declared surrender of a Hungarian national to Hungary admissible because it was satisfied with assurances from the Hungarian authorities. However, the HRC requested a more detailed and concrete description of the expected prison facilities in the concrete case.<sup>65</sup>

#### **4. Greece**

Regarding Greece, HRCs refused surrender, mainly because the Greek authorities submitted too general, non-specific assurances regarding detention conditions. In its order of 14 December 2015, the HRC of Düsseldorf referred to several sources confirming that the detention conditions in Greece do not meet essential fundamental standards, including CPT reports of 2014 and information gathered from the German embassy in Athens.<sup>66</sup> The HRC hold that the stated deficiencies in Greek prisons could not be remedied by an assurance of the Greek Ministry of Justice in the given case. The HRC reasoned that it is first questionable whether the “information” by the Ministry can formally be regarded an “assurance” under international public law since it does not use the word “assurance”. Second, the assurance did not mention whether the minimum standards as set by the ECHR, the UN minimum standard rules for the treatment of prisoners, and the European Prison Rules of the Council of Europe would be maintained during the entire criminal proceedings, including a possible subsequent enforcement phase of the sentence. Therefore, the warrant for extradition detention against the defendant had to be set aside.

Also the HRC of Stuttgart ordered release of the defendant since the Greek authorities did not submit a concrete, individual assurance that the person sought would be detained in

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<sup>63</sup> OLG Karlsruhe, Besch. v. 26.5.2017, Aus 301 AR 54/17.

<sup>64</sup> OLG Dresden, Beschl. v. 13.7.2015 – OLGAusl 98/15.

<sup>65</sup> OLG Hamm, Beschl. v. 1.12.2015 – III-2 Ausl 131/15, 2 Ausl 131/15.

<sup>66</sup> OLG Düsseldorf, Beschl. v. 14.12.2015, III-3 AR 15/15, 3 AR 15/15.

prisons that meet the aforementioned European and international minimum standards. The HRC of Stuttgart asked the Greek authorities several times for remedying past assurances, i.e. to make them more case specific. Since assurance from the Greek Ministry of Justice had been too general, the HRC, in a first decision of 21 April 2016, ordered that the defendant is released, but had to fulfill certain conditions, such as staying at his domicile and regular report at police stations.<sup>67</sup> After the Greek authorities did not sufficiently reply to give the required more detailed assurance on the detention to be expected in the concrete case against the defendant, the HRC finally lifted the conditions to the defendant by order of 8 June 2016.<sup>68</sup>

## VI. Transfer of Evidence

An important issue in cross-border cooperation in criminal matters is whether evidence collected abroad (outgoing requests) can be lawfully transferred into the main criminal proceedings in Germany. In other words, the question is on whether the received information can be used as admissible evidence in the trial before the German criminal court.

In this context, the Federal Court of Justice (Bundesgerichtshof; hereinafter: FCJ) – Germany's highest court of civil and criminal jurisdiction – set important guidelines in a decision of 2012.<sup>69</sup> The case dealt with the use of evidence of intercepted telecommunications information.

In the case at issue, upon a request of the Hamburg prosecutor, the prosecution service of Prague submitted records from telephone interceptions and audio CDs with more than 45,000 intercepted telephone calls. This material was used against the defendants in the German criminal proceedings. In its appeal on points of law before the FCJ, the defendants argued that the material could not be used lawfully because:

- The applicable bilateral mutual legal assistance treaty between Germany and the Czech Republic had required an interception order or warrant by the competent German court declaring that the requirements of the interception would be met, if such measure were carried out on the territory of the re-requesting party;<sup>70</sup> this order or warrant was lacking in the present case;
- German criminal procedure has more stringent rules on the interception of telecommunications since these can only be ordered if the defendant is suspected of a certain offence listed in the relevant provision of the German criminal code of procedure (Sec. 100a). Such listed offence was not given at the time when the interceptions were carried out in the Czech Republic;
- The evidence was gathered unlawfully on Czech territory since the interception order of the Prague court was ill-founded.

Although the underlying facts of the decision did not directly concern the interception of telecommunications by a person abroad on the basis of a targeted German MLA request, but rather the handing over of records by Czech authorities of intercepted data that were initially obtained for the purposes of criminal proceedings in the Czech Republic (preserved data already in the possession of the Czech authorities), the FCJ set important guidelines which also apply for other constellations.

The FCJ reiterated its standpoint that the question of the use of evidence obtained abroad must follow the rules of the requesting state, i.e. in the case at issue German law. In other words: the FCJ applies the *forum regit actum* principle when it comes to the use of evidence, instead of the *locus regit actum* principle, which applies to the enforcement of a requested MLA measure in Germany.

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<sup>67</sup> OLG Stuttgart, Beschl. v. 21.4.2016 – 1 Ausl 321/15.

<sup>68</sup> OLG Stuttgart, Beschl. v. 8.6.2016 – 1 Ausl. 321/15.

<sup>69</sup> BGH 1 StR 310/12 - Beschluss vom 21. November 2012 (LG Hamburg) = BGHSt 58, 32 = HRRS 2013, Nr. 314.

<sup>70</sup> Art. 17 para. 5 in conjunction with para. 2 no. 1 of the bilateral treaty on mutual legal assistance that supplement the 1959 European Convention on Mutual Assistance in Criminal Matters between the Federal Republic of Germany and the Czech Republic.

The Federal Court of Justice further emphasised that – as far as judicial co-operation within the EU is concerned (and there are no indications of abusive actions of the public authorities) – the use of the evidence obtained abroad is independent on the lawfulness of the measure in the requested EU state (here: the law of the Czech Republic). The Federal Court of Justice mainly argues that in an area like the EU, which is footed on the principle of mutual recognition of judicial decisions, Germany is not entitled to examine the compliance of the measure at issue with the law of the enforcing state. As a consequence, it is not relevant when the requested state does not comply with the protection of privileged information in accordance with its law or other substantive or formal requirements of its law. By contrast, the received information cannot be used as evidence in the German criminal procedure if the content of information is affected by an exclusionary rule of German (criminal procedure) law. This would be the case if for example the received information involves the core area of the private conduct of life or conversation with privileged persons pursuant to Sec. 160a CCP.

By applying these rather restricting standards (*eingeschränkter Prüfungsmaßstab*),<sup>71</sup> the FCJ could not detect a ground for the evidence handed over being inadmissible. The FCJ, *inter alia*, argued that the possible fact that orders of the Czech Court were not sufficiently justified, is no issue infringing German *ordre public*. Furthermore, the FCJ rejected the first argument of the defendants. In this context, the FCJ ruled that the relevant provision of the bilateral treaty must be interpreted as meaning of whether the conditions are fulfilled under which German criminal courts may use information that was gathered and transferred in other – not necessarily criminal – proceedings (Sec. 477 CCP). In other words, it has not to be assessed whether the German rules on interception of telecommunications must hypothetically be met, but the rules on the use of information found by chance. These conditions were fulfilled in the given case.

In conclusion, the ruling of the FCJ widely opens the admissibility of evidence gathered in another EU Member State. The standards for equivalent purely national criminal proceedings are not applied. Instead, only the national *ordre public* or the fair trial principle of Art. 6 ECHR are considered the only limitation for declaring evidence inadmissible. It can be assumed that such grounds are only successful in exceptional cases. Interestingly, the FCJ refers to Union law and confers it a pre-judicial effect, although the evidence was gathered on legal basis outside EU law.<sup>72</sup>

## VII. Procedural Safeguards

The EU Directives on strengthening procedural safeguards become more and more subject to case law of German courts.<sup>73</sup> As far as purely national cases are concerned, one of the main issues is currently, whether the defendant can claim the translation of the entire judgment if he/she has no sufficient command of the German language, but is present, represented by a lawyer and supported by an interpreter during the main proceedings. The German courts denied such a claim and argued that also the interpretation of the German law in the light of Directive 2010/64 does not change the already previously followed concept (backed by the FCC) that regularly the interpretation of passages of the judgment is sufficient to maintain an effective defence of the accused.<sup>74</sup> The underlying German implementing law (Sec. 187(2) of the Courts Constitution Act - GVG)<sup>75</sup> is considered in line with Directive 2010/64 (in particular its Art. 3(7)).

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<sup>71</sup> Confirmed by a decision of the FCJ of 9 April 2014 concerning the transfer of wiretap protocols by Hungarian authorities (BGH 1 StR 39/14 = HRRS 2014 Nr. 679).

<sup>72</sup> The FD on the European Evidence Warrant was not implemented by Germany. The EIO was not in place at that time.

<sup>73</sup> It must be noted that case law currently focuses on the application of the German law implementing Directives 2010/64 and 2012/13. Directive 2013/48 was only transposed recently by Law of 27 August 2017 (Official Gazette, *Bundesgesetzblatt I* Nr. 60, 3295) that entered into force on 5 September 2017. Therefore, practical experience is still low. Directives 2016/343, 2016/800 and 2016/1919 have not been implemented yet.

<sup>74</sup> OLG Stuttgart, Beschluss vom 09.01.2014 - 6 - 2 StE 2/12; OLG Hamburg, Beschluss vom 06.12.2013 - 2 Ws 253/13 - 1 OBL 88/13 = NJW-Spezial 2014, 88; OLG Köln, Beschluss vom 30.09.2011 - 2 Ws 589/11 = NSTz 2012, 471;

<sup>75</sup> The provision reads as follows: (2) As a rule, a written translation of custodial orders as well as of bills of indictment, penal orders and non-binding judgments shall be necessary for the exercise of the rights under the law

Another issue of concern is the application of Directives 2010/64 and 2012/13 to special types of criminal procedure that do not terminate it by a judgment. It can be observed that the implementing law is mainly tailored to the regular situation of judgments, and it became questionable how the relevant provisions must be adapted to other forms terminating criminal proceedings. This problem mainly occurred in relation to the penal order procedure (Strafbefehlsverfahren). This procedure is a common tool to effectively deal with trivial and medium offences. In these situations, a case can be unilaterally disposed of by the prosecutor and criminal court without oral hearing and formal judgment, but with the possibility to impose criminal sanctions including a fine or suspended sentence up to one year.<sup>76</sup> Most importantly, the defendant can avoid the enforcement of the sanction (e.g. fine, issued in the first stage in a written procedure) and force a trial only by lodging a formal objection (Einspruch) against a penal order within two weeks following service of the order. In case of admissible objections, the court sets down a main hearing on the case where the defendant can fully exercise his right to be heard.

German courts brought up cases to the CJEU seeking guidance on the interpretation of Directive 2010/64 and Directive 2012/13 in relation to this German penal order procedure, because problems arose on how to handle this procedure if the defendant had no domicile in Germany, but went abroad after having committed the offence. In the case *Gavril Covaci* (C-216/14)<sup>77</sup>, the Luxembourg Court stated that Directive 2010/64 on interpretation/translation does not preclude national legislation which requires the legal remedy to be drafted in the national language of the criminal proceedings (here: written objection against the penal order penalty in German), even if the accused person does not speak it. The CJEU however left to the German court to decide whether such an objection constitutes an “essential document” in accordance with Art. 3(3) Directive 2010/64, so that it must be translated into German.

The opinions on the consequences of the latter finding largely differ in German practice, in particular whether the “objection” must be considered an essential document, and whether the entry of the objection in foreign language meets the two-week deadline and can therefore be considered admissible.<sup>78</sup>

Furthermore, the CJEU ruled that Arts. 2, 3(1)(c) and 6(1) and (3) of Directive 2012/13/EU on the right to information in criminal proceedings

(1) do not preclude German legislation which, in criminal proceedings, makes it mandatory for an accused person not residing in Germany to appoint a person authorised to accept service of a penal order concerning him, but

(2) require that the defendant has the benefit of the whole of the prescribed period for lodging an objection against the penal order.

In the aftermath of the *Covaci* judgment, the local court and regional court in Munich asked the CJEU how to handle situations if the addressees of penal orders had neither a fixed place of domicile or residence in Germany nor in their country of origin. In these cases, the CJEU followed the proposal by the referring courts that Germany may maintain its system of mandatory representatives to officially receive notification of the penal order, but the German provisions on restoring to the status quo ante (*Wiedereinsetzung in den vorigen Stand*) must be interpreted in the light of Directive 2012/13. As a consequence, the accused person must

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of criminal procedure of an accused who does not have a command of the German language. An excerpted written translation shall be sufficient if the rights of the accused under the law of criminal procedure are thereby safeguarded. The written translation shall be made available to the accused without delay. An oral translation of the documents or an oral summary of the content of the documents may be substituted for a written translation if the rights of the accused under the law of criminal procedure are thereby safeguarded. As a rule, this can be assumed if the accused has defence counsel.

<sup>76</sup> For details see *Huber, Barbara*: Criminal Procedure in Germany, in: *VOGLER/HUBER* (eds.), *Criminal Procedure in Europe*, 2008, pp. 350–351. The right to be present can be produced if the defendant lodges a formal objection (*Einspruch*) against the penal order; then a date of the main hearings must be set, unless the objection is inadmissible.

<sup>77</sup> ECLI:EU:C:2015:686.

<sup>78</sup> Supporting: *Böhm, Neue Juristische Wochenschrift*, 2016, 306; sceptical *Brodowski, Strafverteidiger*, 2016, 2010. Denying the applicability of „essential document“ to objections, *Kulhanek, Juristische Rundschau*, 2016, 209.

be conferred a two-week period instead of one week (as stipulated by law) for his objections from the moment when he actually became aware of the order.<sup>79</sup>

However, it must be doubted whether the approach via the provisions on re-storing the status quo ante is the right one, since it seemingly puts on disadvantage persons who are not defended by a German lawyer. They might ignore the German penal order procedure or react too late, and are then confronted with a *res iudicata* decision which might be enforced under the terms of FD 2005/214/JHA. Instead, it is proposed that German authorities should, as a first step, resort to the facilitated possibilities to serve official documents under the EU's mutual legal assistance scheme. Unknown residences could be investigated via the Schengen Information System.<sup>80</sup>

Together with difficulties to reach persons in the context of trials in absentia (see above II.), the problems occurred in relation to penal orders, is another example that solutions must be found on how the law can be applied effectively when persons exercise their Union right of free movement. The existence of national legal regimes which end at the borders of their own territory does not correspond to the single area of free movement which was created by the treaties.

## VIII Transfer of Sentenced Persons

### 1. Enforcement of foreign sentences in Germany

The Higher Regional Court of Karlsruhe dealt with a case where Dutch authorities requested the enforcement of a Dutch sentence against a German national for drugs smuggling. The particularity was that the person concerned was convicted to 12 months of imprisonment, but the Dutch court immediately suspended 4 months of the imprisonment for a probation period. This possibility to suspend part of the sentence on probation already in the judgment finalising the main proceedings (Art. 14a, 14b, and 14c of the Criminal Code of the Netherlands) is not known in the German legal order. Under German criminal law only the enforcement of the entire sentence not exceeding one year<sup>81</sup> can be suspended for a probationary period. A release of a part of the sentence is only foreseen in case of conditional early release of a fixed-term imprisonment during the execution phase of the sentence, i.e. after a certain amount of the sentence had been served.<sup>82</sup>

Despite these differences on probation in the criminal law of the two states, the HRC of Karlsruhe nevertheless confirmed that the Dutch sentence has to be fully recognised as it stands.<sup>83</sup> Therefore, the German courts must take a decision in which also the part of the sentence which is not enforced but suspended for probation is fully adapted. The HRC argued that refusing a part of the enforcement of the Dutch sentence would run counter to the overriding principle of mutual recognition and not respect Art. 8(3) of FD 2008/909/JHA, by which, as a principle, the foreign penalty should fully be taken over. The HRC further clarified that it is not prevented from applying this solution because of Sec. 84k para. 1 AICCM, which implements Art. 17(1),(4) of the FD. The fact that in principle the law of the executing State governs the enforcement of a sentence, including the grounds for early or conditional release is irrelevant, if the original sentence already fixes conditional release, as in the case of the Dutch law. As a consequence, also the German law on early and conditional release remains inapplicable during the enforcement of the sentence, i.e. the person concerned has to serve 8 months of the imprisonment at the minimum.

The HRC further clarified that Germany may refuse the recognition of the sentence under the public policy exception of Sec. 73 sentence 2 AICCM (see above I.d). In this context, the HRC reiterates German case law that cooperation is refused if the sentence must be considered "unbearably severe", i.e. unreasonable under every conceivable aspect. A ground for refusal does not apply if the punishment that is to be executed can merely be regarded as very

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<sup>79</sup> CJEU, 22 March 2017, [C-124/16](#), C-188/16 and C-213/16, *Ianos Tranca and Others*, ECLI:EU:C:2017:228. q.

<sup>80</sup> Wahl, Thomas : Die EU-Strafverfahrensrichtlinien vor deutschen Gerichten, *eu crim* 2017, p. 50 (52).

<sup>81</sup> Under certain circumstances also sentences not exceeding two years, cf. Sec. 56 of the German Criminal Code.

<sup>82</sup> Cf. Sec. 57 of the German Criminal Code.

<sup>83</sup> OLG Karlsruhe, Beschluss v. 31.1.2017, 1 Ws 235/16. Available in the Internet at: [http://lrw.juris.de/cgi-bin/laender\\_rechtsprechung/document.py?Gericht=bw&nr=21873](http://lrw.juris.de/cgi-bin/laender_rechtsprechung/document.py?Gericht=bw&nr=21873).



harsh, and if it could not be regarded as reasonable if it were submitted to strict review under German constitutional law. By applying the “unreasonability test” the German courts take into account the different views of states on the punishability of criminal behaviour and the fact that, as a rule, no harmonised international minimum standard exists for the offence in question. This is especially held true for offences against property and drug offences. Hence, the argument of a too hard punishment is only successful if an extreme, non-tolerable limit is transgressed. This is done case-by-case. The HRC concluded that in the present case the imposition of one year of imprisonment is fully acceptable in view of the drugs offence.

The HRC of Karlsruhe took up these lines of arguments in a subsequent decision of 22 March 2017.<sup>84</sup> In this case, a Romanian with his usual residence in Germany requested the suspension on probation of a Romanian fixed-term sentence for 1 year and 5 months imprisonment for driving without licence and theft, since he was a minor at the time of committing the offences. Under German youth law, minors are only exceptionally convicted to prison sentences, in particular for severe criminal offenses. Nevertheless, the HRC of Karlsruhe only ordered the conversion of the Romanian criminal sentence into a juvenile sentence under German law, but left the level of the Romanian penalty untouched. The HRC argued that a reduction of the foreign sentence is inadmissible according to the German law implementing the FD 2008/909 in the present case. A possible suspension of the sentence on probation can only be taken after a certain proportion of the sentence had been served.

In a case before the HRC of Hamburg, the first instance court, the Regional Court of Hamburg, had to decide whether a sentence taken over from Spain (conviction of over 9 years of imprisonment plus fine of 400,000 EUR for drugs smuggling) could be suspended for probation according to the German rules on conditional early release (Sec. 57 of the German Criminal Code). The HRC indicated that the way of drafting judgments in Spain differs from the one under German criminal procedure law, as a consequence of which important findings are missing in order to assess the requirements for the suspension.<sup>85</sup> The reason is that German law necessitates a comprehensive assessment that must consider, inter alia, the personality of the convicted person, his previous history, the circumstances of his offence, the importance of the legal interest endangered should he re-offend, the conduct of the convicted person while serving his sentence, his circumstances and the effects an early release are to be expected to have on him.

The HRC concluded that the rule under European law that the findings of the foreign judgment are binding (Art. 8(5) and (1) of the 1991 EC-Convention on Enforcement of Foreign Criminal Proceedings) collides with the necessary reasoning under German law. Hence, when assessing conditional early release, German courts are allowed to gather evidence on facts needed for the mentioned assessment on probation if this does not run counter to the findings of the original judgment. This was neglected by the instance court.

In addition, the HRC ruled that the fact that the level of conviction in Spain would not have been imposed in a similar (drugs offence) case in Germany, cannot be decisive for applying the rules on conditional early release. Instead, German courts must, as a rule, also accept the rather severe amount of penalty imposed in a foreign state.

## **2. Enforcement of German sentences in another EU Member State**

German authorities often express concern that in case of enforcement of a German sentence in another EU Member State, the German sentence is converted into a lower sentence, thus not adequately respecting the German State's right to inflict punishment. This is particularly the case in relation to the Netherlands in case of drug offenses where German authorities fear that the Dutch authorities apply conversion procedures and adapt a sentence handed down in Germany out of proportion. Therefore, German prosecutors are generally reluctant to grant requests of sentenced persons for the enforcement of the remainder of the sentence in their home country.

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<sup>84</sup> OLG Karlsruhe, Beschluss v. 22.3.2017 – 1 Ws 8/17.

<sup>85</sup> OLG Hamburg, Beschluss vom 4. 5. 2009 - 2 Ws 80/09 = NStZ-RR 2010, 13.

Such arguments were put forward by the prosecution service of Cologne arguing that granting the request of a Dutch national to serve the sentence in the Netherlands would run counter German punishment since a considerable reduction of the sentence is to be expected in the Netherlands.<sup>86</sup> However, the HRC of Cologne rejected these arguments and argued that the prosecution service did not sufficiently take into account all circumstances of the case, in particular the nationality of the convicted person, its family ties in the Netherlands, its usual place of residence, his professional activity, etc.<sup>87</sup> The HRC also mainly argued by referring to the FD 2008/909 whose primary purpose is the social rehabilitation of the sentenced person. The HRC allowed the appeal of the Dutch national and considered the exercise of discretion by the German prosecution service too one-sided. Therefore, the prosecution service had to decide on the transfer of the sentenced person anew.

In a decision of 2014, the HRC of Hamm, however, rejected the appeal of a Dutch national for having the remainder of the German sentence for drugs offenses served in the Netherlands.<sup>88</sup> The HRC argued that the prosecution service correctly balanced the German State's interests for punishment and the interests of the individual. Hence, the interest of rehabilitation in the home country can only prevail if no considerable reduction of the German sentence is to be expected in the Netherlands. It should be noted in this context that the legal basis for the transfer of the sentenced person in this case were Art. 9 para. 1 lit. b) of the 1983 CoE convention on the transfer of sentenced person and Art. 8 para. 1 lit. b) of the 1991 EC-Convention on Enforcement of Foreign Criminal Proceedings.

In a case before the HRC of Berlin, the Berlin prosecution service argued that it will not grant the request of a Romanian national to serve the remainder of a sentence of 7 years imprisonment for aggravated sexual assault in Romania. The prosecution service mainly justified its decision by pointing out the severity of the criminal offense and the likelihood that the offender may enjoy early release on probation in Romania. The HRC reprimanded the prosecution service for not having assessed in detail the enforcement practice in Romania, in particular also for not having gathered updated information on the law in Romania.<sup>89</sup> By contrast, the HRC believed that current Romanian law does not considerably differ from German law on early conditional release where one of the essential requirements is a favourable social prognosis of the offender. Similarly to the HRC of Cologne, the HRC of Berlin stressed that the exercise of discretion on the application of the convicted person must fully take into account the purposes of the FD 2008/909.

In sum, it is under debate in German practice whether it is a precondition for granting the enforcement of German sentences in other EU Member States that both the rules and practice of enforcement in the foreign state must be similar to those in Germany. In other words, must it be recognised that the foreign state is intending to treat transferred sentenced person equally with persons sentenced under its national law, or must it be recognised that transferred persons cannot be treated better in the executing state than in the sentencing state?<sup>90</sup>

## **IX. Supervision of probation orders**

In a case decided by the HRC of Munich, an insane offender served a measure of rehabilitation in a mental hospital. After release, the offender indicated to take residence in Spain and opposed an order of the instance court obliging him to fulfil various so-called "directions" which were imposed on him in accordance with German criminal law; these included assignment to a supervisory authority and a probation officer for 5 years, seeking employment, regular reports to the supervisory authority, no consumption of alcohol or other drugs, etc. The HRC ruled that these directions can also be ordered if the defendant moves abroad and must be fulfilled also in the foreign country.<sup>91</sup> The binding effect of the German law is not limited to German territory. The HRC also invoked the FD 2008/949,

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<sup>86</sup> The arguments are published at: OLG Köln, Beschl. v. 18.1.2017 – 6 AusIE 7/17 -4- = StraFo 2017, 129.

<sup>87</sup> OLG Köln, Beschl. v. 18.1.2017 – 6 AusIE 7/17 -4- = StraFo 2017, 129.

<sup>88</sup> OLG Hamm, Beschl. v. 12.6.2014 – 1 VAs 25/14 = NSTZ-RR 2014, 323.

<sup>89</sup> KG, Beschl. v. 26.10.2015 – (4) 151 AR 38/15 (197/15) = StV 2016, 243.

<sup>90</sup> In the latter sense yet HRC of Berlin: KG, Beschl. v. 1.10.2009 – 4 Vas 13/09 = StV 2010, 317.

<sup>91</sup> OLG München, Beschluss vom 8. 3. 2013 - 1 Ws 84/13 und 88/13 = NSTZ-RR 2013, 211.

although it had not been implemented at the time of the decision. However, it can be assumed that, at least by way of mutual assistance, Spanish authorities are able to control certain measures imposed. The HRC further concluded that the directions are not a discriminatory act which would infringe the person's right to free movement according to Art. 21 AEUV.

## **X. Recognition of financial penalties**

In view of FD 2005/214/JHA, German courts had above all to deal with the problem of whether mutual recognition of a financial penalty imposed by an-other EU Member States fails because German law does not know liability of car owners. It was particularly argued that this is a form of strict liability that contradicts the German constitutional principle of blameworthiness (*Schuldprinzip*) and the *nemo tenetur* principle. German HRCs stated, however, that the form of strict liability of car owners for traffic offences does not infringe the public policy reservation according to Sec. 73 AICCM (see above I.d.).<sup>92</sup> The HRCs refer, inter alia, to the case law of the ECtHR which concluded that in case of minor offences the principle of the presumption of innocence (Art. 6 para. 2 ECHR) is not touched upon. In addition, the HRCs found that recognition of such financial penalties is possible since the German legislator introduced a kind of compensatory norm in its implementation law whose purpose is to take into account the German principles on individual guilt: hence, in accordance with Sec. 87b (3) No. 9 AICCM, the enforcement of the financial penalty will be inadmissible if the person concerned did not have the opportunity in the foreign proceedings to state that he was not responsible for the actions on which the decision is based and he does so before the authority competent for granting enforcement<sup>93</sup>. In practice, the persons concerned do not exercise this right, so that their counter-arguments are unfounded.

As one of the consequences of these lines of argument, financial sanctions imposed in other EU Member States are also enforced in Germany against legal persons, although Germany does not know criminal liability of legal persons. In this context, case law refers to Art. 54 TFEU that provides for an equal treatment between "companies and firms" and natural persons.<sup>94</sup>

In addition, the German courts decided that the German authorities are not entitled to adapt the level of the financial penalty to standard rates which would be imposed in similar German proceedings.<sup>95</sup>

## **XI. Victims**

In a case of 2011, the Federal Court of Justice dealt with the question of whether the first instance court correctly dismissed the application of aggrieved persons from Austria and Switzerland that became victims of a fraud scheme involving diamonds. In the light of the Council Framework Decision on the standing of victims in criminal proceedings from 2001, the German legislator changed the criminal procedure code and stipulated that applications of victims claiming, in criminal proceedings, the loss of property against the accused arising out of the criminal offence, if the claim actually falls under the jurisdiction of the ordinary courts should, in principal be approved by the criminal courts. As a consequence, the criminal court must decide on the civil claim in the judgment in which the accused is pronounced guilty of a criminal offence (*Adhäsionsverfahren*). Exceptions for dismissing this application for compensation were restricted by this reform legislation. According to Sec. 406 CCP, the criminal court may dispense with the application if it is inadmissible (e.g. the applicant is not an aggrieved person or the application is delayed), unfounded (e.g. the defendant is not held

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<sup>92</sup> OLG Köln: Beschluss vom 21.05.2012 - 2 SsRs 2/12 = NZV 2012, 450; OLG Braunschweig, Beschluss vom 05.12.2012 - Ss (OWiZ) 193/12 = NZV 2013, 148; further references at *Mertens, Oliver*: Die Rechtsprechung zum Recht der internationalen Rechtshilfe in Strafsachen seit dem Jahr 2010 – 2. Teil, NSTZ-RR 2015, 270, fn. 44.

<sup>93</sup> This is the Federal Office of Justice (*Bundesamt für Justiz*), located in Bonn, Germany.

<sup>94</sup> OLG Düsseldorf, Beschluss vom 8.12.20105 – III-3 Ws 100/15 = ZIS 2016, 206 with annotation *Johnson*, p. 207.

<sup>95</sup> OLG Düsseldorf, Beschluss vom 20. 6. 2012 - III – 3 AR 1/12; see also *Johnson, Christian*, case note, NZV 2013, 149.

guilty of a criminal offense) or not suitable. The latter ground – not suitable – poses problems in practice as in the case at issue.<sup>96</sup>

However, the FCJ left open whether his previous case law must still be considered unequivocally valid after the reform and in the light of Union law.<sup>97</sup> In this previous case law the FCJ ruled that the application can be dispensed with if the criminal court has to decide on difficult points of civil law. In the case at issue, the FCJ indeed found that the first instance court had to assess difficult questions of international private law which justified the denial of the Austrian and Swiss applications for compensations. Therefore, the refusal ground of Sec. 406 para. 1 sentence 5 (risk of protracting criminal proceedings) was applicable. Compensations had therefore to be brought by the aggrieved persons before courts of civil litigation.

The Higher Regional Court of Hamburg ruled in 2005 that, also in the light of the FD on the standing of victims and the intentions of the German legislator implementing the Union instrument, German courts have discretion if they decide on whether an application for compensation is “not suitable”. Next to the aspect of considerable protraction of the criminal proceedings by the civil claim,<sup>98</sup> the criminal court can also consider whether the purposes of the criminal procedure are affected by the application. These include the risk for effective defence of the defendant, or exceptional difficulties that lead to risk the operation of the criminal court in view of the proper investigation of the facts of the criminal offence.<sup>99</sup> In the case at issue, the HRC of Hamburg justified the dismissal of the application due to the high amount and scope of the claim, the liability risks for the assigned counsel, arising difficult legal issues, and the impacts of civil procedure law on the criminal proceedings.

The Higher Regional Court of Stuttgart ruled that capital investors damaged by market manipulation cannot be considered as aggrieved party in the sense of German criminal procedure law and therefore their attorneys have no right to inspect the procedural files of the criminal proceedings (Sec. 406e CCP).<sup>100</sup> The Court argued that the Council Framework Decision on the standing of victims in criminal proceedings from 2001 does not change the view of German courts and practitioners that the term “aggrieved person” must be interpreted in a narrow sense. This means that an aggrieved person can only be someone whose legal interest is protected by the criminal law provision, i.e. it must fall under the scope of protection of the criminal law. Legal interests only protected by civil law rules for damage claims cannot turn a person to an aggrieved party in criminal proceedings. In the case at issue, the underlying criminal law provision, Sec. 20a of the German Securities Trading Act (Gesetz über den Wertpapierhandel, WpHG), is not designed to deliver protection for individual capital investors but its purpose is to protect the general public interest in reliability and truthfulness of price determination at money markets or stock ex-changes.

## **Annex:**

### **BVerfG, Order of 15 December 2015**

EN:

<http://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2016/bvg16-004.html>

DE:

<http://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/DE/2016/bvg16-004.html>

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<sup>96</sup> It should be noted that, pursuant to Sec. 406 para. 1 last sentence CCP, the ground of lack of suitability cannot be invoked, where the applicant has asserted a claim in respect of damages for pain and suffering (section 253 subsection (2) of the Civil Code).

<sup>97</sup> BGH: Beschluss vom 14.04.2011 - 1 StR 458/10 = wistra 2011, 335.

<sup>98</sup> Expressly indicated as an example in the CCP.

<sup>99</sup> OLG Hamburg Beschluss vom 29. Juli 2005 – Az. 1 Ws 92/05 = wistra 2006, 76.

<sup>100</sup> OLG Stuttgart, Beschluss vom 28.06.2013 – 1 WS 121/13.

**BVerfG, Order of 6 September 2016:**

Press Release EN:

<https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2016/bvg16-065.html>

Press Release DE:

[https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/DE/2016/bvg16-065.html;jsessionid=584142F98DC381D3EEF3C08906DD5FD1.2\\_cid394](https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/DE/2016/bvg16-065.html;jsessionid=584142F98DC381D3EEF3C08906DD5FD1.2_cid394)

Full text of the order (in DE):

[https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2016/09/rk20160906\\_2bvr089016.html;jsessionid=584142F98DC381D3EEF3C08906DD5FD1.2\\_cid394](https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2016/09/rk20160906_2bvr089016.html;jsessionid=584142F98DC381D3EEF3C08906DD5FD1.2_cid394)

**BVerfG, Order of 18 August 2017:**

Full text (only in DE):

[https://www.bverfg.de/SharedDocs/Entscheidungen/DE/2017/08/rk20170818\\_2bvr042417.html](https://www.bverfg.de/SharedDocs/Entscheidungen/DE/2017/08/rk20170818_2bvr042417.html)

The final decision in this case was taken on 19 December 2017.

Full text (only in DE):

[https://www.bverfg.de/e/rs20171219\\_2bvr042417.html](https://www.bverfg.de/e/rs20171219_2bvr042417.html)

Press Release EN:

<https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2018/bvg18-003.html>

Press Release DE:

[https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/DE/2018/bvg18-003.html;jsessionid=A462BD449A4632A34668A74D561EC771.2\\_cid393](https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/DE/2018/bvg18-003.html;jsessionid=A462BD449A4632A34668A74D561EC771.2_cid393)

**BGH 1 StR 310/12 – order of 21 November 2012**

Full text (available in DE only):

<https://www.hrr-strafrecht.de/hrr/1/12/1-310-12.php>

# National report No 2 on the German criminal justice system

## Part I: Introduction into the German criminal procedure – procedural safeguards – domains of possible harmonisation (except victims) – general recommendations

### A. General features of the German criminal procedure system – some introductory remarks

#### 1. Main features and sources of criminal procedure

The Federal Republic of Germany is constitutionally considered a democratic, social and federal state. An important feature of the constitution is the “*Rechtsstaatsprinzip*” (enshrined in Art. 20 para. 3 of the Basic Law (Grundgesetz - GG)).<sup>101</sup> It is also a source from which further principles and rights are derived. One of these principles is the principle of proportionality (*Verhältnismäßigkeitsgrundsatz* or *Übermaßverbot*). It is anchored deeply in the German legal order. It is one of the most important principles of constitutional law,<sup>102</sup> the terms of which override ordinary legislation.<sup>103</sup> The principle of proportionality can also be found in many statutory provisions that shape more concretely the principle as enshrined in the constitution. It is an own concept of German law. Hence, legal requirements, applicability and results of the principle of proportionality may differ from its “European” counterpart.

Another important consideration is that the German federation is formed of 16 semi-autonomous federal states (*Länder*) which were created in 1949 to limit the influence of the Federation (*Bund*) and as a counter-balance to the federal powers. Therefore, also the competence to legislate is divided between the Federation and the *Länder*. As a consequence, criminal law, court organisation and procedure belong to the concurrent legislative power allowing the *Länder* to legislate if the Federal concerns are not involved.

The administration of criminal justice, which represents procedurally the procedure from the start of criminal investigations to the execution of the penal authority of the state, is mainly carried out at the *Länder* level. Federal courts are regularly involved only as appeal courts within the criminal procedure.<sup>104</sup> They are, in principle, designed to maintain consistency and uniform interpretation in legal decision-making at the entire national level.

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<sup>101</sup> The “*Rechtsstaat*” is often translated as „rule of law“. Although the core idea of the *Rechtsstaatsprinzip* is very similar to the British – in fact Western – tradition, this translation may be misleading since the German “rule of law-concept” is considered wider than the British or other ones. It is has not only a formal character, i.e. the idea of formal guarantee of supremacy of law and checks on state powers, such as the formal act of Parliament (so far similar to the British rule of law), but also substantial elements. The latter is mainly reflected in Art. 20 para. 3 of the Basic Law according to which state authorities, such as the judiciary and the executive are not only bound by acts of parliament, but also “the law” meaning “substantial rightness and justice” as expressed by fundamental constitutional values, namely the basic rights (Art. 1(3) Basic Law). Hence, Parliament (as constituted by the *Bundestag* and *Bundesrat*) itself is bound by the constitution (Art. 20(3) Basic Law). The “*Rechtsstaatsprinzip*” itself is not explained in one single provision in the constitution, but must be derived from several fundamental provisions aiming at limiting state power in order to protect the citizen from arbitrary decisions. See further *N. Foster/S. Sule*, *German Legal System and Laws*, 4<sup>th</sup> edition, OUP, 2010, p. 178.

<sup>102</sup> Hillgruber in: Isensee/Kirchhof (eds.), *Handbuch des Staatsrechts der Bundesrepublik Deutschland*, Band IX, *Allgemeine Grundrechtslehren*, 3rd edition (2011), § 201 (Grundrechtsschranken), mn. 51 et seq. The landmark-case is the judgment of the Federal Constitutional Court of 11 June 1958, official court reports (BVerfGE), vol. 7, p. 377 (404 et seq.).

<sup>103</sup> See e.g. Section 74b Criminal Code (confiscation) and Section 111m (1) Code of Criminal Procedure (seizure of printing devices).

<sup>104</sup> The Federal Prosecutor General at the Federal Court of Justice conducts prosecution only for a number of offences against the State or national security. Criminal proceedings are then carried out at the Higher Regional Court as first instance court, i.e. again at *Länder*-level.

The aims of the criminal process are considered complex, sometimes indeed incompatible in a particular case, so that they must be weighed up against each other. As main aims, the following is put forward:<sup>105</sup>

- Correct application of the substantive criminal law and enforcement of the State's claim for punishment;
- Granting a correct judicial process, including the maxim that justice cannot be reached at any price;<sup>106</sup>
- Restoring social harmony.

Rehabilitation of the victim and of the innocent defendant are ancillary purposes.

The main sources of German criminal procedure are the (German) Code of Criminal Procedure (*Strafprozessordnung – StPO*; in the following: GCCP)<sup>107</sup> and the Courts Constitution Act (*Gerichtsverfassungsgesetz – GVG*; in the following: CCA).<sup>108</sup> As mentioned above, the German constitution (Basic Law; *Grundgesetz – GG*)<sup>109</sup> plays an important role, since criminal procedure law is considered “the seismograph of State's constitution”.<sup>110</sup> The Basic Law provides for further significant provisions, in particular Arts. 1-19 (setting out the citizens' fundamental rights); Art. 46 (immunities of MPs); Art. 92 et seq. (court organisation); 101(1) (ban of extraordinary courts and right to lawful judge); Art. 103 (fair trial) and Art. 104 (deprivation of liberty).

The European Convention on Human Rights (ECHR) contains fundamental procedural guarantees directly applicable by German courts. It forms hierarchically a statutory federal law, below the Constitution. However, case law of the Federal Constitutional Court (*Bundesverfassungsgericht*, in the following: FCC) strengthened the legal position of the ECHR, arguing that the ECHR should be taken into account when interpreting national law.<sup>111</sup> Therefore, the German legislator cannot enact a law contradicting the Convention; German courts must abide by the ECHR if they render a decision.<sup>112</sup>

The substantive criminal law is contained in the (German) Criminal Code (*Strafgesetzbuch – StGB*; in the following: GCC).<sup>113</sup> A separate set of provisions relate to “infractions” (also called “regulatory offences”) which are dealt with in the Act on Regulatory Offences (*Ordnungswidrigkeitengesetz - OWiG*). This Act governs substantive rules and procedure relating to an area of the law, which decriminalised formerly criminal behaviours and created a separate category of less serious wrongdoings.

Rules on the international cooperation in criminal matters are provided for in the Act on International Cooperation in Criminal Matters (*Gesetz über die Internationale Rechtshilfe in Strafsachen (IRG)*, in the following: AICCM).<sup>114</sup> It also contains the national provisions implementing the instruments on the mutual recognition of judicial decision (EU cooperation), such as the EAW or the EIO. The law is linked to other provisions of domestic criminal procedure since Sec. 77 AICCM refers to the GCCP, the CCA, etc., to the extent that this Act

<sup>105</sup> *Beulke*, Strafprozessrecht, 13. Aufl. 2016, mn. 3 et seq.; *Roxin/Schünemann*, Strafverfahrensrecht, 28. Aufl. 2014, § 1, mn. 3 et seq.

<sup>106</sup> BGHSt 38, 215, 219f.

<sup>107</sup> An English translation is available at: [http://www.gesetze-im-internet.de/englisch\\_stpo/index.html](http://www.gesetze-im-internet.de/englisch_stpo/index.html).

<sup>108</sup> An English translation is available at: [http://www.gesetze-im-internet.de/englisch\\_gvg/index.html](http://www.gesetze-im-internet.de/englisch_gvg/index.html).

<sup>109</sup> An English translation is available at: [http://www.gesetze-im-internet.de/englisch\\_gg/index.html](http://www.gesetze-im-internet.de/englisch_gg/index.html).

<sup>110</sup> *Roxin/Schünemann*, Strafverfahrensrecht, 28. Aufl. 2014, § 2, mn. 1.

<sup>111</sup> BVerfG E 74, 358.

<sup>112</sup> However, in recent years conflicts arose between the jurisprudence of the FCC and the ECHR. See further *Nußberger*, The European Court of Human Rights and the German Federal Constitutional Court, published at: [https://www.cak.cz/assets/pro-advokaty/mezinarodni-vztahy/the-echr-and-the-german-constitutional-court\\_angelika-nussberger.pdf](https://www.cak.cz/assets/pro-advokaty/mezinarodni-vztahy/the-echr-and-the-german-constitutional-court_angelika-nussberger.pdf).

<sup>113</sup> An English translation is available at: [http://www.gesetze-im-internet.de/englisch\\_stgb/index.html](http://www.gesetze-im-internet.de/englisch_stgb/index.html).

<sup>114</sup> An English translation of the 2012 version of the act (i.e. recent reforms not considered) is available at: [https://www.gesetze-im-internet.de/englisch\\_irg/englisch\\_irg.html#p0461](https://www.gesetze-im-internet.de/englisch_irg/englisch_irg.html#p0461).

does not contain any special procedural rules. As a result, for instance, some procedural safeguards can be inferred from the GCCP and other acts.

## 2. The hybrid nature of the German criminal procedure

Modern German criminal procedure is not a purely inquisitorial system for it contains several features of an adversarial process. It can best be described as a mixed or “hybrid” system.<sup>115</sup> Inquisitorial elements are, for instance, the leading role of the presiding trial judge, and the duty of the court to establish the relevant facts and the defendant’s guilt. It is required that the trial court itself must establish the facts and not simply rely on the motions or statements of the other parties of the proceedings (Sec. 155(2), 244(2) GCCP). If it believes that evidence adduced is insufficient, it must call evidence *ex officio* (e.g., witnesses or experts). The criminal court “is the master of trial”, thus it keeps control over the presentation of evidence and is the only one that has the power to discontinue the proceedings.

A decisive element that counteracts a purely inquisitorial process is seen in the principle of accusation (*Anklagegrundsatz*, Sec. 151 GCCP).<sup>116</sup> Accordingly, the opening of a court investigation shall be conditional upon preferment of charges. The responsible institution for conducting investigations and bringing a case to court is the public prosecution office (Sec. 152(1) GCCP). Therefore, there is no longer a personal union between investigator, prosecutor and judge – features that coined German criminal procedure for a long time in the past.<sup>117</sup> The investigatory or pre-trial procedure (*Ermittlungsverfahren*) is now formally in the hands of the state prosecution (“master of the investigative phase”).<sup>118</sup> The public prosecution office shall ascertain not only incriminating but also exonerating circumstances (Sec. 160(2) GCCP). The pre-trial judge is involved if certain coercive measures are to be carried out: the necessary applications must be filed by the state prosecutor and the pre-trial judge must approve the coercive measure in question. However, the state prosecutor (neither the police nor the pre-trial judge) decides on the collection of evidence and whether the case is to be dropped or further proceeded to trial by indictment.

In the course of the reform of the German criminal procedure adversarial elements have been introduced and developed. The court is for instance actively supported in its task by both the state prosecution and the defence (although the court is neither limited to evidence presented by the participants nor is it bound by a confession, see above). The prosecutor as well as the defendant can influence the hearing of evidence by suggestions, formal motions on evidence taking, or direct presentation of witnesses to the court. The defendant can influence the procedure by exercising his rights.<sup>119</sup> German criminal procedure law assumes that the defendant takes an active role during the proceedings. He has the right (one can even say the duty) to participate in the process.<sup>120</sup> He/she can, for instance:

- put questions (Sec. 240 GCCP);
- file applications to take evidence (Sec. 244(3)-(6), 245(2), 246(1) GCCP);
- make statements after evidence has been taken in each individual case (Sec. 257 GCCP);
- present arguments or file applications after the closure of taking evidence (Sec. 258 GCCP).

A rather new, recent element that characterises the adversarial component of German procedure is the legislation on “plea bargaining”, i.e. the court can negotiate agreements

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<sup>115</sup> *Huber*, Criminal Procedure in Germany, in: Vogler/Huber (eds.), Criminal Procedure in Europe, 2008, p. 283.

<sup>116</sup> *Beulke*, Strafprozessrecht, 13. Aufl. 2016, mn. 18.

<sup>117</sup> The institution of the “investigating judge” was abolished in 1975.

<sup>118</sup> In practice, however, it is the police that undertakes investigations, for the most part acting on their own authority.

<sup>119</sup> *Huber*, *ibid.*

<sup>120</sup> For the right to be present and actively participate in the criminal proceedings, see also *T. Wahl*, Fair trial and defence rights, in: R. Sicurella/V. Mitsilegas/R. Parizot/A. Lucifora (eds.), General principles for a common criminal law framework in the EU – a guide for legal practitioners, Giuffrè Editore, Milano 2018 (forthcoming), pp. 131 et seq. and pp. 137 et seq.



with the participants on the further course and outcome of the proceedings (Sec. 257c GCCP).<sup>121</sup>

### 3. The elements of democracy, liberty and the social state in German criminal procedure

German criminal procedure realizes three main demands of the Age of Enlightenment: democracy, liberty and a social state.<sup>122</sup> Democratic requirements are fulfilled, for instance, by the participation of lay judges in court (Sec. 28 et seq, 76 et seq CCA) or by the rule that the facts and the defendant's guilt are established in an oral and public hearing, i.e. under the condition that the judicial process can be verified by the people (Sec. 250, 261 GCCP, Sec. 169 et seq. CCA).

The liberal idea of criminal procedure is mainly reflected in the rights of the individual, because his sphere of freedom must be protected from arbitrary and excessive intrusion by the State.<sup>123</sup> The finding of a balance between the interests of the functioning of an effective justice and of the protection of the State's citizen on the one hand, and the safeguard of individual rights of the defendant coins the entire German criminal procedure. Regarding the individual rights, only a few are explicitly mentioned in the German constitution (see below). Others are referred to in the criminal procedure code, e.g. the right not to be subject of compulsory measures that affect the independent will of the suspected or accused person (Sec. 136a, 163(3) and (4) GCCP) or the right to have a mandatory defence counsel paid by the state (Sec. 140 GCCP). Other rights are derived from general principles of German constitution (in particular the "*Rechtsstaatsprinzip*" according to Art. 20 of the Basic Law) and/or the ECHR, e.g. the presumption of innocence or the right to a speedy trial. The fair trial principle is considered an overriding procedural right, against which all norms of criminal procedure must be measured.<sup>124</sup>

Regarding the rights of an accused or suspected person in the criminal proceedings that are enshrined in the German constitution, the following are of particular importance:

- The right to be heard is enshrined in Art. 103(1) of the Basic Law and is an essential part of the "*Rechtsstaatsprinzip*". All participants in a criminal case must have the opportunity to speak, to make statements regarding the facts and the law, and to introduce motions. It requires the court to take account of the participants' statements and consider them.<sup>125</sup> The right to be heard is further expressed in various provisions of the GCCP.

<sup>121</sup> Introduced in 2009. Sec. 257c GCCP reads as follows:

(1) In suitable cases the court may, in accordance with the following subsections, reach an agreement with the participants on the further course and outcome of the proceedings. Section 244 subsection (2) shall remain unaffected.

(2) The subject matter of this agreement may only comprise the legal consequences that could be the content of the judgment and of the associated rulings, other procedural measures relating to the course of the underlying adjudication proceedings, and the conduct of the participants during the trial. A confession shall be an integral part of any negotiated agreement. The verdict of guilt, as well as measures of reform and prevention, may not be the subject of a negotiated agreement.

(3) The court shall announce what content the negotiated agreement could have. It may, on free evaluation of all the circumstances of the case as well as general sentencing considerations, also indicate an upper and lower sentence limit. The participants shall be given the opportunity to make submissions. The negotiated agreement shall come into existence if the defendant and the public prosecution office agree to the court's proposal.

(4) The court shall cease to be bound by a negotiated agreement if legal or factually significant circumstances have been overlooked or have arisen and the court therefore becomes convinced that the prospective sentencing range is no longer appropriate to the gravity of the offence or the degree of guilt. The same shall apply if the further conduct of the defendant at the trial does not correspond to that upon which the court's prediction was based. The defendant's confession may not be used in such cases. The court shall notify any deviation without delay.

(5) The defendant shall be instructed as to the prerequisites for and consequences of a deviation by the court from the prospective outcome pursuant to subsection (4).

See further the articles in the special issue "Plea bargains in Germany", 15 German Law Journal no. 1(2014), available at: <http://www.germanlawjournal.com/volume-15-no-01/>.

<sup>122</sup> Roxin/Schünemann, Strafverfahrensrecht, 28. Aufl. 2014, § 2, mn. 2 et seq.

<sup>123</sup> Roxin/Schünemann, Strafverfahrensrecht, 28. Aufl. 2014, § 2, mn. 9.

<sup>124</sup> Roxin/Schünemann, Strafverfahrensrecht, 28. Aufl. 2014, § 2, mn. 9.

<sup>125</sup> Beulke, Strafprozessrecht, 13. Aufl. 2016, mn. 30 with further references.

- The ban on double jeopardy (or *autrefois convict* or *autrefois acquit* [*Strafklageverbrauch*]) is a fundamental right enshrined in Art. 103(3) of the Basic Law.<sup>126</sup> The ban on double jeopardy is considered a guarantee to individual liberty, which is also founded on human dignity.<sup>127</sup> The German legal order does not provide for a particular rule that would trigger the *ne bis in idem* in a transnational dimension. It is settled case law that the fundamental right of Art. 103 para. 3 of the Basic Law does only apply to decisions of internal tribunals.<sup>128</sup> As a result, German authorities are not prevented from prosecuting a person anew in Germany or extradite a person, although (s)he may have been sentenced or acquitted for the same criminal offence in a foreign country.<sup>129</sup>
- The right to one's lawful judge is guaranteed in Art. 101(1) of the Basic Law. The article further clarifies that extraordinary courts shall not be allowed. The right of Art. 101 also requires that objective and general rules are established to determine the jurisdiction of the criminal court. As a consequence, the GCCP and the CCA provide for rules on the substantive jurisdiction of criminal courts, the venue of the trial and the allocation of cases.<sup>130</sup>
- Art. 97 of the Basic Law sets out the independence of judges who shall be subject only to the law.
- Art. 104 of the Basic Law provides for the important legal framework as to the deprivation of liberty.<sup>131</sup> Intrusions into the personal freedom are regulated more precisely in the GCCP, in particular regarding pre-trial detention (Sec. 112 et seq.).

In sum, Germany follows a mixed system of the defendant's fundamental rights. An explicit, general mentioning of defence rights for persons against whom criminal proceedings have been brought was not taken up in the Constitution.<sup>132</sup> The constitution only expressly mentions few defence rights, in particular the entitlement to a hearing, Art. 103(1) of the Basic Law. Other defence rights, such as the *nemo tenetur* guarantee, or the right to be present are considered of having a constitutional status by the Federal Constitutional Court's case law (derived either from the *Rechtsstaats*-guarantee as enshrined in the constitution or from basic rights as enshrined in the first part of the Basic Law or even by the ECHR). Again other defence rights – regulated in the criminal procedure code, i.e. simple federal law – are considered fundamental only.<sup>133</sup>

German criminal procedure also takes into account social considerations, such as the appointment of a mandatory defence counsel already in the pre-trial stage of the proceedings (Sec. 140, 141 GCCP) or the appointment of defence counsel for the purpose of preparing

<sup>126</sup> "No person may be punished for the same act more than once under the general criminal laws."

<sup>127</sup> Schmidt-Abmann, in: Maunz-Dürig, Grundgesetz Kommentar, Abs. III Art. 103, mn. 260; Kadelbach, in: Dörr/Grote/Marauhn (eds.), EMKR/GG Konkordanzkommentar, 2nd. ed. 2013, Kap. 29, mn. 4.

<sup>128</sup> Basic decision: Federal Constitutional Court, order of 31 March 1987 – 2 BvM 2/86, published in the court's case reports BVerfGE 75, 1 (15).

<sup>129</sup> BVerfGE, *ibid.* (16).

<sup>130</sup> See further Beulke, Strafprozessrecht, 13. Aufl. 2016, mn. 29 with further reference.

<sup>131</sup> Art. 104 reads as follows:

(1) Liberty of the person may be restricted only pursuant to a formal law and only in compliance with the procedures prescribed therein. Persons in custody may not be subjected to mental or physical mistreatment.

(2) Only a judge may rule upon the permissibility or continuation of any deprivation of liberty. If such a deprivation is not based on a judicial order, a judicial decision shall be obtained without delay. The police may hold no one in custody on their own authority beyond the end of the day following the arrest. Details shall be regulated by a law.

(3) Any person provisionally detained on suspicion of having committed a criminal offence shall be brought before a judge no later than the day following his arrest; the judge shall inform him of the reasons for the arrest, examine him, and give him an opportunity to raise objections. The judge shall, without delay, either issue a written arrest warrant setting forth the reasons therefor or order his release.

(4) A relative or a person enjoying the confidence of the person in custody shall be notified without delay of any judicial decision imposing or continuing a deprivation of liberty.

<sup>(132)</sup> Drafts of the German Basic Law after the Second World War foresaw also an article on the right to a lawyer of any accused person beside the right to be heard. The right to a lawyer was not taken up in the final version of the constitution because of various reasons (Rüping, in Bonner Kommentar zum Grundgesetz, 2005, Art. 103 para 1, mn. 3).

<sup>133</sup> See also T. Wahl, in: Sicurella et al., *op cit.*, p. 134 et seq.

proceedings to be reopened (Sec. 364b GCCP). Law enforcement authorities are obliged to take account of the personal situation of a suspect (Sec. 136(3), 160(3) GCCP). An important component in regard of the social responsibility of the state is the strengthening of victims' rights, which have considerably increased during the last two decades.<sup>134</sup>

#### **4. Differences of the criminal procedure systems in Europe and their impact to cooperation**

If it comes to cooperation in criminal matters, diversities of legal traditions regarding criminal procedure law across the Union are, however, not considered an obstacle in principle. Interviewees confirmed this. They particularly pointed out that requirements of each other's criminal procedure are widely accepted and mutually recognized. In this context, interviewees pointed out the *forum regit actum*-principle, which governs daily practice in MLA in Europe. Information requirements regarding the rights of suspects or witnesses or information sheets for victims are widely accepted by all jurisdictions. The limit of the *forum regit actum*-principle, i.e. a non-acceptance if formalities or procedures are contrary to the fundamental principles of law in the requested Member State (Art. 9(2) Directive EIO; Art. 4(1) EU 2000 MLA Convention) has not occurred in practice yet.

Only few issues were mentioned where the different legal traditions have an impact on cooperation. One main aspect is pre-trial detention. It is observed that common law countries' (in particular UK) authorities consider problematic that a person can already be remanded in custody at an early stage of the investigative proceedings (as it is usual in most continental European countries, including Germany). As a result, UK authorities are reluctant, in general, to surrender persons if they have to expect a longer stay in pre-trial detention in the requesting Member State. Orders to arrest somebody in extradition detention by means of the EAW are not always followed by UK authorities; instead, less intrusive measures are carried out, such as release upon bail.<sup>135</sup> Sometimes, UK authorities only assure that they will monitor the whereabouts of the suspect in Great Britain. German authorities observed that in these cases, suspects often escape and their whereabouts remain unknown, as a consequence of which, suspects may escape from justice. Practitioners, however, assess differently whether these differences should lead to a harmonisation at the EU level. In particular, defence lawyers in the interviews argued that a harmonisation of pre-trial detention in the EU is necessary for the proper functioning of the EAW whereas others concluded that the problems resort to a different understanding of charge and indictment which can be resolved by giving relevant explanations on the applying law.

Another example is the different approach of countries to adapt the level of punishment of foreign sentences. Problems mainly occur in relation to the Netherlands where the courts seemingly make extensive use of adapting German sanctions to the punishment or measure prescribe by the Dutch law for a similar offence. Since the level of punishment for drug-related offences is much lower in the Netherlands than in Germany, German authorities fear that offenders are favoured by the Dutch law if a German sentence is enforced in the Netherlands. In the end, this is an issue of discrimination/non-discrimination, which can be regarded from both sides. The Dutch approach has seemingly not changed after the entering into force of the FD on mutual recognition of foreign sentences. As a result, German authorities distrust and a smooth cooperation in the enforcement of sentences is hindered.

## **B. Impact on national law of procedural rights directives**

### **1. Directives for which the transposition deadline has already passed**

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<sup>134</sup> See for further details the contribution of A. *Oppers*.

<sup>135</sup> See in this context also CCBE, EAW-Rights, Analysis of the implementation and operation of the European Arrest Warrant from the point of view of defence practitioners, 2016, p. 34. The CCBE report is available in the Internet at: [https://www.ccbe.eu/fileadmin/speciality\\_distribution/public/documents/CRIMINAL\\_LAW/CRM\\_projects/EN\\_CRM\\_20161117\\_Study-on-the-European-Arrest-Warrant.pdf](https://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/CRIMINAL_LAW/CRM_projects/EN_CRM_20161117_Study-on-the-European-Arrest-Warrant.pdf).

It must be noted that case law currently focuses on the application of the German law implementing Directives 2010/64 and 2012/13. Directive 2013/48 was only transposed recently by Law of 27 August 2017.<sup>136</sup> It entered into force on 5 September 2017. Therefore, practical experience is low yet.

### a) Legal changes

In essence, it can be concluded that the German legal system had already been in line with the obligations of the mentioned Directives.<sup>137</sup> Only particular refinements were necessary in the German laws during the implementation of the Directives (as carried out so far). Even a change of the national legislation upon the requirements of the Directives was only necessary in some parts of the legislation; substantial differences to the European obligations have not been emerged.

An example is the introduction of a "letter of rights" for the arrested accused in Sec. 114b GCCP. This provision was introduced in 2009, i.e. it does not go back to the EU Directive 2012/13. Instead, the new legal provision followed recommendations of the CoE's CPT.<sup>138</sup> Sec. 147(2) GCCP was also amended in 2009. The legislator now clarifies that the defence counsel of the accused in remand detention has, as a rule, the right to the inspection of the files, in order to be able to assess the lawfulness of such deprivation of liberty. This amendment was held necessary in view of relevant case law of the ECtHR.

In legal terms, Directive 2013/48 has been brought about more considerable changes:

- Now, the defence lawyer of the accused has a right to be present and actively participate in examinations of the accused by the police.<sup>139</sup> Equally, the defence counsel has a right to be present at confrontations.<sup>140</sup> Thus, a right to access to a defence lawyer at the very first moment of the investigations is guaranteed and German law takes account of the ECtHR's judgment in *Salduz*. It should be noted, however, that – although the accused had no right to a defence lawyer during his/her examinations by the police in the past – police forces could grant the participation of a lawyer<sup>141</sup> or the access could be enforced by the accused if he claimed his right not to make any statement on the charges, unless prior consultation with his/her defence counsel.<sup>142</sup> Therefore, changes in practice may be limited.
- In addition, the German law implementing Directive 2013/48 entails improvements as to the access to a lawyer. As a result, the suspect who want to consult a defence lawyer before his/her examination, must be provided with information that facilitate the contact to a lawyer. The authorities must inform him/her on emergency legal services.<sup>143</sup> The police authorities must also perform these duties prior to the accused's examination. However, practical impacts of this new legislation may likewise be low since according to previous case law of the German Federal Court of Justice (*Bundesgerichtshof*), police officers already had extensive obligations to help the accused establish the access to a lawyer. Therefore, it was considered insufficient to provide an ignorant accused, who wants to consult a lawyer, with a telephone and directory, but the police officer was obliged to perform "first aid" in establishing the contact with a defence counsel of his choice.<sup>144</sup> Infringements may result in an exclusion of evidence.<sup>145</sup>

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<sup>136</sup> Official Gazette, Bundesgesetzblatt I Nr. 60, 3295.

<sup>137</sup> For the Directives 2010/64 and 2012/13 see BT Drucks. 17/12578, p. 10; *E. Christl*, NSTz 2014, 376, 383. For the Directive 2013/48, see *M. Heim*, NJW-Spezial 2016, 440, and *Oehmichen*, in: Knerim/Oehmichen/Beck/Geisler, *Gesamtes Strafrecht aktuell*, 2017, chap. 17, mn. 8, who notes that legislative amendments further clarified existing case law of the higher German courts.

<sup>138</sup> See BT Drucks. 16/11644, p. 1.

<sup>139</sup> Sec. 163a(4) GCCP new version.

<sup>140</sup> Sec. 58(2) GCCP new version.

<sup>141</sup> *Meyer-Goßner/Schmitt, Commentary, Strafprozessordnung*, 59. ed. 2016, § 163, mn. 16.

<sup>142</sup> *Beulke, Strafprozessrecht*, 13. Aufl. 2016, mn. 156.

<sup>143</sup> See Sec. 136(1) sentence 2 GCCP new version.

<sup>144</sup> BGHSt 42, 15; *Beulke, Strafprozessrecht*, 13. Aufl. 2016, mn. 13; 156.

<sup>145</sup> *Beulke, Strafprozessrecht*, 13. Aufl. 2016, mn. 469.

- Amendments to the provisions on “contact ban” (*Kontaktsperre*) should lead to a strengthening of the accused’s right to access to a lawyer.<sup>146</sup> The provisions on the contact ban stipulate the breaking off of contacts of accused detained because of alleged conduct of terrorist offences vis-à-vis other inmates and the “outside world”, thus also including defence lawyers. The provisions allow incommunicado detention and stem from the impressions of the terrorist attacks by the Red Army Faction (RAF) in the 1970s. They were introduced in 1977 when detained RAF members were supposed to mastermind the kidnapping of Hanns Martin Schleyer, then President of the Employers' Association, with the assistance of their defence lawyers.<sup>147</sup> The newly introduced amendment soften the provisions to the extent that in case of a contact ban the access to a lawyer is possible under certain circumstances. The contact ban as such, however, was not abolished. Also here, a change in practice is expected to be negligible since the provisions have never been applied since the terrorist events in 1977.<sup>148</sup>
- Sec. 83c(2) AICCM takes over the long-awaited demand that the requested person must be informed without undue delay that he/she has the right to appoint a lawyer in the issuing state.

In the latter context, legal literature remarked that Directive 2013/48 has raised the standards and quality of German criminal procedure for domestic cases; however, the legislator remains vague if it comes to the standards of defence counsel in cases of international cooperation. It is argued that the idea of Directive 2013/48 was to establish equal standards for both domestic procedures as well as EAW cases, however assistance in cases of extradition (still) lacks behind.<sup>149</sup> A lawyer of a person sought is, for instance, not called “defence counsel” (*Verteidiger*), but “assistance of counsel” (*Rechtsbeistand*) and assignment is made upon requirements that are additionally applied rather strictly in practice.<sup>150</sup> An early involvement of lawyer’s assistance in cases of international cooperation is (still) rather rare.<sup>151</sup>

Other authors noted that the implementation of Art. 10(4) of Directive 2013/48 into the German law is a bit misleading because the information given to the requested person may confuse him/her that a real right of dual representation both in the executing and issuing state exists.<sup>152</sup>

#### **b) “Changes” by and in court practice**

Beside changes in domestic legislation (“law in books”), the Directives may also entail effects to the “law in action”. As far as the interpretation of national law in accordance with the EU Directives on strengthening procedural safeguards is concerned, the most impact has had Directive 2010/64 on the right to interpretation and translation. For details see the document “Overview of national case law – Germany”, point VII.

Interviewees expressly put forward, however, that due to the exception clauses stipulated in the Directive and taken over by the German legislator, the legal result remains the same as in the past. An example is the German case law on the requirement of translations of judgments, which today follows the same lines of argument that were already set out by the Federal Constitutional Court in 1983: if a lawyer represents the defendant, oral translations

<sup>146</sup> Sec. 31 et seq. of the Introductory Act to the Courts Constitution Act (EGGVG) – a translation into English of this Act is *not* available.

<sup>147</sup> See for details also A. *Oehmichen*, German Law Journal 2008, pp. 855 et seq.

<sup>148</sup> M. *Heim*, NJW-Spezial 2016, 440 with reference to a statement of RA Michael Rosenthal, member of the committee on criminal law of the German Bar Association (DAV-Ausschuss für Strafrecht); *Oehmichen*, in: Knierim et al., op. cit., chap. 17, mn. 53.

<sup>149</sup> R. *Esser*, KriPoz 2017, 167, 179.

<sup>150</sup> See further Sec. 40 of the Act on International Cooperation in Criminal Matters (Gesetz über die Internationale Rechtshilfe in Strafsachen - IRG). See also T. *Wahl*, The perception of the principle of mutual recognition of judicial decisions in criminal matters in Germany, in: Vernimmen-Van Tiggelen/Surano/Weyembergh (eds.), The future of mutual recognition in criminal matters in the European Union, 2008, p. 132 et seq.

<sup>151</sup> Or is at least not handled uniformly among the Higher Regional Courts, as one interview partner confirmed.

<sup>152</sup> *Oehmichen*, in: Knierim et al., op. cit., chap. 17, mn. 75, 76.

by an interpreter are held, in principal, sufficient.<sup>153</sup> Therefore, some interviewees remarked that “all remains the same” and the added value of EU law must be doubted. They added that it is understandable that compromises must be found at the EU level with the Council and its 28 EU Member States as the dominant part in putting forth EU legislation; however, it must be observed that cost-benefit considerations were (implicitly) introduced by the EU legislation that have normally not played a role in German law, but are now picked up by German courts when interpreting German law. Future legislation should duly take into account the impacts of exceptional clauses and make an assessment of the real added value of EU harmonization.

Regarding other issues of judicial practice, the EU directives on procedural safeguards have entailed a very low impact. Special trainings to ensure a high level of competence among interpreters/translators, judicial staff (prosecutors, judges, etc.) and lawyers so as to match the requirements of directives have not been provided in Germany. Most interviewees confirmed what was already explored in former studies:<sup>154</sup> German practitioners do not care much about the EU law, but apply the national law (after entering into force). Only few specialists deal with questions as to which extent general principles of EU law, e.g. the requirement to interpret national law in conformity of the directives, may serve as lines of arguments in favour of a person concerned in a given case. Similarly, also case law of the ECJ does not have an essential impact in daily judicial practice. An exception – as remarked by an interviewed prosecutor – is the ECJ’s case law on the service of penal orders to non-resident accused persons (living abroad).<sup>155</sup>

## 2. Directives that are still in the process of being transposed

### a) Important changes

Directives 2016/343, 2016/800 and 2016/1919 have not been implemented yet. The German Federal Ministry of Justice prepares draft bills. First drafts are expected in the second half of 2018.

aa) Regarding Directive 2016/343 on the presumption of innocence and the right to be present at the trial in criminal proceedings, most interviewees do not expect considerable changes in German legislation.

bb) By contrast, in particular defence lawyers hope that Directive 2016/1919 may be a starting point for a more far-reaching reform of the German legal aid system. To date, Germany does not provide legal aid as such to poor defendants, but links financial public support to defendants only if there is a situation of “mandatory” (better: said: “necessary”) defence (*notwendige Verteidigung*). In this case a lawyer is appointed by court (appointed defence counsel – *Pflichtverteidiger*). A lawyer is only necessary in limited circumstances and he/she is normally appointed at the intermediate stage of the proceedings (as soon as a bill of indictment is released).<sup>156</sup> Defence lawyer argue that a reform of the German rules on “legal aid” should be aligned with the defendant’s “material right” to the access of a lawyer from the outset of the investigative proceedings (see 1.), and the compensation of appointed defence counsels should increase. In the latter context, defence lawyers request a considerable improvement when it comes to the assistance of clients in extradition/surrender proceedings. To date, appointed defence lawyers are not entitled to claim compensation for their assistance at the first questioning of a person concerned before extradition detention is ordered.<sup>157</sup> They may only claim compensation for their work if it comes to oral hearings before the Higher Regional Court that is the first and only instance to decide on the

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<sup>153</sup> BVerfG, Beschl. v. 17.5.1983 – 2 BvR 731/80. For a comparison between the former and current legal situation, see E. Christl, NSTZ 2014, 376, 378 et seq. Critical to the approach chosen by the German legislator: Ü. Yalçın, ZRP 2013, 104.

<sup>154</sup> See, for instance, T. Wahl, Country Report Germany, for the project of Vernimmen-Van Tiggelen/Surano/Weyembergh, “The future of mutual recognition in criminal matters in the European Union”.

<sup>155</sup> See case C-216/14 (*Covaci*) and joined cases C-124/16, C-188/16, and C-213/16 (*Ianos Tranca, Tania Reiter and Ionel Opria*). See in this context also the document “National Report - overview of case law –Germany”.

<sup>156</sup> See also M. Bohlander, Principles of German Criminal Procedure, 2012, p. 60 et seq.

<sup>157</sup> OLG Dresden, Beschluss vom 01.12.2017 - OLGAusl 111/16, BeckRS 2017, 134733. Critical to this approach Oehmichen, FD-StrafR 2018, 400418.

admissibility of extraditions/surrender in Germany. However, oral hearings are ordered very rarely by the Higher Regional Courts; in practice, decisions are made after a purely written procedure. On the other hand, interviewees fear that the German legislator will use the broad margin of discretion granted by Directive 2016/1919, in order to keep up the current system. Here, again interviewees referred to the Directives' too far-reaching "exception clauses" so that the harmonisation effect of EU law remains low.

In addition, it is hoped that a quality control for mandatory defence counsels is introduced by the German implementing law. Defence lawyers observed that Germany lags behind as regards ensuring a high quality of appointed defence lawyers.<sup>158</sup> In this context, it was advocated that the Directive should be the occasion to introduce a new system of assigning defence lawyers *ex officio* which limits discretion of judges.

cc) Considerable changes in German legislation are also expected when it comes to Directive 2016/800 on procedural safeguards for children who are suspects or accused persons in criminal proceedings.<sup>159</sup> In essence, the implementation of the Directive will change the roles of the different parties to the German youth criminal procedure. It is laid down in the Youth Courts Law (*Jugendgerichtsgesetz – JGG*, in the following: YCL) with several references to the GCCP.

(1) The most important changes are expected in relation to the core provision of the Directive, i.e. the assistance by a lawyer (Art. 6 of Directive 2016/800). German law already provides for considerations on proportionality if it comes to the appointment of defence lawyers for juvenile offenders (Sec. 68 YCL), so that the issue under which circumstances defence lawyers must be appointed – Art. 6 paras. 3 and 6 of the Directive –complies more or less with EU law. Considerable changes, however, will be necessary as to the points in time when the appointment must be enforced.<sup>160</sup> This concerns both situations of detention (Art. 6 para. 3 lit. c) and para. 6 subpara. 2), and other situations mentioned in the Directive where assistance of a lawyer is considered compulsory. Regarding detention, German law currently requires compulsory appointment of defence counsel for the accused child if remand detention "is to be enforced" against him (Sec. 68 No. 5 YCL), but not "when he/she is brought before a judge in order to decide on detention". Regarding other cases of necessary appointment, the German law stipulates, as a rule, that defence counsel must be appointed as soon as the accused is indicted, whereas in preliminary proceedings appointment is, in principle, under discretion (Sec. 68 No. 1 in connection with Sec. 141(1), (3), 140 GCCP). By contrast, the Directive clearly states that appointments of defence counsels must be carried out earlier. In line with Directive 2013/48, Directive 2016/800 introduces the assistance by a lawyer from the outset of criminal proceedings ("lawyer of the first moment"), which entails the need for adaptations. This entails several further legal questions, such as how and by whom the lawyer will be selected during preliminary proceedings, whether and how the lawyer can be replaced and how the first questioning must be arranged if a lawyer is not (immediately) available?<sup>161</sup>

If the German legislator transposes the Directive correctly, involvement of defence lawyers in criminal proceedings against "children" (German law uses the legal terms of "juveniles" and "young adults")<sup>162</sup> will considerably increase. Actually, participation of defence counsel in criminal proceedings involving "children" is not very frequent.<sup>163</sup> Critical voices in interviews utter that the regulations on assistance of defence counsel laid down in the Directive may even lead to a distortion of the German criminal procedure against children.

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<sup>158</sup> See also *Schlothauer, Reinhold/Neuhaus, Ralf/Matt, Holger/Brodowski, Dominik*, Vorschlag für ein Gesetz zur Umsetzung der Richtlinie (EU) 2016/1919 betreffend Prozesskostenhilfe für Verdächtige und Beschuldigte in Strafverfahren, HRRS 2/2018, 55, 56; *Jahn, Matthias*, Zur Rechtswirklichkeit der Pflichtverteidigerbestellung. Eine Untersuchung zur Praxis der Beiordnung durch den Strafrichter nach § 140 Abs. 1 Nr. 4 der Strafprozessordnung in der Bundesrepublik Deutschland, De Gruyter 2014.

<sup>159</sup> See *M. Sommerfeld*, ZJJ 2017, 165.

<sup>160</sup> *Sommerfeld*, ZJJ 2017, 165, 173.

<sup>161</sup> *Sommerfeld*, ZJJ 2017, 165, 174.

<sup>162</sup> Sec 1 YCL: "Juvenile" shall mean anyone who, at the time of the act, has reached the age of fourteen but not yet eighteen years; "young adult" shall mean anyone who, at the time of the act, has reached the age of eighteen but not yet twenty-one years.

<sup>163</sup> *Schaffstein/Beulke/Swoboda*, Jugendstrafrecht, 15. ed. 2014, mn. 673.

To date, the majority of cases are dealt with bilaterally between the prosecutor/police on the one side, and the juvenile and his/her parents on the other side during the preliminary proceedings. Under German law, prosecutors and judges specialised in proceedings involving juveniles have far-reaching possibilities of dispensing cases without bringing them to charge (so-called "diversion"). The entire procedure is oriented primarily towards the educational concept (see also Sec. 2 YCL). This concept is "on the top" of the criminal proceedings involving juveniles, but may be shaken if defence counsels participate at an early stage of the proceedings. Instead of finding tenable solutions between the law enforcement authorities and the juvenile offender in the pre-phase of a trial, it is feared that court procedures will increase. Involvement of defence lawyers may even undermine the "socio-educational work" towards the juvenile offender. These concerns are also raised because defence lawyers may pursue different interests than "education of the client" and most defence lawyers lack formation and training in criminal proceedings involving juveniles or young adults. Whether this lack can be compensated by increased training measures in future is very much doubted. Regarding the peculiarities of the German criminal procedure involving juveniles on dispensing cases, it was noted that implementation by the legislator must be awaited who might trigger the exceptional clause of Art. 6(6) of the Directive 2016/800 in order to maintain the current state of play, i.e. a dispense without participation of defence counsel and without (formal) court proceedings.

(2) The roles of other parties to the German criminal procedure involving juveniles and young adults are expected to shift after the transposition of the Directive as well. This concerns first the situations allowing for removal of the rights of the "holder of parental responsibility"<sup>164</sup> under Art. 5 (2) Directive 2016/800. A that far-reaching right of – possibly final – removal of the rights is not known in the YCL.<sup>165</sup>

In particular, implementation of Art. 7 Directive 2016/800 is going to change the way the youth courts assistance service is involved in the criminal proceedings. It is expected that – due to the right to an individual assessment that shall be carried out at the earliest appropriate stage of the proceedings according to the Directive – the youth courts assistance service must be involved much earlier during the preliminary proceedings as to date. Furthermore, the question is whether the Directive does implicitly require the German legislator to amend the law so that the youth courts assistance service has not only a right, but also an obligation to be present at the start of the trial.<sup>166</sup>

Note: The Youth Courts Assistance Service (Sec. 38 YCL) is a special organ representing the supervisory, social and care-related aspects in criminal proceedings involving juveniles. It is provided by the youth welfare offices working in conjunction with the youth assistance associations. Representatives of the Youth Courts Assistance Service support the prosecutor/judge by researching into the personality of the accused, his development and his environment, and shall express a view on measures to be taken. The Youth Court Assistance Service on the one hand provides the juvenile and his parents with the information he or she needs during the prosecution and on the other hand bring personal and individual aspects into the process to help the court to find an individualized and supportive sanction or measure.<sup>167</sup> Representatives have also tasks of a probation officer and look after the juvenile's reintegration into society.

### **b) Pre-effects of directives on procedural rights (the "Milev-doctrine")**

As far as can be seen, no judgments have been delivered by German courts that would have taken into consideration the provisions of the 2016 EU directives on procedural rights when interpreting German procedural law. In general, it can be observed that pre-effects of directives being in the process of transposition are rarely applied by German courts. In a decision of 2012, the Federal Court of Justice based its finding on the admissibility of evidence

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<sup>164</sup> German law distinguishes in this regard the legal notions of "parent or guardian" and of "legal representative" (see Sec. 67 YCL).

<sup>165</sup> Cf. *M. Sommerfeld*, ZJJ 2017, 165, 169.

<sup>166</sup> *M. Sommerfeld*, ZJJ 2017, 165, 170.

<sup>167</sup> See *J. Pruin*, Alternatives to Custody for Young Offenders – National Report on Juvenile Justice Trends: Germany, available at: [http://www.oijj.org/sites/default/files/baaf\\_germany1.pdf](http://www.oijj.org/sites/default/files/baaf_germany1.pdf), p. 2.



gathered abroad (here: Czech Republic) on the FD on the European Evidence Warrant, although the evidence was gathered on legal basis outside EU law and the FD was never implemented in Germany.<sup>168</sup> This is one of the seldom cases where EU law was conferred pre-effects in criminal matters.

### 3. Effectiveness and adequacy of EU law on criminal procedure

Legal literature often criticises the German legislator that the standards are not raised when transposing the EU Directives on procedural safeguards.<sup>169</sup> Instead – as mentioned above – the German legislator makes widely use of the exceptional clauses as stipulated in the Directives so that most legal traditions of the German procedural law can be maintained.<sup>170</sup> This holds true, for example, if one looks into the German law transposing the requirements for interpretation and translation in accordance with Directive 2010/64. Another example is the German law restricting defence counsel-client communication.<sup>171</sup>

Interviewees mentioned some issues for EU-wide regulations (see further below D.). Most of these issues, however, do not refer to issues that are already covered by the directives on procedural safeguards. As mentioned above, some interviewees recommended “a full harmonisation” by the EU, i.e. to reduce as far as possible exception clauses leaving Member States too much leeway in restricting the rights of the individual. Although the opinions of interviewed persons might not be representative, the majority of interviewees concluded that the existing Directives on procedural safeguards have not had an impact on raising mutual trust for the applicability of the principle of mutual recognition. Effects on cross-border cases cannot be noticed.

In the latter context, it was questioned why Directive 2010/64 only tackled the problem of translation in EAW cases, but not for other forms of cooperation, in particular MLA. Defence lawyer pointed out that it is not clear whether submitted documents containing evidence gathered abroad are considered an “essential document” that must be translated. Prosecution evidence does seemingly not fall under the scope of the Directive.<sup>172</sup>

## C. Other domains that have not, or to a very little extent, been subject to harmonisation measures at EU level

### 1. Detention conditions

As far as the national (German) law is concerned, the starting point is Art. 104 of the Basic Law. It sets out the framework for detention. Art. 104 reads as follows:

#### Article 104 [Deprivation of liberty]

(1) Liberty of the person may be restricted only pursuant to a formal law and only in compliance with the procedures prescribed therein. Persons in custody may not be subjected to mental or physical mistreatment.

(2) Only a judge may rule upon the permissibility or continuation of any deprivation of liberty. If such a deprivation is not based on a judicial order, a judicial decision shall be obtained without delay. The police may hold no one in custody on their own authority beyond the end of the day following the arrest. Details shall be regulated by a law.

<sup>168</sup> See document “overview of the national case law – Germany”, point VI.

<sup>169</sup> For the Directives 2010/64 and 2012/13, see *E. Christl*, NSTZ 2014, 376 and *Ü. Yalçın*, ZRP 2013, 104. For the Directive 2013/489, see *R. Esser*, KriPoZ 2017, 167, and *Oehmichen*, in: Knierim et al. op. cit., chap. 17, mn. 12 et seq. with a detailed analysis of the implementing provisions.

<sup>170</sup> For a comparative overview, see: *Wahl*, in: Sicurella, op. cit., pp. 129 et seq.

<sup>171</sup> Sec. 148(2) GCCP. Critical to the non-amendment of this provision in the light of Arts. 4 and 8 of Directive 2013/48, *Oehmichen*, ibid. mn. 48 et seq.

<sup>172</sup> See also *J. Brannan*, Identifying written translation in criminal proceedings as a separate right: scope and supervision under European law, in: *The Journal of Specialised Translation (JoSTrans)* 27 (2017), IIb), available via: <http://www.jostrans.org/archive.php?display=27>.

(3) Any person provisionally detained on suspicion of having committed a criminal offence shall be brought before a judge no later than the day following his arrest; the judge shall inform him of the reasons for the arrest, examine him, and give him an opportunity to raise objections. The judge shall, without delay, either issue a written arrest warrant setting forth the reasons therefor or order his release.

(4) A relative or a person enjoying the confidence of the person in custody shall be notified without delay of any judicial decision imposing or continuing a deprivation of liberty.

Further requirements are detailed in the GCCP. It should be distinguished between detention of non-convicted persons (i.e. remand detention – below a)) and detention of convicted persons after judgment (below b)).<sup>173</sup> Furthermore, detention for the purposes of extradition/surrender must be considered in the context of this study. It is a special form of detention with specific rules in the AICCM (below c).

### **a) Remand detention**

Remand detention concerns the period before a final judgment. Because of the presumption of innocence, German law balances the interests of the as-yet-officially innocent suspect against the public interests in an effective and proper administration of justice and prosecution of criminal offences.<sup>174</sup> Therefore, as a rule, the suspect has to remain at liberty; remand in custody should be the exception.

#### **aa) Admissibility and the accused's rights**

Remand detention can only be ordered by a judge who must issue a written arrest warrant (Sec. 114, 128(2) GCCP).

Remand detention is admissible only if the following conditions are fulfilled (Sec. 112 GCCP):

- Strong (i.e. high degree of) suspicion of the offence;
- There is a ground for arrest;
- The order is not disproportionate to the significance of the case and to the penalty<sup>175</sup> likely to be imposed.<sup>176</sup>

The following grounds for arrest exist:

- Flight or risk of flight;<sup>177</sup>
- Risk of tampering with evidence;<sup>178</sup>
- Strong suspicion of having committed certain serious offences exhaustively listed in the law, such as murder or homicide, or forming terrorist organisations;<sup>179</sup>

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<sup>173</sup> The following deals with the “ordinary detention conditions” most common in German criminal proceedings. Particular forms of detention, such as custody for establishing the identity of an accused person (Sec. 163b and 163c GCCP), detention for failure to answer summons (Sec. 133(2), 134, 230(2) GCCP), arrest of persons found actually committing an offence or fleeing from the scene of crime (Sec. 127, 128), or provisional arrest to secure accelerated proceedings (Sec. 127b GCCP) are not detailed in the following.

<sup>174</sup> *Bohlander*, Principles, op. cit., p. 75 with further references to the jurisprudence of the Federal Constitutional Court.

<sup>175</sup> or measure of reform and prevention.

<sup>176</sup> This requirement expresses in a concrete way the general principle of proportionality (see introductory remarks). Another provision in this context is Sec. 113 GCCP which further restricts remand detention in case of less serious offences (if the offence is punishable only by imprisonment of up to six months, or by a fine up to one hundred and eighty daily unit).

<sup>177</sup> Sec. 112(2) nos 1 and 2 GCCP.

<sup>178</sup> Defined as: the accused's conduct gives rise to the strong suspicion that he will

a) destroy, alter, remove, suppress, or falsify evidence,  
b) improperly influence the co-accused, witnesses, or experts, or  
c) cause others to do so,

and if, therefore, the danger exists that establishment of the truth will be made more difficult. See Sec. 112(2) no. 3 GCCP.

<sup>179</sup> According to the wording of Sec. 112(3) GCCP this applies without the need for a risk of flight or tampering of evidence. However, the FCC found that constitutionality can only be considered, if these grounds for arrest are given

- Risk of further committing certain serious offences or risk of continuing such offences as listed in the law, e.g. sexual abuse, child abuse, or serious offences against the person, or property, arson or public order offences, etc.;<sup>180</sup>
- Risk of non-appearance at the main hearing in accelerated proceedings<sup>181</sup>.
- Detailed and rather complicated rules lay down the rights of the accused and the mechanisms of judicial control of remand detention.
- The rights of the accused include:
  - Handing over of a copy of the warrant of arrest at the time of the accused's arrest;
  - Translation of the warrant of arrest, if the accused does not have a sufficient command of the German language;
  - Instruction as to the accused rights without delay and in writing in a language the accused understands;

Sec. 114b(2) GCCP summarises the rights the accused is to be advised in the instruction:

1. shall, without delay, at the latest on the day after his apprehension, be brought before the court that is to examine him and decide on his further detention;
2. has the right to reply to the accusation or to remain silent;
3. may request that evidence be taken in his defence;
4. may at any time, also before his examination, consult with defence counsel of his choice;
  - 4a. may, in the cases referred to in Section 140 subsections (1) and (2), request the appointment of defence counsel in accordance with Section 141 subsections (1) and (3) [note: German provisions on mandatory defence and legal aid];
5. has the right to demand an examination by a female or male physician of his choice;
6. may notify a relative or a person trusted by him, provided the purpose of the investigation is not endangered thereby.
7. may, in accordance with Section 147 subsection (7), apply to be given information and copies from the files, insofar as he has no defence counsel; and
8. may, if remand detention is continued after he is brought before the competent judge,
  - a) lodge a complaint against the warrant of arrest or apply for a review of detention (Section 117 subsections (1) and (2)) and an oral hearing (Section 118 subsections (1) and (2)),
  - b) in the event of inadmissibility of the complaint, make an application for a court decision pursuant to Section 119 subsection (5), and
  - c) make an application for a court decision pursuant to Sec. 119a subsection (1) against official decisions and measures in the execution of remand detention.

The accused is also to be advised of defence counsel's right to inspect the files pursuant to Section 147 GCCP. An accused who does not have a sufficient command of the German language or who is hearing impaired or speech impaired shall be advised in a language he understands that he may, in accordance with Section 187 subsections (1) to (3) of the Courts Constitution Act, demand that an interpreter or a translator be called in for the entire criminal proceedings free of charge. A foreign national shall be advised that he may demand

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in this alternative too. Only, the burden of judicial justification of the grounds for arrest (risk of flight and tampering) are lowered (cf. *Bohlender*, op. cit., p. 76; *Beulke*, *Strafprozessrecht*, 13. ed. 2016, mn. 214).

<sup>180</sup> Cf. further Sec. 112a GCCP. This provision clearly pursues preventive purposes which is why its proportionality is criticized (cf. *Bohlender*, op. cit., p. 77).

<sup>181</sup> Cf. Sec. 127b GCCP.

notification of the consular representation of his native country and have messages communicated to the same.

### **bb) Judicial remedies**

The accused can lodge certain judicial remedies. The law distinguishes between judicial remedies against the warrant of arrest (below (1)) and against decisions and measures in execution of detention (below (2)).

(1) If the accused is apprehended on the basis of the warrant of arrest, he shall be brought before the competent court without delay. The court shall examine the accused concerning the subject of the accusation without delay following the arrest and not later than on the following day. During the examination, the accused has the right to reply to the accusation (or to remain silent). He shall be given an opportunity to remove grounds for suspicion and arrest and to present those facts which speak in his favour (cf. Sec. 115 GCCP).

If remand detention is continued, the accused can lodge a complaint (*Beschwerde*)<sup>182</sup> aiming at revoking the warrant of arrest.

As long as the accused is in remand detention, he may at any time apply for a court hearing as to whether the warrant of arrest is to be revoked or its execution suspended in accordance with Section 116 GCCP.<sup>183</sup> This remedy is called review of detention (*Antrag auf Haftprüfung*). By contrast to the complaint, the review of detention has no suspensive effect, i.e. the accused remains in custody until a decision revoking the warrant of arrest or releasing the accused on bail is taken.<sup>184</sup>

Upon application by the accused, or at the court's discretion *proprio motu*, a decision on maintaining remand detention is to be given after an oral hearing (Sec. 118 GCCP).<sup>185</sup>

(2) During the execution of the warrant by detention on remand, the suspect may be subjected by judicial order to a number of restrictions relating to visits, telecommunications, letters and parcels, placement of the accused, etc. The accused in remand detention can lodge a complaint against these restrictions pursuant to Sec. 304 GCCP.<sup>186</sup>

### **cc) Judicial control ex officio**

After a detention period of six months, the Higher Regional Court (the highest courts at the level of the *Länder*)<sup>187</sup> examines ex officio whether remand detention can be continued (Sec. 121 GCCP). Furthermore, examinations ex officio take place at the opening of the trial (Sec. 207 GCCP) and at the time of judgment (Sec. 268b GCCP).

Sec. 121 et seq. GCCP make clear that remand detention exceeding a period of six months can only be maintained exceptionally and continuation must be duly justified. According to Sec. 121(1) GCCP, remand detention *for one and the same offence* exceeding a period of six months shall be executed only if the particular difficulty or the unusual extent of the investigation or some other important reason do not yet admit pronouncement of judgment and justify continuation of remand detention.

Sec. 121(1) must be interpreted restrictively because it expresses the citizen's fundamental right to liberty. This right gains more and more importance towards the State's interest in a proper administration of justice and prosecution of criminal offences the more the time in

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<sup>182</sup> Regulated in Sec. 304 et seq. GCCP.

<sup>183</sup> Sec. 117(1) GCCP.

<sup>184</sup> A complaint shall be inadmissible where an application has been made for a review of detention. The right of complaint against the decision following the application shall remain unaffected (Sec. 117(2) GCCP). According to Sec. 117(3), the judge may order specific investigations which may be important for the subsequent decision concerning continuation of remand detention, and he may conduct a further review after completion of such investigations.

<sup>185</sup> The accused may also be located in another place than the court and the hearing is simultaneously transmitted audio-visually to his place, e.g. because of great distance or sickness of the accused (Sec. 118a(2), sentence 2 GCCP).

<sup>186</sup> *Beulke*, Strafprozessrecht, op. cit., mn. 229a. Also this must be considered as a rule. For exceptions see Sec. 119(5) GCCP and *Meyer-Goßner/Schmitt*, Strafprozessordnung, 59. ed. 2016, 3 199, mn. 36; 37.

<sup>187</sup> If the Higher Regional Court is in charge of the detention decisions, the competent court to decide on the extension of the remand detention is the Federal Court of Justice.

detention increases.<sup>188</sup> According to the Federal Constitutional Court, the State's intrusion into the individual's right to liberty requires a higher degree of scrutiny (more profoundness and intensity of examination) if remand detention lasts longer than six months.<sup>189</sup> This concept includes more concretely the following issues:

- The seriousness of the alleged offence cannot in itself be taken into account in the framework of Sec. 121;<sup>190</sup>
- Remand detention cannot be maintained in order to investigate other offences not subject to the current warrant of arrest;<sup>191</sup>
- Delay of investigations attributable to matters falling within the sphere of the State, do not legitimate an extension of the time period of retention detention;<sup>192</sup>
- Work overload is, in principle, not a serious reason, because the prosecution services and the courts are required to address such problems as soon as possible at the organizational level;<sup>193</sup> the same holds true for situations of absences or vacation periods of judges or prosecutors.<sup>194</sup>

As a consequence of these approaches, remand detention periods exceeding one year are rare in practice. If the detention is based on Sec. 112a GCCP (remand detention on grounds of serious offenses, see above), it must by law be terminated after one year (Sec. 122a GCCP).

## **b) Detention after conviction**

Once a judgment is handed down and a sentence of imprisonment is ordered, the judgment cannot generally be corrected by the trial court. The defendant or the prosecution service can challenge the judgment by making recourse to either one of the ordinary remedies provided for by the GCCP or to one of the extraordinary remedies (re-opening of procedure, constitutional complaint).

Regarding ordinary remedies, the defendant can lodge either an appeal on fact and law (so-called *Berufung*) or an appeal on points of law only (*Revision*).<sup>195</sup> Which remedy is possible is dependent on the court that was competent for the trial. In essence, judgments handed down at first instance by the local court (*Amtsgericht*) can be subject to a *Berufung* (before the Regional Court - *Landgericht*) and a *Revision* (before the Higher Regional Court – *Oberlandesgericht*).<sup>196</sup> If the judgment of first instance is handed down by a Regional Court (competent, in principle, for capital offences, serious misdemeanors, medium and serious offences, white collar crimes, and probable imprisonment over 4 years (or detention in a mental hospital or preventive detention)) or a Higher Regional Court (competent, in principle, for offences against the State or national security) only an appeal on law (*Revision*) is admissible. In these cases, the Federal Court of Justice (*Bundesgerichtshof*) is competent to decide on the *Revision*.<sup>197</sup> Both, *Berufung and Revision*, have in common that:

- the appeal is directly moved to the next tier of the court hierarchy (*Devolutiveffekt* – devolutive effect);
- the judgment does not enter into effect or does not become final (*Suspensiveffekt* – suspensive effect);
- the judgment cannot be altered by substituting a sentence to the detriment of the

<sup>188</sup> *Beulke*, op. cit., mn. 227.

<sup>189</sup> BVerfGE 103, 21, 35.

<sup>190</sup> Thüringisches OLG StraFo 2004, 318.

<sup>191</sup> BVerfG NStZ 2002, 100.

<sup>192</sup> BVerfG StV 2006, 2013; 2007, 644; *Bohlander*, op. cit., p. 79.

<sup>193</sup> BVerfG StV 1999, 328.

<sup>194</sup> *Bohlander*, op. cit., p. 80.

<sup>195</sup> In case of a penal order (Strafbefehl), the defendant can lodge an "objection" (*Einspruch*). By contrast to the legal remedies in the ordinary criminal procedure (*Rechtsmittel*), the remedy is generally called "*Rechtsbehelf*".

<sup>196</sup> A judgment of the local court can directly appealed to the Higher Regional Court. This is based on Sec. 335 GCCP according to which a judgment against which an appeal on fact and law is admissible may be contested by an appeal on law in lieu of an appeal on fact and law (so-called *Sprungrevision*).

<sup>197</sup> See the charts at *Huber*, op. cit., p. 287 or *Beulke*, op. cit., p. 46.

defendant when he alone or the state prosecutor appealed in his favour or his defence counsel made the appeal (prohibition of *reformatio in peius*).

The GCCP also stipulates the rules for re-opening criminal proceedings (*Wiederaufnahmeverfahren*) after the judgment had become final. These proceedings aim at reconciling values such as truth, justice and legal proof against the finality of a sentence. The grounds for reopening criminal proceedings are restricted to narrowly defined circumstances laid down in Sec. 359 and 362 GCCP. There is no time limit for an application for re-opening. As a rule, reopening is authorized only in order to review the factual basis of a judgment. A re-opening can take place either in favour of the defendant or against him. In the latter case, it may result in a more severe sentence. One of the grounds for reopening for the convicted person's benefit is if the European Court of Human Rights has held that there has been a violation of the European Convention on the Protection of Human Rights and Fundamental Freedoms or of its Protocols and the judgment was based on that violation.

One of the particularities of the German legal system is that each person can lodge a complaint before the Federal Constitutional Court arguing that one of his fundamental rights or one of his or her rights under Article 20 para. 4, Articles 33, 38, 101, 103 and 104 of the Basic Law are violated. This includes situations where a court did not sufficiently taken into account the rights when rendering a judgment. As a rule, however, the constitutional complaint may only be lodged after all remedies have been exhausted. If the FCC affirms a violation by a court decision, it will reverse the decision and remand the matter to a competent court.

If the judgment is final and imprisonment without probation is ordered, the sentence must be implemented. The German legal order distinguishes between "*Strafvollstreckung*", i.e. execution of a sentence (not necessarily imprisonment) as the last phase of criminal procedure<sup>198</sup> and "*Strafvollzug*", i.e. the way a sentence of imprisonment is executed starting from the time an inmate is received in a penal institution until his release. The latter is regulated in the "Act Concerning the Execution of Prison Sentences and Measures of Rehabilitation and Prevention Involving Deprivation of Liberty" (*Strafvollzugsgesetz - StVollZG*).<sup>199</sup> The *StVollZG* includes rules on:

- the programming of the prisoner's treatment;
- the prisoners' accommodation and food;
- visits, correspondence, and leave;
- work and training;
- exercise of religion;
- medical services;
- leisure activities;
- social assistance, etc.

The offender can lodge informal or formal complaints if he disagrees with the way of the execution.<sup>200</sup> Also here, a constitutional complaint before the FCC is possible.

The question on whether a perpetrator can conditionally early released is regulated in the GCC. Provisions distinguish between conditional early release of a fixed-term imprisonment (Sec. 57) and of life imprisonment (Sec. 57a and 57b).

According to Sec. 57(1) GCC, the court shall grant conditional early release from a fixed-term sentence of imprisonment under an operational period of probation, if

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<sup>198</sup> Regulated in Sec. 449 et seq. GCCP and in the "*Strafvollstreckungsordnung*" [StVollstrO].

<sup>199</sup> An English translation of this Act is available at: [https://www.gesetze-im-internet.de/englisch\\_stvollzg/index.html](https://www.gesetze-im-internet.de/englisch_stvollzg/index.html).

<sup>200</sup> Cf. 108 and 109 StrafVollZG. See further P. Höflich/W. Schrieffer/A. Bartmeier, *Grundriss Vollzugsrecht*, 4 ed. 2014, chapter 19, pp. 191 et seq.; Laubenthal, *Strafvollzug*, 7 ed. 2015, chapter 9, mn. 749 et seq.

1. two thirds of the imposed sentence, but not less than two months, have been served; and
2. the release is appropriate considering public security interests; and
3. the convicted person consents.

The decision shall particularly consider the personality of the convicted person, his previous history, the circumstances of his offence, the importance of the legal interest endangered should he re-offend, the conduct of the convicted person while serving his sentence, his circumstances and the effects an early release are to be expected to have on him.

According to Sec. 57(2) GCC, after one half of a fixed-term sentence of imprisonment, but not less than six months have been served, the court may grant conditional early release, if

1. the convicted person is serving his first sentence of imprisonment, the term not exceeding two years; or
2. a comprehensive evaluation of the offence, the personality of the convicted person and his development while in custody warrant the acceptance of special circumstances, and the remaining requirements of Sec. 57 para. 1, 2<sup>nd</sup> sentence have been fulfilled.

According to Sec. 57a(1) GCC, the court shall grant conditional early release from a sentence of imprisonment for life under an operational period of probation of five years, if

1. fifteen years of the sentence have been served;
2. the particular seriousness of the convicted person's guilt does not require its continued enforcement; and
3. the requirements of Sec. 57(1) 1st sentence Nos 2 and 3 are met.

Furthermore, Section 57(1) 2nd sentence applies *mutatis mutandis*.

### **c) Extradition detention**

#### **aa) Procedure and judicial control**

Particular rules exist if a person is apprehended for the purposes of extradition. These rules also apply for the surrender of a person to another EU Member State upon an incoming EAW. The rules are detailed in the AICCM.

As a rule, the detention of an accused is only possible after an extradition arrest order (*Auslieferungshaftbefehl*)<sup>201</sup> has been issued. The extradition arrest order can only be issued by the Higher Regional Court (*Oberlandesgericht*) which decides this after the procedure has been initiated by the State Attorney at the higher regional court. The Higher Regional Court is the court that holds the extradition procedure in its hands. His decisions are final and not subject to an ordinary remedy (as an extraordinary remedy, constitutional complaint is possible). An extradition arrest order can be issued either upon receipt of an extradition order (Sec. 15 AICCM) or even prior to the receipt of an extradition request. In the latter case, the order is called "provisional extradition arrest order" (*vorläufiger Auslieferungshaftbefehl*) according to Sec. 16 AICCM. Since the European Arrest Warrant is considered to be an extradition request, an extradition order can be directly issued pursuant to Sec. 15 AICCM. This is not only the case when an EAW has already been transmitted but also if the accused has been entered in the SIS. However, the information must contain the minimum contents as described in Sec. 83a AICCM, which transposes Art. 8 of the FD EAW. Often, the requirements of Sec. 83a are not fulfilled since only insufficient information about the facts of the case were provided.

According to Sec. 15(1) AICCM, the Higher Regional Court may issue an extradition arrest order if

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<sup>201</sup> Also translated as "extradition arrest warrant". In order to avoid confusion with the term "European arrest warrant", the term "order" is used.

(1) there is danger that the person may attempt to avoid the extradition proceedings or the extradition (risk of flight) or

(2) if on the basis of known facts, there is reason for strong suspicion that the accused would obstruct the finding of truth in the foreign proceedings or extradition proceedings (danger of collusion/prejudicing).

If it appears that, from the outset, extradition is inadmissible, no order will be issued (Sec. 15(2) AICCM).

The accused, who is apprehended on the basis of an extradition order or provisionally arrested, must be brought before the magistrate of the closest local court (*Amtsgericht*) without delay, at the latest on the day following his apprehension/arrest.<sup>202</sup> Since the extradition procedure is in the hands of the higher regional court, the powers of the magistrate are limited: the magistrate is entitled to examine the identity and citizenship of the accused. The magistrate also advises the accused that he may at any time during the proceedings be represented by counsel (Sec. 40 AICCM) and that he is free to make or not make any statements regarding the charges against him. The magistrate also asks whether and, if so, on what grounds the accused wishes to object to the extradition. At this stage of the first hearing, the accused may already consent to the simplified extradition procedure (Sec. 41 AICCM) after having been advised by the magistrate (Sec. 22(3), Sec. 21(6) AICCM).

The magistrate may only release the accused if (1) he/she is not the person the request refers to, (2) the extradition order has been cancelled, or (3) the execution of the extradition arrest order has been suspended. Otherwise, the magistrate transmits the file to the State Attorney at the higher regional court. In cases of a provisional request, the State Attorney must promptly request a ruling by the Higher Regional Court about the emission of an extradition arrest order. The decision of the magistrate may not be appealed.

The accused may raise objections to the extradition arrest order or against its execution. However, these objections are not taken into account by the magistrate at the local court, but are a matter of the Higher Regional Court (Sec. 23 AICCM). The Court may suspend the extradition order or request a stay of execution of the extradition order. The extradition order is to be suspended as soon as the requirements for the provisional extradition detention or extradition detention no longer exist or a ruling not admitting extradition has been made (Sec. 24 AICCM). The execution of the extradition order may be suspended if less drastic measures will ensure that the purpose of the provisional extradition detention or extradition detention is achieved (Sec. 25 AICCM). In this case, the Higher Regional Court will impose conditions onto the accused (e.g., instructions to regularly report to the office of the judge or prosecutor, deposit of passports, or bail).

If the accused is kept in detention, a review of remand in custody/a writ of habeas corpus is preliminarily undertaken at least twice a month. The Higher Regional Court may order that the review take place within shorter periods of time (Sec. 26 AICCM). The review procedure especially examines if the ordered temporal validity of the arrest warrant is still proportional.<sup>203</sup> In contrast to Sec. 121 GCCP for purely national cases, the AICCM does not provide for a regular maximum duration of extradition detention. An oral hearing is not carried out in the review procedure.<sup>204</sup>

The procedure relating to the extradition arrest order must be distinguished from the following formal extradition procedure, which is characterized by the decision on admissibility and the decision on approval of the extradition request. This procedure also applies to EAWs. The decision on the admissibility of the extradition request is taken by the Higher Regional

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<sup>202</sup> Cf. Sec. 21 and 22 of the AICCM. Sec. 21 of the AICCM provides the procedure after arrest to an extradition arrest order. Sec. 22 considers the particularities of the procedure after a provisional arrest where an arrest order could not be issued. In both cases, the obligations of the magistrate, the obligation to examine and caution, apply correspondingly.

<sup>203</sup> Pfütznner, Country report – Germany, [www.eurowarrant.net](http://www.eurowarrant.net), p. 3.

<sup>204</sup> OLG Düsseldorf MDR 1990, 466; *Schomburg/Hackner*, in: *Schomburg/Lagodny/Gleiß/Hackner, Internationale Rechtshilfe in Strafsachen*, 5. ed. 2012, I, §26, mn. 7.



Court, which also examines – to a certain extent – the decision of approval by the State Attorney. The decisions of the Higher Regional Court are prepared by the State Attorney (Sec. 13(2) AICCM).

Before the Higher Regional Court decides on the admissibility of the extradition request/EAW, the accused is heard. The hearing takes place at the local court belonging to the district in which the accused was apprehended or provisionally arrested. It is initiated by the State Attorney at the higher regional court. The examination of the magistrate at the local court essentially corresponds to examination under Sec. 21 and 22 AICCM. He/She checks the identity and citizenship of the accused and advises him that he may at any time during the proceedings request assistance of counsel (Sec. 40 AICCM) and that he is free to make or not make any statements regarding the charges against him. The magistrate will also ask the accused whether, and if so on what grounds, he wishes to object to the extradition. The accused is free to make statements on the subject matter of the charges; however, explicit interrogation in this regard is only made by the magistrate, provided the State Attorney has applied for it. After advice by the magistrate, the accused can also consent to the simplified extradition procedure.

In accordance with Sec. 28 AICCM, this hearing is necessary, even if the accused had been examined after his arrest pursuant to Sec. 21 or 22 AICCM. The hearing will not be carried out only if the accused has consented to the simplified extradition procedure in his first examination. The examinations according to Sec. 28 and Sec. 21/22 of the LIACM can be carried out simultaneously if the same local court has jurisdiction. In this case, the magistrate is obliged to clarify to the accused that two examinations are being combined.<sup>205</sup>

If the accused has not consented to the simplified extradition procedure, the State Attorney will apply to the Higher Regional Court for a decision on whether the extradition will be admitted. He will also tell the Higher Regional Court whether he does not intend to claim obstacles to approval in the procedure approving/granting a European Arrest Warrant (Sec. 79(2) AICCM). The decision not to claim obstacles to approval must be reasoned and the accused must have the opportunity to make statements. The Higher Regional Court then decides on the admissibility of the extradition and possible abuses of discretion of the State Attorney as regards the hindrances of approval.

The Higher Regional Court may hold an oral hearing (Sec. 30(3) AICCM). According to the law, the Higher Regional Court is not obliged to hold an oral hearing but has discretion. An oral hearing is considered necessary if grounds for refusal play a role, for which the personal impression of the judges of the Higher Regional Court of the accused is relevant, or doubts about admissibility arise that go beyond pure formal requirements.<sup>206</sup> If no oral hearing is carried out, the Higher Regional Court decides in a written procedure.

The decision of the Higher Regional Court regarding the admissibility of the extradition must be reasoned. The State Attorney at the higher regional court, the accused, and his legal counsel must be advised of the decision. The accused must receive a copy.<sup>207</sup> The decision of the Higher Regional Court is final and not subject to review (Sec. 13 AICCM). Therefore, the State Attorney is bound to any decision that declares extradition inadmissible. The only possibility for the accused is to file a constitutional complaint (*Verfassungsbeschwerde*) before the Federal Constitutional Court if the Higher Regional Court has no objections against extradition. The Federal Constitutional Court can only examine whether one of the fundamental rights of the accused contained in the Basic Law (including judicial rights) has been infringed. A constitutional complaint hinders the continuation of the extradition procedure only if the Federal Constitutional Court issues a temporary injunction (*einstweilige Anordnung*). Otherwise, the granting authority has the discretion to postpone extradition

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<sup>205</sup> Lagodny, in: Schomburg/Lagodny/Gleß/Hackner, Internationale Rechtshilfe in Strafsachen, 4th ed., § 28 mn. 1.

<sup>206</sup> Lagodny, in: Schomburg/Lagodny/Gleß/Hackner, Internationale Rechtshilfe in Strafsachen, 5th ed., § 30 mn. 30; Wilkitzki, in Grützner/Pötz/Kreß, Internationaler Rechtshilfeverkehr in Strafsachen, § 30 IRG, mn. 26 disagrees with this view and points out the wider discretion of the Court.

<sup>207</sup> See Art. 32 of the LIACM.

until the final decision of the Federal Constitutional Court has been taken, which it normally does.<sup>208</sup>

The Higher Regional Court, however, may render a new decision if, subsequent to the decision regarding the admissibility of the extradition, circumstances arise that furnish a basis for a different decision. It must reconsider its decision *ex officio* (Sec. 33 LIACM). The procedure of Sec. 33 also refers to circumstances which furnish a new basis for hindrances of approval (Sec. 79(3) AICCM).

If the extradition is granted, the State Attorney at the higher regional court arranges the surrender of the person concerned to the authorities of the issuing state. The surrender is supported by the State Office of Criminal Investigation (*Landeskriminalamt*) and the Federal Police (*Bundespolizei*).<sup>209</sup>

### **bb) Rights of the accused during the extradition procedure**

The main rights of the accused during the procedure of the execution of an EAW follow from the procedure described. The rights are summarized in the following:

- Review of the admissibility of the extradition by the Higher Regional Court;<sup>210</sup>
- Higher Regional Court's review of the abuse of discretion exercised by the State Attorney on the grounds for approving the extradition;<sup>211</sup>
- Right to assistance of counsel at any time during the procedure (Sec. 40 AICCM). In certain cases, the right to assistance of counsel must be provided by the State Attorney or the Court mandatorily if:
  - (1) the factual or legal situation is complex; here the law explicitly mentions cases where doubts arise about whether the conditions of an extradition of own nationals upon an EAW are met (Art. 80) or whether the penal provisions of the request fall under the groups of offences where double criminality is no longer examined (Art. 2 para. 2 of the Framework Decision, Art. 81 No. 4 of the LIACM),
  - (2) it is apparent that the accused cannot himself adequately protect his rights, or
  - (3) the accused is under 18 years of age.
- The legal counsel essentially has the rights according to the German criminal procedure code, the most important of which are access to files (Sec. 147 GCCP) and communications with the accused (Sec. 148 GCCP);
- Right to an interpreter/translator corresponding to the rights in national criminal procedures, including the right to translation of the European Arrest Warrant and further "essential documents" in the extradition procedure;<sup>212</sup>
- Right to be informed, right to notification of decisions/orders;<sup>213</sup>
- Right to advice;<sup>214</sup>
- Right to remain silent;<sup>215</sup>
- Right to be heard;<sup>216</sup>

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<sup>208</sup> *Hackner/Schierholt*, Internationale Rechtshilfe in Strafsachen, 3rd ed., 2017, mn. 67, fn. 90.

<sup>209</sup> For further details on the surrender phase, see *Hackner/Schierholt*, Internationale Rechtshilfe in Strafsachen, 3rd ed., 2017, mn. 78.

<sup>210</sup> Sec. 12 AICCM.

<sup>211</sup> Sec. 79 AICCM.

<sup>212</sup> Art. 6 ECHR, Sec. 77 AICCM in conjunction with Sec. 187 CCA. According to BT Drucks. 17/12578 (p. 10), other documents to be translated in the extradition procedure may include the decision on approval of surrender by the State Attorney.

<sup>213</sup> Sec. 20, 32 AICCM, Sec. 77 in conjunction with Sec. 114b, c GCCP (e.g. notification of relatives before detention).

<sup>214</sup> Sec. 21, 22, 28, 79 para. 2 AICCM.

<sup>215</sup> Cf. Sec. 21, 22, 28 AICCM.

<sup>216</sup> Sec. 28, 30 para. 2, 31 para. 4, 79 para. 2 AICCM.

- Right to make statements and objections;<sup>217</sup>
- Right to suspension or stay of execution of an extradition arrest order;<sup>218</sup>
- Right to review remand in custody at least twice a month;<sup>219</sup>
- Right to examine probable causes of suspicion if special circumstances justify a review;<sup>220</sup>
- Right to reconsider the decision of the Higher Regional Court after new circumstances become known;<sup>221</sup>
- Right to file a constitutional complaint against the Higher Regional Court's decision before the Federal Constitutional Court.<sup>222</sup>

Particularities exist if it comes to the *simplified extradition procedure* in accordance with Sec. 41 AICCM. This procedure is based on the consent of the person concerned.

#### **d) Detention conditions as a ground for refusal**

Germany considers that reference to fundamental rights implies a ground for refusal of requests based on the mutual recognition principle. Notwithstanding, Germany takes the view that the reference as such in the framework decisions (e.g. Art. 1(3) FD EAW) is not sufficient to allow a State to reject a request since framework decisions are not directly applicable. Therefore, framework decisions entail the same effects as conventions insofar as national implementation rules must be set when the national law does not contain them. The reference is understood to leave it up to every Member State to determine whether it would confer the right to its authorities not to execute a request if it contradicts fundamental rights. Germany has implemented the reference as a European public policy exception, better said: "European *ordre public*" clause in Sec. 73 sentence 2 AICCM. The legislator considered necessary that the executing authorities of Germany should keep the possibility to deny the execution of a request in evident cases of a breach of fundamental rights.

Sec. 73 sentence 2 AICCM is as follows: "Should a request concern the eight [EAW], ninth [execution of sentences or sanctions in relation to EU Member States, such as the FD on financial penalties], or tenth [other assistance in relation to EU Member States, such as orders freezing property or evidence] part (of the AICCM), legal assistance shall not be permitted if the satisfaction of the request contravenes the principles contained in Art. 6 of the Treaty on European Union."<sup>223</sup>

Hence, the "European *ordre public* clause" is a general ground for refusal covering all present and future MLA requests in all areas of legal assistance within the EU. It is exclusively applied in relation to requests of EU Member States that are based upon the mutual recognition principle.

As mentioned in the introductory remarks, the principle of proportionality is deeply rooted in the German legal order. This principle has therefore a close connection to the *ordre public* and play the most important role in the interpretation of Sec. 73 in practice. Example: as regards EAWs that request the surrender of a person for rather minor offences or short sentences to be executed. German authorities took the view that these requests do not respect the principle of proportionality, which is considered one of the main elements of a European standard for the rule of law.

The scope of Sec. 73 is coined by the case law of the FCC and the Higher Regional Courts that follow a casuistic approach, which is rather unusual for German jurisprudence. Two categories of cases should be mentioned in relation to "detention" in the wider sense.

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<sup>217</sup> Sec. 21, 22, 23, 28 AICCM.

<sup>218</sup> Sec. 24, 25 AICCM.

<sup>219</sup> Sec. 26 AICCM.

<sup>220</sup> Sec. 10 para. 2 AICCM.

<sup>221</sup> Sec. 33, 79 para. 3 AICCM.

<sup>222</sup> Art. 93 para. 1 no. 4 of the Basic Law. As a further exceptional remedy, an individual complaint before the European Court of Human Rights is, of course, possible.

<sup>223</sup> Supplements in brackets by author.

## (1) Draconic penalties

German courts may deny the execution of an EAW if the expected penalty in the requesting state for the alleged offence is not in line with international understanding of justice. Although German courts apply the principle of proportionality in this regard, they do not apply a "German yardstick", but find that the execution of the EAW/extradition request is only prevented, if "core content" of the proportionality principle is infringed. The courts developed the formula that the Federal Republic of Germany's competent bodies are therefore prevented from extraditing a person sought if the punishment with which he or she is threatened in the requesting state appears "unbearably severe", i.e. unreasonable under every conceivable aspect. Not a ground for refusal applies if the punishment that is to be executed can merely be regarded as very harsh, and if it could not be regarded as reasonable if it were submitted to strict review under German constitutional law.<sup>224</sup>

By applying the "unreasonability test" the German courts take into account the different views of states on the punishability of criminal behaviour and that, as a rule, no harmonised international minimum standard exists for the offence in question. This especially holds true for offences against property and drug offences. Hence, the argument of a too hard punishment is only successful if an extreme, non-tolerable limit is transgressed. The following examples may illustrate the German approach:

The Higher Regional Court of Karlsruhe denied extradition to Greece for the purpose of execution of a sentence of imprisonment of 10 years because of delivery of 2.5 grams of Hashish. By contrast the Higher Regional Court of Celle concluded that it will not refuse extradition if life long sentence is threatened for dealing with also small amounts of hard drugs (surrender to Greece by EAW). The Higher Regional Court of Stuttgart did not consider unbearably severe the fact that Spain would impose 4 years of imprisonment due to selling 0.199 grams of Cocaine.<sup>225</sup>

In cases of offences against life and limb the German courts have not affirmed yet an absolute unreasonability of the sentence imposed or expected.

## (2) Inhuman and degrading treatment

In the field of execution of sentences, persons sought most frequently argue that the conditions of imprisonment are inhuman or lack minimum international standards that no longer comply with Art. 3 ECHR or Art. 7 International Covenant of Civil and Political Rights. Falling short of these minimum standards is indeed the red line in German court practice to accept a denial of the extradition request.

Some Higher Regional Courts also applied the developed yardsticks in Sec. 73 to arguments of the person sought when it came to the execution of a EAW. Indeed, denial of execution of an EAW due to detention conditions became one of the most important arguments in relation to the "European ordre public clause" before the Higher Regional Courts in the past years.

The case law and approach by the various Higher Regional Courts is, however, not uniform at all. For further information, see the overview of the case law in the respective document, under point V.

Although the Higher Regional Court of Bremen sought guidance by the ECJ when bringing up the *Aranyosi/Caldararu* case at the European level, it must be observed that the ECJ's judgment led to further uncertainties. These resulted in further references for preliminary rulings (e.g. "Aranyosi II").<sup>226</sup> In a decision of 19 December 2017, the FCC blamed the Higher Regional Court of Hamburg for having falsely applied the "Aranyosi/Caldararu"-case law when holding surrender to Romania admissible despite doubts of the conformity of detention conditions with Art. 3 ECHR and the relevant case law of the ECtHR (in particular with "*Muršić v. Croatia*", appl. no. 7334/13). Although a preliminary injunction (*einstweilige Anordnung*) of 18 August 2017 in this case indicated that the FCC will further develop its identity control

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<sup>224</sup> Cf. *Lagodny*, in: Schomburg/Lagodny/Gleiß/Hackner, Internationale Rechtshilfe in Strafsachen, 5th ed., § 73 mn. 60.

<sup>225</sup> See *Böhm*, in: Ahlbrecht/Böhm/Esser/Eckelmans, Internationales Strafrecht, 2nd. ed. 2018, mn. 884.

<sup>226</sup> See case C-496/16.

concept (see document “overview of case law – Germany”, point IV.), the FCC did not rule on the substantial issues of the case. It blamed the Higher Regional Court instead for not having made a reference for a preliminary ruling to the ECJ. This failure is considered a violation of the right to one’s lawful judge (Art. 101 para. 1 sentence 2 of the Basic Law (*Grundgesetz*)).

The FCC mainly argued that it cannot be discerned from the case law of the ECJ (in particular in *Aranyosi/Căldăraru*) which specific minimum standards derive from Art. 4 CFR in relation to detention conditions and what determines the applicable review of detention conditions under European Union law. Hence, the case law of the CJEU is incomplete, and it is up to the judges in Luxembourg to further develop the law.

Moreover, the FCC observed that the Higher Regional Court of Hamburg had assessed the case law of the ECtHR on Art. 3 ECHR selectively. The FCC also considered it a mistake that the Higher Regional Court referred to the functioning of criminal justice (“no safe havens”) as an argument in favour of surrender, since the European courts must clarify whether this issue plays a role within the framework of absolute guarantees, e.g., Art. 4 CFR and Art. 3 ECHR respectively.<sup>227</sup>

In the interviews, the practitioners mentioned that the approach chosen by the ECJ is simply not practicable. Still today, one of the most imminent practical problems in cooperation within the EU is the lack of communication. Although the ECJ requests in *Aranyosi/Căldăraru* increased obligations for the executing authorities to start a dialogue with the issuing authorities and seek sufficient information, they often do either not receive replies or not receive adequate replies from the issuing authority.<sup>228</sup> Consequently, extradition detention cannot be upheld and the person sought must be released from custody. Otherwise, extradition detention will be disproportional (see also above aa)).

In addition, Higher Regional Courts are confronted with increasing obligations from the part of the FCC to deeper investigate into the foreign legal order in order to substantiate possible ordre public infringements. The implementation of these obligations also pose problems in practice. In this context, it should be mentioned that the approaches of the ECJ and the FCC differ,<sup>229</sup> and the Higher Regional Courts must find a way to cope with both approaches in practice.

All interviewees found, however, that a solution regarding insufficient detention conditions in certain EU countries or certain prison centers in Europe cannot be remedied by legislation. They found, instead, that the issue of detention conditions is a factual remedy.<sup>230</sup> These can only be solved by the governments of the concerned countries. It is widely seen a problem of financing, and interviewees suggested whether the EU could establish the competence to allocate money to the countries concerned. A further obstacle is seen in the willingness of the governments of the concerned countries to initiative improvements.<sup>231</sup>

## e) Compensations

German law takes into account compensations for times spent in detention in cross-border cases. It is appropriate to distinguish between situations where a person spent time in detention abroad because of a German extradition request/EAW (outgoing requests –

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<sup>227</sup>BVerfG, Beschluss des Zweiten Senats vom 19. Dezember 2017 - 2 BvR 424/17 - Rn. (1-61), [http://www.bverfg.de/e/rs20171219\\_2bvr042417.html](http://www.bverfg.de/e/rs20171219_2bvr042417.html). A press release in English is available at: <https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2018/bvg18-003.html>. The Higher Regional Court of Hamburg meanwhile made a reference for preliminary ruling to the ECJ. The case is registered as C-128/18 (“*Dorobantu*”).

<sup>228</sup> This is another issue that raises, in the end, distrust. Higher Regional Courts and defence lawyers increasingly doubt whether assurances and information given by official authorities can be trusted.

<sup>229</sup> See the document “overview of German case law”, point 1.

<sup>230</sup> In this context, an objective and impartial EU evaluation procedure was also recommended as a pre-condition to tackle the problem.

<sup>231</sup> A further aspect in this regard is the recommendation that, as a first step, the standard of individual prison centers is raised in which extradited persons could be imprisoned. This may lead, however, to a “first/second-class” enforcement of sentences in the domestic systems and may therefore be denied by the concerned countries.

Germany as an issuing country - placement to Germany) and situations where Germany executes a foreign extradition request/EAW.

## **aa) Compensations for detentions spent abroad (Germany as an issuing country)**

### **(1) Crediting**

If a person convicted in Germany spent time in custody abroad, German law first provides for the possibility of crediting the detention abroad. The law distinguishes whether a person was sought by German authorities for extradition for the purpose of conducting a criminal prosecution or for the purpose of executing a custodial sentence or detention order.

In the first case, i.e. extradition for the purpose of conducting a criminal prosecution, Sec. 51(3), 2<sup>nd</sup> sentence GCC sets out that any detention suffered abroad shall be credited towards the German sentence.<sup>232</sup> The notion "detention" includes extradition detention, police custody/garde à vue or remand in detention. The court may order for such time not to be credited in whole or in part if in light of the conduct of the convicted person after the offence this would be inappropriate.<sup>233</sup>

If time in detention abroad is to be credited, the court shall determine the rate as it sees fit (Sec. 51(4), 2<sup>nd</sup> sentence GCC). In determining the rate, the court has to take into account the concrete prison center, not the detention conditions in a country in general. Often, a statement of the Foreign Office<sup>234</sup> is requested. The rate must also be determined if life-long sentence is rendered.<sup>235</sup>

In the second case, i.e. extradition for the purpose of executing a custodial sentence or detention order, Sec. 450a GCCP applies the principles of Sec. 51(3) GCC mutatis mutandis. Accordingly, the deprivation of liberty undergone by the convicted person abroad in extradition proceedings for the purpose of execution of sentence shall also be credited against the enforceable prison sentence. Also in this case, the court may exclude a credit: the court may, upon application by the public prosecution office, order that no, or only partial, credit shall be given, where such credit is not justified in view of the convicted person's conduct after pronouncement of the judgment in which the underlying findings of fact were last examined. If the court gives such an order, credit shall not be given in any other proceedings, for deprivation of liberty undergone abroad, so far as its duration does not exceed the sentence (Sec. 450a(3) GCCP). Although not expressly stated by law, it is settled case law that the court must also determine the rate in accordance with Sec. 51(4) 2<sup>nd</sup> sentence GCC.<sup>236</sup>

Interviewees confirmed that the rate for time spent in custody in other EU member states is one-to-one, i.e. there is no additional credit because of "bad" detention conditions in other EU Member States.<sup>237</sup> Some interviewees remarked that this approach is inconsistent with the case law of the extradition courts denying the surrender to certain EU countries because of inhuman or degrading detention conditions. As a result, German criminal courts deciding on the credit of time spent in detention abroad should reconsider the rate following the ongoing developments as regards detention conditions in other EU countries. It was also remarked, however, that defendants rarely put forward this argument. A reason is seen in the fact that in case of EAWs the time spent in extradition detention abroad has considerably been reduced or is rather short.

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<sup>232</sup> Sec. 51(1) 1<sup>st</sup> sentence provides for credits if convicted person has already been sentenced abroad for the same offence. This provision is widely replaced by Art. 54 CISA within the European Union. Sec. 51(1) 1<sup>st</sup> sentence allocates a compensation mechanism because German law does not foresee a transnational dimension of *ne bis in idem*. It is settled case law that the fundamental right of Art. 103 para. 3 of the Basic Law does only apply to decisions of internal tribunals (basic decision: Federal Constitutional Court, order of 31 March 1987 – 2 BvM 2/86, published in the court's case reports BVerfGE 75, 1 (15)).

<sup>233</sup> Sec. 51(1), 2<sup>nd</sup> sentence GCC which also applies for detentions abroad.

<sup>234</sup> German name for „Ministry for foreign affairs“.

<sup>235</sup> Cf. *Fischer*, Strafgesetzbuch, commentary, §51, mn. 18. Details on the criteria for the determination of the rate at *Bock*, ZIS 2010, 482 et seq ([http://www.zis-online.com/dat/artikel/2010\\_7-8\\_470.pdf](http://www.zis-online.com/dat/artikel/2010_7-8_470.pdf)).

<sup>236</sup> See the references at: Meyer-Goßner/Schmitt, Strafprozessordnung, op. cit., §450a, mn. 3.

<sup>237</sup> See also the overview at: *Fischer*, Strafgesetzbuch, commentary, §51, mn. 19.

## (2) Financial compensations

Furthermore, German law contains rules on the financial compensation of damages suffered because of unlawful or disproportionate measures during the prosecution of a criminal offence. The legal basis is provided by the "*Gesetz über die Entschädigung von Strafverfolgungsmaßnahmen*" (StrEG – "Act on the compensation of prosecutions").<sup>238</sup> The Act does not only regulate compensation in case of wrong final judgments, but also in case of measures during the investigative and prosecution phase of the criminal proceedings.<sup>239</sup> According to Sec. 2(1) StrEG, anyone who has suffered damage as a result of remand detention or any other prosecution will be compensated by the State Treasury if he is acquitted or the case is closed against him or if the court refuses to open the main proceedings against him. Sec. 2(3) clarifies that, for the purpose of this provision, prosecution shall mean the extradition detention, the provisional extradition detention, the seizure, the seizure and the search which have been ordered abroad at the request of a German authority. As a consequence prosecution measures carried out abroad on the request of German authorities are equally treated than measures for purely domestic cases since it is felt unjust that the order is carried out towards a person being/residing abroad.<sup>240</sup> However, the list of measures stipulated in Sec. 2(3) StrEG is exhaustive and cannot be applied in an analogous way. If, for instance, a foreign country suspends provisional extradition detention on bail, the damage cannot be compensated on the basis of the StrEG.<sup>241</sup> By contrast to Sec. 51(3) GCC, Sec. 2 StrEG requires a formal MLA/extradition request. Otherwise, compensation cannot be taken into account.<sup>242</sup>

### bb) Compensations for detentions spent in Germany (Germany as an executing authority)

Sec. 2(3) StrEG only applies for outgoing requests of German authorities. German courts deny an application *mutatis mutandis* if foreign MLA/extradition requests are executed by German authorities, unless the authorities of the Federal Republic of Germany are responsible for the unjustified persecution.<sup>243</sup> In the vast majority of cases, a responsibility of German authorities is denied by the German courts.<sup>244</sup> If, for instance, a country issues an EAW against a person, the person is apprehended and put into extradition detention, but during the extradition proceedings it turns out that the person is innocent (and the EAW is eventually withdrawn), he/she cannot claim for a compensation of the suffered damage. The same holds true if the Higher Regional Court concludes inadmissibility of extradition/surrender after a longer examination of the request, e.g. because replies by the issuing authorities (after having sought information by the German authorities) reveal that a proper re-trial of an initial *in absentia* trial is not guaranteed.<sup>245</sup> Compensation was also denied when the person had to be released because it was found out that prosecution is time-barred and extradition is therefore not possible.<sup>246</sup>

Legal literature is debating whether an exception must be affirmed if the identity of the person sought is mistaken by the German authorities.<sup>247</sup>

<sup>238</sup> There is no official English translation of this Act. The German version of the Act is available at: <https://www.gesetze-im-internet.de/streg/index.html>.

<sup>239</sup> Meyer, StrEG, commentary, 10th ed. 2017, §2 StrEG, mn. 1.

<sup>240</sup> Meyer, *ibid.* mn. 75.

<sup>241</sup> Meyer, *ibid.* mn. 79.

<sup>242</sup> Meyer, *ibid.* mn. 77.

<sup>243</sup> Basic decision: BGH, Beschl. v. 17.1.1984 – 4 ARs 19/83, published in the official case reports, BGHSt 32, 221. See also OLG Dresden Beschl. v. 10.7.2014 – OLGausl 53/14 (=NSTZ-RR 2015, 26) with further references.

<sup>244</sup> Responsibility is only affirmed if – after having taken into account all circumstances of the case, in particular the proper functioning of justice – the measure of the German authorities is bluntly unreasonable (BGHZ 122, 268).

<sup>245</sup> OLG Frankfurt Beschl. v. 4.5.2009 – 1 W 10/09, BeckRS 2009, 13811 (case with Egypt).

<sup>246</sup> OLG Karlsruhe, Beschluss vom 25. März 2013 – 1 AK 102/11 (case with Austria).

<sup>247</sup> Hackner, in: Schomburg/Lagodny/Gless/Hackner, *op. cit.*, vor §15 IRG, mn. 12 argues that in this case Sec. 2 StrEG applies. He refers to an older decision of the Federal Court of Justice of 1981 (BGHSt 30, 152) which affirmed compensation in this case and he argues that the Federal Court of Justice in the subsequent decision of 1984 (BGHSt 32, 221) left this case open. Others (e.g. Meyer, *ibid.*, mn. 81) argue that applicability of the StrEG must be denied in all cases of extradition procedures carried out on the basis of the AICCM and the decision of the Federal Court of Justice of 1981 became meanwhile obsolete. Hackner (*ibid.*) is also arguing that compensation must be granted if

Independent of the responsibility of the German authorities, the Federal Court of Justice decided, however, that according to Sec. 77 AICCM in connection with Sec. 467 and 467a GCCP, the necessary expenses incurred by a person who has been wrongly prosecuted, and against whom a decision on the admissibility of the extradition has been requested, must be reimbursed by the German State Treasury.<sup>248</sup> This reimbursement mainly concerns the costs for a (Germany-based) lawyer.

Notwithstanding the regular non-applicability of the StrEG, the accused may found its claim for damages due to unjustified extradition detention on other bases, in particular Art. 5(5) in connection with Art. 50 ECHR.<sup>249</sup> German courts stress, however, that it is the order of extradition detention that must be examined and not the question of admissibility of the extradition request (unless inadmissibility is manifestly given at the time of the decision on extradition detention<sup>250</sup>). Therefore, the claim based on the ECHR is denied if extradition order is seen justified in order to secure a foreign request for criminal prosecution or execution of a sentence and the principle of proportionality is upheld.<sup>251</sup>

The Higher Regional Court of Frankfurt considered an additional possibility to compensation, e.g. for losses of businesses due to ex post unjustified extradition detention.<sup>252</sup> The court indicated that claims can be based on a general claim to compensation which initially followed infringements of property rights suffered in the course of legal State measures. The claim is rooted in former Prussian law and its requirements are not regulated by positive law in force. It is based on the idea of equity and can be conferred if a person suffered a special sacrifice that distinguishes that person from others in similar situations.

## 2. Evidence gathering and admissibility

The topic under which conditions evidence gathered abroad is admissible in German criminal procedure is much discussed in legal literature.<sup>253</sup> The main problem discussed is whether evidence abroad can be used if the foreign standards of evidence gathering do not comply with German criminal procedure law.

Interviewees widely replied, however, that the different procedural orders of the EU Member States do not lead to problems in practice. The main reason is that the "forum regit actum" principle as enshrined in Art. 9(2) Directive EIO and Art. 4 EU MLA Convention 2000 is being lived in practice. As a consequence, formalities and procedures requested by the foreign state are respected and implemented. The exception of the forum regit actum principle, i.e. the formalities or procedures of the foreign state would be contrary to the fundamental principles of the law of the executing state, have not played a role in practice so far. They argued that the discussed matter of admissibility of foreign evidence is above all of theoretical nature.

One interviewee pointed out, however, that the strict rules of German criminal procedure that a judge must authorize most of the coercive measures may hinder cross-border cooperation. Others contradicted by arguing that the aim of MLA is not to let carry out a specific measure as required, but to get the evidentiary result. The way this result is achieved should be left open to the executing authorities and the Directive EIO explicitly foresees the necessary leeway for the executing State.

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extradition detention is manifestly ill-founded because a "German" ground for refusal applies, e.g. the ban not to extradite German nationals according to Art. 16(2) of the Basic Law. However, he concludes that in "regular cases", compensation for damages suffered in the event of execution of foreign extradition request on the basis of the StrEG must be denied.

<sup>248</sup> BGHSt 32, 221, 227.

<sup>249</sup> Hackner, in: Schomburg/Lagodny/Gless/Hackner, op. cit., vor §15 IRG, mn. 14.

<sup>250</sup> Example: The court overlooks that the person sought is a German national and cannot be extradited.

<sup>251</sup> OLG Frankfurt Beschl. v. 4.5.2009 – 1 W 10/09, BeckRS 2009, 13811. The principle of proportionality is considered not to be infringed if the person sought remained one year in extradition detention for an offence that may be sentenced up to 3 years of imprisonment.

<sup>252</sup> OLG Frankfurt, ibid.

<sup>253</sup> Fundamental: S. Gleß, Beweisrechtsgrundsätze einer grenzüberschreitenden Strafverfolgung, 2007; see further Gleß, Grünwald-FS, pp. 197 et seq.; Gleß, NStZ 2000, pp. 57 et seq.; M. Böse, ZStW 114 (2002), pp. 148 et seq.; Perron, ZStW 112 (2000), pp. 202 et seq.; Hackner/Schierholt, op. cit., mn. 237.



Another interviewee pointed out that he faces problems to investigate assets or property, which is assumedly in foreign countries. He conceded, however, that it is not the rules on cooperation in matters of freezing and confiscation, but the investigation of the assets. The reason is seen in the different content and management of relevant databases in the various EU Member States.

Against this background, most interviewees advocated that the option of Art. 82 (2a) TFEU should not be triggered. It is first argued that the added value of an EU action is expected to remain low. Otherwise, experiences with the implementation and use of the EIO should be gathered and a thorough impact assessment should be carried out in order to define the need for European rules in this matter.

A further reason for the limited added value of an EU action is also seen in the rather broad possibilities to accept foreign evidence although it may not have kept up the standards of German criminal procedure. Reference is made in this context to the case law of the Federal Court of Justice (see details in the document “overview of case law – Germany”, point VI.).<sup>254</sup> The Federal Court of Justice follows a concept of weighing up the interests at stake (*Abwägungslösung*) which is considered to give the necessary leeway to decide on the relevant cases.<sup>255</sup> Although this approach was criticised by one interviewed defence lawyer who argued that German courts can justify “all or nothing” by this concept, it was doubted that an EU legislation would entail improvements, since regulations much in favour for the defendant (preferably followed the Swiss model relating to the exclusion of evidence in MLA procedures) cannot be expected.<sup>256</sup>

It is also pointed out that the existence of different rules in evidence gathering and admissibility have not hindered and/or slowed down negotiations on the European Investigation Order. The EIO is considered a cooperation instrument without claiming to be a harmonising measure as regards admissibility of evidence. It was further remarked that the question on the grounds of refusal took great significance in the debates in the Council; however, this debate was not triggered because of the different procedural systems of the EU countries, but resort to the question to which extent we accept mutual trust in the EU. As decided in the EIO (in particular after intervention of the EP) the EU is going into the direction of shared responsibility, i.e. to concede rights of examination by the executing state. In addition, the question on the use of evidence is not covered by the EIO either. This corresponds to the understanding of the EIO as an instrument of cooperation, respecting the legal traditions of the EU Member States.

### 3. Criteria allocating jurisdiction

All interviewees confirmed that (positive) conflicts of jurisdiction don't play any role in horizontal cooperation practice. It is argued that in nearly all cases of daily practice the jurisdiction is clear (mostly based on the principle of territoriality). The topic of jurisdiction may only play a role in “bigger” cross-border cases of organised crime or drug smuggling.<sup>257</sup>

It was remarked that the allocation of jurisdiction might play a more important role in EPPO proceedings in the future. Nevertheless, German lawyers argue that it must be seen whether the rules in the EPPO regulation will turn out practicable.

Against this background, any further legislation at the EU level is widely considered unnecessary. One interview partner remarked that the fact that the EU has currently only rather vague and unclear rules about the conflict of jurisdiction stems from sovereignty reservations from the EU Member States. Therefore, precondition of any EU action would be

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<sup>254</sup> For the procedure on incoming evidence and the authorities involved, see also *T. Wahl*, Germany, Exchange of Intercepted Electronic Communication Data between Foreign Countries, in: Sieber, Ulrich/von zur Mühlen Nicolas (eds.), *Access to Telecommunication Data in Criminal Justice*, Berlin 2016, pp. 582 et seq.

<sup>255</sup> As mentioned in the case law overview, the “red line” of non-acceptance of evidence is the German “ordre public” reservation.

<sup>256</sup> For the general objection that EU law does hardly change anything in the German legal order, see already above.

<sup>257</sup> Drug smuggling is perhaps the most important offence where questions of jurisdictions are posed, in particular in the relation between Germany and the Netherlands. Interviewees pointed out, however, that such cases are solved bilaterally between the German and the Dutch authorities. The Dutch authorities regularly renounce prosecution.

to overcome these reservations. In other words: willingness of the Member States is more important than legislation.

By contrast to the low importance of conflicts of jurisdiction in practice, German legal literature fiercely debates this topic. Many studies have been carried out in recent years. They included various proposals for models (including potential regulations or directives at the EU level).<sup>258</sup> The debate mainly focuses on the question whether the national rules on jurisdiction *rationae loci* should be harmonised or whether more harmonisation of substantial criminal law is needed. In addition, the studies question which authority should decide on the allocation of jurisdiction, which parties should be involved in this process, and which legal remedies should be provided for.

#### 4. Other areas of concern

##### a) Concerns in relation to procedural safeguards of defendants

In a recent study, the author acknowledged areas where still substantial differences among the European legal orders exist *as far as procedural safeguards and defence rights are concerned*. These areas – that may lead to obstacles of smooth cooperation and mutual trust – include, inter alia: confidentiality of lawyer-client communication; waiver of legal counsel; legal aid schemes; quality standards for interpreters/translators; and the consequences of a suspect's silence.<sup>259</sup> The following gives an overview of the findings of the mentioned study:

##### aa) Lawyer-client communication.

Confidentiality of communication between suspect or accused persons and their lawyers seems to be well-established by European law and is widely considered key to ensuring the effective exercise of the right of the defence.<sup>260</sup> It is indeed of utmost importance if the person is under the control of the State, in particular deprived of liberty. However, the extent of exceptions differs. The diversity and scope of exceptions may essentially go back to the ECtHR's case law finding in *Campbell v. UK* that the lawyer-client conversation is, *in principle*, privileged.<sup>261</sup> As a consequence, several Member States submitted that exceptions from privacy of lawyer-client communications are allowed and necessary, such as in case of collusion of the lawyer with the suspect in a criminal offense or preventing harm on public interests, notably in case of terrorism.<sup>262</sup>

Rather far-reaching is the exception under Polish law: Justified by "exceptional circumstances", the person who made the arrest may reserve the right to be present when conversations take place between an arrested person and the lawyer.<sup>263</sup> In France, for

<sup>258</sup> See *Lagodny*, Empfiehlt es sich, eine europäische Gerichtskompetenz für Strafgewaltskonflikte vorzusehen? Gutachten im Auftrag des Bundesministeriums der Justiz, 145 Seiten, Berlin March 2001, available at: [https://www.uni-salzburg.at/fileadmin/oracle\\_file\\_imports/460066.PDF](https://www.uni-salzburg.at/fileadmin/oracle_file_imports/460066.PDF) (last accessed 26-3-18); *Vander Beken/Vermeulen/Lagodny*, Kriterien für die jeweils „beste“ Strafgewalt in Europa, NSTz 2002, 624; *Biehler/Kniebühler/Lelieur-Fischer/Stein*, Freiburg Proposal on Concurrent Jurisdictions and the Prohibition of Multiple Prosecutions in the European Union, 2003, available at: <https://www.mpicc.de/files/pdf2/fa-ne-bis-in-idem.pdf> (last accessed 26-3-18); *Schünemann* (ed.), Ein Gesamtkonzept für die europäische Strafrechtspflege, 2006, p. 5 et seq.; *Sinn* (ed.), Jurisdiktionskonflikte bei grenzüberschreitender Kriminalität – Ein Rechtsvergleich zum internationalen Strafrecht, 2012 (see in this context also the summary at: *Sinn*, Die Vermeidung von strafrechtlichen Jurisdiktionskonflikten in der Europäischen Union – Gegenwart und Zukunft, ZIS 2013, 1, available at: [http://www.zis-online.com/dat/artikel/2013\\_1\\_726.pdf](http://www.zis-online.com/dat/artikel/2013_1_726.pdf)); *Böse/Meyer/Schneider* (eds.), Conflicts of Jurisdiction in Criminal Matters in the European Union, Volume I: National Reports and Comparative Analysis, 2013; *Böse/Meyer/Schneider* (eds.), Conflicts of Jurisdiction in Criminal Matters in the European Union, Vol. II: Rights, Principles and Model Rules, 2014 (see also the summary at: *Böse/Meyer/Schneider*, Die Regulierung strafrechtlicher Jurisdiktionskonflikte in der Europäischen Union – ein Modellentwurf, GA 2014, 572 et seq.); *Frank Zimmermann*, Strafgewaltskonflikte in der Europäischen Union. Ein Regelungsvorschlag zur Wahrung materieller und prozessualer strafrechtlicher Garantien sowie staatlicher Strafinteressen, 2015.

<sup>259</sup> See *Wahl*, in: *Sicurella et al* (eds.), op. cit., p. 145.

<sup>(260)</sup> See Art. 4 of Directive 2013/48 and its recital 33; ECtHR, 13.3.2007, *Castravet v. Moldova*, ECLI:CE:ECHR:2007:0313JUD002339305, § 49.

<sup>(261)</sup> ECtHR, 25 March 1992, *Campbell v. UK*, no. 13590/88, ECLI:CE:ECHR:1992:0325JUD001359088, § 46.

<sup>(262)</sup> See for example Sec. 148 para. 2 GCPC. In Spain, the secrecy of communications is even not explicitly regulated. For restrictions of interpretation of client-lawyer communications in practice, see FRA, Report 2016, op. cit., p. 41 et seq.

<sup>(263)</sup> Article 245 § 1 CCP. It should be noted that the Art. was reformed in 2013. Beforehand, the CCP even provided for a general right to reserve the presence of a person representing the authority conducting the proceedings

instance, the suspect who is not detained has no right to a private meeting with the lawyer before the hearing. When the suspect is detained in police custody, this private meeting cannot last more than 30 minutes, and the intervention of the lawyer can be postponed up to 24 hours in "exceptional circumstances," with approval of the judiciary.<sup>264</sup>

On the other hand, some Member States consider the right to consult or communicate in private fundamental (IT, UK) and take a pro-active approach that this right is ensured in practice.<sup>265</sup>

### bb) Waiver of legal counsel

It is the common starting point that the suspect or accused person may have the assistance of defence counsel at any stage of the proceedings and that he is free to choose and instruct a lawyer. However, this rule has exceptions in systems which stipulate mandatory defence. The waiver of the right to a lawyer is then not possible or very strict. Criminal procedure rules in Italy and Spain do not provide for a waiver of the right to defence counsel. Under German law, the appointment of a court-appointed lawyer (*Pflichtverteidiger*) can only be revoked if there is a serious ground. This may be if the bond of trust between a defendant and the lawyer is disturbed, but this must be substantially justified and manifest, the pure claim does not suffice.<sup>266</sup>

By contrast, the UK follows the principle that a person, including a detainee, can waive his right to free legal assistance. There is generally no system of mandatory legal representation and the courts do not have powers to appoint lawyers to act for defendants.

### cc) Legal aid schemes

The right to *free* legal assistance seems to be one of the most prominent examples, for which the standards differ considerably because of the different legal aid systems across the EU Member States. It must be doubted that the new Directive 2016/1919 can contribute to a significant harmonization because it leaves Member State much leeway and only regulates the main obligations more or less vaguely. Regarding the current differences, the following indications are noteworthy: Germany does not provide legal aid as such to poor defendants, but links financial public support to defendants only if there is a situation of "mandatory" (better: said: "necessary") defence (*notwendige Verteidigung*). In this case a lawyer is appointed by court (appointed defence council – *Pflichtverteidiger*). A lawyer is only necessary in limited circumstances and he/she is normally appointed at the intermediate stage of the proceedings (as soon as a bill of indictment is released).<sup>267</sup>

By contrast, in Italy, Spain and Poland, both access to a defence lawyer and legal aid is granted nearly unconditionally.<sup>268</sup> For legal aid only a means test is carried out. The seriousness of the criminal offense, complexity of the case or severity of the sanction at stake do not play a role.

In Denmark, lawyers are usually appointed by the court. Mandating defence lawyers in private is rare. Either there is a case of mandatory legal assistance or the court may, at its discretion, with or without application appoint a lawyer in all cases and at all stages of the criminal proceedings (with a right for the accused to appeal upon refusal). A court-appointed lawyer is paid directly by the state and he is prohibited from taking fees from the accused.

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without any additional requirements. This provision was found inadmissible by the Polish Constitutional Tribunal, Decision of 11<sup>th</sup> December 2012, K 37/11, OTK-A 2012 No. 11, item. 133.

<sup>(264)</sup> F. GROS, *eu crim* 2017, p. 29, with further references.

<sup>(265)</sup> See in particular UK, Notes for Guidance s. 6, 6J. For diverging approaches in relation to the interpretation/translation of client-lawyer communications, see FRA report, *op. cit.*, p. 42 et seq.

<sup>(266)</sup> Cf. W BEULKE, *Strafprozessrecht*, *op. cit.*, mn. 169.

<sup>(267)</sup> See also M. BOHLANDER, *Principles of German Criminal Procedure*, 2012, p. 60 et seq.

<sup>(268)</sup> Exception in Italian law: if the person is charged or has been convicted of tax evasion he cannot be granted legal aid. In Spain, even no economic conditioning is required, regardless of the crime, if the person is detained. In Poland it is regarded as a principle – deriving from the constitutional right to defence – that a suspect (accused and convicted person) does not only have the right to defence, but also the right to the assistance of counsel at every stage of the proceedings and the counsel is paid by the state if financial means are lacking (for the statutory law concretising the principle cf. Art. 78 CCP).

However, the convicted defendant is almost automatically obliged to reimburse to the public purse all costs including the fees of the court-appointed attorney.<sup>269</sup>

The UK has a system that knows a distinction between public defenders who are publicly funded and solicitors in private practice who carry out what is generally referred to as “legal aid work”. Furthermore, both a merits and a means test must be satisfied in the UK. The merits test refers to public funding in the ‘interest of justice’. Last but not least, an interesting principle in UK law is that all persons attending at the police station (whether under arrest or attending voluntarily [...]) are entitled to free legal advice, regardless of their means.

#### **dd) Standards of interpretation and translation**

The quality standards for interpreters/translators in criminal proceedings as well as the State duties to ensure these standards highly differ.<sup>270</sup> Unlike Germany and Denmark, Italy and Spain have not established a special system as to quality of interpreters and translators. Furthermore, the conditions for entry into court registers of interpreters and translators vary: The conditions are either not regulated (Spain) or are rather low key (special competence, but no specific licence is required in Italy). In Denmark, by contrast, the Ministry of Justice is conducting a list of translators for justice proceedings and it is ensured that translators listed must have a specific professional title and fulfill certain other requirements. Regarding, training of interpreters/translators there seem no common standards as well, often training seems to be left to self-regulation (Germany, Italy).

In the opposite direction goes the UK. The Ministry of Justice established a Language Service Framework which procures language services to the English courts by different suppliers. The Framework sets standards of terms and conditions. Interpreters and translators must have specific qualifications which vary to three tier-based needs.<sup>271</sup> In addition, the UK provides for procedural rules by which a detainee in the pre-trial phase or a defendant in the trial phase can complain about the quality of interpretation or of translation. The custody officer, the interviewer and the court are obliged to decide on a further, different interpretation/translation.<sup>272</sup>

#### **ee) Consequences of suspect's silence.**

Discrepancies further exist as to the question of whether the exercise of the right to remain silent may entail negative effects at a later stage of the proceedings or in the assessment of evidence. On the one hand, there are systems that accept the possibility of negative inferences rather widely, such as UK. One of the peculiar features of the English criminal justice system is, for instance, the possibility to draw an adverse inference from the defendant's silence.<sup>273</sup> If the defendant, for instance,

- did not rely on given facts for his defence in the pre-trial questioning, even though he could have done so; and
- then, in the course of the proceedings, he changes his/her mind and decides to rely on those facts,

The judge or the jury can draw from such a ‘strange’ silence “such inferences [...] as appear proper”.<sup>274</sup> In principle – and exceptions aside – the court or jury may draw adverse inferences only if the defendant was allowed the opportunity to take independent legal advice and the defendant cannot be convicted solely on an inference drawn from his/her silence. This can be considered to be within the standards set in the European legal framework

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<sup>(269)</sup> Section 1008 of the Administration of Justice Act. In practice however, the defendant is in most cases unable to pay.

<sup>(270)</sup> See also FRA, Report 2016, op cit., pp. 44 et seq.

<sup>(271)</sup> See for more information Guide to language interpreter and translation services in courts and tribunals, available at: [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/559876/interpreter-and-translation-services-guide-q2-2016.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/559876/interpreter-and-translation-services-guide-q2-2016.pdf).

<sup>(272)</sup> See further (PACE) Code C, s. 13.10A and Rule 9.5(d) Criminal Procedural Rules.

<sup>(273)</sup> Regulated in detail in sections 34–39 of the Criminal Justice and Public Order Act (CPJO) 1994.

<sup>(274)</sup> S. 34(2) CPJO.

because the UK system uses here the leeway that was conferred by the ECtHR in the contentious *Murray* case.

But also in other systems, such as Denmark, Spain and France the silence of a suspect may have negative effects at least indirectly. In Denmark, the accused's silence may be taken into consideration as an element of proof, especially as tending to strengthen the other available evidence, on the basis of the general principle of free assessment of evidence. In Spain, silence cannot be used as evidence as a rule, but can be related to other clearly incriminating evidence. If, in the light of these pieces of evidence, the accused does not offer sufficient explanations, his silence constitutes another indication of guilt. The French Code of Criminal Proceedings indicates that the use of self-incriminating evidence in part, together with other integral evidence is admissible.<sup>275</sup>

By contrast, Italy follows a strict rule that no inferences can be drawn from the silence of the suspects or accused persons in the proceedings. This holds, in principle, also true for Germany with the exception that adverse inferences can be drawn from partial silence, i.e. the defendant chooses to answer certain individual questions but remains silent to others on the same count.<sup>276</sup>

## b) EPPO

The study also set out some concerns regarding future EPPO proceedings in relation to the efficient protection of fundamental rights:

The current draft Regulation on the establishment of the European Public Prosecutor's Office (EPPO)<sup>277</sup> includes in Art. 35 the procedural safeguards of the defendants in criminal proceedings of the EPPO. Art. 35(2) refers to the five EU Directives on defence rights<sup>278</sup> and stipulates that any suspected or accused person in criminal proceedings of the EPPO shall have, as a minimum, the procedural rights as they are provided for in the Directives as *implemented by national law*. In addition, Art. 35(3) clarifies that suspects and accused persons shall have all the procedural rights available to them under the applicable national law. In short, the concept is that the safeguards apply which are granted by the national legislation where the EPPO activity is carried out and which are secured by the minimum standards prescribed by the existing EU directives concerning the rights of suspects and accused persons in criminal proceedings. This regulation may entail the following drawbacks in practice:

- The current model risks a significant unequal treatment of suspects or accused persons – in case of both comparable criminal charges of several defendants in several EU Member States and multinational investigations in several countries against one defendant – because of the portfolio of diverging existing procedural guarantees among the EU Member States.<sup>279</sup> The CCBE remarked in this context that leaving the protection of procedural rights "*in accordance with the national law*", creates the risk that the choice of trial venue can dramatically affect the outcome of the prosecution, thus nourishing the risk of "forum shopping".<sup>280</sup>
- In addition, inequality may result because the existing Directives themselves do not guarantee an even level of the (minimum) standards since they offer leeway for the Member States in some respects (see Section I). Furthermore, the Directives may be transposed wrongly or – in some EU Member States – even not implemented in time. Thus,

<sup>(275)</sup> F. GROS, *eu crim*, 2017, p. 29.

<sup>(276)</sup> Cf. M. BOHLANDER, *Principles of German Criminal Procedure*, 2012, p. 173.

<sup>(277)</sup> Council doc. 5766/17 of 31 January 2017. Art. 35 is entitled: „Scope of the rights of the suspects and accused persons.”

<sup>(278)</sup> Not mentioned is Directive 2016/800 on the rights of children in criminal proceedings.

<sup>(279)</sup> The Commission initially countered corresponding concerns of the CZ *Senát* that the EPPO proposal would lower procedural standards by pointing out that the Union will provide a catalogue of procedural safeguards and of investigative measures. This was however not followed-up in the Council drafts.

<sup>(280)</sup> Comments from the CCBE regarding the establishment of a European Public Prosecutor's Office, 16 November 2014, available via: [www.ccbe.org](http://www.ccbe.org)> documents. The Comments include several demands to remedy the problem.

(the) different (level of) implementation risks creating another set of diverging standards also in the areas that had the intention to be harmonised.<sup>281</sup>

- The current standard of procedural safeguards at the EU level is only a common denominator at a (very) minimum level. It is questioned whether or not further important harmonization efforts must be undertaken for the EPPO operating smoothly, such as pre-trial detention, witnesses' rights, admissibility and exclusion of evidence, and compensation rights in case of proven innocence.<sup>282</sup>
- Ultimately, it is pointed out that double or multiple organisation of defence is required more than ever in the EPPO framework. In this context, it is observed that defence lawyers currently lack a level of free mobility to exercise their legal profession in other EU Member States,<sup>(283)</sup> whereas – according to the present organisation – the EPPO would be able to be freely active in all participating Member States and have its acts recognised by their courts (without having to resort to mutual legal assistance).<sup>(284)</sup> As a consequence of the current restrictions for defence lawyers to act in other EU Member States, it is all the important that a double or multiple defence is organised when the EPPO acts in different Member States. This entails additional costs for the defendant. As a result, the balance of power between the prosecution and the defence could become distorted in cross-border cases, which, in turn, could result in a breach of equality between suspects who are prosecuted by the EPPO and those who are not.<sup>(285)</sup>

The author also interviewed the negotiator on behalf of the German Federal Ministry of Justice responsible for the EPPO dossier for the present project. He affirmed that negotiations on the European Public Prosecutor Office were – to a certain extent - hindered and/or slowed down by the presence of differences in national procedural criminal laws. He argued that the EPPO is closely linked to national criminal procedure and the various parties thereof, such as courts or police. Therefore, the different procedural systems of the EU countries had to be taken into account during the negotiations. He stressed, however, that it is another question whether the different procedural systems will “hinder or slow down” the EPPO proceedings. Naturally, it would be more favourable if the EPPO had an own criminal procedure code for its investigations and prosecutions. It turned out, however, that negotiating such a code is a very complex matter, if not unfeasible. It is also questionable whether a “regulation on a criminal procedure code for the EPPO” is useful, since the case is brought to trial at the national courts and all investigations/prosecutions by the EPPO must be directed towards this purpose.

### **c) Areas put forward by interview partners**

Interview partners mentioned various matters that are or may be of concern regarding cooperation within the EU.

#### **aa) Legal issues**

##### **(1) Issues related to competences**

Indeed, the different articulation of competences between law enforcement and judicial bodies in the investigation and prosecution of crimes can pose a problem in some cases. Germany considers MLA as a judicial procedure and gathering evidence via police cooperation is eyed critically. Sometimes Germany is faced with MLA requests by seemingly non-judicial authorities, such as the police forces. This does not mean that such requests are unsuccessful

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<sup>(281)</sup> This trend can be observed for example as regards the different implementations on other EU legal instruments on the mutual recognition of judicial decision, in particular the European Arrest Warrant. For the need for a stronger harmonisation of procedural rights standards for EPPO investigations, see also CCBE, Comments on the EPPO, 27 April 2015, available via: [www.ccbe.org](http://www.ccbe.org)> documents.

<sup>(282)</sup> See e.g. H. MATT, *Guest Editorial, eucrim*, 2017, p. 1.

<sup>(283)</sup> For restrictions, see in particular Directive (EC) 98/5. See also OLG Linz – *Beschl. v. 20.1.1998 – 10 Bs 7/98 = StraFo 1998, 161.*

<sup>(284)</sup> See in this regard also Resolution of the EP of 12 March 2014, P7\_TA(2014)0234.

<sup>(285)</sup> F. FALETTI, *The European Public Prosecutor's Office and the Principle of Equality, eucrim*, 2017, p. 25. For a critical assessment on endeavours to institutionalise the European defence lawyers at the supranational level, J. ARNOLD, *Grenzüberschreitende Strafverteidigung in Europa*, Berlin 2015, p. 185.

in the end, but it comes to further inquiries from the part of the German authorities, as a consequence of which the foreign state must involve a prosecution service or other judicial authorities to formally issue a MLA request.

In this context, it was also submitted that many European countries do not know a strict separation between police and intelligence services. This separation is deeply anchored in the German legal order and may pose problems if intelligence services get involved in criminal proceedings. This is not only the case with the UK where, for instance, intelligence services are seemingly competent for telephone interceptions, but also with the neighbouring country Austria. Here, intelligence is part of the police and supports covert investigations including criminal cases. Such “evidence” is held admissible in Austrian law in the investigation phase and could be used in trial if the undercover agent testifies, whereas under German law the use and admissibility of submitted intelligence information is not legally defined and unclear.<sup>286</sup>

Regarding competences, problems occur due to the different roles of judges in the investigation phase. Some European countries do not provide for the interrogation of witnesses, e.g. spouses, by a judge in their national law. By contrast to German law, these legal orders sanction false testimonies before prosecutors or police officers. Under German law, the corresponding criminal law provision requires false testimony before a court, i.e. judge. Moreover, German criminal procedure law attaches a higher evidential value to testimonies before a judge, as a consequence of which the statements in judicial records can be read out under certain conditions (see e.g. Sec. 251(1 and 2), Sec. 254 GCCP). If a foreign legal order does not accept to take witness or accused evidence before a judge, this may lead to frictions in the German criminal proceedings.

Another issue related to competences concerns the fact that in some countries, e.g. UK, advocates (such as barristers) perform certain functions of the judiciary. German authorities sometimes consider letters from barristers to be of “non-judicial nature” (stemming from “a lawyer”) and do not react.

## **(2) Other legal issues**

Prosecutors mentioned the service or notification of official documents as current problem in MLA. Because of different rules and different obligations to register with the public authorities, service of documents often fails or is not mutually recognized. However, cross-border services (e.g. summons, penal orders, etc.) are one of the main actions of daily MLA practice. The regulations as provided for in the 2000 MLA Convention (remaining untouched by the EIO) are considered partly insufficient.

Furthermore, prosecutors put forward that cooperation is hindered to a certain extent since witnesses have no obligation to testify if they stay abroad. Therefore, they pleaded for considering whether the principle of mutual recognition should be extended to citizens’ duties, i.e. the duty to testify also in another EU Member States if the criminal proceedings are carried out there.

Another problem occurs in the execution of sanctions against juveniles. Certain sanctioning measures imposed under German law do not exist in other countries, such as France. Consequently, these measures cannot be executed at the place of residence of the juvenile. In practice, the problem is solved by executing the measure against the juvenile in Germany. The offender gets assistance by social workers, probation officers, etc. who speak French.

### **bb) Practical issues**

Beyond these legal issues, interviewees also mentioned several factual problems that currently hinder cooperation within the EU. Prosecutors responded that still the execution of issued requests are not executed in a timely manner in foreign EU countries. A reason may be the lack of human resources or the concept of prioritizing cases followed in other EU countries. This situation leads to questions pertaining the state of affairs. In some cases, the

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<sup>286</sup> For the German law, see *Gusy*, in: Schenke/Graulich/Ruthig (eds.), *Sicherheitsrecht des Bundes*, § 9 BNDG, mn. 11 et seq.

German procedure, may be put to an end if no answer to the required assistance is given. This concerns especially minor offenses where waiting too long for replies would contradict the principle of proportionality. Interestingly, prosecutors replied that aspects of time play a minor role if it comes to cooperation with the "new" EU member states (eastern Europe), but different attitudes to rendering assistance in criminal matters exist with "old" Member States, e.g. UK, Spain, Italy, the Netherlands, Denmark, and France. In the latter case, for instance, swiftness of assistance mainly depends on the region, the subject matter and the persons involved in the execution of the request. It was hoped that the time limits for recognition and execution in the Directive EIO will produce improvements

Sometimes, German MLA requests are executed not completely, i.e. evidence is submitted to the German authorities only in a selective way by the foreign ones. This may first lead to delays in the domestic procedure since the foreign authorities must be queried to complete the request, and second, the success of domestic criminal procedure may be endangered if the foreign authorities eventually refuse to submit important, perhaps exonerating evidence.

A big problem is still the language. Interviewees argued that cooperation can only work if one can communicate with each other. Language barriers still hinder effective cooperation. Another problem in relation to language are the partly (still) bad translations of European Arrest Warrants / MLA requests into German received from other EU Member States.

Defence lawyers replied that great differences exist regarding the quality of the lawyer's advice, especially in cross-border cases. In particular, the level of knowledge of lawyers assigned as mandatory defence lawyer to a MLA/extradition case highly differs among the EU Member States. Most defence lawyers lack expertise in MLA and extradition. International cooperation in criminal matters remains a specific field of law, which is only dealt with by few persons.

Defence lawyers also criticized the extensive use of pre-trial detention in most European countries. They observed that clients remain in pre-trial detention after surrender until the beginning of the trial. They argued that in a European Union with the idea of a single legal space it is untenable that suspects cannot stay in the residing country until the investigations are finalized. In this context, it is pointed out that the instruments that should flank the European Arrest Warrant, in particular the Framework Decision 2009/829/JHA on the European Supervision Order and MLA procedures (now: the Directive on the European Investigation Order), are hardly used in practice. In view of the proportionality test, the EAW should ideally be the ultima ratio, but in practice the system is reversed, i.e. the EAW remains the first and nearly exclusive tool to bring people to other jurisdictions.

#### **D. Conclusion and policy recommendations**

German defence lawyer and president of the ECBA, *Prof. Dr. Holger Matt*, suggested the development of a second roadmap on minimum standards of certain procedural rights – an Agenda 2020. The Agenda is mainly designed to further strengthen mutual trust as the underlying principle of mutual recognition. The roadmap should include legislation on Directives or Regulations on the following:<sup>287</sup>

- Measure A: Pre-Trial-Detention, including the European Arrest Warrant
- Measure B: Certain Procedural Rights in Trials
- Measure C: Witnesses' Rights and Confiscatory Bans
- Measure D: Admissibility and Exclusion of Evidence and other Evidentiary Issues
- Measure E: Conflicts of Jurisdiction and *ne bis in idem*
- Measure F: Remedies and Appeal
- Measure G: Compensation

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<sup>287</sup> See eucrim, Guest Editorial, 1/2017, p. 1; see also the paper presented by Holger Matt at the 2017 ECBA spring conference, available at: <http://www.ecba.org/extdocserv/conferences/prague2017/ECBAAgenda2020NewRoadmap.pdf>.



The general view of interview partners is, however, that no further action should be initiated at the EU level at the moment. Instead, time is considered ripe for entering into a consolidation phase and for a thorough evaluation of the existing instruments.

The majority of interviewees stressed that more training measures are needed in order to adequately prepare all persons involved in international cooperation in criminal matters, such as judges, prosecutors, and defence lawyers. The persons should learn more about the existing instruments of cooperation, e.g. the European Supervision Order or the Framework Decision on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions. The judiciary, however, submitted that training measures are only reasonable after the national rules had entered into force, since they have to apply the national law implementing a directive or a framework decision. Therefore, most EU instruments being negotiated or in the pipeline of implementation (e.g. the 2016 directives on procedural safeguards) remain mostly unknown to the practitioners. Experts on the part of defence conceded that lack of knowledge on the part of defence lawyers should be remedied. Most defence lawyers are neither trained nor specialized in the EU instruments of international cooperation and if one is assigned as mandatory defence lawyer, the client may not be adequately advised. Therefore, the objective should be that all defence lawyers who may be assigned to the client should have the same level of knowledge.

The majority of interview partners are of the view that attempts of harmonizing procedural criminal law across the EU are not feasible and not reasonable. It was stressed that also in the case of legal orders that share a common legal culture differences remain that cannot be overcome by EU harmonization. Austria and Germany were mentioned as a good example. Although both countries share a long common legal history and the criminal procedure of both countries seems rather similar (at first glance), vast differences exist. These concern, for instance:

- Role of the public prosecutor and investigating judge during the criminal procedure;
- Rights of the defence (e.g. access to the files);
- Confidentiality of lawyer-client communication;<sup>288</sup>
- Rights to refuse testimony on professional grounds;<sup>289</sup>
- Exclusionary rules for evidence.

Against this background, one interview partner advocated that the EU should not be called to answer the question of further harmonization, but instead to develop a “negative catalogue” of issues under which mutual recognition of judicial decisions is considered inadmissible. As a starting point, one could raise the question: what are the “fundamental principles” of law that may hinder the applicability of the forum principle in MLA (Art. 9(2) Directive EIO; Art. 4(1) 2000 EU MLA Convention)? Possible issues of this negative catalogue could be:

- Detention conditions;
- Privileges to refuse testimony;
- Rights and position of the defence lawyer in criminal proceedings;
- Proportionality of coercive measures.

In order to improve cooperation in criminal matters within the EU, other interview partners were in favour of EU actions in specific fields. They concern both legislative and practical measures.

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<sup>288</sup> See in this regard, *F. Roitner*, Die Überwachung des Gesprächs zwischen dem Beschuldigten und seinem Verteidiger im Lichte der EMRK, in: Lagodny (Hrsg.), *Strafrechtsfreie Räume in Österreich und Deutschland*, 2015, pp. 129 et seq. See also above C 4a.

<sup>289</sup> See in this regard, *J. Taferner*, Die Legitimation von Vernehmungsverboten nach § 155 StPO, in: Lagodny (Hrsg.), *Strafrechtsfreie Räume in Österreich und Deutschland*, 2015, pp. 185 et seq.

#### Legislative measures:

- Union-wide, central, and easily accessible registers, such as a register for criminal records (beyond the current ECRIS system) or a register on DNA (beyond the current Prüm solution);
- Union-wide rules on the service/notification of documents in criminal matters;
- Witnesses' duties in criminal proceedings led in an EU Member State other the EU Member State of stay;
- Ensuring the same level both as regards quality and financing of defence lawyers if it comes to mandatory/ex officio defence<sup>290</sup>.

#### Practical measures:

- Better and continued language training of practitioners involved in MLA;
- Establishment of certified interpreters/translators particular competent for MLA/extradition procedures;
- Establishment of fora where practitioners of all EU member states meet to discuss current problems in the cooperation in criminal matters and/or exchange their views on their national legal system.
- Guide for practitioners on the relationship of the various existing EU instruments on cooperation in criminal matters (key words: European Arrest Warrant as the ultima ratio; use of other EU instruments as less intrusive means, see above).

## **PART II. Rights of victims in Germany**

### **A. Introduction**

This part examines the implementation of European standards for the protection of victims in the legal system of the Federal Republic of Germany.

First, the status of victims' rights in Germany is outlined (B.). Under C. a list of the most important national victim protection measures is provided, whereby the structure is oriented towards the requirements of the Directives 2012/29/EU and 2011/99/EU. This part further shows which victim rights play a role in the Germany beyond the requirements of the EU level. Under D. compensation mechanisms as provided for in Directive 2004/80/EC are discussed. Questions relating to the European Protection Order (EPO) and the Regulation on protection measures in civil matters are analysed under E., asking about the application of safeguard measures and examining possible improvements. The effects of the implementation of the Directive 2012/29/EU will be discussed under F. Subsequently, gaps in implementation of the Directives are considered (G.), followed by identified weaknesses of the instruments in the sense of practicability and open criticism (H.). The last part (I.) is designed as a conclusion and summarises how the instruments for victim protection can be made more effective and whether it makes sense if the EU tables new instruments.

### **B. Status of the rights of victims in Germany**

The terms "victim" and "injured person" are understood synonymously under German law. Contrary to other jurisdictions, German criminal law and criminal procedural law refers to injured persons. The legislature, however, has so far refrained from legally defining the term of the injured person. It is rather settled case-law that the term is to be derived from the respective functional context, i.e. not uniformly, but depending on the relevant legal statutes. Generally speaking, German case-law defines the injured person as a person who has been directly infringed by an alleged offence in one of his or her legal interests.

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<sup>290</sup> The interview partner remarked that this issue is linked to a general debate about the value of criminal defence in a state reigned by the rule of law. This debate could be launched by the European Parliament.

Another – more decisive- question is: what role does the victim play in today's criminal procedure in Germany? Historically, once the state monopoly on the use of force was formed, the injured person lost his role as a procedural subject, which itself led to the prosecution. It was not until the 1970s that victim rights were gradually introduced, expanded and continuously strengthened in Germany. Since the insertion of §§ 406d to 406h StPO (Strafprozessordnung, Code of Criminal Procedure) in 1986, the injured person was "redesignated" as an independent party to the proceedings and thus as a procedural subject. These regulations should provide the victims with a secure legal position that enables them to properly represent their interests.

As mentioned above, the term "victim" is not legally defined in German law; therefore there is no explicit constitutional norm. It is also recognized that the victim has no claim to punishment of the offender. The constitutional norms give, however, rise to fundamental rights of protection which guarantee the victim a sufficient legal status.

This legal status and a corresponding right to participate in criminal proceedings can already be derived from the guarantee of human dignity provided for in Art. 1(1) of the Basic Law. In addition, this right follows from the necessity of a functional administration of justice, which is the result of the guarantee of access to justice under Art. 19(1) of the Basic Law. In addition, the rule of law (Rechtsstaatsprinzip) in Art. 20(1) of the Basic Law is used to derive the principle of fair trial (which applies to all parties involved and thus also to the victim), as well as the state's obligation to ensure that criminal justice functions properly, in which the interests of the victim must also be taken into account. The principle of the welfare state requires the state to have a duty of care, which also relates to criminal proceedings and thus also to the victim. Finally, the right to participate is also deduced from the right to be heard, Art. 103(1) of the Basic Law, as this right is intended to benefit all parties involved in legal proceedings.

In addition to these constitutional guarantees, parts of substantive criminal law also count as victims' rights insofar as they constitute protection standards for the benefit of potential victims. In parallel, criminal procedural law serves to enforce these substantive norms, so that the victim is naturally also assigned a major role here.

In sum, the term victim is not mentioned in the German constitution and is not legally defined anywhere else, yet the victim is entitled to protection claims based on the respective functional context. Due to the ever-increasing protection of victims in Germany, it should also be pointed out that these rights must be brought into equitable harmony in the tension between the interests of the injured and those of the accused.

### **C. Protection measures for victims in German Law**

German law provides for a large number of protective measures and compensation mechanisms in the area of victim protection. A distinction is made between disposition powers, monitoring rights, offensive and defensive rights, information rights as well as rights of reparation or compensation. These victims' rights have been continuously strengthened since the 1970s/1980s. For a comparison with other European countries, it would be appropriate to present these victims' rights first of all in the context of the relevant Directive 2012/29/EU and Directive 2011/99/EU (I. and II.). In a second step, light is shed on some rights that go beyond the required minimum standards (below III.).

#### **I. Directive 2012/29/EU**

##### **1. Federal level**

Directive 2012/29/EU was implemented in Germany by the Law on Strengthening Victim Rights in Criminal Proceedings (3rd Victim Rights Reform Act) of 21 December 2015, which came into force on 31 December 2015, and at the same time implemented Art. 31 a) of the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse ("Lanzarote Convention", ETS No. 201). In addition, the so-called psychosocial procedural support has been established by law, which, as such, goes beyond the requirements of the Directives and is now standardised in § 406g StPO and the new law on psychosocial procedural support (PsychPbG).

Many of the legal instruments were known in German law prior to the Directive and in particular the regulations introduced successively by the Victim Rights Reform Acts go beyond the European minimum standard. In addition, key areas of the Directive are within the legislative competence of the federal states (Länder) see. Accordingly, only limited need for implementation was seen by the German federal legislature.

This concerns, in particular, the information rights of Art. 4, 5, 6 (1) b), (5), 7 (4), (5), 22 of the Directive 2012/29/EU. The implementation mainly focused on the restructuring of the duty to provide information to the victim, which was implemented in §§ 406i to 406k StPO. Besides, the provision of information in connection with the filing of a criminal charge, § 158 (1) StPO, was also revised, as was the need for translation of written information, §§ 158 (4), 406d (1) StPO. Attention was additionally paid to the need for translation services in all hearings and proceedings, §§ 161a (5), 163 (3) StPO, § 185 GVG.

A general standard of protection within the meaning of Art. 18 of the Directive 2012/29/EU is unknown to German law as well as a general regulation for the assessment of a special need for protection according to Art. 22 of the Directive. However, the rights deriving therefrom under Art. 20, 21, 23 and 24 of the Directive had already been applicable law. In order to take account of Art. 22 of the Directive, § 48 (3) StPO was nevertheless constructed as a new entry standard for victim protection, in order to standardise an assessment of the vulnerability of victims as early as possible, to guarantee the sensitisation of public authorities and to initiate any protective measures that may be appropriate. This standard also applies via § 161(1) sentence 2 StPO for the public prosecution service as well as for the police according to § 163 (3) sentence 1 StPO. In this respect, it should be noted that early assessment has already been practised in this way, yet now it is a legally standardised, binding rule. This means that a mandatory examination is now necessary whether there is a need for protection, and this already at the first official appearance of potentially injured persons at the prosecution authorities. The relevance of this provision is seen in the fact that it is not so much a victim protection right in the narrow sense of the word, but rather has a declaratory effect which is intended to underline the importance of victim protection in criminal proceedings.

## **2. Federal State (Länder) level**

As already mentioned above, major areas of the Directive are within the responsibility of the federal states. This applies in particular to Art. 8, 9, 12, 19, 23, 25, which deal mainly with the practical realisation of victim protection. The federal system of Germany is the reason for different regulations in the 16 federal states. Yet the report on the implementation of Directive 2012/29/EU issued by the German Ministry of Justice and Consumer Protection (BMJV) to the European Commission of 15 September 2016 concludes that there is a nationwide and extensive range of institutions and programmes for effective victim protection in all federal states and that further implementation of the Directive was therefore not necessary. In more detail, the report sets out the following:

Art. 8 of the Directive requires free access to victim support measures. In this respect, the report of the BMJV refers to "VIKTIM", a database of the North Rhine-Westphalia State Criminal Police Office, to which each federal state has access and in which extensive, also regionally specific information on support measures and institutions can be found. The same applies to the online database "OBDAS" ([www.odabs.org](http://www.odabs.org)) of the Kriminologische Zentralstelle e.V. on behalf of the Federal Ministry of Labour and Social Affairs (BMAS). This website is also aimed at victims directly and is based on the "Opferatlas", which gives an overview of the victim support landscape in Germany (<http://www.krimz.de/forschung/opferhilfe-atlas/>). In addition, the BMJV offers links to many victim support sites on its own homepage (<http://www.bmjv.de/SharedDocs/Abteilungen/DE/AbtII/IIA3.html?nn=1470246>).

Particularly noteworthy is the WEISSER RING e.V., which operates nationwide as the largest institution for victims in Germany. Finally, all federal states also offer information material and links to the above-mentioned pages on their homepages.

Measures for assistance by victim support services within the meaning of Art. 9 of the Directive are carried out by the federal states under their own responsibility. For example,

there are special foundations with regional offices that are financed by the states' budget. In total, there are well over 1,000 non-governmental victim support organisations, some of which are specifically designed to help victims of certain crimes and to protect women and children.

With regard to the restitution measures required by Art. 12 of the Directive, the report of the BMJV refers to the offenders-victim mediation/perpetrator-victim-agreement (Täter-Opfer-Ausgleich, in the following: TOA), which has long been anchored in §§ 46 (2), 46a no. 1 StGB, § 10 (1) no. 7, 45 (2) sentence 2, 47 (1) JGG, §§ 136 (1) sentence 4, 153a (1) sentence 2 no. 5, 155a, 155b StPO as out-of-court compensation mechanism. Quality standards are established by the Federal Working Group TOA e.V. in cooperation with the TOA Service Office Cologne and enforced by specialised social workers in the judiciary. These standards include that participation for the victim must be voluntary and, as required by the case law, the implication that the offender has essentially acknowledged his crime and is willing to take responsibility for it so that the TOA is effective.

Art. 19 and 23 (2) a) of the Directive demand spatial protection measures for victims. In this context, the report of the BMJV refers to the comprehensive guarantee of witness protection rooms or other separate premises in the judiciary and police. In addition, a large number of courts have special technical equipment such as video conferencing systems. Special emphasis is placed on the interrogation of children and adolescents. In general, guidelines and internal instructions ensure that victims and perpetrators do not encounter where possible.

Concerning the required qualifications of interrogators, Art. 23 of the Directive, the BMJV speaks of nationwide training of police officers with regard to respectful treatment of victims and with special attention to specific protection needs in the sense of the Directive. The same applies to judges.

With regard to the educational requirements of Art. 25 of the Directive, the BMJV even states that many Länder have set up special continuing education programmes and conferences that go far beyond the requirements of the Directive. The protection of victims was an essential element in police education and training, which was continuously evaluated and further developed. There are also detailed instructions for dealing with affected women and children.

Victim protection is also taken into account in the education of judges and prosecutors. There are special training courses, advanced training, seminars and conferences, some of which are offered by the German Judicial Academy. In addition, the topic was an integral part of the training of young lawyers in general and of judicial officers as well as of civil servants of the middle judicial service and the judicial guards' service.

Finally, with respect to the provision of data and statistics (Art. 28 of the directive), the report of the BMJV refers to the police crime statistics (PKS: [https://www.bka.de/DE/AktuelleInformationen/StatistikenLagebilder/PolizeilicheKriminalstatistik/pks\\_node.html](https://www.bka.de/DE/AktuelleInformationen/StatistikenLagebilder/PolizeilicheKriminalstatistik/pks_node.html)) as well as the criminal prosecution statistics (<https://www.destatis.de/DE/Startseite.html>).

## **II. Directive 2011/99/EU**

Violence protection within the meaning of the European protection order is designed as a civil and not a criminal procedure in Germany. Within the limits of the German territory, it is regulated in the Act on Protection against Violence (Gewaltschutzgesetz, GewSchG). In order to implement Directive 2011/99/EU, the EU-GewSchVG of 5 December 2014 was created, which also contains the implementing provisions of Regulation (EU) No 606/2013 of 12 June 2013 on mutual recognition of protection measures in civil matters. Even before the law came into force, there had already been a very efficient domestic system of protection against violence in Germany, which could also be used by citizens of other EU member states residing in Germany.

There was just a need for transposition of Directive 2011/99/EU with regard to the request for recognition of a European protection order in criminal matters by other member states to

Germany as executing state. No such request can be made by Germany itself, since the scope of the Directive is limited to criminal matters (Art. 2 No 2 and Recital 10 of the Directive), and German criminal law does not know such protective measures, since the measures are of civil nature, as mentioned above.

Regulation (EU) No 606/2013 applies accordingly, so there was a need for implementation in so far as the competence and the procedure for issuing a certificate for the EU-wide applicability of a German protection order against violence had to be regulated. It was also necessary to regulate the recognition and enforcement of civil protection measures in other Member States.

This was completely done by the Act on European Violence Protection Procedures (EUGewSchVG). Section 2 of this Act refers to recognition and enforcement under Directive 2011/99/EU and Section 3 covers recognition and enforcement under Regulation (EU) No 606/2013.

### **III. Further protection of victims in the German legal system**

A complete list of all victim protection mechanisms provided by German law would go beyond the scope of this analysis. Nonetheless, some important rights are highlighted in the following.

#### **1. Information**

In addition to the obligations to provide information, which are also foreseen in Directive 2012/29/EU, the right to inspect files in accordance with § 406e (1) sentence 1 StPO should be mentioned. This has to be done by a mandated lawyer for the aggrieved person if there is a legitimate interest. One such example is the collection of information for asserting civil law claims. Without legal assistance, information and copies may be given to the victim from the files, § 405e (5) StPO. However, the right may be denied in accordance with § 406e (2) sentence 1 StPO if the prevailing legitimate interests of the accused or other persons are affected.

#### **2. Protection**

Other important protective victim rights are the secrecy of place of residence and identity, § 68 StPO, the restriction of the right to ask questions on personal matters, § 68a (1) StPO, and the transfer of jurisdiction from the local court (Amtsgericht) to the regional court (Landgericht), § 24 (1) No. 3 GVG, so that vulnerable victims in particular do not have to be heard in two instances. It is also possible to exclude the public in trial, §§ 171b (1) to (3), 172 No 1a, 3 and 4 GVG, and limit the presence of the accused (§ 247 sentence 2 StPO), if this has damaging effects on the victim.

#### **3. Assistance**

In addition, there are rights of assistance, in particular legal assistance from the time of the preliminary investigation, §§ 68b (1) sentence 1, 406f (1), 406h (1) StPO, and guidance by a trusted person chosen by the victim according to § 406f (2) StPO. The psychosocial procedural support, newly introduced in § 406g StPO and the PsychPbG, has already been mentioned above. The aim is to provide non-legal assistance for particularly vulnerable persons before, during and after the trial. This is designed to reduce individual stress and avoid secondary victimization. A further purpose of this new instrument is to increase the readiness to make statements.

Finally, there are cost privileges for certain groups of victims – often in connection with a subsidiary right to sue – e.g. for legal assistance, psychosocial procedural support and interpreters.

#### **4. Monitoring rights**

The aggrieved person's possibility to launch proceedings to compel public charges (Klageerzwingungsverfahren) pursuant to § 172 stop is one of the main examples of monitoring rights in Germany. It is intended to ensure that a criminal complaint is brought up, even though the prosecution service has ceased to prosecute an offence for lack of

sufficient suspicion in accordance with § 170 (2) StPO. It can be applied by the person who has made a criminal complaint and is himself a victim or an injured person. This procedure not only serves the victim, but it is also meant to guarantee the principle of mandatory prosecution.

## **5. Offensive rights**

Offensive rights are understood as meaning that the victim is enabled to exert an active influence on the course of criminal proceedings. This is possible in German criminal procedure by way of an incidental action or accessory private prosecution (Nebenklage), § 395 et seq. StPO. Victims of certain crimes can file an accessory private prosecution and thus become procedural participants with special rights. These rights are set out in § 397 StPO, and include the following:

- Right to be consulted and heard, just the way the prosecution service is;
- Right to reject judges or experts, for example, in cases of bias (cf. §§ 24, 31, 74 StPO);
- Right to question witnesses and experts, § 240 (2) StPO
- Right to object an order by the presiding judge relating to the conduct of the hearing (§§ 238 (2), 242 StPO).
- Right of explanation pursuant to §§ 257, 258 StPO;
- Own right to request evidence, § 244 (3) to (6) StPO.

## **6. Compensation rights**

In the context of compensation for victims, the so called Adhäsionsverfahren (“action civile”) according to §§ 403 et seq. StPO as well as the TOA (offender-victim-mediation) referred to above should be mentioned. The Adhäsionsverfahren is a procedure in which the possibility will be given to assert civil claims of the victim against the offender in criminal proceedings in order to avoid another proceeding.

As already mentioned, the TOA is an out-of-court attempt to resolve a conflict, which can either lead to the termination of the criminal proceeding (§§ 153a, 153b StPO in conjunction with § 46a StGB or §§ 45, 47 JGG) or at least be taken into account in sentencing (§ 46a, 46 (2) StGB). The preconditions for this are clear facts or a confession of the offender. In addition, the accused and the victim must agree to such a procedure.

The seizure of confiscated assets to which the victim is entitled should also be mentioned as a form of compensation rights. This recovery aid ensures that the victim's claims for damages are secured by means of coercive measures in criminal proceedings during the investigations.

Finally, if the perpetrator of particularly serious criminal offences is not in a position to make up for the damage caused or cannot be traced in the first place, the victim is entitled to state compensation under the Crime Victims Compensation Act (Gesetz über die Entschädigung für Opfer von Gewalttaten, OEG.(cf. D.)

## **D. Compensation mechanism for victims of crime**

The victim compensation demanded by Directive 2004/80/EG has existed in Germany since the introduction of the Crime Victims Compensation Act (OEG) of 7 January 1985. In accordance with the directive, § 6a (2) OEG was introduced, which designates the Federal Ministry of Labour and Social Affairs as “assisting authority” and “central contact point” in the sense of the Directive. In addition to the standard required by the Directive, § 3a OEG provides for the provision of compensation in the event of offences abroad to which, however, compensatory payments to be made by other Member States must be credited. The effectiveness of these compensation mechanisms will be discussed below.

## **E. EPO and Regulation on protection measures in civil matters**

### **I. Application and Effectiveness**

The main problem when talking about cross-border-recognition and implementation of a protection measure is that, according to interview information, this procedure has not been applied in Germany so far. Cases are not known, in which the Directive on the European Protection Order (EPO) or the Regulation on protection measures in civil matters have been applied. Accordingly, it is not possible at this point to set out clearly what issues arise with regard to the regulations of other member states. The interviewee argued it is simply easier to make use of domestic procedures instead of initiating the cross-border procedure of mutual recognition. Due to the low-thresholds for the production of an order under the German GewSchG, which can be made directly and even without a lawyer, this “national way” is preferred to an inter-European procedure in which the authorities of the member states must first communicate with each other. The national protective procedure is considered the more direct and thus easier way to claim an order in the member state in which the person concerned is currently staying.

Another reason seems that many judges and lawyers are simply not aware of the EPO instruments. There seems to be a lack of knowledge and competence to adequately draw the attention of victims to the possibility of an EPO and then strive for it accordingly. As a result, the EPO (and with it the Regulation on protection measures in civil matters) has proved to be a paper tiger, which, although it is – in principle – a suitable instrument available, no practical effects can be discerned – at least in Germany. It was also stated in the interview that the fact that the proceedings in the member states are partly governed by civil and partly by criminal law leads to frictions. Therefore, it is quite possible to see here another reason for the ignorance or lack of willingness of practitioners to use the procedure. The coexistence of Regulation and Directive complicates matters.

## **II. Improvements**

Against this background, it is difficult to make suggestions for a better effectiveness of the EPO. On the one hand, practitioners, especially lawyers, need better and more explicit training or further education in order to acquire the skills to carry out the European procedure in an orderly manner and in the interests of victim protection. However, it is problematic that judges in Germany are subject to judicial independence and cannot be forced to undergo further training. The will among lawyers to train oneself accordingly might equally be classified low, since the procedures have apparently not only been rare so far, but do not occur in Germany at all. Training is considered inappropriate, because the national procedures appear quite simple and easy to use, so that there is no wider scope of the European procedure. Finally, it may also be problematic that most lawyers in Germany who deal with criminal law are primarily criminal defence lawyers and they therefore rarely deal with victim protection proceedings. Specialised victim lawyers are quite rare.

As far as the frictions by the coexistence of the Directive and the Regulation are concerned, a full harmonization would, of course, be the easiest way out. This harmonization should conceive protection orders throughout Europe either uniformly under private or criminal law. It is questionable whether such EU legislation is possible in the light of Art. 4 (2) TEU, in particular against the background that national procedures offer sufficient protection from the outset.

The practical implementation of protective orders in Germany will be discussed below.

### **F. Effects of the implementation of the 2012 directive on victim's rights**

The effects of the implementation of Directive 2012/29/EU are assessed positively in the interviews. As mentioned above, one should, however, take into account that most of the requirements were already known to German law beforehand. Nevertheless, sensitivity to the issue of victim protection seems to have increased in German criminal proceedings. This tendency is not always seen positively, because critics note an excess of victim protection (see also below for more details). However, when talking about a transnational scope of application, the interview partners concluded that there have been nearly no cross-border cases of victim protection in Germany. It should be noted that the Directive has significantly increased attention to the protection of victims, yet this has ultimately had no effect on EPO cases.



## **G. Implementation gaps**

Implementation gaps to Directive 2004/80/EC are not evident. As mentioned above under D., victim compensation in Germany has been regulated in the OEG since 1985 and not only complies with European standards, but goes beyond them to some extent. Only the establishment of an “assisting authority” and a “central contact point” were included in the OEG in the course of the implementation of the Directive. This is without prejudice to the fact that compensation mechanisms may pose practical problems (see below) .

A more critical assessment regarding implementation gaps is given for Directive 2012/29/EU.

Already the term “victim” provokes discussion. The definition of the term, which has intentionally not been implemented, is a point that is repeatedly taken up – especially in the statements of various associations and victim institutions on the draft of the 3rd Victim Law Reform Act. Even though the legal term is, in essence, clear in German law and case law , it is criticised that relatives are not subsumed under the term “victim”. In addition, concerns are occasionally raised that it is not made clear that – according to the presumption of innocence – the victim can only be regarded a “potential victim”. Here, for example, reference is made to the Austrian provision in § 65 No 1a Austrian StPO.

Another point of criticism is the implementation of Art. 8 of the Directive. The article demands that victim support services have to be confidential. It is criticised, however, that the German legislator did not take this as an opportunity to grant the psychosocial victim service workers the right to refuse testimony, even though this is essential for proper victim support based on trust. Reference is made to the provisions of Austrian and Swiss law, both of which provide for the right to refuse testimony.

A shortfall in the implementation of the Directive is also seen in the context of Art. 11, 6 (1) a), (3), which calls for review possibilities insofar as public authorities refrain from criminal prosecution. In German law, a procedure to compel public charges (see above under monitoring rights) is only possible if the prosecution dismisses the proceedings for lack of sufficient suspicion in accordance with § 170 (2) StPO. However, the victim may not initiate a further examination if the public prosecutor dismisses the case due to opportunistic reasons (§§ 153 et seq. StPO) . Even a person entitled to an accessory private prosecution (Nebenklage, see above), is not involved into the dismissal proceedings.

As mentioned above, one German instrument of restorative justice is the TOA and the victim must agree for it to apply. In this respect, a contradiction is seen to Art. 12 of the Directive, which requires that restorative justice services are based on the victim’s free and informed consent. Under German law, however, it is possible to encourage a TOA if the victim does simply not disagree. This is seen as a limitation of the victim’s authority. In this context, it is also criticised that the requirement for confession by the offender is not stipulated in law.

Furthermore, it is stated that training in accordance with Art. 25 of the directive is not provided for in German legislation and is not be carried out in a systematic, mandatory manner .

Moreover, the newly introduced standards on interpreting services are considered to be inadequate. In particular, the German legislature points out that sufficient communication in the case of filing of a complaint (cf. § 158 (4) sentence 1 StPO) in a common foreign language or the support of an attendant of the injured person with sufficient language skills would suffice. However, a complete translation is requested.

## **H. Weaknesses of the instruments and reflections**

Besides these legislative implementation deficits, practical problems with the application of the victim protection mechanisms are also put forward. In general, some victim protection institutions are missing a needs-oriented and comprehensive support system. It should be noted, however, that these institutions argue from their own particular point of view. By contrast, legal experts have found an excessive level of victim protection for some time, which is held no longer compatible with the rights of the defendant and his legal status.

One of the main problems with regard to the rebalancing of the various interests within the criminal procedure lies in the fact that there are only very few scientific studies that check the effectiveness of the far-reaching victim protection laws in reality.

Müller-Piepenkötter, which refers to various investigation orders and a survey of the stock of victim support services of 2014 commissioned by the Federal Ministry for Labour and Social Affairs, sees a rather dense network of victim support services in the Federal Republic of Germany. However, she points out that this network is unevenly distributed. She sees a lack of equal access to services, especially in cities with fewer than 20,000 inhabitants. She concludes, however, that the investigations seem to suggest that there is some catching up to be done, yet that the survey does not allow a definitive assessment of actual victim support provision within the meaning of the Directive.

Kett-Straub regards the financial compensation of victims as highly unsatisfactory. In particular, she asserts this at the low level of applied "actions civile" (Adhäsionsverfahren, see above), which despite further legislative expansion had not risen significantly.

She also sees problems in the practical application of the OEG and points out that

- only few victims of violent crime lodge claims, although they are entitled to;
- many victims are not in the scope of application;
- there are considerable regional differences with regard to the granting of compensation.

She refers in this context to statistics of the Weisser Ring e.V. (<https://weisser-ring.de/media-news/publikationen/statistiken-zur-staatlichen-opferentschaedigung>) and the discussion about conducted at Bartsch/Brettel/Blauert/Hellmann.

The latter take up the criticism of the Weisser Ring e.V. and scrutinize the evaluation. They conclude that, due to a lack of scientific research, it is unclear to what extent victims, who are potentially entitled to benefits, may file an application under the OEG. Accordingly, it is not possible to give a definite answer as to whether the OEG works in practice or not. They also conclude that – although there might be indications of problems with the practical implementation – a comprehensive evaluation is needed to be able to identify them. On the other hand, however, it must also be emphasised that there is no lack of legislative implementation of the Directives, since European standards do not go beyond what German law allows in principle.

In 2015, the INASC project (Improving Needs Assessment and Victims Support in Domestic Violence Related Criminal Proceedings), funded by the Criminal Justice Programme of the European Union, conducted interviews with 10 women affected by partner violence and 27 experts from the fields of police, justice, victim protection and protection against violence and analysed 70 procedural files on cases of intimate violence. The findings of the study are available on the project's website (<http://www.inasc.org/reports.php>), where summary brochures can also be found (

The study provides double-edged results. Germany is, for instance, certified by a nationwide network of decentralised confidential and legal support institutions. But INASC also came to the conclusion that some services are not available in rural areas.

The study points out that the transfer of information by police authorities is well established and that in all federal states the referral to victim protection institutions is firmly anchored in the police laws. Nevertheless, the corresponding procedural steps are not always be complied with.

In principle, there are also suitable instruments available in the judiciary for collecting special victim needs according to Art. 22 of the Directive 2012/29/EU, yet there is sometimes a lack of effective cooperation between police and victim protection institutions in this respect.

There seems to be a strong need for improvement in the field of translation, since court documents are often written exclusively in German and, in the case of police hearings, no professional translation is offered.

Similar difficulties are seen in protective orders under the GewSchG, which are in principle assessed very positively, but there is a lack of information on this possibility by the police.

The application of the OEG and the Adhäsionsverfahren are also seen as problematic. In particular, criminal judges consider the latter less favourable, since the criminal proceedings would be delayed and civil law competences were sometimes lacking. So even if the procedure is enshrined in law and judges are called upon to carry it out, there is a certain unwillingness to do so, which is also related to the fact that it is a different kind of legal matter.

## **I. Conclusion**

The question arises as to whether it makes sense for the EU to introduce new instruments or how given instruments could be made more effective. There are voices in Germany – above all the various victim protection institutions – which demand even more extensive victim protection and consider the previous regulations inadequate. It should also be noted, however, that many lawyers (defense lawyers, judges, prosecutors and academics) are increasingly opposed to further regulation of victim protection. As has already been mentioned, a clear answer is difficult due to few studies in this area. As mentioned above, many lawyers are of the view that a thorough evaluation is needed first.

The example of the EPO shows that existing instruments are already not being used, but that in the majority of cases there is no need for them, since national procedures and measures already offer sufficient protection. As things stand at present, the EU legislator should therefore be cautious about creating further instruments, since the effects on the rights of the accused must always be taken into account as well, and thus immanently the impacts on the rule of law procedure in general.

Victim rights and protection mechanisms exist in Germany and are designed effectively from a legal point of view. More problematic is the practical application and effectiveness of the law. However, this can hardly be achieved by ever increasing harmonisation or EU standardisation, which could sometimes make the victim protection system appear overloaded and opaque. It seems more important to emphasise existing European standards at national level to increase the sensitivity of lawyers, prosecution authorities and victim protection agencies working in this field. It would certainly make sense, for example, for victim protection to play a greater role in the training of young lawyers, which is practically difficult in view of the general training scheme as it is designed in Germany.

From a German perspective, it seems to be of higher priority to strengthen victim protection on a low-threshold basis – be it through appropriate training measures or – quite decisively – through the general availability of victim supporters and victim protection institutions, than through a deeply rooted and expanding system of standards driven by political activism. One can close with the words of Kotlenga/Nägele/Nowak that the implementation of the Directive depends above all on the willingness of the law enforcement authorities and courts to apply the spirit of the directive in their daily work.

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## II. COUNTRY REPORTS ON IRELAND

### National report No 1 on the Irish jurisprudence

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#### 1. Introduction

Mutual recognition is the cornerstone of cooperation in criminal justice in the EU to date. The principle of course originated from the law of the internal market (as it is now called) in the seminal case of *Cassis de Dijon*.<sup>1</sup> Mutual recognition has traditionally been contrasted with the concept of harmonisation. Whereas harmonisation involves the adoption of uniform standards across the EU, mutual recognition enable the Member States to maintain their own regulatory standards in a domain of EU cooperation, but requires them to recognise as valid and seek to give effect to the standards of other Member States in whatever sphere of cooperation is in question. The principle of mutual recognition is occasionally referred to as the principle of mutual trust, and the latter term perhaps captures more of the normative content of the concept. 'Trust' implies more than mere recognition, but a willingness to accept the validity in terms of norms or values of another criminal jurisdiction. Criminal law has traditionally been seen as a key attribute of sovereignty, unsurprisingly, as criminal jurisdiction represents the strongest assertion of State power apart from military force, and the deepest incursion by the State on the rights of individuals. Criminal jurisdiction is thus deeply connected to political legitimacy, to the validity of State power and its acceptance in a given society. Across diverse societies, therefore, it should not be surprising that States have traditionally been cautious in cooperating with other States in the enforcement of foreign criminal jurisdiction.

Writing in 2009, the current author observed that as one of the few common law jurisdictions in the EU, Ireland has been cautious in its participation in EU criminal justice cooperation, while at the same time showing a clear willingness to cooperate where fundamental national principles of the criminal process are not threatened.<sup>2</sup> The term 'due process' captures the practical content of the values and norms reflected in the criminal justice system. Substantive criminal law sets out what society has determined to be criminal conduct. The legitimacy of the criminal law is rooted, not just in a sense of what conduct should be criminally prohibited, but also in a sense of fairness of the process by which it is determined a person has committed a criminal offence and is subject to a criminal sanction. For countries to be willing to cooperate in the enforcement of a foreign criminal jurisdiction, it is natural, therefore, that they must have trust and confidence in the fairness of the other system(s) in question. This is reflected in the traditional rules governing mutual legal assistance (MLA) in criminal matters. States have traditionally been permitted to refuse MLA – the two main examples of which relate to extradition and cooperation in obtaining criminal evidence – on grounds of the political nature of the offence, lack of reciprocal or comparable criminal sanctions in both Member States (double criminality), limitation of cooperation to specified offences (speciality), or breach of a fundamental principle of national law, or possibly the establishment of a *prima facie* case.<sup>3</sup> These traditional restrictions on the extent to which countries have been willing to cooperate in the enforcement of each other's criminal jurisdiction allow the requested country a degree of control over the process. Several specific features of the common law system of Ireland are worth highlighting in this regard: the role of juries and the resulting restrictions on the use of hearsay evidence and the corresponding importance of oral evidence; the non-inquisitorial role of the judge; and the general

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<sup>1</sup> Case 120/78, *Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein* [1979] ECR 649.

<sup>2</sup> G. Conway, 'Irish Practice on Mutual Recognition in European Criminal Law', in G. Vernimmen-Van Tiggelen, L. Surano & A. Weyembergh (eds.), *The Future of Mutual Recognition in Criminal Matters in the European Union* (Bruylant 2009), p. 283.

<sup>3</sup> European Convention on Mutual Assistance in Criminal Matters 1959, ETS no. 30; Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters 1978, ETS no. 99; Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters 2001, ETS no. 182.

prohibition of investigative detention apart from short periods following arrest.<sup>4</sup> A traditional adherence to grounds for refusal of MLA is reflected in the main current Irish legislation in the area, the Criminal Justice (Mutual Assistance) Act 2008, s. 3(1) of which provides, *inter alia*, that assistance will be refused where the Minister for Justice & Equality considers that granting the assistance would be likely to prejudice the sovereignty, security or other interests of the State or would be contrary to public policy.

In contrast, mutual recognition as practised in the EU involves a relinquishing of control to a greater degree: it involves a significantly greater degree of automaticity in recognising as valid the criminal procedure of other Member States. Evaluating mutual recognition in practice, therefore, includes examining the extent to which automaticity applies to requests for MLA from one Member State of the EU to another. Writing in 2009, the present author observed:

The term “mutual” implies a two-way process, which suggests mutual recognition is not just about Member States’ recognising each other’s decisions and judgments for the purpose of speedier cooperation, but also recognition of each others’ national sensitivities and concerns, given its origin and context as an alternative to harmonisation. Evaluating the operation of the principle in practice then involves both examining (i) the extent to which it has resulted in speedier cooperation and (2) the extent to which member States have successfully addressed each others’ national sensitivities and concerns.<sup>5</sup>

This is the same method applied in the present study. The focus of the study is Irish caselaw on the implementation of the Framework Decision on a European Arrest Warrant,<sup>6</sup> as there is no Irish caselaw to date on the European Investigation Order,<sup>7</sup> which is the other main instrument applying the principle of mutual recognition in EU law to date. The Framework Decision on a European Arrest Warrant was implemented in Ireland by the European Arrest Warrant Act 2003, as amended by the Criminal Justice (Terrorist Offences) Act 2005 and the European Arrest Warrant (Application to Third Countries and Amendment) and Extradition (Amendment) Act 2012.<sup>8</sup> Ireland broadly accepted the ways in which the Framework

<sup>4</sup> For some background detail, see Conway (2009), *op cit*, pp. 285–286.

<sup>5</sup> *Ibid*, p. 289.

<sup>6</sup> Council *Framework Decision* 2002/584/JHA of 13th June 2002 on the *European arrest warrant* and the surrender procedures between Member States, OJ L 190, 18.7.2002, pp. 1–20; as amended by Council *Framework Decision* 2009/299/JHA of 26th February 2009 amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial, OJ L 81, 27.3.2009, p. 24–36.

<sup>7</sup> Directive 2014/41/EU of 3rd April 2014 of the European Parliament and of the Council regarding the European Investigation Order in criminal matters, OJ L 130, 1.5.2014, p. 1–36. The transposition period for this Directive ended on 22<sup>nd</sup> May 2017. This Directive repealed the *Framework Decision* on the European Evidence Warrant 2008/978/JHA on the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters, OJ L 350, 30.12.2008, pp. 72–92. Speaking in in Dáil Éireann on Wednesday 4<sup>th</sup> June 2014, the then Irish Minister for Justice & Equality Frances Fitzgerald T.D. stated:

The Framework Decision on the European Evidence Warrant 2008/978/JHA is being repealed by the European Investigation Order Directive. Although Ireland has not yet made a final decision on whether or not to opt in to that Directive, we will not be preparing legislation to implement the now defunct Framework Decision. Requests for evidence between Ireland and other states will continue to be done in accordance with the provisions of the Criminal Justice (Mutual Assistance) Act 2008. Such matters are not affected by the fact that the European Evidence Warrant Framework Decision is not being implemented. (Dáil Éireann Debate, *Vol. 843 No. 1*, para. 156)

Although Ireland participated in negotiations for the EIO, it chose to not opt in to it initially (see *ibid*, para. 166). Ireland later opted in to the EIO by adopting secondary legislation in the form of the Criminal Justice (European Investigation Order) Regulations 2017. Participation by the adoption of secondary rather than primary legislation was enabled by the ‘supranationalisation’ of EU criminal justice following the coming into force of the Lisbon Treaty on 1st December 2009.

<sup>8</sup> See generally, E. Fahey, ‘Being a Third Pillar guardian of fundamental rights? The Irish Supreme Court and the European arrest warrant’, 33 *European Law Review* 563 (2008); R. Farrell & A. Hanrahan, *The European Arrest Warrant Ireland* (Clarus Press 2011); Y-M. Daly, ‘[Review of] R. Farrell & A. Hanrahan, *The European Arrest Warrant in Ireland* (2011)’, 3(1) *Irish Journal of Legal Studies* 135–143 (2011), S. Ó Toghda, *European Arrest warrant Acts 2003 and 2012 Annotated and Consolidated* (Round Hall 2013).

Decision on an EAW restricted speciality and double criminality as requirements for surrendering a suspect to another Member State.

It might be considered that acceptance by the Member States of the EU of the European Convention on Human Rights<sup>9</sup> and the EU Charter of Fundamental Rights<sup>10</sup> provides a ready basis for trust and confidence in the area of MLA in criminal matters. However, these tend to represent minimum standards and do not always reflect the fundamental concerns of national law.<sup>11</sup>

The Framework Decision of 2003 was amended in 2009, mainly to enhance the procedural rights of persons subject to an EAW and to promote the application of the principle of mutual recognition to decisions rendered *in absentia*. The 2009 amendment sought to set out an exhaustive list of the circumstances in which it should be considered that the procedural rights of a person tried *in absentia* have not been infringed and that the EAW must therefore be executed. Recital 4 of the 2009 Framework Decision outlined that it was necessary to provide clear and common grounds for non-recognition of decisions rendered following a trial at which the person concerned did not appear in person and that the Framework Decision aimed at refining the definition of such common grounds allowing the executing authority to execute the decision despite the absence of the person at the trial, while fully respecting the person's right of defence.<sup>12</sup> Recital 6 explains how the 2009 Framework Decision is intended to further the principle of mutual recognition by setting conditions under which the recognition and execution of a decision rendered following an *in absentia* trial should not be refused and that these are alternative conditions, meaning that when one of the conditions was satisfied, the issuing authority, by completing the corresponding section of the European arrest warrant or of the relevant certificate under the other Framework Decisions, gives sufficient assurance that the requirements have been or will be met.

## 2. The 2003 Act and Amendments<sup>13</sup>

Section 2 of the 2003 Act defines an EAW as “a warrant, order or decision of a judicial authority of a Member State”. It defines a “judicial authority” as a person, including a judge or magistrate, designated as such to perform similar functions to those carried out by a court in this State (Ireland) when issuing an EAW. Section 2 defines an “issuing judicial authority” as a judicial authority in the issuing Member State and an “executing judicial authority” is, by under s.9 of the Act, the Irish High Court. Section 10 of the Act provides that where the High Court has satisfied itself of certain matters the requested person “...shall, subject to and in accordance with the provisions of this Act, be arrested and surrendered to the issuing Member State.” Section 11 addresses the form of the warrant, s.12 transmission, s. 13 transmission to the High Court by the Irish Central Authority of an EAW (the Minister for Justice & Equality), s. 14 the power in certain circumstances to arrest a person without such a warrant, and s.15 addresses whether the arrested person consents to his surrender, while s. 16 addresses cases where there is an absence of consent. Section 17 provides that a single EAW may refer to more than one offence, while s. 18 provides that a person's surrender can be deferred on humanitarian grounds.

Part III of the 2003 Act set out a series of grounds for refusing surrender, including contravention of the ECHR or its Protocols, breach of Irish constitutional rules, reasonable grounds for believing a person would be discriminated against on specific grounds, the imposition of the death sentence, or the subjection of the persons surrendered to torture or degrading treatment (s. 37); punishment being below the minimum gravity specified in the

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<sup>9</sup> ETS no. 05.

<sup>10</sup> OJ C 202, 07.2016, pp. 389-405.

<sup>11</sup> See Arthur Luke Gerard Griffin, *Could Ireland opting-in to the European Investigation Order have a detrimental effect on Fair Trials and Fundamental Rights protections in Ireland?* (LL.M Thesis awarded at Dublin City University 2016), pp. 115-116.

<sup>12</sup> Recital 14 sets out that the Framework Decision was limited to refining the definition of grounds for non-recognition in instruments implementing the principle of mutual recognition.

<sup>13</sup> Amendments to the 2003 Act are listed on the following official Web page: < [http://www.irishstatutebook.ie/eli/isbc/2003\\_45.html](http://www.irishstatutebook.ie/eli/isbc/2003_45.html) > .

Act (s. 38); the granting of a pardon under Irish law or the granting of immunity under Irish law or the law of the issuing Member State (s. 39); a time bar for a prosecution under Irish law (s. 40); double jeopardy or *non bis in idem* (s. 41); pending or ongoing legal proceedings in Ireland relating to the person whose surrender is sought (s. 42); age (s. 43); extra-territorial exercise of jurisdiction by the issuing Member State (s. 44); *in absentia* conviction in certain circumstances (s. 45); and immunity in Irish law as result of holding a particular office (s. 46). Section 11 contains an important qualification to Irish acceptance of the EAW: Ireland will only surrender where a decision has already been taken to charge the person, i.e. Ireland will not surrender for the purpose of investigative detention.

The Criminal Justice (Terrorist Offences) Act 2005 mostly amended the 2003 Act regarding matters of detail, but also important amendments were made. Section 69 of the 2005 Act inserted s. 4A into the 2003 Act to create a presumption that the issuing Member State will comply with all the requirements of the Framework Decision unless the contrary is shown. Section 79 of the 2005 Act inserted s. 21A into the 2003 Act to create a presumption that an issuing Member State will comply with the requirement to have made a decision charging a suspect before surrender is requested. Section 21A replaces the previous s. 11(3).<sup>14</sup>

The European Arrest Warrant (Application to Third Countries and Amendment) and Extradition (Amendment) Act 2012 enables the application of provisions of the European Arrest Warrant Act 2003 to States other than EU Member States when a third State has an agreement with the EU on surrender. The 2012 Act also makes amendments to implement in Irish law regarding the EAW the provisions of Framework Decision 2009/299/JHA. The 2012 Act makes a number of amendments of a procedural and technical nature, as the Explanatory Memorandum to the Bill noted. The long title of the 2012 Act is:

an Act to provide for the application of provisions of the European Arrest Warrant Act 2003 to states other than Member States in certain circumstances; to amend the European Arrest Warrant Act 2003; to amend the Extradition Act 1965, the Extradition (Amendment) Act 1987 and the Extradition (Amendment) Act 1994; to give effect to Article 2 of Council Framework Decision 2009/299/JHA of 26 February 2009 amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial; and to provide for matters connected therewith.[References omitted]

### 3. Other Irish Legislation

The long title of the Criminal Justice (Mutual Assistance) Act 2008 is:

an Act (a) to enable effect to be given in the State to provisions of the following international instruments relating to mutual assistance in criminal matters: (i) the European Union Convention of 29 May 2000, the Protocol thereto of 16 October 2001 and the Agreement of 19 December 2003 between the European Union and the Republic of Iceland and the Kingdom of Norway on the application of certain provisions of the convention and protocol, (ii) Council Framework Decision 2003/577/JHA of 22 July 2003 concerning orders freezing property or evidence, (iii) the Second Additional Protocol of 8 November 2001 to the European Convention of 20 April 1959, (iv) the Treaty of 18 January 2001 between the United States of America and Ireland, as applied by the instrument contemplated by Article 3(2) of the Agreement of 25 June 2003 between the European Union and the United States of America and done at Dublin on 14 July 2005; (b) to give effect to Council Decision (2002/192/EC) of 28 February 2002 concerning Ireland's request to take part in some of the provisions of the Schengen Acquis, in so far as those provisions relate to

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<sup>14</sup> For further discussion of this issue up to 2009, see Conway (2009), op cit, pp. 291-295.



mutual assistance in criminal matters; (c) to repeal and re-enact, with amendments, Part VII (International Co-operation) of the Criminal Justice Act 1994; and to provide for related matters.[References omitted]

Part I dealt with general matters, including the spontaneous exchange of information between law enforcement authorities of EU Member States, Part 3 dealt with assistance between Member States of the EU regarding the interception of telecommunications for criminal investigation purposes, giving effect to Articles 17 to 22 of the 2000 EU Convention. Part 4 gave effect to the Council Framework Decision 2003 on the execution in the EU of orders freezing property or evidence. Part 5 addressed the enforcement of confiscation and forfeiture Orders, Part 5 also dealt with the provision of evidence, including the transfer of prisoners to give evidence to assist in criminal investigations and for evidence to be given by television and telephone link and for identification evidence for criminal investigations to be obtained both inside and outside the State. Part 6 dealt with other forms of assistance, including controlled deliveries both in the State and in other EU and Council of Europe Member States.

The 2008 Act was amended by the Criminal Justice (Mutual Assistance) (Amendment) Act 2015. The long title of the 2015 Act is:

An Act to give effect to Council Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders, Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties, Council Decision 2008/617/JHA of 23 June 2008 on the improvement of cooperation between special intervention units of the Member States of the European Union in crisis situations, Council Decision 2009/426/JHA of 16 December 2008 on the strengthening of Eurojust and amending Decision 2002/187/JHA setting up Eurojust with a view to reinforcing the fight against serious crime, Council Decision 2010/616/EU of 7 October 2010 on the conclusion of the Agreement between the European Union and Japan on mutual legal assistance in criminal matters; to give further effect to Council Framework Decision 2009/299/JHA of 26 February 2009 amending Framework Decisions 2002/584/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial<sup>6</sup>; for those purposes, to amend the Criminal Justice (Mutual Assistance) Act 2008, the Criminal Justice Act 1994, the Criminal Justice (Joint Investigation Teams) Act 2004 and the Garda Síochána Act 2005; and to provide for related matters.[References omitted]

The range of EU instruments incorporated into Irish law by the above Irish legislation attests the general willingness of the Irish authorities to engage in the principle of mutual recognition. Generally speaking, Ireland has not gone beyond the requirements of EU law.

#### 4. Date and Range of Case law

A search in the British and Irish Legal Information Institute (Bailii) database of Irish caselaw under the term “European Arrest Warrant” produced 524 results.<sup>15</sup> The large majority of these related to High Court judgments, with most of them addressing the EAW as the main issue in the case, while results also included cases where the term ‘EAW’ was just mentioned, along with some Irish legislation and Irish Law Reform Commission publications (and a few UK cases) in which the term EAW was used. Given the time limit within which this study was

<sup>15</sup> The search address for “European Arrest Warrant” is: < [http://www.bailii.org/cgi-bin/lucy\\_search\\_1.cgi?query=\(%22European\)%20AND%20\(Arrest\)%20AND%20\(warrant%22\)&results=200&method=boolean&highlight=1&sort=rank&mask\\_path=ie/cases%20ie/legis%20ie/other](http://www.bailii.org/cgi-bin/lucy_search_1.cgi?query=(%22European)%20AND%20(Arrest)%20AND%20(warrant%22)&results=200&method=boolean&highlight=1&sort=rank&mask_path=ie/cases%20ie/legis%20ie/other) > . These are unofficial copies of judgments, final approved copies are published in the Irish Reports (generally with only minor amendments).

conducted, the following discussion focuses on Supreme Court cases from 2009 to date (the date of a previous study by the author on the topic). Approximately 40 Supreme Court judgments, mostly from late 2008, dealing directly with the EAW scheme are examined for the period.

## 5. Irish Caselaw

Since the present author previously wrote on the topic in 2009, an important development has been the 'supranationalisation' of the Third Pillar by the Treaty of Lisbon. Criminal justice cooperation is now dealt with under the Area of Freedom, Security and Justice in Title V TFEU (Articles 67-80, 82-89). This area is now subject to the compulsory jurisdiction of the Court of Justice of the EU and to the doctrines of supremacy and direct effect of EU law. The principle of the supremacy of EU law is especially relevant regarding grounds of refusal to surrender under Irish legislation. This is discussed below regarding the important Supreme Court judgment in 2015 in *Balmer*.

Broadly speaking, the Irish courts have followed a consistent approach to the interpretation and application of the European Arrest Warrant Act 2003, as amended, since 2009 compared to before 2009. Writing in 2009, the present author the following trends in Irish caselaw on mutual recognition:<sup>16</sup>

- although purposive interpretation has become more common in Irish and UK law as a result of EU law, in the area of the EAW, the Irish courts have not departed significantly from traditional principles of statutory interpretation, focusing on the text and sometimes the specific purposes of individual provisions of legislation;
- Cogent evidence is needed to displace the presumption that the authorities of other Member State are acting in good faith and not in away inconsistent with Irish implementation of the EAW;
- Prejudice regarding delay is a matter for the authorities of the issuing Member State;
- The possibility of appeal within the legal system of the issuing Member State to the European Court of Human Rights does not create a presumption of compliance by the issuing Member States with the European Convention on Human Rights;
- A relatively strict approach to procedural requirements;
- Differences in procedure been Irish law and the law of the issuing Member State are not grounds in themselves for refusing surrender;
- Investigative detention following surrender is prohibited by Irish law, but some fact-finding subsequent to surrender is not necessarily excluded.

Broadly speaking, these trends have been confirmed, especially regarding the presumption that authorities of other Member States are acting in good faith. More recent caselaw indicates that the Irish courts have quite an open attitude to the possibility of errors or problems regarding procedural requirements being remedied within the legal system of the issuing Member State in the sense that they are willing to permit matters such as delay to be dealt with by the judicial authority of the issuing Member State. A number of important points have been clarified since 2009, which can be dealt with under the following headings:

- The presumption of confidence in the authorities of other Member States, the extent of review of laws of other Member States, and practical issues of comparison (5.1);
- The scope of the grounds of refusal, under s. 37 on fundamental rights in particular (also including minimum gravity and the requirements of Irish law that the person surrendered has fled from the issuing Member State under s. 10 and regarding *in absentia* trials under s. 45), and the extent to which Irish constitutional guarantees are expected to be fulfilled in the criminal procedure of issuing Member States (5.2);

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<sup>16</sup> Conway (2009), op cit, pp. 296-298.

- The extent to which an issuing Member State is required to provide as much information as possible about the nature of the process to which a surrendered person will be subject, the nature of the requirement under s. 21A of the 2003 Act that decision has been made to charge and bring to the trial the person whose surrender is requested (5.3);
- Speciality (5.4);
- Double jeopardy (5.5);
- Territoriality (5.6);
- Other issues (5.7).

These categories are now looked at in turn.

### **5.1 Presumption of Confidence in the Authorities of other Member States, Extent of Review of Laws of other Member States and Practical Issues of Comparison:**

This category overlaps the category discussed below in 5.2 on grounds for refusal, although it is somewhat more general as it deals with the overall attitude of the Irish courts to differences in criminal procedure across EU Member States. The broad principle that the Irish courts should have confidence in an EAW submitted by the authorities of other Member States had been set out quite early on in the Supreme Court judgment in *Minister for Justice Equality and Law Reform v. Altaravicius*, where it was held that what is envisaged by the Framework Decision and the EAW Acts is that upon a properly completed EAW being presented it should in general not be necessary to go behind the same, all relevant information being before the court.<sup>17</sup>

In *Minister for Justice Equality and Law Reform v. Ó Fallúin/Fallon*,<sup>18</sup> Finnegan J. in the Supreme Court held that the European Arrest Warrant Acts “do not confer on the courts a general discretionary power to refuse to surrender and neither does the Framework Decision envisage such a power”.<sup>19</sup> He continued that where it was established that a judicial authority within the meaning of the 2003 Act had in fact issued the EAW in question, it was “duly issued” within the meaning of s. 10 of the Act, as amended by s. 71 of the Criminal Justice (Terrorist Offences) Act 2005. Neither the Act, in using the word “duly”, nor the Framework Decision can be interpreted as permitting, let alone requiring, the courts of the executing state to embark on what would be in effect a judicial review of the validity of an order of the court or judicial authority of the requesting state according to the law of that State.

As well as assuming the validity of the procedure of the issuing Member State, Irish courts should assume that issuing Member States will comply with the EU Charter of Fundamental Rights. *Minister for Justice and Equality v. Busby*<sup>20</sup> was an appeal from an order of surrender made on 29th July 2013 by Edwards J. in the High Court under s. 16 of the European Arrest Warrant Act 2003, as amended, that the appellant be surrendered to the United Kingdom for terrorism offences arising from his membership of the Scottish Liberation Army. The point to be determined by the Supreme Court was whether it was necessary to show that the executing State could prosecute the act or omission of which the offence consisted on a similar basis to the jurisdiction asserted by the issuing Member State? In this regard, Denham C.J. cited Fennelly J. stating in *Minister for Justice, Equality & Law Reform v. Stapleton*:

It follows, in my view, that the courts of the executing member state, when deciding whether to make an order for surrender must proceed on the assumption that the courts of the issuing member state will, as is required by Article 6.1 of the Treaty on European Union, ‘respect ... human rights and fundamental freedom’. Article 6.2 provides that the Union is itself to ‘respect fundamental rights, as guaranteed by the European Convention on Human

<sup>17</sup> [2006] 3 IR 148.

<sup>18</sup> [2010] IESC 37, 19th May 2010.

<sup>19</sup> See similarly Denham C.J. in, e.g. *Minister for Justice, Equality & Law Reform v. Koncis* [2011] IESC 37, 29<sup>th</sup> July 2011, para. 38.

<sup>20</sup> [2014] IESC 70, 12<sup>th</sup> December 2014.

Rights and Fundamental Freedoms ... and as they result from the constitutional traditions common to the Member States, as general principles of community law.<sup>21</sup>

She further cited Murray C.J. in *Minister for Justice Equality and Law Reform* to the effect that he was not aware of any authority for the principle that the extradition or surrender of a person to a foreign country would contravene the Constitution simply because their legal system and system of trial differed from the Irish Constitution, but that there may well be egregious circumstances such as a clearly established and fundamental defect in the system of justice of a requesting state where a refusal of an application for surrender may be necessary to protect such rights.<sup>22</sup>

The standard of "egregious" defect in the criminal procedure of the requesting Member State as a ground for refusal of surrender was confirmed again in *The Minister for Justice & Equality v. Buckley*.<sup>23</sup> This was an appeal to the Supreme Court based on an argument that the potential right of the prosecution in the United Kingdom to introduce evidence of an alleged co-conspirator's conviction in a trial for conspiracy would be incompatible with the Irish Constitution in that it would be a denial of the respondent's right to hear evidence presented in the context of a trial and to contest such evidence by cross-examination. MacMenamin J. stated:

Both *Brennan* and *Nottinghamshire County Council* are authority, therefore, for the proposition that, absent some matter which is fundamental to the scheme and order of rights ordained by the Constitution, or egregious circumstances, such as a clearly established and fundamental defect, or defects, in the justice system of a requesting state, the range and focus of Article 38 must be within the State and not outside it. The Court is presented, here, with what, at its height, can only be characterised as a 'different rules of evidence case'; but no more.

I would, therefore, summarise matters this way. First, the case advanced by the appellant is hypothetical, in that its actual or likely impact on the respondent is unclear, and certainly no capable of being characterised as a defect in the system of justice of the requesting state. Second, even if, hypothetically, ss.74 and s.75 P.A.C.E. 1984 are not in accordance with the values found in Article 38; it is immaterial, if the appellant cannot show what would be at issue would be, or is likely to be, an "egregious" departure amounting to a denial of fundamental or human rights (per Murray C.J. in *Brennan* [2007] 3 IR 732 at p. 744 par. 40). There would have to be significantly more: a real and substantive defect in the system of justice, where fundamental rights were likely to be placed at risk, or actually denied. As Murray C.J. pointed out in *Brennan*, rules of evidence "may differ" between states, and that alone does not at all lead to the necessary conclusion that there is a breach of fundamental rights in the requesting state. Finally, and again as held in *Brennan* and *Nottinghamshire County Council*, the reach of Article 38, save in exceptional circumstances, goes no further than the boundary of the State. There is nothing in Article 38 to suggest anything beyond that. What is in question, then, is the lawfulness of the *surrender* of the appellant in this jurisdiction. I would, therefore, answer the question in the negative.<sup>24</sup>

McMenamin J. also refers to "fundamental to the scheme and order of rights ordained by the Constitution", which is an elaboration of the notion of an egregious defect in the procedure

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<sup>21</sup> Ibid, para. 18, citing Fennelly J. stating in *MJELR v. Stapleton* [2008] 1 IR 669.

<sup>22</sup> [2014] IESC 70, para. 19, citing Murray C.J. in *Minister for Justice Equality and Law Reform v. Brennan* [2007] 3 IR 732.

<sup>23</sup> [2015] IESC 87, 26th November 2015.

<sup>24</sup> Ibid, paras. 24-25.

of the issuing Member State: the defect is judged by fundamental principles of constitutional protection for criminal suspects under Irish law.

That different legal and prosecution structures across the Member States should not inhibit the operation of the EAW is apparent from *Minister for Justice Equality and Law Reform v. McArdle & Brunell*.<sup>25</sup> McArdle and Brunell were the subject of EAWs from the Netherlands and specifically, issued by the Public Prosecutor of Amsterdam. Three questions needed to be decided as certified by the High Court for the Supreme Court : (i) Is it necessary, once there is evidence of the existence of a domestic arrest warrant or other orders of a judicial authority which is the basis for a EAW, for the High Court in Ireland to be satisfied before ordering surrender that the arrest warrant or other order of the judicial authority is subject to independent judicial oversight or scrutiny?; (ii) If so, is the High Court entitled to presume that the domestic warrant has been the subject of independent judicial oversight or scrutiny for the purpose of a s. 16 hearing?; (iii) If the answer to questions 1 and 2 is yes, was the High Court correct in concluding that the presumption was not rebutted on the evidence in the present case? Denham C.J. in the Supreme Court observed that the net issue to be determined was whether a public prosecutor could be considered a competent judicial authority for the purpose of issuing an EAW. In accordance with the jurisprudence of the Supreme Court, and the principles of mutual respect and co-operation. She observed that there was a burden on the appellants to address issues that they wished to raise as to the nature of the “judicial authority” and they had not met the burden in this case. Denham C.J. noted that the structure and composition of judicial systems in the Member States of the EU are varied and that in many countries the public prosecutor is an integral part of the judicial structure or judicial corps. The issue was relevant to extradition generally, and, for example, the text and explanatory materials of the European Convention on Extradition 1957<sup>26</sup> indicated that a public prosecutor could fall within the concept of judicial authority. Denham C.J. concluded that it was manifest in the operation of the EAW that a public prosecutor may be designated as a judicial authority and, in those circumstances, having regard to the principles set out in *CILFIT* that there are no grounds for a reference to the European Court of Justice under Article 267 TFEU.<sup>27</sup> It is apparent from the judgment that a person seeking to resist surrender on grounds of differences between Irish law and procedure and those of the issuing Member State must show how those differences somehow fall within one the grounds for refusal for surrender specified in the 2003 Act as amended.

The issue of compatibility between Irish law and procedure and that of other Member States was considered in detail by O'Donnell J. in *Balmer v. Minister for Justice and Equality*.<sup>28</sup> This was an appeal regarding an EAW issued by the UK for Michael Anthony Balmer, who was subject to a life sentence in the UK with a licence to be released that had been revoked. It was not clear from the evidence if Balmer travelled to Ireland before or after the revocation of his licence (his licence was revoked in March 2012) or if travelling to Ireland was itself a breach of the licence. The EAW was issued in October 2012. Balmer objected to surrender on grounds that the surrender would constitute a contravention of the Irish Constitution inasmuch as his return would be to serve a sentence that at this stage would be purely preventative in nature and that return would contravene the Constitution and be incompatible with the State's obligation under the European Court of Human Rights in that the United Kingdom's procedures did not provide for any hearing before a licence was revoked and a person recalled to custody. Two points were certified for the Supreme Court from the Court of Appeal: (i) Where a prisoner has been sentenced in another jurisdiction to a life sentence and has served the portion of the sentence described as consisting of the entirety of the punitive element of the sentence, in conformity with Article 40.3 and Article 40.4 of the Irish Constitution, is it possible to take any further step in Ireland to enforce an apparent remaining element of the sentence that is ostensibly that of prevention or deterrence?; and (ii) Where a prisoner has been released on licence prior to the full expiry of their sentence and was sought to be recalled because of an apparent breach of licence, was it necessary, and to what

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<sup>25</sup> [2015] IESC 56, 25th June 2015.

<sup>26</sup> ETS no. 24.

<sup>27</sup> Case 283/81, *CILFIT* [1982] ECR 3415.

<sup>28</sup> [2016] IESC 25, 12th May 2016.

extent was it required, to have a hearing prior to or immediately proximate to that recall for such detention to conform with Article 40.4 of the Constitution and Article 5 of the European Convention on Human Rights? O'Donnell J. for the Supreme Court observed:

The proposition that Ireland will not refuse to surrender a person to another country with whom it has an agreement, whether bilateral, multilateral, or pursuant to the obligations of membership of the European Union, merely because it is said that the manner in which that person would be treated would not be permitted here under the Constitution, is one which is, by now, well established. At the same time, it is clear that there are circumstances in which a court obliged to uphold the Constitution must refuse to transfer a person or cooperate with another jurisdiction. However, neither the precise dividing line between cases of surrender and non-surrender, nor the principle justifying such a distinction, has been articulated in any detail in the decisions. These courts, perhaps wisely, have proceeded incrementally.<sup>29</sup>

Later in a lengthy judgment, O' Donnell J. discussed the limits of the application of the Irish Constitution abroad:

43. In my view, these are the reasons why it can be said that the Irish Constitution does not, in general, apply abroad. It also explains why the *Brennan* test applies to surrender. Irish constitutional law (and therefore s. 37(1)(b) of the EAW Act) distinguishes between events occurring abroad and those occurring here, not merely because they do occur abroad, and therefore, are observed rather than controlled by Irish law: it is also, and more importantly, because, particularly in the field of criminal law, they are controlled by the law of a foreign sovereign state. In this case, the execution of a sentence lawfully imposed, the trial of an offence contrary to law, and the enactment of laws providing for definitions of offences, punishments and administration of sentences, are all fundamental and central attributes of sovereignty. The comity of courts is not merely a matter of politeness between lawyers, or an end in itself: it is an aspect of the relationship between sovereign states. An essential corollary of sovereignty is the equality of states, expressed in the 14th century maxim "*non enim una civitas potest facere legem super alteram, quia par in parem non habet imperium*" (For it is not for one city to make the law upon another, for an equal has no power over an equal) Brownlie's *Principles of Public International Law*, 8th Ed (Oxford, 2012), at p. 448. Article 5 of the Constitution asserts, in words that were by no means rhetorical in 1937, that Ireland is a sovereign, independent state. By Article 1 of the Constitution, the nation affirms its sovereign right to determine its relations with other nations. The conduct of external relations of the State raises separate constitutional issues, and requires a wider constitutional focus than the question of whether a certain procedure would be permissible within the jurisdiction.

44. Article 29 of the Constitution outlines that Ireland affirms its "devotion to the ideal of peace and friendly co-operation amongst nations founded on international justice and morality". This statement encapsulates a key principle applicable to the circumstances of this case. Cooperation implies some give and take. It also focuses attention on reciprocity, and the equality of sovereign states. The making of an extradition treaty, adherence to a convention on extradition, the implementation of a framework decision, and adherence to international decisions in areas of family law may all raise issues when surrender or return is sought. It is also necessary to appreciate that those issues arise under the same instrument which permits Ireland to seek the surrender of suspects for trial of offences alleged to have occurred in Ireland

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<sup>29</sup> Ibid, para. 25.

in respect of which Ireland has jurisdiction, or for the return of individuals to the jurisdiction of the Irish courts. It is not, therefore, a case of the Irish Constitution controlling events abroad (in which case the only question would be whether the acts alleged amount to a breach of the Constitution); it is, as already observed, rather that the Irish court is observing events abroad. Moreover, those events are observed through the lens of Article 29, requiring friendly cooperation, and Articles 1 and 5, which, in asserting sovereignty, require the respect of the sovereignty of other countries. The events, with which we are concerned here, are not private transactions between individuals. They are, by definition, the application of the criminal law within the territory of a sovereign state (in most cases to, and in respect of, its own citizens), or the execution of sentences imposed by their courts. These are key attributes of sovereignty of foreign friendly states, whose sovereignty we are bound by the Constitution to respect, in the same way as we expect respect for matters within our own jurisdiction. This is why, in my view, it is correct to speak of s.37 of the EAW Act as applying only to matters of “egregious” breach of fundamental principles of the Constitution or when something is so proximate a consequence of the court’s order and so offensive to the Constitution as to require a refusal of surrender or return. It may be that the concept of friendly cooperation may also permit or require steps to be taken which would not have been taken in an earlier age, and not merely because the provisions of the Irish Constitution have been altered, but also because the area and content of international cooperation has extended. Such cooperation is, however, not unlimited. It is, for example, by the terms of the Constitution itself subject to justice and morality. There are also examples of limitations on this principle by consent, or international agreement or otherwise. It is neither necessary nor desirable to explore these circumstances here, since they were not adverted to in argument. It is enough to identify the focus of the analysis for the purpose of s.37, which, in my view, explains the application of the *Brennan* approach.

45. This suggests that this area cannot be subject to absolute bright line rules, and further, that progress should be careful and incremental, and in contested cases, should involve close consideration of the relevant facts. It is necessary, therefore, in my view, to look much more closely at the sentencing regime in the United Kingdom and to consider equally carefully the constitutional law on preventive detention in this jurisdiction than the argument on either side would permit before coming to a conclusion as to whether or not Mr. Balmer’s surrender is prohibited under the Constitution, and therefore under s.37 of the EAW Act.

The above passages confirm the “egregious breach” standard, but also set the broader context of equality of States, reliance by States on each other to mutually facilitate extradition, and friendly international relations that Ireland sought with other States. Later on in the judgment, O’Donnell J. noted<sup>30</sup> that Hogan J. in the Court of Appeal reminded himself of the observations of Lord Hope in the House of Lords in *Pilecki v. Circuit Court of Legnica*, that it must not be supposed that “it was the purpose of the Framework Decision to require member states to change their sentencing practices. The principle of mutual recognition indicates the contrary”.<sup>31</sup> O’Donnell J. also commented on the tests to be applied under s. 37 of the EAW generally, especially s. 37(1)(a) and s. 37(1)(b), on grounds for refusing surrender. On these provisions, O’Donnell J. stated:

66. ... Furthermore, the Irish court is entitled to apply a presumption that the national court of the requesting state is best placed to make a determination

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<sup>30</sup> Ibid, para. 57.

<sup>31</sup> Ibid, para. 25, referring to *Pilecki v. Circuit Court of Legnica* [2008] 1 WLR 325, [2008] 4 All ER.

as to compatibility [with the ECHR], at least in the first place. Such a state has, after all, the obligation of conducting the trial and administering the sentence. It may be rare, therefore, for a national court to have to address the question equivalent to a determination under s. 37(1)(a) of the EAW Act without the benefit of reports and decisions from the institutions of the Council of Europe or in circumstances where it is not entitled to rely, at least in the first place, on the existence of national courts bound to uphold the provisions of the Convention. However, where such an issue does arise, the question for the national court would be whether the particular provision in issue is a breach of rights guaranteed in the Convention. That is an entirely distinct test from the test posed under s. 37(1)(b) of the EAW Act, which is whether what is proposed is both such a direct consequence of surrender, and would, if it occurred in Ireland, be so egregious in breaching the guarantees of the Irish Constitution that the Court cannot, consistently with its constitutional obligations, order surrender.

The judgment is also important because of *obiter* comments regarding the principle of the primacy or supremacy of EU law:

69 The conclusion I have come to in this case means that this Court does not have to address any issue of the interpretation of s.37 by reference to the Framework Decision, and in particular it is not necessary to here consider the impact of the decision of the Grand Chamber of the ECJ in *Melloni v. Ministero Fiscale* (Case C- 399/11). Of course, it might be said that the obligation to give a conforming interpretation to implementing legislation as laid down in *Pupino* cannot permit a court to give an interpretation that is *contra legem*, and s.37 is apparently clear in its terms. This issue was not addressed in the course of argument, but it is something which the Court itself recognises. Issues may yet arise for the Court as to the interpretation to be given to section 37. It cannot be too readily resolved by invocation of undoubted principles of primacy, unity and effectiveness of European law since Article 6.3 of the Treaty of the European Union recognises fundamental rights resulting from constitutional traditions common to Member States as a general principle of that same European law. Furthermore, the fair trial guaranteed by Article 47 of the Charter of the European Union might be considered to extend to the process both in the executing state and in the trial state. In principal, the primacy and effectiveness of European law is not necessarily compromised by decisions to refuse surrender because of the impact of any such decision in the executing state on long established principles derived from fundamental values. This is a matter which may require careful consideration in an appropriate case, and indeed sensitive and respectful dialogue between national courts and the ECJ. It may also require to be addressed at national level since the terms of the Framework Decision are ultimately matters which can be determined at national level. I have thought it preferable, therefore, to address the question of any potential breach of the Constitution at the outset, since it is only if this Court considered that surrender would constitute a breach of the Constitution that the issue arises at all, and it would then become necessary to address these difficult and sensitive issues.

This passage indicates that any consideration of the supremacy of EU law in the context of the EAW might not lead to a very simple and automatic priority of EU law principles over Irish law. On the two issues submitted by the Court of Appeal, O'Donnell J. concluded that it is possible for Ireland to surrender, in accordance with the EAW, a person sentenced in another jurisdiction to a life sentence who has served a portion of that sentence described colloquially as consisting of the entirety of the punitive element of the sentence and regarding the second issue, it is not necessary to speculate on what is required in the abstract, but the Court was satisfied that the provision of information and the capability in the UK to review or appeal a decision to recall a person released on licence, both of which apply in this case, are sufficient



to comply with any requirement of fair procedures under either the Constitution or the Convention.

**5.2 The scope of the grounds of refusal, under s. 37 on fundamental rights in particular (also including minimum gravity and the requirements of Irish law that the person surrendered has fled from the issuing Member State under s. 10 and regarding *in absentia* trials under s. 45), and the extent to which Irish constitutional guarantees are expected to be fulfilled in the criminal procedure of issuing Member States:**

The category of grounds of refusal under s. 37 of the 2003 Act as amended overlaps with the category discussed in 1.5.1. As stated, for example, by Denham J. in *Minister for Justice, Equality & Law Reform v. Koncis*, “The Courts are not given a general discretionary power to refuse surrender [under the 2003 Act]”<sup>32</sup>, reflecting the quote cited above in 1.5.1 by Finnegan J. in *Fallon*. The “egregious defect” standard applies to s. 37(1)(b) on refusal of surrender for breach of constitutional rights, as indicated in *Balmer*, for example. Grounds of refusal are specified in the 2003 Act as amended, mainly in s. 37, but failure to satisfy a range of other requirements in other sections of the Act do in effect also amount to grounds of refusal, including the requirement of Irish law that the person surrendered has fled from the issuing Member State and regarding *in absentia* trials.

This general idea that the mere existence of differences in criminal procedure in another Member State is not enough to justify a refusal to surrender by Irish courts seems self-evident in the context of non-harmonised criminal justice systems, but the practical issue presents itself of when differences are such as to justify a refusal to surrender. As O’Donnell J. indicated in *Balmer*, quoted just above, this will be decided incrementally. Murray C.J. addressed these points in *Minister for Justice, Equality & Law Reform v. Brennan* on the application of s. 37(1)(b) of the European Arrest Warrant Act 2003 and set quite a high threshold before a refusal to surrender would be justified: “egregious circumstances, such as a clearly established and fundamental defect in the system of justice of a requesting state”.<sup>33</sup> In *Brennan*, the respondent had absconded from prison in the United Kingdom and an EAW was issued, seeking his surrender for, *inter alia*, the offence of escape from lawful custody, with the EAW delivered stating that escape from lawful custody was a common law offence, and the maximum sentence, therefore, was life imprisonment. The warrant also explained the sentencing regime in the United Kingdom in respect of life sentences, and explained the system of tariff-setting and subsequent detention. The argument was made on behalf of the respondent that such a sentence was incompatible with the Irish Constitution as the setting of a minimum tariff under the United Kingdom regime did not, it was alleged, take account of the circumstances of the crime, or the respondent’s culpability, personal circumstances or age, which, it was argued, were essential components of sentencing under the Irish Constitution. Murray C.J. held as follows:

The manner, procedure and mechanisms according to which fundamental rights are protected in different countries will vary according to national laws and constitutional traditions. The checks and balances in national systems may vary even though they may have the same objective such as ensuring a fair trial. There may be few, if any, legal systems which wholly comply with the precise exigencies of our Constitution with regard to these matters. Not all for example will provide a right to trial by jury in exactly the same circumstances as our Constitution does in respect of a trial for a non-minor offence. Rules of evidence may differ. The fact that a person would be tried before a judge and jury in this country for a particular offence could not in my view, be a basis for refusing to make an order for surrender solely on the grounds that in the requesting state he or she would not be tried before a jury. The exceptions which we have to the jury requirement, as in trials before the Special Criminal

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<sup>32</sup> [2011] IESC 37, 29<sup>th</sup> July 2011, para. 38.

<sup>33</sup> *Minister for Justice, Equality & Law Reform v. Brennan* [2007] IESC 21, 4th May 2007.

Court, acknowledges that a fair trial can take place without a jury even though it is constitutionally guaranteed for most trials in this country.

That is not by any means to say that a court, in considering an application for surrender, has no jurisdiction to consider the circumstances where it is established that surrender would lead to a denial of fundamental or human rights. There may well be egregious circumstances, such as a clearly established and fundamental defect in the system of justice of a requesting state, where a refusal of an application for surrender may be necessary to protect such rights. It would not be appropriate in this case to examine further possible or hypothetical situations where this might arise. The sole matter which I wish to make clear here is that the mere fact that a trial or sentence may take place in a requesting state according to procedures or principles which differ from those which apply, even if constitutionally guaranteed, in relation to a criminal trial in this country does not of itself mean that an application for surrender should be refused pursuant to s. 37(2) of the Act.<sup>34</sup>

In *Minister for Justice, Equality and Law Reform v. Murphy*, it was held that while it is a principle of Irish constitutional law that a prisoner is not detained for purely preventative purpose, this did not prevent surrender to the UK to serve a sentence that was partly preventive in nature.<sup>35</sup> The respondent had escaped from hospital detention and a surrender under an EAW was sought by the United Kingdom authorities. The respondent had been convicted in the United Kingdom on rape and assault charges and was sentenced to a "hospital detention order" coupled with a "restriction order", while the EAW stated that the defendant was to be "detained indefinitely". The effect of this was that he was to be detained in a psychiatric hospital with his discharge being at the discretion of the Mental Health Tribunal and the relevant Secretary of State. The Supreme Court ordered the respondent's surrender. The judgment of Denham J. in the Supreme Court established that only part of the sentence that the respondent would have to serve involved preventing further harm to society and this did not prevent surrender: "The law relating to sentencing is not identical in all Member States. In this case the law of the United Kingdom enables a sentence to be one of detention by way of a hospital order. Such a detention order apparently involves elements of protection for society".<sup>36</sup>

In contrast, a more general incompatibility of sentencing law between Ireland and an issuing Member State, due to incompatibility with the ECHR, may prevent surrender. *Minister for Justice and Equality v. Kelly aka Nolan*<sup>37</sup> concerned surrender based on an EAW issued by the United Kingdom in circumstances where part of the sentence to be served was indeterminate and preventative in nature, and depended on assessment of future risk posed by a defendant. Giving judgment for the Supreme Court, Denham C.J. stated:

22. In these circumstances, I am satisfied that the respondent should not be surrendered to serve a term of imprisonment in accordance with the former statutory regime of the United Kingdom which has been found to be in contravention of Article 5.1 of the European Convention on Human Rights. Accordingly, that prior statutory regime under which this particular respondent would be detained if surrendered constitutes a fundamental and systemic breach of the European Convention on Human Rights. To surrender the respondent to the United Kingdom in those circumstances would be a breach of Ireland's obligations under the European Convention on Human Rights. Accordingly, the surrender must be refused in accordance with s. 37(1)(a)(i) of the European Arrest Warrant Act 2003, which provides that a person shall

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<sup>34</sup> Ibid, paras. 39-40.

<sup>35</sup> [2010] 3 IR 77.

<sup>36</sup> Ibid, para. 49.

<sup>37</sup> [2013] IESC 54, 10<sup>th</sup> December 2013.

not be surrendered under the Act if his or her surrender would be incompatible with the State's obligations under the European Convention on Human Rights.

Amongst the issues addressed in *Minister for Justice, Equality & Law Reform v. Sliczynski*<sup>38</sup> was the requirement in s. 10 of the 2003 Act that a person surrendered from Ireland must have fled the issuing Member State. The issue as to whether the appellant "fled" the issuing Member State related to the fact that Irish law imposes a precondition, which is not to be found as a precondition in the Framework Decision, to the surrender of persons pursuant to an EAW where the surrender is sought for the purpose of serving a term of imprisonment, in s. 10 of the Act of 2003 as inserted by the Act of 2005, to the effect that surrender should be ordered where the person in question "fled", before commencing or completing his or her sentence, the jurisdiction that imposed the sentence. On the facts, Murray C.J. concluded that on the evidence before him the learned trial Judge was entitled to be satisfied that in leaving Poland the appellant was seeking to evade the consequences of the three sentences which had been imposed on him prior to leaving Poland and therefore to conclude that he had "fled", within the meaning of the section, the jurisdiction which imposed the sentences.<sup>39</sup> The final part of the judgment concerned an undertaking under s. 45 of the European Arrest Warrant 2003 regarding *in absentia* trials. Section 45 requires that the issuing Member State must give an undertaking to retry a surrendered person if a previous *in absentia* trial had not been notified to the person to be surrendered or the person has not been permitted to attend it. Section 45(b)(i) had to be interpreted and applied as a matter of Irish law, rather than regarding the requirements of Polish law regarding notice. On the facts and information as provided, it could only be concluded that the appellant was not actually notified of the time and place of trial, as all that was known was that his mother was notified and at an address at that the Polish authorities knew the appellant not be at, and for that reason alone, absent the undertaking set out in s. 45, he could not be surrendered to serve a sentence in respect of that particular offence as specified in the warrant. Although the Act fell to be interpreted in the light of the Framework Decision, there was nothing in the provisions of the latter that could lead to any other interpretation of the plain meaning of s. 45, but in any case this interpretation seemed compatible with the wording of Article 5(1) of the Framework Decision. Accordingly, the appellant could not be surrendered for the purpose of serving a sentence in respect of the fourth offence for which he was convicted and sentenced *in absentia*, but of course he should be surrendered in respect of the other three offences.

*In absentia* trials also arose in *Minister for Justice and Equality v. Horvath*.<sup>40</sup> The issue on appeal was whether the High Court was correct in law in its decision that the surrender of the respondent to Hungary for the purposes of a second instance prosecution fell within the scope of s. 45 of the European Arrest Warrant Act of 2003, as amended and substituted by s. 23 of the European Arrest Warrant (Application to Third Countries and Amendment) and Extradition (Amendment) Act 2012. Denham C.J. cited *Minister for Justice v. Bailey*,<sup>41</sup> where Fennelly J. stated:

There does not seem to me to be any reason in principle to exclude the principle of conforming interpretation from a measure merely because it implements an "opt-out." On the contrary, logic demands that the principle be applied equally to such a situation. Indeed, it might well be that a correct interpretation would lead to the exclusion of an individual from the benefit of a national measure, once it was correctly interpreted as a matter of European Union law. Accordingly, I am satisfied that section 44 must be interpreted in

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<sup>38</sup> [2008] IESC 73, 19th December 2008.

<sup>39</sup> Murray C.J. said agreed with Macken J. in the High Court that the subjective reasons given by a person such as the appellant for leaving the issuing Member State and coming to Ireland, in this case that he wanted to make a better life for himself, may be taken into account within the context of the facts and circumstances of the case as a whole. Future caselaw may determine if ever subjective intention may justify a finding that the physical act of fleeing did not amount to fleeing under s. 10 of the 2003 Act.

<sup>40</sup> [2017] IESC, 15 2<sup>nd</sup> March 2017.

<sup>41</sup> *Ibid*, para. 12, citing [2012] IESC 16, [2012] 4 IR 1.

conformity with article 4.7(b) and not merely with the general objectives of the Framework Decision.

The terms of s. 45 of the European Arrest Warrant Act 2003, prior to amendment in 2012,<sup>42</sup> applied to the facts, and in interpreting the words of the section, they should be given their plain and ordinary meaning. It is not contested that the respondent was tried in his absence, and was not notified of the trial. Thus, *prima facie*, s. 45 was applicable to him as he was tried and convicted when he was not present, and had not been notified of the time and place of this trial. The wording of s. 45 was clear. Denham C.J. stated she was satisfied that there was an evidential and legal basis upon which the learned trial judge could reach the conclusion he did, and she would affirm his decision that an undertaking for a re-trial was required by section 45, in its un-amended form (i.e. prior to amendment in 2012).<sup>43</sup>

The decision in *Sliczynski* needs to be read in light of (i) the supranationalisation of EU criminal justice since the Treaty of Lisbon and (ii) the European Arrest Warrant (Application to Third Countries and Amendment) and Extradition (Amendment) Act 2012. Since the Treaty of Lisbon came into effect, the supremacy doctrine now applies to this area of EU law, so that any conflict between Irish legislation and EU legislation would normally have to be resolved in favour of EU law requirements. Section 22 of the 2012 Act inserted s. 45(d) into the 2003 Act, amending the Irish requirements as to an undertaking regarding *in absentia* trials to give effect to the 2009 Framework Decision discussed above:

45.—A person shall not be surrendered under this Act if he or she did not appear in person at the proceedings resulting in the sentence or detention order in respect of which the European arrest warrant was issued, unless the European arrest warrant states that—

(a) he or she was summonsed to attend in person the proceedings, or he or she was otherwise made aware, by official notification, of the time when, and place at which, those proceedings were to take place, and he or she was informed that a sentence could be imposed even if he or she did not appear,

(b) he or she was aware of the proceedings concerned and was represented at those proceedings by a lawyer whom he or she appointed,

(c) after having been served with the sentence and expressly informed of his or her right to a retrial or an appeal in which he or she would have been able to participate (and which would have been an examination of the case on its merits, including the possibility of adducing fresh evidence) and which could have led to a reversal of the sentence, he or she—

(i) expressly stated that he or she did not contest the sentence, or

(ii) did not request the retrial or appeal within the time limit for exercising that right,

or

(d) where he or she was not personally served with the sentence or order, he or she will be personally served with the sentence or order without delay after surrender and will be expressly informed of his or her right to a retrial or an appeal in which he or she will be able to participate (and which will be an examination of the case on its merits, including the possibility of adducing fresh evidence) and which could lead to a reversal of the sentence or order, and of the time limit for exercising that right.

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<sup>42</sup> Section 23 of the 2012 Act amended s. 45 to reflect the changes introduced at EU level regarding in absentia trials by Council Framework Decision 2009/299/JHA, discussed above.

<sup>43</sup> In *Minister for Justice Equality and Law Reform v. Slonski* [2010] IESC 19, 25<sup>th</sup> March 2010, Denham J. stated it was appropriate to consider only the legal argument made on the basis that the respondent failed to bring to the attention of the learned High Court judge evidence upon which the High Court could properly conclude that the appellant fled Poland, this making it clear that the question of facts is for the High Court. On the facts, she applied *Sliczynski* and allowed the appeal.

The use of 'or' before s. 45(d) seems to indicate that (a)-(d) are alternative requirements. In particular, (d) seems to codify *Sliczynski* regarding actual notice being given to a person, although it may have been clearer to have inserted s. 45(d) into a single provision with s. 45(a).

*Minister for Justice & Equality v. Lipinski*<sup>44</sup> concerned an *in absentia* judgment on sentencing. Clarke J. (as he then was) delivered judgment for the Supreme Court and stated that the net issue that arose on appeal stemmed from the fact that a sentence imposed by the relevant Polish court, when part-served, was initially suspended but, by a subsequent order, reinstated without notification to the person (whose surrender was sought) of the hearing that led to that reinstatement. The issue was whether these facts precluded the surrender of Lipinski. Clarke J. observed that there are some minor differences in the wording of the relevant provisions of the Irish implementing measures, being s. 45 in either its original or amended form, as compared with the equivalent provisions of the Framework Decisions (again whether the 2002 Framework Decision or the 2009 amending Framework Decision). Whereas Article 4a of the Framework Decision in its current form refers to non-appearance in person at 'the trial', s. 45 refers to non-appearance 'at the proceedings', but it did not appear that any such differences could be material to the proper construction of the legislation as a whole. Ireland has, by enacting s. 45 of the 2003 Act as amended, opted in to the regime under Article 4 of the Framework Decision, and no question, therefore, arose from the discretionary nature of Article 4a. He further observed that the annex to the Framework Decision in its amended form requires the EAW to specify first whether the person actually appeared in person at the trial resulting in the relevant decision and if not a specification of which of the various exceptions to the general rule requiring appearance in person, which can be found in sub. paras. (a), (b), (c) or (d), are said to have applied. The EAW in this case did not specify that any of those permissible exceptions to actual attendance in person occurred, but rather specified that Mr. Lipinski had appeared in person at the trial resulting in the relevant decision. It was agreed by counsel on both sides that the appeal, therefore, turned solely on the question of whether Mr. Lipinski's case came within the substantive provision preventing surrender in *in absentia* cases, if it did, then his surrender could not be directed for none of the exceptions are relied on and, if it did not then, that being the only issue remaining, there would be no barrier to his surrender. Clarke J. concluded that it did not seem that the material question of the proper interpretation of Article 4a is *acte clair*, and the Supreme Court being a court of final appeal, it follows that there must be a reference of that issue to the Court of Justice of the European Union under Article 267 of the Treaty on the Functioning of the European Union. Thus, judgment in the case was stayed pending the outcome of the reference for a preliminary ruling.

*Rimsa v. Governor Cloverhill Prison & Others* is an example of a conflict within the Irish implementing legislation and also between one provision of that legislation and the Framework Decision.<sup>45</sup> Murray C.J. delivered judgment for the Supreme Court. Article 23 of the Framework Decision on an EAW requires that any agreement to postpone a surrender after the initial ten days provided for must be one that is agreed upon by the judicial authorities of *both* the executing state and the issuing Member State. Thus, Murray C.J. found that there was a clear and manifest conflict between article 23(3) of the Framework Decision and s. 16(5)(b) of the Act of 2003, in that the latter expressly permits and requires any agreement by an authority in the State on a new surrender date to be agreed by the Minister, as the Central Authority in the State and not the executing judicial authority. Section 16(5)(b) of the Act of 2003 did not specify the Central Authority or any authority in the issuing Member State as the authority with which an agreement for a postponed surrender date may be made, can, an ambiguity that could only be resolved by looking at the provisions of the Framework Decision in order to avoid, to the extent to which the language of the provision permits, a result contrary to that envisaged by the framework decision, and accordingly, even though para. (b) of s. 16(5) expressly authorised the Central Authority in the State to reach an agreement on a new date for surrender, the agreement to do so could

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<sup>44</sup> [2017] IESC 26, 22<sup>nd</sup> May 2017.

<sup>45</sup> [2010] IESC 47, 28<sup>th</sup> July 2010.

only be made by that Authority with the judicial authority of the issuing Member State. Moreover, while the entering into an agreement with the Latvian authorities by the Central Authority in the State was in conformity with s. 16(5)(b), it was in direct conflict with the provision of Article 23.3 of the Framework Decision and therefore not in accordance with s. 10 of the Act of 2003. Article 23.3 provides that If the surrender of the requested person within the period laid down in paragraph 2 is prevented by circumstances beyond the control of any of the Member States, the executing and issuing *judicial* authorities shall immediately contact each other and agree on a new surrender date, in which event, the surrender shall take place within 10 days of the new date thus agreed. Murray C.J. noted that it was rather belatedly accepted, during the course of the hearing, on behalf of the Central Authority (i.e. the Minister), that there was a direct conflict between the provisions of Article 23.3 of the Framework Decision and those of s. 16(5)(b), which failed to properly give effect to the Framework Decision. If the Central Authority had acknowledged from the outset that obvious conflict, he observed that this litigation would probably have been resolved at a much earlier stage or indeed rendered unnecessary. What occurred in the case was that the Irish Central Authority in entering into the agreement to postpone the date for surrender, rather than taking steps to ensure that there was agreement between the two respective judicial authorities as Article 23(3) of the Framework Decision requires, failed to act in accordance with the requirements of s. 10 of the Irish Act. This was in addition to the earlier conclusion that the agreement was also contrary to s. 16(5)(b) insofar as it was made with the Central Authority of Latvia rather than the Latvian judicial authority as identified in the arrest warrant. For these reasons, there was no valid agreement to postpone the date of surrender pursuant to s. 16(5)(b) of the Act and, therefore, the applicant's continued detention was unlawful. As a postscript to the case, s. 10 of the 2012 Act amended s. 16(5) to reflect this judgment.

The important issue of proportionality as a standard of review (given the broader influence internationally of proportionality as a standard of review and its potentially wide scope) in decisions by Irish courts on EAW requests for surrender was addressed in *Minister for Justice & Equality v. Ostrowski*.<sup>46</sup> Denham C.J., McKechnie J. and MacMenamin J. delivered judgment for the Supreme Court. McMenamin J. agreed with Denham C.J.. The High Court certified the following question for the consideration of this Court: Is the issue of proportionality a matter solely for consideration by the issuing judicial authority when deciding whether to issue an EAW, or is the High Court in Ireland entitled to consider proportionality at a point in time when it is considering whether to surrender a respondent on foot of an [EAW]? This was the first case in which an EAW had been reviewed by Ireland on proportionality grounds. The High Court described the case as having unusual features regarding the relevance of the effect on Ostrowski for his family life of an EAW, in as much as the High Court accepted that he was unlikely to receive a custodial sentence if returned to Poland, and also that he was not a fugitive in the usual sense of that term. The High Court refused surrender on the basis that it would be disproportionate to do so relative to the offence for which surrender was sought. Denham C.J. in the Supreme Court noted while in this case the High Court clearly considered the offence trivial, but that once an offence was a corresponding offence, and the potential sentence met the requirements of the Act of 2003, the question of whether or not the offence is trivial was not a matter for the High Court (emphasis in the judgment).<sup>47</sup> She continued that the Framework Decision might, at least to some degree, be said to have addressed a proportionality question in this context in providing for what has been called the minimum gravity test with regard to offences that fall within the ambit of the Decision, which was reflected in s.38(1)(a)(i) of the Act of 2003, the effect of which is that a person may only be surrendered on foot of an EAW for the purposes of being prosecuted if the offence for which surrender is sought is subject to a maximum sentence of at least 12 months. She further held that the High Court has no role to look at possible sentences that might be awarded in an issuing Member State when a person is surrendered and to consider whether such a sentence is proportionate and that it would be virtually impossible in the vast majority

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<sup>46</sup> [2013] IESC 24, 15<sup>th</sup> May 2013.

<sup>47</sup> *Ibid*, para. 25.

of cases for the High Court or any national court to ascertain the likely sentence to be imposed by a court in the requesting state in all the circumstances of a particular case. Denham C.J. went on to consider the respondent's argument that surrender would cause a disproportionate interference with his rights under s. 37 of the Act of 2003 and concluded that even if the principle of proportionality might arise in some circumstances, even if it could be a factor in a case, there is no basis in the principle of proportionality upon which to refuse to surrender the respondent in this case. Concerning the incorporation of the Framework Decision on an EAW into Irish law, McKechnie J. noted:

14. As explained more fully later in this judgment, the Framework Decision is binding upon Member States "as to the result to be achieved but shall leave to the national authorities the choice of form and methods. [It] shall not entail direct effect" (ex Art. 34(2) TEU provisionally carried over by article 9, Protocol No.36 on Transitional Provisions annexed to the Treaties). As is therefore evident, without having direct effect, Member States must pass measures to implement the Decision in their individual jurisdictions. That has been done in this State by the enactment of the 2003 Act.

15. The Act, at least with regard to certain of its provisions, according to Fennelly J. in *Dundon* "presents unusual features of interpretation" (p.545), whilst Murray C.J. in *Altaravicus*, when specifically referring to s.10 but also when clearly having in mind other provisions, described its interplay with the Decision as "... to say the least, an idiosyncratic method of legislating and likely to create ambiguity" (p.155). The Oireachtas has responded, at least to some extent, by the enactment of the 2012 Act, but such, for reasons previously given, has no application to this case. Therefore the difficulties, as identified, continue to exist.

McKechnie J. also noted, citing Denham J. (as she then was) in *Koncis* that "The Courts are not given a general discretionary power to refuse surrender", <sup>48</sup> and stated that unless there is to be found within the Act, the Framework Decision, or general principles of Irish or EU law, a justifiable reason for refusing surrender, the same should be ordered once the relevant statutory terms and conditions of the Act have been complied with. He further noted that no challenge is mounted purely on the basis of the warrant being re-issued, nor could it, in light of the Supreme Court's decision in *Koncis*. McKechnie continued that consequent upon s. 37 of the 2003 Act, if rights appropriate to the respondent are engaged, being those found in the Constitution or the European Convention on Human Rights, and if his surrender would contravene the relevant constitutional provision or be incompatible with the State's obligations under the Convention (abbreviated to "Convention rights"), he must be released, and the principle of proportionality is central to this assessment. He held that at the outset, when considering proportionality, a court is not engaged in the traditional or historical exercise of deciding a *lis* between the parties because there is no question of the extraditee having to discharge any onus of proof in a legal sense, although of course he does carry an evidential burden, so as to engage with the asserted rights in the first instance. McKechnie J. observed that the situation in the United Kingdom was that the public interest in extradition proceedings is a weighty and thoughtful one and as a result, it is only in the rarest of cases that an asserted interference with family rights will outweigh the public interest as constant factor, but that he was inclined to address the issue in a less rigid and less prescriptive manner. He continued that he did not favour any fixed or specific attribution being assigned to the importance of public interest in this context and that every case on both sides of the assessment will have its individual set of values and must be so viewed. In this regard, he concluded that where resistance is offered by virtue of a Convention or Constitution right, the court must conduct a fact-specific enquiry into all relevant matters so that a fair balance can be struck between the rights of the public and those of the person in question, but that consequences, inherent in the process or extradition and surrender itself, without more, will

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<sup>48</sup> *The Minister for Justice, Equality and Law Reform, v. Koncis* [2011] IESC 37, at para.38.

attract a much lesser value than consequences with real and substantial effect on the individual.

Although there is a difference of approach between Denham C.J. and McKechnie J. in the extent of their willingness to consider proportionality as a general ground of review of EAW requests in the High Court, the difference between the majority and McKechnie J. may not make much difference in practice. On either approach, proportionality might still be considered within the terms of the Framework Decision both simply in terms of the principle of minimum gravity in the Framework Decision and also, arguably, under the grounds for refusal listed in s. 37 of the 2003 Act.

### **5.3 The extent to which an issuing Member State is required to provide as much information as possible about the nature of the process to which a surrendered person will be subject and the nature of the requirement under s. 21A of the 2003 Act that decision has been made to charge and bring to the trial the person whose surrender is requested:**

In *Minister for Justice & Equality v. Herman*,<sup>49</sup> the Supreme Court outlined that the offence for which person's surrender is sought must be clear as to the punishment to be imposed and that separate EAWs may be appropriate for distinct offences in a situation where the issuing Member State has already issued an EAW and wishes then to proceed for more offences not already listed on that EAW, rather than seeking to amend the existing EAW. The case involved an appeal from the order of the High Court (Edwards J.), made on 28th March 2014, that the appellant be surrendered to the Czech Republic on foot of two EAWs dated the 10th August, 2011 and the 15th November 2012. Surrender on foot of a third EAW was stayed pending the outcome of this appeal. Thus, there were three EAWs involved in the facts of the case. The Czech authorities also submitted a document entitled 'European Arrest Warrant - Amendment', which referred to the ordering of a retrial regarding Warrant No. 03, rather than as before the enforcement of an existing custodial sentence. The certified point of law for the Supreme Court to determine in the appeal was:

In circumstances where S. 10 of the 2003 Act as amended sets out, in disjunctive terms, the four purposes for which surrender can be ordered in respect of an offence, does the Court have jurisdiction to order surrender in respect of an offence in circumstances where more than one of the purposes referred to in S. 10 (a) - (d) applies to the said offence; or where it is not clear from the Warrant and associated information which of the said provisions actually apply.

Denham C.J. stated that at the core of the appeal was the issue of clarity or the lack of it and that it was essential that when a court has before it a request for surrender that there should be clarity as to the offences for which surrender was sought and as to any proposed sentencing, this being the settled jurisprudence of the Court.<sup>50</sup> She observed that in the present case the lack of clarity was to some degree due to an aspect of the law of the Czech Republic, which enables a sentence in an earlier court decision to be varied by a later court decision, but the main issue that was unclear was as to exactly for what the requesting state sought the appellant. She noted that as a consequence of a prosecution under Warrant No. 3, the appellant might be given a more severe sentence on Warrant No. 1, in the global sentencing on Warrant No. 1 and Warrant No. 3 and, further, that it was not clear whether the maximum sentence would be eight years or more. The position in the case now was that instead of being sought for sentencing under Warrant No. 3 the appellant is now sought to be arrested and prosecuted and, further, the effect on Warrant No. 1 is that he may have to serve a different sentence on Warrant No. 1 to that set out in the warrant itself. This did not amount to a variance under s. 45C(b) of the European Arrest Warrant Act 2003 that the

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<sup>49</sup> [2015] IESC 49, 21<sup>st</sup> May 2015.

<sup>50</sup> *Ibid*, para. 17.



Court can disregard for the purpose of ordering surrender, rather there was a fundamental change from the purpose for which surrender was sought in the original warrant. Denham C.J. continued that where the national judicial authority that issued an EAW seeks to change a fundamental element in the nature or purpose of the warrant, as opposed to providing further information or corrections of a minor nature, a new warrant should be issued in the form required by the Act, namely, in the form in the Annex to the Framework Decision, so that it may be endorsed for execution in the State by the High Court, and she concluded that the appeal should be allowed regarding both Warrant no. 1 and Warrant No. 3, but that the appellant could be surrendered regarding the other EAW (Warrant No. 02). On balance, this judgment does not represent a restrictive or particularly demanding, or inflexible, approach to procedure: the nature of the offence and the possible sentence for which surrender was sought can reasonably be considered fundamental information.

The issue of information to be provided by the issuing Member State was also addressed in the previous judgment in *Minister for Justice, Equality & Law Reform v. Sliczynski*.<sup>51</sup> This was an appeal against an order of the High Court directing that Sliczynski be surrendered to the appropriate authorities in Poland for the purpose of serving four terms of imprisonment imposed on him by the Polish Courts in respect of four separate offences. Of the four offences, his conviction on one of them occurred when he was tried *in absentia* and sentenced. His first three convictions occurred on 19th January 2004, 30th December 2004 and 24th March 2005. For each conviction, a suspended sentence was imposed ranging from one sentence of one year and ten months' imprisonment to two sentences of two years' imprisonment. The suspension of the sentence in each case was subject to certain conditions with which the appellant was bound to comply. For the *in absentia* conviction, a two-year sentence was imposed that was not suspended. As a consequence of the *in absentia* conviction (and the fact that in breach of the conditions of suspension regarding the other offences he had, *inter alia*, absconded and failed to either keep in contact or report to his probation officer), the suspension of the earlier terms of imprisonment was lifted and orders made requiring him to serve those sentences. Four grounds of appeal were raised: (i) the High Court erred in admitting as evidence from the Polish Judicial Authority exhibited in affidavits sworn on behalf of the applicant/respondent on the grounds that it constituted inadmissible hearsay evidence; (ii) the wrong onus of proof had been applied regarding the appellant as a respondent in the application before the High Court; (iii) the High Court erred in finding that the appellant had fled Poland within the meaning of s. 10(d) of the European Arrest Warrant Act 2003, as amended; and, (iv) the High Court erred in deciding that the Polish Authorities were not obliged to provide an undertaking pursuant to s. 45 of the Act of 2003 on *in absentia* trials. On the issue of hearsay evidence (which in the common law refers to out-of-court statements admitted as proof of their content), which on the facts consisted of two letters that were received from the Requesting Authority in the form of the Polish Court and in each case signed by a District Court Judge, Murray C.J. noted that the Framework Decision on an EAW in establishing a new and simplified system for the surrender based on mutual trust and recognition of the Judicial Authorities of the Member States meant that an executing Judicial Authority may rely on additional information relating to the warrant and its contents provided by an issuing Judicial Authority. He went on to note that normally the information contained in the warrant should be sufficient to enable the executing Judicial Authority, in this country the High Court, to arrive at a decision on the application for surrender, but he had no doubt that it was foreseen by the drafters of the Framework Decision that even with a carefully designed form of warrant and one which has been properly filled in that, in the ordinary nature of things, in particular cases ambiguities might arise, or some lacunae on points of detail in the information found to exist, particularly when the standard form of arrest warrant falls to be issued by a Judicial Authority in one legal system and executed by a Judicial Authority in another legal system, e.g. regarding the use of different languages. Section 20(1) and (2) of the Act of 2003, as amended, are provisions by which the Oireachtas sought to give effect to the system of surrender envisaged by the Framework Decision so as to ensure that information could be furnished by the requesting Judicial Authority to the executing Judicial Authority, the High Court, and s. 20 must be interpreted in the light of the

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<sup>51</sup> [2008] IESC 73, 19th December 2008.

objectives of the Framework Decision and its provisions to specifically give effect to Article 15(2) and (3) of the Framework Decision so that the High Court would have available to it the information provided by the issuing Judicial Authority and would have full regard to that information, in addition to information provided in the EAW itself. Murray C.J. quoted his own prior judgment in *Minister for Justice v. Altaravicius*:

Generally speaking extradition arrangements and the like are issued on reciprocity and mutuality. Each country enters into such arrangements on the presumption that the other country will comply with their requirements and apply them in good faith. Those considerations apply equally to the system of surrender to the European arrest Warrant having regard to the provisions, explicit and implicit, of the Framework Decision.

He continued that the Oireachtas had chosen to deal with the specified or expressly prescribed kind of documents by means of s. 12, relating to the EAW itself and an undertaking required by the Act and to information under s. 11 of the Act that is to be regarded as an adjunct to the EAW itself, and with the transmission of further information, which may vary according to the nature of the request in each case, pursuant to s. 20 (or may not arise at all). The issue as to whether the appellant "fled" the issuing Member State related to the fact that Irish law imposes a precondition, which is not to be found as a precondition in the Framework Decision, to the surrender of persons pursuant to an EAW where the surrender is sought for the purpose of serving a term of imprisonment, in s. 10 of the Act of 2003 as inserted by the Act of 2005, to the effect that surrender should be ordered where the person in question "fled" before commencing or completing his or her sentence, the jurisdiction that imposed the sentence. On the facts, Murray C.J. concluded that on the evidence before him the learned trial Judge was entitled to be satisfied that in leaving Poland the appellant was seeking to evade the consequences of the three sentences which had been imposed on him prior to leaving Poland and therefore to conclude that he had "fled", within the meaning of the section, the jurisdiction which imposed the sentences.<sup>52</sup>

Clarity about information on sentencing is also apparent from *Minister for Justice Equality and Law Reform v. Kizelavicius*<sup>53</sup> involved an appeal by Modestas Kizelavicius, the respondent/appellant, from the decision of the High Court (Peart J.) delivered on the 8th April 2008 to surrender him to Lithuania in respect of three of the four offences outlined on the EAW issued by Lithuania. Two main issues arose on appeal: (a) the "fled" point under s. 10 of the European Arrest Warrant Act 2003, also referred to as the "*Tobin* point" as a result of the decision in *Minister for Justice, Equality and Law Reform v. Tobin*,<sup>54</sup> and (b) that the appellant's surrender is prohibited under s. 38 of the European Arrest Warrant Act 2003 and the "*Ferenca* point" arising under the case *Minister for Justice, Equality and Law Reform v. Ferenca*.<sup>55</sup> However, the appellant only pursued the *Ferenca* point on appeal. Denham J. (as she then was) delivered judgment for the Supreme Court. The first offence was robbery, the second offence assault, and the fourth offence was using a forged driving licence. They were held to be corresponding offences by the High Court, while the third offence was held not to correspond, the High Court pointing out that it was unusual because the appellant was convicted of an act of forgery that took place not in Lithuania but in Dublin. Denham J.

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<sup>52</sup> Murray C.J. said agreed with Macken J. in the High Court that the subjective reasons given by a person such as the appellant for leaving the issuing Member State and coming to Ireland, in this case that he wanted to make a better life for himself, may be taken into account within the context of the facts and circumstances of the case as a whole. Future caselaw may determine if ever subjective intention may justify a finding that the physical act of fleeing did not amount to fleeing under s. 10 of the 2003 Act.

<sup>53</sup> [2009] IESC 74, 11th November 2009.

<sup>54</sup> [2008] 4 IR 42. The Criminal Justice (Miscellaneous Provisions) Act 2009 in s. 6 removed the requirement in s. 10 of the European Arrest Warrant Act 2003 (as amended) that a person must have fled the issuing Member State in order to be surrendered by Ireland on foot of an EAW. A summary is available on the Web site of the EU FRA regarding the 2012 Supreme Court decision in *Tobin*:

< <http://fra.europa.eu/en/caselaw-reference/ireland-supreme-court-2012-iesc-37> > . For the 2012 judgment of the Supreme Court in *Tobin* (see, e.g. the judgment of Denham CJ which explains the previous litigation, including the 2009 legislative amendment):

< <http://www.courts.ie/judgments.nsf/6681dee4565ecf2c80256e7e0052005b/f4065ecaef71236880257a22004f7605?OpenDocument=&Highlight=0%2CTobin> >

<sup>55</sup> [2008] 4 IR 480.

observed that the appellant was sought to serve a sentence in Lithuania, rather than a series of separate sentences, it was a composite sentence for which he was sought. She continued that the problem was that the sentence of one year and three months was a composite sentence and was not fully explained: it was not possible to identify the sentence for the non-corresponding offence, all four offences were included in the composite sentence of one year and three months. Section 17 of the Act of 2003 does make provision for surrendering in respect of some offences while refusing surrender for another offence or offences when there are multiple offences mentioned in the EAW. That section was clearly only intended to apply where the request in relation to each offence in the warrant was distinct and separate. Denham C.J. concluded that the principles stated by the Supreme Court in *Ferenca* (delivered since the High Court judgment in this case) were applicable to the warrant in this case, meaning there was obviously no basis on which the court could apportion part of the composite sentence among the offences so that the appellant could be surrendered for the purpose of serving the amount of the sentence which related to the first, second and fourth offences. The appeal was allowed.

*Minister for Justice Equality & Law Reform v. Tighe* is an example of an inadequately framed EAW. Hardiman J. delivered judgment for the Supreme Court:<sup>56</sup>

Due to the narrow focus of this case it is unnecessary to discuss the Act of 2003 in general. It is sufficient to quote certain authoritative passages from the judgment of this Court in *The Minister for Justice, Equality and Law Reform v. Ivans Desjatnikovs* [2009] 1 IR 618. At para. 9 in this judgment, under the heading “Form of the European Arrest Warrant”, Denham J. says:

“Section 11(1) of the Act of 2003 mandates that the European Arrest Warrant shall insofar as it is practicable be in the forms set out in the annex to the Framework Decision, and shall specify matters as set out therein. This includes, for example, the name and nationality of the person in respect of whom the European Arrest Warrant is issued. As to the offence, the requirement is to specify the offence to which the European Arrest Warrant relates, including the nature and classification under the law of the issuing Member State of the offence concerned. It is also required to specify the circumstances in which it is alleged that the offence took place, including the time and place and degree of involvement. The penalties are required to be stated, *inter alia*. Thus a significant amount of detail is required.”

It appears to me that this very grave difficulty has arisen because the drafters of the warrant, presumably the prosecuting solicitors to the Inland Revenue, failed to distinguish between the completed offence of cheating the Revenue, which might or might not be capable of description as “fraud”, on the one hand, and the offence of conspiracy to cheat the Revenue which, as the warrant itself proclaims, is not within the framework list. Notwithstanding this, the warrant earlier contains a certificate that all of the offences *were* on the list.

In *Minister for Justice, Equality & Law Reform v. Koncis*,<sup>57</sup> discussed further below, one of the two issues stressed by the appellant was the admissibility of a letter from the Public Prosecutor's Office of Latvia dated the 22nd June 2007, the argument being that because it was not from a judicial authority it should not be admitted, and that there was an onus on the Minister to satisfy the court that it should be admitted. The Minister relied on s. 20(2) of the 2003 Act, as amended, being the affidavit of John Davis of the Irish Central Authority and the letter exhibited. On the facts, the Central Authority of Ireland sought further information, as exhibited in an affidavit of John Davis of the Central Authority of Ireland, and the High Court admitted the affidavit and the letter, bearing in mind the principle of mutual recognition and judicial cooperation. In all the circumstances of the case, Denham C.J. said

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<sup>56</sup> [2010] IESC 61, 21<sup>st</sup> December 2010.

<sup>57</sup> [2011] IESC 37, 29<sup>th</sup> July 2011.

she would not interfere with the exercise of the discretion of the High Court on the issue of the admission of the information.

Section 21 A of the 2003 Act as amended, on whether a decision has been made by the issuing Member State to prosecute the person whose surrender is sought, was addressed in *Minister for Justice, Equality and Law Reform v. Olsson*.<sup>58</sup> Here, the Supreme Court found that there must be actual evidence to the effect that a decision to prosecute had not been made, rather than that there must be evidence that the decision to prosecute had been made, but that surrender could not be sought to investigate further in order to allow a decision to prosecute. The accused was a citizen of Sweden in Ireland, against whom the Swedish authorities issued an EAW in relation to four offences, for which they intended to prosecute him and on which basis the High Court ordered the respondent's surrender to Sweden. The accused appealed to the Supreme Court, the primary issue being about mutual legal assistance, while s. 21A of the Act of 2003, as amended, was also in issue. The evidence in *Olsson*, as given on behalf of the appellant, was that under Swedish law his status was one "on probable cause suspected", of the crime in question, and that no decision had yet been taken either to charge him or that he should stand trial, in respect thereof. The Swedish prosecutor with responsibility for the case acknowledged that no formal charge had been laid and that likewise no formal decision to prosecute had been made, because under Swedish law it is legally impossible to arrive at a final decision until the person in issue is presented with the investigative evidence and given an opportunity of responding. On s. 21A of the 2003 Act, the Supreme Court concluded on the facts that there was sufficient evidence to establish, that the purpose of the arrest warrant was for the prosecution and trial of the subject person on the offences specified in the warrant. O'Donnell J. delivering the judgment of the Supreme Court stated:

... Thus, the concept of the 'decision' in s.21A should be understood in the light of the 'intention' referred to in s.10 of the Act of 2003 and the 'purpose' referred to in art. 1 of the Framework Decision.

When s.21A speaks of 'a decision' it does not describe such decision as final or irrevocable, nor can it be so interpreted in the light of the Framework Decision. The fact that a further decision might be made eventually not to proceed, would not therefore mean that the statute had not been complied with, once the relevant intention to do so existed at the time the warrant was issued. The Act of 2003 does not require any particular formality as to the decision; in fact, s.21A focuses on (and requires proof of) the absence of one. The issuing Member State does not have to demonstrate a decision. A court is only to refuse to surrender a requested person when it is satisfied that no decision has been made to charge or try that person. This would be so where there is no intention to try the requested person on the charges at the time the warrant is issued. In such circumstances, the warrant could not be for the purposes of conducting a criminal prosecution.

... A warrant issued for the purposes of investigation of an offence alone, in circumstances where that investigation might or might not result in a prosecution, would be insufficient. Here it is clear that the requested person is required for the purposes of conducting a criminal prosecution (in the words of the Framework Decision) and that the Kingdom of Sweden intends to bring proceedings against him, (in the words of s.10 of the Act of 2003) Consequently it follows that the existence of any such intention is virtually coterminous with a decision to bring proceedings sufficient for the purposes of section 21A. As Murray C.J., pointed out in *Minister for Justice v. McArdle* [2005] IESC 76, [2005] 4 IR 260, that result is not altered by the fact that there may be a continuing investigation, or indeed that such investigation will be assisted by the return of the requested person.

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<sup>58</sup> [2011] 1 IR 384.

It would be entirely within the Framework Decision and the Act of 2003 if, after further investigation, the prosecution authorities decided not to prosecute because, for example, they had become convinced of the requested person's innocence. There would still have been an 'intention' to prosecute, and a decision to do so at the time the warrant was issued and executed. Accordingly the warrant would have been issued for the purposes of conducting a criminal prosecution. *What is impermissible is that a decision to prosecute should be dependent on such further investigation producing sufficient evidence to put a person on trial. In such a situation there is in truth no present 'decision' to prosecute, and no present 'intention' to bring proceedings.*

Section 21 A of the 2003 Act as amended was also one of the main issues in *Minister for Justice Equality and Law Reform v. Bailey*,<sup>59</sup> discussed further below under Territoriality.<sup>60</sup> Concerning the content of the EAW, she noted that it relied on the Garda investigation in Ireland and stated that it justified that the appellant be charged, but that it was clear that if the appellant were surrendered to France on the warrant it would be at the investigation stage of the case. Under s. 21A of the 2003 Act, as amended, a warrant issued for the purposes of the investigation of an offence alone, in circumstances where that investigation might or might not result in a prosecution, would be insufficient, and in such circumstances a court could be satisfied under s. 21A of the Act of 2003, as amended, that no decision had been made to charge and try the requested person. It was clear from the facts of the case on the documents before the Court, that while a decision had been made in France equivalent to charging the appellant, that decision did not incorporate a decision to try the appellant for the murder of Mme. Toscan du Plantier and thus an Irish court could not be satisfied that the terms of section 21A were met. It seems from this that decision on charging must be specific enough to relate to the particular facts and a particular offence. Each member of the Supreme Court in separate judgments concluded that whilst there was a decision in existence to charge Mr. Bailey, there was not a decision to put him on trial and thus the provisions of s. 21A were not satisfied. As the appeal could be allowed on two of the issues raised, in accordance with the jurisprudence of the Supreme Court, there was no necessity to proceed to consider a further issue.

Murray J. observed that in fact in virtually all cases in which an order for surrender has been made pursuant to the Act of 2003, have been made on foot of warrants that stated no more than that the warrant was issued for the purpose of conducting a criminal prosecution, without more, which was considered to conform to the requirements of the Act of 2003 and the Framework Decision. He noted that the terms of the Framework Decision and the Act make it clear that surrender on foot of an EAW may only be applied for and granted for the purposes of prosecuting someone for a criminal offence and this excludes the surrender of any person for the purposes of being investigated by the investigative authorities, such as the police or a judge, where no decision to conduct a prosecution has been taken. He further observed that a person cannot be surrendered pursuant to the Act of 2003 solely because he or she is suspected of having committed an offence and the relevant authorities wish to question the person concerned or have him or her assist them in one form or another in their

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<sup>59</sup> [2012] IESC 16, 1<sup>st</sup> March 2012.

<sup>60</sup> On s. 42 of the Act of 2003, as amended by the Act of 2005, which concerns parallel proceedings or possible parallel or past proceedings in Ireland, Denham C.J. stated she was not satisfied that the appellant had established any right under the now repealed s. 42(c) of the 2003 Act. Section 42 of the 2003 Act, which was removed by s. 83 of the 2005 Act, provided that the Director of Public Prosecutions or the Attorney General, as the case may be, has decided not to bring, or to enter a *nolle prosequi* [a decision to withdraw or terminate an existing prosecution proceeding in court] under s. 12 of the Criminal Justice (Administration) Act 1924 in proceedings against the person for an offence consisting of an act or omission that constitutes in whole or in part the offence specified in the European arrest warrant issued in respect of him or her, for reasons other than that a European arrest warrant has been issued in respect of that person. Murray C.J. noted that the decision of the Director of Public Prosecutions that criminal proceedings should not be brought against the appellant in respect of the death in question would have been a manifest and complete bar to the surrender of the appellant by virtue of s. 42 of the Act of 2003 but for the amendment to that section by s.83 of the Criminal Justice (Terrorist Offences) Act 2005.

enquiries or investigations and this was so irrespective of whether the authorities concerned are judicial or police. Between the initiation of a prosecution following a decision to prosecute, there may be further procedures and proceedings of a substantive nature which must occur before there is an actual decision that the accused should be put on trial for the offence or offences with which he or she is charged, such as the role of the District Court in Ireland to order an accused forward for trial on indictment. Murray J. concluded on the facts of this case as outlined above and in particular as explained in the document of the French prosecutor presented on the last day of the hearing, the conclusion must be that there has not been, expressly or impliedly, any decision to try the appellant for the offence specified in the EAW and so the application for the surrender of the appellant must be refused in accordance with s.21A. Hardiman J. noted that it was clear from the formulation of s. 21A that the decision in default of which the Court must refuse to surrender the person is not merely a decision to charge him with the offence, but a decision to try him for that offence, which is made perfectly clear by the emphatic punctuation of s. 21A(1), in particular in the last two lines of the subsection. He noted that on the facts, it was clear that no decision could be made whether or not to try Mr. Bailey for the offence in the warrant until after the end of the investigative stage. He also noted that s. 21A(1) is expressed conjunctively, not disjunctively, so the Court has to enquire whether a decision has been made both to charge the person with and to try him for the relevant offence, and that there are many good reasons for this stance, including the extremely prolonged course that preliminary proceedings may take in inquisitorial systems. He further observed that he was not to be taken as endorsing what Fennelly J. called a "*broad, purposive and conforming*" approach to interpretation in a matter concerning human and civil rights, nor did he consider that the result of this case reflects any deficiency in Irish legislation. He further observed that his comments were not to say that the common law accusatorial system, was superior: merely that very prolonged imprisonment without charge is unacceptable in the common law system. Later he observed he accepted that the Irish legislation should be construed so far as possible in the light of the wording and purpose of the Framework Decision.

*Bailey* did not change the approach of the Irish courts to s., 21A, but it did clarify that what the section requires is that decision to put a person on trial has been made and such a decision cannot depend on further investigation after surrender has occurred.

McKechnie J. considered the scope of s. 21A of the 2003 Act as amended in detail in *Attorney General v. Pocevicus*.<sup>61</sup> This case arose under the Extradition Act 1975, as amended. One of the two main issues concerned whether Pocevicus, whose extradition had been sought by Norway, was sought for the purpose of "proceedings" within the meaning of s. 9 of the Extradition Act 1965. Section 9 provides where a country duly requests the surrender of a person who is being proceeded against in that country for an offence or who is wanted by that country for the carrying out of a sentence, that person shall, subject to and in accordance with the provisions of the Act, be surrendered to that country. Part of the argument in the case concerned the argued difference between this and the European Arrest Warrant Act 2003, as amended, s. 21A(1) of which provides that where an EAW is issued in the issuing Member State in respect of a person who has not been convicted of an offence specified therein, the High Court shall refuse to surrender the person if it is satisfied that a decision has not been made to charge the person with, and try him or her for, that offence in the issuing Member State, while under subs. (2) of the section there is a presumption that such a decision has been made unless the contrary is proved. On the question of the relevance of the EAW and s. 21A of the 2003 Act to s. 9 of the 1965 Act, McKechnie J. stated:

42. ... In broad terms, the 2003 Act is intended to capture the same two categories of persons as are envisaged in s. 9 of the 1965 Act: these are individuals which the requesting state has already prosecuted or intends to prosecute on the one hand, and post-conviction individuals either to serve their sentence or be sentenced, on the other (s. 10 of the 2003 Act). Even

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<sup>61</sup> [2015] IESC 59, 24<sup>th</sup> June 2015.

allowing for the more detailed provisions of the European Union's instrument and its implementing domestic measures, nonetheless it is instructive to note what circumstances have been considered by the courts as sufficient, regarding the first category of persons, as would justify the making of a surrender order.

43. Under Article (1)(i) of the Framework Decision it is stated that a European Arrest Warrant is a judicial decision issued by a member state with a view to the arrest and surrender of the requested person "for the purposes of conducting a criminal prosecution". Section 10 of the 2003 Act, in its original form, speaks of an "intention" to bring proceedings: in 2005 it added persons "who [are] the subject of proceedings". Section 11(3)(b) of the Act requires a statement in writing to accompany the warrant, that where the person has not been charged a decision "to [so charge] and try him or her for, the offence...", has been made. Section 21A(1) of the Act, as about set out (para. 39 *supra*), prohibits the surrender of the requested person "if [the High Court] is satisfied that a decision has not been made to charge the person with, and try him or her for, that offence in the issuing Member State" (emphases added). It is the meaning of this provision which has given rise to some recent decisions, most notably those of *Olsson* and *The Minister for Justice, Equality and Law Reform v. Bailey* [2012] 4 I.R. 1 ("*Bailey*").<sup>62</sup>

McKechnie J. then sought to summarise the principles of Irish law on surrender or extradition regarding a decision to prosecute having already been taken:

Part 1:

- A person should be surrendered where the purpose of the request is "to prosecute", that is, to put him on trial for the subject offence.
- Where such prosecution proceedings are in being that will be a sufficient compliance with this requirement.
- Where such proceedings are not in being the intention to prosecute must be founded on the existing evidence, as known at the time of the request.
- Where such proceedings are not in being an intention to charge only is not sufficient: in addition, there must be a decision to try, i.e. to put the individual on trial.

Part 2:

- A person therefore should obviously not be surrendered purely on suspicion of having committed an offence.
- Likewise, where a person is sought simply to help the police with their inquiries, or to aid them with their investigation or to be eliminated from such inquiries.
- Therefore a person who is merely a "suspect" should not be the subject matter of such an order.

Part 3:

- It is a principle of surrender law that an order will not be made if the purpose thereof is related only to a continuation of the investigation: a person will not be extradited or surrendered for this reason.
- This does not mean that the investigation must be irreversibly concluded: there is no obligation to this end: indeed, it is counter-intuitive to so suggest as if such was the case, any further evidence subsequently discovered, even of innocence, would have to be disregarded: further, the entire process of surrender

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<sup>62</sup> Ibid, paras. 42-43.

could be irreparably compromised if the request had to await the complete finalisation of the investigation.

- What is required however is that the decision to prosecute is not contingent or otherwise dependent on any further investigation producing evidence without which no such decision could justifiably be made.
- The investigation must therefore have reached a level whereby there exists sufficient evidence in the opinion of the competent prosecuting authority upon which the extradited person can be charged and tried and further that a decision to do so has in fact been made.
- The fact that an arrest warrant has been issued will not, of itself, be determinative on the point last made. Depending on the investigative and the prosecution process of each country, such a warrant may be consistent either with the purpose of putting the individual on trial or with a continuation of the investigative part of the process. The latter is not sufficient to establish an intention to prosecute.

Part 4:

- A decision to cease to prosecute, based on evidence discovered as part of any ongoing investigation is completely compatible with surrender: it could not be otherwise for if it was, it could mean that a person whose innocence was established subsequent to charge, would have to stand trial. Evidently that could not be the case.<sup>63</sup>

McKechnie J. continued that he entirely rejected the proposition that, as a precondition to the application of s. 9 of the 1965 Act, there must be proceedings in being, in the sense that the formal prosecution must have commenced in respect of the affected person, as such a construction would seriously curtail the effectiveness of the 1965 Act and would be inconsistent with the State's international commitment, which being a signatory to the 1957 Convention entails.<sup>64</sup> On the facts, McKechnie J. noted that the investigation is still open but only so as to offer the respondent an opportunity of disputing, rebutting or challenging the existing evidence "but not for any other specific purpose": in particular, not for the purpose of obtaining additional evidence upon which the ultimate decision might rest.

#### **5.4 Speciality:**

The continuing significance of speciality was apparent in *Minister for Justice Equality and Law Reform v. Gotszlik*.<sup>65</sup> Article 27 of the Framework Decision on an EAW provides for a restriction on speciality in certain circumstances, including where punishment does not involve custody or a deprivation of liberty. This was an appeal by the Minister of a refusal by the High Court to surrender Gotszlik to Poland. The central issue in the case related to the circumstances that the judicial authority in Poland issued two separate warrants on which the surrender of the respondent was sought. One related to a judicial decision arising from charges of sexual offences relating to minors and the other related to a sentence imposed on Gotszlik for assaults on and mental cruelty to his wife. Denham J. (as she then was) in the Supreme Court identified that "The primary issue in this case is a construction of Irish statutory law in the light of the Framework Decision of the European Union."<sup>66</sup> The High Court had refused surrender on the basis of an interpretation of s.22 of the European Arrest Warrant Act, 2003, as substituted by s.80 of the Criminal Justice (Terrorist Offences) Act 2005. Section 22 relates mainly to the charging of a person surrendered with offences other than those in the EAW, i.e. it contains the traditional speciality requirement of extradition law as subject to the exceptions in Article 27 of the Framework Decision on an EAW. Peart J. in the High Court stated "I hasten to add that this situation arises only from the fact that for whatever reason the Polish judicial authority has chosen to send over two separate warrants.

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<sup>63</sup> Ibid, para. 48.

<sup>64</sup> Ibid, para. 51.

<sup>65</sup> [2009] IESC 13, 19th February 2009.

<sup>66</sup> Ibid, para. 4.



That need not have occurred, and indeed there would appear to be nothing to inhibit that authority from issuing a new warrant on another occasion containing within it both offences and then this point would not arise.”<sup>67</sup> By the time of the Supreme Court judgment, one of the EAWs had been withdrawn, but the Supreme Court determined to address the legal issue of the issuing of more than one EAW for the same person. Denham J. set the broader context of the legal issue as follows:

However, as the European arrest warrant Scheme is based on mutual confidence between the Member States it enables a reversal of the rule of specialty by consent. This is a matter which may be developed in the future. It does not apply in this case. But it assists the analysis of this case in that it clarifies the fact that Article 27 of the Framework Decision is grounded on the specialty rule, as is section 22. Consequently, the mischief to be avoided by section 22 is the prosecution, sentence, etc. of a person in the requesting State for an offence not the subject of a warrant processed in the requested State.<sup>68</sup>

Denham J continued that “Thus, applying the principles enunciated in Case C-105, *Pupino*, this Court should construe section 22 as far as possible in a manner which conforms with the provisions of the Framework Decision”.<sup>69</sup> Denham J. concluded that bearing in mind the words of section 22, and taking a purposive interpretation, noting especially the qualifying words “except where the context otherwise requires” in s. 22, and considering that the Framework Decision could not be construed as requiring all offences to be on a single warrant along with the principles of EU law enunciated in *Pupino*, a court may order the surrender of a person on more than one EAW. A person can be ordered to be surrendered on two warrants, which preserves the rule of specialty and is consistent with the terms of s. 22 and with the purpose of the Framework Decision. Macken J. agreed. She observed that the application of s.18 of the Interpretation Act 2005 would mean that, where the singular includes the plural, as is invariably the case unless legislation otherwise specifically requires, on its plain wording, s.22 applies even when referring to more than one warrant, and it nevertheless maintains the protection granted by that section under the rule of specialty, which, as explained in the judgment of Denham J., was the clear purpose of s.22 of the Act of 2003, enacting, as it does, the provisions in that regard found also in the Framework Decision. She added that she was equally satisfied that even if that were not so, and the Court - as it must - applied the principles enunciated by the European Court of Justice in *Pupino* so as to implement the wording and purpose of the Framework Decision, the same result would ensue. She observed that the basis of the principle of mutual recognition was that of judicial cooperation, and not merely cooperation between Member States, or between Member State central authorities, and that the legal systems of the Member States differed in structure and clearly could allow the possibility of more than one competent judge or judicial officials in the same Member State to concurrently issue an EAW regarding the same person.

The issue of the approach to be taken when a Member State to whom a person has already been surrendered requests consent from Ireland to vary the offences to be prosecuted arose in *The Minister for Justice and Law Reform v. Strzelecki*.<sup>70</sup> Denham C.J. delivered judgment for the Supreme Court. She noted that the correct interpretation of s. 22(8) of the European Arrest Warrant Act 2003, as amended, was the sole issue before the Supreme Court. She held that the Irish courts must on such a request address any issue of fundamental rights raised on behalf of the person surrendered:

31. Of course, the appellant here has been surrendered already on foot of a European Arrest Warrant. However, I am not satisfied that the provisions of the Act of 2003, as amended, in relation to fundamental rights, and in light of the Framework Decision, do not apply in the High Court on a request from a requesting state for consent to prosecute a person, who has already been

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<sup>67</sup> *Minister for Justice, Equality & Law Reform v. Gotszlik* [2007] IEHC 369, 2nd November 2007.

<sup>68</sup> [2009] IESC 13, para. 14.

<sup>69</sup> *Ibid*, para. 24, referring to CaseC-105/03, *Maria Pupino* [2005] ECR I-5285.

<sup>70</sup> [2015] IESC 15, 26<sup>th</sup> February 2015.

surrendered, for further offences. The appellant has already been surrendered to Poland for the offences stated on the European arrest Warrant. However, in essence, Poland is now seeking consent to his being prosecuted on two further offences, *i.e.* that his surrender now cover these extra offences. The word "surrender" covers his transfer to another state for prosecution on the offences set out in the European arrest Warrant. However, in essence, the request for consent to prosecute him on two further offences is a request that his surrender also applies to the two additional offences set out in the request for consent by Poland.

32. Indeed, this analysis is consistent with s. 22(8) of the Act of 2003, as amended, which provides, as set out earlier in the judgment, that the High Court shall not give its consent under s. 22(7) if the offence concerned is an offence for which a person could not by virtue of Part 3 be surrendered under the Act of 2003 as amended. ...

39. I am satisfied that Irish law does not exclude issues of fundamental rights at any stage of a process under the Act of 2003, as amended. This includes an application for consent subsequent to an initial successful application from a requesting country. I do not consider this is contrary to the Framework Decision....

42. However, whereas a person may not be excluded from raising issues of fundamental rights, the jurisprudence as established in case law is applicable. Thus, a court may determine that such issues are to be, or may be, litigated in the requesting state. For example, in *Minister for Justice v. Stapleton* [2008] 1 IR 669 at p. 692, Fennelly J. delivered a judgment with which the members of the Court agreed. ...

43. The system of the European Arrest Warrant is based on a high level of mutual confidence and mutual respect amongst members of the European Union. This informs the approach to the implementation of s. 37 of the Act of 2003, as amended. The fact that the requesting state does not implement the same constitutional principles will not necessarily be a basis to refuse a request.

44. However, a person may not be excluded from raising an issue of fundamental rights before the court.

The appeal was allowed and the case remitted to the High Court.

### 5.5 Double Criminality:

*Minister for Justice Equality and Law Reform v. Dolny* was an appeal by Damian Dolny from an order of the High Court (Peart J.) made on the 23rd October, 2008, pursuant to s. 16 of the European Arrest Warrant Act 2003, that he be surrendered to Poland.<sup>71</sup> Two principal and intertwined grounds of appeal were raised: first, that there were insufficient particulars stated on the EAW in that the surrounding events were not described and, secondly, there was no corresponding offence, which it was alleged arose also because of the insufficiency of the particulars. The High Court held that the words "beating or battery" were an adequate description of the offence. Denham C.J. held on the first point that there were sufficient particulars on the warrant upon which the trial judge could reach his determination. The High Court had held that the relevant offence in Ireland was that provided for in s.3 of the Non-Fatal Offences Against the Person Act 1997. Denham J. stated that she would affirm the approach taken by the High Court:

14. In addressing the issue of correspondence it is necessary to consider the particulars on the warrant, the acts, to decide if they would constitute an

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<sup>71</sup> [2009] IESC 48, 18<sup>th</sup> June 2009.

offence in the State. In considering the issue it is appropriate to read the warrant as a whole. In so reading the particulars it is a question of determining whether there is a corresponding offence. It is a question of determining if the acts alleged were such that if committed in this jurisdiction they would constitute an offence. It is not a helpful analogy to consider whether the words would equate with the terms of an indictment in this jurisdiction. Rather it is a matter of considering the acts described and deciding whether they would constitute an offence if committed in this jurisdiction. ... 17. ... Thus, the High Court may look at all the information provided relating to the EAW, the facts and acts described, and give to words their ordinary and popular meaning.[On the latter point, see also *Minister for Justice, Equality & Law Reform v. Sas* [2010] IESC 16 (18 March 2010)]

The appeal was dismissed. The quote just made could be described as reflecting a relatively generous view of the task of finding correspondence: the technical character of the word is not essential, rather what is looked for is correspondence of substance as reflected in the EAW as a whole.

*Minister for Justice Equality and Law Reform v. Szall*,<sup>72</sup> Edwards J. in the High Court certified that his order of the 17th February 2012 refusing surrender of Szall to Poland pursuant to an EAW involved two points of law of exceptional for the Supreme Court to decide: (i) where compliance with, or breach of, a statutory provision is an ingredient of an offence in Ireland, is that offence capable of amounting to a corresponding offence for the purposes of s. 5 of the European Arrest Warrant Act 2003 (as amended); and (ii) is s. 6(2) of the Criminal Justice Act 1960 capable of being a corresponding offence for the purposes of s. 5 of the European Arrest Warrant Act 2003 (as amended)? Clarke J. (as he then was) delivered judgment for the Supreme Court. Edwards J. in the High Court had found a lack of correspondence between one of the six offences listed in the EAW from Poland and offences in Irish law. Given that the Minister accepted that correspondence between Irish and Polish law was necessary for surrender in the context that the Polish court had imposed a single composite sentence for all of the six offences, the net issue on appeal came down to a consideration of whether there is correspondence between the offence specified at item VI in the relevant EAW and a relevant offence in Irish law. The nature of the offence in Polish law was said to be a "misdemeanour against administration of justice under article 242 paragraph 3 of the Criminal Code" for failing to return from a break in imprisonment. The closest offence in Irish law was contained in s. 6(2) of the Criminal Justice Act 1960. Section 6(2) provided that a person "who is unlawfully at large shall be guilty of an offence under this section and on summary conviction thereof shall be liable to imprisonment for a term not exceeding six months", while s. 6(1) of the same Act deemed a person who had been temporarily released under the 1960 Act to be unlawfully at large if (a) the period for which he was temporarily released had expired or (b) a condition to which his release was made subject had been broken. It was clear that Mr. Szall was convicted of failing to return to the relevant penal institution after the expiry of a fixed term break which, in his case, was ordered by a relevant court. The High Court had focused on the established principle of statutory interpretation to the effect that a penal provision should be given an interpretation "*which is least unfavourable to the accused, or as in the present case the respondent, concerned.*" Edwards J. in the High Court adverted to the fact that the Mr. Szall's release was pursuant to court order and not pursuant to a ministerial scheme, as was the case under s. 6 of the 1960 Irish Act. In those circumstances, and giving Mr. Szall the benefit of the most favourable interpretation possible, there was insufficient correspondence between the offences. Clarke J., went on to note that the general question of correspondence in the case involved a consideration of the proper approach which should be adopted in cases where the purported Irish corresponding offence itself contains within its terms a requirement of lack of compliance with or breach of, an Irish statutory provision or scheme separate from the provision creating the offence. He noted that, strictly speaking, therefore, an Irish offence which involves, as an important ingredient, reference to an Irish statutory scheme, cannot have a strict equivalent offence in any other country for

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<sup>72</sup> [2013] IESC 7, 15<sup>th</sup> February 2013.

the Irish statutory scheme will not apply in that other country even though that requesting country may have its own (and perhaps quite similar) statutory regime. The difficulty with such regime cases is that the acts or omissions which are rendered an offence only constitute an offence because of some failure to comply with the terms of the specified Irish regime. Clarke J. noted that in *Attorney General v. Dyer*,<sup>73</sup> Fennelly J. re-emphasised the principle, which can be traced back to *State (Furlong) v. Kelly*,<sup>74</sup> to the effect that the comparison to be conducted in order to determine correspondence is to be based on the acts or omissions which are said to constitute the offence. There was not any material difference, so far as correspondence is concerned, between the law as it stood under the 1965 Act and the law as it now stands under the 2003 Act (save for the exception provided for in Article 2(4) of the Framework Decision on an EAW for offences for which double criminality did not have to be shown). Clarke J. referred to a number of precedents from other jurisdictions, mainly *R (Al-Fawwaz) v Governor of Brixton Prison*<sup>75</sup> and *Norris v. Government of the United States of America*.<sup>76</sup> He quoted from *In re Collins (No. 3)*, where Duff J. stated:

In the first place, the treaty itself, which, after all, is the controlling document in the case, speaks not of the acts of the accused, but of the evidence of 'criminality,' and it seems to me that the fair and natural way to apply that is this—you are to fasten your attention not upon the adventitious circumstances connected with the conduct of the accused, but upon the essence of his acts, in their bearing upon the charge in question. And if you find that his acts so regarded furnish the component elements of the imputed offence according to the law of this country, then that requirement of the treaty is complied with...<sup>77</sup>

Clarke J. held that the proper approach is to regard an Irish regime case as amounting, for the purposes of correspondence and of s. 5 of the 2003 Act, to an offence where the act or omission concerned is defined by reference to a lawful regime rather than the specific Irish regime. Where, therefore, the offence specified in the relevant EAW involved the same acts or omissions by reference to a regime in the requesting state then, at least at the level of principle, correspondence can be established provided that there is a sufficient similarity between the respective regimes to justify the conclusion that the substance of the acts or omissions that amount to offences in the respective jurisdictions is the same even though the specific relevant regimes will necessarily be, as a matter of law, different, emanating as they will from the legal systems of the two separate jurisdictions. On the Irish offence relevant to the issue of correspondence in this case, it seemed clear that the intent of the Oireachtas, in enacting s. 6(2), was to provide for the potentiality of an additional sanction above and beyond being required to serve the balance of the sentence which would have applied in any event, so as to discourage failure to comply with the temporary release regime. The proper construction of s. 6(2) is that persons can only be guilty of an offence under that section if they come within the deemed definition requirements set out in s. 6(1). The real question that must be asked in this case was to whether the Irish and Polish statutory regimes on returning to prison following temporary release were sufficiently similar so that breach of one may be taken to correspond to breach of the other even though the schemes are not, for obvious reasons, the same scheme. Clarke J. held that that the difference in the identity of the person or body that has lawful authority to allow a temporary release or break, as the case may be, was not of sufficient materiality to render the two statutory regimes sufficiently different so as to exclude correspondence. Clarke J. concluded that as it was reasonable to conclude that the circumstances in which a person can be temporarily but lawfully absent from prison during the currency of a sentence in Ireland are either exclusively to be found in the 1960 Act or, as a matter of almost universal practise, come within that statute, there was a broad and close correspondence between the temporary release provisions of the 1960

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<sup>73</sup> [2004] 1 IR 40.

<sup>74</sup> [1970] IR 132.

<sup>75</sup> [2002] 1 AC 556.

<sup>76</sup> [2008] 1 AC 920.

<sup>77</sup> (1905) 10 CCC 80, at pp. 100-101.

Act and the break in carrying out a penalty provisions of article 242 paragraph 3 of the Polish Criminal Code.

## 5.6 Territoriality:

*Minister for Justice Equality and Law Reform v. Bailey*<sup>78</sup> was an appeal from an order of surrender of the appellant to France relating to a murder that occurred in Ireland. The Supreme Court unanimously allowed the appeal. Denham C.J. began her judgment by observing that this appeal from an order to surrender the appellant to France under the European Arrest Warrant Act 2003 arose in unique circumstances and raises unprecedented questions of law. The issue certified for the Supreme Court to decide was

Whether the surrender of a person is prohibited by section 44 of the Act where the offence for which surrender is sought is committed in the State and where the victim is a national of the requesting State which seeks to exercise an extra-territorial jurisdiction to prosecute the offence under its own laws and in circumstances where the Director of Public Prosecutions in this State has decided not to prosecute the person in respect of that offence.

Section 44 of the 2003 Act, entitled 'Commission of an offence outside the State', provides:

A person shall not be surrendered under this Act if the offence specified in the European arrest warrant issued in respect of him or her was committed or is alleged to have been committed in a place other than the issuing Member State and the act or omission of which the offence consists does not, by virtue of having been committed in a place other than the State, constitute an offence under the law of the State.

Denham C.J. noted that an unusual aspect of this application for surrender was that the murder in question occurred in Ireland and not in France. However, the victim of the murder was a citizen of France, and under the laws of France, the French courts have jurisdiction to prosecute and put on trial an accused in relation to the murder of a French citizen even where it occurs outside France and a further unusual feature was that the Director of Public Prosecutions (DPP) in Ireland had questioned the appellant and others regarding the case and had on a number of occasions decided not to proceed to a prosecution of him. Denham C.J. observed that four issues had to be decided: (i) the meaning and application of s. 44 of the European Arrest Warrant Act, 2003; (ii) the meaning and application of s. 42 of the Act of 2003, and its amendment by the Criminal Justice (Terrorist Offences) Act 2005; (iii) the meaning and application of s. 21A the Act of 2003, as amended by the Act of 2005; and (iv) Section 37 of the Act of 2003, and submissions on fair procedures and abuse of process. On s. 44 of the 2003 Act concerning extra-territoriality, the appellant, who, though resident in West Cork for many years, was a citizen of the United Kingdom, submitted that surrender is prohibited under the provisions of s. 44, since the offence was committed outside the issuing Member State (France), and the law of the executing State (Ireland) does not permit the prosecution in the State of an offence of murder committed outside the State where the accused person is other than an Irish citizen. The High Court had interpreted s. 44 by reading into it the additional words: "and other than this State", noting that this did not "do violence" to s. 44 when one considers s. 42 and the Framework Decision in tandem with it, and this enabled surrender to be granted in this case. Denham C.J. in the Supreme Court stated that the words of s. 44 were clear, and a person should not be surrendered if two specific conditions were satisfied: the first of these conditions was that the offence was committed or alleged to have been committed in a place other than the issuing Member State and the second prohibited the surrender of a person where the act of which the offence consists did not constitute an offence in Ireland by virtue of having been committed, i.e. because it was committed, in a place other than Ireland, but, further, that s. 44 enabled Ireland to surrender

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<sup>78</sup> [2012] IESC 16, 1<sup>st</sup> March 2012.

a person in respect of an offence alleged to have been committed outside the territory of the issuing Member State in circumstances where the Irish State would exercise extra-territorial jurisdiction in reciprocal circumstances. This interpretation was supported by an examination of the *travaux préparatoires* on Article 4.7 of the Framework Decision, which indicate that Article 4.7 of the Framework Decision as implemented in s. 44 of the 2003 Act reflected, somewhat exceptionally regarding the EAW system overall, a principle of reciprocity. Concerning Irish law on extra-territoriality, she noted that there is no jurisdiction in Ireland to prosecute for an offence of murder committed outside the area of the application of the laws of the State, unless an ingredient in that crime is that the alleged offender was an Irish citizen. Thus, on s. 44, she concluded that the reciprocity that is required is a factual reciprocity concerning the circumstances of the offences and that the reciprocity in this case required Ireland to examine its law as if the circumstances of the offence were reversed. Applying this to the facts, given that Bailey was a citizen of the United Kingdom, surrender should not be ordered in light of s. 44 since Ireland would not exercise extra-territorial jurisdiction over an offence committed outside of Ireland unless the offender was an Irish citizen. Regarding s. 44, Hardiman J. noted that whereas the equivalent Article 4.7 of the Framework Decision was expressed disjunctively, the wording of s. 44 was conjunctive (and this difference accounted for disturbing cases where Ireland would surrender one of its own citizens where another Member State would not one of its citizens). He cited Farrell & Hanrahan<sup>79</sup> with approval regarding s. 44, that it amounts to the court engaging in a hypothetical test of substituting the Irish State for the position of the requesting State in relation to the offence described in the warrant. On s. 44, he concluded that Irish law operates to preclude the appellant's forcible delivery to France because Irish law does not confer a power to prosecute on the same basis as France.<sup>80</sup>

The approach to s. 44 in *Bailey*, concerning the double requirement of s. 44, was confirmed in *Minister for Justice and Equality v. Egharevba*.<sup>81</sup> In *Egharevba*, the appellant is the subject of an EAW issued by the Republic of France, on the 11th July 2013, which warrant was endorsed by the High Court for execution in Ireland on 16th July 2013 and was executed on the 26th July 2013. Denham C.J. delivered judgment for the Supreme Court and noted that the sole point of objection proceeded with in the High Court was a Part 3 objection in which the appellant invoked s. 44 of the Act of 2003. The High Court held that where, with respect to both of the offences to which the EAW relates, the respondent has not been able to demonstrate the existence of "the two conjunctive requirements" that are required to be established for a valid invocation of s. 44 of the Act of 2003, the Court must decline to uphold the s. 44 objections raised in the case. Section 44 states: "A person shall not be surrendered under this Act if the offence specified in the EAW issued in respect of him or her was committed or is alleged to have been committed in a place other than the issuing Member State and the act or omission of which the offence consists does not, by virtue of having been committed in a place other than the State, constitute an offence under the law of the State." Thus, the High Court made an order of surrender pursuant to s. 16(1) of the Act of 2003. Denham C.J. held that the determination of the High Court judge on the issue was correct, citing the Supreme Court in *Minister for Justice, Equality and Law Reform v. Bailey*. The requirements set out in s. 44 of the Act of 2003, as amended, are conjunctive and, thus, both conditions are required to be met for the appellant to succeed. The High Court had determined that in the present case, the relevant feature is that the essence of the offending conduct is being a participant in an organised group that was engaged in money laundering activities (of which there were many), just some of which took place in France, and these activities were perpetrated on behalf of the group by different members of the group at different times, in circumstances where the law of the issuing Member State allows all

<sup>79</sup> R. Farrell & A. Hanrahan, *The European Arrest Warrant Ireland* (Clarus Press 2012), paras. 12-21.

<sup>80</sup> Fennelly J. noted that he left open the question of whether Article 4.7 of the Framework Decision could be relied on directly without regard to s. 44 of the 2003 Act, but that Ireland had chosen not to insert in the Act the possibility under Article 4.7 of refusing surrender on the grounds that the offences for which surrender was sought occurred wholly or partly in this State, but the Minister for Justice, Equality & Law Reform considered that the opt-out in Article 4.7(b) was implemented in Irish law by ss. 42 and 44 of the 2003 Act as originally enacted before amendments under the Criminal Justice (Terrorist Offences) Act 2005.

<sup>81</sup> [2015] IESC 55, 25<sup>th</sup> June 2015.

members of the group to be held jointly responsible for all of those activities. As the appellant did not satisfy the first requirement of s. 44, and as the two requirements of the section are conjunctive, the appellant did not meet the conditions set out in s. 44.

### 5.7 Other Issues:

Among the other issues addressed in the caselaw surveyed are multiple proceedings relating to the same person, including *res judicata* and double jeopardy/*ne bis in idem* and the issues of parallel proceedings in Ireland the validity of successive EAWs relating to the same person; the onus of proof and matters of evidence in EAW/extradition proceedings; the stages at which issues need to be decided in the EAW process; delay; the significance of plea bargaining being part of the judicial procedure within the issuing Member State; and whether legal aid is in EAW cases regulated by national law rather than the Framework Decision on an EAW.

*Minister for Justice Equality and Law Reform v. Ó Fallúin/Fallon* addressed the issue of multiple proceedings concerning the situation of a person whose surrender was sought.<sup>82</sup> It concerned an appeal from an EAW granted at the request of the UK in 2004 relating to a charge of conspiracy together with Philip Ryall and David Alexander Fallon to defraud the United Kingdom Passport Agency by the provision of false passport applications contrary to common law. Fallon was subject to an order of the Irish High Court to be surrendered and appealed, but simultaneously began proceedings under Article 40.4.2□ of the Constitution, which deals with the procedure for *habeas corpus* (judicial review of detention). Fallon succeeded before the Supreme Court and was released, and after a further period of time a new EAW was issued by the UK in 2007. The Supreme Court held that although Irish jurisprudence established that there should not be repeated attempts to procure a conviction (*E.S. v. Judges of the Court Circuit Court and the Director of Public Prosecutions*<sup>83</sup>), proceedings under the EAW Acts are not criminal proceedings and the same principles do not apply. In the proceedings regarding the 2004 EAW, all issues of law raised by him were determined against him and an order for his surrender made and neither any of the High Court judgments or the Supreme Court judgment under Article 40.4.2□ prejudiced or affected these issues. Surrender did not occur on foot of the 2004 EAW solely because of the failure to effect his surrender within the times stipulated in the Acts; there was no decision on any issue which could create an estoppel in the appellant's favour or give rise to *res judicata*:

The Framework Decision envisages, instead of extradition, a system of surrender between judicial authorities based on a high level of confidence between Member States and the mutual recognition of judicial decisions. In the present case there exists a domestic warrant of arrest for the purpose of conducting a criminal prosecution of the appellant. The principle of mutual recognition applies to that domestic warrant and it should be executed on that basis. This is, of course, subject to the issues raised by the appellant at grounds 2, 3 and 4 set out above: however if unsuccessful on those grounds there is no reason why surrender should not be effected simply because the EAW is the second issued in respect of the same domestic warrant. (Finnegan J.)

The appellant was entitled to challenge both EAWs. However, in considering delay (should it be relevant), time taken in prosecuting court proceedings should be discounted. The offence of conspiracy to defraud the United Kingdom Passport Authority could not be prosecuted in Ireland, and s. 42, on the effect of proceedings in Ireland on an EAW from another Member State, of the European Arrest Warrant Act 2003 had no application to the appellant: it was not suggested that consideration was being given to bringing proceedings against the appellant for an offence in Ireland, and no proceedings had been brought in Ireland against him for an offence to which the EAW wholly or partly related.

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<sup>82</sup> [2010] IESC 37, 19th May 2010.

<sup>83</sup> [2008] IESC 37.

Double jeopardy or *ne bis in idem* was addressed in *Minister for Justice, Equality & Law Reform v. Renner-Dillon*<sup>84</sup> and also the issue of interpreting compatibly the wording of the 2003 Act and the wording of the Framework Decision. Finnegan J. delivered judgment for the Supreme Court. By order dated the 25th March 2010, the High Court (Peart J.) gave consent pursuant to s. 22(7) of the European Arrest Warrant Act 2003 to proceedings for the offence of rape alleged to have been committed by the respondent on the 17th December 1982. Section 22(7) of the 2003 Act, as amended by s. 80 of the 2005 Act, provides that the Member State to which a person has already been surrendered can request Ireland to consent to vary the offences prosecuted from those originally included in the EAW issued. Forensic samples taken at that time were re-examined during 2005 and 2006 and in consequence the prosecuting authorities decided to apply a statutory procedure to have the appellant's acquittal quashed and a re-trial ordered. The Court of Appeal of England & Wales delivered judgment on this application on the 25th June 2009 and concluded that in the light of evidence that was not available at the original trial, there was now new and compelling evidence and that the interests of justice require that the acquittal should be quashed and a new trial ordered. The order of surrender of 25<sup>th</sup> March 2010 was obtained for this purpose. From that order, the appellant appealed to the Supreme Court. Finnegan J. noted that the issue that arose on the appeal was whether the order of acquittal of 17th June 1983 was a final judgment within the meaning of s. 41 of the European Arrest Warrant Act 2003<sup>85</sup> and that the appeal concerned the meaning of "finally judged" in Article 3.2 of the Framework Decision and of "final judgment" in s. 41(2) of the European Arrest Warrant Act 2003. Concerning mutual recognition, he observed that decisions of the European Court of Justice in cases on Article 54 of the Schengen Agreement are relevant, and cases on Article 54 consistently recognise that Contracting Parties should recognise the criminal laws in force in other Member States even when the outcome would be different if its own national law had been applied: *R. v Gozutok and Brugge*,<sup>86</sup> *Van Esbroeck*.<sup>87</sup> From the judgment in *Mantello* it is clear that "finally judged" in the Framework Decision has an autonomous meaning in the law of the European Union. Where under the law of the issuing Member State a judgment, in this case a judgment of acquittal, does not definitively bar further prosecution or, as stated in *Mantello*,<sup>88</sup> "constitute a procedural obstacle to the possible opening or continuation of criminal proceedings in respect of the same acts against that person", then that person had not been finally judged. It was clear that the acquittal of the appellant of the offence did not definitively bar the commencement of further criminal proceedings in respect of the offence under the law of the United Kingdom by virtue of the Criminal Justice Act 2003, s. 76(1). The phrase "final judgment" in s. 41(1) of the European Arrest Warrant Act 2003 must bear the autonomous meaning ascribed by the European Court of Justice to "finally judged" in Article 3.2 of the Framework Decision, and the judgment of acquittal in respect of the offence accordingly was not "a final judgment" within the meaning of s. 41 of the 2003 Act. The order of surrender of the High Court was thus affirmed.

The issue of successive EAWs arose in *Minister for Justice, Equality & Law Reform v. Koncis*,<sup>89</sup> where it was held that it will not generally be contrary to the 2003 Act to issue EAWs in succession. The case was an appeal on behalf of Kaspars Koncis against the judgment and order of the High Court (Peart J.), of the 12th November 2008, in which the appellant was ordered to be surrendered to Latvia pursuant to the European Arrest Warrant Act 2003 as amended. This was an appeal by the appellant from the third of three EAWs, all three of which related to the same four offences. Denham C.J., giving judgment for the Supreme Court, observed that in essence, there is a third warrant coming after a second warrant for the same offences on which there was an order of the High Court for the surrender of the appellant, an appeal to this Court, which was struck out on consent, a motion to the High Court, and an order of *habeas corpus*, and the key to the situation was the order for release under Article 40.4.2□ of the Constitution (i.e. the application for *habeas corpus*) on the 20th

<sup>84</sup> [2011] IESC 5, 11<sup>th</sup> February 2011.

<sup>85</sup> Section 41 of the European Arrest Warrant Act 2003 addresses double jeopardy.

<sup>86</sup> [2003] CMLR 2.

<sup>87</sup> [2006] 3 CMLR 6, at para 30.

<sup>88</sup> Case C-261/09, *Mantello*, judgment of 16<sup>th</sup> November 2010.

<sup>89</sup> [2011] IESC 37, 29<sup>th</sup> July 2011.



February 2007, on the second warrant. She further observed that in this case, the High Court ordered the release of the appellant on the second warrant as it referred to the prosecution of offences for which, it had transpired, he had been convicted in his absence. She held that as long as the procedures are in accordance with the 2003 Act and that fair procedures have been followed, there is no reason why a second warrant on the same offences could not be issued, it would depend on all the circumstances of the case. The issue of second or subsequent warrants was considered in *Minister for Justice, Equality and Law Reform v. Ó Fallúin/Fallon*,<sup>90</sup> and in the circumstances of this case there had been no decision that could create an estoppel or give rise to *res judicata* in favour of the appellant. In all the circumstances, the history of the case, which includes a High Court order and a subsequent enquiry and order pursuant to Article 40.4.2° of the Constitution ordering the release of the appellant on the second warrant, is not a bar to the third warrant.

Whether the issuance of successive EAWs could limit to an abuse of process by the issuing Member State was considered in *Minister for Justice and Equality v. J.A.T. No. 2*,<sup>91</sup> and it is apparent from the judgment of Denham C.J. delivered for the Supreme Court that there is limited scope for claiming abuse of process in this context as a ground for refusing surrender. To succeed on such an argument, it seems that the person whose surrender was sought would need to show that the issuance of a second warrant was for tactical reasons and that the problem could not be cured by something short of refusing surrender. The following passages set out the position:

8 I am prepared to accept, for the purposes of this argument, that there are circumstances where a second or subsequent warrant may be issued for tactical reasons which may accordingly amount to an abuse of process. Certainly, *obiter dicta* in *Turin v Barone* [2010] EWHC 3004 might support this approach. I also accept that while abuse of process normally involves an improper motive (and certainly can be more readily identified when that is present) it is not necessarily confined to such circumstances. It may be that a situation can be arrived at in an individual case, perhaps without culpability and certainly without improper motive, but where it can nevertheless be said that to permit proceedings to continue would be an abuse of the Court's process in the sense that it would no longer be the administration of justice. I also do not rule out the possibility that there may be a case where the facts are so extraordinary that they call for explanation. However, in the present context, it must be kept in mind that the issue for an Irish court, in respect of which it is required to administer justice, relates principally to the surrender, and it is the process in relation to that which must be the primary focus of any such inquiry. I would not, therefore, have considered that the issuance of a second warrant in this case amounts to, or even comes close to being an abuse of the process. I do not think that if the second warrant had been issued reasonably promptly, and in relation to a person of full health, and with less forceful claims under Article 8, that it would be considered that the issuance of a second warrant after refusal of surrender on an earlier warrant would, by itself, be a ground for refusal of surrender. ...

10 It seems clear that the respondent is in a very difficult health situation, although the Court might expect a more detailed expert report. Again, however, this matter must not be tested against some generalised consideration of personal sympathy, but rather as to whether the circumstances are such which render it unjust to surrender the respondent. It will almost always be the case that considerations such as these, which undoubtedly evoke some sympathy, would never, in themselves, be remotely a ground for refusing surrender any more than they would be a ground for prohibiting a trial in this jurisdiction. The respondent, however, is also the

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<sup>90</sup> [2010] IESC 37.

<sup>91</sup> [2016] IESC 17, 28th April 2016.

primary, and effectively the sole caregiver for his son, who in turn is in a situation where that care is particularly important. For the reasons set out in the judgment of the Chief Justice, it seems clear that he will undoubtedly suffer very severely if the appellant is surrendered for trial. He is not a person against whom there is any accusation of wrongdoing. The impact on the appellant's son is, for me, an important consideration. While the appellant's son is not a child, he is, in my view, a member of the appellant's family for the purposes both of Article 8 of the ECHR and the Constitution. Nevertheless, I agree with the learned trial judge in this case that these considerations would, themselves, not be enough to establish a ground for refusing surrender if the first warrant had been in a proper form and these matters, which were present at that time, had been the sole ground for resisting surrender. I do not, however, agree that the fact that neither the respondent's health issues nor his son's condition has deteriorated in the intervening time means that this consideration is now irrelevant. It seems to me to be relevant that this is a second application, and moreover, that there has been avoidable delay on the part of the authorities in both jurisdictions in the preparation, submission, and execution of the second warrant, even though the evidence of the respondent's circumstances, and those of his son, had been adduced in the first European Arrest Warrant proceedings. These factors - repeat application, lapse of time, delay, impact on the appellant's son, and knowledge on the part of the requesting and executing authorities of those factors - when weighed cumulatively, are powerful. Even then, and without undervaluing the offences alleged here, it is open to doubt that these matters would be sufficient to prevent surrender for very serious crimes of violence. This illustrates that the decision in this case is exceptional, and even then close to the margin.

11 In any future case, where all or any of the above factors may be relied on, it would not, in my view, be necessary to carry out any elaborate factual analysis or weighing of matters unless it is clear that the facts come at least close to a case which can be said to be truly exceptional in its features. Even in such cases, which must be rare, it is important that the considerations raised are scrutinised rigorously.

12 Finally, I also agree that the real issue in this case is whether an abuse of process has been established. Where a true abuse of process is established, I think it would normally follow as a matter of logic that the proceedings should not be further entertained and should normally be struck out. There may be cases where the abuse itself is one capable of remedy, and where a *locus poenitentiae* might be permitted to allow the defect to be cured. But the normal and logical remedy for an abuse of process is the striking out or staying of the proceedings constituting abuse. Inasmuch, however, as there is expansion of the concept of abuse of the process, and less reprehensible conduct is included under that heading, it may be understandable that there would be inevitable tendency to broaden the corresponding remedies to accommodate and respond to the different levels of conduct constituting abuse of process. That is, perhaps, a reason to ensure that the concept of abuse of process is not extended unduly, and its essential strength diluted. If it is considered that matters can properly be addressed by admonishment, then it is open to doubt that the conduct amounts to an abuse, *de facto* or otherwise, at all.

The issue of parallel proceedings in Ireland was addressed in *Minister for Justice Equality and Law Reform v. Murrell*.<sup>92</sup> This was an appeal from an order of the High Court (Peart, J.), pursuant to s. 18 of the European Arrest Warrant Act 2003, as amended, postponing the

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<sup>92</sup> [2011] IESC 35, 29th July 2011.

surrender of the appellant to the United Kingdom pending the determination of certain domestic offences in respect of which the appellant has been charged. Section 18 of the 2003 Act as amended by s. 11 of the 2012 Act, allows the High Court to postpone surrender in certain circumstances, including where a person is being proceeded against for an offence in Ireland (s. 18(1)(b)). The parties disputed the extent of the application made for postponement, the appellant saying it arose from all six extant charges against him, the respondent arguing it only was in reliance on only the five new charges against him. The High Court had found that while the charge sheet was struck out at the District Court on the 27th May 2009, it was immediately replaced by another charge sheet in respect of the same offence, and noted the refinement of the particulars. Additional charges were also preferred on that date. Peart J. in the High Court took the view that the striking out of the earlier charge sheet did not amount to an acquittal in respect of that offence, and in that regard accepted what was said by McGuinness J. in her judgment in *Kennelly v. Cronin*,<sup>93</sup> and neither did it amount to a dismissal or a disposal of the case. Macken J. delivering judgment for the Supreme Court stated that there were two issues in the appeal: (i) whether the original charge was no longer before the District Court or had been in law, disposed of finally; (ii) whether the “*additional charges*” were in the contemplation of the Director of Public Prosecutions (DPP) at the relevant date, in this case, the 3rd November 2009. Macken J. noted that the legal basis for the appellant’s argument was founded entirely on the proposition that, in law, the charge in the District Court was “disposed of”, and that sufficed to conclude that there was no longer any charge before the Supreme Court, within the terms of its order of the 3rd February 2009. He contended that the striking out of the relevant charge against the appellant on 27th May 2009 amounted to “a due disposal of the charges against him according to law”, but observed that she could not find any support for the argument that a charge or charge sheet which has been struck out and immediately thereafter substituted by a new charge sheet in respect of the same offence – precisely the same offence – can, under the circumstances of this appeal, constitute “a determination” of the offence against an accused, or even “a disposal” of the charge. She held that the postponement order of the Supreme Court of the 3rd February 2009 was worded so as to survive until the “acquittal or conviction” of the appellant in respect of the stated offence, and the postponement of the original surrender remained extant where the offence was the subject of an immediately substituted charge sheet in the District Court, unless the appellant could establish that he was otherwise acquitted of the offence. She continued that the striking out and immediate replacement of one charge sheet with another, recording precisely the same offence against the appellant, was neither an acquittal nor a conviction, nor does it constitute any other form of “disposal” of an offence with which the appellant had been charged. Finally Macken J. held on the facts that s. 42 of the 2003 Act as amended (concerning consideration of charges in Ireland by the DPP) could not apply to the offence in respect of which the appellant was charged on the 31st January 2009, but could only apply, if at all, to the offences with which he was later charged (on the 27th May 2009 several months later).

*Minister for Justice, Equality & Law Reform v. Sliczynski*, already discussed above,<sup>94</sup> also addressed the onus of proof. Murray C.J. noted that extradition proceedings are neither strictly criminal nor civil in nature but the ordinary rules of evidence apply and as he himself stated in *Attorney General v. Park*,<sup>95</sup> which concerned extradition under the Act of 1965, as amended, that “... the burden of proof of facts which may rest on the applicant in these proceedings is not that of a criminal trial. ... An extradition proceeding pursuant to the relevant Acts has its own special features which in a certain sense makes it *sui generis*.” On the general judicial role under the EAW 2003, Murray C.J. noted:

The responsibility for bringing a person named in a warrant before the High Court clearly rests with authorities in the State. Once that is done the task in determining whether all legal requirements for the making of an Order

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<sup>93</sup> [2002] 4 IR 292.

<sup>94</sup> [2008] IESC 73, 19th December 2008.

<sup>95</sup> Unreported, Supreme Court, 6th December 2004.

pursuant to s. 47 are fulfilled rests with the High Court Judge. That is an inherently inquisitorial function.

Where a person whose surrender is sought alleges bad faith by the issuing Member State, there is a particular onus of proof (though presumably not to the criminal standard). In *Minister for Justice Equality and Law Reform v. Gheorghe & anor*, Fennelly J. delivered judgment for the Supreme Court:

28. The absolute denial by the first named appellant of any knowledge whatever of the criminal investigation and his repudiation of the written statement attributed to him can only mean that the Romanian judicial authorities have knowingly provided the High Court with a forged and fraudulent document. According to Recital 10 to the Framework Decision, "*the mechanism of the European Arrest Warrant is based on a high level of confidence between Member States.*" It would require very clear evidence to show that an issuing judicial authority had behaved in the dishonest manner that is implicitly alleged.<sup>96</sup>

This latter point is supported by *Minister for Justice Equality and Law Reform v. Stankiewicz*.<sup>97</sup> Geoghegan J. delivered judgment for the Supreme Court in an appeal from an order of surrender of Stankiewicz to Poland made by Peart J. in the High Court. Geoghegan J. noted that there is only one legal point at issue on this appeal and that was the question of whether the appellant can be said to have "*fled*" within the meaning of s. 10 of the European Arrest Warrant Act 2003 as amended by s. 71 of the Criminal Justice (Terrorist Offences) Act 2005 and as interpreted by the Supreme Court in *Tobin*. The appellant was subject to a suspended prison sentence in Poland and alleged that there were no conditions attaching to the suspension, that he was free to leave the country any time he wished and that to the knowledge of the authorities he worked in Germany for three days in the week for a substantial time. On the alleged basis that he wanted to improve himself, he emigrated to Ireland in March 2005. The appellant alleged (which Poland denied) that this was a *bona fide* departure from Poland and that he could not have been characterised as having "*fled*" within the meaning of section 10. Prior to leaving for Ireland, the appellant was convicted in Poland on another offence, which the appellant alleged was an *in absentia* conviction. Geoghegan J. noted that there was a jurisdiction in Poland to activate the original, suspended sentence into a custodial sentence if there was a conviction on a later offence committed during the period of suspension.

Regarding the *in absentia* conviction (his guilt for which the appellant denied), the appellant pleaded s. 45 of the 2003 Act, which requires that a person shall not be surrendered on the basis of an *in absentia* conviction if he or she was not notified at the time of the trial or was not permitted to attend the trial, unless the issuing Member State undertakes to hold a second trial upon surrender on notice to the person whose request is surrendered so that the person can attend the trial. The appellant accepted that s. 45 applied to an offence in respect of which the extradition or surrender proceedings related and not, as in his case, to a subsequent offence that is not the subject of the extradition proceedings, but the conviction for which had the effect of lifting a suspension of earlier sentences. Nonetheless, the appellant argued that the court should view the contents of s. 45 as representing a public policy which should equally be applied in his situation. Geoghegan J. described the essence of the respondent/Minister's case as being that at the time the appellant departed for Ireland, he knew he had committed the later offence and, therefore, knew that the suspension could be lifted. Geoghegan J. stated he agreed with the judgment of Peart J. in the High Court that there is in general an obligation on this State to surrender persons the subject of an EAW unless very clear circumstances and facts are shown to exist why such an order should not be made and that the court could safely assume that an issuing Member State acts in good faith in these matters and it follows that there is a heavy onus upon any respondent who raises a point of objection, to support that objection by cogent evidence, with mere assertion being insufficient, as to conclude otherwise would lead to a situation where the aims and

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<sup>96</sup> [2009] IESC 76, 18<sup>th</sup> November 2009.

<sup>97</sup> [2009] IESC 79, 1<sup>st</sup> December 2009.

objectives of the Framework Decision would be undermined and set at nought simply by unsubstantiated assertions made on affidavit by a respondent. It was clear that both Peart J. in the High Court and Fennelly J. who delivered the judgment with which the other members of the Supreme Court agreed in *Minister for Justice, Equality and Law Reform v. Tobin*<sup>98</sup> were regarding the facts of that particular case as being very special, those facts being that there was not a fleeing from justice at the relevant time, rather there was a departure from Hungary with the consent of the authorities that there need be no return for the trial, while the money deposit that had to be paid under Hungarian law to avoid a retrial was paid. One of the issues addressed in *Minister for Justice, Equality and Law Reform v. Sliczynski*<sup>99</sup> was the test for fleeing under s. 10, on which point Murray C.J. (in agreement with the more detailed judgment of Macken J. in that case) stated that an objective test applied, albeit that subjective elements could be taken in to account:

... that while the subjective reasons given by a person such as the appellant for leaving the issuing Member State and coming to Ireland, in this case that he wanted to make a better life for himself, may be taken into account within the context of the facts and circumstances of the case as a whole, the appellant, having already been the subject of three separate terms of imprisonment, albeit suspended, was placed under certain judicial constraints a breach of which would or could lead to an order requiring him to serve those sentences. As Macken J. also points out the courts must also look at the objective circumstances in which a person such as the appellant left the country in question. I am satisfied that on the evidence before him the learned trial judge was entitled to be satisfied that in leaving Poland the appellant was seeking to evade the consequences of the three sentences which had been imposed on him prior to leaving Poland and therefore to conclude that he had 'fled', within the meaning of the section, the jurisdiction which imposes the sentences.

On the facts of this case, irrespective therefore of whether he authorised the lawyer who did in fact appear for him or not, by not ensuring he would receive the notifications, he must be taken to have been evading justice, and he cannot simply make assertions of innocence; there would be a heavy onus of proof on him that was discharged by Mr Tobin in his case.

The issue of evidence in EAW proceedings was also addressed in *Minister for Justice Equality and Law Reform v. McGuigan*.<sup>100</sup> This was an appeal by the Minister from a High Court order for the discovery by him of certain documents and materials that allegedly relate to issues arising in the substantive proceedings brought by the Minister against the respondent. In the substantive proceedings, the Minister had applied to the High Court for the surrender of the respondent to Lithuania on foot of an EAW issued by a judicial authority there. The respondent (McGuigan) filed objections to the appeal, of which there were eight points of objection. Points 1 to 6 broadly claimed that the EAW did not comply in form or substance with the requirements of the Act of 2003 or the Framework Decision. Point 7 claimed that the surrender of the respondent should be refused under s. 37 of the Act of 2003 because conditions in places of detention in Lithuania allegedly were such as to be in breach of Article 3 of the European Convention on Human Rights and in particular its prohibition on inhuman or degrading treatment or punishment. Point 8 of the objection, also relying on s.37 of the Act of 2003, alleged that there were fundamental defects in the criminal justice system in Lithuania and the respondent's right to fair procedures and his right not to be deprived of his liberty save in accordance with law would be infringed in the event of such a surrender. The respondent claimed to be entitled to discovery (under Order 8 of the Rules of the Superior Courts European Arrest Warrant Act 2003 and Extradition Acts 1965–2001<sup>101</sup> of the documents in question in order to enable him to properly address issues raised by him in his challenge to the application for his surrender. Murray J. stated that the documents the subject

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<sup>98</sup> [2008] 4 IR 42.

<sup>99</sup> [2008] IESC 73.

<sup>100</sup> [2012] IESC 17, 23<sup>rd</sup> February 2012.

<sup>101</sup> S.I. No. 23 of 2005.

matter of the High Court order for discovery were not relevant to the deficiencies alleged by the respondent concerning the criminal justice system in Lithuania nor the conditions of detention there. At all material times, those issues fell to be decided in the substantive proceedings before the High Court and were not and could not have been the basis on which the High Court made the order for discovery under appeal. The latter related to matters that occurred within the State, namely, alleged requests to the authorities in this State by other parties pursuant to Irish law or international mutual assistance conventions and copies of any records in the possession or procurement of the Minister relating to any interception and surveillance of the respondent. As regards the alleged provision of information or material to the Lithuanian authorities by the Minister, the sworn statements of the respondent throughout his affidavit were simply an assertion, unsupported by any evidence, that material may have been supplied by the Minister to the Lithuanian authorities and that issues could arise in relation to the legality of procedures by which information was obtained by the Minister and released to other parties.

In proceedings of this nature matters cannot be considered to be issues in the proceedings between the parties unless there is some demonstrable basis by way of material or evidence which would allow a court to conclude that there is a genuine issue to be tried. Mere assertions or allegations without more, particularly where they involve serious allegations of unlawfulness and illegal conduct, are not a sufficient basis for treating such matters as being an issue in the proceedings. (See for example *Minister for Justice, Equality and Law Reform v. Altaravicius* [2006] I.R. at 160, where it was held "A mere assertion of non-compliance or the mere raising of a possibility of non-compliance, which is the case here, is not sufficient to dislodge the presumption of compliance." That was a case in which the respondent in that case sought to raise, by way of assertion, an issue as to whether the domestic warrant underlying the EAW had been duly issued or issued in accordance with the law of the requesting State.)

In the absence of any material or evidence in the High Court tending to support (and which counsel admitted he was not in a position to provide) the broad ranging assertions made by the respondent in paragraphs 17 and 18 of his objections those matters cannot, in my view, be properly to be considered to be in issue in these particular proceedings. On the facts of this case they can only be considered as speculative assertion.

In any event, what is clear from the affidavits filed on behalf of the respondent is that at best, he is seeking to establish whether any such records, "if any", exist in relation, for example, to an alleged surveillance. As regards the alleged search of his house, it is stated that the deponent wished to ascertain, *inter alia*, "whether the said search was lawful". This is classically a fishing expedition which the principles governing discovery do not permit.

In the final part of his judgment, Murray J. noted that it was a long established principle of practice and ethics that pleadings, affidavits and similar documents placed before a court should not be drafted so as to contain an allegation of fraud or serious illegality unless counsel, and/or the solicitor, have clear instructions to make such an allegation and have before them reasonably credible material, admissible in court, that gives substantive support to such allegations. He concluded that paragraphs 17 and 18 of the objections be struck out as constituting an abuse of process.

*Minister for Justice, Equality & Law Reform v. Hall* addressed the issue of whether Irish courts or the courts of the issuing Member State should deal with certain matters, including delay.<sup>102</sup> The case involved an appeal by Charles Hall, the respondent/appellant, from the order and

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<sup>102</sup> [2009] IESC 40, 7<sup>th</sup> May 2009.

judgment of the High Court (Peart J.) on the 30th May, 2008, which ordered that the appellant be surrendered to the United Kingdom. Three issues were raised in the appeal: (i) the trial judge erred in law and in fact in finding that the arrest of the appellant was valid; (ii) the trial judge erred in finding that an objection to surrender based on delay cannot be considered by the Court; (iii) the trial judge erred in law in finding that the family and personal circumstances of the appellant cannot be factors which the Court can take into account when considering whether or not an order should be made under s. 16 of the European Arrest Warrant Act 2003. On the appellant's arrest, it was alleged that the State never had the intention to proceed with an unrelated matter and that the appellant's arrest and detention were thus unlawful. Denham J. (as she then was) held, firstly, that while factors may be analysed in relation to an arrest and may be relevant to the legality of a detention, no factors existed in this case so as to undermine the validity of the arrest of the appellant; further, counsel on behalf of both parties submitted that there was no conspiracy, thus this ground could not succeed in the circumstances of this case. In the context of the issue of delay in the case, Denham J. noted:

This scheme [i.e. the EAW] is based on mutual trust and cooperation and the mutual recognition of judicial decisions in the States of the European Union. Consequently when a court makes a decision under the Act of 2003, in accordance with the Framework Decision, it does so on the assumption that the courts of the requesting state will respect fundamental rights and freedoms.

Therefore, issues such as delay and the right to a fair trial are more appropriately raised in the requesting state, if there is a remedy available in that state. There is no doubt that in the United Kingdom there are procedures to raise the issue of delay, of prosecutorial delay, and the right to a fair trial. It is more appropriate that these issues be raised in the jurisdiction of trial. The Court is required to have regard to and to balance the constitutional rights of a requested person with the obligations under the European Arrest Warrant scheme of the Framework Decision.<sup>103</sup>

On delay, applying the authority of Fennelly J. in *Minister for Justice, Equality and Law Reform v. Stapleton*,<sup>104</sup> Denham J. concluded that it would be inappropriate for the Supreme Court to examine and express any view on whether the matters referred to by the respondent could amount to a sufficient prejudice to prohibit his trial, since if at all these would be the subject of a determination before a court in the issuing jurisdiction. The submission regarding hardship in the appellant's personal and family circumstances was really a plea in mitigation and was more appropriate to be made to a trial court and thus in the circumstances of this case was not a basis to refuse to surrender the appellant. Donnelly J. observed that reciprocity as a principle was not involved here and was not helpful to understanding the applicable provisions, as neither s. 44 nor Article 4.7 of the Framework Decision make any inquiry as to the circumstances when the issuing Member State would itself surrender.

*Minister for Justice Equality and Law Reform v. Gheorghe & anor*, referred to just above, also addressed the technical point as to when the sentence for which surrender is sought should have been imposed, and it does not have to be imposed prior to the suspect leaving the issuing Member State:

20. ... It ...appear(s) to me ...that it suffices for the sentence to have been imposed at the time when the surrender of the person is sought. Section 10 ... applies... to a person 'on whom a sentence of imprisonment..... has been imposed..... and who fled from the issuing Member State before he or she..... commenced serving that sentence...'...Nothing in the section requires that the sentence (has) been imposed prior to the person leaving the issuing Member

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<sup>103</sup> Ibid, para. 19.

<sup>104</sup> [2008] 1 IR 669.

State. Such an interpretation would not be in accordance either with common sense or with the purpose of the European Arrest Warrant system. Subparagraph (a) applies where the state 'intends to bring proceedings' against a person; subparagraph (b) applies where the person is 'the subject of proceedings;' subparagraph (c) applies where a person 'has been convicted... but not yet sentenced...' The interpretation advanced by the appellants would leave an obvious and pointless gap. ...

This seems to be a separate scenario to an *in absentia* trial. There is often a delay between conviction and sentencing, and a convicted person who attended trial could be sentenced *in absentia*, i.e. but not tried *in absentia*). Section 45 of the European Arrest Warrant Act 2003 refers to an *in absentia* conviction, rather than sentencing. In *Stankiewicz*, discussed just above, Geoghegan J. endorsed the approach on this point in *Gheorghe*. The matter has now been referred to the Court of Justice by Clarke J. (as he then was) in *Lipinski* (above) for a preliminary ruling.

The issue of plea bargaining being a part of the judicial procedure of the issuing Member State was addressed in *Minister for Justice Equality & Law Reform v. Tokarski*,<sup>105</sup> The case was an appeal by the Minister against the refusal of the High Court to grant an order for the surrender of the respondent to the Republic of Poland pursuant to the provisions of the European Arrest Warrant Act 2003, as amended. Murray J. delivered judgment for the Supreme Court. The point of law certified for the purposes of appeal to the Supreme Court by the High Court was as follows: To what extent, if any, did s. 45 of the European Arrest Warrant Act 2003, as amended, (which refers to a person who was "not present when he or she was tried for and convicted of the offence" specified in the European Arrest Warrant) apply in circumstances where the domestic law of the issuing Member State allowed for plea bargaining and the issue of the accused's guilt has been agreed between an accused person and the Police/State Prosecutor in advance of the matter coming before any court? The fact that the Polish court's decision was given *in absentia*, without proper notification to the respondent within the meaning of s.45 of the Act of 2003, was not at issue between the parties. Murray J. concluded that the fact that a judicial decision in the case was preceded by plea bargaining did not bring the Polish procedure outside the scope of the EAW:

In my view, tried and convicted in its ordinary meaning applies to what factually happened in this case where a Polish court judicially determined that the respondent should be convicted of the offence. The fact that there was what has been described as a form of "*plea bargaining*" and that the respondent had, in a pre-trial investigation, admitted the commission of the offences and agreed the sentence does not take away from the fact that there was a judicial hearing before a Polish court which made a judicial decision that he should be convicted of the offence and sentenced. ... Article 5(1) of the Framework Decision reads as follows:

*"Where the European Arrest Warrant has been issued for the purpose of executing a sentence or detention order imposed by a decision rendered in absentia ..."* (emphasis added)

Article 5 then refers to the fact that surrender may be subject to the condition that the issuing judicial authority give an assurance that the person, if surrendered, "*will have an opportunity to apply for a retrial of the case in the issuing member state and to be present at the judgment*". (emphasis added)

In referring to the decision which imposed a sentence the reference is, evidently, to a judicial decision, and one which led to the imposition of the

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<sup>105</sup> [2012] IESC 61, 6<sup>th</sup> December 2012.



sentence. It seems to me that it would be entirely incompatible with Article 5(1) of the Framework Decision if the phrase 'tried for' in s.45 was to be so narrowly interpreted that it only applied to a judicial determination where the court was required to hear witnesses on the merits of all the prosecutions allegations of fact pointing to the accused's guilt.

The appeal was dismissed and surrender allowed.

Time limits for surrender arose in *Voznuka v. Governor of the Dóchas Centre, Mountjoy Prison*.<sup>106</sup> This was an appeal by the Governor of the Dóchas Centre, Mountjoy Prison, against the order and judgment of the High Court (McCarthy J.) delivered on 10th January 2012 ordering the release of Vaznuka on the basis that the time limits for surrender under the European Arrest Warrant Act 2003 had not been met. Denham C.J. delivered judgment for the Supreme Court. The EAW in issue was issued by Latvia and related to one offence, the entering of a premises and the unplugging of the gas supply. The legal issue was the construction of s. 16 of the European Arrest Warrant Act 2003, as amended in 2009. This section was amended subsequently by European Arrest Warrant (Application to Third Countries and Amendment) and Extradition (Amendment) Act 2012, but this decision did not refer to the law following the 2012 Act. Denham, C.J. noted that that section of the statute was not very clear, it was ambiguous, and gave rise to difficulties in interpretation, in which circumstances, any construing of the section would have to favour freedom over detention and surrender. The substantive ground of the appeal was whether the period of 10 days referred to in s. 16(5) ran from the date upon which the respondent's appeal to the Supreme Court was dismissed, namely, the 18th November 2010, given that the sub-section, *inter alia*, required that the person in question be surrendered not later than 10 days after the order for surrender, in this case the order being originally made previously by the High Court prior to appeal. Denham C.J. observed that the statute must be construed consistently with the policy of the Act and the Framework Decision, which favour expeditious proceedings. Denham C.J. reasoned:

19. Section 16, sub-section 3 provides that the High Court Order for surrender should take effect upon the expiration of 15 days from the date of the making of the Order. In this case that means 15 days from the date when the stay placed on the Order of the High Court pending appeal ceased to have effect. That was the 18th November, 2010, when the appeal was dismissed. The 10 day period within which the person concerned must be surrendered then begins to run subject to the provision of sub-section 7 that where a person is not surrendered to the issuing Member State within the relevant period, the 10 days, the High Court may remand the person in custody or on bail for such period as is necessary to effect surrender, unless it considers it would be unjust or oppressive to do so. As indicated in paragraph 17 above, no application was made to the High Court pursuant to sub-section 7. Consequently, the time within which it was permissible to surrender the respondent, as provided for in sub-section 5, had expired during December, 2010 and before the arrest of the respondent on 5th January, 2012. It was argued on behalf of the appellant that the order for surrender did not take effect until the respondent was actually arrested on foot of the warrant issued by the Supreme Court. Counsel for the appellant sought to support this proposition by drawing an analogy with a sentence imposed by a court following conviction where a defendant is not actually before the court at the time of sentence and a warrant is issued for his or her arrest for the purpose

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<sup>106</sup> [2013] IESC 33, 27<sup>th</sup> June 2013.

of giving effect to that sentence. In such circumstances, counsel argued that the sentence did not begin to take effect or to run until the person was actually arrested. By analogy, it was submitted, the time provided for in sub-section 5 should not be treated as running until the respondent had been arrested. However, the law governing the sentencing and imprisonment of convicted persons cannot be considered as analogous to a specific statutory scheme governing the detention for administrative or practical purposes of persons for the purpose of giving effect to an order for surrender. The statutory scheme must be interpreted within its own terms. On that basis, as already indicated, the time for surrender had expired before the respondent was arrested.

As the time within which it was permissible to surrender the respondent, as provided for in sub-section 5, had expired during December 2010 and before the arrest of the respondent on 5th January 2012, Vaznuka should not be surrendered.

Amongst the issues addressed in *Minister for Justice, Equality and Law Reform v. Olsson*<sup>107</sup> was that Article 11(2) of the Framework Decision provided for a right of legal assistance in accordance with national law, and did not itself require the grant of legal aid. Legal aid in the context of the EAW scheme was also considered in

*Minister for Justice and Equality v. O'Connor*.<sup>108</sup> O'Donnell J. delivered judgment for the Supreme Court. He began by noting that although this appeal concerned both an EAW and plenary proceedings, it concerned in truth one issue: the application of the Legal Aid Custody Issues Scheme in EAW cases. The Court of Appeal had dismissed the appeal from the High Court judgment that although there was a disparity of treatment in EAW compared to other proceedings, considering the fundamental features of the scheme particularly in the light of the assurances given under it, there was no breach of any right to equality of treatment under Article 40.1 of the Constitution (Hogan J. dissented in the Court of Appeal on this point). The Court of Appeal also held although that court was now in a position to make a reference to the Court of Justice (which had not been a possibility in the *Olsson* case), it considered that it would be inappropriate to make any such reference. The Court of Appeal certified for decision by the Supreme Court the argument concerning unequal treatment when it came to legal aid of those facing a request for their surrender pursuant to and EAW (in which case legal aid was available under a discretionary administrative scheme) and those facing criminal proceedings (in which case legal aid was available under the Criminal Legal Aid Act 1962) and whether it was appropriate to refer the question to the Court of Justice of the EU. O'Donnell J. stated he could not agree with the approach of Hogan J. in the minority in the Court of Appeal that if a court concluded that the plaintiff had a constitutional right that was breached by the process adopted in determining the EAW request, that the court's discretion could extend to ordering the surrender notwithstanding the unconstitutionality. O'Donnell J. noted that since *The State (Healy) v. Donoghue*,<sup>109</sup> it was clear that the entitlement to legal aid in criminal cases is constitutionally based and not dependent on the particular language of the statute. On the equality argument, O'Donnell J. concluded once legal representation was made available at the cost of the State, it was not a breach of the Constitution that such legal representation is made available through a different route in other cases. On whether it was necessary to make a reference for a preliminary ruling under Article 267 TFEU, O'Donnell J. concluded it was not, as legal aid was available for EAW respondents under national law and given that Article 11.2 of the Framework Decision did not require legal aid, but merely legal representation provided in accordance with national law.

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<sup>107</sup> [2011] 1 IR 384.

<sup>108</sup> [2017] IESC 21, 30<sup>th</sup> March 2017. O'Donnell J. in the Supreme Court in *Minister for Justice and Equality v. O'Connor, Re Brexit* [2017] IESC 48 (03 July 2017) re-iterated the conclusions on legal aid in *Olsson* and *O'Connor*.

<sup>109</sup> [1976] IR 325.

## 6. Conclusion

The Irish courts have generally been willing and cooperative enforcers of the special scheme of extradition represented by surrender pursuant to an EAW. The Irish courts have frequently stated that the EAW scheme is based on mutual confidence and trust, and a high level of these, between the Member States and that the Irish implementation legislation is to be interpreted, where possible and not *contra legem*, in conformity with the Framework Decision on an EAW as amended. The Irish courts have not engaged in any radical interpretation of Irish legislation on the basis of a notion of teleological reasoning in favour of integration. Although strictly speaking not criminal in themselves, extradition or surrender proceedings relate to a criminal subject matter, and the careful approach of the Irish courts reflects that. In terms of the idea of automaticity referred to in the Introduction above, Ireland's approach is cooperative and geared toward enabling automaticity, but without compromising Ireland's grounds of refusal, set out in legislation and reflecting Irish constitutional principles, or watering down the process of judicial review of the relevance of those grounds of refusal in particular cases.

**The following conclusions can be drawn from the caselaw discussed under the categories above:**

5.1 *The presumption of confidence in the authorities of other Member States, the extent of review of laws of other Member States, and practical issues of comparison:*

- fundamental to the scheme and order of rights ordained by the Constitution", which is an elaboration of the notion of an egregious defect in the procedure of the issuing Member State: the defect is judged by fundamental principles of constitutional protection for criminal suspects under Irish law (*Buckley*);
- a person seeking to resist surrender on grounds of differences between Irish law and procedure and those of the issuing Member State must show how those differences somehow fall within one of the grounds for refusal for surrender specified in the 2003 Act as amended (*McArdle & Brunell*);
- as O'Donnell J. stated in *Balmer*, neither the precise dividing line between cases of surrender and non-surrender, nor the principle justifying such a distinction has been defined in the caselaw and the courts are proceeding incrementally, meaning that what constitutes an egregious defect is difficult to say exactly, but will be decided on a case-by-case basis; however, a finding that an aspect of national criminal procedure is in breach of the ECHR by a Council of Europe institution will be sufficient, as indicated in *Balmer* (and also in *Nolan* below).

5.2 *The scope of the grounds of refusal, under s. 37 on fundamental rights in particular (also including minimum gravity and the requirements of Irish law that the person surrendered has fled from the issuing Member State under s. 10 and regarding in absentia trials under s. 45), and the extent to which Irish constitutional guarantees are expected to be fulfilled in the criminal procedure of issuing Member States (5.2):*

- as indicated under 1.5.1, the egregious defect standard applies to breach of constitutional rights under s. 37(1)(b), but a finding of incompatibility between national law of an issuing Member State and the ECHR by a Council of Europe institution may be sufficient to refuse surrender under s. 37(1)(a).
- the Irish courts have stuck carefully to the legislative restrictions on surrender in the context of an *in absentia* trials, reflecting the general prohibition on *in absentia* trials in the common law tradition; the Irish courts have not been willing to read down the Irish legislation in this respect, and actual - and not, for example, constructive notice - appears to be required of a person who has been tied of that trial;

- while it is a principle of Irish constitutional law that a prisoner is not detained for purely preventative purpose, this did not prevent surrender to the UK to serve a sentence that was partly preventive in nature (*Murphy*);
- the High Court has no role to look at possible sentences that might be awarded in an issuing Member State when a person is surrendered and to consider whether such a sentence is proportionate and that it would be virtually impossible in the vast majority of cases for the High Court or any national court to ascertain the likely sentence to be imposed by a court in the requesting state in all the circumstances of a particular case (*Ostrowski*).

5.3 *The extent to which an issuing Member State is required to provide as much information as possible about the nature of the process to which a surrendered person will be subject, the nature of the requirement under s. 21A of the 2003 Act that decision has been made to charge and bring to the trial the person whose surrender is requested (5.3):*

- that there should be clarity as to the offences for which surrender was sought and as to any proposed sentencing (*Herman*);
- where the national judicial authority that issued an EAW seeks to change a fundamental element in the nature or purpose of the warrant, as opposed to providing further information or corrections of a minor nature, a new warrant should be issued in the form required by the Act, namely, in the form in the Annex to the Framework Decision, so that it may be endorsed for execution in the State by the High Court (*Herman*);
- normally the information contained in the warrant should be sufficient to enable the executing Judicial Authority, in Ireland the High Court, to decide on a request for surrender, but even with a carefully designed form of warrant and one that has been properly filled in that, in the ordinary nature of things, in particular cases of ambiguities might arise, or some lacunae on points of detail in the information could be found to exist, particularly when the standard form of arrest warrant falls to be issued by a Judicial Authority in one legal system and executed by a Judicial Authority in another legal system, and s. 20(1) and (2) of the Act of 2003, as amended, ensure that information could be furnished by the requesting Judicial Authority to the executing Judicial Authority for this purpose (*Sliczynski*);
- the issue in Irish implementation of the EAW as to whether a person has “fled” the issuing Member State related to the fact that Irish law imposes a precondition, which is not to be found as a precondition in the Framework Decision, to the surrender of persons pursuant to an EAW where the surrender is sought for the purpose of serving a term of imprisonment, in s. 10 of the Act of 2003 as inserted by the Act of 2005, that surrender should be ordered where the person in question “fled” before commencing or completing his or her sentence, the jurisdiction that imposed the sentence (*Sliczynski*);
- Section 17 of the European Arrest Warrant Act of 2003 does make provision for surrendering in respect of some offences while refusing surrender for another offence or offences when there are multiple offences mentioned in the EAW, but that section was clearly only intended to apply where the request in relation to each offence in the warrant was distinct and separate, rather than in the case of a single composite sentence for two or more offences (*Ferenca, Kizelavicius*);
- must be actual evidence to the effect that a decision to prosecute had not been made, rather than that there must be evidence that the decision to prosecute had been made, but that surrender could not be sought to investigate further in order to allow a decision to prosecute (*Olsson*);
- where it is clear from the facts of the case that while a decision has been made in the issuing Member State equivalent to charging the appellant, that decision did not incorporate a decision to try the appellant for an offence, an Irish court could not be satisfied that the terms of section 21A of the 2003 Act as amended were met (*Bailey*), a

requirement that seems to involve that charging must be specific enough to relate to the particular facts and a particular offence;

- section 21A(1) of the 2003 Act is expressed conjunctively, not disjunctively, so the High Court has to enquire whether a decision has been made both to charge the person with and to try him for the relevant offence, and such a decision cannot depend on further investigation after surrender has occurred (*Bailey, Pocevicius*), although this does not mean that the investigation must be irreversibly concluded (*Pocevicius*);
- there are many good reasons for the stance in s. 21A of the 2003 Act as amended, including the extremely prolonged course that preliminary proceedings may take in inquisitorial systems (*Bailey*).

#### 5.4 *Speciality*:

- Member States may issue more than one EAW contemporaneously regarding the same offence (*Gotszlik*);
- the Act of 2003, as amended, in relation to fundamental rights, and in light of the Framework Decision, do not apply in the High Court on a request from a requesting state for consent to prosecute a person, who has already been surrendered, for further offences (*Strzelecki*).

#### 5.5 *Double jeopardy*:

- in applying the principle of double criminality, it is a question of determining if the acts alleged were such that if committed in Ireland they would constitute an offence, not whether the words would equate with the terms of an indictment in Ireland, but rather whether the acts described and deciding whether they would constitute an offence if committed in this jurisdiction (*Sas, Dolny*);
- where the offence specified in the relevant EAW involved the same acts or omissions by reference to a regime in the issuing Member State then, at least at the level of principle, correspondence can be established provided that there is a sufficient similarity between the respective regimes to justify the conclusion that the substance of the acts or omissions that amount to offences in the respective jurisdictions is the same even though the specific relevant regimes will necessarily be, as a matter of law, different, emanating as they will from the legal systems of the two separate jurisdictions (*Szall*).

#### 5.6 *Territoriality*:

Section 44 of the European Arrest Warrant 2003, as amended, prohibited surrender if two specific conditions were satisfied: the first was that the offence was committed or alleged to have been committed in a place other than the issuing Member State and the second prohibited the surrender of a person where the act of which the offence consists did not constitute an offence in Ireland by virtue of having been committed, i.e. because it was committed, in a place other than Ireland; but s. 44 enables Ireland to surrender a person in respect of an offence alleged to have been committed outside the territory of the issuing Member State in circumstances where the Irish State would exercise extra-territorial jurisdiction in reciprocal circumstances (*Bailey*).

#### 5.7 *Other issues*:

- where under the law of the issuing Member State a judgment, in this case a judgment of acquittal, does not definitively bar further prosecution or, as stated in *Mantello* constitute a procedural obstacle to the possible opening or continuation of criminal proceedings in respect of the same acts against that person, then that person had not been finally judged (*Renner-Dillon*);

- as long as the procedures are in accordance with the 2003 Act and that fair procedures have been followed, there is no reason why a second warrant on the same offences could not be issued, it would depend on all the circumstances of the case (*Koncis*);
- to succeed on an argument that the issuing of successive EAWs amounts to an abuse of process and should be struck out, it seems that the person whose surrender was sought would need to show that the issuance of a second warrant was for tactical reasons and that the problem could not be cured by something short of refusing surrender (*J.A.T. No. 2*);
- the striking out and immediate replacement of one charge sheet with another, recording precisely the same offence against the appellant, was neither an acquittal nor a conviction, nor did it constitute any other form of "disposal" of an offence with which an appellant has been charged so as to prevent surrender pursuant to an EAW (*Murrell*);
- extradition proceedings are neither strictly criminal nor civil in nature, but the ordinary rules of evidence apply, and the burden of proof of facts that may rest on the applicant is not that of a criminal trial (*Sliczynski*);
- given the principle of mutual trust and confidence amongst the Member State authorities on which the EAW scheme is based, it would require very clear evidence to show that an issuing judicial authority had behaved in a dishonest manner for a surrender request to be rejected on that ground (*Gheorghe*);
- the fact that a judicial decision in the case was preceded by plea bargaining does not bring the judicial procedure of the issuing Member State outside the scope of the EAW (*Tokarski*);
- Article 11(2) of the Framework Decision provided for a right of legal assistance in accordance with national law, and did not itself require the grant of legal aid (*Olsson, O'Connor*).

## National report No 2 on the Irish criminal justice system

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### A. General questions on the features of national criminal procedure systems

#### 1. Do you consider your criminal justice system as inquisitorial, accusatorial, or mixed?

Accusatorial and adversarial. There are few inquisitorial elements in Irish criminal procedure. A judge generally acts as a referee at trial and is not to actively intervene in the conduct of the case by the prosecution and defence save as to point out any error of law. Caselaw indicates that too active a role by the judge in favour of one side over another a role by a trial judge may justify an acquittal or retrial.<sup>110</sup>

#### 1.1. If your country has been under communist rule, does your criminal justice system still bear the influence of that regime? Could you please describe it briefly?

This is not applicable.

#### 1.2. If mixed, could you briefly explain which elements belong to which tradition? Have judicial or legislative changes occurred recently in your country that had an effect on the functioning of your criminal justice system?

The Irish criminal justice system is based on the traditional common law system, but with substantive legislative amendments and a written Constitution.<sup>111</sup> As a result of the latter, there has been a degree of codification, but caselaw remains a centrally important source.

#### 1.3. How do you think the diversity of legal traditions regarding criminal procedure law across the Union may impact cross-border cooperation in criminal matters?

The substantive principles of criminal law are reasonably consistent across the EU but there are very significant differences as regards criminal procedure law.<sup>112</sup> In particular, it creates a challenge for Ireland particularly regarding:

- (i) admission of evidence obtained from Ireland in a trial in another Member State in a way that may be inadmissible as contrary to Irish constitutional rights of the accused;
- (ii) detention for investigation, which is strictly prohibited.

This can cause significant difficulties, misunderstandings and delay in cross border cooperation in areas such as extradition and the gathering of evidence for the purposes of criminal prosecution. The relevant EU instruments have been drawn up with these considerations in mind but it is difficult to overcome these difficulties without regular contact and mutual understanding.<sup>113</sup> In future, the departure of the UK from the EU may potentially negatively impact on cooperation with the UK from an Irish perspective in that future EU legislative measures which may be designed for an inquisitorial system of law with issues in application for a common law system such as Ireland's. Post-Brexit, the only other common law jurisdiction in the EU will be Malta.<sup>114</sup>

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<sup>110</sup> See recently, e.g. *Director of Public Prosecutions v. Rattigan* [2017] IESC 72, 12th December 2017.

<sup>111</sup> Response of the Department of Justice and Equality to the survey questionnaire (Appendix I).

<sup>112</sup> Response of the Department of Justice and Equality to the survey questionnaire (Appendix I).

<sup>113</sup> Response of the Department of Justice and Equality to the survey questionnaire (Appendix I).

<sup>114</sup> Response on a personal basis of an official in the Office of the Director of Public Prosecutions (Appendix II).

2. What is the status of the rights of the defence in your country (e.g. fundamental right, constitutional right) and how does the defence challenge evidence gathered by the prosecution?

Rights of the accused are constitutionally protected, with account taken of the jurisprudence of the European Court of Human Rights.<sup>115</sup>

The defence may challenge evidence gathered by the prosecution mainly through the process of cross-examination. The defence may also call its own witnesses, who in turn may be cross-examined by the prosecution. It is normal for the defence to call its own witnesses. The defence do not typically investigate matters themselves, though defence lawyers may interview witnesses before a trial. Section 34 of the Criminal Procedure Act 2010 requires the defence to request permission from the court of trial before it may call its own expert witnesses.

The prosecution have a duty of disclosure towards the defence. The extent of the duty of disclosure is set out in caselaw and in practice directions from the Director of Public Prosecutions. The Office of the Director of Public Prosecutions has summarised the current law on disclosure in the following:

9.1 The constitutional rights to a trial in due course of law and to fair procedures found in Articles 38.1 and 40.3 of the Constitution of Ireland place a duty on the prosecution to disclose to the defence all relevant evidence which is within its possession. That duty was stated by McCarthy J. in *The People (Director of Public Prosecutions) v. Tuite* (Frewen 175) as follows:

*"The Constitutional right to fair procedures demands that the prosecution be conducted fairly; it is the duty of the prosecution, whether adducing such evidence or not, where possible, to make available all relevant evidence, parol or otherwise, in its possession, so that if the prosecution does not adduce such evidence, the defence may, if it wishes, do so".*

9.2 In *Director of Public Prosecutions v. Special Criminal Court* [1999] 1 IR 60, Carney J. (at p.76, in a passage subsequently approved by the Supreme Court at p.81) defined relevant material as evidence which "might help the defence case, help to disparage the prosecution case or give a lead to other evidence".

*"the prosecution are under a duty to disclose to the defence any material which may be relevant to the case which could either help the defence or damage the prosecution and that if there is such material which is in their possession they are under a constitutional duty to make that available to the defence"- McKevitt v. Director of Public Prosecutions* (Supreme Court, 18 March 2003, Keane C.J.).

9.3 The prosecution is therefore obliged to disclose to the defence all relevant evidence which is within its possession. A person charged with a criminal offence has a right to be furnished, firstly, with details of the prosecution evidence that is to be used at the trial, and secondly, with evidence in the prosecution's possession which the prosecution does not intend to use if that evidence could be relevant or could assist the defence. The extent of the duty to disclose is determined by concepts of constitutional justice, natural justice, fair procedures and due process of law as well as by statutory principles. The limits of this duty are not precisely delineated and depend upon the

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<sup>115</sup> Response of the Department of Justice and Equality to the survey questionnaire (Appendix I).



circumstances of each case. Further, the duty to disclose is an ongoing one and turns upon matters which are in issue at any time.<sup>116</sup>

The issue of disclosure has recently (in 2014) been the subject of a report from Irish Law Reform Commission, *Disclosure and Discovery in Criminal Cases*.<sup>117</sup>

The issue of disclosure can be related to conception of the role of prosecutor as a non-partisan figure, notwithstanding the general context of adversarial procedure, whose role can be described as a 'minister of justice' or seeker of the truth, which has been upheld in Irish caselaw.

### 3. What is the status of the rights of victims in your country (e.g. fundamental right, constitutional right)?

These are not directly protected in Irish constitutional law, but are inherent in other rights, e.g. the (un-enumerated) right to bodily integrity and to property. Ireland has implemented EU Directive 2012/29/EU, establishing minimum standards on the rights, support and protection of victims of crime.<sup>118</sup> Recently, the rights of victims have been set out in legislation, including the transposition of the EU Victims Directive, in the Criminal Justice (Victims of Crime) Act 2017. It includes a right for a victim of crime to request a review of a decision not to prosecute, as well as provisions on the protection of victims during investigations and criminal proceedings. It also provides for a voluntary restorative justice scheme between the offender and the victim.<sup>119</sup>

## B. Impact on national law of procedural rights directives

### B.1. State of transposition of directives for which the transposition deadline has already passed

4. Has the entry into force of the directives on suspects/defendants and victims triggered important changes in:

4.1. The criminal procedure of your country? If so, has the implementation of directives made the national system raise its standards and thus comply with ECHR case law?

Irish constitutional law places considerable emphasis on the rights of the accused and does so in a way that generally goes beyond protections under the ECHR. Thus, neither EU membership nor incorporation of the ECHR into Irish law has impacted directly on Irish criminal procedure. The most significant impact has been to require a development in policy by the Director of Public Prosecutions to give reasons to victims of crime for not prosecuting. This development was already underway to some extent in Ireland as a result of administrative practice by the Director of Public of Prosecutions, but the context of the EU Victims Directive ensured it was extended to all crimes.<sup>120</sup>

Under Protocol 21 on the position of the UK and Ireland in the Area of Freedom, Security and Justice, annexed to the TEU and TFEU, Ireland participates in, and is bound by, only two of the 6 procedural rights Directives (2010/64/EU on the right to interpretation and translation

<sup>116</sup> Office of the Director of Public Prosecutions, *Guidelines for Prosecutors* (4<sup>th</sup> ed. 2016), chap. 9, p. 31.

<sup>117</sup> Law Reform Commission, *Disclosure and Discovery in Criminal Cases* (LRC 112-2014), available at [www.lawreform.ie](http://www.lawreform.ie) > . The thrust of the recommendations was for the process of discovery to be more systematically dealt with in the criminal procedure, including by addressing it as early as possible.

<sup>118</sup> OJ L 315, 14.11.2012, p. 57–73.

<sup>119</sup> Criminal Justice (Victims of Crime) Act 2017, s. 26.

<sup>120</sup> Details of the current scheme are available here: < [https://www.dppireland.ie/victims\\_and\\_witnesses/young-witnesses/](https://www.dppireland.ie/victims_and_witnesses/young-witnesses/) > . For background, see Office of the Director of Public Prosecutions, *Final Report on Reasons Project* (Office of the DPP 2008), available at: < <https://www.dppireland.ie/filestore/documents/FINAL%20REPORT%20201008.pdf> > .

in criminal proceedings<sup>121</sup> and 2012/13/EU on the right to information in criminal proceedings<sup>122</sup>).<sup>123</sup> The main effect of the procedural rights directives has been to clarify in legislation the scope of rights particularly in the area of interpretation and translation, and a large majority of the rights already exist under Irish law.<sup>124</sup>

*4.2. How have national courts interpreted national legislation transposing the relevant EU directives thus far? Have significant changes been brought to the judicial practice of your country?*

See generally the report submitted on Irish caselaw on the European Arrest Warrant (EAW). Irish courts have been careful to maintain traditional standards of Irish constitutional law and practice concerning criminal matters in their interpretation of Irish implementing legislation on the EAW. No significant changes in judicial practice have been identified.<sup>125</sup> However, the recent *Telesveredg-Watson* judgement from the Court of Justice of the EU<sup>126</sup> is now being raised in Irish courts and could have a dramatic effect.<sup>127</sup>

*4.3. To what extent have national courts in the transposition process taken into account general principles of EU law and ECJ case law on EU procedural directives?*

The Supreme Court has adopted a cautious jurisprudence that indicates acceptance of general principles. A conflict situation has yet to occur between a fundamental principle of Irish constitutional law and EU law to test the issue more fully. The Irish courts always examine the principles of EU law in interpreting legislation as per the *Pupino*<sup>128</sup> approach to purposive interpretation<sup>129</sup> (that does not amount to *contra legem* interpretation).

*5. Have transposition gaps persisted? If so, could you briefly point them out?*

Ireland has an opt-out of EU criminal justice measures. So far Ireland has generally opted in (the main exception being regulation on the establishment of a European Public Prosecutor's Office). Ireland waited some time before opting in to the European Investigation order (EIO), which it did through the Criminal Justice (European Investigation Order) Regulations 2017. In addition, Ireland has not transposed Article 27 of the EAW Framework Decision on possible prosecution for other offences nor fully transposed Article 24 (2) of that Framework Decision on temporary surrender.<sup>130</sup>

*1) e.g. legislation that heralded a shift from a predominantly inquisitorial to a more adversarial criminal justice system; landmark decision by the national court that changed the way mutual recognition instruments were operationalised*

Ireland has always operated an adversarial system, so there has been no particular shift.<sup>131</sup>

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<sup>121</sup> OJ L 280, 26.10.2010, p. 1–7.

<sup>122</sup> OJ L 142, 1.6.2012, p. 1–10.

<sup>123</sup> Response of the Department of Justice and Equality to the survey questionnaire (Appendix I).

<sup>124</sup> Response on a personal basis of an official in the Office of the Director of Public Prosecutions (Appendix II).

<sup>125</sup> Response of the Department of Justice and Equality to the survey questionnaire (Appendix I); Response on a personal basis of an official in the Office of the Director of Public Prosecutions (Appendix II).

<sup>126</sup> Judgment of the Court (Grand Chamber) of 21st December 2016, which held that Article 15(1) of Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector, as amended, read in the light of Articles 7, 8 and 11 and Article 52(1) of the Charter of Fundamental Rights of the European Union, must be interpreted as precluding national legislation which, for the purpose of fighting crime, provides for general and indiscriminate retention of all traffic and location data of all subscribers and registered users relating to all means of electronic communication.

<sup>127</sup> Response on a personal basis of an official in the Office of the Director of Public Prosecutions (Appendix II).

<sup>128</sup> Case C-105/03, *Maria Pupino* [2005] ECR I-5285.

<sup>129</sup> Response on a personal basis of an official in the Office of the Director of Public Prosecutions (Appendix II).

<sup>130</sup> Response on a personal basis of an official in the Office of the Director of Public Prosecutions (Appendix II).

<sup>131</sup> Response of the Department of Justice and Equality to the survey questionnaire (Appendix I).

2) e.g. EU directives on legal aid and the right of access to a lawyer compared to the 2008 *Salduz v. Turkey judgment*.

Ireland does not participate in either of the two Directives in question.<sup>132</sup> The Irish courts have been active in promoting the right of access to a lawyer and take into account the jurisprudence of the ECHR.<sup>133</sup> As a matter of constitutional right, legal aid is available to defendants in criminal cases.<sup>134</sup> It is the practice in Ireland to ensure that a suspect has access to a lawyer before police questioning and to allow a lawyer to be present during questioning.<sup>135</sup> The extent of constitutional recognition of a right of access to a lawyer was addressed recently in *Director of Public Prosecutions v. Doyle*, where the Supreme Court held that the constitutional right of access to a lawyer does not extend to having lawyer present during police interviews,<sup>136</sup> although there is a constitutional right of reasonable access to a lawyer.<sup>137</sup> In *Doyle*, the Supreme Court indicated it may be prepared in future to recognise the right claimed in *Doyle*.

3) e.g. trainings to ensure a high level of competence among interpreters/translators and lawyers so as to match the requirements of directives, reform of the application system for legal aid, etc.

The application system for criminal legal aid is currently under review, with a view to reforming the law to provide greater clarity and improved transparency with regard to eligibility criteria, without in any way impinging on access to justice and fairness in the criminal justice system.<sup>138</sup> Further, legal professionals and relevant criminal justice authorities are making significant progress on training and skill issues in such areas as police detention questioning.<sup>139</sup>

## B.2. Directives that are still in the process of being transposed

6. Has the transposition process of directives adopted in 2016 begun? Do you think it will lead to important changes in the national law of your country?

- Directive on the presumption of innocence (Directive (EU) 2016/343 - deadline for transposition 1 April 2018):
  - The presumption of innocence is already protected under Irish constitutional law as an aspect of the right to a fair trial under Article 38.1 of the Constitution, as recognised in *The People (Attorney General) v. O'Callaghan*.<sup>140</sup> Ireland does not participate in any of the 2016 procedural rights Directives.<sup>141</sup>
- Directive on legal aid (Directive (EU) 2016/1919 – deadline for transposition 25 May 2019): Irish constitutional law already provides for legal aid (see above).
- Directive establishing safeguards for children (Directive (EU) 2016/800 - deadline for transposition 11 June 2019):

Relatively little information is currently available.

<sup>132</sup> Response of the Department of Justice and Equality to the survey questionnaire (Appendix I).

<sup>133</sup> Response of the Department of Justice and Equality to the survey questionnaire (Appendix I).

<sup>134</sup> The foundational case is *State (Healy) v. Donoghue* [1976] IR 325 discussing Articles 34, 38 and 40 of the Constitution. The relevant legislation is the Criminal legal aid Act 1962. Legal aid in case involving the European Arrest Warrant is available separately to this Act by administrative arrangement.

<sup>135</sup> Response of the Department of Justice and Equality to the survey questionnaire (Appendix I).

<sup>136</sup> *Director of Public Prosecutions v. Doyle* [2017] IESC 1, 18<sup>th</sup> January 2017. On the facts, access to a lawyer occurred during breaks in interviewing.

<sup>137</sup> *The People (Director of Public Prosecutions v. Healy* [1990] 2 IR 73.

<sup>138</sup> Response of the Department of Justice and Equality to the survey questionnaire (Appendix I).

<sup>139</sup> Response of the Department of Justice and Equality to the survey questionnaire (Appendix I).

<sup>140</sup> [1966] IR 501.

<sup>141</sup> Response of the Department of Justice and Equality to the survey questionnaire (Appendix I).

7. *In light of the Milev judgment recently delivered by the Court of Justice, are the provisions of EU directives on procedural rights being taken into consideration by national courts when interpreting national procedural law?*

The *Milev* judgment confirms previous caselaw concerning interpretation of national law in light of a Directive. In the main (indeed sole) EU instrument adopted so far in Ireland that has been subject to litigation in the Irish courts, the Irish courts have repeated ECJ formulations concerning interpretation of domestic Irish law in conformity with EU Directives. While the courts are obliged to take into account such judgments, it is not considered that the *Milev* judgment will be particularly significant in an Irish context.<sup>142</sup>

### **B.3. Effectiveness and adequacy of EU law on criminal procedure**

8. *In some cases, has the national legislator gone beyond the standard provided by EU directives?*

Concerning the EAW, Irish implementing legislation has made surrender pursuant to an EAW conditional upon respect for fundamental guarantees of due process.

9. *Do you think some procedural issues have not been addressed by EU directives/at EU level?*

Investigative detention and abuse of process are amongst issues not addressed.

10. *To what extent do you think transposition gaps and persisting differences between the Member States may postpone/block cross-border cooperation in criminal matters, including the operation of mutual recognition instruments? If this occurred in the past, please explain which cross-border/mutual recognition measure was at stake.*

The answer to this will reflect the answer to Q. 8 above. If transposition gaps and persisting differences give rise to an inference that the rights of an accused will not be fully respected that can give rise to difficulties in cross border cooperation in criminal matters,<sup>143</sup> the extent of this remains to be seen. To date, fundamental problems have not arisen. One practical example to date is Ireland's transposition of Article 5 of the Framework Decision on an EAW dealing with the potential repatriation of a person surrendered on foot of an EAW back to the executing Member State to serve any custodial sentence imposed. Ireland's transposition of this measure does not satisfy e.g. Norway who insist that the Irish authorities physically deliver the person back to Norway i.e. it is not sufficient that the person is made available for repatriation.<sup>144</sup>

11. *Has recent ECJ case law on mutual recognition measures impacted cross-border cooperation? Has the national law of your country conformed to the case law of the ECJ?*

Not directly. Ireland has only recently submitted its first Article 267 TFEU references. Irish courts are bound to follow ECJ caselaw, and they do so regarding the EAW. Broadly speaking, Ireland has not experienced any major conflict between EU law and its own legal processes in implementing mutual recognition in the criminal justice sphere. To date, not many references for a preliminary ruling have been made by Irish courts regarding EU criminal justice issues, this has occurred quite recently and the outcomes are pending. Ireland has not yet adopted the EIO, which would likely prove more challenging in implementation.

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<sup>142</sup> Response of the Department of Justice and Equality to the survey questionnaire (Appendix I).

<sup>143</sup> Response of the Department of Justice and Equality to the survey questionnaire (Appendix I).

<sup>144</sup> Response on a personal basis of an official in the Office of the Director of Public Prosecutions (Appendix II).

### **C. Other domains that have not, or to a very little extent, been subject to harmonisation measures at EU level Detention conditions**

12. Does your criminal justice system provide for specific detention conditions (e.g. time-limits for custody or detention at each stage of the proceeding)?

Yes investigative detention is strictly limited, i.e. detention for the purpose of investigation after a decision has been made to charge, ranging up to 48 hours for ordinary offences or 96 hours for terrorist offences.<sup>145</sup> The practise in Ireland is that an accused is released on bail except in very limited circumstances; where a person is remanded in custody, it is for a specific period after which the remanded person must be brought back before the court for a further decision as to whether the person should be remanded further in custody or released on bail.<sup>146</sup>

12.1. If so, do differing/absence of similar conditions regulating detention regimes in other member states constitute a ground to refuse the execution of a mutual recognition instrument, such as the EAW?

Yes. Ireland will not surrender pursuant to an EAW unless a decision has already been made to prosecute. In practice, this has not caused problems to date (see the report on Irish caselaw on the implementation of the EAW).

12.2. Has the *Aranyosi and Caldaru* judgment impacted the decisions taken by the judicial authority of your country on the operation of the EAW (for example, through postponing its execution if there exists substantial evidence that detention in the issuing state may result in a breach of Article 3 ECHR / Article 4 of the Charter)? Have some EAWs been suspended/refused on those grounds by the judicial authorities of your country? Irish law already reflects this principle.

Yes, *Aranyosi and Caldaru* was a consideration in the case of *Minister for Justice and Equality v. Kinsella*,<sup>147</sup> a Greek EAW case.<sup>148</sup> Having sought additional assurances, the Court ruled that Mr Kinsella's surrender to Greece would breach his Article 3 rights by virtue of the prison conditions in that State.<sup>149</sup> *Aranyosi and Caldaru* is also a feature of a recent judgment of the Irish executing judicial authority (the High Court) to make a preliminary reference to the ECJ in relation to Polish reforms of the judiciary,<sup>150</sup> in the case of *Minister for Justice and Equality v. Celmer*.<sup>151</sup>

13. Does your criminal justice system take into account a custodial sentence (or part of it) already served in other EU state after a prisoner is transferred to your country?

Yes if the sentence relates to the same crime for which punishment is sought in Ireland. Whether 'double jeopardy' applies to foreign convictions is a somewhat complex topic. However, in an EU context, caselaw indicates prior punishment for the same offences should be taken into account in Ireland (see the report on Irish caselaw on the implementation of the EAW).

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<sup>145</sup> Among the relevant legislative measures are: Criminal Justice Act 1984, s. 4; the Criminal Justice Act 1999, s. 42; the Offences Against the State Act 1939, s. 30; the Criminal Justice (Drug Trafficking) Act. 1996, s. 2; and the Criminal Justice Act 2007, s. 50.

<sup>146</sup> Response of the Department of Justice and Equality to the survey questionnaire (Appendix I).

<sup>147</sup> [2017] IEHC 519, 26<sup>th</sup> July 2017.

<sup>148</sup> Response of the Department of Justice and Equality to the survey questionnaire (Appendix I).

<sup>149</sup> The judgment can be accessed here: < [> http://www.bailii.org/cgi-bin/format.cgi?doc=/ie/cases/IEHC/2017/H519.html&query=\(Kinsella\)+AND+\(Greece\)](http://www.bailii.org/cgi-bin/format.cgi?doc=/ie/cases/IEHC/2017/H519.html&query=(Kinsella)+AND+(Greece)) > .

<sup>150</sup> Response of the Department of Justice and Equality to the survey questionnaire (Appendix I).

<sup>151</sup> [2018] IEHC 153, 23<sup>rd</sup> March 2018.

14. Does your criminal justice system provide for a compensation regime for unjustified detention for the purpose of executing an EAW (e.g. in case of mistaken identity of the suspect/accused)? If so, could you please describe the features of such regime?

Yes, wrongful imprisonment gives rise to a claim damages both under the law of tort and under Irish constitutional law.

15. What would you recommend as further action for EU institutions in the area of detention (e.g. action for failure to act, harmonisation measures, etc.)?

- i. Minimising investigative detention, especially of non-nationals
- ii. Independent scrutiny of data protection rules, including requirement to notify victims of data breaches

### **Evidence gathering and admissibility**

16. Were negotiations on the European Investigation Order hindered and/or slowed down by the existence of different rules in evidence gathering and admissibility?

Yes, Ireland has not opted in.<sup>152</sup>

17. Is evidence gathered in another EU state admissible in criminal proceedings in your country? If so, must evidence conform to domestic rules on evidence gathering?

Generally evidence from another EU state is admissible, but only if it meets Irish requirements on evidence gathering.<sup>153</sup>

18. Which authority is in charge of reviewing how evidence has been gathered in the other EU state?

The court of trial and superior courts.

19. Can evidence that is gathered unlawfully or may entail a breach of fundamental rights be used during the trial? If not, are there exceptions to this rule?

It is not automatically inadmissible, but it may be excluded if it would prejudice the trial. Supreme Court jurisprudence has recently relaxed to some extent a previously very strict exclusionary rule for evidence obtained in breach of constitutional rights. The recent Irish Supreme Court case of *DPP v. JC*<sup>154</sup> now provides for very limited grounds for the admissibility of evidence obtained as a result of a breach of a person constitutional rights.<sup>155</sup>

20. To what extent do you think differing rules on gathering and admissibility of evidence have constituted obstacles to the operation of mutual recognition instruments, including in the case of the EAW?

In practice, this has not been a major issue to date. It is difficult to tell exactly at this stage, but some difficulties are easy to envisage, e.g. evidence obtained from another Member State in a manner different to that envisaged as constitutionally required in Ireland. The Irish courts

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<sup>152</sup> Unlike the UK, which did through the Criminal Justice (European Investigation Order) Regulations 2017.

<sup>153</sup> The judgment can be accessed here: < [> http://www.bailii.org/cgi-bin/format.cgi?doc=/ie/cases/IEHC/2017/H519.html&query=\(Kinsella\)+AND+\(Greece\) > .](http://www.bailii.org/cgi-bin/format.cgi?doc=/ie/cases/IEHC/2017/H519.html&query=(Kinsella)+AND+(Greece))

<sup>154</sup> Evidence will now be admissible if obtained unconstitutionally where the breach of constitutional rights was inadvertent.

<sup>155</sup> Response on a personal basis of an official in the Office of the Director of Public Prosecutions (Appendix II).

will seek to facilitate the EIO if Ireland opts in, but will not likely permit fundamental Irish rules of admissibility to be circumvented.

### **Criteria allocating jurisdiction**

21. *To what extent the absence of binding criteria allocating jurisdiction hinders cross-border cooperation?*

It is not a major obstacle in practice. In implementing the EAW, Ireland in effect reserves a right to refuse surrender in order to prosecute itself. This has not generally given rise to difficulties for Ireland in the context of cross border cooperation.<sup>156</sup>

22. *Do you think we should adopt an EU instrument that goes beyond existing measures and Eurojust's competence in the field (e.g. Framework Decision 2009/948/JHA on conflicts of jurisdiction)?*

Given the generally effective operation of the EAW and given the provisions in the Regulation on an EPPO on this issue, it does not seem an urgent priority. It is not seen as such a need from an Irish perspective.<sup>157</sup>

### **Victims**

23. *What kind of protection measures are available for victims in your legal system? What is their nature (criminal measure, civil measure or both)?*

Compensation and damages may be available from the offender as a matter of a court's criminal jurisdiction. A scheme of Compensation for Personal Injuries Criminally Inflicted also exists. This covers out-of-pocket expenses and bills rather than compensation for distress experienced.

Further:

- Under the Domestic Violence Act 1996, victims of domestic violence may be granted safety orders, barring orders, interim barring orders or protection orders by the courts. The Domestic Violence Bill 2017 which is currently going through the legislative process also provides for the granting of emergency barring orders by the courts. These orders are civil measures.<sup>158</sup>

- In line with the EU Victims Directive and the Criminal Justice (Victims of Crime) Act, 2017, victims may have access to a range of supportive measures when giving evidence in court including evidence by television link or from behind a screen, intermediaries for those who cannot fully comprehend complex questions, and recording of evidence by video prior to the trial in certain circumstances.<sup>159</sup>

- Police individually assess each victim.<sup>160</sup>

Traditionally in Irish criminal procedure, victims could appear as a witness and often did, but did not have any standing apart from this. Under the common law, a victim of a crime has the right to act as a private prosecutor - this rarely happens in practice. The rights of the victim have been significantly enhanced as a result of the transposition in Ireland of the EU Victims Directive.

Prior to the implementation in Ireland of the EU Victims Directive, Victim Impact Statements (VIs) were already provided for in cases specified in s. 5 of the Criminal Justice Act 1993,

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<sup>156</sup> Response of the Department of Justice and Equality to the survey questionnaire (Appendix I).

<sup>157</sup> Response of the Department of Justice and Equality to the survey questionnaire (Appendix I).

<sup>158</sup> Response of the Department of Justice and Equality to the survey questionnaire (Appendix I).

<sup>159</sup> Response of the Department of Justice and Equality to the survey questionnaire (Appendix I).

<sup>160</sup> Response of the Department of Justice and Equality to the survey questionnaire (Appendix I).

and this was extended by s. 4 of the Criminal Procedure Act 2010. The cases in which a VIS is permitted now are:

- (a) A sexual offence within the meaning of the Criminal Evidence Act 1992
- (b) An offence involving violence or a threat of violence to the person
- (c) An offence under the Non-Fatal Offences Against the Person Act 1997
- (d) an offence consisting of attempting or conspiring to commit, or aiding, abetting, counselling, procuring or inciting the commission of, an offence mentioned in paragraph (a), (b) or (c).

Sections 5 and 6 of the 2010 Act also provide respectively for evidence to be given through a video or (in more limited circumstances) through an intermediary.

The EU Victims Directive has resulted in passing of the Criminal Justice (Victims of Crime) Act 2017. The main provisions of the Criminal Justice (Victims of Crime) Act 2017 relate to rights of information and protection for victims during criminal investigation and proceedings.

The Victims' Rights alliance (VRA) in Ireland in its submission to the current Irish Commission on the Future of Policing has noted that part of the shift needed to fully implement the EU Victims Directive in Ireland is cultural, commenting for example:

A cultural shift can only happen in An Garda Síochána [the Irish police] if each member understands their obligations with respect to victims of crime. Historically, the role of An Garda Síochána was often seen to be to investigate and prosecute offences. However, the Victim's Directive and the *Criminal Justice (Victims of Crime) Act 2017* now requires An Garda Síochána to provide, information, support and protection to victims of crime. Members of An Garda Síochána must also carry out an individual assessment of all victims of crime to ascertain whether they have special protection needs.<sup>161</sup>

In one exceptional situation, victims could be represented by counsel in court. Section 34 of the Sex offenders Act 201 inserted s. 4A(1) of the Criminal Law (Rape) Act 1981 whereby a complainant can be represented in a special procedure referred to as a *voir dire* that is used when an accused raises the sexual history of the complainant as a part of the evidence. During the *voir dire*, the trial judge will consider the fairness of admitting evidence of a complainant's past sexual history.

A non-statutory (but is now subject to the general requirements of the Criminal Justice (Victims of Crime) Act 2017) victim protection programme does exist in Ireland, it applies to witnesses in general and is referred to as the Witness Security/Protection Programme. It is run by the national police, the Garda Síochána.

#### 24. Does your legal system foresee a compensation mechanism for victims of crime?

A perpetrator who is convicted may be ordered to pay compensation to a victim by a court under s. 6 of the Criminal Justice Act 1993, while there is also an administrative scheme called the Criminal Injuries Compensation Scheme, in compliance with EU Directive 2004/80/EC.<sup>162</sup>

Confiscation or forfeiture of criminal assets does exist in Ireland.

#### Two types of forfeiture exist:

1. Civil forfeiture: Under the Proceeds of Crime Act 1996 (as amended by the Proceeds of Crime (Amendment) Act 2005), which allows the High Court to make an interim order confiscating assets for 21 days, to be made on an application by the Criminal Assets Bureau

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<sup>161</sup> Victims' Rights Alliance/Maeve McDonagh BL, *Submissions to the Commission on the Future of Policing in Ireland* (February 2018), p. 11.

<sup>162</sup> Response of the Department of Justice and Equality to the survey questionnaire (Appendix I); OJ L 261, 6.8.2004, p. 15–18.



(CAB), and for a follow-on interlocutory order of seven years (after this period, if no one has demonstrated legitimate ownership, CAB may seek a disposal order). The burden of proof is on the balance of probabilities (the civil burden of proof).

2. Criminal forfeiture: Under the Criminal Justice Act 1994, a court of trial may, generally at the request of the Director of Public Prosecutions and following conviction and sentence, to assess the benefit accruing to the convicted person from that offence and thereafter to make a confiscation order on the balance of probabilities that assets in questions were the proceeds of crime.<sup>163</sup>

Although the jurisdiction in both cases is made on the balance of probabilities, in the case of the Criminal Justice Act 1994, there is generally a stronger evidential case as there will have first been a conviction.

However, the proceeds are not necessarily given to the victim (see s. 28 of the 1994 Act, the proceeds are passed to the exchequer after costs have been met).

*25. Have you ever been involved in the cross-border recognition and implementation of a protection measure?*

Yes.<sup>164</sup>

If so, on which EU instrument did you rely: Directive on the European Protection Order (EPO – criminal matters) or Regulation on protection measures in civil matters?

Ireland did not opt into this measure.<sup>165</sup>

*26. Have you ever issued an EPO where the issued protection measure was not available in the legal order of the executing state? If so, what happened?*

Ireland did not opt into this measure.<sup>166</sup>

*27. How would you make the EPO more effective? Could you identify issues not/insufficiently addressed in the directive that should be further developed/included?*

Ireland did not opt into this measure.<sup>167</sup>

*28. Has the implementation of the 2012 directive on victims' rights had a positive effect on the amount of issued/executed protection measures, including EPOs?*

Information is not available.

*29. Have gaps persisted in the implementation of Directive 2004/80/EC on compensation of victims and Directive 2012/29/EU on victims' rights?*

Directive 2012/29/EU was implemented on an administrative basis from November 2015 and transposed into national law in November 2017. The implementation of the Victims Directive is monitored on a quarterly basis in a committee comprised of all the criminal justice agencies. Cross border compensation does give rise to some issues and efforts need to be made to remedy these through dialogue and by effective administrative solutions.<sup>168</sup>

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<sup>163</sup> Office of the Director of Public Prosecutions, *Guidelines for Prosecutors* (4<sup>th</sup> ed. 2016), chap. 15.

<sup>164</sup> Response on a personal basis of an official in the Office of the Director of Public Prosecutions (Appendix II).

<sup>165</sup> Response of the Department of Justice and Equality to the survey questionnaire (Appendix I).

<sup>166</sup> Response of the Department of Justice and Equality to the survey questionnaire (Appendix I).

<sup>167</sup> Response of the Department of Justice and Equality to the survey questionnaire (Appendix I).

<sup>168</sup> Response of the Department of Justice and Equality to the survey questionnaire (Appendix I).

30. *Have you identified weaknesses and gaps in the previously mentioned instruments and how would you make them more effective? Do you think new instruments on victims' rights should be tabled by the EU?*

The key thing about the existing instruments is to implement them to a consistent and high standard, which requires much ongoing work, and changing the legal framework at this early stage in relation to victims would be counter-productive.<sup>169</sup> On compensation, administrative remedies are required rather than new legal powers.<sup>170</sup>

#### **Other areas of concern**

31. *Were negotiations on the European Public Prosecutor Office hindered and/or slowed down by the presence of differences in national procedural criminal laws?*

Yes.<sup>171</sup> Ireland has not yet opted in.

32. *Please mention any other points of concern (linked to differences in national criminal procedures/procedural rights) that hindered or may hinder cross-border cooperation in criminal matters. If you think that differences in the articulation of competences between relevant bodies (e.g. judges, prosecutors, police, lawyers, etc.) might hinder cross-border cooperation in criminal matters, please elaborate.*

Admissibility of evidence is sensitive from an Irish point of view. Ireland reflects a separation of powers between police, prosecutors and the judiciary. So far, this has not been an issue in regard to the EAW because Irish courts have permitted issuing Member States to determine how a judicial authority is designated.

#### **D. Conclusion and policy recommendations you may have, including areas where you would recommend to intervene and how**

33. *Should the EU legislator intervene beyond the scope of the minimum standards provided by the set of directives adopted in the field of procedural criminal law?*

There is no obvious need at present to do so from an Irish perspective, apart from perhaps limiting investigative (i.e. pre-charge) detention.

34. *If so, what kind of action should be taken at EU level and in which area(s)? Please explain your choice and possible obstacles that the EU may encounter.*

Perhaps the adoption of minimum standards on judicial review of pre-conviction detention.

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<sup>169</sup> Response of the Department of Justice and Equality to the survey questionnaire (Appendix I).

<sup>170</sup> Response of the Department of Justice and Equality to the survey questionnaire (Appendix I).

<sup>171</sup> Response of the Department of Justice and Equality to the survey questionnaire (Appendix I).

### III. COUNTRY REPORTS ON SPAIN

## National report No 1 on the Spanish jurisprudence

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As executing authorities, the judges of Spanish courts have settled many disputes over requests for judicial cooperation in criminal matters regarding fundamental rights violations. However, these cases are not exactly related to procedural differences between the legal systems involved but a mere deficiency of the Spanish transposition law, which at that time did not expressly provide for a procedure for the requested person to submit allegations. In this regard, we refer to the Judgment of the Spanish Constitutional Court n. 181/2011 of 21 November. This judgment focused on a surrender request from the Netherlands. The surrender was authorized by the Spanish court. However, once the defendant was on Dutch soil, the Spanish court lifted the speciality rule. As the requested person had not had the opportunity to raise grounds for refusal or to express renunciation of the entitlement to the “speciality rule”, a breach of the right to due process (Art. 24 of the Spanish Constitution) was declared by the Spanish Constitutional Court.

In other cases, problems arise in purely internal situations when the procedural rights recognized in the European directives are not applied or incorrectly applied. These disputes are usually settled by the judge through an interpretation of national law in conformity with EU law. In the Order of 12 April 2016, the Provincial Court of Madrid had to interpret the meaning of the “right of access to the case-file” provided by the *Directive 2012/13/EU of 22 May 2012 on the right to information in criminal proceedings*. When the accused was arrested and confidentiality of the judicial investigation was ordered, it was a judicial practice not to allow access to the accused’s attorney to case-files. He was only verbally informed on the prima facie reasons why his client had committed a crime and why pre-trial detention had been ordered. By doing an interpretation in accordance with the Directive, the Provincial Court stated that the failure to deliver to the appellant or his/her lawyer the documents required to oppose the deprivation of liberty, breaches domestic and European legal provisions. That generates defenselessness, by preventing him/her from challenging the pre-trial detention warrant with sufficient information and diminishing its potential effectiveness. There has also been consistent interpretation by the Constitutional Court of the right of access to the case-file, including access to the police record. The contrary implies a violation of the right to counsel’s assistance (Judgment of the Constitutional Court, Second Chamber, of 30 January 2017).

The same has happened with the declaration of minors in cases of abuse or sexual offences before the oral trial started. Following *Pupino* and the jurisprudence of the ECtHR (Judgment of the ECtDH of 28 September 2010, *case A. S. c. Finland*), both the Constitutional Court and the Supreme Court have admitted that the interrogation a minor previously to the trial stage does not breach the rights of the accused (Judgment of the Constitutional Court n. 174/2011 of 7 November; Judgments of the Supreme Court n. 743/2010 of 17 June; 1251/2009 of 10 December; 1804/2009 of 10 March).

Some isolated rulings point to the diversity of legislation between Member States. But even in these cases, it is not a procedural criminal law issue, but a substantive one. Judgment of the Supreme Court n. 774/2014 of 11 November 2004, dealt with the case of serving a sentence in Spain by previously refusing an arrest warrant and surrender for the purpose of serving a sentence imposed by an Italian judge. The refusal was based on the claimant’s Spanish nationality. Therefore, it was agreed that the person should serve his sentence in Spain. The penalty imposed in Italy was 14 years and 4 months for drugs trafficking with the aggravating circumstance of belonging to a criminal organization. The defendant claimed that if these acts had been committed in Spain, he would have been punished under the criminal law in force at that time in Spain with a maximum prison sentence of 6 years. Therefore, he appreciated a clear disproportion and considered its right to freedom to be violated. At the time of the facts at issue, the national act transposing the *Council Framework Decision*

*2008/909/JHA on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union* had not yet entered into force. In the lower instance, it was considered that it was not possible to apply European standards because the European framework decision had not been transposed. However, the Supreme Court did an interpretation of national law in conformity with European law and considered that Article 8, which allows the executing State to adapt the sentence in accordance with its own law for similar offences, was indirectly applicable. However, the Supreme Court wondered what penalty had to be taken into account for the purposes of adaptation: whether the penalty in force at the time of the commission of the offence or the penalty at the time when the sentence is adapted. The Supreme Court stated that the penalty to be compared must be that which is foreseen at the time of adaptation. This being the case, the penalty imposed by the Italian judge was not disproportionate, as these facts at the time of adaptation would be punished in Spain with a prison sentence of between 10 and 15 years. The Supreme Court could have referred a question to the EU Court of Justice for a preliminary ruling to clarify whether Article 8 of the Framework Decision where adaptation is foreseen refers to the domestic legislation in force at the time the facts were committed or at the time the foreign conviction is adapted. However, it was not necessary since the draft transposition law, which at that time was in the process of parliamentary consideration made clearly reference to "Spanish legislation at the time of requesting recognition of the decision". This criterion has been maintained in the final drafting of Article 83 of *Act 23/2014, of 20 November, on mutual recognition of judicial decisions in criminal matters in the European Union*.

Other times there are problems of potential recognition of judicial decisions. For example, the Santander Provincial Court Ruling n. 507/2015 of 26 November 2005. The person had been convicted of a crime of gender violence (physical abuse) to 7 months in prison. The sentence was suspended and during the probation period he moved to France where he was re-socialized. He travelled to Spain and was arrested, although released the next day. The issue arose because one of the conditions for suspending the sentence was that he should take a course in behavioral re-education. However, he did not do so because he was never required to do so, despite having informed the competent court of his change of address from Spain to France. The court wondered whether it could ask the French judge that he took the course there. However, there was no legal basis for this, since Article 8.2 (d) of *Framework Decision 2009/829/JHA of 23 October 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* only includes among the measures to be recognized the obligation to undergo therapeutic or treatment for addiction. Neither Spain nor France, when transposing the European framework decision, had included courses in behavioral re-education. It would be a good opportunity to see if this kind of courses can also be included in Article 8.2 (d) and only the ECJ could respond to this.

Other judicial decisions address issues related to the way in which the mutual recognition legal instrument has been transposed into national law. Thus, the Resolution of the Central Instruction Court of the *Audiencia Nacional*, of 7 August 2015. The Spanish judge issued an arrest warrant, which the British judge refused on the grounds that the principle of proportionality was violated as regards the use of other judicial cooperation instruments. According to the *Handbook on how to issue and execute a European Arrest Warrant* (p. 19) "before deciding to issue a EAW, the issuing judicial authorities are advised to give due consideration to other possible measures » (i.e. the European Investigation Order; the transfer of prisoners; etc.). The following decision of the *Audiencia Nacional* was a communication from the Spanish judge to the UK Crown Prosecution Service to take into account his view for the purpose of bringing an appeal in cassation before the United Kingdom court. First of all, the Spanish judge pointed out that the British judge had not provided for sufficient explanation for the reasons why the European arrest warrant was not proportionated. Secondly, the executing judge had checked the decision of the issuing judge and denied the EAW on a ground that was not included into the grounds for refusal provided for in the framework decision. Thirdly, the Spanish judge noted that a videoconference could

not have taken place because the United Kingdom stated in relation to Article 10 of the *Convention on Mutual Assistance in Criminal Matters between EU Member States* that no videoconferences will be held in the case of defendants. In addition, temporary surrender would neither be possible as an alternative measure, since it is only provided for when the person is deprived of liberty. That was not the case. The Crown Prosecution Service stated on 12.08.2015 that it would not appeal. However, it suggested that the Spanish judge issued an urgent international letter rogatory to request the practice of a videoconference. The Spanish judge so proceeded. But even so, the British judge denied it on the grounds that it was not viable when it comes to defendants. It also refused that the requested person could testify before the British judge. The Spanish judge again issued an arrest warrant on 23 October 2015.

Much jurisprudence had been generated on the mutual recognition of criminal convictions handed down in other Member States under the *Council Framework Decision 2008/675/JHA of 24 July 2008 on taking account of convictions in the Member States of the European Union in the course of new criminal proceedings*. These are cases in which the appellants (ETA terrorists) pursue the accumulation of convictions handed down in Spain with other convictions already imposed and executed in France. Accumulation according to Spanish Criminal Code implies the establishment of maximum penalty limits. The recognition of European foreign convictions benefits the appellants by allowing them to deduct the prison time already served in another Member State from the Spanish conviction. The many judgments of the Supreme Court that deal with the issue<sup>1</sup> conclude that the recognition of foreign convictions does not take place for cumulative purposes, among other reasons, because this is deduced from Article 3.5 of the above-mentioned European framework decision and from the Spanish transposition of the European legal instrument. Article 3.5 of the Framework Decision provides that if the offence for which the new proceedings being conducted was committed before the previous conviction had been handed down or fully executed, recognition of a EU foreign conviction shall not be compulsory, where the application of national rules on imposing sentences to foreign convictions would limit the judge in imposing a sentence in the new proceedings.

The exception provided for in Article 3.5 was introduced, among other reasons, to address the concerns of the Dutch delegation. In this country, when the offences are tried separately, the previous punishment is neither annulled nor is a new one imposed for both offences (the latter is what actually may happen under Spanish law). On the contrary, the court will impose a penalty in the second proceeding discounting the penalty already imposed, taking into account the maximum limit that would have been imposed if the two crimes had been tried jointly. In this respect, if a penalty of 5 years was imposed in Member State A and the Netherlands imposed in a following case, as a starting point 5 years, the full application of the principle of equivalence in Article 3.1 of the Framework Decision would mean that, in the new proceedings, no penalty could be imposed. In Spain, accumulation is normally carried out *posteriori* when penalties have been imposed in different procedures. One of the keys to the case was to determine what should be understood under “new process”. The *Council Framework Decision 2009/315/JHA of 26 February 2009 on the organisation and content of the exchange of information extracted from the criminal record between Member States* provides for a broad definition of “criminal procedure” including the “pre-trial stage, the trial stage itself and execution of the conviction”. However, the word used here is not *procedure*, but *process*. It could be understood that they are synonymous and therefore the execution of the conviction would also be included. Consequently, the Spanish accumulation procedures could also be included in the exception and recognition of the foreign conviction would not be possible. Nevertheless, it is only at the trial stage itself that the sentence is determined on the basis of the guilt of the offender and only at that stage that the court could be limited

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<sup>1</sup> The leading case is the Judgment of the Supreme Court n. 874/2014, of 27 January. This opinion has remained constant (see Judgments of the Supreme Court n. 334/2017, of 12 May; n. 95/2017, of 16 February; n. 457/2016, of 26 May; n. 333/2016, of 20 April; n. 261/2016, of 4 April; n. 241/2016, of 29 March; n. 76/2016, of 10 February; n. 12/2016, of 25 January; n. 81/2016, of 10 February; n. 336/2015, of 24 May; n. 818/2015, of 22 December; n. 804/2015, of 14 December; n. 789/2015, of 7 December; n. 772/2015, of 3 December. The Constitutional Court have already reached an identical decision in its Judgment n. 155/2016, of 20 September).

in imposing a sentence. With this interpretation, the cases of accumulation as they occur in Spain should not be excluded from recognition for the purposes of Article 3.5 of the framework decision. In any event, what has been criticised is that the Supreme Court had not referred a question to the ECJ for a preliminary ruling that clarifies the boundaries of exceptions to the principle of equivalence between convictions handed down in the Member States. It must be underlined that the leading judgment was delivered by a very rushed majority (9 votes in favour and 6 against).

Another internal but potentially important issue has taken place with regard to the *res judicata* doctrine of requests for extradition of the same person denied on the basis of the principles governing extradition proceedings. Once extradition has been refused (i.e. the requested person is a national of the required State), the issuing State issues an EAW in respect of the same facts and the same person. As a result of the new rules governing mutual recognition instruments, the requested person is surrendered. Both the Audiencia Nacional (Order n. 60/2004, of 3 June; n. 140/2002, of 17 December; n. 54/2004, of 30 June) and the Constitutional Court (Judgment n. 30/2006, of 30 January; n. 177/2006, of 5 June; n. 293/2006, of 10 October) stated the absence of *res judicata* of a decision refusing extradition because the effects of *res judicata* are only attributed to substantive decisions. A decision refusing extradition or even an EAW decision do not rule on the guilt or innocence of the person.

Judgment of the Constitutional Court n. 191/2009, of 28 September, analyses among other issues that are not interesting at present, the principle of *ne bis in idem* (Document n° 8). Particularly, the defendant was convicted in France and fleeing to Spain. In the latter State, trial is opened against him for the same facts and a provisional dismissal is issued because it has not been possible to determine, through the investigations carried out, his involvement in the commission of the crime. According to Spanish procedural law, a decision for dismissal is considered as final when no appeal is possible. The French authorities issued an arrest warrant and the Audiencia Nacional executed it. The surrender took place, but the defendant files an application for amparo based on a breach of the principle of *ne bis in idem*. The Constitutional Court denied the application for amparo because it was a provisional dismissal order. Only final dismissal orders are included in the transposition act as a ground for refusal. Moreover, at that time the ground for refusal was optional<sup>2</sup> and, therefore, given that the Audiencia Nacional provided the reasons for its decision<sup>3</sup>, the application for amparo could not be upheld. This case is interesting if it relates to the judgment of the ECJ in case C-398/12, *M.*, of 5 June 2014. In this judgment, the Court of Luxembourg stated that, the principle of *ne bis in idem* provided for in Art. 54 the CISA 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 finding 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” (&41). Therefore, such as an order precludes new proceedings against the same person in respect of the same acts in another Contracting State. In order to declare a breach of the principle of *ne bis in idem* the procedure must be closed with a detailed investigation. If no detailed investigation has been carried out, a decision terminating criminal proceedings and finally closing the investigation procedure against a person cannot be characterized as a final decision for the purposes of Arts. 54 of the CISA and 50 of the Charter of Fundamental Rights of the EU (Judgment of the ECJ, case

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<sup>2</sup> The first Spanish act transposing the Framework Decision on the European Arrest Warrant (*Ley 3/2003, de 14 de marzo, sobre la orden de detención y entrega europea*) included in Article 12.3 as optional ground for refusal the existence of a Spanish final dismissal agreement by the commission of the same facts. This ground for refusal became mandatory in the second act transposing the Framework Decision (Article 48.1b *Ley 23/2014, de 20 de noviembre*).

<sup>3</sup> Audiencia Nacional Order No. 35/2005 of 19 April 2005 (FJ 1) ruled that it was not appropriate to apply the ground for refusal since it was an offence of rape by an ascendant in respect of his daughter. This offence was serious enough and legally and socially repugnant. In addition, the dismissal order issued was provisional so that it “would not preclude the prosecution of the offence if new evidence appeared making possible the accusation”.

C-486/14, *Piotr Kossowski*, of 29 June 2016)<sup>4</sup>.

There have been cases in which it was necessary to determine whether, once the surrender deadlines had elapsed without having been able to carry it out for reasons beyond the control of the Member States involved, the requested person could continue to be deprived of liberty. The Constitutional Court (Judgments n. 99/2006, of 27 March and n. 95/2007, of 7 May) has upheld the violation of the right to freedom when the requested person remains in prison once the delivery deadlines have been exceeded. For the Constitutional Court, the ordinary procedural time limits for pre-trial detention provided for in the Procedural Criminal Code are not applicable, but the special time limits provided for in the Act transposing the Framework Decision (Document No. 9). These judgments precede the *Lanigan* and *Tomas Vilkas* judgments of the Court of Justice (ECJ, 25 January 2017, C-640/15 and 16 July 2015, C-237/15), which stipulate the obligation to comply with the arrest warrant even after the deadlines have been met, always respecting the right to freedom. It is therefore for the executing judicial authority to determine whether pre-trial detention is proportionated and appropriate under domestic law. If the individual is to be released, this does not preclude the judge from taking other measures to enforce the European arrest warrant (i.e. alternative measures to prevent the escape of the requested person). The latter should be taken into account in future pronouncements of the Spanish judges.

Finally, a mention should be made of the only real problem of legislative procedural differences between legal systems. These are proceedings in absentia. In Spain, the general rule is that a trial is only possible in the presence of the accused. As is well known, this peculiarity of the Spanish procedure was a major obstacle in the *Melloni* case. The Italian judge asked the Spaniard to surrender a person sentenced there without having been present at the trial. According to the Constitutional Court's case-law a distinction used to be done between "ad intra" and "ad extra" projection of a fundamental right. The "ad intra" projection of a fundamental right is taken into consideration by the Spanish public powers at domestic level. However, the binding content of fundamental rights when projected "ad extra", i.e. in cases of judicial cooperation, is more limited. In its judgment n. 91/2000, of 30 March 2000, the Constitutional Court held that there was an "indirect" infringement of Art. 24.2 of the Spanish Constitution when a Spanish judge agrees the extradition to countries that, in cases of a very serious crime, validate convictions in absentia without subjecting the surrender to the condition that the convicted person may challenge the sentence in order to safeguard his or her rights of defense. The reason why is that the Spanish Constitutional Court considered that this undermined the essential content of the fair trial in a way that affects human dignity (FJ 14).

This line of interpretation was maintained for all requests of European arrest warrants (Judgments of the Constitutional Court n. 177/2006 of 5 June; 199/2009 of 28 September). Forced by the ECJ in the *Melloni* case, the Constitutional Court (Judgment n. 26/2014 of 13 February 2004) overruled its doctrine and circumvented the problem by resorting to the standard protection offered at European level by the ECHR and the interpretation of Article 6 of the ECtHR and Article 48 of the EU Charter of Fundamental Rights as interpreted by the ECJ. The European canon implies that there is no breach of Article 6 ECtHR if the defendant, after being duly summoned, freely decides to waive his hearing at the trial, and, as long as, throughout these proceedings he is counselled by a Lawyer to defend his interests (ECtHR Judgment *Pelladoah v. The Netherlands*, of 22 September 1994, para. 40; mutatis mutandi, Judgments *Poitrimol v. France*, of 23 November, of 23 November 1993, para. 35; *Lala v. The Netherlands*, of 22 September 1994, para. 33; *Van Geyseghem v. Belgium*, of 21 January 1999, para. 34; ECJ Judgments, case C-619/10, of 6 September 2012, *Trade Agency*, pars. 52 and 55).

Having complied with these requirements in the factual situation, there was no violation of the fundamental right to effective judicial protection and, therefore, the order of the *Audiencia Nacional* by which it was agreed the appellant's surrender was not declared null. However, the Constitutional Court warned in a similar way to the German one that if EU law

<sup>4</sup> The fact that neither the victim nor a potential witness was interviewed is an indication that no detailed investigation took place.

were to become irreconcilable with Spanish Constitution, "the conservation of sovereignty of the Spanish people and the given supremacy of the Constitution could lead it to approach the problems which, in such a case, would arise". (Judgment n. 26/2014, of 13 February 2014, FJ 3).



## National report No 2 on the Spanish criminal justice system

### A. General questions on the features of national criminal procedure systems

1. Do you consider your criminal justice system as inquisitorial, accusatorial, or mixed?

The Spanish criminal justice system is mixed.

1.1. If your country has been under communist rule, does your criminal justice system still bear the influence of that regime? Could you please describe it briefly?

1.2. If mixed, could you briefly explain which elements belong to which tradition? Have judicial or legislative changes occurred recently in your country that had an effect on the functioning of your criminal justice system?<sup>5</sup>

The main characters of the Spanish justice procedure are the use of oral procedures, publicity, immediacy and contradiction, and free assessment of evidence by the judge. There are two phases: the pre-trial phase or investigating phase and the oral one. The functions of any of these phases are assigned to different judges<sup>6</sup>.

In the pre-trial phase, the inquisitive principle prevails in a certain way because there is an investigating judge (*Juez de instrucción*) entitled to intervene in the process with regard to evidence given. During this phase the Public Prosecutor and/or the parties set out in their indictment (*escrito de calificación*) evidence they intend to rely on, by presenting a list of experts and witnesses. In some cases, the investigating judge can outline the evidence to be presented at the oral trial. The investigating judge examines the evidence and issues a decision admitting the relevant one and rejecting any other. The pre-trial phase only involves the parties and should not be made public until the start of the oral trial. However, if the crime is public the court may declare the trial totally or partially secret for all parties involved for no longer than one month.

The oral trial is generally public although the court may decide that all or any part of the trial be heard in closed sessions when this is necessary (i.e. for reasons of public policy). At this stage, the investigating judge does not intervene, and the accent is undoubtedly placed on the accusatory principle<sup>7</sup>. The principle requires that the prosecutor or the parties (private or popular accusation<sup>8</sup>), exercise the accusation against the accused and before a court, usually a Provincial Court (*Audiencia Provincial*). The main function of the oral trial is to produce evidence and determine the grounds for the final judgement or decision by the court. There is contradiction, that is to say, the parties' lawyers may ask questions to other parties or witnesses to ascertain the facts. The judge can intervene as well, i.e. questioning the witnesses or the party summonsed to testify to obtain clarifications and complete the evidence presented by the parties. This intervention is not contrary to judicial impartiality because the judge decides exclusively on the basis of what has been done and proved in the

<sup>5</sup> e.g. legislation that heralded a shift from a predominantly inquisitorial to a more adversarial criminal justice system; landmark decision by the national court that changed the way mutual recognition instruments were operationalised.

<sup>6</sup> In the case of misdemeanors, there is only a phase before a judge. However, this is not to be understood as a breach of the right to a fair trial, because in this kind of trials there is not properly an investigation phase.

<sup>7</sup> The Constitutional Court has proclaimed that the accusatory principle forms part of the procedural rights contained in Article 24 of the Spanish Constitution (SCC Judgement 53/1989, of 22 February 1989).

<sup>8</sup> Under Spanish law prosecution begins by action of the Public Prosecutor but also by the victim of the offence (*acusación particular*) or even by any natural or legal person not offended by the crime (*acción popular*). Popular action is a particularity of the Spanish criminal justice system. There are no similar precedents in comparative law. It constitutes a form of popular participation in the administration of justice.

trial. This court will finally give judgment. In this judgement the judge will be bound by the facts and claims of the parties.

*1.3. How do you think the diversity of legal traditions regarding criminal procedure law across the Union may impact cross-border cooperation in criminal matters?*

Although there are differences between both systems, it would be more accurate to say, in my opinion, that original inquisitorial systems -as it was the Spanish one in the past- have implemented adversarial practices over time. So that judicial practices in States with mixed criminal justice systems reasonably resembles the practices of countries with pure adversarial criminal justice systems. Investigating judges hardly or nothing resembles that judge of the traditional inquisitive systems for several reasons.

First of all, an investigating judge, usually under the supervision of the Public Prosecutor's Office, conducts the investigation, but he/she does not have the function of investigating and judging at the same time. Therefore, the impartiality of the court is safeguarded. An investigating judge does not act as a party to the proceedings, since he/she does not exercise criminal prosecution.

Secondly, a pre-trial phase does not generally have value as evidence. As rule, it is in the oral trial where evidence is carried out with immediacy and publicity. Exceptionally, it will be possible to assess evidence carried out at the pre-trial stage, when it is impossible to do so during the oral trial. But, in any case, it is subject to contradictory debate in the trial.

Finally, despite the fact that in some inquisitorial criminal justice systems the proceedings can be initiated *ex-officio*, this is not an exclusive feature of inquisitive proceedings. There are criminal justice systems belonging to the so-called adversarial model in which the trial could be initiated at the request of both a public body or a private party<sup>9</sup>.

**2. What is the status of the rights of the defence in your country (e.g. fundamental right, constitutional right)?**

The rights of the defence in Spain are constitutional fundamental rights (mainly, Art. 24 Spanish Constitution).

**3. What is the status of the rights of victims in your country (e.g. fundamental right, constitutional right)?**

The rights of victims have a constitutional basis in the value of justice (Art. 1); the human dignity (Art. 10) and the right to a fair trial (Art. 24). The last one is a fundamental right and guarantees the right of victims to participate in criminal proceedings (Judgment of the Constitutional Court 35/1994, of 31 January, and 67/2001, of 16 May).

Most of them have been legally developed. There is a new holistic act related to the rights of victims: Act 4/2015, of 27 April, on victim's rights (*Ley 4/2015, de 27 de abril, del Estatuto de la víctima del delito*). Besides, there are other acts regulating the rights of specific victims providing for a wider protection (i.e. in the case of compensation). This is the case of Act 35/1995 of 11 December 1995, on assistance to victims of violent and sexual crimes (*Ley de ayudas y asistencia a las víctimas de delitos violentos y contra la libertad sexual*), developed by Royal Decree 738/1997 of 23 May 1997; Organic Law 1/1996 of 15 January 1996 on the Legal Protection of Minors (*LO de protección jurídica del menor*); Organic Law No. 1/2004 of 28 December 2004 on Integral Protection Measures against Gender Violence (*Ley de medidas de protección integral contra la violencia de género*), as well as Law No. 29/2011 of 22 December 2004 on Integral Protection Measures to Victims of Terrorism (*Ley de reconocimiento y protección integral de víctimas del terrorismo*).

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<sup>9</sup> On these reflexions, see BACHMAIER WINTER, L.: "Sistemas procesales: La hora de superar la dicotomía acusatorio-inquisitivo", in *IUS. Revista del Instituto de Ciencias Jurídicas de Puebla*, 2009, pp. 172-198.

## **B. Impact on national law of procedural rights directives**

### **B.1. State of transposition of directives for which the transposition deadline has already passed**

4. Has the entry into force of the directives on suspects/defendants and victims triggered important changes in:

4.1. *The criminal procedure of your country? If so, has the implementation of directives made the national system raise its standards and thus comply with ECHR case law?*<sup>10</sup>

Yes, they have triggered important changes.

In relation to the rights of victims, the following changes can be drawn:

Before the European directive, one of the main features of Spanish legislation regarding the recognition of victims' rights was its sectorial approach. In this regard, certain groups of victims (i.e. victims of terrorism) have been under special protection. The great contribution of the 2015 Law on victim's rights has been to recognize the right of all victims of any offence to protection in criminal proceedings.

Significant changes can also be seen with regard to the right to return property. Article 15 of the Directive 2012/29/EU on victims obliges Member States to guarantee the right to return of property to the victim *without delay (my italics)*. The Spanish legislator has understood *without delay* as an immediately return. Therefore, immediately return shall be done even if the property shall be retained as evidence or for the purposes of other proceedings, provided that preservation of the property could be guaranteed, and the victim assume the obligation to preserve it. This is in contrast to the past, as the seized effects had to remain in the deposit until the criminal proceedings concluded with a ruling or a non-suit order (a dismissal decision).

Article 13 of the Directive 2012/29/EU requires Member States to ensure that victims have access to legal aid, *where they have the status of parties to criminal proceedings (my italics)*. The Spanish legislator has extended this right to those victims who have not the status of parties to criminal proceedings. This is the case, for example, of those victims that not having been party to the proceedings wish afterwards to appeal a dismissal order.

In the field of compensation, it must be said that the Spanish legislator has raised the standard of protection in the cases of legal persons since they are also included.

The Spanish legislator has extended victims' participation rights in criminal proceedings by granting them powers during the enforcement phase of the sentence. These powers have been criticized by scholarship. Unlike criminal proceedings, whose aim is to determinate the innocence or guilt of a person, during the enforcement of a penalty the victim has not the status of party. During this phase the principles of equality or contradiction are not basic principles to take into account. Conversely, it is an inquisitive procedure in which the sentencing court and the judge responsible for prison supervision carry out their activity vis-à-vis the person after having been finally sentenced. This system does not fit with the intervention of the victim to challenge the decisions handed down by those courts. This choice of criminal policy has been justified by the Spanish legislator in the explanatory memorandum of Act 4/2015. The Spanish legislator considers that the monopoly on the enforcement of sentences is still held by the State through its judicial bodies. However, the explanation behind the official version is that the participation of victims at this stage satisfies the demands of victims' associations. At time the draft statute was presented, the victims'

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<sup>10</sup> e.g. EU directives on legal aid and the right of access to a lawyer compared to the 2008 *Salduz v. Turkey* judgment.

associations felt outraged after the ruling of the ECtHR in the *Prada del Río case*, which led to the release of many ETA terrorists.

The victims' rights during the phase of enforcement of the penalty can be summarized as follows:

Victims may provide the sentencing judge or court with any information relevant to the decision on the execution of the sentence imposed, the civil responsibilities or the confiscation that has been agreed upon (Article 13.2b Act 4/2015). In this way, this information can be provided for the judge to decide whether or not to suspend the sentence (Article 80 Spanish Criminal Code, hereinafter SCC) or to grant probation conditionally to compliance with several requirements (Article 83 SCC).

In addition, once the execution of the sentence has been initiated, the prison supervision judge must inform the victim about prison benefits, release leaves, third degree classification<sup>11</sup>, calculation of the time for parole and granting of probation. This information will only be provided to the victim who has expressly requested it. Once the information has been received, she/he may make representations within 5 days.

Furthermore, victims may appeal the following judicial decisions:

- the order by which the prison supervision judge authorizes the classification of the sentenced person in the third-degree category before half of the sentence is extinguished.
- the order agreeing that prison benefits, release leaves, third degree classification and calculation of time for probation shall refer to the limit of sentence and not to the totality of sentences imposed<sup>12</sup>.
- the order awarding the offender probation when the offence committed is a serious crime, provided that a penalty of more than five years' imprisonment had been imposed.
- victims may request the judge to order measures or rules of conduct provided for by law before conditional release is granted (that is possible when the offender has been convicted for acts "from which a situation of danger to the victim may reasonably arise").

Concerning the suspects/defendants' rights:

Organic Law 5/2015 of 27 April, amending the Criminal Procedural Code and the Organic Law related to Judiciary, transposed into Spanish law both the *Directive 2012/13/EU on information in criminal proceedings* and the *Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings*. On two occasions, the explanatory memorandum recognizes a deficit of previous legislation, stating that the transposition of these Directives entails "a significant strengthening of the guarantees of criminal procedure" and that "the amendments facilitate the application of these rights", enshrined in Article 6 of the ECHR and in the ECHR case-law.

Although Spanish law recognized and applied the right to interpretation prior the transposition, it was practically limited to the taking of accused statements before police officers or judges (both in the pre-trial phase and in oral proceedings). However, the right to translation was lacking, saved in the case of information on the rights of detainees held in police stations (there are forms in the most common languages). On very rare occasions, the courts have agreed to provide translation of some essential documents of the proceedings. As a general rule, it has not been given the possibility of translating, even orally, the summary or a part of it. On the other hand, the interpretation to which the suspect or accused person was entitled was not controlled in terms of its quality. Thus, the Supreme Court has

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<sup>11</sup> This is the lowest category within the Spanish prison system, which allows for day release.

<sup>12</sup> As rule the maximum effective sentence to be served by a convicted person in Spain may not exceed triple the time imposed for the most serious of the penalties incurred, provided that this does not exceed twenty years. Exceptionally, such maximum limit shall be 25, 30 or 40 (Article 76 SCC). If, due to these limitations, the punishment to be served were to be lower than half the aggregate sum of those imposed, the sentencing Judge or Court of Law may order that prison benefits, term-release leaves, pre-release classification and calculation of the time to be served prior to probation shall refer to the total penalties imposed in the sentences (Article 78 SCC).

maintained (Judgement n. 23/2015, of 4 February) that any legal disposition requires an official qualification to act as a judicial interpreter. In fact, it has been admitted that any person who knows the language may be qualified as an interpreter for oral proceedings, after having sworn an oath or promise. In that regard, also, the Supreme Court's Judgement n. 490/2014, of 17 June, expressed that the absence of official qualification of the interpreter was not a requirement of validity. Therefore, a lack of quality could be considered in any case as a defect of pure legality, but not as a constitutional deficit. Previously, the Supreme Court Judgement n. 250/2014, of 14 March, considered that the qualification of translators/interpreters could not be regarded as a necessary condition to ensure the constitutional legitimacy of the procedural act of interrogation, provided that in practice any risk of doubt being raised as to the accuracy of the translation as to what was actually expressed by the accused was ruled out as a result of the lack of expertise of the designated interpreter. The unanimous doctrine of the Spanish Constitutional Court was also based on the ECHR case-law, particularly in *case Abdulkadir Coban v. Spain*, of 26 September 2006. On this occasion, it was said that the interpreter is not required to hold an official diploma but to have a sufficient degree of reliability in terms of knowledge of the language he/she interprets. The doctrine of the Constitutional Court had, however, gone a little further in protecting the right to interpretation, being unanimous doctrine that the appointment of an interpreter is a constitutional right recognized to defendants in order to avoid their defenselessness (Judgment n. 5/1984; 71/1988, 188/1991) and included in the right to a public process with all guarantees. The Constitutional Court also understood that the assistance of an interpreter is not only necessary at the stage of the oral trial, but also in all stages of the procedure, making specific reference to the need to provide the accused with an interpreter in his/her relations with counsel (Judgment n. 71/1988, 387/1988). More recently, however, the Supreme Court (Judgment n. 690/2006, of 20 June), held that there was no violation of the right to defence in refusing the defendant's request for an interpreter to be appointed to hold talks with his lawyer, since "in the case of a lawyer appointed by the defendant himself and, therefore, of his trust, the State is alien to that relationship and is not responsible for the dialogue between them". On the contrary, in Judgment n. 813/2004, of 21 July, the Supreme Court concluded that "the investigating judge must remove the obstacles necessary for the constitutional guarantee of defence to be fulfilled in all its fullness. New Article 123,1 of the Criminal Procedural Code extends the right expressly to the conversations held with his/her lawyer and which are directly related to his/her subsequent interrogation or taking of a statement or which are necessary for the filing of an appeal or for other procedural requests, as well as in all the proceedings of the oral trial.

As regards the right to translation, this is truly new in Spanish law. This undoubtedly represents a considerable advance in terms of the rights of the accused. The right is not absolute. Article 123 of the Criminal Procedural Code only recognizes the right to translation of essential documents. This is an indeterminate legal concept subjected to interpretation. It is clear that all decisions placing a person in pretrial detention, indictments and judgements are essential documents. However, does the right also include police statements, complaints, evidence documents, etc.? In my opinion, all these documents are also essential to preserve the right to defence. Therefore, they should also be included.

Spanish law recognizes translation and interpretation rights also for people with sensory disabilities. This includes, for example, the use of sign language interpreters.

The right to information of detainees or prisoners was already provided for in Spanish legislation. Nevertheless, the transposition of the Directive completes its content. First of all, it emphasizes the need to inform about the defendant's rights "in a simple and accessible language, in a language that he/she understands and immediately". This includes rights that were not expressly mentioned in the right to information, such as the right to legal aid. The right of access is added to the elements of the proceedings that are essential to challenge the legality of detention or deprivation of liberty. It also includes information on the maximum legal period of detention until the person is brought before a judge and the procedure by which he/she can challenge the legality of his/her detention.

4.2. *How have national courts interpreted national legislation transposing the relevant*

*EU directives thus far? Have significant changes been brought to the judicial practice of your country?*<sup>13</sup>

The obligation consisting of given access to the accused's attorney to case-files stated in Article 7 of the *Directive 2012/13/EU of 22 May on the right to information in criminal proceedings*, has given rise to different interpretations as to whether or not it includes the right of access to the official police statement. After the period for transposal of the directive had expired, the Constitutional Court granted protection to two detainees for crimes of robbery whose attorney did not have access to the police report during the course of their police detention<sup>14</sup>. The Pre-Trial Court, competent to open the *habeas corpus* procedure, rejected the petition on the grounds that at the time the police record was requested, there was no file as such, since the police officers were still carrying out proceedings and the attestation had not been drawn up.

The first thing the Constitutional Court does is to use the ECJ case-law on the principles of primacy and of effectiveness of the directive to consider that Article 7 of Directive 2012/13/EU is directly applicable. Secondly, it considers that there had been a violation of the right to legal assistance in police offices (Article 17,3 of the Spanish Constitution) and the right to freedom (Article 17,1 of the Spanish Constitution) by reason of the failure to provide counsel with the file. Therefore, the reason given by the investigating court for the fact that the police report did not yet exist became devoid of purpose: "The very logic of the facts depicted in the police report undermines this assertion: if detention was triggered as a result of a police operation against persons accused of committing various crimes in several locations, as evidenced by the Public Prosecutor's Office in its statement of allegations, there should at least have been under some support a (paper or computerized) report of such crimes, as well as the documentation of the records made upon arrest. So, the fact of giving access to all these materials, as the Public Prosecutor points out, does not appear to be problematic because it did not pose a threat to the life or fundamental rights of another person, and there were no reasons of public interest which should prevail over the right" (Legal Ground n° 7).

Although at the time of the Spanish Constitutional Court's judgment, the Directive 2012/13/EU had already been implemented but not when the facts took place, it indicated that the transposing legislation was not subject of the application for *amparo*. However, it is precisely the transposition of Article 7 of the Directive that still raises problems of interpretation. Article 520 of the Criminal Procedural Code transposing this disposition states: "Every detained person shall have the right to access to the *elements* of the proceedings that are *essential* to challenge the legality of detention or deprivation of liberty" (*my italics*). It remains unclear whether a copy of the whole police report should always and in any case be provided to the lawyer or whether it is enough to give him access to the elements of the attestation considered essential to challenge the legality of detention. Some believe that this right does not include the access to the whole police record as soon as he/she is arrested<sup>15</sup>, but only from the time he/she is brought before a judge (i.e. within 72 hours after detention<sup>16</sup>). Until then, what must be made available to the detainee and his/her lawyer is access to the essential elements for challenging the legality of detention. The problem lies in determining what is meant by "essential elements". Article 7 of the Directive 2012/13/EU does not specify which materials are accessible to the detained person but recital 30 does: "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". And this access should be made to suspects or accused persons or to their lawyers "at the latest before a competent judicial authority is called to decide upon the lawfulness of the arrest or detention". No reference for a preliminary ruling before the ECJ has been made in order to determine whether the Spanish

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<sup>13</sup> e.g. trainings to ensure a high level of competence among interpreters/translators and lawyers so as to match the requirements of directives, reform of the application system for legal aid, etc.

<sup>14</sup> Spanish Constitutional Court Judgement n° 13/2017, of 30 January.

<sup>15</sup> See ABASCAL JUNQUERA, A.: "Incidencia del derecho de la Unión europea en el estatuto procesal del investigado", in *Revista del Ministerio Fiscal*, n° 3, 2017, p. 126-127.

<sup>16</sup> So, it has been before interpreted by the Spanish Constitutional Court. See SCC Order n° 73/2015, of 21 April (FJ 4°).

transposition is adequate and if so, how “essential elements” has to be interpreted in conformity to the Directive. The National Commission for the Coordination of the Judicial Police, at its meeting on 15 July 2015, unanimously approved that “essential elements” should only include “whatever information relating to the place, date and time of arrest and the commission of the offence, identification of the criminal act motivating the arrest, a brief summary of the facts and indicia pointing to the commission of an offence (eyewitness statements without specifying who the witnesses are; fingerprints, etc.)”.

This view has been supported by the Constitutional Court in the recent Judgement of 5 March 2018 (application for *amparo* n. 3766/2016). This was the case of a detainee who was not informed by the police about the reasons for his arrest. The lack of information prevented him from preparing his defence during the police interrogation and violated his right to liberty. After being arrested, he was informed of his rights and informed that the arrest was due to his involvement in a crime of injury and his presence at the scene. The lawyer assigned asked for his client appearance before the judge (*habeas corpus*) and therefore asked for access to the police report. Access was refused. The Constitutional Court states that the Constitution “expressly recognizes the right of every detainee to be informed immediately and in a way that is comprehensible of his rights and of the reasons for his detention”.

This Judgement is the first ruling since the European directives to guarantee the rights of detainees have been implemented into the Criminal Procedural Code (LECrim). As mentioned above since the 2015 reform, the Criminal Procedural Code recognizes the right of detainees to be informed “about the procedure” they can follow to appeal their detention and the right “to have access to the *elements* of the proceedings that are *essential* to challenge the legality of detention. This right, affirms the sentence, does not imply that the detained person can have access to the entire content of the statement, but “only to those elements that are essential to challenge the legality of the detention”. Therefore, it may be inferred from the new regulation that the officers responsible for the custody of the detainee must inform him in writing “immediately and comprehensively, not only of the rights that correspond to him/her during such conditions, but also of the facts attributed to him/her and the objective reasons on which his/her deprivation of liberty is based”.

For the Constitutional Court “the meaning of *essential elements* depends on the circumstances that have justified the detention. To such an extent, for example, they may be essential elements that support the detention, depending on the circumstances of each case, a formal complaint, when it refers to accusations that incriminate the detainee; or the documentation of incriminating testimonies, as well as the content of the scientific expert reports that establish a connection link between the facts under investigation and the detainee; documents, photographs and sound or video recordings that objectively link the suspect to the criminal offence, as well as documents containing the result of a search and seize of real property [...], those of an ocular inspection, those that verify the collection of vestiges or those that describe the result of an examination carried out for prevention by the police to ascertain the crime. In short, all those documented actions that retain an identity of reason with those already exposed are also considered” (Legal Ground nº 7).

In this particular case the appellant was only informed that his arrest was due to his alleged involvement in an injury offense and his presence at the scene. However, no mention was done about the objective reasons for the arrest. For example, he was not informed that his detention was based on the testimony from witnesses in the area where the facts took place. The Court also points out that such insufficient information could have been supplemented or corrected by allowing the detainee or his counsel access to those parts of the police report containing the decisive circumstances that justified police detention.

It follows from the reasoning of the Constitutional Court that there is no need to give access to other procedures that are not relevant to challenge the detention and compromise the ongoing police investigation, such as personal information on victims or witnesses, third party telephone interventions, entries and registrations not yet made, etc.

In police practice, it seems that no direct access is being allowed to the police report at the time when the detainee intends to challenge the lawfulness of his/her detention<sup>17</sup>. Instead, the detainee is provided with a form on which he/she is informed of the time, place and reasons for detention, with a brief summary of the facts attributed to him/her<sup>18</sup>.

Where it is foreseeable that confidentially of judicial investigations could be ordered, it could be reasonable to limit access to certain police proceedings. However, in my opinion, it should be specified in national legislation how the police force should proceed. In any case, the right of access to the police report where confidentially of judicial investigations is ordered was previously discussed by the Provincial Court of Madrid (Order of 12 April 2016). The practice in these cases consists of not allowing access to the accused's attorney to case-files. He/she is only verbally informed on the prima facie reasons why his/her client had committed a crime and why pre-trial detention had been ordered. By doing an interpretation in accordance with the Directive (still not implemented at that time), the Provincial Court stated that the failure to deliver to the appellant or his/her lawyer the documents required to oppose the deprivation of liberty, breaches domestic and European legal provisions. That generates defenselessness, by preventing him/her from challenging the pre-trial detention warrant with sufficient information and diminishing its potential effectiveness.

In other cases, the judge has used the *Directive 2013/48/EU on the right of access to a lawyer* to interpret national procedural law. An example of this is the judgement of the Supreme Court, n. 196/2015, of 6 April. The appellant alleged a violation of the right to freedom of home privacy. The appellant had given his consent to the house search in the presence of a legal counsel. However, the house search had been carried out with the legal assistance. He claimed that there was no advice. The Supreme Court said that "legal advice was not required. Legal aid for the consent of the detainee is a jurisprudential requirement that ensures the free consent. It is not necessary to prove that previously there was a private interview, nor would the absence of such an interview a ground for invalidity of activities. This assistance, which has been respected here and which implies the possibility of advice, is sufficient. With the legislation proposed in the promised reform of the Criminal Procedural Code, perhaps the examination perspective could be different, but existing law, even in the light of Directive 2013/48/EU (...), does not require for such consent the prior advice of a lawyer". In a very recent case (Judgement 154/2017, of 10 March), the Supreme Court stated that legal assistance is not necessary while a house search is carried out with judicial authorization, that is to say, before a legal secretary. The Supreme Court argued (Legal Ground nº 2) that the presence of a lawyer during a house search agreed upon by a judicial authority is not required by the Spanish Constitution nor any international agreements signed by Spain. Besides, "Article 3 of the Directive 2013/48/EU (...) only requires legal aid in three cases (identity parades, confrontations and reconstructions of the scene of a crime). In this case, the Supreme Court did not want to raise the minimum standard. In conclusion, a house search only needs the presence of a lawyer when there is not judicial decision and it is carried

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<sup>17</sup> See *TRAINAC Report on the assessment, good practices and recommendations on the right to interpretation and translation, the right to information and the right of Access to a lawyer in criminal proceedings*, Council of Bars and Law Societies of Europe (CCBE), pp. 35-58. Interviews to some attorneys licensed to practice in Ciudad Real reveal that the access to the police record is lacking most of cases (Mrs. Margarita Gijón's, Mr. Luis De Juan's and Ernesto Montes' interview, membership numbers 105716, 2663 and 2680).

<sup>18</sup> The Spanish Council of Bars in its Meeting of 15 July 2015 (available on <http://www.abogacia.es/2016/01/13/acceso-al-atestado-policial-expresion-del-derecho-fundamental-a-la-asistencia-letrada-al-detenido/>, last accessed on 14.02/2018) has warned that, in practice, only what the Judicial Police Commission considers to be the "essential elements for challenging the lawfulness of detention" is provided (i.e. the place and date of arrest; the offence for which the arrest was made; a brief summary of facts, etc.). This is corroborated in the surveys conducted by some bar associations. Thus, for example, the Bar Association of Barcelona has indicated that the surveys carried out during March 2017 among the lawyers of the Bar Association on call in attendance to the detainee reveal that 95% of the legal aid has been carried out without having access to the police report. This information is available on <http://www.icab.es/?qo=eaf9d1a0ec5f1dc58757ad6cffdacedb1a58854a600312ccb08705c7052b3548defa77fbee6568220ad267282aab51636546a378e79acd8f398de3b0504fcc>, last accessed on 14/02/2018).



out with the suspect's person. When it is agreed by a judge, the intervention of a legal secretary guarantees the rights of the persons and legal aid is not necessary"<sup>19</sup>.

Another interesting case is the Judgement of the Supreme Court, n. 734/2014, of 11 of November. In this case the Supreme Court raised the minimum standard provided by the Directive 2013/48/EU. The Supreme Court confirmed the need for legal assistance for collecting samples for DNA analysis, even though the sample is collected through a painless removal of a sample of cells from the lining of the mouth (buccal smear). In this regard, there is an Agreement of the Supreme Court, of 24 September of 2014. The Public Prosecutor, the appellant in this case, dissented by indicating that there was no legal basis to require legal advised in these cases and even the Directive 2013/48/EU only requires the Member States to ensure that suspects or accused persons shall have the right for their lawyer to attend identity parades, confrontations and reconstructions of the scene of a crime (Article 3.3c). However, the Supreme Court stressed the fact that "the Directive provides for a minimum standard, so that the Member States may rise the standard".

The minimum standard provided by the Directive has been also raised by the Supreme Court in its Judgement n. 161/2015, of 17 March. The question arises whether the fact of taking photographs of a person detained to be compared with images taken of the day of the facts requires legal assistance. The Supreme Court decided in the affirmative since the accused and detained were forced to offer different poses for the practice of a physiognomic photographic report that would serve as a basis for the subsequent preparation of an expert report. The Court pointed out that "this could even be considered something more than a mere identification diligence". And it follows: "the requirement for effective legal assistance (...) in police identification procedures that go beyond a mere photographic or dactyloscopic review and that require the detainee to cooperate actively with the police officers who are collecting the necessary investigative elements to clarify the facts, is an essential requirement, mainly in those cases in which the material is called to subsequently incorporate an expert report (...) Without legal assistance, depending on the circumstances, the right to a fair trial may be breached (Article 24,2 of the Spanish Constitution)".

#### 4.3. *To what extent have national courts in the transposition process taken into account general principles of EU law and ECJ case law on EU procedural directives?*

National courts have taken into account general principles of EU law and EU procedural directives during the transposition process. A very illustrative case is the declaration of children victims of sexual abuse during the pre-trial phase. Following *Pupino* and the jurisprudence of the ECtHR (Judgment of the ECtDH of 28 September 2010, *case A.S. v. Finland*; of 19 December 2013, *case Rosin v. Stonia*; of 24 May 2016, *case Przydział v. Poland*, etc.), both the Constitutional Court and the Supreme Court have admitted that the interrogation a minor previously to the trial stage does not breach the rights of the accused provided that the principle of contradiction is respected. The reasoning is also based on the directive on the protection of victims of offences (Judgment of the Constitutional Court n. 174/2011 of 7 November; Judgments of the Supreme Court n. 743/2010 of 17 June; 1251/2009 of 10 December; 1804/2009 of 10 March 1/2016, of 19 February; 336/2016, of 28 April; 415/2017, of 8 June; 742/2017, of 11 March; 468/2017, of 22 June).

In 2015, the Spanish legislator has successfully amended Article 730 of the Spanish Criminal Procedural Code to compliance with Article 24 of the Directive 2012/29/EU, allowing the reading, viewing or reproduction of the declarations of minors, taken during the investigation phase when due to their lack of maturity it was necessary to avoid harm.

#### 5. *Have transposition gaps persisted? If so, could you briefly point them out?*

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<sup>19</sup> The same was previously pointed out. See Judgements of the Supreme Court n. 399/2015, of 18 June; 77/2014, of 11 February and 695/2014, of 29 October.

I think that the degree of compliance with the objectives of the Directive 2010/64/EU through the Organic Law 5/2015 is high, although it can also be said that the Spanish transposition grants a somewhat lower scope of protection than that deriving from the European legislation, at least in the following aspects:

- Within the scope of the European Arrest Warrant, Article 3,6 of the Directive recognized the right to obtain a translation of the warrant. However, neither the *Organic Law 5/2015* nor the *Law 23/2014, of 20 November, on the recognition of criminal judgments of the European Union*, provide for the right to have this document translated.
- Article 1,2 of the Directive provides that these rights shall apply until the conclusion of the proceedings, including not only the judgment but also any resolution of appeal. Spanish law only refers to "the judgment".
- Articles 2,5 and 3,5 of the Directive establish the need for Member States to ensure that any accused person has the right to appeal against the decision refusing interpretation or translation and the possibility to complaint that the quality of the interpretation and translation is not sufficient to safeguard the right to a fair trial. Under Spanish law, appeal is only possible before a court but not when the person is under arrest before the police or the Public Prosecutor, or he/she appears before the latter.

Nevertheless, I believe that in all these cases it will be possible to invoke the direct effect of the Directive.

On the other hand, the Spanish Bar Association has highlighted the following as the main shortcomings in the implementation of these European standards in Spain<sup>20</sup>: the incompleteness of the rights information provided to detainees in police stations (the information on the right to challenge detention or access to the police file is still frequently omitted) and the poor conditions under which the confidential lawyer-client interview is usually conducted; the lack of human and technical resources to provide the accused or detainee with the effective exercise of his/her right to translation and interpretation, in addition to the widespread lack of quality and the absence of control measures in this regard. In this report it is highlighted that three years after the date of mandatory transposition, a Register of Interpreters and Translators is still lacking. Organic Law 5/2015 set 28 April 2016 as the deadline for submitting a draft law, which has not yet been published. Organic Law 5/2015 only amended the Procedural Criminal Code (Article 124) to require the translator or court interpreter to be appointed from among those included in the "lists drawn up by the competent authority". However, in exceptional cases, it may be possible to rely on persons not included in the register. The problem is even greater if one considers that the provision of personal means in these cases is a shared competence between the State and the Autonomous Communities with transferred powers as regards the administration of justice. That is why in some regions official registers have been created (for example, in Catalonia<sup>21</sup>), in others there are mere "listings" and in most territories collaboration agreements have been signed with public or private companies or entities.

In this regard, Ms. Morán believes that "probably a solution would be to create a State body of translators and interpreters". They could have the status of civil servant or at least of public worker and they could be even included in the justice system staff.

## **B.2. Directives that are still in the process of being transposed**

6. *Has the transposition process of directives adopted in 2016<sup>22</sup> begun? Do you think it*

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<sup>20</sup> *Análisis por los Servicios Jurídicos del Consejo General de la regulación de los derechos de las personas detenidas; en particular, el derecho a examinar las actuaciones policiales*, 17.11.2016.

<sup>21</sup> *Decreto Ley 8/2014 por el que se crea el Registro de traductores e intérpretes judiciales para su actuación ante los órganos judiciales con sede en Cataluña* [BOE nº 33, de 7 de febrero de 2015].

<sup>22</sup> Directive on the presumption of innocence (Directive (EU) 2016/343 - deadline for transposition 1 April 2018), Directive on legal aid (Directive (EU) 2016/1919 – deadline for transposition 25 May 2019) and Directive establishing safeguards for children (Directive (EU) 2016/800 - deadline for transposition 11 June 2019).

*will lead to important changes in the national law of your country?*

*Directive 2016/342 on the presumption of innocence* did not need legal transposition since pre-existing laws (i.e. the Criminal Procedural Code<sup>23</sup>) already comply with the Directive standards. With regard to the other two (*Directive 2016/800/EU* and *2016/1919*), at this time there is only a draft law (Bill amending Act 23/2014, of 20 November, on mutual recognition of criminal decisions in the European Union). It was presented before Parliament on 1 December 2017. Although its main aim is to transpose the *Directive 2014/41/EU*, on the European Investigation Order, it is also transposes certain matters regulated by *Directives 2013/48/EU*, *2016/800/JHA* and *2016/1919*.

Concerning *Directive 2016/800*, the draft bill introduces specific provisions in the chapter on the European arrest warrant. Criticism had been levelled at the fact that the Mutual Recognition Act had no specific provisions for the detention of minors. The bill makes a reference to the Juvenile Criminal Liability Act and indicates that the period of detention will be 24 hours and not 72 hours, as is the case for adults. However, the draft does not take the opportunity to introduce the right of the child to be accompanied by the holder or holders of parental authority during the proceedings (the recognition of this right is limited in certain isolated legal provisions); the right to an individual assessment to order special measures during criminal proceedings, the extent of criminal responsibility and the appropriateness of the sanction or of a particular penalty or educative measure (the reference to the assistance of the technical team services attached to the Juvenile Court does not seem to be enough); the right to a medical examination and without delay, when the minor is deprived of his/her liberty; and the periodic review of precautionary measures involving deprivation of liberty and the adoption, for as long as the measure is prolonged, of special protective measures.

The draft also includes improvements in relation to *Directive 2013/48/EU*, including the “right to appoint a lawyer in the issuing State, whose function will be to assist the lawyer in Spain by providing him/her with information and advice on the possibility of consenting to a hearing before the judge and of handing over to the issuing State”. The draft bill also articulates the guarantee when Spain is the issuing State (Article 39.4). In addition, it includes the right to renounce the lawyer in the issuing State and the possibility of subsequent revocation (Article 50 of the Draft).

Finally, the draft bill amends *Law 1/1996 on Legal Aid* by recognizing the right to legal aid when the intervention of counsel is mandatory or when it is not, some circumstances concurs (when the intervention is expressly required by the court or tribunal by means of a reasoned order to guarantee the equality of the parties in the proceedings, or, in the case of minor offences, when the person against whom the criminal proceedings are directed has exercised his/her right to be assisted by counsel). The latter addition, which recognizes the right to legal aid in the case of minor offences, is a novelty that will completely change pre-existing judicial practice. Currently, there are many minor offences that do not require the mandatory intervention of counsel. Until now, only when the judge understands that it is necessary to ensure equality of the parties to the proceedings (for example, because the private prosecution did appear before counsel and the accused requested it), the court may order the appointment of a free defence counsel. Under the directive, it is no longer possible to intervene in proceedings for a misdemeanor without a lawyer because the right to legal counsel requires that the lawyer may be present during the interrogation of the accused, which is the case in oral trials for misdemeanors. Therefore, the subject has the right to a lawyer in these cases and, furthermore, in the event that he/she does not have sufficient financial means, a free defence counsel should be appointed.

The draft bill also transposes the obligation provided for in Article 7.4 to take “the necessary measures to ensure that suspects, accused persons and requested persons have the right, upon their request, to have the lawyer providing legal aid services assigned to them replaced, where specific circumstances so justify”.

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<sup>23</sup> See <http://eur-lex.europa.eu/legal-content/ES/NIM/?uri=CELEX:32016L0343>.

7. *In light of the Milev judgment recently delivered by the Court of Justice,<sup>24</sup> are the provisions of EU directives on procedural rights being taken into consideration by national courts when interpreting national procedural law?*

Concerning the EU Directives 2016/800 and 2016/1919, no case-law has been found. There are generic references to the Directive 2016/343 on the presumption of innocence used to reinforce the recognition of the right at EU level (among others, Provincial Court of Madrid, Judgements n. 52/2017, of 31 January; n. 33/2017, of 10 February 81/2017, of 23 February; n. 211/2017, of 11 April; n. 346/2017, of 12 June; n° 439/2017, of 18 July; n. 595/2017, of 31 October; n. 498/2017, of 27 November; Judgment of the Supreme Court n. 277/2016, of 6 April; n. 686/2016, of 26 July). A very interesting case is the Judgment of the Supreme Court n. 980/2016, of 11 January. The Court has to determine the validity of a graphologists' expert obtained without legal assistance as a result of a pre-judicial investigation carried out by the Public Prosecutor. The problem has always been whether in pre-judicial investigations carried out by the Public Prosecutor the same guarantees must be followed as for judicial investigations carried out by a judge. The Supreme Court indicated that it makes no difference that a citizen is treated as suspect before the Public Prosecutor or a judge. In both cases all guarantees must be followed. It based its argument, amongst others, on *Directive 2016/343*, by saying that the effectiveness of the right to the presumption of innocence requires the proper exercise of the right to defence. Article 2 of *Directive 2016/343*, pointed out the Supreme Court, forces Member States to take into account the presumption of innocence, and therefore the right to defence, in "all stages of the criminal proceedings, from the moment when a person is suspected or accused of having committed a criminal offence, or an alleged criminal offence, until the decision on the final determination of whether that person has committed the criminal offence concerned has become definitive". Therefore, the lack of legal counsel during the development of each and every one of these investigations led by the Public Prosecutor prevents the Court from considering the expert opinion as a source of evidence capable of being integrated into the material valued by the judge at the oral trial.

### **B.3. Effectiveness and adequacy of EU law on criminal procedure**

8. *In some cases, has the national legislator gone beyond the standard provided by EU directives?<sup>25</sup>*

See above question 4.2.

9. *Do you think some procedural issues have not been addressed by EU directives/at EU level?*

*Directive 2016/343/EU* does not expressly provide a duty to inform suspects and defendants of their right not to testify, although recital 31 states that "Member States should consider ensuring that, where suspects or accused persons are provided with information about [their] rights, they are also provided with information concerning the right not to incriminate oneself".

It is missing reference to the consequences of evidence obtained in violation of the rights not to incriminate oneself and to remain silent. The initial proposal provided for a rule of inadmissibility of evidence thus obtained, precisely because, in the context of criminal proceedings, statements or evidence obtained in violation of these rights automatically deprive the whole procedure of equity. The directive refers in an asymptomatic manner to

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<sup>24</sup> According to which: "It follows therefrom that, from the date upon which a directive has entered into force, the authorities and courts

of the Member States must refrain as far as possible from interpreting domestic law in a manner which might seriously compromise, after the period for transposition has expired, attainment of the objective pursued by that directive" (paras 31 and 32).

<sup>25</sup> e.g. by extending the list of 'essential documents' to be translated/interpreted under Directive 2010/64/EU, or the list of rights a suspect/accused must be informed of under Directive 2012/13/EU.

the assessment of evidence obtained in violation of the above-mentioned rights in Article 10,2 *on remedies* and in Recital 45.

Finally, I do not believe that a new procedural package should be launched at European level. I believe that it would now be appropriate to consolidate the preexisting set of rules. Afterwards, harmonisation of time-limits of pre-detention could perhaps be debated if differences are significant.

*10. To what extent do you think transposition gaps and persisting differences between the Member States may postpone/block cross-border cooperation in criminal matters, including the operation of mutual recognition instruments? If this occurred in the past, please explain which cross-border/mutual recognition measure was at stake.*

Of particular concern is the limited access to the police report. That could postpone/block cross-border cooperation in criminal matters. The executing authority could refuse cooperation claiming the violation of the rights to defence (i.e. in a cross-border evidence gathering case).

*11. Has recent ECJ case law on mutual recognition measures impacted cross-border cooperation? Has the national law of your country conformed to the case law of the ECJ?*

The most relevant ECJ judgment which has impacted cross-border cooperation in Spain was the *Melloni case* related to proceedings in absentia. In Spain, the general rule is that a trial is only possible in the presence of the accused. As is well known, this peculiarity of the Spanish procedure was a major obstacle. The Italian judge asked the Spaniard to surrender a person sentenced there without having been present at the trial. According to the Constitutional Court's case-law a distinction used to be done between "ad intra" and "ad extra" projection of a fundamental right. The "ad intra" projection of a fundamental right is taken into consideration by the Spanish public powers at domestic level. However, the binding content of fundamental rights when projected "ad extra", i.e. in cases of judicial cooperation, is more limited. In its judgment n. 91/2000, of 30 March 2000, the Constitutional Court held that there was an "indirect" infringement of Art. 24.2 of the Spanish Constitution when a Spanish judge agrees the extradition to countries that, in cases of a very serious crime, validate convictions in absentia without subjecting the surrender to the condition that the convicted person may challenge the sentence in order to safeguard his or her rights of defense. The reason why is that the Spanish Constitutional Court considered that this undermined the essential content of the fair trial in a way that affects human dignity (FJ 14).

This line of interpretation was maintained for all requests of European arrest warrants (Judgments of the Constitutional Court n. 177/2006 of 5 June; 199/2009 of 28 September). Forced by the ECJ in the *Melloni case*, the Constitutional Court (Judgment n. 26/2014 of 13 February 2004) overruled its doctrine and circumvented the problem by resorting to the standard protection offered at European level by the ECHR and the interpretation of Article 6 of the ECtHR and Article 48 of the EU Charter of Fundamental Rights as interpreted by the ECJ. The European canon implies that there is no breach of Article 6 ECtHR if the defendant, after being duly summoned, freely decides to waive his hearing at the trial, and, as long as, throughout these proceedings he is counselled by a Lawyer to defend his interests (ECtHR Judgment *Pelladoah v. The Netherlands*, of 22 September 1994, para. 40; *mutatis mutandi*, Judgments *Poitrimol v. France*, of 23 November, of 23 November 1993, para. 35; *Lala v. The Netherlands*, of 22 September 1994, para. 33; *Van Geyseghem v. Belgium*, of 21 January 1999, para. 34; ECJ Judgments, case C-619/10, of 6 September 2012, *Trade Agency*, pars. 52 and 55).

Having complied with these requirements in the factual situation, there was no violation of the fundamental right to effective judicial protection and, therefore, the order of the *Audiencia Nacional* by which it was agreed the appellant's surrender was not declared null. However, the Constitutional Court warned in a similar way to the German one that if EU law were to become irreconcilable with Spanish Constitution, "the conservation of sovereignty of

the Spanish people and the given supremacy of the Constitution could lead it to approach the problems which, in such a case, would arise". (Judgment n. 26/2014, of 13 February 2014, FJ 3).

Ms. Asua Batarrita's dissenting opinion in relation to the Judgment delivered in the amparo appeal n° 6922-2008 (in the Melloni case) criticized this view. She stated that the majority of the Constitutional Court seems to be suggesting that the Constitutional Court is entitled to apply a level of protection that is eventually higher than the one that may arise from the Spanish Constitution further to the EU law application scope. That would mean, said Ms. Batarrita, that "the Judgment adopted by the majority would be implicitly stating its rejection of the EU law primacy".

Moving on to other issues, one of the grounds for refusal of an EAW is when the warrant has been issued for the purpose of serving a sentence and the person is of Spanish nationality, unless he/she consents to serve the sentence in the issuing State. ECJ jurisprudence has established that residents are treated as nationals for the purposes of serving their sentences in the country (see ECJ Judgement, 5 September 2012, *Lópes da Silva case*), but the Spanish transposition law does not include residents. Although the National High Court, through interpretation, is already following this jurisprudence, the draft reform of the Mutual Recognition Act mentioned above (see above question 6) already provides expressly for the guarantee for residents.

The *Bob-Dogi case* (ECJ Judgement, 1 June 2016, C-2014/15) is also a judgment of particular interest to Spanish legal actors. As Mr. García Moreno, Judge and Head of the International Relations Department of the General Council of the Judiciary, has pointed out: "Even if it could be argued that the provisions of *Law 23/2014 on mutual recognition* are unclear as to consider that a previous national arrest warrant other than the European arrest warrant itself is a requirement to issue and execute an EAW (...)", a consistent interpretation with the ECJ Judgment in the *Bob-Dogi case* "means, in short, that an EAW can only be issued by the competent Spanish judicial authority when there has been a previous final judgment imposing a sentence or detention measure to be enforced (...) or when there has been a previous judicial decision imposing some provisional measures involving deprivation of liberty (...)"<sup>26</sup>.

Finally, the ECJ Judgment of 24 May 2016 (C-108/16 PPU), *Dworzecki*, is interesting for Spanish legal actors too. *Law 23/2014, on mutual recognition* allows trials conducted in the absence of the accused, provided that the accused person receives notice of the hearing at his/her domicile or at the person's one designated by him/her at his/her first appearance at pre-trial stage. However, the issuing judicial authority would be obliged to specify in the certificate the data from which it can be inferred that notification has effectively arrived at defendant's knowledge "in due time", "meaning sufficiently in time to allow him or her to participate in the trial and to effectively exercise his or her right of defence" (&7). The ECJ Judgment allows the executing authority to assess, in the light of the statements made by the requested person at the hearing, if official information of the scheduled date and place of the trial was "in due time". Therefore, it is clear that details on this in the certificate will make a decisive contribution to the EAW's recognition by the executing judicial authority.

### **C. Other domains that have not, or to a very little extent, been subject to harmonisation measures at EU level**

#### **Detention conditions**

12. *Does your criminal justice system provide for specific detention conditions (e.g. time-*

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<sup>26</sup> GARCÍA MORENO, M.: "Desarrollos jurisprudenciales recientes en materia de orden europea de detención y entrega", available at [http://www.elderecho.com/tribuna/penal/Detencion-privacion-libertad-norma-europea-entrega\\_11\\_1067305001.html](http://www.elderecho.com/tribuna/penal/Detencion-privacion-libertad-norma-europea-entrega_11_1067305001.html) (last accessed on 21/02/2018).

*limits for custody or detention at each stage of the proceeding)?*

Yes, it does. At the pre-trial phase, an arrested person is informed of the reason for his/her arrest and of his/her rights. He/she is then likely to be held temporarily in a police cell until a formal statement answering the alleged offences can be taken. Afterwards, but in any event within 72 hours of arrest (24 hours in case of minors) the accused will be brought before a Judge (Juez de Instrucción – investigating judge) or released. In certain very special circumstances (mainly offences concerning terrorism or major drug trafficking) a prisoner can be held “incomunicado” for up to 72 hours. Also, in exceptional cases (i.e. terrorism) a Judge can extend the 72-hour period by up to another 2 days. (Article 384 of the Criminal Procedural Code).

A person may be under pre-trial detention for a maximum period of 2 years.

I have to add that duration is always determined by the proportionality principle. However, the following maximum terms are provided for: where it is ordered to avoid destruction of evidence, it may not exceed 6 months; in all other cases: (a) if the offence carries a sentence of more than 3 years, imprisonment may not exceed 2 years, although such period could be extended for another 2 years; (b) if the crime is punishable by a sentence of less than 3 years, preventive detention may not exceed 1 year, with a possible extension of 6 months; (c) where the accused is convicted, it may never exceed one-half of the sentence imposed.

Appeal may be brought. It shall be decided within 30 days (Article 507 Spanish Criminal Procedural Code).

Pre-trial detention shall be grounded on at least one of the following purposes: (a) to ensure the presence of the accused at the trial; (b) to avoid destruction of evidence; (c) to prevent the commission of further crimes and, in particular, to protect the victim (Article 503 Spanish Criminal Procedural Code).

There are certain alternatives to pre-trial detention:

1. Obligation to appear before the judge: The most usual alternative to preventive detention, when it is aimed at ensuring the presence of the accused at trial, is the obligation to appear before the judge, with the established periodicity, and as often he/she may be called before the court. To ensure compliance with this obligation, by means of a reasoned decision the judge or court may withhold his/her passport (Article 530 LECrim).

2. Release on bail: The obligation to appear may be reinforced by the imposition of a bail (Article 529 LECrim). Its purpose is to ensure the presence of the accused whenever he/she is called by the competent Judge or Court (Article 532 LECrim). In determining the bail, the nature of the crime, the accused’s social situation and record must be taken into account, as well as any other circumstances that could influence the intention to flee from the judicial authority (Article 531 LECrim). The bail may be subsequently modified (Articles 591-596 LECrim). The imposition of a bail must be requested by the public prosecutor and by the parties, and the decision is subject to appeal by the parties.

3. Preventive detention served in the accused’s residence: The judge or court may order preventive detention to be served in the accused’s residence, subject to any necessary security measures, where, due to illness, imprisonment would entail serious risks to the accused’s health. The judge or the court may authorize the accused to leave the residence for as long as necessary for his/her treatment, always subject to the necessary security measures (Article 508 LECrim).

4. Preventive detention served in a detoxification center: When the accused is undergoing a drug or alcohol detoxification treatment and imprisonment might interfere with the outcome of such treatment, preventive detention may be replaced by admission to an official or duly authorized center in order to continue treatment, provided that the events giving rise to the legal proceedings took place before treatment started. In such cases, the accused may not leave the center without authorization from the judge or court ordering the measure.

5. Prohibition to approach the victim and prohibition of residence: The prohibition to approach the victim is an alternative to preventive detention when the latter is ordered to protect the

victim (Article 544 LECrim). This measure is especially relevant in cases of gender-based violence, but it is also applied in cases of violent crimes against privacy or property (see offences of Article 57 of the Criminal Code). Removal measures may consist in a restraining order, a change of residence order, or a prohibition to approach certain places. In adopting these measures, the accused's economic situation and health requirements, family situation and work activity must be taken into account. Breach of the measure will give rise to another more restrictive measure or, in accordance with the proportionality principle, preventive detention.

Another alternative to pre-trial detention is judicial expulsion of aliens under aliens' legislation.

When it comes to sentencing, the Spanish legal system offers a very limited list of measures. There are only two: suspension of custodial sentences and expulsion as an alternative to custodial sentences. Organic Act 1/2015, of March 30, entered into force on 1 July 2015. After that date, the suspension regime is substantially modified. The reform introduces a single system unifying the two previous figures (suspension and alternative sentences or replacement) under a single one named "suspension of execution of custodial sentences" (Articles 80-87 of the Criminal Code). However, the imposition of an alternative sentence is established as an autonomous measure for the expulsion of aliens. For further details, see NIETO MARTÍN/RODRÍGUEZ YAGÜE/MUÑOZ DE MORALES ROMERO: Spanish Report on alternative measures to detention (in attachment).

*12.1. If so, do differing/absence of similar conditions regulating detention regimes in other member states constitute a ground to refuse the execution of a mutual recognition instrument, such as the EAW?*

No, they do not.

*12.2. Has the Aranyosi and Caldaru judgment impacted the decisions taken by the judicial authority of your country on the operation of the EAW?<sup>27</sup> Have some EAWs been suspended/refused on those grounds by the judicial authorities of your country?*

No, it has not had any impact. However, in the Puigdemont case, the Spanish judge, acting as issuing judicial authority, was asked by the Belgium authorities about the detentions conditions in Spanish prisons.

The German decision by which the EAW was refused for the crime of rebellion has not been welcomed by most of legal scholars and legal practitioners. The Supreme Court took advantage of an appeal brought by Mr. Jordi Sanchez (another Catalan politician prosecuted for rebellion), to oppose the decision of the German court (17.04.2018). The Supreme Court pointed out that the 6,000 police officers used to prevent the referendum were "ostensibly surpassed" by the two million voters, and proof of this is that "the consultation was carried out (without the minimum guarantees) and that the defendants continued with their secessionist roadmap and ended up declaring the independence of Catalonia". The Court added that "if a considerably larger number of police officers had intervened, it would be very likely that everything would end in a massacre and then it would be very likely that the result of the EAW would be very different".

Furthermore, the Supreme Court emphasized that it is unreasonable to compare what has happened in the separatist process of an autonomous community of more than seven million inhabitants, such as Catalonia, with riots organized by the extension of the Frankfurt airport, since these are two alleged facts that have nothing to do with each other. What strikes the Supreme Court the most about the German court's argument is that it begins with a hypothetical example that is very appropriate to the case of Catalonia, which is to ask itself what would happen in Germany if the president of a Land were to engage in conduct such as

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<sup>27</sup> For example, through postponing its execution if there exists substantial evidence that detention in the issuing state may result in a breach of Article 3 ECHR / Article 4 of the Charter.



that perpetrated in Catalonia, but a few lines later it abandons that discourse without going into it in depth and suddenly slips towards the factual assumption of the airport runway, thus avoiding the swampy comparative example that was so appropriate and pertinent.

Prof. Nieto Martín has writing on the topic criticizing the German decision (<http://almacenederecho.org/reconocimiento-mutuo-doble-incriminacion/>), amongst other reasons, because an examination of the merits of the case has been made by the German court and that is the Spanish Supreme Court's responsibility.

*13. Does your criminal justice system take into account a custodial sentence (or part of it) already served in other EU state after a prisoner is transferred to your country?*

Spanish criminal justice system only takes into account a custodial sentence (or part of it) already served in other EU state when such recognition does not favour the convicted person (i.e. for recidivism purposes). When it favours, it does not take into account it.

The question has been large debated and given rise to many judicial decisions. These are cases in which the appellants (ETA terrorists) pursue the accumulation of convictions handed down in Spain with other convictions already imposed and executed in France. Accumulation according to Spanish Criminal Code implies the establishment of maximum penalty limits. The recognition of European foreign convictions benefits the appellants by allowing them to deduct the prison time already served in another Member State from the Spanish conviction. The many judgments of the Supreme Court that deal with the issue<sup>28</sup> conclude that the recognition of foreign convictions does not take place for cumulative purposes, among other reasons, because this is deduced from Article 3.5 of the above-mentioned European framework decision and from the Spanish transposition of the European legal instrument (Document No 6). Article 3.5 of the Framework Decision provides that if the offence for which the new proceedings being conducted was committed before the previous conviction had been handed down or fully executed, recognition of a EU foreign conviction shall not be compulsory, where the application of national rules on imposing sentences to foreign convictions would limit the judge in imposing a sentence in the new proceedings.

The exception provided for in Article 3.5 was introduced, among other reasons, to address the concerns of the Dutch delegation. In this country, when the facts against the same person are judged separately, the previous sentence is not annulled or a new one is imposed for the two facts, but in the second trial the judge has to impose a sentence discounting the one already imposed, taking into account the maximum limit that would have been imposed if the two crimes had been tried jointly. In this respect, if a penalty of 5 years was imposed in Member State A and the Netherlands imposed in a following case, as starting point 5 years, the full application of the principle of equivalence in Article 3.1 of the Framework Decision would mean that, in the new proceedings, no penalty could be imposed. In Spain, accumulation is normally carried out *posteriori* when penalties have been imposed in different procedures. One of the keys to the case was to determine what should be understood under "new process". The *Council Framework Decision 2009/315/JHA of 26 February 2009 on the organisation and content of the exchange of information extracted from the criminal record between Member States* provides for a broad definition of "criminal procedure" including the "pre-trial stage, the trial stage itself and execution of the conviction". However, the word used here is not *procedure*, but *process*. It could be understood that they are synonymous and therefore the execution of the conviction would also be included. Consequently, the Spanish accumulation procedures could also be included in the exception and recognition of the foreign conviction would not be possible. Nevertheless, it is only at the trial stage itself that the sentence is determined on the basis of the guilt of the offender and only at that

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<sup>28</sup> The leading case is the Judgment of the Supreme Court n. 874/2014, of 27 January. This opinion has remained constant (see Judgments of the Supreme Court n. 334/2017, of 12 May; n. 95/2017, of 16 February; n. 457/2016, of 26 May; n. 333/2016, of 20 April; n. 261/2016, of 4 April; n. 241/2016, of 29 March; n. 76/2016, of 10 February; n. 12/2016, of 25 January; n. 81/2016, of 10 February; n. 336/2015, of 24 May; n. 818/2015, of 22 December; n. 804/2015, of 14 December; n. 789/2015, of 7 December; n. 772/2015, of 3 December. The Constitutional Court have already reached an identical decision in its Judgment n. 155/2016, of 20 September).

stage that the court could be limited in imposing a sentence. With this interpretation, the cases of accumulation as they occur in Spain should not be excluded from recognition for the purposes of Article 3.5 of the framework decision. In any event, what has been criticised is that the Supreme Court had not referred a question to the ECJ for a preliminary ruling that clarifies the boundaries of exceptions to the principle of equivalence between convictions handed down in the Member States. It must be underlined that the leading judgment was delivered by a very rushed majority (9 votes in favour and 6 against).

*14. Does your criminal justice system provide for a compensation regime for unjustified detention for the purpose of executing an EAW (e.g. in case of mistaken identity of the suspect/accused)? If so, could you please describe the features of such regime?*

Yes, it does. It is an administrative procedure called "financial liability claims from the operation of Justice Administration". This procedure is used to demand compensation from the Ministry of Justice for damages suffered due to the actions of the Justice Administration that the affected party is not legally bound to pay<sup>29</sup>. Causes for compensation are:

Judicial error: as a result of adopting legal decisions that are not in keeping with the Law, whether due to improper application of the legislation or due to a mistaken assessment of the facts or omission of key pieces of evidence.

- Irregular functioning of the Justice Administration: as a result of the irregular functioning of the legal services included in the structure of the Justice Administration. Examples include cases of undue delays in the processing of the legal procedure, loss or damage to goods in the custody of judicial bodies, etc. Merely revoking or cancelling the judicial decisions does not in itself constitute the right to compensation.
- Unlawful preventive custody: this applies to those who have been placed in preventive custody and then been acquitted or dismissed (in both cases for lack of evidence), whenever this has caused them harm.

The amount of the compensation depends on the amount of time they were deprived of their freedom and of the personal and family consequences that have arisen.

*15. What would you recommend as further action for EU institutions in the area of detention (e.g. action for failure to act, harmonisation measures, etc.)?*

The *Aranyosi and Caldaraaru* cases and the multiple ECtHR convictions of many EU Member States (i.e. Italy, Belgium, Bulgaria, Romania) for the situation in their prisons recommend a directive on guarantees and conditions of at least pre-trial detention.

## **Evidence gathering and admissibility**

*16. Were negotiations on the European Investigation Order hindered and/or slowed down by the existence of different rules in evidence gathering and admissibility?*

Mr. Espina believes that "different rules in evidence gathering and admissibility were not a main issue since most of the topics had been previously dealt with in course of negotiations of the 2000 Convention on mutual assistance in criminal matters".

However, at least in the case of Spain it has been debated -as a problem itself of the directive- the types of proceedings for which an EIO can be issued. Article 4 b of Directive 2014/41/EU indicates that an EIO may be issued in proceedings brought by administrative authorities in respect of acts which are punishable under the national law of the issuing State by virtue of

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<sup>29</sup> For delivery periods and further information see the official website of the Ministry of Justice translated into English. See <http://www.mjusticia.gob.es/cs/Satellite/Portal/en/servicios-ciudadano/tramites-gestiones-personales/reclamacion-responsabilidad> (last accessed on 21/02/2018).

being infringements of the rules of law and where the decision may give rise to proceedings before a court having jurisdiction, in particular, in criminal matters". This is the case of countries as Germany or Portugal, but it is not the case of Spain. This means that Spain will never be able to attempt to investigate offences such as traffic offences that do not constitute a crime. However, Spain is a country which receive and execute a huge number of requests for judicial assistance (or orders for the recognition of pecuniary sanctions) to investigate facts that in Spain are simply administrative infractions and could never give rise to criminal judicial assistance. This creates a situation of inequity between countries in terms of making their administrative sanctioning regime more effective vis-à-vis foreign citizens. The different situation is also detrimental in terms of international judicial cooperation since it depletes the resources intended for this task. Judicial authorities should devote all their scarce cooperation resources to relevant issues in the fight against international crime. The reality is that Spanish judicial authorities are forced to execute requests by carrying out investigations into minor acts that would never be dealt with by a judicial authority if they were committed in Spain. The majority of these procedures, beyond some issues related to hunting and fishing that give rise to some requests from some of our neighboring countries, are related to traffic violations<sup>30</sup>.

The same subject has been discussed in the Annual reports of the Attorney General's office. These reports criticize the overused by foreign authorities of the instrument of mutual recognition of pecuniary sanctions, in many cases related to administrative law-valued fines. That leads to an abusive and inappropriate use of judicial authorities in cases of no criminal interest for purely tax collection purposes<sup>31</sup>.

Ms. Morán confirms that the same also happens in the field of evidence gathering. She underlines that there is misuse by administrative agencies in some countries, such as Germany, which are asking for evidence (vehicle identification) in the case of drivers who have not paid a toll or have not respected the maximum driving time. In her words, "it is a serious problem of proportionality and misuse of the legal instruments on judicial cooperation". Nevertheless, Ms. Morán thinks that Article 2,c i. of the EIO Directive may contribute at least to minimize disproportionate cases of judicial cooperation. According to this legal disposition when the issuing authority is an authority other than a judge, a court, an investigating judge or a public prosecutor, the order transmission shall be validated by a judicial authority (a judge, court, investigating judge or a public prosecutor).

*17. Is evidence gathered in another EU state admissible in criminal proceedings in your country? If so, must evidence conform to domestic rules on evidence gathering?*

Yes, it is. Since Spain has not already implemented the EIO, Article 4 of the *2000 Convention on mutual assistance in criminal matters between the Member States of the European Union* is the legal basis for evidence gathering. Therefore, the Spanish issuing authority sometimes indicates any formality or procedure to be followed by the executing judicial authority (i.e. defendant's appearance while a house search is carrying out). This possibility will not be changed with the transposition of the EIO. According to Article 9.2 of the EIO directive "the executing authority shall comply with the formalities and procedures expressly indicated by the issuing authority (...)".

The case-law of the Spanish Supreme Court has reiterated many times that the Spanish courts do not review the legality of proceedings carried out in another European Union country, nor can the evidence there obtained be subject to the requirements established by Spanish law. Furthermore, the Supreme Court has pointed out that the so-called rule of inquiry does apply<sup>32</sup>. It has based this view on the principle of *lex loci*. In this regard, Article

<sup>30</sup> Public Prosecutor Office's Report on the Draft bill amending the Act 23/2014, on mutual recognition of criminal judicial decisions in the European Union, by which the European Investigation Order is implemented, 20 September 2017, pp. 25-27.

<sup>31</sup> See *Annual Report of the Public Prosecutor's Office, Year 2017*, p. 615 and *Annual Report of the Public Prosecutor's Office, Year 2016*, pp. 571-572.

<sup>32</sup> See Supreme Court Judgments n. 1281/2006, of 27 December; n. 19/2003, of 10 January; n. 480/2009, of 22 May; n. 1521/2002, of 25 September; n. 4777/2013, of 8 October; n. 480/2009, of 22 May.

3 of the European Convention on Mutual Assistance in Criminal Matters, which provides that “the requested Party shall execute in the manner provided for by its law any letters rogatory relating to a criminal matter”<sup>33</sup>. However, there are other decisions which do not follow the rule of non-inquiry. Thus, in these judgments there is an examination of the adequacy of the evidence obtained either by comparing it with the international rules governing international legal assistance<sup>34</sup> or by referring to the need to verify the regularity of the taking of evidence in accordance with the law in force in the requested State<sup>35</sup>.

According to Article 189,3 *Act n. 23/2014 on mutual recognition*, “evidence obtained through a European evidence warrant<sup>36</sup> performed pursuant to the procedural regulations of the executing State and, where appropriate, pursuant to the proceedings specifically indicated by the Spanish authority, shall take full effect and shall not be liable to an appeal aimed at controlling the guarantees of impartiality observe when obtaining them, nor the validity of the act duly performed”. This provision has been criticized by scholarship since Recital 28 of the FWD states that it “does not prevent any Member State from applying its constitutional rules relating to due process”. Therefore, an appeal should be granted<sup>37</sup>.

There is no possibility of appeal to challenge the legality of the evidence (whether or not it was obtained in violation of legal requirements in the executing member State). However, the defendant’s defense could present any other evidence. That is to say, the judge will assess the evidence (its credibility), in the same way as the presentation of different national evidence (i.e. statements by different witnesses. It could be the case of a witness questioned abroad and then the defence provides the testimony of a different witness who contradicts what was said by the previous witness).

*18. Which authority is in charge of reviewing how evidence has been gathered in the other EU state?*

The authority in charge of it is the sentencing judge.

*19. Can evidence that is gathered unlawfully or that may entail a breach of fundamental rights be used during the trial? If not, are there exceptions to this rule?*

No, it cannot. Article 11 of Organic Law of Judicial Power provides: “Evidence obtained, directly or indirectly, in violation of fundamental rights or freedoms shall have no effect in court”. The procedural moment in which this inefficiency must be asserted is complex. There are those who advocate directly at the pre-trial stage, others at the oral trial stage. The last law reform of the Criminal Procedural Code has resolved it at the pre-trial stage. The possible expansive or reflective effect of the evidence obtained indirectly from which it was illegally obtained is also complex. While our jurisprudence has generally tended to favour the ineffectiveness of an evidence gathered directly from illicit sources, both the Spanish Constitutional Court and the Supreme Court have sometimes been more generous.

It should be noted, however, that in the case of an *a priori* unlawful evidence obtained by private individuals, this may be part of the process. That happened in the Supreme Court’ Judgement 228/2017, of 3 April. The facts related to a case of judicial cooperation, since it was debated whether or not the so-called “Falciani List” should have effects because it was indirectly obtained through the violation of the fundamental right to privacy. There is no

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<sup>33</sup> See Supreme Court Judgments n. 382/2000, of 8 March; n. 259/2005, of 4 March; 733/2013, of 8 October; n. 456/2013, of 9 June.

<sup>34</sup> See Supreme Court Judgments n. 1493/1999, of 21 December and n. 2084/2001, of 13 December.

<sup>35</sup> See Supreme Court Judgment n. 340/2000, of 3 March.

<sup>36</sup> The Directive on the European investigation order has not yet implemented. The draft law does not foresee any provision in this sense.

<sup>37</sup> See BACHMAIER WINTER, L., “El exhorto europeo de obtención de pruebas en la Ley 23/2014 de 20 de noviembre”, in ARANGÜENA FANEGO, C.; DE HOYOS SANCHO, M., RODRÍGUEZ-MEDEL NIETO, C., (coords.): *Reconocimiento mutuo de resoluciones penales en la Unión Europea. Análisis teórico-práctico de la Ley 23/2014, de 20 de noviembre*, Cizur Menor, 2015.

doubt that the theft of business data by one of an employee infringed the fundamental right to privacy of depositors of money in that bank, as well as the same right of the entity to confidential information, also known as banking secrecy. Furthermore, there is no legal basis in Spanish law for admitting this type of evidence obtained by private individuals. However, the Supreme Court understood that “the possibility of assessing a source of evidence obtained by a private individual with complete disconnection from all state activity (i.e. the subject never acted in the framework of an activity in support of State organs called to prosecute the crime), that is to say, it is an evidence alien in its origin to the will to prefabricate evidence, does not need to comply with Article 11. Its assessment is perfectly possible in view of the very literality of the current enunciation of Article 11 and, above all, in view of the idea that, in its historical origin and its jurisprudential systematization, the rule of exclusion only becomes meaningful as an element of prevention against State excesses in the investigation of the crime”.

*20. To what extent do you think differing rules on gathering and admissibility of evidence have constituted obstacles to the operation of mutual recognition instruments, including in the case of the EAW?*

As Mr. Espina has above indicated in question 16, “different rules in evidence gathering and admissibility are not a main issue since most of the topics had been previously dealt with in course of negotiations of the 2000 Convention on mutual assistance in criminal matters”. Besides, as Ms. Morán points out, the possibility for the issuing judicial authority to indicate any formality or procedure to be followed by the executing judicial authority helps resolve differences.

### **Criteria allocating jurisdiction**

*21. To what extent the absence of binding criteria allocating jurisdiction hinders cross-border cooperation?*

Mr. Espina believes that the lack of binding criteria is a problem without solution since there is not a supranational actor with competence to impose the follow up of one or another criterion. So, the only possibility is to trust involved Member States’ consensus in order to solve a given problem of jurisdiction. To this effect, the role to be played by Eurojust is crucial.

The data gathered at the last Annual Report of the Public Prosecutor’s Office for 2016 shows that, at least in Spain, the “consensus model” seems to work. In 2016, 6 recommendations were issued by the National Member of Eurojust. All of them were accepted: “5 cases were related to parallel proceedings opened in Spain and in another Member State; of these, 4 were conflicts of jurisdiction settled by the assessment that the other Member State concerned was in better condition than Spain and, therefore, it was agreed to refer a complaint for procedural purposes to that State and in the other two cases Spain assumed its competence (...)”<sup>38</sup>.

In Ms. Holgado’s opinion, “cross-border cooperation is not necessarily hampered by the absence of binding criteria allocating jurisdiction. In particular, the European Convention on Mutual Assistance in Criminal Matters of 1959 (Council of Europe) and the Convention on Criminal Assistance between EU Member States of 2000 have enabled an efficient judicial cooperation. In the Public Prosecutor’s Office in Toledo, mainly through these instruments and other more residual instruments, a sizable number of letter rogatory has been executed without incident and aimed at different purposes: financial investigation, witness and investigated persons statements, information on the ownership of telephone numbers and house seizures (these last ones, prior judicial authorization). Eurojust involvement in cases involving several countries in the investigation has been decisive”.

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<sup>38</sup> See *Annual Report of the Public Prosecutor’s Office, Year 2017*, p. 631.

22. *Do you think we should adopt an EU instrument that goes beyond existing measures and Eurojust's competence in the field (e.g. Framework Decision 2009/948/JHA on conflicts of jurisdiction)?*

As Ms. Holgado points out, "Eurojust effectively detects and manages cases of conflicts of jurisdiction in accordance with existing instruments. On the other hand, the *Guidelines for deciding which jurisdiction should prosecute* are extremely useful and have been taken for reference by several Member States when they have developed this matter internally. The creation of a European database on final judgments is also an important tool".

Nevertheless, the 1972 European Convention on the Transfer of Proceedings in Criminal Matters has been ratified by a half of Member States and even in case of ratification a huge number of reserves has been made and so it is a convention with a very practical use<sup>39</sup>. Therefore, a EU legal instrument on this topic would be very welcome. In this regard, both Mr. Espina and Ms. Morán think that there is a need for a directive regulating the transfer of proceedings, which is the natural consequence of any conflict to be resolved. However, in Mr. Espina's opinion, Article 85 TFEU related to the Eurojust competence to solve conflicts of jurisdiction should be interpreted not as a basis for allowing Eurojust to impose a given solution on the parties in conflict but rather in the sense of allowing the improvement of mechanisms leading involved authorities to arrive to a consensus.

### Victims

23. *What kind of protection measures are available for victims in your legal system? What is their nature (criminal measure, civil measure or both)?*

Measures available for victims in Spanish legal system are of criminal nature.

Protection measures for victims are applied at all stages of the proceedings.

- **At the pre-trial stage:** The prohibition to approach the victim is an alternative to preventive detention when the latter is ordered to protect the victim (Article 544 LECrim). This measure is especially relevant in cases of gender-based violence, but it is also applied in cases of violent crimes against privacy or property (see offences of Article 57 of the Criminal Code). Removal measures may consist in a restraining order, a change of residence order, or a prohibition to approach certain places. In adopting these measures, the accused's economic situation and health requirements, family situation and work activity must be taken into account. Breach of the measure will give rise to another more restrictive measure or, in accordance with the proportionality principle, preventive detention.
- **At the sentencing stage:** deprivation of right to reside in specific places or to visit them; prohibition to approach the victim, or his relative or other persons and prohibition to communicate with the victim are penalties (Art. 48 Spanish Criminal Code). The sentencing court may impose them in criminal offences of manslaughter, abortion, bodily harm, against liberty, of torture and
  - In cases of crimes committed against a former spouse, or against a person who has been bound to the convict by a similar emotional relationship, even without cohabitation, or against the descendents, ascendants or biological, adopted or fostered siblings of that person or of the spouse or cohabitating partner, or against minors or a disabled person requiring special protection cohabitating with them, or subject to the parental rights, guardianship, care,

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<sup>39</sup> MORÁN MARTÍNEZ, R.: "Conflictos de jurisdicción, "ne bis in ídem" y transferencia de procedimientos", en ARNÁIZ SERRANO, A. (coord.): *Cooperación Judicial penal en Europa*, Ed. Consejo General del Poder Judicial, p. 1017.

fostership or *de facto* safekeeping of the spouse or cohabitating partner, or against a person protected by any other relationship arising within the core family cohabitation, as well as against persons who, due to their special vulnerability, are subject to their custody or safekeeping at public or private centers, prohibition to approach the victim, or his relatives or other persons shall be imposed in all cases for a time that shall not exceed ten years if the criminal offence is serious, or five if less serious.

- **At the post-trial state:** Either probation (suspension of the penalty) or conditional release may be subject to compliance with certain duties and prohibitions (Article 83). The judge shall assess the risk of further offences, guided by the proportionality principle. These measures have a preventive nature (prohibition to approach certain places, the victims, their relatives or other persons determined by the judge; the prohibition to communicate with certain persons, to drive vehicles, to reside in a certain place, to appear before the judge or in police offices, etc., the prohibition to drive motor vehicles without technological mechanisms that subject their startup or functioning to previous verification of the driver's physical condition); they also have a rehabilitation nature (participation in training or cultural programs, in detoxification programs regarding alcohol or drug dependence, etc.). If the offenders have been convicted of crimes committed by the husband or a person with an analogous affective relationship against his wife, the prohibition to approach the victim, to reside in a certain place, and participation in training or other programs must be mandatorily imposed.

24. *Does your legal system foresee a compensation mechanism for victims of crime?*

Yes, it foresees a compensation (Article 110 Criminal Procedural Code and Organic Law on victims' rights). Moreover, when the perpetrator is insolvent or cannot be identified or convicted, i.e. when he/she is unable to fulfill the civil responsibilities arising from the crime, the State compensates the victim. This aid and compensation scheme is provided for in the law on assistance to victims of violent crimes and crimes against sexual freedom, and in the rules on assistance to victims of terrorism. This subsidiary protection by the State also applies to cross-border victims (nationals and EU foreigners residing in a Member State).

#### **Compensation from the state**

Compensation from the State is only provided for victims of violent crimes and crimes against sexual freedom, and victims of terrorism. This subsidiary protection by the State also applies to cross-border victims (nationals and EU foreigners residing in a Member State).

The amounts of compensation vary depending on the crime. According to *Article 20 Act 29/2011, of 22 September, pursuant to protect victims of terrorism*, direct and indirect (e.g. relatives) victims have the right to compensation for death and personal injury (included psychological injuries). Compensation for death is 250.000 Euro; for injuries that have left the victim disable for life compensation ranges between 75.000 and 500.000 Euro. For injuries that have not left the victim disable for life the amount, the work-related accident compensation scheme or the scale related to the compensation derivative from motor accident are applied. The State shall also assume, as an extraordinary measure, the payment of the corresponding civil compensation, imposed in a final judgement as civil liability, for the commission terrorism related offences.

The procedure for the recognition of the right to compensation for damages referred to terrorist offences shall be handled and resolved by the Home Ministry. Requests must be made within a maximum of one year of the occurrence of the damage. The maximum time limit for the resolution of the procedure is 12 months. The decisions handed down may be appealed before a court with jurisdiction in administrative law matters.

*Act No. 35/1995, of 11 December, on aid and assistance to victims of violent crime and crimes against sexual freedom* establishes incompatibilities (e.g. between compensation from the State and civil compensation, unless the offender had been declared partially insolvent, between State compensation and damages covered by a private insurance). The amount of aid shall not exceed the civil compensation fixed in the judgment. Such amount shall be determined by the application of the different rules. For example, the maximum compensation for to be paid shall be 120 monthly payments of the national minimum wage; compensation for injuries that have left the victim disable for life ranges between 40 and 130 monthly payments of the national minimum wage; in the event of temporary inability to work, the amount to be received shall be equivalent of twice the minimum daily wage during the period in which the person concerned is in such a situation.

Amounts shall be determined by taking into account the financial situation of the victim and the beneficiary; the number of persons financially dependent on the victim and the beneficiary and the degree of affectation or damage suffered by the victim.

Compensation for funeral expenses are also included. In the case of offences against sexual freedom which cause damage to the victim's mental health, the amount of the aid shall cover the costs of therapeutic treatment, up to a maximum amount determined by law.

The action to apply for aid is time-barred for a period of one year from the date on which the offence occurred.

Applications for aid shall be decided by the Ministry of Economic Affairs and Finance. The interested parties may challenge the decisions of the Ministry of Economy and Finance before the National Commission for Aid and Assistance to Victims of Violent Crimes and against Sexual Freedom, within one month of personal notification to the interested parties.

### **Compensation from the offender and confiscation**

According to Article 111 Spanish Criminal Procedural Code, a civil claim may be brought in the criminal or civil proceedings. However, the civil claim shall not be brought separately while the criminal action is pending. That means that a civil claim shall not be brought in a civil procedure until the criminal action has been resolved by a final judgment.

Regardless of the financial position of the victim, victims of gender-based violence, terrorism and trafficking in human beings are entitled to legal aid in relation to any proceedings involving, deriving from or resulting from their status as victims. This also applies to minors and persons with intellectual disabilities or mental illness when they are victims of situations of abuse or mistreatment (Article 2 Act 1/1996, of 10 January, on Legal Aid). Other than that, victims will be required to provide proof of insufficient financial resources. Insufficient financial resources are determined by different criteria foreseen by Article 3 Act on Legal Aid (e.g. resources shall not exceed twice the public income index).

Art. 127 *octies* Spanish Criminal Code states that the goods, instruments and gains confiscated via a final ruling shall be assigned to the State. However, it does not include those goods, instruments and gains confiscated allocated to pay compensation to the victims.

*25. Have you ever been involved in the cross-border recognition and implementation of a protection measure? If so, on which EU instrument did you rely: Directive on the European Protection Order (EPO – criminal matters) or Regulation on protection measures in civil matters?*

Ms. Holgado has never been involved in such situations. Mr. Espina has been involved but not in many cases and always in the base of an EPO.

Ms. Morán explained that the number of EPOs is quite limited as Annual Reports of the Public Prosecutor's Office show. In 2016, only 3 cases were notified, all of them with Spain as issuing authority (DP 62/16 del JVM n. 1 de Barcelona; –Ejecutoria 336/15 del J. Penal n. 1 de



Ourense; y Sumario n. 399/16 del JVM de Pontevedra)<sup>40</sup>. In 2015 there were only two EPO cases<sup>41</sup>. In the first case, since both parties had their habitual residence in Germany, the EPO was deemed not to be applicable. Instead, a decision on alternative measures to pretrial detention was issued. Subsequently, the precautionary measures agreed upon rendered without effect due to the couple's reconciliation and resumption of cohabitation. Provisional dismissal of the proceedings was ordered. In the second case, the EPO was issued to the United Kingdom.

26. *Have you ever issued an EPO where the issued protection measure was not available in the legal order of the executing state? If so, what happened?*

Neither Mr. Espina nor Ms. Morán nor Ms. Holgado have ever been involved in a case like that.

27. *How would you make the EPO more effective? Could you identify issues not/insufficiently addressed in the directive that should be further developed/included?*

As an Assistant to the National Member for Spain at Eurojust, Mr. Espina has no experience in it. Therefore, he does not have an opinion on it. For the same reasons, neither has Ms. Holgado an opinion on it.

Ms. Morán believes that the EPO is very few used and mainly only in cases of gender-based violence. But paradoxically, it is not used when it would just be more desirable. This is the case of protected witnesses and victims of organized crime.

28. *Has the implementation of the 2012 directive on victims' rights had a positive effect on the amount of issued/executed protection measures, including EPOs?*

Mr. Espina and Ms. Morán do not think so. As the Annual Reports of the Public Prosecutor's Office show, the number of EPO reported is very small (3 cases in 2016, 2 in 2015).

Ms. Holgado basically shares that view although she explains that the transposition of *Directive 2012/29*, together with others, has led in Spain to a crime victim's rights act. The application of this act is being translated into greater concern for the position of the victim and the materialization of the rights legally recognized.

29. *Have gaps persisted in the implementation of Directive 2004/80/EC on compensation of victims and Directive 2012/29/EU on victims' rights?*

Article 13 *Directive 2012/29/EU on victim's rights* poses a challenge to the Spanish State to which the transposition law has not provided for an appropriate response. This is the right to legal aid in the case of victims who, according to national law, such as the Spanish legal system, have the status of parties to criminal proceedings<sup>42</sup>. The transposition law does not extend legal aid to all victims who are part of the process, which would certainly be a very ambitious decision from a budgetary point of view. Does it mean a breach of the directive?

Article 20 of *Directive 2012/29/EU* on the right to protection of victims during criminal investigation has been incorrectly transposed by Article 21 *Organic Law 4/2015* by limiting its scope of application. Article 21 *Organic Law 4/2015* reproduces exactly all the measures laid down in the directive (conduction of interviews without unjustified delay, the possibility of being accompanied, etc.). However, it limits their adoption to ensuring that such measures do not undermine the effectiveness of the process. A broad interpretation of the concept of

<sup>40</sup> See *Annual Report of the Public Prosecutor's Office*, Year 2017, p. 465.

<sup>41</sup> See *Annual Report of the Public Prosecutor's Office*, Year 2016, p. 411.

<sup>42</sup> As mentioned above, under Spanish law prosecution begins by action of the Public Prosecution but also by the victim of the offence (*acusación particular*) or even by any natural or legal person not offended by the crime (*acción popular*). Popular action has so the status of party to the proceedings.

the “effectiveness” of the process, which does not have to be identified exclusively with the rights of the defence as the Directive does, would allow a more restricted application of these measures.

The procedure for the individual assessment of victims is left to the Member State. It is therefore surprising that the Spanish legislator had only included generic procedural indications within the meaning of Article 22 Directive and had left the whole proceeding to regulatory development. It is doubtful whether a legal rule with the status of a regulation has sufficient rank to develop such issues that are not even addressed in the organic law.

Nor has the Organic Law 4/2015 on the victims’ rights resolved three serious issues affecting women victims of crimes of domestic violence, gender-based violence, humiliating and abusive treatment or crimes against sexual freedom.

Firstly, Spanish law and judicial practice continues without providing an appropriate solution to this kind of victims when they are the only witnesses to the crime<sup>43</sup>. Organic Law 4/2015 omits any improvements in this respect. Case-law requirements for their declaration to become the only incriminating evidence against the offender are very strict. The Supreme Court addressed the issue in the 1990s and its doctrine can be summarized as follows<sup>44</sup>:

- For the victim’s statement to be valid as the only evidence against the offender, a number of parameters has to be met (not necessarily all of them): a) lack of implausibility of her testimony which is assessed merely on the absence of spurious motives and the degree of development and maturity of the victim); b) the credibility of victim’s statement (no discrepancies in her testimony, body injuries, etc.), and/or c) persistence of incrimination (no substantial modifications in the successive statements made by the victim without contradiction, vagueness or ambiguity of the testimony).
- Organic Law 4/2015 does not say how to proceed when the victim of sexual offences has a hierarchical dependency on his/her assailant, who is a civil servant. These acts are very serious or serious offences of an administrative nature and in the sanctioning procedure the victim is most often denied the right to be party to the proceedings. Sanctioning administrative laws do not say anything about it. The Constitutional Court has indicated that the principles governing administrative sanctioning law must be the same as those governing criminal proceedings. Therefore, if the victims have, for example, the right to be heard in criminal proceedings and this is not expressly recognized under administrative law, the principles of criminal law must be transferred to disciplinary law, including not only the defendant’s rights but also those of the victims<sup>45</sup>.

Secondly, victims can appeal against judicial decisions in the process of enforcement of the sentence (leaves, conditional freedom, probation). It raises difficulties inherent in the notification of decisions, especially when the victim has not been present in the course of the proceedings. Article 7.1 Organic Law 4/2015 tries to resolve it stating that in the case of citizens residing outside the European Union, if there were no e-mail or postal address, notification would be sent to the Spanish diplomatic or consular office in the country of residence.

Another issued related to the victim’s participation at this stage of the proceedings is that such appeals have suspensive effect. That prevents the inmate from releasing while pending the appeal. Organic Law 4/2015 provides for the appeal procedure to be made on a preferential and urgent basis, but the harm that difficulties in locating the victim could cause to the freedom of the sentenced person are obvious.

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<sup>43</sup> GÓMEZ COLOMER, J.L.: “Tres graves falencias del estatuto de la víctima del delito cuando la mujer es víctima de violencia de doméstica, de género, de tratos vejatorios y humillantes, o de delitos contra la libertad e indemnidad sexuales”, in DE HOYOS SANCHO, M. (dir.): *La víctima del delito y las últimas reformas procesales penales*, Thomson Reuters Aranzadi, 2017, p. 38 y ss.

<sup>44</sup> See amongst others, Judgements of the Supreme Court n. 625/2010, of 6 July and n. 480/2012, of 29 May.

<sup>45</sup> GÓMEZ COLOMER, J.L.: “Tres graves falencias del estatuto de la víctima del delito cuando la mujer es víctima de violencia de doméstica, de género, de tratos vejatorios y humillantes, o de delitos contra la libertad e indemnidad sexuales”, in DE HOYOS SANCHO, M. (dir.): *La víctima del delito y las últimas reformas procesales penales*, Thomson Reuters Aranzadi, 2017.

But probably the most important issue is the lack of resources. The effectiveness of most of the rights granted to victims (effective protection, timely and comprehensible information, availability of translators and interpreters, legal aid, victim assistance offices, implementation of mediation systems, etc.) requires the provision of material and human resources, as well as the training of professionals working in this field. In the case of Spain, in the numerous procedural reforms in 2015 in this area, the legislator has taken care to expressly affirm that the measures included in these standards “will not entail an increase in staff provisions, remuneration or other expenses”. Legal scholars<sup>46</sup> and other actors<sup>47</sup> have emphasized that it is very difficult for reforms to be effectively implemented within these budgetary constraints, in addition to those which we have already been experiencing.

In this regard, Ms. Holgado points out that the Crime Victim’s rights Act satisfies the need to create a systematic and orderly catalogue of the rights of any kind of victim. Therefore, it can be said that EU regulation has improved the Spanish situation on this field, mainly it has contributed to ending with the preexisting legal dispersal. However, she underlines that “an efficient implementation of all these rights is being carried out very slowly, for various reasons, including the lack of material and personal means”.

*30. Have you identified weaknesses and gaps in the previously mentioned instruments and how would you make them more effective? Do you think new instruments on victims’ rights should be tabled by the EU?*

Consideration should be given to whether *Directive 29/2012*, by obliging all Member States to establish a state system of compensation for cross-border victims, extends such a system to all types of crime and for all victims (not only cross-border but also domestic victims). In Case C-601/14 of 11 October 2016, the ECJ indicated that Article 12.2 of the directive “must be interpreted as meaning that it is intended to guarantee to Union citizens the right to fair and appropriate compensation for the injuries they suffer on the territory of the Member State in which they find themselves in exercising their right to free movement, by requiring each Member State to introduce a compensation scheme for victims of any violent intentional crime committed on its territory” (&45). Italian law provided for State compensation only for victims of certain intentional and violent crimes (terrorism and organized crime). This judgement makes it clear that Member States have the competence to define the scope of the legal concept of “intentional and violent nature crime”. However, they cannot limit the scope of the compensation scheme for victims to only certain violent intentional crimes. Two different interpretations can be made here. The first is that the State has to change the compensation scheme for violent intentional crimes with transnational elements, as well as that which it applies to its nationals and residents when they suffer from such acts on its own territory. The second interpretation would lead the State to only modify its domestic system to establish a more “generous” scheme in the case of cross-border situations. This second interpretation would result in reverse discrimination. That is to say, cross-border victims would enjoy greater protection than national ones. In principle, the ECJ would have to pronounce itself in order to give the appropriate interpretation. However, in purely internal situations, it has no competence to do so. It indicated so in its order of 30 January 2014, Case C-122/13.

Regarding EPO’s issues, the following points can be drawn:

- *Directive 2011/99* and *Regulation 606/2013* are complex. The legal nature of civil or criminal protection measures and the fact that the judge responsible for issuing and enforcing them may belong to different jurisdictional orders greatly hinders their

<sup>46</sup> *Ibidem*, p. 38 and ss., and DE HOYOS SANCHO, M.: “Principales avances en derechos, garantías y protección de víctimas”, in *Diario La Ley*, nº 8955, 5 April 2017.

<sup>47</sup> See GARCÍA RODRÍGUEZ (Lawyer at the Andalusian Victim Assistance Service): “El nuevo estatuto de las víctimas del delito en el proceso penal según la Directiva europea 2012/29/UE, de 25 de octubre, y su transposición al ordenamiento jurídico español”, in *Revista Electrónica de Ciencia Penal y Criminología*, 2016, nº 18-24, pp. 76-77.

application. As Ms. Medel<sup>48</sup> points out Spanish law does not provide for the enforcement of civil protection orders. Consequently, a civil protection order issued by, for example, a German authority will have difficulty in being able to be executed in Spain as if it were a criminal EPO, despite the fact that due to the nature of the measures the civil order includes these would necessarily be of a penal nature under Spanish law<sup>49</sup>.

- Moreover, the fact that the principle of dual criminality has been included (in Spain it has been transposed as a mandatory ground for refusal) is also an issue<sup>50</sup>. Imagining the case of stalking offences or gender-based and domestic violence offences where the national laws of the Member States differ considerably (there is not a single concept or meaning on the notion of gender-based violence). Another problem associated with the disparity of legislations occurs when the host country does not recognize one of the protection measures for a crime recognized in both countries or does not recognize the protection in the case of same-sex couples. The different understanding of gender-based violence also influences the variety, nature and importance of the protection measures granted to victims within the different Member States. In this sense, the three measures that can be included in the protection order under the directive may differ in terms of their parameters, for example in terms of their duration. However, the States may also add complementary measures of an economic, welfare or supervisory nature. These measures, which are not included in the Directive, also result in a comparative grievance between victims of gender-based violence in one State and those in another<sup>51</sup>.
- Some Member States use sophisticated tools to protect victims from the breaching of protection orders (smartphone apps, geolocation devices, etc.), whereas others do not have resources allocated to such monitoring mechanisms. "This raises the question of the feasibility, in practice, of an instrument that is intended to guarantee to victims the application of 'identical' or 'equivalent' protection measures across the EU"<sup>52</sup>.
- One of the main reasons for the very limited use of EPOs by the Spanish courts is the need to listen to the person causing the risk before issuing an European protection order<sup>53</sup>. This will not be always possible, especially when cross-border protection is requested long after a domestic protection order has been granted. Besides, the person causing the risk shall be informed on the new place of residence or, at least, the distance at which he/she cannot approach a particular place located in the country to which the victim is going to move. Such information is crucial to prevent him/her from unintentionally violating the order. But, at the same time, the perpetrator knows where the victim is located. Therefore, the victim prefers in these cases to leave Spain without a European protection order. In addition, the State on which the victim move may not even have as effective protection measures as those that were agreed and applied in Spain (brazalets or geolocation devices connected to police servers or telephones).
- Another issue is that the issuing of an EPO requires application from the side of the victim. This is a double-edged sword. The victim may choose not to seek a EPO because he/she does not want his/her partner or ex-partner to have knowledge of the place where he/she is. The problem is that due to today's social networks anonymity become complicate and the victim may feel safer when in fact she is not.
- In conclusion, the practical effectiveness of EPOs is becoming very weak, at least from a Spanish perspective (for data see above question 25).

<sup>48</sup> Judge, former Head of the International Relations Department of the General Council of the Judiciary, now Justice Adviser to the Secretary of State

<sup>49</sup> See RODRÍGUEZ MEDEL, C., in FREIXES, T./ROMÁN, L. (dirs.): *The European Protection Order. Its application to the victims of gender violence*, Ed. Tecnos, 2015, p. 75-76.

<sup>50</sup> See *Memoria de la Fiscalía General del Estado*, 2016, p. 560.

<sup>51</sup> See MERINO, V. in FREIXES, T./ROMÁN, L. (dirs.): *The European Protection Order. Its application to the victims of gender violence*, Ed. Tecnos, 2015, 46ss., spec. 57-58.

<sup>52</sup> In this respect, see European Protection Order Directive 2011/99/EU. European Implementation Assessment, European Parliamentary Research Service, September 2017, p. 11 (available at [http://www.europarl.europa.eu/RegData/etudes/STUD/2017/603272/EPRS\\_STU\(2017\)603272\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2017/603272/EPRS_STU(2017)603272_EN.pdf), last accessed on 20.02.2017).

<sup>53</sup> See *Annual Report of the Public Prosecutor's Office*, Year 2016, p. 560.

Finally, mediation in criminal cases and implementation of restorative justice mechanisms in Spain is still limited. Saved in the cases of minors, there is no legal basis for general criminal mediation. There is as well an express exclusion of mediation in cases of gender-based violence. It is true that the last amendment of the Penal Code, in force since 1 July 2015, and Law 4/2015 are a very important step in regulating mediation in criminal cases for the first time. However, its effects are rare limited. If the crime is private, mediation can avoid prosecution. For semi-public crimes prosecution can conclude at the request of a party. So that criminal mediation could operate as a previous mechanism for settling the dispute that would prevent the process from taking place. In some criminal proceedings already initiated by the offended person's own denunciation or complaint, the agreement reached during the pendency of that process could determine the offended person's forgiveness or the withdrawal of the denunciation or complaint. In some cases, it could lead to the finalization of the criminal process. Finally, criminal mediation can act as a complementary and appropriate mechanism to achieve such compliance agreements. However, for the generality of criminal offences, particularly public offences, mediation should generally be limited to the application and enforcement phase of the relevant penalty, through mitigating criminal liability, or to the execution phase of the sentence, through suspension (probation) or execution of the penalty imposed.

### **Other areas of concern**

*31. Were negotiations on the European Public Prosecutor Office hindered and/or slowed down by the presence of differences in national procedural criminal laws?*

Yes, there were. The Spanish General Prosecutor at that time, Mr. Eduardo Torres-Dulce, during his intervention in the seventh Annual Plenary Meeting of the Network of Public Prosecutors or equivalent institutions at the Supreme Judicial Courts of the Member States of the European Union, et in Trier, on 23 and 24 October 2014, said: "It is sometimes perceived that some Member States are busier trying to oppose any provision that does not exactly coincide with their national procedural systems than trying to define and design structures and procedures that make the EPPO an efficient substitute for existing systems".

*32. Please mention any other points of concern (linked to differences in national criminal procedures/procedural rights) that hindered or may hinder cross-border cooperation in criminal matters. If you think that differences in the articulation of competences between relevant bodies (e.g. judges, prosecutors, police, lawyers, etc.) might hinder cross-border cooperation in criminal matters, please elaborate.*

Given the fact that mutual trust is not a juridical concept to be evaluated by judicial authorities, but a political principle from which the principle of mutual recognition is derivate, Mr. Espina is of the view that only the latter must be assessed by judges. However, the temptation of some judges (from certain Member States) to grant themselves competences to review what their homologues in other Member States have decided, can be seen something.

At the same time, as Ms. Holgado points out, "cross-border cooperation depends to a large extent on the awareness of judicial authorities (including public prosecutors) with the assistance and use of informal means of cooperation, which very often make real cooperation possible".

But undoubtedly, the most important issue in this regard is what the EU Council critically exposed in the sixth round of mutual evaluations in 2014. The evaluation concluded that "the Spanish criminal procedural system is extremely complex and fragmentary; cooperation in criminal matters is characterized by the multiplicity of actors and a lack of overall coordination as well as the absence of a comprehensive tool for tracing mutual legal assistance

requests”<sup>54</sup>. Therefore, the Council recommended Spain to “reflect on the respective role, powers and obligations of all mutual legal assistance actor in Spain (...) and their relation to each other, and to provide clarity to other Member States on this in order to simplify judicial cooperation with Spain and reduce gaps and overlaps (...)”<sup>55</sup>.

As it has been pointed out in the reports of the Attorney General’s Office<sup>56</sup>, the fragmentation of the Spanish judicial institutions, together with the maintenance of competition criteria linked to the territory -which is a 19<sup>th</sup> criterion-, means that there are hundreds of competent authorities for the execution of letters rogatory. This creates problems of delays, losses and major failures in the execution and issuing of letters rogatory. Among the problems detected, it is worth mentioning the lack of conservation of the documentation generated by letters rogatory, inasmuch as the Courts usually remit the original of the request received together with the original of the execution proceedings without keeping a copy. In the event of loss in the process of remission there is no way to recover what has been done. Prosecutors always keep a copy of the request and the execution measures. This is of course a very useful measure but after years it is generating an over-accumulation of documents in the prosecutor’s offices.

It is very unsuitable to present a map with all judicial parties as competent authorities for the execution of mutual legal assistance requests. It is enough to access the European Judicial Atlas to see the different approach to this issue in the rest of the EU countries, including those that maintain the status of investigating judge (Belgium, Slovenia, Luxembourg and partly France). A reasonable response to foreign authorities requires the presentation of specialized and accessible bodies capable of responding formally and informally to international requests, capable of coordinating action throughout the territory and avoiding situations of delays, losses and inadequate responses in the execution of letters rogatory. As mentioned in the Annual Report of the Attorney General’s Office for 2017, “the General Council of the Judiciary has been aware of this problem and has made a considerable and commendable effort to advise the judicial bodies from the International Relations Service of the CGPJ. However, due respect for judicial independence is not always compatible with advice from a government body and with the granting of access to confidential data contained in criminal proceedings. The development of handbooks is also a helpful tool. Nevertheless, these guides shall not include criteria for interpreting procedural rules since this is not a competence of the General Council of the Judiciary. It is worrying that some judicial bodies accept interpretations included in these guides. On the other hand, the agreements of some Judges’ Boards whereby the distribution of letters rogatory is attributed exclusively to one or more specific judicial bodies in a population have also helped to better identify the competent courts and give more rational treatment to this matter. However, it solves the situation only partially, in the large populations where this approach has been adopted<sup>57</sup>.

Another worrying issue is the question of negative conflicts of jurisdictions between the courts for the determination of the body competent to execute a letters rogatory. That is happening as well at domestic level. However, it should be borne in mind that when there are foreign authorities involved waiting for the execution of a diligence, they understand with difficulty the transfer of the case from one court to another and the waiting time until the Court reaches a decision.

Finally, lack of a centralized recording of letters rogatory issued and received by and in Spain prevents judicial actors from having an overview of the situation of criminal cooperation in Spain and from making any kind of assessments. The information contained in the Public Prosecutor’s Office and in the Ministry of Justice or the General Council of the Judiciary is partial. Therefore, a proposal to make open access to the three registers possible has been launched. However, this proposal is complex to implement given the need for data protection and the difference in data that each register manages and collects. The result is that Spain is not in a position to provide general information on requests for assistance issued or

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<sup>54</sup> See *Evaluation Report on the sixth round of mutual evaluations: Report on Spain*, 2014, p. 47.

<sup>55</sup> *Ibidem*, p. 75.

<sup>56</sup> See *Annual Report of the Public Prosecutor’s Office*, Year 2015, p. 561.

<sup>57</sup> See *Annual Report of the Public Prosecutor’s Office*, Year 2016, p. 559

received and, of course, neither other more specific information such as requesting or required countries, the type of proceedings requested, times or execution difficulties<sup>58</sup>.

The above-mentioned issues of multiplicity of actors are not limited to the absence of statistical data, but rather to the difficulties in the day-to-day practice of locating, managing and informing foreign authorities who request information on a specific request sent specially to the courts. As Ms. Morán points out: “In many cases, complementary MLA requests are issued and sometimes it is very difficult to locate the initial request. For this reason, it can happen that a request is managed in one court and the complementary request is in another one. Obviously, that slows down the proceedings”.

#### **D. Conclusion and policy recommendations, you may have, including areas where you would recommend to intervene and how**

*33. Should the EU legislator intervene beyond the scope of the minimum standards provided by the set of directives adopted in the field of procedural criminal law?<sup>59</sup>*

Mr. Espina is of the opinion that at this point “a period of time should be provided for the implementation of the many reforms and legal instruments introduced in recent years, giving time for the ECJ to lay down some general principles (even if we run the risk of this jurisprudence causing, as it is happening, some mistaken reactions from national courts)”.

*34. If so, what kind of action should be taken at EU level<sup>60</sup> and in which area(s)? Please explain your choice and possible obstacles that the EU may encounter*

The Commission indicated in the process of adopting the directive on the presumption of innocence and so it was finally reflected in Recital 14 that “[a]t the current stage of development of national law and of case-law at national and Union level, it is premature to legislate at Union level on the presumption of innocence with regard to legal persons. This Directive should not, therefore, apply to legal persons (...)”. This a whole new area for exploring with different options: by amending the directives to guarantee procedural rights to legal persons only in those States whose laws already provide for their criminal liability; by adopting a directive dealing solely and exclusively with the procedural rights of legal persons and which would be applicable where they are criminally liable; and finally, by taking the definitive step of making criminal liability of legal persons compulsory in the directives on substantive criminal law.

With regard to detention conditions in Member States’ prisons, the passivity of community institutions is striking. In the event of a serious structural risk linked to systematic deficiencies verified by the ECJ, the European Commission and the Council should proceed to activate the existing protection mechanisms within the framework of the Union. In principle, the Commission should act earlier to activate the EU framework for strengthening the rule of law, as this mechanism is intended to be a preliminary and complementary instrument to the non-enforcement procedure and the preventive and sanction mechanisms of Article 7 TEU. The framework procedure allows the Commission, where there are clear indications of a systemic threat to the rule of law in a Member State, to initiate a structured three-stage exchange with that State (evaluation, recommendation and follow-up by the Commission). Among other objectives, the process aims to seek a solution through dialogue with the Member State concerned and to ensure an objective and thorough assessment of the situation by examining the measures that could be taken. So far, not even in asylum cases, the Commission has activated the new framework, something that the EP has reprimanded it for.

Finally, the growing expansion of judicial cooperation in criminal matters at EU level and the extension of the principle of mutual recognition will mean that our judges and courts will be

<sup>58</sup> See *Annual Report of the Public Prosecutor's Office*, Year 2017, p. 614.

<sup>59</sup> e.g. in such areas as detention conditions, compensation for unjustified detention, admissibility of evidence, or any other areas to which you consider EU action should be extended.

<sup>60</sup> e.g. new legislative measure, action for failure to act, preliminary rulings referred to ECJ so as to clarify provisions of EU law.

increasingly likely to deal with foreign judgments. Therefore, they will have to take decisions, affecting the fundamental rights of citizens, who will demand to know the exact content of those documents produced in a foreign language. In this respect, the European Public Prosecutor will carry out cross border investigations, which will involve the confluence of different languages in working documents and investigations. In the same vein, the European Investigation Order obviously implies cooperation in different languages. All this will mean that, in a very short time, the activities of interpretation and translation will become ordinary in the day-to-day life of our Courts and Tribunals. The embryonic development that currently exists does not seem to be sufficient to always surround these activities with the necessary guarantees in order to preserve the fundamental procedural rights of people facing a criminal case. The European Commission should launch calls for training and seminars of good practices should be held between the different Member States to discuss different models (i.e. a public model with civil servants).

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- Ms. Marta Holgado Madruga, Prosecutor, Member of the International Cooperation Network, Toledo.
- Mrs. Margarita Gijón, Lawyer in Ciudad Real.
- Mr. Luis De Juan, Lawyer in Ciudad Real.
- Ernesto Montes, Lawyer in Ciudad Real.

Legal papers written by practitioners have been also used.



## IV. COUNTRY REPORTS ON FRANCE

### National report No 1 on the French jurisprudence

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There are no cases where differences between national criminal procedures were directly perceived as an obstacle to the application of EU tools and mutual recognition instruments. If there are a few cases relevant regarding the implementation of these instruments, they show on the contrary a smooth cooperation between judicial authorities and the request of additional information when doubts regarding the respect of rights protected by these instruments are raised. Most of the cases listed relate to Framework Decisions whereas recent instruments – such as the directive 2012/13/EU of 22 May 2012 on the right to information in criminal proceedings – are often invoked but in purely internal situations and were therefore excluded. The review will be structured as follows: decisions *in absentia* (I), taking into account of convictions in the Member States of the European Union in the course of new criminal proceedings (II), EU mutual recognition of prison sentences and prisoner transfers (III), *ne bis in idem* (IV), Detention order (V), right to a lawyer (VI), special safeguards for vulnerable persons (VII).

#### I. Decisions *in absentia*

Cour de cassation, Chambre criminelle, 25 mars 2014, n° 14-81.430, inédit.

This case concerned the surrender a person to the Italian judicial authorities pursuant to a European arrest warrant. The French judicial authorities (the Investigating chamber of the Appeal Court) had in first instance authorised the surrender of Eric X. for executing a custodial sentence of four years, five months and 26 days pronounced *in absentia* by a judgement handed down for trafficking of stolen vehicles, confirmed by the Italian Appeal Court. The defendant was arguing, in order to challenge the decision of surrender, on the one hand that the judgment of the Appeal Court had been rendered out of his presence, without receiving a summons to appear in court and without having giving mandate to lodge an appeal from the first instance judgment convicting him, on the other hand that the possibility to exercise his right to contest the case against the appeal court decision was not certain.

The Investigating chamber had solicited additional information from the Italian authorities and considered that the defendant having elected domicile at the office of his lawyer, he was informed of the proceedings in compliance with the provisions of the article 161 of the Italian Procedural criminal code and thus informed within the meaning of article 4 bis, 1 b of the Framework Decision 2009/299/JHA enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial. On the contrary, the Criminal Chamber of the Court of cassation found that these elements were insufficient and quashed the judgment on the basis that the Investigating chamber should have « *better inquire if, firstly, M. X had been defended before the appeal court by a counsellor to whom he had given mandate for this purpose, secondly, if he had at his disposal, after his surrender, the ability to request a retrial* ».

The Court of cassation is not challenging the conformity of the Italian law as regards the Framework Decision nor considering it as an obstacle to mutual recognition in this case. It simply recalls that according to article 695-22-1 of the French Criminal procedural code, the surrender of a person may be authorized only in four cases: where unambiguously, the person was informed of or had been represented in the proceedings in the issuing State (1° and 2°); or had received the signification of the decision and was informed that a new procedure allowing a further examination on the merits, he/she did not wish to appeal (3°); or if the issuing State had undertaken to notify the court of its decision and to inform him/her of the time-limits for appeal (4°). Rather, the Court indicates that judges should request additional information to make sure these conditions are fulfilled. The Court, on an another

occasion, approved the lower executing court for authorising the surrender of the person searched, although convicted *in absentia*, as long as a lawyer appointed in compliance with the national law of the issuing Member State had represented the person<sup>1</sup>. The Court of cassation even specified it was not the role of the requested judicial authority to assess the conformity of the article 161 of the Italian Procedural criminal code as regards to European Union's norms regarding notifications of proceedings.

## **II. Taking into account the convictions in the Member States of the European Union in the course of new criminal proceedings**

### **A. Concurrent sentences (confusion des peines)**

Cour de cassation, Chambre criminelle, 2 novembre 2017, n°17-80.833, publié au Bulletin

In this case, the French Public Prosecutor filed an appeal against a judgment pronounced by a French Appeal Court ordering the imposition of concurrent sentences. The indicted, Adil X., in the course of the execution in France of a custodial sentence of ten years pronounced in 2013 for offences committed in 2002 and 2003, requested the Appeal Court to impose concurrent sentences with two custodial sentences pronounced (by the Audiencia Provincial of Malaga) and entirely executed in Spain from 2007 (occurrence date of the offences) to 2012. The Court of cassation approved the decision of the trial judges considering that the imposition of concurrent sentences requested cannot have the effect of interfering with the conditions of execution of the previous convictions pronounced and entirely served in Spain. For the Court, article 132-23-1 of the French Criminal code, interpreted in light of article 3 of the Framework Decision 2008/675/JHA of 24 July 2008 on taking account of convictions in the Member States of the European Union in the course of new criminal proceedings and in light of the decision of the CJEU of 21<sup>st</sup> of September 2017 (C-171/16), allows to impose concurrent sentences of a sentence pronounced by a French court with a sentence pronounced by a court of another Member State of the EU if the second has been entirely served when the request for taking it in account is examined.

This case is the first positive application brought before the Court of cassation of transnational "confusion de peines".

Cour de cassation, Chambre criminelle, 19 nov. 2014, n° 13-80.161, publié au Bulletin

On a previous occasion, the Court of cassation had approved the trial judges for denying a request in imposing concurrent sentences. In this case, the indicted was detained in Belgium after having served a custodial sentence pronounced by the Criminal court of Paris (Cour d'assises). He submitted a request to the French Investigating Chamber to order the merge of the French sentence with the custodial penalties pronounced in 2005 by a Belgium Court and in 2003 by a German Court.

The trial judges considered that article 3.3 of the Framework Decision 2008/675/JHA aforementioned, transposed in French law by article 132-23-1 of the Criminal code provides that the taking into account of previous convictions handed down in other Member States does not have the effect of interfering with these previous convictions or any decision relating to their execution by the Member State conducting the new proceedings, not revoking or reviewing previous convictions. The judges therefore concluded that the French judicial authority is not able to order that a foreign conviction (not yet executed) be served concurrently with a previous conviction pronounced and served in France.

This case should not be read as an obstacle to mutual recognition of previous convictions, but rather as a clarification of the blurry drafting of the article 132-23-1 of the French Code pénal under which "the convictions pronounced by the criminal courts of a Member State of

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<sup>1</sup> See Court of cassation, Crim., 29 oct. 2014, n° 14-86.480, inédit ; see also Crim., 25 mars 2014, n° 14-81.430, inédit.

the European Union are taken into account by the French criminal courts and have the same legal effects as these convictions”<sup>2</sup>.

## **B. Assessment of the final nature of a judgment**

Cour de cassation, Chambre criminelle, 3 février 2016, 14-84.259, Inédit

Convicted on appeal for various offences to seven years of imprisonment, the defendant was requesting the nullity of the French act of indictment on the basis that it was relying on inquiry acts and proceedings expedited in the Netherlands and declared invalid by the Court of justice of Amsterdam. The argumentation of the defendant was based on Framework Decision 2008/675/JHA on taking account of convictions in the Member States of the European Union in the course of new criminal proceedings and on articles 6 and 8 of the European Convention on Human Rights as well as articles 7 and 47 of the Charter of Fundamental Rights of the EU (right to a fair trial, respect for private life). The Court of cassation approved the trial judges to have considered, that the provisions stemming from the transposition of Framework Decision 2008/675/EU are related to the taking into account of criminal custodial sentences in the same conditions as French convictions and are not intended to be extended beyond these provisions linked to custodial sentences. The Court of cassation also approved them for considering that the final nature of the acquittal decision of the Court of justice of Amsterdam was not established and therefore did not constitute a « conviction » within the meaning of article 132-23-1 of the Code pénal. Furthermore the trial judges, approved by the Court of cassation, specified that the acquittal of the defendant resulted from a formal defect impacting evidence elements presented before the Amsterdam court and could not be analysed in a decision of annulment of the entire proceedings.

No reference is made to differences in national legislations here and no request to the ECJ for a preliminary ruling. The case indicates that the Dutch authorities did not mention the judgement of the Court of justice and on the contrary transmitted to the French investigating authorities the inquiry acts obtained in the Netherlands.

## **C. Recidivism**

Cour de cassation, Chambre criminelle, 24 March 2015, n° 15-80.023, publié au Bulletin.

Again in the context of the application of the Framework Decision 2008/675/JHA, this case raised the question of the taking into account by the national judge of a previous conviction of the defendant in Germany – for drug trafficking – when only the second offence – rape – was committed after the transposition of the Framework Decision under article 132-23-1 of the French Criminal Code. The defendant was arguing that the Court could not consider him as reoffender (“en état de récidive légale”) because it would breach the principle of non-retroactivity of the criminal law. The Court of cassation held that article 132-23-1 was immediately applicable and that it was sufficient, to consider the defender as a reoffender, that the offence constituting the second term be posterior to the entry into force of article 132-23-1.

## **III. EU mutual recognition of prison sentences and prisoner transfers (FD DC 2008/909/JHA)**

Cour de cassation, Chambre criminelle, Crim., 10 août 2016, n° 16-84.723

In this case, the Portuguese judicial authorities issued a European arrest warrant for the surrender of Gilberto X., Portuguese national and resident in France (since 2004) where he had built a family, in order to execute a conviction for murder in 1999. The defendant was requesting to serve this sentence in France on the basis of the EAW FD and the Framework

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<sup>2</sup> See also B. Thellier de Poncheville, « Chronique Jurisprudence judiciaire française intéressant le droit de l'Union - Incidence du droit pénal de l'Union européenne sur le droit pénal interne », *RTDE*, 2015, p. 348 et s.

Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition of judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union as transposed in article 728-31 of the French Criminal procedural code as well as on the basis of the right to respect for private and family life (articles 8 of the ECHR conv. and 7 CFREU). Whereas the Investigating chamber had authorised the surrender, the Court of cassation quashed the decision finding that the judges should have checked if the issuing State was considering to make a request for the purpose of the recognition and enforcement of the sentence imposed in the French territory or if the Public prosecutor was intending to make such a request.

In this way, the provision of article 728-31 of the Criminal procedural code forces the requested authorities to reach the issuing State to determine more precisely if the person can or cannot serve his custodial sentence on the French territory. This provision is even used in other cases by the Court of cassation as an argument to allow the surrender when it is for the purpose of conducting a criminal prosecution. The Court tends to consider that there is no breach of the right to respect for private life because the defendant will be able to come and serve his sentence in France<sup>3</sup>.

#### IV. Ne bis in idem

Cour de cassation, Chambre criminelle, 2 avr. 2014, n° 13-80.474, Dieter X., publié au Bulletin (affaire *Bambeski/Krombach*)

This case is better known as the *Bambeski/Krombach* case which started in 1982 with the death of French girl of 14 years old, Kalinka Bamberki, daughter of André Bamberki in Germany. D. Krombach, the father in law and companion of the mother of Kalinka Bamberki, was suspected by the German authorities, which opened an investigation led by the German Public prosecutor. The investigation concluded that evidence was insufficient, and despite the use of several remedies by A. Bamberki, the Public prosecutor decided to close the proceedings and to not prosecute D. Krombach. The father of the victim brought the proceedings before the French justice, which opened parallel investigation leading to the conviction by contumacy of D. Krombach in 1995, which then was then challenged before the ECHR and ECJ<sup>4</sup>. The case went through many twists: the first proceedings were quashed, new proceedings were opened in France. The German authorities refused to execute a European arrest warrant issued by France on the basis that it would breach the *ne bis in idem* principle, and D. Krombach was subsequently kidnapped and handed to the French authorities. This led to a new conviction of D. Krombach in France, which was challenged by the defendant on several grounds including on the basis of the principle *ne bis in idem* and brought before the Court of cassation<sup>5</sup>. In its decision of the 2<sup>nd</sup> of April 2014, the Criminal chamber of the Court approved the trial judges for having rejected the exceptions of termination of a public prosecution and *res judicata* (« chose jugée ») raised by the defendant on the grounds that « *the closing of the investigation with no further action by the Public prosecutor of the foreign court, confirmed by this court which decided not to conduct prosecutions except in the event of new facts, cannot be considered as a final judgement* » within the meaning of article 54 of the **Convention implementing the Schengen Agreement**<sup>6</sup>.

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<sup>3</sup> See for e.g Court of cassation, Crim., 8 juillet 2015, 15-83.651, Inédit ; also Court of cassation, Crim., 27 mai 2015, 15-82.503, Publié au bulletin.

<sup>4</sup> See CJCE, 28 mars 2000, *Krombach c/ Bamberki*, C-7/98 and ECHR, 13 févr. 2001, *Krombach c/ France*, n° 29731/96. On these two cases see. C. Marie, « Retour sur l'affaire Krombach, temps fort de la construction d'un ordre public procédural européen et persistance de la volonté française de purger la contumace », *Annuaire de droit européen*, 2005, Bruylant, p. 889.

<sup>5</sup> For an overview of the proceedings see B. Aubert, « Application par les juridictions internes », RSC, 2015, p. 471 ; also J. Lelieur, « Le dernier mot de la Court of cassation dans l'affaire Krombach, degré zéro de la coopération judiciaire pénale dans l'UE », *AJ pénal*, 2014, p. 365.

<sup>6</sup> Original version : « *le classement sans suite par le ministère public près une juridiction étrangère, confirmée par cette juridiction, qui a dit n'y avoir lieu à l'exercice de l'action publique, sauf survenance de faits nouveaux, n'a pas valeur de jugement définitif au sens des textes précités* ».

**The differences in the criminal procedures in France and in Germany are considered as an obstacle, or more so instrumentalised as an obstacle to reject the application of the principle *ne bis in idem* as interpreted by the European Court of Justice. The Court of cassation associates** the closing of the proceedings by the Public prosecutor (*Einstellung des Verfahrens*, § 170 II StPO) to a decision « *classement sans suite par le ministère Public près une juridiction étrangère, confirmé par cette juridiction* ». Some commentators have underlined that this equivalence is misleading and arises from a simple comparison of institutions<sup>7</sup>. Because there is no more investigating judge in Germany, German proceedings tend to be only institutionally compared to the one led in France by the Public prosecutor, instead of comparing substantially the legal regimes. It should rather have been analysed as a discharge order (“ordonnance de non-lieu”) made by the investigating judge in France because this decision can also be challenged by the person affected by the offence (see article 186 al. 2 of the Criminal procedural code)<sup>8</sup>. Furthermore, it has been pointed out that the assertion of Court of cassation that « *le classement sans suite par le ministère public près une juridiction étrangère* » was confirmed by this same court was untrue because German criminal procedure provides for a judicial control of the Public prosecutor’s decision, which has to be carried out by another court, at a superior judicial level, and was carried out in this case.

**This last *Krombach* decision has been rightly qualified as the « *degré zéro de la coopération judiciaire pénale dans l'UE* »<sup>9</sup>. As noted by commentators, the reasoning of the Court appears questionable in light of the case law of the ECJ regarding the principle *ne bis in idem* and its refusal to refer the question to the ECJ for a preliminary ruling is hardly understandable<sup>10</sup>.**

## V. Detention order (mesure de sûreté)

Cour de cassation, Chambre criminelle, 10 févr. 2016, n° 16-80.510, Publié au bulletin

In this case, the Romanian judicial authorities issued a European arrest warrant to request the surrender of an underage teenager (of more than 13 years old), Romanian national, after he was convicted in his country for multiples aggravated thefts and break-ins over a period between 2011 and 2012. The initial conviction consisted in an “educational detention measure in an educational centre” but was later replaced, after a legislative change, by a non-custodial educational measure. Having broken the rules set by the measure, he was convicted by a final decision in 2015 to return to detention in an educational centre for 296 days. He escaped and when he was arrested in France he refused to be surrendered to Romania. The French Investigating Chamber of the Appeal Court decided by a judgment of the 12<sup>th</sup> January 2016 that the sanction pronounced by the issuing State “cannot be characterised as a custodial sentence nor as a detention order, considering it is a simple educational measure, undoubtedly only faced by the person concerned given his age”. The Public prosecutor lodged an appeal and the Court of cassation quashed the judgment under article 695-11 of the Criminal procedural code (transposing article 1 of the Framework Decision of 13 June 2002 on the European arrest warrant).

By specifying the contour of the notion of “detention order”, the Court of cassation is preventing the executing judges to substitute their own assessment and instead pushing them to read the law of the issuing Member state<sup>11</sup>.

<sup>7</sup> J. Lelieur, *op. cit.*

<sup>8</sup> J. Lelieur, *op. cit.*

<sup>9</sup> J. Lelieur, *op. cit.*

<sup>10</sup> Especially regarding CJUE, 5 June 2014, *M.*, C-398/12 ; see also CJCE, 11 févr. 2003, *Gözütok c/ Brügge*, C-187/01 ; CJCE, 22 déc. 2008, *Turanski*, C-491/07. For critical comments see B. Aubert, *op. cit.* ; J. Lelieur, *op. cit.* ; S. Fucini, « Confiance mutuelle : la décision de refus de poursuivre n'est pas une décision définitive, Dalloz actualité, 8 avril 2014.

<sup>11</sup> See also Court of cassation, Crim., 25 mai 2005, n° 05-82.525, inédit where the Court of cassation specified that a measure of confinement in a psychiatric hospital constitutes a detention order.

## **VI. Right to a lawyer**

Cour de cassation, Chambre criminelle, 30 mai 2017, n° 17-82.792, Inédit

Directive 2013/48/EU of 22 October 2013 on the right of access to a lawyer in criminal proceedings was recently invoked in a case where a European arrest warrant was issued by the Spanish authorities. The surrender of the accused was requested to prosecute him for offences against public health, abductions, torture and other offences committed between 2009 and 2011 in Spain. He refused the surrender. He challenged the judgement of the Investigating chamber authorising it on the basis articles 695-27 of the Criminal procedural code (formal procedure of the EAW), article 6 of the ECHR convention, article 47 of the CFREU and article 10 of Directive 2013/48/EU, arguing that the official notification of the EAW should have mentioned the steps taken by the issuing state to inform it of the claim of the requested person to be assisted by a lawyer in this State. However in this case, because this defence (lack of mention) was new, considering it was raised after the appeal, the Court of cassation found it inadmissible and therefore refused to make a preliminary ruling referral to the ECJ.

## **VII. Special safeguards for vulnerable persons**

Cour de cassation, Chambre criminelle, 17 févr. 2016, n° 16-80.653, Publié au bulletin.

In this case, M. X. an adult under a protective supervision of tutorship consented to his surrender to the authorities of the Netherlands in the execution of a European arrest warrant. The association "Eva tutelles", acting as his tutor filed an appeal against the judgement of the Investigating chamber approving the surrender. The Court of cassation quashed the decision and held that a protected adult under the regime of tutorship could not consent to his surrender. Consequently, his situation should be examined by the Investigation chamber according to the provisions of article 695-31, al. 4 of the Criminal procedural code, which provides for a time limit of 20 days and the possibility to challenge the decision. Whereas the Framework Decision is not distinguishing depending on whether the person is capable or not to validly give his consent, the Court of cassation is imposing a procedure more protective of vulnerable adults. Again, a referral of a preliminary ruling to the ECJ on this question could have been useful.

## National report No 2 on the French criminal justice system

### A. Introduction – General features of the French criminal procedural system

The current French Code of Criminal Procedure (hereafter CPP) was adopted in 1958 replacing the Napoleonic *Code d'instruction criminelle* of 1808. Whereas the French procedural system is traditionally seen as inquisitorial, the contemporary reality is closer to mixity, rather than an inquisitorial model in its pure form<sup>12</sup>. French criminal procedure has undergone numerous changes introducing accusatorial features under the influence of the ECHR as well as under the process of constitutionnalisation of criminal procedure and now under the influence of EU instruments.

This is particularly true in the pre-trial phase where the procedure is not any more secret and the rights of the private parties have been progressively developed. The role of the defence lawyer during police custody ("garde à vue") was refined and extended<sup>13</sup> and the role of the investigating judge is slowly but surely declining to the benefit of the constant rise of the public prosecution service<sup>14</sup>. The role of the judge in collecting evidence is actually weak in France: the investigating judge is only intervening in approximately 5% of the cases, whereas the majority of inquiries are realised by the police under the supervision of the public prosecution service. The questioning of suspects is generally done by the judicial police ("police judiciaire") and usually under the framework of police custody. Even when the investigating judge is referred to, it is common that he delegates questioning and audition of witnesses to police investigators. During the trial phase, the system is also more accusatorial than in the past. For example, the defence lawyer can now question witnesses and experts<sup>15</sup> and a system of plea-bargaining was introduced in 2004 with the procedure of "guilty plea on first appearance" ("comparution sur reconnaissance préalable de culpabilité")<sup>16</sup>.

The rights of the defence and the rights of victims are to a different extent protected by the Constitution. The Constitution in France does not directly contain any norms of criminal procedural law but the *Déclaration des droits de l'homme et du citoyen* of 1789<sup>17</sup>, which has constitutional value, affirms the right to presumption of innocence (Article 9) as well as the right to separation of powers (Article 16) from which stem the right to an effective remedy as well as the right to an impartial and independent judge. The Constitutional Council has long ago expressly given constitutional value to the rights of the defence as a "principe fondamental reconnu par les lois de la République"<sup>18</sup>. More recently, the Constitutional Council, clearly asserted that the right to a fair trial derives from Article 16 of the *Déclaration des droits de l'homme et du citoyen*<sup>19</sup>. This process of constitutionnalisation of criminal procedure<sup>20</sup> has been strengthened by the introduction of a new procedure of preliminary ruling on the issue of constitutionality in 2008 ("*Question prioritaire de constitutionnalité*")

<sup>12</sup> S. Guinchard et J. Buisson, *Procédure pénale*, LexisNexis, 10<sup>ème</sup> éd., 2014, p. 27.

<sup>13</sup> See Article 63-1 CPP revised by the "*loi n°2011-392 du 14 avril 2011*". This provision was modified again by the "*loi n°2014-535 du 27 mai 2014*" and by the "*loi n°2016-731 du 3 juin 2016*".

<sup>14</sup> The investigating judge is not yet suppressed in France but his power were reduced by two successive reforms with the statute of the 15 June 2000 and the statute of the 9 March 2004. On this see S. Guinchard et J. Buisson, *op. cit.*, n°110 and n°131.a

<sup>15</sup> See Article 312 CPP.

<sup>16</sup> See Article 495-7 CPP and ff.

<sup>17</sup> See Conseil constitutionnel, 16 July 1971, *Liberté d'association*, n° 71-44 DC.

<sup>18</sup> See Conseil constitutionnel, 2 December 1976, *Prévention des accidents du travail*, n°76-70 DC ; also Conseil constitutionnel, 20 July 1977, *Service fait*, n°77-83 DC ; Conseil constitutionnel, 19 et 20 January 1981, *Sécurité et liberté*, n°80-127 DC.

<sup>19</sup> See Conseil constitutionnel, 17 janvier 2008, n°2007-561 DC. Only implicitly established before, see Conseil constitutionnel, 28 juillet 1989, n°89-260 DC.

<sup>20</sup> See L. Favoreu, "La constitutionnalisation du droit pénal et de la procédure pénale: vers un droit constitutionnel pénal", in *Mélanges en l'honneur d'André Vitu*, Editions Cujas, 1989 ; B. Bouloc, "La constitutionnalisation du droit en matière pénale", in B. Mathieu (dir.), *50<sup>e</sup> anniversaire de la Constitution de la V<sup>e</sup> République*, Dalloz, 2008, p. 445.

referred to as "QPC")<sup>21</sup>. The rights of the victims, as opposed to the rights of the defence, were not considered as a fundamental constitutional principle but the Constitutional Council seems now to ensure the rights of the civil party via the rights of the defence and the right to a fair trial<sup>22</sup>.

The rights of the defence and of the victims are also protected by statutory law since 2000 ("*loi n°2000-516 du 15 juin 2000 renforçant la protection de la présomption d'innocence et les droits des victimes*"). This statute introduced in particular a preliminary article to the CPP, setting out guiding principles of criminal procedure<sup>23</sup>. It enshrined the necessary balance between the rights of the person suspected/accused and the rights of the victim<sup>24</sup>.

## B. Impact on national law of procedural rights directives

The entry into force of the directives on suspects/defendants and victims has triggered only relative changes in French law. Often reforms were initiated before the adoption of EU instruments under the ECtHR case law influence and furthermore the legislator performed transpositions *a minima*.

### State of play of transposition into French law

**Directive 2010/64** on the right to interpretation and translation in criminal proceedings has been transposed by the "*loi n°2013-711 du 5 août 2013*". The directive essentially led to the inclusion of a new subparagraph in the Preliminary article of the CPP setting the right to interpretation and to translation of all documents essential to ensure the exercise of the defence rights and to guarantee the fairness of the proceedings. It also led to the introduction of a new provision – Article 803-5 CPP – specifying this right<sup>25</sup>. This last provision transposes the principle and the exception provided for in the directive, this is to say the possibility of an oral summary of essential documents instead of a written translation on condition that such oral translation or oral summary does not prejudice the fairness of the proceedings. However, it does so without defining more its contours and modalities of application. Article 803-5 CPP has been interpreted by the Court of cassation *a minima*: where documents supporting the proceedings have been read and orally translated by an interpret, the absence of a written translation does not constitute in itself a ground for invalidity as long as the exercise of the rights of the defence were not negated and that the possibility of legal remedy existed<sup>26</sup>. This refusal to sanction the disregard for the right to translation of all documents

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<sup>21</sup> See V. Tellier-Cayrol, "La constitutionnalisation de la procédure pénale", *AJ Pénal*, 2011, p. 283.

<sup>22</sup> See Conseil constitutionnel, 23 July 2010, n° 2010-15/23 QPC. For a critical account see B. De Lamy, "Inconstitutionnalité de l'Article 575 du code de procédure pénale : la partie civile promue par le Conseil constitutionnel", *RSC*, 2011, p. 188.

<sup>23</sup> "I. Criminal procedure should be fair and adversarial and preserve a balance between the rights of the parties. It should guarantee a separation between those authorities responsible for prosecuting and those responsible for judging. Persons who find themselves in a similar situation and prosecuted for the same offences should be judged according to the same rules ; II. The judicial authority ensures that victims are informed and that their rights are respected throughout any criminal process ; III. Every person suspected or prosecuted is presumed innocent as long as his guilt has not been established. Attacks on his presumption of innocence are proscribed, compensated and punished in the circumstances laid down by statute. He has the right to be informed of charges brought against him and to be legally defended. The coercive measures to which such a person may be subjected are taken by or under the effective control of judicial authority. They should be strictly limited to the needs of the process, proportionate to the gravity of the offence charged and not such as to infringe human dignity. The accusation to which such a person is subjected should be brought to final judgment within a reasonable time. Every convicted person has the right to have his conviction examined by a second tribunal". This provision has been redrafted in 2011 and 2013 in order to take into account the reform of police custody and more generally to strengthen the rights of the defence during the pre-trial phase.

<sup>24</sup> The rights of the victims in French criminal proceedings were first developed through the recognition of the right to lodge a "civil party petition" ("droit de se constituer partie civile") as an actor of the criminal trial. For a brief account of the changes in legislation regarding victims' rights E. Vergès, "Un corpus juris des droits des victimes : le droit européen entre synthèse et innovations", *RSC*, 2013, p. 121 ff.

<sup>25</sup> See on this E. Daoud et L. Rennuit-Alezra, « Le droit à un interprète : la consécration d'un nouveau droit », *AJ pénal*, 2013, p. 527 ff.; A. Cerf-Hollender « Transposition de la directive 2010/64/UE relative à l'interprétation et à la traduction dans le cadre des procédures pénales », *EFDP*, 2013, n°9, p. 6 ff.

<sup>26</sup> See Court of cassation, Crim., 7 January 2015, n°14-86.226 ; and Court of cassation, Crim., 26 January 2016, n° 15-80.299. The Court of cassation has however uphold that a person suspected or prosecuted who does not understand French has the right to translation of all documents essential to the exercise of his defence rights and



essential to the proceedings, if it can seem appropriate in terms of time burden and cost of translations, tends to weaken the effectivity of this right<sup>27</sup>.

**Directive 2012/13** on the right to information in criminal proceedings was transposed by the “loi n°2014-535 du 27 mai 2014”. It led in particular to the introduction of Article 803-6 CPP, which provides for a written declaration summarising the rights of the person placed in police custody as well as the right to access to certain materials of the case. The French transposition does not appear totally in line with the directive especially concerning the access by the accused to the materials of the case during police custody<sup>28</sup>. After the provisions on police custody being substantially amended in 2011 as a result of ECHR and Constitutional Council case law on the role of the lawyer during the “*garde à vue*”<sup>29</sup>, the transposition of directive 2012/13 has only led to minor changes. It brought about the extension of the right of access to the materials of the case by the person arrested and not anymore only to the lawyer. It has been pointed out that the directive was transposed *a minima* and did not lead to the extension of the right of access to the materials of the case<sup>30</sup>. Doubts were also raised about the compliance on this point to the directive<sup>31</sup>. Indeed, during police custody access is still in France limited to some materials<sup>32</sup> and the question remains as to how Article 7§1 of the directive stating that 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*” will be interpreted. In the same way, compliance issues were raised in relation to the access to the materials of the case during judicial investigation, which can be restrained by the investigative judge<sup>33</sup>. The question was raised before the Court of cassation without success; French judges refused to make a referral to the ECJ<sup>34</sup>. They considered the directive only prescribes to Member states to ensure that individuals arrested be informed about the criminal act they are suspected or accused of having committed, but does not imply to give detailed information about the accusation, particularly on the nature of the participation, which shall be communicated at the latest when the court rules on the determination of criminal charges and not necessarily from the phase of the arrest<sup>35</sup>.

**Directive 2013/48** on the right of access to a lawyer in criminal proceedings was transposed by the “loi n°2016-731 du 3 juin 2016” and led to several changes. Article 63-2 CPP, which previously only provided the possibility for the arrested person to have a third person informed of his/her detention, has been modified in order to authorise the arrested person to communicate by writing, by phone or by a meeting with a third person<sup>36</sup>. Article 3 of the

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quashed the refusal of the investigative judge to translate certain essential documents, see Court of cassation, Crim., 4 November 2015, 15-84.012.

<sup>27</sup> R. Méza, « La sanction de la transgression du droit à la traduction des pièces essentielles à l'exercice des droits de la défense », *Gazette du Palais*, 2016, n°12, p. 23 f

<sup>28</sup> S. Pellé, “Garde à vue : la réforme de la réforme (acte I)”, *Reccueil Dalloz*, 2014, p. 1508 ff.

<sup>29</sup> See on this H. Matsopoulou, “Une réforme inachevée. A propos de la loi du 14 avril 2011”, *JCP*, 2011, p. 908f; also E. Vergès, “Garde à vue : le rôle de l’avocat au cœur d’un conflit de normes nationales et européennes”, *Point de vue*, *Dalloz*, 2011, p. 3005f.

<sup>30</sup> S. Pellé, *op. cit.*; O. Bachelet, “Droits de la défense: transposition ‘ambivalente’ de la directive information”, *Gazette du Palais*, 2014, n°39, p. 9f.

<sup>31</sup> *Ibid.*

<sup>32</sup> See Article 63-1 CPP, the lawyer or the arrested person are informed “*du droit de consulter, dans les meilleurs délais et au plus tard avant l'éventuelle prolongation de la garde à vue, les documents mentionnés à l'Article 63-4-1*”. Article 63-4-1 CPP provides that : “*A sa demande, l'avocat peut consulter le procès-verbal établi en application de l'avant-dernier alinéa de l'Article 63-1 constatant la notification du placement en garde à vue et des droits y étant attachés, le certificat médical établi en application de l'Article 63-3, ainsi que les procès-verbaux d'audition de la personne qu'il assiste. Il ne peut en demander ou en réaliser une copie. Il peut toutefois prendre des notes*”.

<sup>33</sup> See Article 144 CPP and O. Bachelet, *op. cit.* The investigative judge can decide to restrain the access to the materials of the case.

<sup>34</sup> Directive 2012/13 was invoked more than 30 times before the Court of cassation, mainly in purely internal situations and even before the entry into force of the directive. See in particular Court of cassation, Crim., 27 November 2012, n°12-85.645 ; Court of cassation, Crim., 25 February 2015, 14-86.453. The Court refused to refer the question to the ECJ in Court of cassation, Crim., 31 janvier 2017, n°16-84.613.

<sup>35</sup> See in particular, Court of cassation, Crim., 31 janvier 2017, n°16-84.613, *op. cit.*

<sup>36</sup> With the limit that the communication is not incompatible with the objectives mentioned in Article 62-2 CPP and that the person does not risk to commit an offence.

directive, which provides for the right to a lawyer upon the carrying out by investigating or other competent authorities of an investigative or other evidence-gathering, has been transposed *a minima*; there is a specific provision dedicated to the right to a lawyer during reconstitution exercises or during identification of suspects<sup>37</sup>. On this point but also for the rest of the transposition, commentators have underlined the nearly literal implementation of directive 2013/48 and the clear choice of the national legislator to not extend the rights of the defence beyond European standards<sup>38</sup>. Whereas directive 2012/13 established a general status of the suspect, the Code of criminal procedure only regulates its status through procedural steps (police custody, indictment, etc.). As a result, the transposition process consists in technical thorough modifications at the expense of an overall vision<sup>39</sup>. In relation to the European arrest warrant, Article 695-27§3 CPP sets that the Public prosecutor informs the arrested person that he/she can request to be assisted in the issuing Member State by a lawyer of its choice and that if the person requests so, the demand is immediately transmitted to the competent judicial authority. The Court of cassation has considered that the omission of this transmission necessarily jeopardises the rights of the defence, this finding leading in the case to the release of the suspect whom surrender was sought for the purpose of prosecution<sup>40</sup>. The judges interviewed in the framework of this research indicated that this obligation to inform the foreign authorities of the request of a lawyer was delicate to implement and furthermore not very helpful for the rights of the defence because in practice the issuing authorities were not responding to it<sup>41</sup>.

**Directive 2012/29** establishing minimum standards on the rights, support and protection of victims of crime was transposed by the "*loi n°2015-993 du 17 août 2015*" and essentially led to the introduction of a section in the Code of criminal procedure dedicated to the rights of the victims composed of four technical provisions set by the directive<sup>42</sup>. The key innovations it brought relate in particular to the right of the victim to be accompanied by a third person – lawyer or a person of his/her choice –, which applies "at every step of the criminal investigations" ("*à tous les stades de l'enquête*") and seems therefore to exclude the judicial investigation and the trial phase where only the lawyer can play this role<sup>43</sup>. The victim also receives an individualised assessment in order to determine if he/her should benefit from specific measures of protection during criminal proceedings. For this purpose, the Ministry of justice proposed a guide for assessing victims, having for function in particular to harmonise assessment's practices<sup>44</sup>. Once again however, the transposition has been done in a minimalist manner and just consisted in complementing the CPP in compliance with the directive; everything that was not strictly necessary was not modified<sup>45</sup>.

Concerning the **directives adopted in 2016**, French criminal procedure seems already largely in compliance with them as the French government notified it to the Commission<sup>46</sup>. As regards children's rights in criminal proceedings, the "*loi n° 2016-1547 du 18 novembre 2016*" extended the provisions relating to police custody previously only applicable to minors from 10 to 13 to minors from 13 to 18. The statute also provides for the assistance of a

<sup>37</sup> See Article 61-3 CPP.

<sup>38</sup> E. Vergès, « La procédure pénale à son point d'équilibre », *RSC*, 2016, p. 551f.

<sup>39</sup> E. Vergès, « La réforme par transposition : la nouvelle voie de la procédure pénale », *RSC*, 2015, p. 683f.

<sup>40</sup> Court of cassation, Crim., 24 May 2017, n° 17-82.655.

<sup>41</sup> See the table below.

<sup>42</sup> For a detailed presentation see E. Vergès, "La réforme par transposition : la nouvelle voie de la procédure pénale. Loi n° 2015-993 du 17 août 2015 portant adaptation de la procédure pénale au droit de l'Union européenne", *RSC*, 2015, p. 683f. This statute also transposed – with delay – into French law Framework Decision 2008/947/JHA on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions, Framework Decision 2009/948/JHA on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings and Framework Decision 2009/829/JHA 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.

<sup>43</sup> *Ibid.*

<sup>44</sup> <http://www.justice.gouv.fr/aide-aux-victimes-10044/un-guide-pour-levaluation-des-victimes-28155.html>

<sup>45</sup> E. Vergès, *RSC*, 2015, *op. cit.*

<sup>46</sup> T. Cassuto, "Dernières directives relatives aux droits procéduraux", *AJ pénal*, 2016, p. 314f. See also the notifications made to the European Commission for directive 2016/1919 and directive 2016/343.

lawyer from the beginning of police custody<sup>47</sup>. So far, these texts have rarely been invoked in criminal proceedings<sup>48</sup>.

#### Adequacy in light of the case law and practice on judicial cooperation in criminal matters

French authorities as executing judges control the respect of the rights of the defence concerning both EAWs proceedings in France and EAWs proceedings in the issuing Member state. Regarding the proceedings in the issuing Member state, the control is carried out as regards proceedings prior to the delivery of the EAW but also as regards proceedings to come once the person is surrendered<sup>49</sup>. However, no cases where differences between national criminal procedures were directly perceived as an obstacle to the application of EU tools and mutual recognition instruments could be found in the French case law<sup>50</sup>. On the contrary, the analysis of the case law mostly reveals a smooth cooperation between judicial authorities and the request of additional information when doubts regarding the respect of rights protected by these instruments are raised<sup>51</sup>. Nonetheless, two types of situation were identified as more problematic: cases involving the *ne bis in idem* principle and cases involving *in absentia* convictions<sup>52</sup>. The difficulties arising in *in absentia* cases<sup>53</sup> were confirmed by the interviews carried out with judges. It appears to be the most common ground for refusal<sup>54</sup>. The practice is to request additional information to verify that the person was notified the date and place of his/her trial hearing, however sometimes the information given is not precise enough or not well translated. It led for example in 2016 to several refusal of execution of EAW issued by Romania, Portugal or also Poland. However, according to the judges interviewed, it is not an issue of standards/level of protection set by FD 2009/299/JHA, which was transposed almost by a copy-paste in Article 695-22-1CPP<sup>55</sup>. It is rather a question of rigourness in practice (precision, translation, etc.) and the main obstacle is to know how in practice the notification was made to the accused in the issuing Member State. Answers to the requests for complementary information are sometimes too short and limited to the (re)affirmation that the notification was duly made. Distrust may grow because it is hard to discern what is behind these affirmations.

### **C. Other domains not or to a very little extent subjected to harmonisation measures at EU level**

#### Detention conditions

In France, the **legal framework for detention pending trial** (“détention provisoire”) is set by the CPP (Article 137-1). The principle is that the person “*under judicial examination, presumed innocent, remains at liberty. However, if the investigation so requires, or as a precautionary measure, he may be subjected to one or more obligations of judicial*

<sup>47</sup> See Article 63-3-1 to 63-4-3 CPP.

<sup>48</sup> We found only one case where directive 2016/343 was invoked along with articles 5 and 6 of the ECHR. See Court of cassation, crim., 20 September 2016, n°16-84.386.

<sup>49</sup> See Court of cassation, Crim., 20 May 2014 n°14-83.138 ; and Court of cassation, Crim., 12 July 2016, n°16-84.000. See also J. Lelieur, “Mandat d’arrêt européen”, *Répertoire de droit pénale et de procédure pénale*, Dalloz, 2017, n°422.

<sup>50</sup> See the first report on French case law.

<sup>51</sup> *Ibid.*

<sup>52</sup> *Ibid.* On *ne bis in idem* see Court of cassation, Crim., 2 April 2014, n°13-80.474, *Dieter X.*, publié au Bulletin ; on *in absentia* judgments see Court of cassation, Crim., 25 mars 2014, n° 14-81.430, inédit ; Court of cassation, Crim., 29 oct. 2014, n° 14-86.480, inédit ; see also Crim., 25 mars 2014, n° 14-81.430, inédit.

<sup>53</sup> In France, two situations have to be distinguished as regards *in absentia* trials. 1) If the person does not surrender to custody or is arrested, only an appeal in cassation can be made by the convicted person *in absentia* within five clear days (Articles 379-2, °3 and 568 CCP) from the date when the judgment was brought to the attention of the accused; 2) If the person surrenders to custody or is arrested within one month from the date of his arrest or his/her surrender as a prisoner, the accused may nevertheless acquiesce to the judgment of the court of Assizes and renounce, in the presence of his lawyer, to the re-examination of his/her case (Article 379-4 CPP).

<sup>54</sup> At least in the jurisdiction of the Appeal Court of Paris (which deals approximately with 60% of the EAW executed in France). In 2016, Out of 12 refusals, 3 were related to *in absentia* proceedings.

<sup>55</sup> Council Framework Decision 2009/299/JHA of 26 February 2009 amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial

supervision. If this does not serve its purpose, he may, in exceptional cases, be remanded in custody"<sup>56</sup>. A person can only be put in detention pending trial by the liberty and custody judge ("juge des libertés et de la détention") upon court referral through reasoned decision by the investigating judge, or potentially directly by the Public Prosecutor (Article 137-4 CPP). The decision of the liberty and custody judge is subject to two conditions – gravity of the offence and a double condition of necessity and subsidiarity<sup>57</sup>. Detention pending trial is subject to statutory time limits: four months in correctional matters<sup>58</sup>, renewable by four months under certain conditions and within the absolute and exceptional limit of two years and four months<sup>59</sup>; one year in criminal matters renewable for six months and within the absolute and exceptional limit of four years and eight months<sup>60</sup>. Pre-trial detention automatically stops at the end of judicial investigation in correctional matters, unless the judge gives a special reasoned order, whereas it continues after the end of the judicial investigation in criminal matters until the hearing of the Assize Court<sup>61</sup>. Therefore, the first review takes place after four months in correctional matters and after one year at most in criminal matters. An order for release may be taken "at any time" by the investigating judge, following the opinion of the Public prosecutor, at the request of the Public prosecutor or the concerned person (or his/her lawyer)<sup>62</sup>.

Regarding EAWs proceedings, specific provisions are applicable. Pursuant to Article 695-28 paragraph 1 CPP, the Public prosecutor decides to request, after notifying the EAWs to the person arrested, the release of the person or his/her incarceration. The person is presented to the Appeal court who orders the incarceration of the requested person in the prison nearest the appeal court in whose jurisdiction he has been apprehended, unless he/she feels that his appearance at all the steps in the proceedings is sufficiently guaranteed. This decision cannot be challenged, however as for "détention provisoire", the person on remand can request his/her release at "any time"<sup>63</sup>. In the case of a decision to not incarcerate the person, he/she remains in principle free, but can be subjected to measures of "judicial supervision"<sup>64</sup> or be assigned to house arrest under electronic surveillance<sup>65</sup>. According to the judges interviewed, detention is favoured in the majority of EAWs cases. For 2016, under the jurisdiction of the Appeal Court of Paris, out of 180 EAWs executed, for 124 EAWs individuals whose surrender was sought were placed in detention, which represents approximately 70% of the cases<sup>66</sup>. According to the Public prosecutor met, detention is depending on the importance of the case

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<sup>56</sup> Article 137 CPP.

<sup>57</sup> See Article 143-1 CPP : "Subject to the provisions of Article 137, pre-trial detention may only be ordered or extended in one of the cases listed below: 1 The person under judicial examination risks incurring a sentence for a felony; 2 The person under judicial examination risks incurring a sentence for a misdemeanour of at least three years' imprisonment. Pre-trial detention may also be ordered under the conditions provided for in Article 141-2 where the person under judicial examination voluntarily evades the obligations of judicial supervision". See also Article 144 CPP: "Pre-trial detention may only be ordered or extended if it is the only way: 1° to preserve material evidence or clues or to prevent either witnesses or victims or their families being pressurised or fraudulent conspiracy between persons under judicial examination and their accomplices; 2° to protect the person under judicial examination, to guarantee that he remains at the disposal of the law, to put an end to the offence or to prevent its renewal; 3° to put an end to an exceptional and persistent disruption of public order caused by the seriousness of the offence, the circumstances in which it was committed, or the gravity of the harm that it has caused", Official translation of the CPP available on <https://www.legifrance.gouv.fr/Traductions/Liste-des-traductions-Legifrance>.

<sup>58</sup> Correctional penalties are incurred for "délits" (misdemeanours), for which the applicable penalties cannot go beyond 10 years. Criminal penalties in French criminal law are incurred for "crimes" (felony), for which applicable penalties go beyond ten years (see articles 131-1 et 131-3 CPP).

<sup>59</sup> See Article 145-1 CPP. Or three years but only in case of terrorist association (Article 706-24-3 CPP).

<sup>60</sup> Article 145-2 CPP.

<sup>61</sup> See Articles 179 and 181 CPP.

<sup>62</sup> See Articles 147 et 148 CPP. See also Articles 143-1 and 144 CPP. The judge checks that there still are conditions and reasons for detention on remand.

<sup>63</sup> See Article 695-34 paragraph 1 CPP.

<sup>64</sup> The obligations are listed under Article 138 CPP (e.g. "1° not to leave the territorial boundaries fixed by the investigating judge or the liberty and custody judge; 2° not to leave his domicile or the residence fixed by the investigating judge or the liberty and custody judge except under the conditions and for the grounds determined by this judge; 3° not to go to certain places or only to go to the places determined by the investigating judge or the liberty and custody judge (...)").

<sup>65</sup> See Article 142-5 CPP.

<sup>66</sup> Figures communicated by the interviewees at the Paris Appeal Court for 2016.

and the main disadvantage of judicial supervision is the risk that the person breaches his obligations and vanishes.

The French system does not provide a special **compensation regime for unjustified detention** related to EAWs but the existing provisions for compensation of unjustified remand apply to extradition and EAW (Article 149 CPP and seq.)<sup>67</sup>. This framework has been profoundly modified by "*loi n°2000-516 du 15 juin 2000 renforçant la protection de la présomption d'innocence et les droits des victimes*" aforementioned and the "*loi n° 2000-1354 du 30 décembre 2000 tendant à faciliter l'indemnisation des condamnés reconnus innocents et portant diverses dispositions de coordination en matière de procédure pénale*". Pursuant to the CPP, a person who has been remanded in custody during the course of proceedings ended by a decision to drop the case or a discharge or acquittal decision that has become final has, at his request, the right to full compensation for any material or moral harm that this detention has caused him. Such reparation is indeed limited to cases where EAWs are issued by France<sup>68</sup>; unjustified detention in the course of EAWs issued by France should be sought in the issuing Member state.

As regards detention conditions, if the **Aranyosi and Caldaru case**<sup>69</sup> is indeed taken into consideration by national courts, the Court of cassation appears to apply strictly the solution secured by the ECJ<sup>70</sup>. In a case where the requested person was challenging the respect of his fundamental rights based on detention conditions in Romania, the Criminal chamber dismissed the appeal against the lower court's order, which had rightly "*considered insufficient the evidence on file and that therefore the existence of systemic or generalised deficiencies, affecting certain groups of people, or certain places of detention, constituting an exception to the automaticity regime of surrender of the EAW based on fundamental rights, was not demonstrated so that the lower court did not have to proceed to further research*"<sup>71</sup>. The Criminal chamber, in another case concerning Romania rejected the appeal against a decision of release where the lower court had excluded any risk of detention in conditions incompatible with human dignity after examining effective conditions of detention as they were detailed by a document established by the Romanian authorities<sup>72</sup>. Giving the repeated convictions of France by the ECtHR regarding its prison conditions being against human dignity, it is indeed hard to imagine French judges assessing very closely other Member States carceral systems<sup>73</sup>. In the aftermath of the *Aranyosi and Caldaru* case, judicial cooperation has been impacted as regards EAWs issued by France. The judges interviewed reported sensitive discussions in 2017 in the execution by the Netherlands of EAWs issued by France, where Dutch authorities had required assurances that the surrendered would not be detained in certain French prisons such as Villepintes or Fleury-Merogis. In practice, it appears almost impossible because in case of transferring most inmates go through the detention house of Fleury-Merogis. It led to diplomatic dialogue between chancelleries and in the end the surrender was made without requiring these

<sup>67</sup> The "*Commission nationale de réparation des détentions*" (CNRD), which is attached to the Court of cassation, has in particular held that the time spent in remand abroad in the execution of an EAW has to be taken into account to calculate the whole time spent in custody. See CNR détentions, 10 May 2016, n°14 CRD 007 P.

<sup>68</sup> See for an example of application : <https://www.nouvelobs.com/justice/20140106.OBS1463/incarcere-5-mois-par-erreur-il-obtient-45-000-euros-de-dedommagement.html>.

<sup>69</sup> ECJ (Grand chamber), 5 April 2016, *Aranyosi and Caldaru*, C-404/15 and C-659/15.

<sup>70</sup> See Court of cassation, Crim., 12 July 2016, n°16-84.000; Court of cassation, Crim. 10 August 2016, n°16-84.725. On these cases, see also B. Thellier de Poncheville, "Chronique Jurisprudence judiciaire française intéressant le droit de l'Union - Tour d'horizon de la jurisprudence de la chambre criminelle de la Cour de cassation relative aux motifs de refus d'exécution d'un mandat d'arrêt européen", *RTDE*, 2017, p. 336f. For an overview of the control carried out as regards fundamental rights by French courts, see J. Lelieur, "Mandat d'arrêt européen", 2017, *op. cit.*

<sup>71</sup> Free translation, see Crim., 12 July 2016, n°16-84.000: the Court stated that the lower court had rightly "*considéré, au vu de l'insuffisance des preuves versées au dossier, que n'était pas démontrée l'existence de défaillances systémiques ou généralisées, touchant soit certains groupes de personnes, soit certains centres de détention en ce qui concerne les conditions de détention dans l'Etat membre d'émission, de nature à faire exception au régime général d'automatisme des remises du mandat d'arrêt européen en raison d'une insuffisance de la protection des droits fondamentaux dans ce dernier, de sorte qu'elle n'avait pas à procéder à des recherches que ses constatations rendaient inopérantes*".

<sup>72</sup> Court of cassation, Crim. 10 August 2016, n°16-84.725.

<sup>73</sup> See for example ECHR, 10 November 2011, *Plathey v. France*, n° 48337/09; ECHR, 25 July 2013, *Canali v. France*, n° 40119/09. See also N. Hervieu, "Droits des détenus (Art. 3 CEDH) : Une condamnation européenne des conditions carcérales en France à conjuguer à tous les temps", *La Revue des Droits de l'Homme*, 29 avril 2013.

assurances. This shows in our view, the discriminatory treatment citizens can undergo following the *Aranyosi and Caldaru* case, which leaves some leeway to national judicial authorities to decide *in fine* whether and what type "assurances" to require<sup>74</sup>. This indeed opens the prospect to grant a differentiated treatment to Member states depending on how good diplomatic relations are, reintroducing thereby a politicised proceeding contrary to the spirit of the EAW. In this regard, a European initiative to address unacceptable detention conditions persisting in some Member States – including France – should be foreseen to prevent obstacles to mutual recognition and enhance detention conditions as regards human dignity.

With reference to **custodial sentences already served in another Member State**, the Framework Decision 2008/675/JHA on taking account of convictions in the Member States of the European Union in the course of new criminal proceedings appears to be applied smoothly by French judicial authorities. The case law analysed shows that custodial sentences already served in another EU Member State are for example used to allow imposing concurrent sentences ("confusion de peines") when a sentence was pronounced by a court of another Member State of the EU and entirely served when the request for taking it into account is examined<sup>75</sup>. Indeed, the Court of cassation has recently interpreted Article 132-23-1 of the French Criminal code, in light of Article 3 of the Framework Decision 2008/675/JHA and in light of the decision of the CJEU rendered on the 21<sup>st</sup> of September 2017 (C-171/16), as allowing to impose concurrent sentences. Custodial sentences already served in another EU Member are also taken into account by French courts to determine the finding of recidivism<sup>76</sup>.

#### Evidence gathering and admissibility

In French law, the principle is the freedom of proof, which means that the rule of evidence by all means apply. As set by Article 427 CPP *"Except where the law otherwise provides, offences may be proved by any mode of evidence and the judge decides according to his innermost conviction. The judge may only base his decision on evidence which was submitted in the course of the hearing and adversarially discussed before him is limited by the necessity for the judge to verify the legality of the administration of the rule. The judge cannot base any ruling on evidence that has been annulled"*. This rule applies principally at the trial phase, where the judge is going to decide on evidence, but it also has implications at the pre-trial phase where the judicial police, the prosecutor and/or the investigating judge apply it by using of all means of evidence available (within of the limits of the principle of legality of evidence). During the trial phase, the defense can also since 2000, as the other party, question witnesses and experts<sup>77</sup>.

In terms of the European Investigation order (EIO), French authorities, although they were not part of the group of Member States who proposed the EIO, appeared to be rather in favour of it, as they were generally in favour of the European evidence warrant and of the European Commission's Green Paper on evidence-gathering<sup>78</sup>. The French position was in general very similar to the one of the seven initiating Member States. France considered that certain grounds for refusal should be excluded, as well as the possibility of review on the merits of the case or on the proportionality principle<sup>79</sup>. This position can be explained by the fact that the principle of proportionality of criminal investigations only has a very limited

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<sup>74</sup> See CJEU, 5 April 2016, *Aranyosi and Caldaru*, C 404/15 et C 659/15 PPU, paragraph 95f.

<sup>75</sup> See Court of cassation, Crim., 2 November 2017, n° 17-80.833, detailed in the first report on French case law.

<sup>76</sup> Court of cassation, Crim. 24 March 2015, n° 15-80.023, detailed in the first report on French case law.

<sup>77</sup> See Article 312 CPP: *"Subject to the provisions of article 309, the public prosecutor and the parties' advocates may put questions directly to the accused, the civil party, witnesses or anyone else called to testify, by asking the president for permission to speak. The accused and the civil party may also ask questions through the intermediary of the president"*.

<sup>78</sup> COM(2009) 624, 11 November 2009. See on the French position V. Giannoulis, "La question de la preuve européenne: un besoin de réformes pratiques pour améliorer la coopération judiciaire mutuelle", *RSC*, 2005, p. 437f; J. Lelieur, "La reconnaissance mutuelle appliquée à l'obtention transnationale de preuves pénales dans l'Union européenne : une chance pour un droit probatoire français en crise ?", *RSC*, 2011, n° 1, p. 1f.

<sup>79</sup> "Note from the French authorities on the European Commission's Green Paper on obtaining evidence in criminal matters from one Member State to another and securing its admissibility", [http://ec.europa.eu/justice\\_home/news/consulting\\_public/0004/national\\_governments/france\\_en.pdf](http://ec.europa.eu/justice_home/news/consulting_public/0004/national_governments/france_en.pdf)

scope in French law. Albeit it is enshrined in law<sup>80</sup>, most of the time proportionality is not subjected to any judicial review because the Court of cassation considers that this control is only up to the judge competent to insure a direct and immediate review of the measure<sup>81</sup>. Directive 2014/41/EU on the EIO was transposed before the deadline set by the text by the “Ordonnance n°2016-1636 du 1er décembre 2016” and introduced in the CPP with the Article 694-20 and seq<sup>82</sup>. The investigating judge or the Public prosecutor territorially competent is in charge of “executing” the EIO (Article 694-30 CPP) but no validation is required.

Concerning the review of **evidence gathered in another Member State**, Article 694-24 CPP states: “*the fact that the investigating measure undertook in the executing State was successfully challenged in accordance with this Member State’s own national law does not lead in itself to the nullity of the elements of evidence addressed to the French judicial authorities, but these elements cannot be the sole basis to convict the person (...)*”<sup>83</sup>. Grounds of refusal provided for in the directive have been transposed in Article 694-31 CPP. This provision indicates in particular that the judicial authority seized can refuse to recognise or execute the EOI “7° *If there are serious reasons to believe that execution of the investigation measure would be incompatible with the respect by France of rights and liberties protected by the European Convention on Human Rights and by the Charter of Fundamental Rights*”<sup>84</sup>. It remains to be seen how this ground of refusal will be used, but it should be underlined that the judicial review of evidence gathered abroad is generally extremely limited in light of the existing practice in international mutual legal assistance matters<sup>85</sup>. Evidence gathered abroad is admissible in criminal proceedings in France and has to respect certain national rules such as the principle of loyalty in collecting evidence, but the control carried out in this context is very poor. The Court of cassation to this day considers that the legality of the evidence collected can only be reviewed by the judicial authorities of the State executing the rogatory commission<sup>86</sup>. Therefore, when evidence is collected abroad, French judicial authorities are not competent to control the regularity of its collecting. As some have underlined it, “*it derives from this case law that the French State grants a blind trust to its partners from the Council of Europe*”<sup>87</sup>.

Concerning the review of **evidence collected in France upon the request of a Member State**, Article 694-41 CPP provides that when the measures executed in the national territory pursuant to an EIO could have, if they would have been executed in the framework of national proceedings, been challenged by a request of nullity or other form of remedy, the same remedies should be available to challenge them. As it was already the case in international mutual legal assistance matters when evidence is collected in France upon the request of a foreign State, French authorities are competent to verify that the regularity of evidence gathering is in conformity with its domestic principles. Nonetheless, it should be again noted that the case law has set conditions considerably limiting the review performed. The Court of cassation requires that the procedural documents of which legality is challenged be at the disposal of the competent judicial authority in charge of the review; therefore no review can be carried out when the rogatory commission has been sent back to the requesting State. Indeed, the guarantees offered concerning evidence collected appear very weak in France and it explains why the move towards mutual recognition in this area seems easy from the French perspective. But beyond the risk of a condemnation by ECtHR on the basis of

<sup>80</sup> In the Preliminary Article of CPP.

<sup>81</sup> J. Lelieur, “La reconnaissance mutuelle appliquée à l’obtention transnationale de preuves pénales dans l’Union européenne : une chance pour un droit probatoire français en crise ?”, *RSC*, 2011, n°1, p. 1f.

<sup>82</sup> The transposition is very faithful (almost a copy-paste of the directive), see G. Taupiac-Nouvel, “La transposition de la décision d’enquête européenne par l’ordonnance du 1er décembre 2016 : une surprise attendue ...”, December 2016, <http://www.gdr-elsj.eu>.

<sup>83</sup> Free translation.

<sup>84</sup> *Idem*.

<sup>85</sup> J. Lelieur, *op. cit.*, n°9.

<sup>86</sup> J. Lelieur, *op. cit.*, n°9; Court of cassation, Crim., 24 June 1997, Bull. crim. n° 252.

<sup>87</sup> J. Lelieur, *op. cit.*, n°9. (free translation).

Article 6 ECHR, such a low standard could also be detrimental to trust among Member States and therefore to effectivity of their cooperation<sup>88</sup>.

If we could not yet obtain statistics on the implementation of the EIO, one investigating judge interviewed, working close to the border with Belgium, confirmed that the EIO is already very often used with this Member State. The magistrate insisted on the lack of flexibility of the instrument compared to the framework of the European Convention on Mutual assistance in criminal matters of 20 April 1959. She regretted in particular the impossibility to make a general request as regards investigation steps to be taken; having to formulate instead specific requests often implies to request supplementary investigating elements. The interviewee also considered the form to use too detailed and more complicated. Albeit, she considered the cooperation smooth with Belgium under the EIO (potentially due to strong cooperation links between the two countries), she mentioned cases of refusal, such as for example the case of an EIO issued by France requesting geo-tracking going beyond a year from the time of the alleged facts that was refused by Belgium because it was not possible to do so under Belgium procedural criminal law. Whereas so far we do not have the necessary hindsight on this instrument, there is indeed, in our view, a significant risk that the EIO cannot operate successfully without minimum standards of evidence gathering in place, to ensure admissibility of evidence in the issuing State.

#### Criteria allocating jurisdiction

Even if the prevention of conflict of jurisdiction is not limited to prevent decisions *bis in idem*, the only genuine obstacle to cooperation identified has been the case the *Bamberski/Krombach*, where the Court of cassation rejected the exceptions of termination of a public prosecution in Germany based on the *ne bis in idem* principle and refused to refer the question to the ECJ<sup>89</sup>. As underlined by commentators, this case is showing at the same time the need to clarify in which cases the principle *ne bis in idem* can or should apply as well as the need to act upstream, instead of using the principle *ne bis in idem* downstream<sup>90</sup>. The deficiencies of the Framework Decision 2009/948/JHA on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings have also been largely pointed out, in particular its non-prescriptive feature<sup>91</sup>. It would be appropriate in our view to provide for supplementary instruments including in particular the rule *ne bis in idem* and the transmission of proceedings.

#### Victims

A wide range of **protection measures exists in French law** including civil and criminal law measures apply at all stage of the proceedings. In France, protection of victims has been a priority of the legislator mainly since 2010 and the legislation was largely adapted before the adoption of the 2012 directive on victims' rights<sup>92</sup>. First, it is possible to protect the victim by a removal procedure of the author, which can be of civil or criminal nature. On the one hand, the Family court ("juge aux affaires familiales) can take an order of protection, including in the absence of criminal proceedings or conviction, when there are serious reasons to consider plausible the commission of alleged facts of violence and the danger to which the victim is exposed<sup>93</sup>. The order is taken upon the request of the person in danger, or with the latter's agreement upon the request of the Public prosecutor. The breach of the order

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<sup>88</sup> J. Lelieur, *op. cit.*, n°16-17. The author points out that "à long terme nul n'a intérêt à ce que la France devienne un havre de 'facilité probatoire'. (...) Aussi la progression de la technique de la reconnaissance mutuelle dans ce contexte s'avère-t-elle non seulement dangereuse pour la protection des personnes dans l'Union, mais également risquée en terme d'efficacité des investigations transnationales".

<sup>89</sup> See Court of cassation, Crim., 2 April 2014, n°13-80.474, *Dieter X.*, detailed in the first report on French case law.

<sup>90</sup> B. Aubert, "Application par les juridictions internes", *RSC*, 2015, p. 471f.

<sup>91</sup> See for example M. Massé et L. Abou Daher, "Les conflits de compétence entre juridictions nationales", *Droit international pénal*, 2<sup>nd</sup> ed., Pedone, 2012, pp. 1027-1038; – B. Thellier de Poncheville, "La transposition manquée de la décision-cadre 2009/948/JAI du Conseil du 30 novembre 2009 relative aux conflits de compétences", *AJ pénal*, 2015, p. 528f. The author notes the late – loi n° 2015-993 du 17 août 2015 – and deficient transposition of FD 2009/948/JAI. See Article 695-9-54 CPP and seq.

<sup>92</sup> For an overview see J. Alix, "Le dispositif français de protection des victimes de violences conjugales", *AJ Pénal*, 2014, p. 208f.

<sup>93</sup> Article 515-9 and req. of the Civil Code.



constitutes a criminal offence<sup>94</sup>. On the other hand, penal measures also exist, removal measures can be taken at every stage of the proceedings: as a condition to close the case<sup>95</sup> or as alternative measure to prosecution<sup>96</sup>; pending trial as an obligation under judicial supervision during the judicial investigation<sup>97</sup>. Beyond that, the interdiction to see the victim can also be a modality of the sentence, imposed as an obligation under a socio-judicial follow-up<sup>98</sup> or as a suspension with probation<sup>99</sup>. It can also be pronounced instead of a penalty of imprisonment or as an additional sentence taking effect at the end of the detention<sup>100</sup>. Furthermore, the removal order can be imposed as an adjustment of sentencing<sup>101</sup>. Second, it is indeed possible to protect the victim by the conviction and imprisonment of the offender.

The **compensation of the victim** is, as a rule, provided by the author of the offence<sup>102</sup>. Article 2 CPP sets that "*[c]ivil action aimed at the reparation of the damage suffered because of a felony, a misdemeanour or a petty offence is open to all those who have personally suffered damage directly caused by the offence*". Article 706-3 CPP furthermore provides that "*[a]ny person who has suffered harm caused by an intentional or non intentional action which has the material characteristics of an offence may obtain full compensation for the damage deriving from offences against the person*" when the victim is French or when the facts have been committed in the French territory and the person injured, is (*inter alia*) a citizen of an EU Member State. French law provides for the victim the right to the restitution of his/her goods confiscated during the criminal proceedings, however restitution of confiscated property is not considered as a form of compensation from the offender<sup>103</sup>. Nonetheless, confiscation concerns the victim who has benefited from a final decision granting him/her damages to compensate the harm suffered as a result of criminal offences. In this case, pursuant to Article 706-164 CPP, the victim can request for the damages to be paid on the assets confiscated to the perpetrator's provided that the confiscation was ordered by a final decision.

Concerning the implementation of the European Protection Order we could not find any data showing it is actually used by judicial authorities. The differences between Regulation 606/2013 on mutual recognition of protection measures in civil matters, which provides for a direct and automatic circulation of the protection measure as well as the fact that the qualification of the protection order of civil or criminal measure determines the applicability of the instruments, could be an explanation. It should also be underlined that grounds of non-recognition are different and that the weigh of sovereignty is more important in criminal matters<sup>104</sup>. In this regard, whereas directive 2011/99/EU on the European Protection Order only sets that double criminality *can* be a ground of refusal, the French transposition makes it an obligatory ground of refusal (Article 696-100 CPP)<sup>105</sup>.

### European Public Prosecutor

France, along with Germany, was part of the group of Member States that pushed for the adaptation of the Commission's EPPO proposal, in particular as regards the organisation of

<sup>94</sup> Article 227-4-2 and 227-4-3 of the Penal Code (CP).

<sup>95</sup> Article 41-1, 6° CPP. This is at the initiative of the Public prosecutor, who has to request the opinion of the victim beforehand.

<sup>96</sup> Article 41-2 CPP. This is also at the initiative of the Public prosecutor.

<sup>97</sup> Article 138, 9° and 17°. Judicial supervision is ordered by the investigating judge or the liberties and detention judge.

<sup>98</sup> Article 131-36-2 CP.

<sup>99</sup> Article 132-4, 13° and 19° CP.

<sup>100</sup> Article 131-6, 14° CP.

<sup>101</sup> Article 731 CPP. See also 723-10 CPP (electronic bracelet) and 721-2 CPP (reduction of sentence).

<sup>102</sup> Compensation on the basis of national solidarity also exists in some cases for which the "Commission d'indemnisation des victimes d'infractions" (CIVI) is competent.

<sup>103</sup> See in particular Articles 99 and 420-1 CPP. Also M. Jacquelin, "La participation des victimes dans la procédure pénale française dans la perspective d'une transposition de la directive européenne du 25 octobre 2012 : un état des lieux", <http://www.protectingvictims.eu/upload/pages/85/Participation-des-victimes.it.en.pdf>.

<sup>104</sup> D. Porcheron, "Le principe de reconnaissance mutuelle au service des victimes de violences", *Rev. crit. DIP*, 2016, p. 267f.

<sup>105</sup> D. Porcheron underlined that this could be an important brake to recognition of the criminal law decision, particularly in case of harassment which is not a criminal offence in every Member State. See the final report elaborated by the POEMS-project, sp. p. 212, available at <http://poems-project.com>.

EPPO, towards a more decentralised Prosecutor (delegated prosecutors, permanent Chambers, etc.). The French opposition to the initial proposal is also illustrated by French Senate's Yellow card issued under the subsidiarity control mechanism. The Senate insisted on the too centralised and prescriptive choice of the Commission and considered it was going beyond what was necessary in order to attain the objective of a better steering and better cooperation<sup>106</sup>.

#### **D. Conclusion and Policy recommendations**

Through this research, we have seen the general reluctance of the French legislator to amend more than marginally criminal procedure. In this regard, it seems so far hard to foresee rules on procedural rights going beyond minimum rules and this also appears in line with the limitations deriving from the legal basis as set by the TFEU. Furthermore, the existing instruments are still very new and remain to be clarified by the ECJ through preliminary ruling, or through infringement proceedings if they were to be launched in order to remedy unsatisfactory transpositions. Mutual recognition instruments such as the European Investigation Order or the European Protection Order have yet to prove how efficient they are through practice. Lessons could be learnt from the EIO in order to draw the future minimum rules on evidence, in the same way as the EAW led to legislating on *in absentia* proceedings. Concerning improvements of the EAW framework, the practitioners met insisted on the recurrent problems of translation and the need to improve the training of translators. A European initiative to address unacceptable detention conditions persisting in some Member States should also, in our view, be foreseen to prevent obstacles to mutual recognition.

Finally, it is above all important to have the necessary hindsight before legislating on new matters. Information needs to be available and data collected in order to properly assess already existing instruments. A duty to collect figures (through a central national authority?) would be a good way to facilitate the assessment of instruments.

<b>Interviewee 1</b>	Marie-José Aubé-Lotte, Public Prosecutor, Appeal Court of Paris
<b>Interviewee 2</b>	Marie-Anne Chapelle, President of the Investigating Chamber of the Appeal Court of Paris
<b>Interviewee 3</b>	Pauline Moulard, Investigating judge at Tribunal de grande instance d'Avesnes-sur-Helpe

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<sup>106</sup> Résolution européenne portant avis motivé sur la conformité au principe de subsidiarité de la proposition de règlement portant création du Parquet européen (COM (2013) 534), 23 October 2013.

## V. COUNTRY REPORTS ON ITALY

### National report No 1 on the Italian jurisprudence

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#### A. THE EUROPEAN ARREST WARRANT

##### 1. Background: the Italian law implementing FD 2002/584/GAI

After almost three years of thorny debate<sup>1</sup>, the Italian legislator implemented FD 2002/584/JHA on the European Arrest Warrant (EAW) by adopting the law of 22 April 2005 n. 69 (“l. 69/2005”).

Between 2002 and 2005, several concerns about the compatibility between the – back then - brand new system of surrender and the national constitutional guarantees on substantive and procedural criminal law were exacerbated (and to a certain extent misrepresented) in the internal political dispute and led to the adoption of a “reluctant” and “defensive” implementing law.

The l. 69/2005, indeed, at least on paper, contains several provisions which are clearly aimed at limiting the principle of mutual recognition and appear not in line with the letter and the spirit of the Framework Decision.

A preliminary summary description of the contents of the law seems opportune before introducing an overview of the case law relevant for the study.

The Italian legislator, indeed:

- “translated” and substantially rewrote on the basis of the Italian definitions of the offences the list of 32 categories of offences for which double criminality is no longer required<sup>2</sup>;
- extended the number of grounds for refusal (far) beyond those indicated by Artt. 3 and 4 of the FD: Art. 18 of l.69/2005 contains over 20 mandatory grounds<sup>3</sup> for refusal, covering a heterogeneous set of hypotheses. Among these, a particular relevance
- provided additional conditions for the execution of EAWs, implying an in depth control over the merits of the case by the Italian executing authority: in particular, in regard to EAWs issued for the purposes of a criminal prosecution (“*mandati d’arresto processuali*”) the Italian legislator required the Italian executing authority<sup>4</sup> to verify the existence of a probable cause in terms of “*gravi indizi di colpevolezza*”<sup>5</sup> (“serious indications of guilt”<sup>6</sup>), the same standard imposed for the adoption of a precautionary measure in the context of a national criminal proceedings.

On top of that, the opening provision of l. 69/2005 (art. 1 para 1) expressly declares that the EAW FD is to be implemented insofar its provisions do not result “incompatible with the supreme constitutional principles on fundamental rights, fundamental freedoms and fair

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<sup>1</sup> At the academic level the debate was significantly influenced by the early critical stance of two former presidents of the Constitutional Court, who expressed concerns about the compatibility of the abolition of double criminality with the constitutional principles of legality (of offences and sanctions, Art. 25 par. 2 of the Italian Constitution) and equality (Art. 3 of the Italian Constitution) see V Caianiello – G Vassalli, Parere sulla proposta di decisione quadro sul mandato d’arresto europeo, in Cassazione Penale 2002 p. 462 ff; and G Vassalli, Il mandato d’arresto europeo viola il principio di uguaglianza, in Diritto e Giustizia 2002 p. 28.

<sup>2</sup> See Art. 8 (‘consegna obbligatoria’)

<sup>3</sup> The grounds for refusal under Art. 18 of the l. 69/2005 are all mandatory. The Italian executing authority must refuse the surrender if any of the grounds is fulfilled.

<sup>4</sup> Identified in the Court of Appeal territorially competent.

<sup>5</sup> See Art. 17 para 4 of l. 69/2005. The check on the existence of “serious indications of guilt” (“*gravi indizi di colpevolezza*”) as a condition to execute an EAW issued for prosecution purposes recalls the same threshold required for the adoption of a precautionary measure in a national criminal proceeding (see art. 273 of the Italian Code of Criminal Procedure, CPP).

<sup>6</sup> The English translation of the Italian terminology is taken from M Gialuz, L Luparia and F Scarpa (eds), *The Italian Code of Criminal Procedure. Critical Essays and Translation* (Cedam 2014).

trial", thereby suggesting a structural reference to the national principles of criminal procedure as a parameter to operate the recognition.

In the context of such a restrictive national legal framework, the case law developed by the Italian Court of Cassation, since the early applications of the EAW, was generally oriented at reducing the obstacles to the operability of the surrender system.

Following to this premise, this overview will address the following points tackled by the national case law:

- the absence of a predetermined system of time limits for pre-trial detention in the issuing MS;
- the verification of the existence of a probable cause and the respect of procedural guarantees in the on evidence gathering in the issuing MS.

## **2. The case law on the time limits for pre-trial detention: the Ramoci decision and the "equivalent" guarantees**

Art. 13 para 5 of the Italian Constitution provides that "the law establishes the maximum period of preventive detention". The provision represents an essential element for the legitimate restriction of personal liberty in the context of a criminal proceedings and it is considered inherently connected with the respect presumption of innocence<sup>7</sup>: in this perspective, preventive detention must be theoretically kept separate from punishment and should not (systematically) last until the conclusion of the proceedings.

The Italian Code of Criminal Procedure gives effect to the constitutional provision by establishing an articulated system of time limits for the maximum duration of precautionary measures<sup>8</sup>; under this system, specific time limits<sup>9</sup> are predetermined for each stage of the proceeding (investigation, trial, appeal, cassation, possible referral following the annulment by the Court of Cassation) and the performance of certain procedural acts or the occurrence of certain specific conditions may determine either the extension or the suspension of the time limits<sup>10</sup>. The transition from one to the other procedural stage determines the running of the new time limit for the new phase but, in any case, across the whole length of the proceedings certain maximum time limits cannot be exceeded<sup>11</sup>. If a specific or the maximum time limit expire the suspect or accused person must be released.

The peculiarity (and the importance) of this system is represented by its automatic and non-discretionary nature: while the suspect or accused can always be released by the judge before the expiry of the time limit<sup>12</sup>, when the time limits are exceeded, the judge has no alternative but to release the person in custody, irrespective of whether the original precautionary needs<sup>13</sup> for the adoption of the measure are still present.

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<sup>7</sup> The presumption of innocence is guaranteed under Art. 27 para 2 of the Italian Constitution. This latter provision states that "the defendant is not considered guilty until the final judgement is passed". On the relationship between the maximum time limits and the presumption of innocence, see V Grevi, *Voce Libertà Personale dell'imputato*, Enc. del Diritto vol XXIV, 1974, p. 342 and the Italian Constitutional Court, sent. 18.7.1998, n. 292.

<sup>8</sup> For precautionary detention and house arrest, see Art. 303 CPP. Time limits are provided also for non-custodial precautionary measures but, in this latter case, the maximum time limit is the double of that provided for custodial measures (precautionary detention and house arrest), see Art. 308 CPP.

<sup>9</sup> Diversified in reason of the gravity of the offence; special provisions are laid down in regard to serious organised crime and terrorism.

<sup>10</sup> See Artt. 304 and 305 Italian CPP.

<sup>11</sup> See Art. 303 para 4 Italian CPP.

<sup>12</sup> Following a request for revocation or substitution of the measure according to Art. 299 CPP.

<sup>13</sup> The precautionary needs for the adoption of any precautionary measure represent a *numerus clausus*. They are defined in a specific way under Art. 274 CPP and relate to the need to preserve of the correct gathering of evidence from a real risk of suppression or tampering by the suspect or accused, the need to prevent a real risk of flight of the suspect or accused person or his/her social dangerousness determined according to specific indicators (including his/her previous criminal records and the nature of the crime under investigation or prosecution).

This premise is necessary, since the l. 69/2005 provided (and still formally provides) for an express ground for refusal when the legislation of the issuing MS does not provide maximum time limits for preventive detention<sup>14</sup>.

The provision was criticised in literature already before the entry into force of the l. 69/2005<sup>15</sup> as a 'legislative bug' capable of almost systematically paralyzing the execution of EAWs: it is a well-known fact, indeed, that EU MSs adopt a variety of mechanisms to contain the duration of preventive custody and that such systems are not always based on a system of predetermined statutory time limits.

What is more such kind of ground for refusal was unknown under the previous regime of extradition<sup>16</sup>.

Due to its importance and to its potential for the defence of requested person, the case law of the Court of Cassation was confronted with the issue shortly after the entry into force of the implementing law.

A first line of case law started in 2006 with the decision in *Cusini*, adhered to a strict and literal reading of the provision and acknowledged the impossibility to execute the EAW issued by a MS (Belgium) which adopts a system of periodical reviews of preventive detention instead of a system of statutory maximum time limits<sup>17</sup>.

The point nonetheless remained controversial and, in early 2007, the Court of Cassation in its plenary composition ('*Sezioni Unite*') intervened to settle the issue. The case concerned an EAW issued by German authorities for the purposes of prosecution and the decision taken in the case *Ramoci*<sup>18</sup> still represents the main judgement delivered on the Italian law on the EAW.

In *Ramoci* the Court of Cassation interpreted the national provision laying down the specific ground for refusal in light of the objectives of the FD on the EAW and of the high level of mutual trust between the EU MS, making an express reference to the *Pupino* judgement of the CJEU and the doctrine of "conforming interpretation"<sup>19</sup>.

In this perspective, the Court concluded that the absence of statutory maximum time limits in the issuing MS should not *per se* constitute an obstacle to the surrender, provided that an equivalent mechanism for the containment of the length of preventive detention – also in the form of periodical reviews without automatic release - can be retraced in the law or in the practice of that system.

The solution in *Ramoci* has been criticized in literature<sup>20</sup> for substantially achieving the disapplication of a clear national norm through the principle of conforming interpretation<sup>21</sup>;

<sup>14</sup> Art. 18 para 1 (e) l. 69/2005.

<sup>15</sup> See C Pansini, il rifiuto della consegna motivato da esigenze processuali in G Pansini and A Scalfati, *Il Mandato di Arresto Europeo*, ESI, 2005 p.164; E Calvanese, *Problematiche attuative del mandato d'arresto europeo*, in *Cassazione Penale* 2007, p. 1392.

<sup>16</sup> See G Iuzzolino, *La decisione sull'esecuzione del mandato d'arresto europeo* in M Bargis and E Selvaggi (eds), *Mandato d'arresto europeo. Dall'estradizione alle procedure di consegna* (Giappichelli 2005) 289.

<sup>17</sup> C. Cass. Sez. VI, 8.5.2006, n. 16542, *Cusini* (Rv. 233546).

<sup>18</sup> C. Cass. Sez. Un, 30.1.2007, n. 4616, *Ramoci* (Rv. 235531).

<sup>19</sup> CJEU, 16.6.2005, C-105/03, *Pupino*. In *Pupino*, the CJEU affirmed that national courts are under an obligation to interpret national law as far as possible in the light of the wording and purpose of a FD. Conforming interpretation – as an obligation stemming from the principle of loyal cooperation - represented a long-standing doctrine applied to Directives in the context of the - back then – "First Pillar"; with *Pupino* the Court extended its applicability to the "Third Pillar" Framework Decisions. The Court of Cassation in *Ramoci* made also reference to the case law of the ECtHR on Art. 5 ECHR and to the Recommendations of the CoE (13/2006) on preventive detention as a support to its interpretation.

<sup>20</sup> See G Frigo, *Annulare la garanzia del limite massimo sconfina nelle prerogative del legislatore*, in *Guida al Diritto*, 2007, 10 p 45 ; A Di Martino, *Questo limite non è un termine. Tecnicismi 'specifici' e 'collaterali' nel contesto di un sistema penale internazionalizzato*, in *Archivio Penale* 2011.

<sup>21</sup> In *Pupino*, the CJEU had indeed attached a *caveat* to the principle of conforming interpretation (par. 47): 'the principle of conforming interpretation cannot serve as the basis for an interpretation of national law *contra legem*'. Such *caveat*, under the previous institutional framework, was inherent to the nature of the FDs which were expressly deprived of direct effect (See Art. 34 para 2 of the Pre-Lisbon TEU). It was implied by this line of criticism that where a national provision was in contrast with a FD and (such as Art. 18 para 1 (e)) had a clear meaning: 1. there would have been no room for interpretation 2. any conforming interpretation different from the literal meaning

notwithstanding the criticism, however, the Constitutional Court validated the approach of the Court of Cassation by excluding doubts of unconstitutionality<sup>22</sup>.

The subsequent case law of the Court of Cassation, confirmed the *Ramoci* approach and recognised the “equivalence” of other legal systems, allowing the surrender to France<sup>23</sup>, Austria<sup>24</sup>, Lithuania<sup>25</sup>, Spain<sup>26</sup>, Greece<sup>27</sup>, Scotland<sup>28</sup>, England and Wales<sup>29</sup>, Romania<sup>30</sup>, Poland<sup>31</sup>, Hungary<sup>32</sup> and Luxembourg<sup>33</sup>.

### **3. The case law on the verification of probable cause and the respect of procedural guarantees in the context of evidence gathering**

As for what concerns the respect of procedural guarantees in the context of evidence gathering, it has to be recalled that several provisions of the l. 69/2005 seem to imply a power for the Italian executing authority to assess the merits of the case and to review the evidence underlying the EAW according to the Italian domestic rules of criminal procedure.

As already mentioned, in regard to EAW for the purposes of prosecution, Art. 17 para 4 of l. 69/2005 requires the verification of a probable cause (“serious indications of guilt”/“*gravi indizi di colpevolezza*”) as a condition to execute the surrender.

Furthermore, Art. 1 para 1 of the same law, by recalling the constitutional guarantees on fair trial, seems to imply an extension of the evidentiary principles contained in Art. 111 of the Italian Constitution in the context of the execution of the EAW. The Constitutional provision – following a constitutional reform enacted in 1999 – consecrates the basic evidentiary rule for the Italian criminal trial: the principle of adversary gathering of evidence (adversary hearing/“*contraddittorio nella formazione della prova*”).

This rule implies that the judge shall not use evidence other than that lawfully gathered during the trial stage and, in principle, excludes the possibility of using hearsay evidence or other materials unilaterally gathered during the investigations: those materials, under the CCP, are qualified as “elements of proof” and are not technically “evidence” that can be used to ground a conviction. Exceptions to the rule are possible and are provided under the same constitutional provision<sup>34</sup>; nonetheless such exceptions are generally considered exhaustive and subject to strict interpretation.

Considering the variety of approaches that on the point are still present in Europe, the extension of the evidentiary principles and domestic rules on evidence to the execution of an EAW would have probably determined systematic refusals of surrender and a clash with the principle of mutual recognition.

Also in this regard, however, the case law of the Court of Cassation seems to have generally endorsed a flexible approach to the provisions of the l. 69/2005, in order to make the cooperation workable.

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of the national provision would have inevitably resulted in a *contra legem* interpretation and in an inadmissible disapplication of national law.

<sup>22</sup> See Italian Constitutional Court, ord. 109/2008.

<sup>23</sup> C. Cass., Sez. VI, 19.2.2007, n. 41758, Brugnetti.

<sup>24</sup> C. Cass., Sez. VI, 20.3.2007, n. 12405, Marchesi (Rv. 235907).

<sup>25</sup> C. Cass., Sez. VI, 19.3.2008, n. 12665, Vaicekauskaitė (Rv. 239155).

<sup>26</sup> C. Cass., Sez. VI, 4.9.2008, n.34781, Varacalli (Rv. 240921).

<sup>27</sup> C. Cass., Sez. Fer., 28.8.2008, n. 34754, PG contro Orsi (Rv. 240716).

<sup>28</sup> C. Cass., Sez. VI, 2.7.2010, n. 26194, Mancioffi (Rv. 247827).

<sup>29</sup> C. Cass., Sez. VI, 14.12.2012, n.48777, Crapuljar (Rv. 254012).

<sup>30</sup> C. Cass., Sez. VI, 22.11.2013, n. 47013, Busuioc (Rv. 258031).

<sup>31</sup> C. Cass., Sez. VI, 27.2.2014, n. 9938, Wojcik (Rv. 261534).

<sup>32</sup> C. Cass., Sez. VI, 30.12.2014, n. 49, Chitoroaga (Rv. 261847).

<sup>33</sup> C. Cass. Sez. VI, 11.7.2017, n. 34439, Oviero (Rv. 270761).

<sup>34</sup> The rule can be derogated by consent of the suspect or accused, in cases of ascertained objective impossibility or proven illicit conduct. Special proceedings – based on the consent of the suspect or accused – are based on the elements of proof contained in the investigation file.

Since the very first two decisions of the Court of Cassation on the EAW, *Osman*<sup>35</sup> and *Ilie Petre*<sup>36</sup>, the provision imposing the control about the existence of "serious indications of guilt"/ "*gravi indizi di colpevolezza*" (Art. 17 para 4) has been interpreted in the sense of excluding the power for the executing authority to exercise an actual review of the reasoning and of the evidence already assessed by the issuing authority: on the basis of considerations of coherence – including the comparison with the previous extradition framework under which such kind of control over the merits was generally excluded - the Court limited the scrutiny to an extrinsic verification of the mere existence of a reasoning.

Such approach has been consolidated in the abovementioned *Ramoci* decision and reiterated in the subsequent case law of the Court<sup>37</sup>.

In the case *Pintea* (2009)<sup>38</sup> the Court of Cassation expressly excluded that in regard to an EAW issued for the execution of an enforceable judgement, the Italian authority has the power to examine and review the modalities through which the evidence grounding the conviction has been acquired in the issuing MS: therefore the use as evidence of witness statements gathered by the police during the pre-trial stage (a circumstance which in the Italian system would only be allowed exceptionally) was not considered as an obstacle to the surrender.

In 2012 in the *Baldi* decision<sup>39</sup> the Court restated that the yardstick for assessing the respect of fair trial's guarantees in the context of the execution of an EAW is represented by the ECtHR standards and that it is not necessary for the legal order of the issuing MS to present a configuration of the procedural safeguards identical to that provided by the Italian CPP.

## B. EVIDENCE LAW

Evidence law in Italy has been profoundly reshaped by the accusatorial reform that led to the new code of criminal procedure in 1989. But all these changes seem to have no impact on the gathering of evidence according to MLA agreement. In the following sections I highlighted the most relevant decisions of the Cassation Court on different measures.

In general terms, we might say that the Italian Court of Cassation tends to accept evidence collected according to foreign rules even when they deeply differ from the Italian standards.

We must recall that until very recently Italy has relied upon the old Convention on mutual legal assistance of 1957. Only recently by Law no. 149 of 21 July 2016, the Italian Parliament authorised the ratification of the Convention of 29 May 2000 on Mutual Assistance in Criminal Matters between the Member States of the European Union,

The law adapting national rules to the Convention has been approved only this last year<sup>40</sup>. For this reason, the case law is not yet developed and the totality of the decisions here quoted are related to the old MLA Convention.

A second remark concerns the presence in the Italian criminal justice system of a set of exclusionary rules in order to exclude evidence when it is in breach of fundamental rights and it is specifically provided by law. For this reason, several decisions make reference to the need (or the absence of the need) to exclude evidence collected abroad instead of referring to nullity as it is the case in the majority of continental systems.

<sup>35</sup> C. Cass., Sez. Fer., 13.9.2005, n. , Osman.

<sup>36</sup> C. Cass., Sez. VI, 23.9.2005, n. Petre.

<sup>37</sup> See C. Cass. Sez VI, 16.4.2008, n. 16362, Mandaglio (Rv. 239649); C. Cass., Sez. VI, 17.9.2008, n.35832, Indino (Rv. 240722) ; and more recently C. Cass., Sez. VI, 6.6.2017, n. 28281, Mazza (Rv.270415). In the opposite sense there seems to be only a spare - and outdated – precedent (C. Cass., Sez. VI, 3.4.2006, n. 12453, PG contro Nocera (Rv. 233543) which affirmed the power of the executing authority to assess the credibility of an accusation of complicity underlying an EAW according to the rules of the Italian CCP (Art. 192 para 3 of the CPP establishes that an accusation of complicity must be corroborated by other elements confirming the credibility of the accuser).

<sup>38</sup> C. Cass. Sez. VI, 24.11.2009, n. 46223, Pintea (Rv 245450) ; more recently, see also Cass. Sez. VI, 26.1.2016, n. 3949, Picardi (Rv. 267185).

<sup>39</sup> C. Cass., Sez. VI, 27.1.2012, n. 4528, Baldi (Rv. 251959).

<sup>40</sup> See Legislative Decree 5 April 2017, n. 52.

## 1. Interceptions of telecommunications:

### Impact on: EIO, EAW, Transfer of prisoners, MLA

One might highlight that the Italian case law concerning interceptions of telecommunications and the need of MLA goes in the sense of reducing as much as possible the link with the foreign territory and tries to justify as far as possible the exclusion of such a need.

Rogatory letters shall be executed according to the law of the executing State (*lex loci*) with the only limit of the respect of fundamental rights, in particular defence rights of the defendant. The Italian Court of Cassation confirmed the validity of Dutch law concerning the (intercettazioni fra presenti) taping of conversations between two people because they satisfy the requirements of Italian Constitution on privacy of communications (Article 15).

Four points were raised by the defence:

- The lack of reasoning in the warrants authorizing the taping.
- The lack in the file of the reports attesting the listening of the tapes,
- The lack of a Dutch authorisation to use the evidence resulting from the taping in a proceedings different from the one in which they were originally required for.

The Italian Court of Cassation replied that:

- The wire-tapping should be executed according to the Dutch law and the applicable defence rights should be the ones provided by Dutch law
- The only limit to the *lex loci* principle in the execution of letter rogatory are provided by the Italian Constitution, in particular defence rights.
- In Dutch law, no state of reasons is required for the judicial warrant whereas the prosecutor should justify the need to intercept private communications. These requirements are in line with the Article 15 of the Italian Constitution<sup>41</sup>.

Concerning rogatory letter requesting to wire-tap phone conversations, there is no need of documents authentication. Despite the specific provision on Article 696 c.p.p. and 729 c.p.p., a consolidated international praxis excludes the need to authenticate the documents transmitted by the foreign judicial authority<sup>42</sup>.

There is no need of MLA to intercept phone conversations of a foreign cell number located in Italy or of an Italian cell number located abroad when the interception and the taping intervene entirely on the Italian territory. The need for a MLA intervenes only when the interception concerns communications carried out entirely abroad<sup>43</sup>. The same rule applies when the call is placed from abroad and "routed" to a hub located on the Italian territory<sup>44</sup>.

As for the possibility of using the wire-taped conversation in a criminal proceeding that is different from the one for which they were initially requested via MLA, the Court of Cassation stated that Article 8§3 of the Protocol to the MLA Convention signed on the 16<sup>th</sup> of October 2001 and into force since 5 October 2005 has revoked Article 50§3 of the CAAS. As a consequence, there is no limit anymore to the possibility of using as evidence of those conversations in a different case, exception made when is the requested State to require that<sup>45</sup>.

SMS texts sent by a Blackberry system can be collected according to Italian law on wire-tapping without asking for a letter rogatory even though the PIN data decryption required the support of a SP located abroad<sup>46</sup>.

## 2. E-evidence

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<sup>41</sup> Cass., sez. II, 22.12.16, n. 2173, Rv. 269000, Crupi.

<sup>42</sup> Cass. sez. II, 29.4.09, Raggio, rv 246562.

<sup>43</sup> Consolidated case law, among the most recent Cass., Sez. III, 03.03.2016, Violi, Rv. 267090.

<sup>44</sup> Consolidated case law, among the most recent Sez. III, 29.01.2016, Rao, Rv. 266490; Sez. VI, 12.12.2014, Nardella, Rv. 262495.

<sup>45</sup> Cass., Sez. II, 13.12.16, Commisso, Rv. 268760.

<sup>46</sup> Cass., Sez. IV, 08.04.2016, Fortugno Rv. 266983.



### **Impact on: EIO, MLA**

Digital communications can be intercepted via the routing procedure of email messages (including incoming and outbound messages) even when the system provider is located abroad if they cross an Italian hub. In this way, the whole interception is entirely carried out within the Italian territory and there is no need to ask for MLA or any potential breach of Article 8 ECHR<sup>47</sup>.

The Court can legitimately rely on “chat” communications that have been collected on the Italian territory even though they were protected by a “pin to pin” service hosted by a server located abroad<sup>48</sup>.

### **3. Documents**

#### **Impact on: EIO, MLA**

When the documents are directly collected via an Italian branch (EBay Italy) of an International company (Ebay Europe)<sup>49</sup> there is no need of a MLA request because the collection of evidence has occurred entirely on the Italian territory without any invasion of a foreign territory<sup>50</sup>.

### **4. Witness and victim statements (testimony)**

#### **Impact on: EIO, MLA, Victims rights, Directives on procedural safeguards**

The controversial turn of the Italian criminal procedure into an accusatorial/adversarial system had a huge impact on the law of evidence. In particular, rules governing testimony imply the right to cross-exam any witness before a trial Court. This might have had a great impact on MLA requests directed to continental countries with lower standard of adversarial rules. Nevertheless, the case law of the Court of Cassation excluded the relevance of the new set of rules for MLA evidence and considered as admissible every testimony gathered according to different rules<sup>51</sup>.

Concerning victim’s statements collected by a requested State according to a letter rogatory, no exclusionary rule intervenes because of the lack for the defence of any possibility to participate to the victim’s questioning or to cross-exam her (the foreign Court did not communicate the date of the questioning to the Italian Court). According to Articles 727 and 729 c.p.p., the exclusionary rules intervene only when the evidence gathered according to MLA are in breach of public order or public decency<sup>52</sup>.

BUT:

According to Article 727 §5-bis c.p.p., evidence should be excluded when there is no proof that the requested State followed the modalities specifically indicated by the requesting State for the collection of the evidence requested via MLA. In the specific case, Romanian authorities were supposed to alert Italian judicial authorities of the place and the date of the activity but they never did and the report just stated that they followed the procedures required by Italy<sup>53</sup>.

No exclusion of the evidence is provided when the defence lawyer assisted to the questioning of the victim without the power to have his remarks recorded in the final report. In this case,

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<sup>47</sup> Cass., Sez. IV, 28.06.16, Grassi et al., Rv. 268230.

<sup>48</sup> Cass., Sez. VI, 04.11.15, Rv. 267184.

<sup>49</sup> Cass., sez. III, 23.3.16, Casà, Rv 267752.

<sup>50</sup> Cass., sez. IV, 29.1.15, Andreone, Rv. 262441; Cass., sez. IV, 28.2.08, Volante, Rv. 239288 ; sez. VI, 3.12.07, Ortiz, Rv. 239459.

<sup>51</sup> Cass., Sez. II, 05.03.1999, Rv. 212981 ; Sez. VI, 01.12.2010, Rv. 248963.

<sup>52</sup> Cass., Sez. III, 16.12.14, D.G., Rv. 263347; Sez. III, 19.07.12, Sozzi, Rv. 254068.

<sup>53</sup> Cass., Sez. IV, 26.05.10, B et al., Rv. 247822.

there is no breach of defence rights but rather a mere different modality of gathering testimony in criminal proceedings<sup>54</sup>.

The presence of the defendant is not mandatory when the lawyer assisted to the questioning<sup>55</sup> nor is the presence of the Italian judge<sup>56</sup>.

The use of Italian language is mandatory only for the judicial activities carried out during the trial in Italy whereas the translation of witness statements is necessary only when they represent the evidentiary basis for a specific decision and if the requesting party would specify the reasons that support the need for the translation and the potential breach in case of a denial of such a translation. In the specific case, the defendant did not require any translation of witness statements in Spanish, language that he did know quite well<sup>57</sup>.

## **5. Recognition of foreign decisions**

It is irrelevant for its legality that the foreign decision to be recognised in Italy was not transmitted via the Ministry of Justice but it was transferred directly between judicial authorities<sup>58</sup>.

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<sup>54</sup> Cass., Sez. III, 23.11.11, E. Rv. 251802).

<sup>55</sup> Cass., Sez. VI, 01.12.10, De Falco, Rv. 248963.

<sup>56</sup> Cass., Sez. U, 25.02.10, Mills, Rv. 246588.

<sup>57</sup> Cass., Sez. II, 22.03.17, Jebali, Rv. 270067.

<sup>58</sup> Cass., Sez. VI, 22.07.15, Rv. 264463.

## National report No 2 on the Italian criminal justice system

### A. General questions on the features of national criminal procedure systems

#### 1. Do you consider your criminal justice system as inquisitorial, accusatorial, or mixed?

The Italian system of criminal procedure should be considered today as an accusatorial system where several key features of the previous inquisitorial system still persist<sup>59</sup>. The new code of criminal procedure, adopted on October 1989, “incorporated significant adversarial procedures into what had previously been a purely inquisitorial System. According to that reform, in a nutshell, the investigative judge was abolished and investigative and prosecutorial powers were exclusively conferred to the prosecutor”<sup>60</sup>. Furthermore, evidence law was reshaped according to the Anglo-American tradition of oral testimony: witnesses’ declarations gathered during the preliminary investigative phase do not represent automatically evidence in trial but witnesses should sit and declare before the courtroom upon request of the parties and be subject to cross-examination by the parties. Defence has the same powers of the prosecutor to introduce evidence in trial and also to conduct autonomous investigations<sup>61</sup>.

Nevertheless, the reform was not entirely completed and several elements of the previous inquisitorial tradition still characterize the Italian system. Among them: the decision to drop the case is still under judicial control; the judge of the preliminary investigation, when required to validate the *non lieu*, can disagree and ask to investigate specific facts and also force the prosecutor to press charges; the trial court can intervene during the questioning of the witness or of the defendant and can also introduce new evidence. When it comes to legal remedies, no coordination has been made between the reform and the rules related to appeal or cassation: the prosecutor can lodge an appeal against acquittals<sup>62</sup>; the accusatorial evidence law applicable in the first degree can be overturned by the inquisitorial powers of the Court of appeal.

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<sup>59</sup> On the Italian reform of the code of criminal procedure, in English, see Caianiello, Country report - Italy, in Cape, Namoradze, Smith, Spronken, *Effective criminal defence rights in Europe*, Intersentia, 2010, p. 1 f.; Caianiello, M. & Illuminati, G., ‘The Investigative Stage of the Criminal process in Italy’, in: E. Cape, J. Hodgson, T. Prakken and T. Spronken, *Suspects in Europe. Procedural Rights at the Investigative Stage of the Criminal Process in the European Union*, Antwerp–Oxford: Intersentia, 2007, p. 129-154; Amodio, E. & Selvaggi, E., ‘An Accusatorial System in a Civil Law Country: The 1988 Italian Code of Criminal Procedure’, *Temple Law Review*, 1989, p. 1211-1240; Grande, E., ‘Italian Criminal Justice: Borrowing and Resistance’, *American Journal of Comparative Law*, 2000, p. 228-260; Illuminati, G., ‘The Frustrated Turn to Adversarial Procedure in Italy (Italian Criminal Procedure Code of 1988)’, *Washington Universal. Global Studies Law Review*, 2005, p. 567-581; Panzavolta, M., ‘Reforms and Counter-Reforms in the Italian Struggle for an Accusatorial Criminal Law System’, *North Carolina Journal of International Law and Commercial Regulation*, 2005, p. 577-622; Pizzi, W.T. & Montagna, M., ‘The Battle to Establish an Adversarial Trial System in Italy’, *Michigan Journal of International Law*, 2004, p. 429-466; Luparia, The model code of broken dream? The Italian criminal procedure in a comparative perspective, in Gialuz, Luparia, Scarpa, *The Italian code of criminal procedure*, 2<sup>nd</sup> ed., 2017, p. 1 f.; Gialuz, *The Italian code of criminal procedure: a reading guide*, in Gialuz, Luparia, Scarpa, *The Italian code of criminal procedure*, 2<sup>nd</sup> ed., 2017, p. 15 f.

For an English translation, M. Gialuz, L. Lupária, F. Scarpa “*The Italian Code of Criminal Procedure: critical essays and english translation*”, Cedam Kluwer, 2017. *Victims and criminal justice: European standards and national good practices*, a cura di L. Lupária, Kluwer, 2015

<sup>60</sup> Caianiello, *The Italian Public Prosecutor: An Inquisitorial Figure in Adversarial Proceedings?*, in Luna-Wade, *The Prosecutor in Transnational Perspective*, Oxford University Press, 2012, p. 250 ff.

<sup>61</sup> Marcolini- Ruggeri, Italy, in Ligeti, *Toward a Prosecutor for the European Union*, Hart, 2012, p. 378 ff.

<sup>62</sup> A reform limiting this possibility has been overturned by the Constitutional court claiming that the Constitution requires the control of the superior courts on acquittals.

1.1. *If your country has been under communist rule, does your criminal justice system still bear the influence of that regime? Could you please describe it briefly?*

NA

1.2. *If mixed, could you briefly explain which elements belong to which tradition? Have judicial or legislative changes occurred recently in your country that had an effect on the functioning of your criminal justice system?*

A complete description of the entire system is not possible in the framework of this report.

I will sketch the main features.

Elements belonging to accusatorial tradition:

- Evidence should be oral, in particular with reference to testimony, questioning of the defendant. Cross-examination is used to gather evidence in trial. The judge cannot ask questions in the first place but only at the end of the parties questioning.
- Statements gathered during pre-trial investigations are not included into the dossier that is transmitted to the trial court and cannot in principle be used as evidence. Their use is limited to the cross-examination in order to challenge the witness' credibility
- Defence can collect evidence directly and produce them in trial (intrusive and coercive measures such as interceptions are obviously excluded)
- Prosecutor is in charge of the investigation coordinating the police. He is also in charge of prosecution but the final decision on the *non lieu* should be validate by a judge.
- Evidence exclusionary rules are intended as a ban to use evidence in any circumstances and cannot be overruled by the *intime conviction*.
- There are several special proceedings among which a very large form of plea bargain that allows to negotiate the evidence up to five years of imprisonment.

Main elements still belonging to the inquisitorial tradition:

- Prosecutor is in charge of the investigation *à charge et à décharge*.
- The judge controlling the investigation and the judge of the preliminary ruling
- When it is not possible to gather oral testimony in trial, the previous statements collected during the preliminary stage can be used as evidence when exceptional circumstances occur<sup>63</sup>.
- The court can ask questions to the witnesses or to the defendant after the questioning of the parties.
- The entire legal framework for remedies is still the same as under the previous code.

1.3. *How do you think the diversity of legal traditions regarding criminal procedure law across the Union may impact cross-border cooperation in criminal matters?*

From the Italian point of view, the case law shows no particular issue. Evidence law in Italy has been profoundly reshaped by the accusatorial reform that led to the new code of criminal procedure in 1989 but all these changes seem to have no impact on the gathering of evidence according to MLA agreement.

In general terms, we might say that the Italian Court of Cassation tends to accept evidence collected according to foreign rules even when they deeply differ from the Italian standards. We must recall that until very recently Italy has relied upon the old Convention on mutual legal assistance of 1957. Only recently by Law no. 149 of 21 July 2016, the Italian Parliament authorised the ratification of the Convention of 29 May 2000 on Mutual Assistance in Criminal Matters between the Member States of the European Union. The law adapting national rules

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<sup>63</sup> Article 111 par. 5 of the Constitution and Article 512 c.p.p. strongly criticized by the ECtHR in the cases *Bracci v Italy*, no. 36822/02, 13 October 2005; *Kollcaku v Italy*, no. 25701/03, 8 February 2007; *Cafagna v Italy*, no. 26073/13, 12 October 2017.

to the Convention has been approved only last year<sup>64</sup>. For this reason, the case law is not yet developed and the totality of the decisions here quoted are related to the old MLA Convention.

A second remark concerns the presence in the Italian criminal justice system of a set of exclusionary rules in order to exclude evidence when it is in breach of fundamental rights and it is specifically provided by law. For this reason, several decisions make reference to the need (or the absence of the need) to exclude evidence collected abroad instead of referring to nullity as it is the case in the majority of continental systems.

The main problems may arise from the law of evidence that might require specific guarantees that are absent in the foreign system.

In particular, wire-tapping of telephone communications is an extremely common investigative measure, *voire* abused, from Italian investigative authority and they require a judicial authorization in order to be executed.

One might highlight that the Italian case law concerning interceptions of telecommunications and the need of MLA goes in the sense of reducing as much as possible the link with the foreign territory and tries to justify as far as possible the exclusion of such a need.

Despite the theoretical differences, the case law developed by the Italian Court of Cassation shows that when it comes to evidence collected abroad, Italian courts are willing to limit as much as possible detrimental effects stemming from national differences.

Rogatory letters shall be executed according to the law of the executing State (*lex loci*) with the only limit of the respect of fundamental rights, in particular defence rights of the defendant. The Italian Court of Cassation confirmed the validity of Dutch law concerning the tapping of conversations between two people that are present in person (*intercettazioni fra presenti*) because they satisfy the requirements of Italian Constitution on privacy of communications (Article 15).

Four points were raised by the defence:

- The lack of reasoning in the warrants authorising the taping.
- The lack in the file of the reports attesting the listening of the tapes,
- The lack of a Dutch authorisation to use the evidence resulting from the taping in proceedings different from the one in which they were originally required for.

The Italian Court of Cassation replied that:

- The wire-tapping should be executed according to the Dutch law and the applicable defence rights should be the ones provided by Dutch law
- The only limit to the *lex loci* principle in the execution of letter rogatory are provided by the Italian Constitution, in particular defence rights. In Dutch law, no state of reasons is required for the judicial warrant whereas the prosecutor should justify the need to intercept private communications. Nevertheless, these requirements are in line with the Article 15 of the Italian Constitution<sup>65</sup>.

Concerning rogatory letter requesting to wire-tap phone conversations, there is no need of documents authentication. Despite the specific provision on Article 696 c.p.p. and 729 c.p.p., a consolidated international praxis excludes the need to authenticate the documents transmitted by the foreign judicial authority<sup>66</sup>.

There is no need of MLA to intercept phone conversations of a foreign cell number located in Italy or of an Italian cell number located abroad when the interception and the taping intervene entirely on the Italian territory. The need for a MLA intervenes only when the

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<sup>64</sup> See Legislative Decree 5 April 2017, n. 52.

<sup>65</sup> Cass., sez. II, 22.12.16, n. 2173, Rv. 269000, Crupi.

<sup>66</sup> Cass. sez. II, 29.4.09, Raggio, rv 246562.

interception concerns communications carried out entirely abroad<sup>67</sup>. The same rule applies when the call is placed from abroad and "routed" to a hub located on the Italian territory<sup>68</sup>.

As for the possibility of using the wire-tapped conversation in a criminal proceeding that is different from the one for which they were initially requested via MLA, the Court of Cassation stated that Article 8§3 of the Protocol to the MLA Convention signed on the 16<sup>th</sup> of October 2001 and into force since 5 October 2005 has revoked Article 50§3 of the CAAS. As a consequence, there is no limit anymore to the possibility of using as evidence those conversations in a different case, exception made when is the requested State to require that<sup>69</sup>.

SMS texts sent by a Blackberry system can be collected according to Italian law on wire-tapping without asking for a letter rogatory even though the PIN data decryption required the support of a SP located abroad<sup>70</sup>.

As for digital communications, they can be intercepted via the routing procedure of e-mail messages (including incoming and outbound messages) even when the system provider is located abroad if they cross an Italian hub. In this way, the whole interception is entirely carried out within the Italian territory and there is no need to ask for MLA or any potential breach of Article 8 ECHR<sup>71</sup>.

The Court can legitimately rely on "chat" communications that have been collected on the Italian territory even though they were protected by a "pin to pin" service hosted by a server located abroad<sup>72</sup>.

Documentary evidence does not present specific issues in cross-border cases. When the documents are directly collected via an Italian branch (EBay Italy) of an International company (Ebay Europe)<sup>73</sup> there is no need of a MLA request because the collection of evidence has occurred entirely on the Italian territory without any invasion of a foreign territory<sup>74</sup>.

Moving to the sensitive field of testimony and questioning of the suspects, the controversial turn of the Italian criminal procedure into an accusatorial/adversarial system radically transformed the law of oral evidence. In particular, rules governing testimony imply the right to cross-exam any witness before a trial Court and no automatic probative value is conferred to the statements collected during the pre-trial stage. This might have had a great impact on MLA requests directed to continental countries with lower standard of adversarial rules. Nevertheless, the case law of the Court of Cassation excluded the relevance of the new set of rules for MLA evidence and considered as admissible every testimony gathered according to different rules.

Concerning victim's statements collected by a requested State according to a letter rogatory, no exclusionary rule intervenes because of the lack for the defence of any possibility to participate to the victim's questioning or to cross-exam her (the foreign Court did not communicate the date of the questioning to the Italian Court). According to Articles 727 and 729 c.p.p., the exclusionary rules intervene only when the evidence gathered according to MLA are in breach of public order or public decency.

**BUT:**

According to Article 727 §5-bis c.p.p., evidence should be excluded when there is no proof that the requested State followed the modalities specifically indicated by the requesting State

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<sup>67</sup> Consolidated case law, among the most recent Cass., Sez. III, 03.03.2016, Violi, Rv. 267090.

<sup>68</sup> Consolidated case law, among the most recent Sez. III, 29.01.2016, Rao, Rv. 266490; Sez. VI, 12.12.2014, Nardella, Rv. 262495.

<sup>69</sup> Cass., Sez. II, 13.12.16, Commisso, Rv. 268760.

<sup>70</sup> Cass., Sez. IV, 08.04.2016, Fortugno Rv. 266983.

<sup>71</sup> Cass., Sez. IV, 28.06.16, Grassi et al., Rv. 268230.

<sup>72</sup> Cass., Sez. VI, 04.11.15, Rv. 267184.

<sup>73</sup> Cass., sez. III, 23.3.16, Casà, Rv 267752.

<sup>74</sup> Cass., sez. IV, 29.1.15, Andreone, Rv. 262441; Cass., sez. IV, 28.2.08, Volante, Rv. 239288 ; sez. VI, 3.12.07, Ortiz, Rv. 239459.

for the collection of the evidence requested via MLA. In the specific case, Romanian authorities were supposed to alert Italian judicial authorities of the place and the date of the activity but they never did and the report just stated that they followed the procedures required by Italy.

No exclusion of the evidence is provided when the defence lawyer assisted to the questioning of the victim without the power to have his remarks recorded in the final report. In this case, there is no breach of defence rights but rather a mere different modality of gathering testimony in criminal proceedings.

The presence of the defendant is not mandatory when the lawyer assisted to the questioning nor is the presence of the Italian judge.

The use of Italian language is mandatory only for the judicial activities carried out during the trial in Italy whereas the translation of witness statements is necessary only when they represent the evidentiary basis for a specific decision and if the requesting party would specify the reasons that support the need for the translation and the potential breach in case of a denial of such a translation<sup>75</sup>. In the specific case, the defendant did not require any translation of witness statements in Spanish, language that he did know quite well.

According to Fair Trials<sup>76</sup>, the major and continuing criticism of the Italian legal system is that trials take an unaccountably long time. The Report of the Working Group on Arbitrary Detention states that ‘the Government should, as a matter of priority, put in place legislative and other measures to decrease the duration of criminal trials with a view to ensuring better protection of the right to be tried without delay’. This sentiment is echoed in numerous NGO reports. The absence of effective limits on the length of pre-trial investigations, the large number of minor offences covered by Italian law, unclear and contradictory legal provisions, insufficient resources, including an inadequate number of judges, and strikes by judges and lawyers have all been raised as key factors in accounting for the current delays.

According to Fair Trials<sup>77</sup>, the US State Department highlighted the Italian police practice of engaging detained persons in ‘informal chats’ before making a formal arrest. This practice essentially denies suspects the right of consulting a lawyer as this right may only be invoked at the time of arrest.

In the past several problems might arise from the large possibility to prosecute *in absentia* but thanks to a recent reform the *in absentia* trial is suspended and issues related to cross-border cooperation seems to be over<sup>78</sup>.

## 2. *What is the status of the rights of the defence in your country (e.g. fundamental right, constitutional right)?*

Defence rights are protected by Article 24(2) of Italian Constitution according to which “Defense is an inviolable right at every stage and instance of legal proceedings”. The open formula offers Constitutional protection to all different aspects of defence in criminal matters. The different components of criminal defence are protected by several rules of the code of criminal procedure. Some of them have been modified by recent laws in order to implement European directives (see below section B). As a consequence of a Constitutional reform, the current Article 111 of the Italian Constitution provides for some detailed rules concerning the administration of evidence and, directly and indirectly, the rights of the defence. The law n. 2 of 1999 added the following paragraphs in the article 111 Cost.: “1. The judicial function should be carried out according to the principle of due process of law. 2. Every trial should be carried on giving the parties the right to offer evidence or counterproof and counterarguments against unfavourable evidence, on equal standing in front of an impartial judge. The law guarantees the reasonable length of the trial. 3. In the criminal trial the law guarantees that everyone charged with a criminal offence should be privately informed as

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<sup>75</sup> Cass. Sez. II, 22.3.2017, Jebali, RV 270067.

<sup>76</sup> <https://www.fairtrials.org/country-profile-italy/>

<sup>77</sup> <https://www.fairtrials.org/publication/criminal-justice-and-defence-rights-italy>

<sup>78</sup> Law n. 67 del 28 aprile 2014.

soon as possible of the nature and cause of the accusation against him; that the accused should be assured to have adequate time and facilities for the preparation of his defence; that the accused should be allowed the opportunity, before the judge, to examine or to have examined any witnesses against him; that the accused have the right to have favourable witnesses summoned for being examined at trial on an equal basis with the prosecution, as well the right to produce other evidence in his favour; that the accused have the free assistance of an interpreter if he cannot understand or speak the language used in court. 4. The criminal trial is based on the principle that evidence should be heard in front of the parties and each party should be able to offer contrary evidence and to challenge opposing evidence. The accused person's guilt shall not be proved on the basis of statements made by the person who deliberately chose not to be examined by the accused or his lawyer. 5. The law regulates cases in which evidence is not presented in a manner such that the accused may challenge the evidence at trial by reasons of the accused person's consent or of an objective impossibility or of a proved unlawful conduct".

3. *What is the status of the rights of victims in your country (e.g. fundamental right, constitutional right)?*

The Italian Constitution provides for a specific right to locus standi for civil and criminal actions. According to Article 24(1), "anyone may bring cases before a court of law in order to protect their rights under civil and administrative law.

As for criminal law, before describing what is the status of victim's rights in Italy, a terminological clarification is needed. Technically speaking, the term 'victim' can refer to two different figures in the Italian system of criminal justice: first, it may refer to the "person harmed by the crime" (*persona offesa dal reato*) and secondly to the "person that suffered civil damages from the crime" (*danneggiato dal reato*). The "person harmed by the crime" is the holder of the legal interest (the German Rechtsgut) that is protected by criminal law. Hence not every person that suffers an economic loss from the crime can be considered as a "person harmed by the crime". It may happen that the offence intends to protect a legal interest of the State and none of those who suffered the negative effects of the crime may enjoy the standing rights recognised to "person harmed by the crime" before in criminal trial<sup>79</sup>.

The "person economically damaged" is instead the one who suffered an economic loss or a form of moral damage as a direct consequence of the crime (Article 185 Criminal Code, C.P.).

Types of standing differ accordingly to this distinction.

a) PERSON HARMED BY THE CRIME.

Usually the term 'victim' refers to the person harmed by the crime. She can take part to all stages of criminal proceedings, although she enjoys the most relevant powers in the investigative stage. In general, she has the right to hire a counsel (Article 101 of the Italian code of criminal procedure, C.P.P.) and, if indigent, is allowed to apply for the State to pay for her legal aid. Instructing a lawyer plays a key role in carrying out parallel private investigation, given that the victim has no power to conduct such an investigation in person. A person who has been harmed by an offence can file a complaint to the public authorities (i.e. police, public prosecutors). Certain crimes – petty offences or serious crimes of sensitive nature affecting primarily the victim privacy – can be prosecuted only if there is a formal complaint (*querela*) coming from the person harmed by the crime. At any time of the proceedings the victim has the right to present memorial briefs and motions or to indicate evidentiary sources to the public prosecutor or to the court (Article 90 of the C.P.P.). The victim may play a proactive role in the investigations by searching privately for evidence (although with the exclusion of coercive measures) or by asking the prosecutor to collect evidence and even to do so with a special formal procedure called "incidente probatorio" (a

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<sup>79</sup> (e.g. in the crime of perjury, see Cass., 5 April 2011, no. 250038).



sort of trial anticipation for collecting the evidence which is at risk to vanish, be suppressed or tampered with) when there is a risk that the evidence might get lost in view of a future trial (Article 394 C.P.P.). The victim may ask for the judicial review of the decision of the prosecutor to dismiss the case and she can bring an appeal against the decision not to prosecute issued at the end of the preliminary hearing (see question 1.2.2).

At trial (and at the preliminary hearing) the persons harmed by the crime hold little powers. There is no full right to be heard: victims are witnesses and they may be called to testify in trial by the prosecutor, by the defendant or his defence counsel. Nonetheless, when they stand in the proceedings as civil parties, they may ask for their own testimony. According to the aforementioned general rule set out in Article 90 of the C.P.P., the victim can point out evidence to the trial judge but once again the indication is not binding upon the judge. Set aside this prerogative, victims do not hold the position of a party to the trial. They cannot examine witnesses or make a closing argument. If the persons harmed by the crime want to enjoy larger powers at trial they ought to file a civil claim in the criminal process, provided that they also suffered some form of economic loss from the crime.

#### b) PERSON ECONOMICALLY DAMAGED BY THE CRIME

In order to claim for civil damages and ask for compensation, victims must have suffered an economic damage by an offense. Only the person who suffered civil damages may intervene in the trial as a civil party (Articles 74-76 C.P.P.). Civil party proceedings may be instituted only after the stage of the investigations, when the case moves on to the preliminary hearing or to trial. For a civil action to be raised validly it needs to be attached to the indictment made by the prosecutor, hence necessarily at the end of the investigations and not before that moment. If the claim is filed at the trial hearing, the civil party should not enjoy the power to introduce testimonial evidence (witnesses or expert witnesses), because such a right requires the presentation by each party of a list of testimonies seven days before the trial hearing. Consequently, in order for the damaged persons to introduce evidence, they would need to file their action at least seven days before trial. Courts however have proved to be lenient in the interpretation of the latter requirement and they allow victims to submit their testimonial lists even before they have formally raised any claims (see question no. 4.1).

The civil claim has to be filed in writing, by stating the kind of economic loss that the victim suffered and by demanding for compensation of the damage. The civil claim gives to the person economically damaged the status of a party in the criminal proceedings just like the prosecutor and the defendant. Hence, she will have the possibility to argue her case during the preliminary hearing as all other parties. During the investigations the person who suffered a pecuniary damage can take advantage of the prerogatives accorded to the person harmed by the crime, provided that she satisfies the requirements. If the person who endured a financial damage from the crime does not hold the position of the "person harmed by the crime", she can do nothing during the investigations.

At trial the persons harmed by the crime are given the possibility to call their own evidence, to cross-examine all witnesses, and they can make a closing argument.

The right to appeal adverse decisions to the Court of Appeal and to the Court of Cassation is given only to the victim who filed a civil claim. The appeal has to be limited to those parts of the judgment which concern the civil claim.

See also *infra*, sub 23.

## **B. Impact on national law of procedural rights directives**

### **B.1. State of transposition of directives for which the transposition deadline has already passed**

Italy duly implemented the first three directives approved by the EU (the so-called ABC directives) during the last four years via different laws and decrees. As a general remark, we might say that the transposition has been in line with the EU expectations and it improved the concrete exercise of defence rights. Anyway, the Italian system already provided for a very advanced framework of procedural safeguards in criminal proceedings (at least in books). As a consequence, reforms have been limited compared to what happened in those European systems more linked to the inquisitorial/continental model.

As for the victims, please refer to n. 23.

*4. Has the entry into force of the directives on suspects/defendants and victims triggered important changes in:*

*4.1. The criminal procedure of your country? If so, has the implementation of directives made the national system raised its standards and thus comply with ECHR case law?*

As a general remark, one might observe an increase in procedural safeguards as a consequence of the implementation of the recent EU directives. Nevertheless, the Italian system reacted differently to the ABC directives and only rarely required a deep change of procedural rules (namely in the framework of the Directive 2010/64/EU on interpretation and translation. For a more detailed analysis, I will refer specifically to the single directive and its impact on the Italian system.

## **INTERPRETATION AND TRANSLATION**

The implementation of the Directive 2010/64/EU on interpretation and translation into the Italian system occurred in 2014<sup>80</sup>. It surely helped improving the protection of non-Italian defendants increasing the scope of application of certain rights even beyond the directive provisions.

As for the right to an interpreter, Article 143 CCP has been modified by legislative decree n. 32 of 2014. The new paragraph 1 expressly recognises the right to having an interpreter during the trial, in the preliminary phase and – for the first time in Italian history – during the communication between suspected or accused persons<sup>81</sup>. The right though covers all the meetings with the defence lawyer before any questioning scheduled by judicial authorities or any legal act to be drafted. Same increase concerns the acts (decisions, warrants, orders) to be translated into the language known by the suspect/defendant<sup>82</sup>. Among them there are the notice of investigation (Article 369 CCP), the notice to the suspect about his right of defence (Article 369-bis), the decision directing personal precautionary measures (Articles 280-290 CCP), the notice to the suspect on the conclusion of preliminary investigations (Article 415-bis CCP), the decree ordering preliminary hearing (Article 418) and the decree for direct summons for trial (Article 552 CCP)<sup>83</sup>, the judgment and the decree of conviction (Article 460). Needless to say, it is uncertain to what extent the Italian government might find the funds to sustain these policies and if they will be enough to cover so many cases.

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<sup>80</sup> Legislative Decree n. 32, 4 March 2014 adopted according to the European delegation law 2013 (l. 6 August 2013, n. 96). See M. Gialuz, *Il decreto legislativo di attuazione della direttiva sull'assistenza linguistica (n. 32 del 2014): un'occasione sprecata per modernizzare l'ordinamento italiano*, in *penalecontemporaneo.it*, 10 April 2014; D. Curtotti Nappi, *La normativa in tema di assistenza linguistica tra direttiva europea e nuove prassi applicative*, in *Processo penale e giustizia*, 2014, p. 115 f.

<sup>81</sup> Gialuz, *The Italian code of criminal procedure: a reading guide*, in Gialuz, Luparia, Scarpa, *The Italian code of criminal procedure*, 2<sup>nd</sup> ed., 2017, p. 31.

<sup>82</sup> Before the entry into force of the new law, the case law showed to be very restrictive on this issue; Cass., Sez. IV, 19 aprile 2013, n. 26239; Cass., Sez. III, 7 luglio 2011, n. 26703, in *Dir. pen. proc.*, 2012, p. 433, con nota di M. Gialuz, *L'obbligo di interpretazione conforme alla direttiva sul diritto all'assistenza linguistica. Contra*, Cass., Sez. III, 4 febbraio 2013, n. 5486, in *Cass. pen.*, 2013, p. 2185, con nota di M. Gialuz, *La Corte di cassazione riconosce l'obbligo di tradurre la sentenza a favore dell'imputato alloglotto*, in *Cass. pen.* 2013, p. 2194.

<sup>83</sup> Gialuz, *The Italian code of criminal procedure: a reading guide*, in Gialuz, Luparia, Scarpa, *The Italian code of criminal procedure*, 2<sup>nd</sup> ed., 2017, p. 32.

Furthermore, according to the scholars, the main persistent problem is the quality of the interpreter/translator in charge<sup>84</sup>. This problem was not tackled by the l.d. n. 32 of 2014; only a couple of years later, “in an attempt to overcome the criticism raised by the doctrine, the Government passed a second legislative decree in 2016, no. 129, to implement Directive no. 64 and create a national list of interpreters and translators to be made available to all judicial authorities (Article 67-bis of the Provisions for the implementation of the CCP). Nevertheless, instead of requiring a specific training in legal interpretation or translation, the Italian law only requires that the expert would register in a formal registry to be set up in every Court of Appeal district but this registration is not mandatory to be nominated because the Italian legislator neglected to impose to the judicial authorities to select the interpreter/translator from the abovementioned registry. As a result, the authority in charge is free to select a non-professional, non-expert person in order to grant translation and/or interpretation. Moreover, the new law did not modify the rules on the challenge of rejection (*ricusazione*) of the interpreter, a tool that would have allowed to challenge earlier his professional capacity. In the end, the control over the “quality” is left to the judge when the parties are raising a potential nullity of the related procedural activity.

### **RIGHT TO INFORMATION**

The directive 2012/13/EU on the right to information has been transposed by Legislative Decree 1<sup>st</sup> July 2014, n. 101 in a way that the scholars defined “*minimalista, rinunciatario e asettico*”<sup>85</sup>. Among the three pillars of the Directive - the right to information about the charges, the letter of rights and the right to have access to the materials of the case - only the first two have been translated into Italian law. Nothing is said on the latter. It worth to say that the Italian system did not need a deep transformation in order to comply with the European minimum standards. For that reason, scholars had suggested to take the occasion of the reform in order to improve some aspects that would have reserved more attention. But the result is a minimal maquillage just to adapt the code to the European duties.

With reference to the right to information, “it must be pointed out that still today the CCP has a particularly complex set of rules. Firstly, various letters of rights are to be sent as provided for in Article 369 (Notice of investigation<sup>86</sup>), Article 369-bis CCP (Notice to the

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<sup>84</sup> Gialuz, p. penalecontemporaneo.it ; M. Bargis, *L'assistenza linguistica per l'imputato: dalla Direttiva europea 64/2010 nuovi inputs alla tutela fra teoria e prassi*, in *Studi in ricordo di Maria Gabriella Aimonetto*, a cura di M. Bargis, Milano, 2013, p. 104 ss.

<sup>85</sup> Ciampi, *Diritto all'informazione nei procedimenti penali: il recepimento low profile della direttiva 2012/13/UE da parte del d. lgs. 2014 n. 101*, penalecontemporaneo.it, p. 4.

<sup>86</sup> Article 369, Notice of investigation, 1. Only when the Public Prosecutor must carry out an activity in which the lawyer has the right to be present, shall he send a notice of investigation to the suspect and the victim by mail, in a sealed registered envelope with return receipt. The notice of investigation shall contain the legal provisions which have allegedly been violated as well as the date and place in which the criminal act was committed along with a request to exercise the right of appointing a retained lawyer.

1-bis. The Public Prosecutor shall also inform the suspect and the victim of their right to being informed as set forth in Article 335, paragraph 3.

2. If he believes it to be necessary or when the post office returns the envelope because the addressee could not be found, the Public Prosecutor may order that the notice of investigation be served according to Article 151.

suspect about his right of defence<sup>87</sup>) and Article 415-bis CCP<sup>88</sup> (Notice to the suspect on the conclusion of preliminary investigations). Secondly, the Code establishes that these notices, the suspect's request as per Article 335§3 CCP<sup>89</sup>, and the summons to the examination (Article 375§3 CCP) must include a summary description of the offence being prosecuted<sup>90</sup>.

As a consequence of the implementation of the abovementioned directive, the prosecutor should give notice to the defendant of his right to ask for being informed of the charges as filed in the Prosecutor's registry. Unfortunately, no sanction is provided in case of refusal or denial to answer<sup>91</sup>.

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<sup>87</sup> Article 369-bis Notice to the suspect about his right of defence

1. During the first activity in which the lawyer has the right to be present and, in any case, prior to sending the summons to appear for questioning according to the conjunction of Articles 375, paragraph 3, and 416, or no later than the service of the notice on the conclusion of preliminary investigations according to Article 415-bis, the Public Prosecutor, under penalty of nullity of subsequent acts, shall serve on the suspected person the notification on the designation of a court-appointed lawyer.

2. The notification referred to in paragraph 1 shall contain:

- a) the information that technical defence in criminal proceedings is mandatory, along with the specification of the rights assigned by law to the suspected person;
- b) the name of the court-appointed lawyer, his address and his telephone number;
- c) the specification of the right to appoint a retained lawyer, along with the notice that, if the suspect does not have a retained lawyer, he shall be assisted by the court-appointed lawyer;
- d) the specification of the obligation to remunerate the court-appointed lawyer, unless the conditions for accessing the benefit referred to in letter e) are met, along with the warning that, in case the lawyer is not paid, mandatory enforcement shall be imposed;
- d-bis) the information that the suspect has the right to an interpreter and to the translation of essential documents;
- e) the specification of the conditions for accessing legal aid at the expense of the State.

<sup>88</sup> Article 415-bis

Notice to the suspect on the conclusion of preliminary investigations

1. Prior to the expiry of the time limit provided for in paragraph 2 of Article 405, also if extended, when the case must not be discontinued under Articles 408 and 411, the Public Prosecutor shall serve the notice on the conclusion of preliminary investigations on the suspect and his lawyer. When any of the offences referred to in Articles 572 and 612-bis of the Criminal Code are prosecuted, the same notice shall be served on the victim's lawyer or, in his absence, the victim himself.

2. The notice shall contain a brief description of the criminal act under prosecution, the rules of law allegedly violated, the date and place of the act, along with the notice that the record of the completed investigations is filed with the Clerk's Office of the Public Prosecutor and the suspect and his lawyer shall be entitled to examine it and copy it.

3. The notice shall also specify that, within twenty days, the suspect is entitled to submit briefs, produce documentary evidence, file the results of the defence investigations, request that the Public Prosecutor conduct investigative actions. He is also entitled to appear to either make statements or request to be questioned. If the suspect requests to be questioned, the Public Prosecutor shall question him.

4. If the Public Prosecutor, after the requests submitted by the suspect, orders new investigations, these must be completed within thirty days of the request submission. The time limit may be extended by the Preliminary Investigation Judge, upon request of the Public Prosecutor, only once and for no longer than sixty days.

5. The statements made by the suspect person, his questioning and the new investigative actions of the Public Prosecutor, provided for in paragraphs 3 and 4, may be used if completed within the time limit set in paragraph 4, even if the time limit set by law or extended by the Preliminary Investigation Judge for prosecution or the request to discontinue the case has expired.

<sup>89</sup> Article 335 Register of *notitiae criminis*

1. The Public Prosecutor shall enter immediately, in the dedicated register retained in his office, any *notitia criminis* he receives or acquires on his own initiative as well as, simultaneously or as of the moment it is known, the name of the alleged perpetrator of the offence.

2. If, during preliminary investigations, the legal definition of the criminal act changes or such act turns out to be differently circumstantiated, the Public Prosecutor shall update the entries provided for in paragraph 1 without recording any new *notitia criminis*.

3. With the exception of the crimes referred to in Article 407, paragraph 2, letter a), the alleged perpetrator of the offence, the victim and the lawyers, upon their own request, shall be informed of the entering of *notitiae criminis* according to paragraphs 1 and 2.

3-bis. If there are specific needs concerning the investigative activity, while deciding on the request, the Public Prosecutor may order, by reasoned decree, secrecy over the entering of *notitiae criminis* for a non-renewable period of up to three months.

3-ter. Without prejudice to the secrecy of investigations, the victim may request information on the state of proceedings to the proceeding authority, six months after the date of submission of the report or complaint.

<sup>90</sup> Gialuz, *The Italian Code of criminal procedure, a reading guide*, p. 30-31.

<sup>91</sup> Ciampi, *Diritto all'informazione nei procedimenti penali: il recepimento low profile della direttiva 2012/13/UE da parte del d. lgs. 2014 n. 101*, *penalecontemporaneo.it*, p. 9.

The Italian Code recognises the right of access to the materials of the case according to the different phases of the proceedings. As pre-trial detention and other precautionary measures, Article 293 CCP<sup>92</sup> sets up the duty for the prosecutor and the judge of preliminary investigations to allow the defendant full access to the request of the Public Prosecutor and the enclosed documents. In the framework of preliminary investigations and notwithstanding the adoption of provisions affecting the liberty of the subject concerned, the full discovery all the entire dossier intervenes at the end of the preliminary investigations according to Article 415-bis CCP.

## **RIGHT OF ACCESS TO A LAWYER**

Italy fully implemented the Directive 2013/48/EU on the right to access to a lawyer by legislative decree 15 September 2016, n. 184. The modifications were very limited: it impacted only three articles of the CPP and one of the law 22 April 2005, n. 69 on the European Arrest Warrant. The changes are not so significant and this is due to two different sets of reason: first, the content of the directive itself was not so ambitious, as the scholars noticed. Second, Italian law was already extremely protective toward defence rights. The Salduz case had no impact on the Italian system because the presence of the lawyer was already foreseen in all the relevant cases<sup>93</sup>.

In a nutshell, these are the amended provisions of the Italian CCP:

- The Article 364 CCP has been amended according to Article 3(3)(c) of the Directive introducing the investigative measure of "identification" (*individuazione di persone*) among the ones which requires to give notice to the defence lawyer at least 24h in

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<sup>92</sup> Article 293

### Enforcement requirements

1. Without prejudice to Article 156, the official or officer in charge of enforcing the order of precautionary detention shall provide the accused person with a copy of the decision along with a clear and precise written notice. If the accused does not know the Italian language, the notice shall be translated into a language he understands. The notice shall contain the following information:

- a) his right to appoint a retained lawyer and to access legal aid at the expense of the State according to the provisions of the law;
- b) his right to obtain information on the accusations raised;
- c) his right to an interpreter and to the translation of essential documents;
- d) his right to silence;
- e) his right to access documents on which the decision is based;
- f) his right to inform consular authorities and his relatives;
- g) his right to access emergency medical assistance;
- h) his right to be brought before the judicial authority within five days of enforcement of precautionary detention in prison or within ten days if a different precautionary measure is applied;
- i) his right to appear before a court for questioning, to appeal the order directing the precautionary measure and to request its substitution or revocation.

1-bis. If the written notice referred to in paragraph 1 is not promptly available in a language that the accused understands, the information is provided orally, without prejudice to the obligation to provide the accused with the aforementioned written notice without delay.

1-ter. The official or officer in charge of enforcing the order shall immediately inform the retained lawyer or the lawyer appointed by the court in accordance with Article 97 and shall draft a record of all the activities carried out, including the delivery of the written notice referred to in paragraph 1 or the information provided orally in accordance with paragraph 1-bis. The record shall be immediately forwarded to the court who has issued the order and to the Public Prosecutor.

2. The order directing measures other than precautionary detention shall be served on the accused.

3. The orders provided for in paragraphs 1 and 2, after their service or enforcement, shall be filed in the Registry of the court that has issued them together with the request of the Public Prosecutor and the enclosed documents. A notice of the filing shall be served on the lawyer.

4. A copy of the order directing a disqualifying measure shall be forwarded to the authority that may have competence over the disqualification by other legal means.

<sup>93</sup> See S. Quattrocchio, *Interventi minimi in materia di diritto di accesso al difensore: la recente trasposizione della direttiva 2013/48/UE*, in Eurojus.it, 15 October 2016; S. Quattrocchio, *Right to access to a lawyer in Europe: anything new under the sun?*, in *Processus criminalis europeus*, Festschrift fuer August Nacke, Plovdiv University Press, 2016, p. 270 ss.; G. Centamore, *Il diritto al difensore nei procedimenti di esecuzione del mandato di arresto europeo nella direttiva 2013/48/UE: osservazioni generali e aspetti problematici*, 14.1.2016, p. 6 s.)

advance of the time and place of the activity so that he will be able to participate. A derogation is possible only in exigent cases<sup>94</sup>;

- The amended version of Article 29 of the introductory provisions extends the possibility for the persons arrested in force of a EAW to come directly in touch with an Italian lawyer thanks to a service organized by the bar associations.
- Conversely, when the person is arrested in Italy in force of a EAW issued by a foreign authority, the police agent should inform him about his right to nominate a defence lawyer in that country. The President of the Appeal court shall communicate to the foreign counterparts the wish of the request to nominate a lawyer (Articles 9 and 12 of the Law 69/2005 on the EAW).

*4.2. How have national courts interpreted national legislation transposing the relevant EU directives thus far? Have significant changes been brought to the judicial practice of your country?*

It is simply too early to detect the trends of the Supreme courts.

*4.3. To what extent have national courts in the transposition process taken into account general principles of EU law and ECJ case law on EU procedural directives?*

As we highlighted previously, before the national implementation of the ABC directives took place, the Italian courts were reluctant to fully recognize certain rights such as the right to translation of certain judicial decisions. The Court of Cassation refused to interpret the Italian law in force before the abovementioned amendments in a way to be compatible with EU law. In particular, the predominant case law of the Court of Cassation excluded the right for the defendant that ignores Italian language to have a written translation in a known language of the final decision<sup>95</sup>, of the decision allowing the surrender in case of extradition<sup>96</sup>, of the order validating the arrest that was delivered during the hearing in which the interpreter assisted the suspect<sup>97</sup>.

*5. Have transposition gaps persisted? If so, could you briefly point them out?*

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<sup>94</sup> Article 364 Appointment and assistance of the lawyer

1. If the Public Prosecutor must carry out a questioning, inspection, informal identification or line-up in which the suspect must participate, the Public Prosecutor shall require the suspect to appear according to Article 375.

2. The suspected person who does not have a lawyer shall also be Informed that he shall be assisted by a court-appointed lawyer, but that he may also appoint a retained lawyer.

3. The court-appointed lawyer or the retained lawyer appointed by the suspect shall be informed, at least twenty-four hours in advance, of the activities that are to be performed as specified in paragraph 1 and of the inspections which do not require the suspect's presence.

4. In any case, the lawyer has the right to be present during the activities referred to in paragraphs 1 and 3, without prejudice to the provisions of Article 245.

5. In cases of absolute urgency, if there are reasonable grounds to believe that the delay may compromise the search for or the securing of the sources of evidence, the Public Prosecutor may carry out a questioning, inspection, informal identification or line-up even prior to the set time limit, after informing the lawyer without delay and, in any case, promptly. The notice may be omitted if the Public Prosecutor performs an inspection and there are reasonable grounds to believe that the traces or other material items of the offence may be altered. The right of the lawyer to intervene shall be preserved in any case.

6. When the Public Prosecutor acts according to the methods provided for in paragraph 5, he must specify, under penalty of nullity, the grounds for the derogation and the methods of giving notice.

7. It is forbidden for anyone participating in the activities to show signs of approval or disapproval. If the lawyer is present while the actions are carried out, he may submit to the Public Prosecutor requests, observations and reservations, which shall be included in the record.

<sup>95</sup> Cass., sez. I, 8 marzo 2014, n. 449, Cass., sez. IV, 19 marzo 2013, n. 26239, CED Cass.,

255694; Cass., sez. II, 7 December 2011, n. 46897, ivi, 251453 see Gialuz, L'obbligo di interpretazione conforme alla direttiva sul diritto all'assistenza linguistica, Dir. pen. proc., 2012, 434.

<sup>96</sup> Cass., sez. VI, 4 February 2011, n. 5760, CED Cass., 249453.

<sup>97</sup> Cass., sez. I, 23 January 2013, n. 38715, ivi, 256759, (contra, Cass., sez. I, 16 December 2010, n. 2735, ivi, 249382).

As for the Directive 2013/48, the only provision that was not transposed is Article 13 which states that in implementing the Directive, Member States should take into consideration the needs of the vulnerable suspects. The need to urgently implement the Directive 2016/800/EU of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings might be the future occasion to rethink also the need to define vulnerability of adults defendants and suspects.

Furthermore, no reference has been added to the right of the arrested or detained person to come in touch with someone that is not necessary his family or the diplomatic authorities (Article 6 and 7 of the Directive 2013/48/EU)

As for the Directive on interpretation and translation, major problems concern the lack of specific training programmes to ensure a high level of competence among interpreters/translators and lawyers so as to match the requirements of directives.

## **B.2. Directives that are still in the process of being transposed**

*6. Has the transposition process of directives adopted in 2016 begun? Do you think it will lead to important changes in the national law of your country?*

The implementation process of the two directives approved in 2016 has not start yet.

*7. In light of the Milev judgment recently delivered by the Court of Justice, are the provisions of EU directives on procedural rights being taken into consideration by national courts when interpreting national procedural law?*

See answer sub 4.3.

## **B.3. Effectiveness and adequacy of EU law on criminal procedure**

*8. In some cases, has the national legislator gone beyond the standard provided by EU directives?*

Italian system provides for a very active role for the defence during several investigative measures, in particular during the questioning of the suspect. Furthermore, the defence lawyer is very active in both collecting evidence autonomously and participates as a protagonist to the gathering of evidence in trial. Nevertheless, we might say that these powers are not related to the transposition of EU directives but rather to the adversarial turn adopted with the code approved in 1988.

*9. Do you think some procedural issues have not been addressed by EU directives/at EU level?*

As for the access to a lawyer, no specific protection is offered for the *post-iudicatum*, i.e. the execution of the penalty.

In more general terms, Italian system would suggest to increase some of the powers of the defence in order to allow an autonomous collection of evidence.

*10. To what extent do you think transposition gaps and persisting differences between the Member States may postpone/block cross-border cooperation in criminal matters, including the operation of mutual recognition instruments? If this occurred in the past, please explain which cross-border/mutual recognition measure was at stake*

From the Italian point of view, despite the differences existing with other countries, the national courts seem to be very lenient and to limit the problems using all interpretative resources to find a compromise and allow the effectiveness of mutual recognition.

*11. Has recent ECJ case law on mutual recognition measures impacted cross-border cooperation? Has the national law of your country conformed to the case law of the ECJ?*

As for the impact of the most recent judgements of the CJEU on cross-border cooperation, it can be observed that the case law of the Italian Court of Cassation fully endorsed the findings of *Caldararu and Aranyosi*. In this regard, however, it has to be highlighted that the Italian law implementing the EAW did already include an express ground for refusal based on the serious risk or torture or other inhuman or degrading treatment (art. 18 (1) (h) and the case law on the EAW and extradition had already recognised the relevance of detention conditions to refuse the surrender/extradition (although with a restrictive approach). After *Caldararu and Aranyosi*, the "two steps" approach for the assessment of the risk under the EAW FD (systemic risk and individualised assessment) has been restated in several judgements by the Court of Cassation and, it seems that more careful consideration to detention conditions is given by judicial authorities in the context of EAW proceedings.

In regard to the CJEU judgement *Piotrowski* (C-367/16) which excluded the possibility for the executing authority to carry out an individualised assessment of the personality of the minor in order to execute the surrender, it has to be observed that the Italian law implementing the EAW expressly requires such form of assessment in order to grant the surrender of a minor between 14 and 18 years old (art. 18 (1) (i) l.69/2005). The case law so far developed by the Court of Cassation is divided between some decisions requiring an autonomous assessment by the Italian executing authority<sup>98</sup> and a more flexible approach requiring the mere verification of the performance of such an assessment by the issuing authority (C. Cass., Sez. 6, 11.11.2008, n. 43127, C., (Rv. 241550); C. Cass., Sez. 6, 13.5.2009, n. 20371, D. (Rv 243679)). Arguably, this second line of case law will prevail after *Piotrowski* (nonetheless, no new decisions of the Court of Cassation have been adopted on the issue after January 2018).

### **C. Other domains that have not, or to a very little extent, been subject to harmonisation measures at EU level**

#### **Detention conditions**

*12. Does your criminal justice system provide for specific detention conditions (e.g. time-limits for custody or detention at each stage of the proceeding)?*

Art. 13 (5) of the Italian Constitution provides that "the law establishes the maximum period of preventive detention". The provision represents an essential element for the legitimate restriction of personal liberty in the context of a criminal proceedings and it is considered inherently connected with the respect presumption of innocence<sup>99</sup>: in this perspective, preventive detention must be theoretically kept separate from punishment and should not (systematically) last until the conclusion of the proceedings.

The Italian Code of Criminal Procedure gives effect to the constitutional provision by establishing an articulated system of time limits for the maximum duration of precautionary

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<sup>98</sup> (C. Cass., Sez. 6, 22.5.2008, n. 21005, S. (Rv. 240198); C. Cass., Sez. 6, 12.12.2011, n.46574 PG in proc. contro M. (Rv. 251188).

<sup>99</sup> The presumption of innocence is guaranteed under Art. 27 para 2 of the Italian Constitution. This latter provision states that "the defendant is not considered guilty until the final judgement is passed". On the relationship between the maximum time limits and the presumption of innocence, see V Grevi, *Voce Libertà Personale dell'imputato*, Enc. del Diritto vol XXIV, 1974, p. 342 and the Italian Constitutional Court, sent. 18.7.1998, n. 292.



measures<sup>100</sup>; under this system, specific time limits<sup>101</sup> are predetermined for each stage of the proceeding (investigation, trial, appeal, cassation, possible referral following the annulment by the Court of Cassation) and the performance of certain procedural acts or the occurrence of certain specific conditions may determine either the extension or the suspension of the time limits<sup>102</sup>. The transition from one to the other procedural stage determines the running of the new time limit for the new phase but, in any case, across the whole length of the proceedings certain maximum time limits cannot be exceeded<sup>103</sup>. If a specific or the maximum time limit expire the suspect or accused person must be released.

The peculiarity (and the importance) of this system is represented by its automatic and non-discretionary nature: while the suspect or accused can always be released by the judge before the expiry of the time limit<sup>104</sup>, when the time limits are exceeded, the judge has no alternative but to release the person in custody, irrespective of whether the original precautionary needs<sup>105</sup> for the adoption of the measure are still present.

*12.1. If so, do differing/absence of similar conditions regulating detention regimes in other member states constitute a ground to refuse the execution of a mutual recognition instrument, such as the EAW?*

A premise is necessary, since the I. 69/2005 provided (and still formally provides) for an express ground for refusal when the legislation of the issuing MS does not provide maximum time limits for preventive detention<sup>106</sup>.

The provision was criticised in literature already before the entry into force of the I. 69/2005<sup>107</sup> as a 'legislative bug' capable of almost systematically paralyzing the execution of EAWs: it is a well-known fact, indeed, that EU MSs adopt a variety of mechanisms to contain the duration of preventive custody and that such systems are not always based on a system of predetermined statutory time limits.

What is more such kind of ground for refusal was unknown under the previous regime of extradition<sup>108</sup>.

Due to its importance and to its potential for the defence of requested person, the case law of the Court of Cassation was confronted with the issue shortly after the entry into force of the implementing law.

A first line of case law started in 2006 with the decision in *Cusini*, adhered to a strict and literal reading of the provision and acknowledged the impossibility to execute the EAW issued by a MS (Belgium) which adopts a system of periodical reviews of preventive detention instead of a system of statutory maximum time limits<sup>109</sup>.

The point nonetheless remained controversial and, in early 2007, the Court of Cassation in its plenary composition ('*Sezioni Unite*') intervened to settle the issue. The case concerned

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<sup>100</sup> For precautionary detention and house arrest, see Art. 303 CPP. Time limits are provided also for non-custodial precautionary measures but, in this latter case, the maximum time limit is the double of that provided for custodial measures (precautionary detention and house arrest), see Art. 308 CPP.

<sup>101</sup> Diversified in reason of the gravity of the offence; special provisions are laid down in regard to serious organised crime and terrorism.

<sup>102</sup> See Artt. 304 and 305 Italian CPP.

<sup>103</sup> See Art. 303 para 4 Italian CPP.

<sup>104</sup> Following a request for revocation or substitution of the measure according to Art. 299 CPP.

<sup>105</sup> The precautionary needs for the adoption of any precautionary measure represent a *numerus clausus*. They are defined in a specific way under Art. 274 CPP and relate to the need to preserve of the correct gathering of evidence from a real risk of suppression or tampering by the suspect or accused, the need to prevent a real risk of flight of the suspect or accused person or his/her social dangerousness determined according to specific indicators (including his/her previous criminal records and the nature of the crime under investigation or prosecution).

<sup>106</sup> Art. 18 para 1 (e) I. 69/2005.

<sup>107</sup> See C Pansini, *il rifiuto della consegna motivato da esigenze processuali* in G Pansini and A Scalfati, *Il Mandato di Arresto Europeo*, ESI, 2005 p.164; E Calvanese, *Problematiche attuative del mandato d'arresto europeo*, in *Cassazione Penale* 2007, p. 1392.

<sup>108</sup> See G Iuzzolino, *La decisione sull'esecuzione del mandato d'arresto europeo* in M Bargis and E Selvaggi (eds), *Mandato d'arresto europeo. Dall'estradizione alle procedure di consegna* (Giappichelli 2005) 289.

<sup>109</sup> C. Cass. Sez. VI, 8.5.2006, n. 16542, *Cusini* (Rv. 233546).

an EAW issued by German authorities for the purposes of prosecution and the decision taken in the case *Ramoci*<sup>110</sup> still represents the main judgement delivered on the Italian law on the EAW.

In *Ramoci* the Court of Cassation interpreted the national provision laying down the specific ground for refusal in light of the objectives of the FD on the EAW and of the high level of mutual trust between the EU MS, making an express reference to the *Pupino* judgement of the CJEU and the doctrine of “conforming interpretation”<sup>111</sup>.

In this perspective, the Court concluded that the absence of statutory maximum time limits in the issuing MS should not *per se* constitute an obstacle to the surrender, provided that an equivalent mechanism for the containment of the length of preventive detention – also in the form of periodical reviews without automatic release - can be retraced in the law or in the practice of that system.

The solution in *Ramoci* has been criticized in literature<sup>112</sup> for substantially achieving the disapplication of a clear national norm through the principle of conforming interpretation<sup>113</sup>; notwithstanding the criticism, however, the Constitutional Court validated the approach of the Court of Cassation by excluding doubts of unconstitutionality<sup>114</sup>.

The subsequent case law of the Court of Cassation, confirmed the *Ramoci* approach and recognised the “equivalence” of other legal systems, allowing the surrender to France<sup>115</sup>, Austria<sup>116</sup>, Lithuania<sup>117</sup>, Spain<sup>118</sup>, Greece<sup>119</sup>, Scotland<sup>120</sup>, England and Wales<sup>121</sup>, Romania<sup>122</sup>, Poland<sup>123</sup>, Hungary<sup>124</sup> and Luxembourg<sup>125</sup>.

*12.2. Has the Aranyosi and Căldăraru judgment impacted the decisions taken by the judicial authority of your country on the operation of the EAW?<sup>126</sup> Have some EAWs been suspended/refused on those grounds by the judicial authorities of your country?*

Art. 18 (1) (h) of Italian implementing law on the European Arrest Warrant (l.n.69/200) provides expressly a mandatory ground for refusal in case the surrender should entail “a

<sup>110</sup> C. Cass. Sez. Un, 30.1.2007, n. 4616, *Ramoci* (Rv. 235531).

<sup>111</sup> CJEU, 16.6.2005, C-105/03, *Pupino*. In *Pupino*, the CJEU affirmed that national courts are under an obligation to interpret national law as far as possible in the light of the wording and purpose of a FD. Conforming interpretation – as an obligation stemming from the principle of loyal cooperation - represented a long-standing doctrine applied to Directives in the context of the - back then – “First Pillar”; with *Pupino* the Court extended its applicability to the “Third Pillar” Framework Decisions. The Court of Cassation in *Ramoci* made also reference to the case law of the ECtHR on Art. 5 ECHR and to the Recommendations of the CoE (13/2006) on preventive detention as a support to its interpretation.

<sup>112</sup> See G Frigo, *Annullare la garanzia del limite massimo sconfina nelle prerogative del legislatore*, in Guida al Diritto, 2007, 10 p 45 ; A Di Martino, *Questo limite non è un termine. Tecnicismi ‘specifici’ e ‘collaterali’ nel contesto di un sistema penale internazionalizzato*, in Archivio Penale 2011.

<sup>113</sup> In *Pupino*, the CJEU had indeed attached a *caveat* to the principle of conforming interpretation (par. 47): ‘the principle of conforming interpretation cannot serve as the basis for an interpretation of national law *contra legem*’. Such *caveat*, under the previous institutional framework, was inherent to the nature of the FDs which were expressly deprived of direct effect (See Art. 34 para 2 of the Pre-Lisbon TEU). It was implied by this line of criticism that where a national provision was in contrast with a FD and (such as Art. 18 para 1 (e)) had a clear meaning: 1. there would have been no room for interpretation 2. any conforming interpretation different from the literal meaning of the national provision would have inevitably resulted in a *contra legem* interpretation and in an inadmissible disapplication of national law.

<sup>114</sup> See Italian Constitutional Court, ord. 109/2008.

<sup>115</sup> C. Cass., Sez. VI, 19.2.2007, n. 41758, *Brugnetti*.

<sup>116</sup> C. Cass., Sez. VI, 20.3.2007, n. 12405, *Marchesi* (Rv. 235907).

<sup>117</sup> C. Cass., Sez. VI, 19.3.2008, n. 12665, *Vaicekauskaitė* (Rv. 239155).

<sup>118</sup> C. Cass., Sez. VI, 4.9.2008, n.34781, *Varacalli* (Rv. 240921).

<sup>119</sup> C. Cass., Sez. Fer., 28.8.2008, n. 34754, *PG contro Orsi* (Rv. 240716).

<sup>120</sup> C. Cass., Sez. VI, 2.7.2010, n. 26194, *Mancioppi* (Rv. 247827).

<sup>121</sup> C. Cass., Sez. VI, 14.12.2012, n.48777, *Crapuljar* (Rv. 254012).

<sup>122</sup> C. Cass., Sez. VI, 22.11.2013, n. 47013, *Busuioc* (Rv. 258031).

<sup>123</sup> C. Cass., Sez. VI, 27.2.2014, n. 9938, *Wojcik* (Rv. 261534).

<sup>124</sup> C. Cass., Sez. VI, 30.12.2014, n. 49, *Chitoroaga* (Rv. 261847).

<sup>125</sup> C. Cass. Sez. VI, 11.7.2017, n. 34439, *Ovieroba* (Rv. 270761).

<sup>126</sup> For example, through postponing its execution if there exists substantial evidence that detention in the issuing state may result in a breach of Article 3 ECHR / Article 4 of the Charter.

serious risk for the requested person to be subject to the death penalty, torture or other inhuman or degrading treatment or punishment”<sup>127</sup>.

Before the CJEU judgment in *Caldararu and Aranyosi*, the Italian Court of Cassation had dealt with Art. 18 (1) (h) of l. 69/2005 in the 2014 case *Florin*<sup>128</sup>, excluding that the mere existence of a situation of prison overcrowding in the issuing Member State could, in the absence of other concrete and specific elements, integrate the “serious risk” required by the provision to refuse the surrender.

After *Caldararu and Aranyosi*, the Court of Cassation expressly endorsed the CJEU “two steps approach” in several different cases starting from *Barbu*<sup>129</sup>.

Following and expressly quoting the CJEU, the Italian Cassation established that the Italian executing authority, when addressed under art. 18 (1) (h) l. 69/2005, shall in first place assess the existence of a concrete risk of inhuman and degrading treatment due to the general detention conditions on the basis of “objective, reliable, specific and properly updated” information which may include judgements of the ECtHR and documents from international institutions such as CoE and UN; if the existence of such risk is established then, the Italian judicial authority shall perform an individualized assessment of the risk, by contacting and requiring “any necessary information” from the issuing authority. The Court of Cassation concluded that if the individualized assessment shows that the risk cannot be excluded, the Italian judicial authority is bound to refuse the execution *rebus sic stantibus* (“*allo stato degli atti*”), meaning that, in case the risk conditions should change for the better in the issuing Member State, such previous refusal would not prevent a second decision granting the surrender<sup>130</sup>. In terms of legal certainty, this solution is undoubtedly preferable to the unclear indication of a “postponement” of the surrender contained in *Caldararu and Aranyosi*, although the adoption of a refusal *rebus sic stantibus*, will determine the immediate (and unconditional) release of the person<sup>131</sup>.

In subsequent decisions, the Court of Cassation highlighted certain specific aspects to be considered in assessing the existence of an individualized risk: the Italian executing authority, in particular, will have to take into account (and require information about) the regime of detention to which the person will be subject in case of surrender. In case of “continuous” (“closed”) detention it shall be ensured to the detainee a cell space of at least 3 m<sup>2</sup> (according to the ECtHR case law<sup>132</sup>); in cases of “semi-detention”, a smaller cell space may be accepted, provided that that other conditions are fulfilled (short duration of the detention, sufficient freedom of movement outside the cell and overall adequate detention conditions)<sup>133</sup>.

<sup>127</sup> In the Italian text “ se sussiste un serio pericolo che la persona ricercata venga sottoposta alla pena di morte, alla tortura o ad altre pene o trattamenti inumani o degradanti”. In the domain of extradition, art. 705 (2) (c) of the Italian Code of Criminal Procedure did already provide for an express refusal of the extradition in such cases. For the case law of the Court of Cassation refusing extradition in such cases see: C. Cass., Sez. VI, 12.7.2004, n.359892, Sumanschi (Rv. 229964); C. Cass., Sez. VI, 15.10.2013, n. 46212, Van Coolwijk, (Rv. 258082). The case law of the Court of Cassation, however, has in different occasions admitted the possibility of granting the extradition when the authorities of the requesting State – at the highest level of government - had provided specific reassurances on the differentiated treatment of the requested person: see C. Cass., Sez. VI, 11.2.2015, n. 10965, Pizzolato (Rv. 262934) and C. Cass., Sez. II, 6.10.2015, n. 2282, Repubblica Federal del Brasile (Rv. 266253).

<sup>128</sup> C. Cass., Sez. VI, 15.10.2014, n. 43537, Florin (Rv. 260448)

<sup>129</sup> Shortly after the CJEU *Caldararu and Aranyosi* judgment, the Court of Cassation delivered a series of decisions in cases relating to Romanian EAWs: C. Cass., Sez. VI, 1.6.2016, n. 23277, Barbu (Rv. 267296); C. Cass., Sez. VI, 14.6.2016, n. 25423, Rusu (n.m.); C. Cass., Sez. VI, 8.7.2016, n. 29721, Udrea (n.m.); C. Cass. Sez. VI, 18.8.2016, n. 35255, Tornita (n.m.)

<sup>130</sup> To date remains unclear, however, whether the executing procedure should restart from the beginning and which issues should be considered as covered by *res judicata*/preclusion.

<sup>131</sup> The solution indicated in *Lanigan* (CJEU, 16.7.2015, C-237/15 PPU, *Lanigan*, par. 61) and recalled in par. 98 of *Caldararu and Aranyosi* seems difficult to be retained in case of a formal (although *rebus sic stantibus*) refusal of surrender. The maintenance/extension of measures involving detention shall be excluded in terms of legality and proportionality, but also the possibility of adopting control/obligatory measures after a refusal of the surrender should be based on a proper legal basis (and this seems not to be the case at the moment).

<sup>132</sup> ECtHR, 4.12.2012, *Torreggiani v. Italy*, app. n. 43517/09; ECtHR, 21.7.2007, *Kantjyrev v. Russia*, app. n. 37213/02; ECtHR, 29.3.2007, *Frolov v. Russia*, app. n. 205/02.

<sup>133</sup> See C. Cass., Sez. VI, 9.11.2017, n. 53031, P. (Rv. 271577).

Recent decisions of the Court of Cassation reaffirmed the need for an individual inquiry in regard to the surrender to Belgium<sup>134</sup>, by referring to the findings of the judgment *Vasilescu v. Belgium*<sup>135</sup>.

Interestingly, express references to *Caldararu and Aranyosi* were made also in the context of extradition to Third Countries<sup>136</sup>.

An open question, under the Italian case law, relates to reports by NGOs and their use in extradition and EAW proceedings to substantiate the existence of a systemic risk: one line of case law consistently rejected the possibility to use such documents<sup>137</sup>, while recent judgements accepted reports coming from Amnesty International or other reliable non-governmental organizations<sup>138</sup>.

*13. Does your criminal justice system take into account a custodial sentence (or part of it) already served in other EU state after a prisoner is transferred to your country?*

Detention suffered abroad in precautionary custody or in execution of a sentence before the transfer of the prisoner to Italy is taken into account in the determination of the length sentence to be executed in Italy<sup>139</sup>.

Art. 16 of the Legislative Decree n. 161/2010 implementing the Framework Decision 2008/909/JHA expressly provides that the part of the sentence already served in the transferring Member State must be accounted for the determination of the sentence to be executed in Italy.

The same principle applies in the context of the European Arrest Warrant with regard to the custody suffered in another Member State pending the decision on the surrender to Italy.

In case of an EAW issued for the purposes of prosecution in Italy, the custody suffered abroad in the context of its execution is taken into account to determine the time limits of pre-trial custody according to artt. 303 and 304 of the Italian CPP<sup>140</sup>.

*14. Does your criminal justice system provide for a compensation regime for unjustified detention for the purpose of executing an EAW (e.g. in case of mistaken identity of the suspect/accused)? If so, could you please describe the features of such regime?*

The general provisions for the compensation for unjustified detention (art. 314 and 315 Italian Code of Criminal Procedure) are, in principle, applicable to extradition and the European Arrest Warrant proceedings. The Constitutional Court<sup>141</sup> and the Court of Cassation<sup>142</sup> have acknowledged such a possibility.

In the case of extradition, being Italy the requested State, the Constitutional Court specified that compensation for unjust detention may be admissible when is *ex post* established the

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<sup>134</sup> C. Cass., Sez. VI, 3.5.2017, n. 22249, Bernard Pascale (Rv. 269920) and C. Cass., Sez. VI, 21.2.2018, n. 8916, R.G. (n.m.)

<sup>135</sup> ECtHR, 25.11.2014, *Vasilescu v. Belgium*, app. n. 64682/12.

<sup>136</sup> C. Cass., Sez. VI, 15.11.2016, n. 54467, Resneli (Rv. 268932)

<sup>137</sup> See C. Cass., Sez. VI, 8.4.2014, n. 30864, Lytvynyuk (Rv. 260055); C. Cass., Sez. VI, 20.12.2013, n. 2657, Cobalan (Rv. 257852); C. Cass., Sez. VI, 5.2.2008, n. 15626, Usurelu (Rv. 239672).

<sup>138</sup> See, in regard to an extradition case, C. Cass., Sez. VI, 15.11.2016, n. 54467, Resneli (Rv. 268932). This case related to an extradition requested by Turkey and the Court, referring *inter alia* to *Caldararu and Aranyosi*, admitted the possibility to ascertain the existence of a systematic risk on the basis of reports of NGOs (together with other sources, such as decisions adopted by courts of other Member States).

<sup>139</sup> See Artt. 657 of the Italian Code of Criminal Procedure.

<sup>140</sup> See Art. 33 of the l. n. 69/2005 and C. Cost., 7.5.2008, n.143 which declared unconstitutional the part of art. 33 of l.n. 69/2005 limiting the relevance of the custody suffered abroad in execution of an EAW to the sole determination of the maximum statutory time limits of pre-trial detention. As a consequence of the Constitutional judgement the custody suffered abroad in execution of the EAW must be fully taken into account in determining the time limits of pre-trial detention according to the Italian Code of Criminal Procedure.

<sup>141</sup> See Italian Constitutional Court, judgement n. 231/2004.

<sup>142</sup> See C. Cass., Sez. IV, 12.12.2008, n. 2678, Pramstaller (Rv.242505)

lack of the conditions to grant the extradition<sup>143</sup>. According to the law implementing the EAW (l.n.69/2005) coercive measures cannot be applied if there are reasons indicating the existence of a ground for refusal<sup>144</sup>.

However, an essential condition generally applicable to the ordinary regime of compensation for unjust detention is that the person unjustly detained had not induced intentionally or due to gross negligence the erroneous assessment of the judicial authority.

*15. What would you recommend as further action for EU institutions in the area of detention (e.g. action for failure to act, harmonisation measures, etc.)?*

The current framework on mutual recognition in criminal matters presents several asymmetries.

In particular after the adoption of the European Investigation Order, a reflection on the absence in the EAW FD of a ground for refusal based on the risk of violation of fundamental rights is needed.

The solution currently provided by the CJEU in *Caldararu and Aranyosi* represents a significant step forward – particularly in regard to the previous case law of the Court – but lacks of clarity in regard to the “postponement” of the surrender if the existence of that risk cannot be discontinued “in a reasonable time” and the limit of “non-excessiveness” of the extension of the detention in case of postponement of the surrender.

Such aspects would require further consideration, for the sake of legal certainty in the context of the right to liberty.

As for what concerns detention conditions, even considering the doubts about the existence of a legislative legal basis on penitentiary rules<sup>145</sup>, an EU initiative setting minimum standards (inspired to the ECtHR and CoE) would contribute to the improvement of the current situation (and could represent potentially a guidance to consistently apply the findings of *Caldararu and Aranyosi* in the context of the EAW).

## **Evidence gathering and admissibility**

*16. Were negotiations on the European Investigation Order hindered and/or slowed down by the existence of different rules in evidence gathering and admissibility?*

Evidence gathering and admissibility in criminal proceedings undoubtedly represent a raw nerve of approximation of procedural rules and mutual recognition within the AFSJ.

The most recent example of the difficulty to agree on minimum rules in this field is undoubtedly represented by the Regulation on the establishment of the European Public Prosecutor’s Office, under which the rules on evidence gathering (by a single office) were essentially left to national law.

In the context of mutual recognition, the negotiations of the European Investigation Order - which lasted more than 3 years - were not easier. Besides the length of the legislative procedure and the trilogues, the complexity of the final text of the Directive is an indirect evidence of the difficult of the negotiations.

In more general terms, however, it cannot be overlooked that rules on evidence are inherently connected with the deeper systemic choices of a specific procedural system, including a certain understanding of the purposes of the criminal trial (the search for material truth historically sat uneasily with strict formal rules on evidence).

<sup>143</sup> See Italian Constitutional Court, judgment n. 231/2004.

<sup>144</sup> See art. 9 (6) l. n. 69/2005.

<sup>145</sup> Although a reasonable interpretation of Art. 82 (2) (b) TFEU might allow legislative action on minimum standards of detention as “rights of individuals in criminal procedure”.

While it is certainly possible to identify a majoritarian procedural tradition across continental Europe (“inquisitorial plus procedural guarantees”), it is also true that some systems (including Italy) moved away from the Napoleonic tradition towards a more adversarial approach. Identifying common standards in this context is not impossible but surely requires a higher degree of common commitment to the establishment of the Area of Freedom Security and Justice than other fields of approximation.

In the field of judicial cooperation, however, it is also true that national Courts developed compromise solutions in order to accommodate judicial cooperation and the national principles and rules on evidence (see, in this regard the next answer and, with regard to the EAW, the answer to question n. 20).

*17. Is evidence gathered in another EU state admissible in criminal proceedings in your country? If so, must evidence conform to domestic rules on evidence gathering?*

The Italian Code of Criminal Procedure regulates gathering of evidence abroad through rogatories under articles 723-729; the provisions of the Code, however, are subsidiary and residual to the provisions contained in the multilateral or bilateral conventions on MLA<sup>146</sup>. Until recently, the main multilateral instrument available to the Italian authorities to gather evidence in other EU Member States was represented by the 1959 CoE Convention; Italy, indeed, implemented the 2000 EU MLA Convention only in 2016<sup>147</sup>. The law implementing the European Investigation Order was implemented in June 2017 with the Legislative Decree n. 108/2017<sup>148</sup>.

Evidence gathered abroad under the framework of traditional MLA is considered admissible by the Italian case law. As for the divergence or conformity of the *lex fori* to the Italian procedural rules, the Italian Constitutional Court in 1995<sup>149</sup> clarified that, evidence gathered abroad needs not to conform to the rules of the Italian Code of Criminal Procedure in order to be admissible but must, in any case, comply with the fundamental principles of the Italian legal system, which include the right to defence<sup>150</sup>. The concrete modalities of exercise of the right to defence remain, however, those established by the *lex loci*. Therefore, evidence gathered abroad is admissible under two general conditions: compliance with the *lex loci* and compatibility with the fundamental principles of the Italian legal order.

The case law of the Court of Cassation followed this approach and held consistently that evidence gathered abroad is generally admissible, unless incompatible with fundamental principles of the legal order<sup>151</sup>. The case law of the Court of Cassation specified that only a lack of provisions on defense rights would affect the admissibility for a violation of the right to defense<sup>152</sup>.

Documents or information spontaneously transmitted by foreign judicial authorities or international or supranational organizations are considered fully admissible by the case law<sup>153</sup>.

*18. Which authority is in charge of reviewing how evidence has been gathered in the other EU state?*

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<sup>146</sup> See Art. 696 Italian Code of Criminal Procedure

<sup>147</sup> L. n. 149/2016 adopted on 21 July 2016.

<sup>148</sup> Legislative Decree n. 108/2017 adopted on 21 June 2017.

<sup>149</sup> See Italian Constitutional Court judgment 12 July 1995 n. 379.

<sup>150</sup> Expressly foresee by the Constitution under art. 24 Cost.

<sup>151</sup> See, in particular, C. Cass., Sez. Un., 25.2.2010, n.15208, Mills (Rv. 246587) on the admissibility of statements gathered abroad from a witness that, under Italian law, would have been entitled to professional privilege; C. Cass., Sez. VI, 1.12.2010, n. 44488, De Falco (Rv. 248963); C. Cass., Sez. I, 7.10.2005, n. 45103, Schneeberger, (Rv. 232701); C. Cass., Sez. 1, 3.3.2003, n. 41302 (n.m); C. Cass., Sez. V, 14.10.1996, n. 873, Colecchia et al. (Rv. 206902).

<sup>152</sup> See C. Cass., Sez. VI, 24.4.2012, n. 43534

<sup>153</sup> C. Cass., Sez. I, 20.2.2014, n. 37250, Bongiorno (Rv. 260588); C. Cass., Sez 2, 2.7.2008., n.35130, Catanese (Rv. 240956); C. Cass., Sez. VI, 27.1.2005, n. 9960, Biondo et al. (Rv. 231048).

Evidence obtained from another State through traditional MLA rogatory letters or through the European Investigation Order<sup>154</sup> is inserted in the trial dossier ("*fascicolo per il dibattimento*"<sup>155</sup>). Such dossier is composed after the adoption at the preliminary hearing of a decree for the committal to trial<sup>156</sup>. At this stage the parties can object to the inclusion / exclusion of the specific items of evidence in the dossier.

Normally, issues of admissibility of evidence are decided by the trial judge.

Objections or motions on the inadmissibility and exclusion of unlawfully obtained evidence (including evidence gathered abroad see *supra* question 17) however are possible at any stage of the proceeding before the judge functionally competent for that stage<sup>157</sup>. The competent judge can also declare the exclusion of the evidence *ex officio*.

The unlawfulness of evidence may also constitute a ground for appeal of the decision adopted on the basis of that evidence (before the Court of Appeal or the Court of Cassation).

*19. Can evidence that is gathered unlawfully or may entail a breach of fundamental rights be used during the trial? If not, are there exceptions to this rule?*

Unlawfully gathered evidence is not admissible under the Italian Code of Criminal Procedure. Art. 191 ICCP provides for the exclusion ("*inutilizzabilità*") of evidence unlawfully gathered and, as mentioned in the previous answer, such exclusion may be declared at any stage of the proceeding. Violation of constitutionally protected fundamental rights may determine the exclusion under such provision<sup>158</sup>.

*20. To what extent do you think differing rules on gathering and admissibility of evidence have constituted obstacles to the operation of mutual recognition instruments, including in the case of the EAW?*

Art. 17 (4) of the Italian law implementing the EAW (l. n. 69/2005) requires the verification of a probable cause ("*serious indications of guilt*" / "*gravi indizi di colpevolezza*") as a condition to execute an EAW for the purposes of prosecution.

In addition, Art. 1 (1) of the same law, by referring to the constitutional guarantees on fair trial, seems to recall the extension of the evidentiary principles contained in Art. 111 of the Italian Constitution as conditions to execute an EAW. The Constitutional provision – reformed in 1999 – consecrates the basic evidentiary rule for the Italian criminal trial represented by the principle of adversary gathering of evidence (adversary hearing / "*contraddittorio nella formazione della prova*"). This rule implies that the judge shall not use evidence other than that lawfully gathered during the trial stage and, in principle, excludes the possibility of using hearsay evidence or other materials unilaterally gathered during the investigations<sup>159</sup>.

Considering the variety of approaches that are still present in Europe on the way evidence is gathered and admitted in criminal proceedings, requiring the executing authority to verify the respect of domestic evidentiary principles and rules on evidence for the execution of an EAW would have probably determined systematic refusals of surrender and a clash with the principle of mutual recognition.

<sup>154</sup> See Art. 36 of the Legislative decree n. 108/2017.

<sup>155</sup> See Art. 431 (1) (d) and (f) of the Italian Code of Criminal Procedure.

<sup>156</sup> See Art. 430 Italian code of Criminal Procedure.

<sup>157</sup> See Art. 191 (2) of the Italian Code of Criminal Procedure.

<sup>158</sup> See under the previous Code of Criminal Procedure: C. Cost., 4.4.1973, n. 34. Under the new Code of Criminal Procedure (1988): C. Cass., Sez. Un., 13.7.98, n. 21, Gallieri (Rv. 211196); C. Cass., Sez. Un., 23.2.2000, n. 6, D'Amuri (Rv. 215841); C. Cass., Sez. Un., 21.6.2000, n. 16, Tammaro (Rv. 216247); C.Cass., Sez. Un., 28.5.2003, n. 36747, Torcasio; C.Cass., Sez. IV, 21.9.07, n. 38537, Saltari (Rv. 237780).

<sup>159</sup> The materials and the information gathered during the investigation are formally qualified under the Italian Code of Criminal Procedure as "elements of proof" and are not technically "evidence", i.e. they can be used for grounding a conviction. Exceptions, allowing for the use of such materials, are granted under the same art. 111 (5) Cost (ascertained objective impossibility or proven illicit conduct) and are generally considered exhaustive and of strict interpretation.

Also in this regard, however, the case law of the Court of Cassation has generally endorsed a flexible approach, in order to make judicial cooperation and mutual recognition workable.

Since the very first two decisions on the EAW, *Osman*<sup>160</sup> and *Ilie Petre*<sup>161</sup>, the Court of Cassation interpreted the provision imposing the control about the existence of "serious indications of guilt" / "*gravi indizi di colpevolezza*" (Art. 17 (4)) in the sense of a mere formal verification, excluding an actual review of the reasoning and the evidence already assessed by the issuing authority. In coherence with the extradition framework (which generally excludes such an intrusive control over the merits), the Court indeed stated that in the context of the EAW the expression "*gravi indizi di colpevolezza*" does not entail the same meaning of the Code of Criminal Procedure<sup>162</sup>, but rather that of as an extrinsic verification of the mere existence of a reasoning accompanying the EAW.

Such approach has been consolidated in the abovementioned *Ramoci* decision and reiterated in the subsequent case law of the Court<sup>163</sup>.

Furthermore, in the case *Pintea* (2009)<sup>164</sup> the Court of Cassation expressly excluded that the Italian authority has the power to examine and review the modalities through which the evidence grounding the conviction underlying and EAW has been acquired in the issuing Member State: therefore the use as evidence of witness statements gathered by the police during the pre-trial stage (a circumstance which in the Italian system would be allowed only exceptionally) was not considered as an obstacle to the surrender.

In 2012 in the *Baldi* decision<sup>165</sup> the Court restated that the yardstick for assessing the respect of fair trial's guarantees in the context of the execution of an EAW is represented by the ECtHR standards and that it is not necessary for the legal order of the issuing MS to present a configuration of the procedural safeguards identical to that provided by the Italian Code of Criminal Procedure.

## Criteria allocating jurisdiction

### 21. To what extent the absence of binding criteria allocating jurisdiction hinders cross-border cooperation?

Conflicts of jurisdiction and parallel criminal proceedings may hinder cross border cooperation. Parallel uncoordinated investigations and prosecutions for the same facts and against the same person may unnecessarily waste resources and increase, within the AFSJ, the risk of breaching transnational *ne bis in idem* situations.

European *ne bis in idem* under Art. 54 CISA and 50 EU CFR provides undoubtedly a fundamental guarantee for the individual but, on the other hand, its "first come, first served" way of operating may also lead to random and arbitrary results. The existence of a developed principle of transnational *ne bis in idem* within the AFSJ does not represent an alternative or relief the EU and the Member States from the need to predispose an adequate mechanism for the prevention or at least the settlement of conflicts of jurisdiction within the AFSJ.

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<sup>160</sup> C. Cass., Sez. Fer., 13.9.2005, n. 33642, Hussain Osman (Rv 232118).

<sup>161</sup> C. Cass., Sez. VI, 23.9.2005, n. 34355, Ilie Petre (Rv. 232053).

<sup>162</sup> The concept of "*gravi indizi di colpevolezza*" in the Code of Criminal Procedure identifies the general requirement for the adoption of a precautionary measure. See Art. 273 of the Italian Code of Criminal Procedure.

<sup>163</sup> See C. Cass. Sez VI, 16.4.2008, n. 16362, Mandaglio (Rv. 239649); C. Cass., Sez. VI, 17.9.2008, n.35832, Indino (Rv. 240722); and more recently C. Cass., Sez. VI, 6.6.2017, n. 28281, Mazza (Rv.270415). In the opposite sense there seems to be only a spare - and outdated - precedent (C. Cass., Sez. VI, 3.4.2006, n. 12453, PG contro Nocera (Rv. 233543) which affirmed the power of the executing authority to assess the credibility of an accusation of complicity underlying an EAW according to the rules of the Italian CCP (Art. 192 para 3 of the CPP establishes that an accusation of complicity must be corroborated by other elements confirming the credibility of the accuser).

<sup>164</sup> C. Cass. Sez. VI, 24.11.2009, n. 46223, Pintea (Rv 245450) ; more recently, see also Cass. Sez. VI, 26.1.2016, n. 3949, Picardi (Rv. 267185).

<sup>165</sup> C. Cass., Sez. VI, 27.1.2012, n. 4528, Baldi (Rv. 251959).



Besides efficiency considerations and the need to respect *ne bis in idem*, the existence of a mechanism and clear criteria for allocating jurisdiction in the context of a jurisdictional conflict within the AFSJ is required by other fundamental guarantees under primary EU Law.

The absence of clear criteria for allocating jurisdiction, indeed, appears problematic in regard to the fundamental guarantee to a lawful judge recognized by the EU CFR<sup>166</sup>. Art. 47 (2) of the EU CFR indeed entitles everyone with the right to a judge “previously established by law”<sup>167</sup> implying a minimal core of legality – a reasonable level of foreseeability - in the context of conflicts of jurisdiction.

This because, as it has been pointed out in literature, “to choose jurisdiction means also to choose rules and context”<sup>168</sup> and holding a criminal trial in one Member State rather than another is not neutral for the legal position of the suspect or accused. The determination of jurisdiction, indeed, determines the procedural rules applicable and, most importantly, the substantive criminal law applicable. Different procedural and substantive rules may entail very different trial outcomes and, from the defendant’s perspective, different defence chances and choices.

In this perspective, the current EU legal framework on the prevention and settlement of conflicts of jurisdiction does not appear satisfactory: FD 2009/948/JHA lays down a mere contact and consultation procedure between judicial authorities based on consensus without providing for clear criteria on the determination of the competent jurisdiction and remaining unclear on the outcome of such consultation.

The current Eurojust framework, on the other hand, is also based on consensus with a residual possibility of the adoption of a non-binding opinion of the College<sup>169</sup>.

Although the Eurojust Guidelines (firstly adopted in 2003 and revised in 2016) represent a valuable attempt to provide a certain (minimal) degree of transparency in the context of the resolution of conflicts of jurisdiction, their soft law and inherently flexible nature does not seem to ensure an adequate level of foreseeability to the individual.

Furthermore, both the horizontal consultation mechanism of FD 2009/948/JHA and the Eurojust competence on the prevention and settlement of conflicts of jurisdiction do not consider any role for the defence of the individual concerned. Although the individual does not have a right to be prosecuted in a specific jurisdiction<sup>170</sup>, providing to the suspect or the possibility to express his/her point of view in the context of the consultations between the judicial authorities (when possible without the risk of jeopardizing the investigations or other essential interests) would ensure a more balanced and fair determination of the jurisdiction to prosecute.

### The Italian implementation of FD 2009/948/JHA

Italy implemented FD 2009/948/JHA in 2016 (with a delay of 4 years on the final date for transposition) with the Legislative Decree 29/2016<sup>171</sup>. The implementation law identifies the competent authorities in:

a) the judicial authority in charge of conducting proceeding: when the Italian authority is the ‘contacting’ authority; the competent contacting authority thus will be the public prosecutor during the investigations and the trial judge during the trial phase;

b) the Prosecutor General before the Court of Appeal: when the Italian authority is the ‘contacted’ authority. The Prosecutor General before the Court of Appeal is also the

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<sup>166</sup> In this regards see M. Panzavolta, *Choice of Forum and the Lawful Judge Concept*, in M. Luchtman (Ed.), *Choice of Forum in Cooperation Against EU Financial Crime. Freedom, Security and Justice and the Protection of Specific EU-Interests*. Eleven Publishing, 2013, p. 159

<sup>167</sup> See M. Panzavolta, *Choice of Forum and the Lawful Judge Concept*, cit., p.

<sup>168</sup> See M. Panzavolta, *Choice of Forum and the Lawful Judge Concept*, cit., p. 160

<sup>169</sup> Art. 7 (a) (ii) of the Current Eurojust Decision.

<sup>170</sup> See J. Vervaele, *European Territoriality and Jurisdiction*, cit., p. 180

<sup>171</sup> See the Legislative Decree 29/2016 adopted on 15 February 2016 and effectively in force on 11 July 2017.

competent authority to engage and conduct the direct consultations foreseen by art. 10 of the FD;

c) the Ministry of Justice: must be informed in case of direct consultations only for the purpose of opposing to the concentration of proceedings in another Member State when such a circumstance could compromise national security or other essential interests of the Italian State.

The Italian law of implementation, similarly to the Spanish one<sup>172</sup>, includes a set of criteria that the Prosecutor General before the Court of Appeal has to take into account during the direct consultations with the competent authorities of other Member States<sup>173</sup>. Those criteria are listed in a non-hierarchical way and are:

- a) the place where took place the majority of the action, omission or result
- b) the place where the major part of the damage occurred
- c) the place of residence, domicile or abode of the suspect or accused
- d) considerations relating to the perspectives of surrender or extradition of the suspect
- e) considerations about the protection of victims and witnesses
- f) homogeneity of the sanctions
- g) any other relevant factor.

In case of concentration of proceedings in Italy the detention suffered abroad is taken into account for the purposes of determining the length of the pre-trial custody or the sentence in Italy<sup>174</sup>.

*22. Do you think we should adopt an EU instrument that goes beyond existing measures and Eurojust's competence in the field (e.g. Framework Decision 2009/948/JHA on conflicts of jurisdiction)?*

As mentioned under the previous answer the lack of clear criteria on the determination of the competent jurisdiction in case of conflict within the AFSJ appears in tension with art. 47 (2) EU CFR and, in our view, would need a legislative intervention in order to ensure a reasonable level of foreseeability.

This should imply the inclusion in an instrument of secondary EU law at least of a set of criteria for the determination of the competent jurisdiction and minimal procedural rules to settle the conflict.

The criteria should not be necessarily binding or hierarchically listed (although a "prioritization" of jurisdictional criteria has been adopted recently in the context of the EPPO Regulation<sup>175</sup>) but need to be clear and transparent.

Reasonable foreseeability, indeed, does not mean that exercise of discretion should not be allowed in forum choices or that the individual should have since the very beginning the absolute certainty about which jurisdiction will eventually adjudicate his case; more realistically, reasonable foreseeability would imply that the criteria for exercise the choice should have a decent legal basis and that certain minimal procedural safeguards for the suspect – such as the possibility to at least submit his point of view to the authorities in charge of deciding - should be in place.

## **Victims**

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<sup>172</sup> See Art. 32 par. 5 of the Ley 16/2015 of the 15 July 2015

<sup>173</sup> See Art. 8 (4) of the Legislative Decree 29/2016

<sup>174</sup> See Art. 11 of the Legislative Decree 29/2016.

<sup>175</sup> Art. 26 (4) of Regulation 2017/1939

23. *What kind of protection measures are available for victims in your legal system? What is their nature (criminal measure, civil measure or both)?*

Italy foresees protection for victims both via civil and criminal law. A victim has *locus standi* before civil courts whenever she is claiming that her rights have been breached and she looks for compensation.

As for criminal protection, if the subject claims to be victim of a criminal offence, the Italian system of criminal justice does not allow private prosecution. According to article 112 of the Constitution, the public prosecutor has the monopoly to prosecute. Victims may act as complainants by reporting the crime to the public authorities but they have no prosecutorial powers and they can never oblige the prosecutor to start the investigations or bring the case to trial.

There is only one exception to this general principle: when the crime falls within the competence of the Justice of the Peace (usually petty offences) the victim may bring a charge directly in front of the judge ('ricorso diretto al giudice di pace'). Recently the Supreme Court clearly stated that the renunciation of the claim directly presented in front of the Justice of the Peace bears as a consequence the formal extinction of the crime (Cass., 5 October 2011, no. 42427).

As the new Code of 1988 confirmed the traditional distinction between the person who has suffered the crime (victim) and the person who suffers harm as a result of the offence (injured person), there is still no full protection for the victim that does not decide to intervene claiming damages as a *partie civile* in the criminal proceedings according to Article 75 CCP<sup>176</sup>.

Nevertheless, victims protection, under the influence of EU law, has been strongly enhanced in the last ten years.

In particular, the Code recognises to the victim the right to information (Articles 90-bis, 90-ter, 299, 335, Par. 3, 335, Par. 3-ter, 360, 369, 406, Par. 3, 408, Par. 2, 415-bis, 419 CCP), rights of participation, which translate into control powers over the non-prosecution of the Public Prosecutor (Articles 406, Par. 3, 408, Par. 2, 413), as well as the right to urge the Public Prosecutor (Articles 90, 394, 572 CCP) and, finally, rights of protection – particularly for victims with specific protection needs (Article 90-quarter CCP).

Furthermore, the Italian system provides for specific protective measures to prevent the risk for the victim to come in touch with the suspect via specific protection orders (Articles 282-bis, 282-ter CCP).

Other rules concern the protection of the victim from the "violence" of cross-examination during the trial phase, anticipating his questioning or imposing specific protective measures during the trial questioning (Articles 190-bis, 351, Par. 1-ter, 362, Par. 1-bis, 392, Par. 1-bis, 398, Par. 5-bis, 5-ter, 5-quater, 472, Par. 3-bis, 498, Par. 4-quarter CCP).

As for the victims' rights to interpretation and translation, Article 143-bis CCP was amended by legislative decree no. 212 in 2015 which added that language assistance must be provided for the translation into Italian of any document that is written in a foreign language or when the person who has to make a statement (for example the witness) does not know the Italian language.

Victim's protection was remarkably strengthened by l.d. no. 212 of 2015 in order to implement the Directive 2012/29/EU. In the current version of the CCP, the victim shall receive a general information regarding his rights (Article 90-bis) and specific information when the person remanded in custody, prosecuted or sentenced for criminal offences affecting the victim is released from or has escaped detention (Article 90-ter). The Italian

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<sup>176</sup> G. Todaro, *The Italian System for the Protection of Victims of Crime: Analysis and Prospects*, in *Victims and Criminal Justice*, cited, p. 101: "with eyes focused on the guarantees to be granted to the defendant – whereby to overcome the inquisitorial drifts of the old system – very little attention has been dedicated to the injured party, in fact relegated to the margins".

legislator also introduced the concept of “victim with specific protection needs”, applicable throughout the entire proceedings. The existence of specific needs is assessed by taking into account the personal characteristics of the victim, the type or nature of the crime and the circumstances of the crime (Article 90-quater) – in line with article 22 of Directive 2012/29/EU<sup>177</sup>. According to Article 90-quarter, CCP, “the victim’s needs for specific protection shall be presumed not only on the basis of his age and physical or psychological impairment, but also in relation to the type of offence, and the circumstances and particulars of the case under prosecution. The victim’s needs for specific protection shall be assessed by taking into account whether the offence was committed with either violence or racial hatred, whether the offence qualifies as organised crime or national or international terrorism or trafficking in human beings, whether it was committed for the purposes of discrimination, and whether the victim depends on the offender either emotionally, psychologically or economically.

*24. Does your legal system foresee a compensation mechanism for victims of crime?*

See sub 23 and sub 29.

*25. Have you ever been involved in the cross-border recognition and implementation of a protection measure?*

NA

*If so, on which EU instrument did you rely: Directive on the European Protection Order (EPO – criminal matters) or Regulation on protection measures in civil matters?*

NA

*26. Have you ever issued an EPO where the issued protection measure was not available in the legal order of the executing state? If so, what happened?*

NA

*27. How would you make the EPO more effective? Could you identify issues not/insufficiently addressed in the directive that should be further developed/included?*

*28. Has the implementation of the 2012 directive on victims’ rights had a positive effect on the amount of issued/executed protection measures, including EPOs?*

*29. Have gaps persisted in the implementation of Directive 2004/80/EC on compensation of victims and Directive 2012/29/EU on victims’ rights?*

Italy implemented the Directive 2004/80/EC relating to the compensation to crime victims via the legislative decree no. 204 of 2007. However, this law does not increase standing rights before a criminal court. It only helps victims to ask for standing rights already existing in the EU member State where the crime occurred. It provides for specific rules governing the transnational dimension of the victims’ compensation, i.e. conferring to the public

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<sup>177</sup> Gialuz, The Italian Code of criminal procedure, a reading guide, p. 33.

prosecutor office working at the Court of appeal the duty to inform and transmit relevant documents and information to the victim living abroad or to the Italian victim who suffered a crime abroad.

Furthermore, Italian insufficient implementation of Directive 2004/80/EC lead to the decision of the EU Commission to refer the Republic of Italy to the Court of Justice of the European Union for not adequately implementing EU rules on compensation for victims of crime. As stated by the Press release of the Court of 16 October 2014, according to that Directive national compensation scheme should guarantee a fair and appropriate compensation to the victims of violent intentional crimes, committed on their territory. Instead, Italian legislation provided only for compensation to victims of certain violent intentional crimes, such as terrorism or organised crime, but not for all of them. In addition, compensation should be available in national as well as in cross-border situations, regardless of the country of residence of the victim and regardless of in which Member State the crime was committed. Following complaints from victims who suffered a violent intentional offence in Italy and who did not find compensation in national or cross-border situations, the Commission raised this issue with the Italian authorities through a letter of formal notice in November 2011. Despite the Commission's reasoned opinion sent on 18 October 2013, Italy has still not taken the necessary steps to amend its legislation in line with the requirements of EU legislation. On 11 October 2016, the Court of justice declared that Italy had failed to fulfil its obligation under Article 12(2) of the abovementioned directive<sup>178</sup>.

As a consequence, Italy fully implemented the Directive 2004/80 only with the law n. 122 of 7 July 2016, as modified by 11 December 2016, n. 232, in force since the 1<sup>st</sup> January 2017.

*30. Have you identified weaknesses and gaps in the previously mentioned instruments and how would you make them more effective? Do you think new instruments on victims' rights should be tabled by the EU?*

As for the Italian situation, I really think that there is a gap between law in books and law in action. The legal framework protects victims in a sufficient way but statistics on *femminicidio* and violence against women show an increase every year.

From a more technical point of view, there might may be the need to grant formally a major role to victims in the cases of negotiated justice, in particular during the *patteggiamento* (the Italian plea bargain).

### **Other areas of concern**

*31. Were negotiations on the European Public Prosecutor Office hindered and/or slowed down by the presence of differences in national procedural criminal laws?*

Italy has always been a great supporter of the EPPO. Its refusal not to sign immediately the enhanced cooperation was due to the fact that Italy would have preferred a stronger and more efficient EPPO instead of the one finally approved in October.

As for Italy, the main problems concerning the EPPO are:

- the existing exclusionary rules concerning evidence. As briefly described above (question 16) the Italian code of criminal procedure follows an adversarial approach to evidence and foresees strict rules on its admissibility and exclusion. The EPPO Regulation contains a rather minimal non-discrimination rule (Art. 37)<sup>179</sup> on admissibility of evidence and similarly to the investigatory powers, admissibility of evidence will remain largely governed by national law. Although both the Italian Constitutional Court and the Court of Cassation found a compromise

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<sup>178</sup> CJEU, Case C-601/14 Commission v Italy, 11 October 2016.

<sup>179</sup> Art. 37 par.1 of the EPPO Regulation provides : "Evidence presented by the prosecutors of the EPPO or the defendant to a court shall not be denied admission on the mere ground that the evidence was gathered in another Member State or in accordance with the law of another Member State".

solution for the admissibility of evidence gathered abroad through MLA and following a different procedural rules (see above question 17), the extension of such case law to the cross-border investigations conducted by the EPPO may not be automatic. The stricter Italian rules on admissibility of evidence (f.i. on the limits to hearsay evidence or on the exclusion of the records of witness statements gathered unilaterally during the investigative stage) could pose significant limits to the admissibility of evidence gathered by the EPPO in another MS (e.g. in cases where the Permanent Chamber at the end of an investigation conducted in another Member State should decide to re-assign the case for prosecution in Italy).

- the forum choice that might be not compatible with the principle of natural judge as provided by Article 25 Const. Indeed, the possibility provided under Art. 26 (4) of the EPPO Regulation to deviate from the general competence rule and assign the case to a Delegated Prosecutor of a different Member State according to criteria that leave a certain margin of discretion, might run counter to the requirement that the judge be previously and foreseeably determined by law.

*32. Please mention any other points of concern (linked to differences in national criminal procedures/procedural rights) that hindered or may hinder cross-border cooperation in criminal matters. If you think that differences in the articulation of competences between relevant bodies (e.g. judges, prosecutors, police, lawyers, etc.) might hinder cross-border cooperation in criminal matters, please elaborate.*

NA

#### **D. Conclusion and policy recommendations you may have, including areas where you would recommend to intervene and how**

*33. Should the EU legislator intervene beyond the scope of the minimum standards provided by the set of directives adopted in the field of procedural criminal law?*

Yes, in particular in the following fields:

- arrest and pre-trial detention;
- evidence law and exclusionary rules
- procedural sanctions

*34. If so, what kind of action should be taken at EU level and in which area(s)? Please explain your choice and possible obstacles that the EU may encounter*

I think that the legal basis of Article 82 TFEU would allow such interventions via directives. Political divergences might interfere negatively.

## VI. COUNTRY REPORTS ON HUNGARY

### National report No 1 on the Hungarian jurisprudence

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#### Case 1 Tobin I

*1. Short summary of the main issues brought before the national court, followed by the main arguments underpinning the judgment delivered by the latter*

In 2002 the Hungarian court adopted its judgement regarding the case of the Irish driver, Francis Ciarán Tobin who hit to death two children in Hungary in April 2000.

The Pest County Chief Prosecutor's Office brought charges against Mr. Tobin for recklessly causing road traffic accident resulting in death. At the time of the offence, Mr. Tobin has been resident in Hungary as senior manager of the Irish Life insurance company. He had initially been required to surrender his passport, but it was subsequently returned to enable him to travel to Ireland for a family event. Upon the initiative of the Pest County Chief Prosecutor's Office, the Buda Surroundings District Court allowed the return of passport to Mr. Tobin and pursuant to the criminal procedural code, the court also ordered the defendant to deposit HUF 500,000 as so-called insurance. The sum of the insurance was deposited and Mr. Tobin authorised his defence attorney to receive official documents on his behalf, then he left Hungary.

In possession of his lawfully returned passport, Mr. Tobin travelled to Ireland with his family and after the wedding he came back to Hungary on 9 October 2000. His defence attorney notified the court on the same day that the defendant was in Hungary again; nevertheless the Hungarian State did not show interest towards Mr. Tobin. He was not required to submit his passport to the Hungarian authorities and no action was taken with respect to ensuring Mr. Tobin's presence during the procedure or providing his return in case of imprisonment. At the end of November 2000, Mr. Tobin's definite term labour contract expired and he travelled back to Ireland with his family.

On 7 May 2002, Mr. Tobin was convicted in absentia to 3 years of imprisonment for recklessly causing a road traffic accident resulting in death by the Buda Surroundings District Court, then in the procedure of second instance the Pest County Court approved the judgement with the condition that the convict could be released on probation after serving at least half of his punishment. The convict did not, however, return to Hungary to serve his sentence.

Pursuant to the 2002/584/JHA framework decision of the European Union on the European arrest warrant and the surrender procedures between Member States (the "Framework Decision") surrendering the defendant to the requesting country could be mandatory if the requesting court issued an arrest warrant in order to execute a sentence which is of at least 4 months prison term and if the Framework Decision does not set out grounds for non-execution. In case of Mr. Tobin such non-execution grounds did not exist, still the question whether he could be surrendered was questioned. In fact, he was never surrendered due to a wrongful implementation of the Framework Decision and the specificities of common law.

*2. Short explanation of the nature of the difference(s) between national criminal procedures*

The High Court of Ireland refused on 12 January 2007 the request for surrender on the following grounds: (See Annex I) According to Section 10 of the Irish act adopted in 2003 to implement the Framework Decision , and amended by Section 71 of the Criminal Justice (Terrorist Offences Act) , the convict could be surrendered for the purposes of execution if he or she fled from the issuing state before he or she commenced serving the sentence or before he or she completed serving the punishment. In other countries fleeing is not a

requirement for surrender. The Minister for Justice, Equality and Law Reform submitted an appeal to the Supreme Court. The Supreme Court dismissed the appeal on 25 February 2008. (See Annex II)

*3. Identify whether the difference(s) was(ere) considered as an obstacle by the court. If so, please explain why.*

The court found that pursuant to the act implementing the Framework Decision, Mr. Tobin did not “flee” from Hungary as he “left” the country following the expiry of his definite term labour contract and in the lawful possession of his passport, therefore the requirements for surrender were not met.

*4. If the difference(s) was(ere) considered as an obstacle, identify whether the national court rejected the cooperation request and the application of the EU instrument, or on the contrary solved the problem. Please explain the reasoning followed by the court.*

The court was not in a position to remedy a faulty implementation of the Framework Decision, but following the unsuccessful attempt to extradite Mr. Tobin, the Irish legislator responded to the discrepancies in its laws: it amended its criminal law with the introduction of Criminal Justice (Miscellaneous Provisions) Act, 2009. Section 6 of the 2009 Act repeals each and every obstacle to the surrender of Francis Ciarán Tobin or any other convict in a similar position. Pursuant to the amendment, which could be inspired by the troubled outcome of the Hungarian incident in the framework of which three arrest warrants were issued with different contents, future arrest warrants do not need to be “duly” formulated any more. The amendment also removed the conjugative conditions according to which prior to the commencement or the completing the punishment, the convict needs to have “fled from the issuing state”.

The Tobin case therefore serves as an excellent example to demonstrate how the member states were able to practice self-correction, as they learned from the miscarriages of the law and rectified the mistakes resulting from the jealous protection of their sovereignty and improved cooperation in criminal justice.

After the failed attempt at Mr. Tobin’s surrender – in recognition of the differences between the Anglo-Saxon and the continental legal systems and in order to avoid repetition of such an embarrassing situation – the Irish legislature introduced comprehensive changes in their criminal code by Act 28 of 2009, which, in Section 6, eliminated all obstacles from the path of Francis Ciarán Tobin’s extradition.

The Irish implementation of the Framework Decision also emphasises the importance of comparative law. Ex post facto it has become clear that the legislator did not intend to bypass EU law, but the lawmaker simply proceeded in accordance with its own procedural legal system and in the course of implementation it merely considered the possibilities provided by common law. The in absentia hearing is unconceivable in common law systems, i.e. in legal systems where the emphasis is on the hearing and verbosity, where parties determine the issues that need to be proven, and where the importance of direct and cross-examination is highly appreciated. Disregard of other legal systems’ specificities resulted in wrong implementation – and this legislative mistake is the major reason why the Irish court could not and did not surrender Mr. Tobin.

## **Case 2 Tobin II**

*1. Short summary of the main issues brought before the national court, followed by the main arguments underpinning the judgment delivered by the latter*

The facts in the Hungarian setting are the same as above in Tobin I.



As indicated above, Mr. Tobin was not surrendered from Ireland to Hungary due to a mistake in the implementation of the Framework Decision. After this legislative issue has been remedied, in September 2009, Hungary issued another arrest warrant. In relation to the issuance of this last arrest warrant, we may ask whether arrest warrants could be issued again and again after final refusal of surrender by referring to the change in the regulatory environment. As to their legal nature, I am confident that surrender and extradition could be considered as administrative decisions, or rather the legal instruments have both administrative and criminal law features. Given that these legal instruments do not serve to determine criminal responsibility in any way, the principle of ne bis in idem does not apply, or in other words there is no procedural res iudicata. The Irish court also shared this viewpoint on the nature of arrest warrants and agreed to decide in the merits whether to approve the fourth Hungarian request for surrender.

Following several hearing postponements, on 11 February 2011 Judge Peart, contemplating with the Irish amendment in due course, approved the surrender request repeated in the fourth European arrest warrant. (See Annex III) On appeal however, on 19 July 2012 the Supreme Court of Ireland adopted its 3:2 judgement and reversed the judgement of first instance resulting in a decision where the surrender of Mr. Tobin to Hungary was refused. (See Annex IV)

Chief Justice Denham exhaustively dealt with all the possible points arising in the matter, in order to decide whether Mr. Tobin's second-instance extradition procedure and, if so required, his actual surrender could in any way be in violation of the Irish Constitution – especially regarding the principles of the separation of powers and of the independence of the judiciary. In the interest of resolving the issue, the prosecution and the defence agreed on addressing eight questions, some of which had several sub-questions.

The legal issues that were to be decided on are the following: (Paragraph 16)

- A. Does the procedure in the second round
  - constitute an abuse of process,
  - violate separation of powers,
  - violate Section 27 of the Interpretation Act 2005?
- B. How to interpret the requirement of the Transfer of Execution of Sentences Act 2005 according to which a prison sentence can only be executed if the convict "fled" from the issuing state?
- C. Does lack of reciprocity, i.e. the fact that Hungary would not surrender a Hungarian citizen to Ireland in a reverse scenario have any significance?
- D. Does the offence identified in the European arrest warrant issued by Hungary correspond to an offence under Irish law?
- E. Taking the differences in the various European arrest warrants issued by Hungary into consideration, are they sufficiently precise so as to serve as the basis of surrender?
- F. Can a person be surrendered to a Member State in respect of a conviction imposed by the courts of that country prior to its EU accession?
- G. Does it influence the validity of the warrant that at the time of issuing it, the amendment to the law possibly enabling Mr. Tobin's surrender, i.e. the provisions of the Criminal Justice (Miscellaneous Provisions) Act 2009 were not yet published and disseminated?
- H. Can surrender be denied on other grounds, such as
  - the period of ten years that has elapsed since the crime,
  - the exclusion of relevant pieces of possibly exonerating evidence at the trial,
  - the alleged threat to the life and bodily integrity of Mr. Tobin if he was returned to serve his prison sentence in Hungary?

In my opinion, only the first major question (Point A) had relevance to the matter, as there had already been decisions on all the other points at the first instance rulings, and the facts, the evidence and the relevant legal articles have not changed, and even the composition of the panel of judges was hardly altered. Neither were the judges – even including the ones who concurred in the majority view – swayed by these excuses, with the sole exception of Justice Hardiman, who only stated that, even in the event that he hadn't refused the request for surrender on the basis of the first point, he would have continued to study the other points listed, and could not exclude the possibility that he would have ended up refusing the surrender on these other bases.

From among the concurring justices, in his concurring opinion Justice O'Donnell believed the court's duty to be to determine whether the reaction of the defendant in the course of his arrest at second instance was lawful or not. Justice O'Donnell also shares the opinion that no procedural *res iudicata* exists in the case, however he found important to clarify whether Mr. Tobin has the right to finality of the first instance judgement, in particular considering the principle of fair procedure. The question for Justice O'Donnell is whether the Oireachtas, the Irish Parliament intended to overwrite the judgment adopted at first instance. When answering the question, he assessed the text of the amending act, and came to the conclusion that the respective Irish law serves compliance purposes with the Framework Decision and it did not aim at the alteration of the Tobin decision passed in 2007. Justice O'Donnell underlined repeatedly that his judgement does not have precedential value: due to the special circumstances of the case it is so narrow that it would not be applicable to anyone else. Besides Mr. Tobin, most probably no other person would be involved in a similar situation. In each future case, surrender will be preceded in accordance with the amended act.

Concurring Justice Fennelly – together with Justice Hardiman – argued that the second round proceeding constituted abuse of process. According to Justice Fennelly in the Tobin case it was a legislative mistake and its correction that triggered two surrender proceedings. Mr. Tobin won the case in the first round on the basis of a national law implementing the framework decision. It was never suggested that the law was erroneous; therefore once he successfully relied on its provisions, Mr. Tobin had no reason to expect that the law would be changed. Neither the original mistaken implementation, nor its subsequent correction can be attributed to Mr. Tobin, therefore in Justice Fennelly's view the repeated proceedings amounted to an abuse of process.

Finally, the third concurring judge, Justice Hardiman pointed at the differences in the Hungarian and Irish legal systems, and his points are for relevance for the present discussion.

## *2. Short explanation of the nature of the difference(s) between national criminal procedures*

There were no specific differences mentioned. Justice Hardiman's judgment in the case however questioned the concept of mutual trust behind European Arrest Warrants, given the differences among national legal systems.

## *3. Identify whether the difference(s) was(ere) considered as an obstacle by the court. If so, please explain why.*

Since the issue on the differences in Irish and Hungarian laws was not discussed in other opinions in the Tobin II case, in the following Justice Hardiman's concurring judgment will be singled out.

In his concurring opinion, he profoundly supports his conclusion on non-surrender from two different approaches. On the one hand, he placed particular emphasis on the unblemished character of Mr. Tobin portraying him as a fundamentally law abiding person, and the victim of a crusade by the justice system. Accordingly the concurring opinion specifies and refers at numerous points to the social recognition and excellent character of Mr. Tobin and to the hostile attitude adopted towards him by the authorities. On the other hand, Justice

Hardiman refers to differences between the Irish and the Hungarian law systems and identifies some 'mistakes' for declining surrender. However, his opinion about another Member State's legal system shall be irrelevant from the perspective of a surrender case – unless there is persuasive evidence to underpin systemic problems, which was not the case here. An Irish judge cannot question mutual trust existing between Member States and there was no basis for essentially reopening and carrying out a further assessment on the substance of the criminal proceedings, as its competence should be strictly limited to the decision on surrender. The next argument is another piece of evidence proving that Justice Hardiman clearly does not believe in the principle of mutual recognition: he states that if he had not refused the surrender on other grounds he would have assessed in details the raised questions, as from his side, who is not familiar with Hungarian law, mutual trust cannot exclude a scrutiny of the Hungarian proceedings, where a complaint is made by the individual concerned.

*4. If the difference(s) was(ere) considered as an obstacle, identify whether the national court rejected the cooperation request and the application of the EU instrument, or on the contrary solved the problem. Please explain the reasoning followed by the court.*

Please note that references to the differences between national laws were only pointed out by one opinion, which was technically a concurring one – but these elements of the opinion were not shared by any of the other four justices, therefore strictly speaking it was not an issue to be overcome.

### **Case 3 Hernádi**

*1. Short summary of the main issues brought before the national court, followed by the main arguments underpinning the judgment delivered by the latter*

The Hungarian transposition had practical consequences in the case of Zsolt Hernádi, CEO of the company MOL, who was accused by the Croatian prosecutor of bribery in connection with the privatization of Croatian oil refinery INA. According to the news, back in 2008 or 2009 Mr. Hernádi paid then Croatian PM Ivo Sanader €10 million before MOL acquired a 47.47% stake in INA.<sup>1</sup> Details were unclear, but Mr. Sanader resigned on 1 July 2009 and left Croatia for Austria from where he was extradited. By July 2011 Croatia decided to review the 2003 and the 2009 agreements signed between MOL and the government of PM Sanader. The criminal proceeding against Mr. Sanader began in September 2011, and Mr. Hernádi was named as a suspect for his involvement in the alleged bribery. A request was submitted by the Croatian prosecutor for legal aid, but in January 2012 the Hungarian prosecutors were no longer investigating the case, as they had not found any pieces of evidence of a crime. As for the legal aid, the Hungarian prosecutor's office couldn't oblige because giving such information was said to "endanger the security of Hungary." In November 2012 Mr. Sanader was sentenced to ten years for bribery. In October 2013, Croatia issued both an international arrest warrant, but importantly for the present analysis also an EAW. The latter has been refused by the Hungarian court with regard to the ne bis in idem principle.

*2. Short explanation of the nature of the difference(s) between national criminal procedures*

The surrender case of Zsolt Hernádi requested by Croatia illustrates the consequences of different meanings attached to the phrase "final sentence". According to Article 4(3) of the Framework Decision on the EAW, the executing judicial authority may refuse to execute the EAW "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". Hungarian implementing legislation Act CLXXX of 2012 in Article 5 g) states that surrender may be refused if

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<sup>1</sup> See for example <https://www.bloomberg.com/news/2011-07-05/hungary-opposes-changes-in-mol-ina-agreements-orban-says-2-.htm>, or <http://www.portfolio.hu/en/tool/print/7/27890>.

"Hungarian judicial authorities (courts, or prosecutors) or the investigation authorities rejected the denunciation filed or terminated the investigation or the procedure." But these decisions do not seem to be final even according to their Hungarian interpretation. According to Article 191(1) of the old CPC, as a general rule "termination of the investigation shall not prevent the subsequent resumption of the proceeding in the same case." Little wonder that the majority of Member States transposing the Framework Decision on the EAW (17 out of 27) meant a decision of the prosecutor, which brings the procedure to an end without the possibility of having it reopened.

*3. Identify whether the difference(s) was(ere) considered as an obstacle by the court. If so, please explain why.*

Surrender was refused by the Hungarian court with regard to the ne bis in idem principle, due to the fact that the prosecutor's office had previously started investigations, but later in January 2012 decided to terminate it.

*4. If the difference(s) was(ere) considered as an obstacle, identify whether the national court rejected the cooperation request and the application of the EU instrument, or on the contrary solved the problem. Please explain the reasoning followed by the court.*

The court did not make attempts to resolve the conflict, but there was a momentum, which could have contributed to the clarification of the legal issue, when a former legal representative and shareholder of MOL decided to continue the case as a substitute private prosecutor. In his view, he suffered losses due to the fact that Mr. Hernádi refused to inform shareholders in due time about the alleged corruption case, about which they first read in the news. But in May 2014 the court of first instance ruled that Mr. Hernádi could not be made liable for the decrease in the value of MOL shares, and neither could the substitute private prosecutor prove that Mr. Hernádi bribed the Croatian ex-PM. It partially terminated the procedure, partially exonerated Mr. Hernádi. The court of second instance in October 2015 ruled that the substitute private prosecutor is not a "victim" to the alleged crime, therefore the court could not go into the merits and decide on the issue whether Mr. Hernádi was guilty or not. For future cases a lesson to be learned is that in case a substitute private prosecutor presses on with the case, there could be an undisputedly "final" judgment rendered, which may prevent beyond doubt compliance with a surrender request.

(The case had further knock on effects: in May 2017 a Zagreb court filed a preliminary reference with the CJEU asking whether Hungary and other Member States, notably Austria and Germany violated EU law when refusing surrender of Mr. Hernádi arguing that doing otherwise would be contrary to the principle of ne bis in idem. In September 2017 Mr. Hernádi filed a complaint against Croatia for having breached his human rights when issuing an EAW against him.)

## National report No 2 on the Hungarian criminal justice system

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When compiling the present paper describing criminal procedural law in Hungary, on the one hand, desk research has been conducted studying relevant legal instruments and related secondary literature, including commentaries, codification materials, Eurojust publications and scholarly articles, and on the other leading experts and relevant institutions have been interviewed and consulted. The author would like to thank the Department of International Criminal Law and Human Rights at the Ministry of Justice of Hungary, and furthermore László Láng, Head of Department, Department for Supervision of Investigations and Preparation of Indictments, Office of the Prosecutor General of Hungary, for providing responses. The author is also grateful for sharing valuable information to the Hungarian Helsinki Committee and the following individual experts: Pál Bátki, Tünde Barabás, Ádám Békés, Tamás Dombos, Erzsébet Kadlót, Krisztina Karsai, Anna Kiss, Anita Nagy, Erika Róth, Péter Stauber, Barbara Zséger, and Anonymous Contributors.<sup>2</sup>

### A. General questions on the features of national criminal procedure systems

#### 1. Do you consider your criminal justice system as inquisitorial, accusatorial, or mixed?

Hungary and the democratic transition

Hungary was the first “post-communist” country to join the Council of Europe and signed the European Convention on Human Rights and Fundamental Freedoms (hereinafter: ECHR or Convention) on 6 November 1990. The ECHR and its eight Protocols were ratified back in 1992.<sup>3</sup>

Before ratification it was decided to thoroughly scrutinize Hungarian legislation on its compatibility with Strasbourg case law and to first prepare legislation in areas where compliance with the jurisprudence of the Convention organs called for modifications. Thus an Inter-Ministerial Committee was set up chaired by the then Ministry of Justice deputy secretary of state and composed of senior civil servants working in the various ministries. After seventeen months of study and analysis the report was submitted to the government. The conclusions were published in a Hungarian human rights journal and were made available to all Members of Parliament.<sup>4</sup> The Committee identified relatively few areas where the Convention required modification of Hungarian laws.

This was partly explained by the fact that by the 1989 amendment of the 1949 Constitution the chapter on human rights was radically modified. The text of Act XX of 1949, i.e. the 1949 Hungarian constitution originally mirroring the 1936 Soviet “Stalinist” constitution was radically reformed during and after the political changes. Hungary – unlike other countries in the region – after an ambitious 1989 amendment<sup>5</sup> failed to formally adopt a new constitution, despite the fact that the 1989 constitution’s drafters did not foresee it as a lasting document.<sup>6</sup>

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<sup>2</sup> Since experts provided responses in their individual capacity, references to affiliations are omitted.

<sup>3</sup> The ECHR and its eight Protocols were ratified on 5 November 1992 and incorporated into the Hungarian legal system through Act XXXI of 1993 on 7 April 1993 entering into force eight days later. The Act provides that the Convention and Protocols 1, 2 and 4 have to be applied as of 5 November 1992, Protocol 6 is applicable as of 1 December 1992, and Protocol 7 applied from 1 February 1993. By today, Hungary ratified all but two protocols to the Convention: Protocol 12, which was signed, but not ratified, and Protocol No. 14bis.

<sup>4</sup> For a detailed summary of the findings see Doc. H(95)2 of the Council of Europe published also in Andrew Drzemczewski, Ensuring Compatibility of Domestic Law with the European Convention on Human Rights Prior to Ratification: The Hungarian Model. Introduction to a Reference Document, *Human Rights Law Journal*, 16 (7–9) (1995), 241-60.

<sup>5</sup> Act XXXI of 1989 on the modification of the Constitution of 18 October 1989

<sup>6</sup> The preamble as modified in 1989 stated that the Constitution was established “until the adoption of the new constitution”.

The 1989 text has been adjusted several times during the 1990s. The transitional constitution-making was completed in the fall of 1990. As a formal result of the many modifications almost no provision of the original survived, but more importantly from a substantive point of view the later major constitutional amendments of the 1989 version set up a functioning constitutional democracy in Hungary with substantial checks on government power. Separation of powers had been realized where parliamentary law-making procedure required extensive consultation with both civil society and opposition parties and crucial issues of constitutional concern required a two-thirds majority vote of the Parliament. An independent self-governing judicial power ensured that the laws were fairly applied.<sup>7</sup> The Hungarian Constitutional Court (HCC) has been created<sup>8</sup> exercising important corrective roles against the majoritarian dangers of parliament.<sup>9</sup> In line with the idea of the judiciary as “the least dangerous branch of government”<sup>10</sup> and that apex *fora* are the “most principled guardians of constitutional rights and of “deliberative, constitutionally limited democracy”,<sup>11</sup> the HCC was given weighty powers with the unique possibility of reviewing cases *in abstracto* by way of a so-called *actio popularis*. The most important decisions had been rendered on the basis of such procedures. The HCC was consistently among most respected political institutions.<sup>12</sup> The interpretative decisions of the HCC substantially added to making transition into a democracy a reality. Other independent institutions, such as the institution of the President of the Republic, i.e. the Head of State, the national central bank, the state audit office provided additional checkpoints. An effective fundamental rights protection mechanism has been established, and apart of the judiciary and the HCC, four ombudspersons and certain powers of the public prosecutors’ office complemented the system of rights protection.

In addition, amendments to the Code of Criminal Procedure and the Criminal Code before Hungary’s ratification of the ECHR also contributed to narrowing the gap between Hungarian law and European standards including the Convention. It is fair to say that legal institutions and procedures reminiscent of the previous regime vanished from laws of a constitutional, human rights and a criminal law nature.<sup>13</sup>

### The mixed criminal justice system of Hungary

It is difficult to determine with utmost precision to which legal tradition Hungarian criminal procedure belongs, not least because of the differences in terminology, such as Continental, inquisitorial, mixed, or Anglo-Saxon, accusatorial, adversarial proceedings. Still, in the overall assessment, one may conclude that Hungary’s criminal justice system adheres to the Continental inquisitorial mixed tradition. Even though through amendments to the law in force at the time of the political changes in 1989, some elements of the US system have been introduced (Miranda warning, exclusion of illegally obtained evidence) and act XIX of 1998 on the Criminal Procedural Code (hereinafter also referred to as ‘old CPC’) brought the Hungarian system closer to the party driven Common Law model (e.g. examination through

<sup>7</sup> As the HCC formulated, “separating the legislative and executive powers today means dividing competences between Parliament and the Government, which are however politically intertwined. Parties having a majority in Parliament set up the Government and in the vast majority of the cases Parliament votes Government proposals into a law.” See Decision 38/1993. (VI. 11.) of the HCC.

<sup>8</sup> Established by a comprehensive amendment to the 1949 Constitution (Act XX of 1949) through Act XXXI of 1989 of 18 October 1989, which granted the Court exceptionally wide jurisdiction. The specific law applicable to the HCC is Act XXXII of 30 October 1989.

<sup>9</sup> For a comprehensive evaluation see Christian Boulanger, Europeanization Through Judicial Activism? The Hungarian Constitutional Court’s Legitimacy and the ‘Return to Europe’, in: Wojciech Sadurski, Adam Czarnota, Martin Krygier (eds.), *Spreading Democracy and the Rule of Law?* Dordrecht: Springer, 2006, 263-280.

<sup>10</sup> Alexander Hamilton, The Federalist No. 78. The Judiciary Department, *Independent Journal Saturday*, June 14, 1788.

<sup>11</sup> Ernst-Ulrich Petersmann, From State-Centered towards Constitutional ‘Public Reason’, in Giorgio Bongiovanni, Giovanni Sartor, Chiara Valentini (eds.), *Reasonableness and Law*, Dordrecht: Springer, 2009, 421-458, 428.

<sup>12</sup> Narrowing the powers of the HCC was among the least supported steps by the Parliaments’ majority. See [http://www.median.hu/object.d659e526-d25f-4444-b928-4551cee46d87\\_ivy](http://www.median.hu/object.d659e526-d25f-4444-b928-4551cee46d87_ivy)

<sup>13</sup> For further details see Petra Bárd, Károly Bárd, The European Convention on Human Rights and the Hungarian Legal System, In: Silvija Panović-Đurić (ed.), *Comparative Study on the Implementation of the ECHR at the National Level*, Belgrade: Council of Europe, 2016, 147-166.

the parties as an alternative to interrogation by the presiding judge) the dominant procedural features of Continental law have been preserved.<sup>14</sup>

A criminal proceeding starts with the investigation phase. The investigating authorities conduct the investigation independently or upon the order of the prosecutor. Their tasks are the exploration of the crime, the finding of the perpetrator, and the collection of pieces of evidence. Judicial involvement in the investigation is limited, confined to deciding on interference with fundamental rights (during search, detention) and to cases where evidence cannot be produced later at the trial phase. (Using German terminology, the pre-trial judge in the Hungarian legal system is no *Untersuchungsrichter*, but *Ermittlungsrichter*.) Full access to the files by the suspect's representatives happens right before the court procedure only. After the conclusion of the investigation, the prosecutor or the investigating authority hands over to the suspect and the defence counsel the documents of the investigation. With the exception of classified information, all pieces of evidence have to be disclosed to the suspect and the defence counsel that may serve as the basis for pressing charges.

The discretionary powers of the public prosecutor were extended over the past 30 years. The prosecutor examines the files of the case and based on this, he or she performs or orders the performance of further investigatory action; suspends the investigation; terminates the investigation; directs the case to victim-offender mediation or decides on the postponement of an indictment (this is practically identical with a probation order, but issued not by the court but by the prosecutor); or files an indictment, or makes a decision on dropping some of the charges. The prosecutor is responsible for presenting all pieces of evidence, both for and against the person charged. The prosecutor is a public accuser. The court proceedings can only be based upon an indictment: the court may only ascertain the criminal liability of the person against whom charges were filed, and may only consider acts contained in the charges.

The trial itself is directed by the judge, however parties may submit evidence, too. The suspect has no right to self-representation, if the law prescribes mandatory defence for the given procedure. There is no bifurcated trial, the decision on guilt and sentence is rendered in one comprehensive decision. There is a broad possibility of appeal.

### **The impact of the diversity of legal traditions regarding criminal procedure law across the Union**

Among others a practical necessity led to the approximation of legal systems. Dissatisfaction with one's own legal system lead policy makers and codifiers look for alternative solutions, and it seemed natural to turn to foreign legal systems. For a long time, there was a one-way "borrowing" of legal institutions: it seemed that constitutional democracy more corresponded to the contradictory procedure than the mixed one. For nearly one and a half centuries past, we could witness the triumph of the adversarial process. From the 19<sup>th</sup> century on, Spain and Norway, and then at the beginning of the 20<sup>th</sup> century, Denmark made significant steps towards the adversarial process. Japan decided to follow the US pattern in the middle of the 20<sup>th</sup> century. In 1948, Swedes could still decide whether the tribunal should proceed in adversarial or inquisitorial proceedings, and in 1988 they opted for the former due to its increasing popularity. In the 1980s and 1990s, Portugal, Italy, Albania and Russia also turned to the adversarial model. After a series of *Justizmorde* in the 1980s and 1990s the United Kingdom started to show interests towards the borrowing of certain Continental law elements of the criminal procedure.<sup>15</sup> A schoolbook example of the approximation of legal systems is the position of the prosecution in Common law countries. Until 1985 there was no independent prosecutor's office in Great Britain. The person in charge of the prosecution in

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<sup>14</sup> Károly Bárd, A büntető eljárási törvény tervezete az európai jogfejlődésben [The draft Criminal Procedural Code in light of European legal developments]. Budapest: *Jogtudományi Közlöny*, 1998/4., 121–125.

<sup>15</sup> See the works of the Philips Commission (Royal Commission on Criminal Procedure) between 1977 and 1981 and the proposals of the Runciman Commission (Royal Commission on Criminal Justice) in 1995. Peter J. van Koppen, Steven D. Penrod (eds.), *Adversarial versus Inquisitorial Justice: Psychological Perspectives on Criminal Justice Systems*. London: Springer, 2003. 1-2.

Common law countries defended his or her position equally vehemently as the defender. The prosecutor of today's US criminal prosecution must remain neutral. Accordingly, contrary to previous rules, prosecutors have to share pieces of evidence with their opponents, which would underpin the arguments of the defendant. Just like in Continental law, the prosecutor and the defence lawyer have different roles in the criminal proceeding. The former takes the interests of both society and the person charged into account, whereas the latter shall only consider his or her clients' interests.<sup>16</sup> International criminal courts also knowingly combine elements belonging to various legal families, whereas the European Court of Human Rights (ECtHR) more and more imposes the Common Law understanding of fair trial on High Contracting Parties.<sup>17</sup>

European integration also contributes to bringing the legal families closer to each other, especially by way of instruments adopted along the lines of the principle of mutual recognition. This principle, originally established in relation to goods, was – from the end of the 1990s onwards – applied by analogy to the area of freedom, security and justice.

The principle in EU criminal law prescribes that the decisions of one member state need to be automatically acknowledged by all member states, as their own. However different member states' substantive and procedural rules may be, if a judgment was rendered in full compliance with a member state's laws, it should be 'good enough', i.e. recognised by all other member states as well. Numerous legal instruments in the field of EU criminal law have been adopted on the basis of mutual recognition covering all stages of criminal proceedings, ranging from the pre-trial to the post-trial phases. They all simplify, ease and accelerate criminal cooperation between the member states. They make cooperation less formal, move international assistance from diplomatic channels to smooth judicial cooperation and oblige states to waive the nationality exception to own nationals in extradition.

When implementing or applying mutual recognition based instruments, the legal culture, structure and black letter law of other Member States needs to be considered. Let me mention an example showing the force of comparative law, or the consequences of the lack of it for mutual recognition based instruments. The illustration is taken from the seminal *Tobin* case also addressed by a separate paper authored in the frame of this project on the '*Overview of the national case law*'. The Irish citizen Francis Ciarán Tobin was not surrendered to Hungary due to a mistake in the Irish implementing legislation. The Irish act implementing the framework decision allows the convict to be surrendered for the purposes of execution only, if he or she fled from the issuing state before commencing to serve the sentence or before completing to serve the punishment. The court found that Mr. Tobin could not be surrendered to Hungary, since he did not "flee", but after having arranged due legal representation for the *in absentia* trial, he left the country in the lawful possession of his passport.<sup>18</sup>

Following the unsuccessful attempt to surrender Mr. Tobin, the Irish legislator responded to the discrepancies in the law: it amended national criminal law, removing the condition according to which prior to the commencement or the completing the punishment, the convict needs to have 'fled from the issuing state' from the country where the arrest warrant was issued.<sup>19</sup> The Irish implementation of the Framework Decision draws the attention to the importance of comparative law. The legislator did not intend to bypass EU law, but the lawmaker simply proceeded in accordance with its own procedural legal system and in the course of implementation it merely considered the possibilities provided by common law. The *in absentia* hearing is unconceivable in common law systems, i.e. in legal systems where the emphasis is on the hearing and verbosity, where parties determine the issues that need to be proven, and where the importance of direct and cross-examination is highly appreciated. But since the main text of the framework decision on the EAW makes no mention of

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<sup>16</sup> George P. Fletcher, Steve Sheppard, *American law in a global context: the Basics*. New York: Oxford University Press, 2005, 533.

<sup>17</sup> Antonio Cassese, *International Criminal Law*. Oxford: Oxford University Press, 2008, 365-388.

<sup>18</sup> High Court, *Minister for Justice Equality & Law Reform v. Tobin* [2007] IEHC 15, 12 January 2007.

<sup>19</sup> No. 28 of 2009 Criminal Justice (Miscellaneous Provisions) Act 2009, being effective from 25 August 2009.



absconding, the implementation should have taken into account the possibility of prosecution *in absentia*, which is legal under Continental law.<sup>20</sup>

Apart from the need to consider foreign law, mutual recognition based instruments contribute to bringing legal traditions closer in another way. Initially, the principle was only mentioned in the context of soft laws, i.e. the multiannual programmes giving guidance on justice and home affairs policies. The Stockholm programme launched by the European Council in 2009 admitted that mutual trust, which was allegedly the cornerstone of several criminal law instruments adopted after 9/11, was in reality absent. The European Council saw the harmonisation of laws as the way to establish trust.<sup>21</sup> The Stockholm programme offered a roadmap for subject matters to be harmonised, and indeed several important EU laws were passed to this effect. The Lisbon Treaty also acknowledged this connection. According to Article 82(2) of the Treaty on the Functioning of the EU (TFEU) “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”, directives may be adopted. Currently, we are witnessing how the minimum harmonisation of some aspects of criminal law permits mutual recognition-based instruments to survive. Once member states acknowledged that the cost was the inoperability of mutual trust-based instruments, they agreed on harmonisation of criminal laws after all, at least in those areas that have fundamental rights connotations, such as due process guarantees and victims’ rights.<sup>22</sup>

## 2. What is the status of the rights of the defence in your country (e.g. fundamental right, constitutional right)?

Defence rights as enshrined in the European Convention on Human Rights and EU law are part of Hungarian law.

Defence rights are also constitutionally embedded in Hungary. The Chapter on “Freedom and responsibility” of the FL is the relevant part. Before getting into the actual defence rights provision, let me mention a number of general rules relevant for the topic. According to Article I “The inviolable and inalienable fundamental rights of MAN shall be respected. It shall be the primary obligation of the State to protect these rights.” Article II on human dignity, Article III on the prohibition of torture, inhuman or degrading treatment or punishment may be relevant, especially for detention conditions. Further articles relevant for criminal justice include Article XIV dealing with expulsion, extradition and asylum, Article XV on equality before the law, Article XVI on the rights of the child.

The provisions of direct relevance are Article IV on the right to liberty and security, Article XXIV on fair trial in general, and Article XXVIII on defence rights and procedural guarantees in the narrow sense.

### Article IV

(1) Everyone shall have the right to liberty and security of the person.

(2) No one shall be deprived of liberty except for reasons specified in an Act and in accordance with the procedure laid down in an Act. Life imprisonment without parole may only be imposed for the commission of intentional and violent criminal offences.

(3) Any person suspected of having committed a criminal offence and taken into detention shall, as soon as possible, be released or brought before a court. The court shall be obliged to hear the person brought before it and shall forthwith take a decision with a written reasoning to release or to arrest that person.

<sup>20</sup> Petra Bárd, Traps of Judicial Cooperation in Criminal Matters: The Tobin Case, In: Marcel Szabó, Petra Lea Láncoş, Réka Varga (eds.), *Hungarian yearbook of international law an European law, 2013*, Hague: Eleven International Publishing, 2014, 469-505. For a more detailed analysis see Petra Bárd, *Az európai elfogatóparancs Magyarországon = The European Arrest Warrant in Hungary*, Budapest: P-T Műhely, 2015, 175-218.

<sup>21</sup> Stockholm Programme, Section 3.1.1. See <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=URISERV:j10034&from=EN>.

<sup>22</sup> Petra Bárd, Saving EU criminal justice. Proposal for an EU-wide supervision of the rule of law and fundamental rights, *CEPS Policy Brief*, 2018, [https://www.ceps.eu/system/files/PBard\\_Saving%20Justice.pdf](https://www.ceps.eu/system/files/PBard_Saving%20Justice.pdf).

(4) Everyone whose liberty has been restricted without a well-founded reason or unlawfully shall have the right to compensation.

Article XXIV

(1) Everyone shall have the right to have his or her affairs handled impartially, fairly and within a reasonable time by the authorities. Authorities shall be obliged to give reasons for their decisions, as provided for by an Act.

(2) Everyone shall have the right to compensation for any damage unlawfully caused to him or her by the authorities in the performance of their duties, as provided for by an Act

Article XXVIII

(1) Everyone shall have the right to have any charge against him or her, or his or her rights and obligations in any litigation, adjudicated within a reasonable time in a fair and public trial by an independent and impartial court established by an Act.

(2) No one shall be considered guilty until his or her criminal liability has been established by the final decision of a court.

(3) Persons subject to criminal proceedings shall have the right to defence at all stages of the proceedings. Defence counsels shall not be held liable for their opinion expressed while providing legal defence.

(4) No one shall be held guilty of or be punished for an act which at the time when it was committed did not constitute a criminal offence under Hungarian law or, within the scope specified in an international treaty or a legal act of the European Union, under the law of another State.

(5) Paragraph (4) shall not prejudice the prosecution or conviction of any person for any act which, at the time when it was committed, was a criminal offence according to the generally recognised rules of international law.

(6) With the exception of extraordinary cases of legal remedy laid down in an Act, no one shall be prosecuted or convicted for a criminal offence for which he or she has already been finally acquitted or convicted in Hungary or, within the scope specified in an international treaty or a legal act of the European Union, in another State, as provided for by an Act.

(7) Everyone shall have the right to seek legal remedy against any court, authority or other administrative decision which violates his or her rights or legitimate interests

The Criminal Procedural Code takes the form of a so-called Act, which corresponds to Article I(3) FL demanding that all rights and obligations are incorporated in the form of parliamentary acts. Currently Act XIX of 1998 on the Criminal Procedural Code is in force, but it will soon be replaced by Act XC of 2017 entering into force on 1 July 2018 (hereinafter also referred to as 'new CPC').

### **3. What is the status of the rights of victims in your country (e.g. fundamental right, constitutional right)?**

Crime victims' rights are not constitutionally embedded in Hungary.

Victims' rights were however on the agenda for almost 25 years. Already the codification guidelines of Act XIX of 1998 on the Criminal Procedural Code put a heavy emphasis on victims.<sup>23</sup>

Act C of 2012 on the Criminal Code, Act CCXL of 2013 on the execution of punishments, criminal measures, certain coercive measures and confinement for administrative offences, i.e. the Prison Code, Act CVII of 1995 on the Penitentiary System, Act LXXX of 2003 on Legal Aid, and Act XXXI of 1997 on the Protection of Children and the Administration of Guardianship, but also the victim-specific law Act CXXXV of 2005 on Crime Victim Support and State Compensation have been amended and/or drafted in a way as to protect victims' rights.

Lower pieces of legislation are laying down detailed rules on crime victim protection. These include Directive 2/2013 (I. 31.) of the National Police Headquarters on the victim protection tasks of the police; Decree 32/2015. (XI. 2.) of the Minister of Justice on the detailed content

<sup>23</sup> See Point 6 of Government Decision 2002/1994 (I.17.).

requirements of the information brochure on victim's rights prepared by the Victim Support Services; Decree 64/2015. (XII. 12.) of the Minister of Interior on the victim protection tasks of the police; 29/2017. (XII. 27.) of the Minister of Justice on the content and filling of the template for victim support, and on certain procedural rules in relation with the victim services; and Government Decree 420/2017. (XII. 19.) on the procedure aiming at the authorisation for crime victim support.

Act CLI of 2015 on the modifications was specifically designed to bring Hungarian laws in line with the Victims' Rights Directive 2012/29/EU. The new CPC therefore did not need to bring about any changes in this area. The Hungarian legal system was already in line with EU obligations when drafting it.

## **B. Impact on national law of procedural rights directives**

### **B.1. State of transposition of directives for which the transposition deadline has already passed**

#### **4. Has the entry into force of the directives on suspects/defendants and victims triggered important changes in:**

Let me start with **defendants' rights and procedural guarantees**. Just like the modifications to its predecessor since Hungary's EU accession, the new CPC also took international obligations into consideration. These include various EU instruments, such as the EU Charter of Fundamental Rights; or secondary laws on defendants' procedural guarantees and victims' rights.

The regulatory guidelines of the new CPC as submitted by the Government on 11 February 2015 mention EU obligations as a trigger for legislative solutions at several instances.<sup>24</sup> Article 43 old CPC on the rights of the defendant were not considerably modified. Article 39 new CPC rather makes it clear that defendants' rights need to be guaranteed by the court, the public prosecutor and the investigation authorities. More specifically, these organs are singled out as entities which need to grant sufficient time and opportunity for the defendant to prepare his or her defence. In line with Directive 2016/343/EU the right of the defendant to be present at the trial in criminal proceedings and proceedings where a decision on deprivation of liberty is envisaged, was given special weight. Defendants in custody are granted additional rights in line with Directive 2012/13/EU.

In order to comply with Directive 2013/48/EU, the new CPC clarifies the provisions on custody in Articles 274-5. The law specifies that the right to notification of the person designated by the suspect in custody may be postponed so that the success of investigation is not jeopardized. This is not an absolute limitation, meaning that the suspect may designate another person to be notified. Notification may not be delayed beyond 8 hours.

The circumstances of seizure and sequestration were refined by Articles 333-4 new CPC so that the objectives of investigation could be reached with causing less damages. Directive 2014/42/EU was taken into account when drafting the new provisions. Authorities need to make sure that the value of the goods seized or sequestered is not more reduced than otherwise in their natural state. When managing the goods, actions may only be taken, if they are aimed at keeping the value of the goods.

Rules on judicial review in Article 374 new CPC have been drafted with a view to Directive 2012/13/EU.

Articles 468-473 new CPC on the arrangement of public sessions take into account of provisions of Directive 2012/13/EU. The law prescribes that the suspect and his or her legal

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<sup>24</sup> Az új büntetőeljárási törvény szabályozási elvei, A Kormány 2015. február 11. napján megtartott ülésén elfogadott előterjesztés.

representative must have access to all pieces of evidence presented by other parties, with special regard to arrest. When filing the motion for ordering or prolonging arrest, the prosecutor must hand over all pieces of evidence to the court. At the same time the prosecutor is obliged to hand over all pieces of evidence to the defendant and his or her legal representative, which serve as the basis for the motion of ordering or prolonging the request (Article 470 new CPC). Already the old CPC was amended to this extent: as of 1 January 2014, Article 211 old CPC set out the above rule in case of a motion for ordering pre-trial detention, and as of 1 July 2015, the rule applies with regard to a motion for prolongation, too.<sup>25</sup> That also meant that suspects not arrested were worse off than those arrested, as the latter did not have access to all pieces of evidence. In case of defendants whose pre-trial detention was not motioned by the prosecutor, there was no rule on full disclosure of evidence, but the legal representative had unrestricted access only to the expert opinion and the minutes of those investigative acts where the defendant or the lawyer could have been present. (Articles 185-6 old CPC) The authorities also abused this discrepancy when instead of an arrest, the leaving of residence was prohibited, or house arrest was ordered, so that disclosure of evidence wasn't triggered.

This practice went against Article 7 (1) of the Directive, which covers defendants "arrested and detained", whereas in Recital (21) the EU law references the ECHR when defining these terms. According to the case law of the Strasbourg court, house arrest is also covered by Article 5 of the Convention.<sup>26</sup>

Article 100 new CPC puts an end to this abusive practice: accordingly the defendant and his or her representative must gain access to the documents in all cases – irrespectively of ordering an arrest or not – after questioning the suspect. Experts interviewed agree that the Hungarian lawmaker would not have drafted the above provisions without EU obligations arising from Article 7 Directive 2012/13/EU. Still, as the Hungarian Helsinki Committee has shown, certain issues remain to be resolved. For example, the wording of the law discusses "documents", and not copies of documents. Whereas practice shows that written documents are photocopied, the same does not necessarily apply to audio, videorecordings. Also, electronic copies are not provided.<sup>27</sup>

Chapter CI new CPC deals with the procedure against an absent defendant. As the explanation to the law states, the special rules on *in absentia* trials are aimed at balancing the social expectations towards the operation of criminal justice and the constitutional rights of defendants. The special procedure was designed in view of the judgments of the Hungarian Constitutional Court, the European Convention on Human Rights and the Strasbourg case law, the International Covenant on Civil and Political Rights and Directive 2016/343/EU.

Codification of **victims' rights** in Hungary had fit into the international trend of the reinvention of victims' rights in the 1990s. Later, the Framework Decision 2001/220/JHA adopted was also of direct influence on Hungarian laws. Whereas Hungarian procedural rules corresponded to the European instrument, there is at least one instance where the latter directly inspired the Hungarian lawmaker: Act LI of 2006 made victim-offender mediation possible so as to comply with the obligations flowing from the Framework Decision.<sup>28</sup>

Almost a decade later the Hungarian Parliament adopted Act CLI of 2015 on the modifications of certain Hungarian pieces of legislation in order to make the Hungarian legal system compatible with the Victims' Rights Directive 2012/29/EU. The following main amendments were introduced: (i) After the death of the victim, the relative in direct line, the brother or sister, the spouse or common-law partner of the victim and the legal representative of the victim may exercise victim's rights; (ii) The victim is entitled to know if the defendant has

<sup>25</sup> A lower piece of legislation, Instruction of the Prosecutor General 11/2003 (Ü.K. 7.) and more specifically its Article 21 (4) has also been amended mirroring the modifications of the old CPC.

<sup>26</sup> *Süveges v. Hungary*, Application no. 50255/12, 5 January 2016, paragraph 77.

<sup>27</sup> For this and further criticism see Hungarian Helsinki Committee (András Kristóf Kádár, Nóra Novoszádek), Article 7 – Access to Case Materials in the Investigation Phase of the Criminal Procedure in Hungary, 2017, [https://www.helsinki.hu/wp-content/uploads/HHC\\_Article\\_7\\_research\\_report\\_2017\\_EN.pdf](https://www.helsinki.hu/wp-content/uploads/HHC_Article_7_research_report_2017_EN.pdf)

<sup>28</sup> Erika Róth, A sértett helyzete a büntetőeljárásban az Európai Unió elvárásainak tükrében [The victim's position in the criminal procedure in light of European Union expectations], 6 *Miskolci Jogi Szemle* (2011), 155-167.

escaped or has been released; (iii) The victim has the right to representation by legal aid counsel in the all criminal proceedings; (iv) The victim is entitled to clear communication both in verbally and in writing during the criminal proceedings; (v) The victim is entitled to avoid contact with the defendant, whenever possible; (vi) The victim is entitled to not have to repeat the procedural steps, if possible; (vi) The need for special treatment of victims needs to be assessed; (vii) In sex offenses, the victim may request that s/he is heard by a person of the same sex; (viii) Interrogation of a witness under the age of fourteen must be video recorded; (ix) The victim may be supported during the proceedings by an adult person of their request; (x) In the case of a victim requiring special treatment, it is possible to have a closed hearing.<sup>29</sup>

The new CPC in Article 50 clarifies that a victim can be both a natural and and a legal person. The law summarizes victims' rights at one place, thereby overcoming previous problems of the scattered nature of victims' rights in the law;<sup>30</sup> and at the same time mentions victims' obligations. The victim may at any point in time make a declaration about the physical, psychological or financial effects of the crime, and state whether he or she wished the guilt to be established and the perpetrator punished. This is no obstacle to the victim being heard as a witness, and does not elevate his or her responsibility from appearing at the trial. The victim may withdraw the declaration at any time during the process.

For further instruments see the response to Question 3.

*5. Have transposition gaps persisted? If so, could you briefly point them out?*

No.

## **B.2. Directives that are still in the process of being transposed**

*6. Has the transposition process of directives adopted in 2016 begun? Do you think it will lead to important changes in the national law of your country?*

Yes, the transposition process has begun.

*7. In light of the Milev judgment recently delivered by the Court of Justice, are the provisions of EU directives on procedural rights being taken into consideration by national courts when interpreting national procedural law?*

Interviewees couldn't name any examples.

## **B.3. Effectiveness and adequacy of EU law on criminal procedure**

*8. In some cases, has the national legislator gone beyond the standard provided by EU directives?*

In case of JITs Hungary agreed to apply other Member State's laws and technical solutions, in case it was not in contradiction of Hungarian law.

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<sup>29</sup> For details see Balázs Lencse, A büntetőeljárás törvény egyes sértettekre vonatkozó rendelkezéseinek módosítása az Európai Unió áldozatvédelmi irányelvének tükrében [Amendments to the Criminal Procedural Code's victims' rights provisions in light of the European Union's Victims' Rights Directive The disadvantaged position of the victim in the criminal procedure], *Büntetőjogi Szemle* 1-2 (2016), 50-61.

<sup>30</sup> Anna Kiss, 'A sértett hátrányos helyzete a büntetőeljárásban' [The disadvantaged position of the victim in the criminal procedure] 2 *Ügyészek lapja* (2003) 5-18.

9. Do you think some procedural issues have not been addressed by EU directives/at EU level?

Act XC of 2017 on the new Criminal Procedural Code will enter into force on 1 July 2018. Rights enshrined therein can only be evaluated once they are applied in future criminal proceedings.

Often structures and processes are in place, but the desired outcome is missing.<sup>31</sup> This was also the case with the Letter of Rights, which as the Hungarian Helsinki has proved, was understandable by 38,5 % of the defendants only, despite the fact that Directive 2012/13/EU required both information on procedural rights and also Letters of Rights shared with detained defendants to be provided in simple and accessible language.<sup>32</sup> In another research the Hungarian Helsinki Committee pointed at deficiencies in the practical realisation of the Hungarian provisions that implement Directive 2013/48/EU.<sup>33</sup>

Some practicing lawyers pointed at the lack of trainings, which hinder the realisation of rights enshrined in EU Directives in practice.

10. To what extent do you think transposition gaps and persisting differences between the Member States may postpone/block cross-border cooperation in criminal matters, including the operation of mutual recognition instruments? If this occurred in the past, please explain which cross-border/mutual recognition measure was at stake

Until two years ago the Slovak Republic demanded double criminality, and refused to freeze property with a view to possible subsequent confiscation when it came to value added tax fraud. Authorities thus refused to apply 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, and instead initiated investigation for a separate money laundering case and confiscated property in this latter procedure. The matter has been resolved since.

In surrender cases differences between the Member States national laws or transposition gaps have not led to difficulties.

11. Does your criminal justice system allow in *absentia* trials? Have in *absentia* trials been an obstacle to cross-border cooperation (e.g. refusal of surrender in EAW cases)?

The new CPC lays down the right to be present at the trial and at procedures when a decision is made on measures infringing liberty. According to the explanatory note on the Act, and in particular Article 39, the legislative power took special account of Directives 2016/343/EU and Directive 2012/13/EU.

At the same time, Hungarian law allows for *in absentia* trials (Chapter XXV of the old CPC, Chapter CI of the new CPC), but it also allows for retrials in case the defendant who had been tried *in absentia*, is found (old CPC, Article 408(1) e) and Article 409(3); new CPC, Article 637(1) g) and Article 644(2)). Therefore EAWs can be complied with in line with Article 4a(1) d) of the Framework Decision on the EAW.

However in case the European arrest warrant is issued for the purpose of executing a custodial sentence or detention order, *in absentia* trials may lead to the executing State

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<sup>31</sup> For the sturture-process outcome models see UN OHCHR (2012), Human rights indicators: a guide to measurement and implementation, HR/PUB/12/5 Fundamental Rights Agency (2014), Fundamental rights: challenges and achievements in 2013 – Annual report 2013, Focus Chapter, Luxembourg, Publications Office, 7-20.

<sup>32</sup> Hungarian Helsinki Committee (Mátyás Bencze, Júlia Koltai, Zsófia Moldova, András Kádár), Accessible Letters of Rights in Europe. Research Report on the Accessibility of Letters of Rights in Hungary, 2016, [https://www.helsinki.hu/wp-content/uploads/Accessible\\_LoRs\\_sociolinguistic-testing\\_HHC.pdf](https://www.helsinki.hu/wp-content/uploads/Accessible_LoRs_sociolinguistic-testing_HHC.pdf), 6. The alternative Letter of Rights the HHC and the legal, plain language and sociology experts drafted was accessible by 62% of defendants.

<sup>33</sup> Hungarian Helsinki Committee (András Kristóf Kádár, Nóra Novoszádek), The Right of Access to a Lawyer and Legal Aid in Criminal Proceedings in Hungary, 2018, forthcoming.

refusing to recognise the judgment and enforcing the sentence, unless the situation is covered by one of the exceptions mentioned in Article 9(1) i) of the Framework Decision 2008/909/JHA (the person was summoned personally or informed via a representative according to the national law of Hungary of the time and place of the proceedings which resulted in the judgment being rendered *in absentia*, or the person has indicated to a competent authority that he or she does not contest the case).

### **C. Other domains that have not, or to a very little extent, been subject to harmonisation measures at EU level**

#### **Detention conditions**

12. *Does your criminal justice system provide for specific detention conditions (e.g. time-limits for custody or detention at each stage of the proceeding)?*

According to the new CPC there are time limits for detention at each stage of the proceeding.

Detention ordered prior to filing the indictment may continue up to the decision of the court of first instance during the preparations for the trial, but may never be longer than 1 month.

Detention may be extended by the investigating judge by 3 months several times, but the overall period may not exceed 1 year after detention has been first ordered.

Thereafter, detention may be extended by the investigating judge by 2 months

The detention shall cease

- a) if the period thereof reaches 1 year and the procedure is conducted against the defendant for a criminal offence punishable by not more than 3 years,
- b) if the period thereof reaches 2 years and the procedure is conducted against the defendant for a criminal offence punishable by not more than 5 years,
- c) if the period thereof reaches 3 years and the procedure is conducted against the defendant for a criminal offence punishable by not more than 10 years,
- d) if the period thereof reaches 4 years and the procedure is conducted against the defendant for a criminal offence punishable by more than 10 years.

There are exceptions from the above rules: the above limitations do not apply, if the procedure is conducted against the defendant for a criminal offence punishable by life imprisonment; if the arrest is ordered or prolonged after the conclusive decision of the court; if the appeal procedure against the court of second or third instance decision is pending; or if there is a repeated procedure pending owing to the repeal of a previous court decision.

After filing the indictment, the court decides on the motion of the prosecutor or ex officio to maintain, order or terminate the detention.

If the period of the preliminary arrest is ordered or maintained after filing the indictment, its justification shall be reviewed

- a) by the court of first instance if such detention exceeds 6 months and the court of first instance has not delivered a conclusive decision yet,
- b) by the court of appeal, if the period of the preliminary arrest has exceeded 1 year.

After the lapse of the 1 year period, the justification of the preliminary arrest ordered or maintained after filing the indictment shall be reviewed by the court of appeal, if the procedure is conducted before the court of third instance, the court of third instance at least once in every 6 months.

12.1. *If so, do differing/absence of similar conditions regulating detention regimes in other member states constitute a ground to refuse the execution of a mutual recognition instrument, such as the EAW?*

No.

12.2. *Has the Aranyosi and Caldaru judgment impacted the decisions taken by the judicial authority of your country on the operation of the EAW? Have some EAWs been suspended/refused on those grounds by the judicial authorities of your country?*

No.

13. *Does your criminal justice system take into account a custodial sentence (or part of it) already served in other EU state after a prisoner is transferred to your country?*

The Hungarian criminal justice system takes into account a custodial sentence, but prevents a so called "matching process". The enforcement of a custodial sentence can only be enforced if at least six months of imprisonment are to be served. The court must establish the date of the conditional release.

14. *Does your criminal justice system provide for a compensation regime for unjustified detention for the purpose of executing an EAW (e.g. in case of mistaken identity of the suspect/accused)? If so, could you please describe the features of such regime?*

The Hungarian criminal justice system provides for a compensation regime for unjustified detention. According to Article 848 new CPC it can be claimed whether in a simplified procedure or a so-called compensation lawsuit. The claim must be submitted within one year after the decision that serves as the basis of compensation has been communicated to the person concerned.

15. *What would you recommend as further action for EU institutions in the area of detention (e.g. action for failure to act, harmonisation measures, etc.)?*

Pre-trial detention should only be used as a measure of last resort and non-custodial alternatives including regular reporting to the police and electronic monitoring should be given preference.

### **Evidence gathering and admissibility**

16. *Were negotiations on the European Investigation Order hindered and/or slowed down by the existence of different rules in evidence gathering and admissibility?*

Interviewees conducted supported the thesis that negotiations on the European Investigation Order were considerably hindered by the existence of different rules in evidence gathering and admissibility, but since the preparatory documents by the Council are not public, not further information was disclosed.

Article 40 (1) of Act CLXXX of 2012 on criminal cooperation in criminal matters between the Member States of the European Union list all grounds of refusal, and Point e) incorporated the scenario when an investigative act is not known in or is contradictory with Hungarian law. The provision however has never been invoked in practice.

17. *Is evidence gathered in another EU state admissible in criminal proceedings in your country? If so, must evidence conform to domestic rules on evidence gathering?*



Evidence gathered in another EU state is admissible in criminal proceedings in Hungary. It does not have to conform to domestic rules on evidence gathering, but the same rules apply to illegally obtained evidence (see *infra* in Point 19.)

In reverse situations, the Hungarian version of search of a house, body search and seizure are an issue, since it is not just the court, but also the prosecutor, and the investigating authority which may order them. In such cases, an express reference to the Hungarian CPC is attached, proving that the procedure was conducted in compliance with the law.

*18. Which authority is in charge of reviewing how evidence has been gathered in the other EU state?*

Evidence gathering is reviewed by the public prosecutor and by the judiciary.

*19. Can evidence that is gathered unlawfully or may entail a breach of fundamental rights be used during the trial? If not, are there exceptions to this rule?*

In the course of criminal proceedings, all means of evidence specified by law and all evidentiary procedures may be used without restrictions, but facts derived from means of evidence obtained by the court, the prosecutor or the investigating authority by way of committing a criminal action, by other illicit methods or by the substantial restriction of the procedural rights of the participants may not be admitted as evidence.<sup>34</sup> (Article 78 (1) and (4) old CPC, Article 167 (1) and (5) new CPC)

Beyond the above general rule there are also special provisions on evidence to be excluded. These are:

- witness statements, if prior to the examination, the information of the witness on the grounds on exemption as well as on his or her rights was not recorded into the minutes;
- witness statements made in violation of the provisions on taking a testimony;
- witness statements, which were given without recording in the minutes a prior warning as to the obstacles to testify as a witness, about witness's obligation to tell the truth to their best knowledge and conscience and the consequences of giving false evidence;
- the statement of the accused, witness and victim made in front of the expert concerning the act underlying the proceedings, which constitutes part of the expert opinion;
- defendant testimony, which was given without recording in the minutes that he or she was informed about that fact that defendants are not under the obligation to testify, and his or her response to it;
- the outcome of a house search, if the search is to be confirmed by a court, and the court refuses to issue a warrant;
- the data medium containing the document or the document itself not seized by the prosecutor or the court (the document may not be admitted as a means of evidence either in the given case or in other criminal proceedings);
- the outcome of covert data gathering, if the court has rejected the motion, or its maintenance is unlikely to yield any result, or the person concerned is the attorney, someone who cannot be interrogated as witness, or someone who can deny witness testimony;
- the statement of the defendant and the victim made in the course of the victim-offender mediation process.

*20. To what extent do you think differing rules on gathering and admissibility of evidence have constituted obstacles to the operation of mutual recognition instruments, including in the case of the EAW?*

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<sup>34</sup> For the details, and the possibility of remedying the violation of procedural rules when obtaining evidence see Balázs Elek, A 'mérgezett fa gyümölcsének elve' a hazai és a strasbourgi gyakorlat tükrében [The 'doctrine of the fruit of the poisonous tree' in light of the Hungarian and Strasbourg jurisprudence], *Magyar Jog* 2 (2018) 94-104.

The constitutions of the Czech Republic and Slovakia entrench the right to have a legal representative informed, which in some cases trumps mutual recognition-based instruments incorporated into lower pieces of legislation. Therefore even if all procedural steps are flawless with regard to the issuing of an EIO or in relation to JIT cooperation, the above mentioned states will refuse cooperation, and courts will not accept pieces of evidence, in case no legal representative was informed.

## Conflicts of jurisdiction

21. *Have you experienced conflicts of jurisdiction due to differences in criminal procedures (e.g. different meaning of a final judgment from a Member State to another)?*

The surrender case of Zsolt Hernádi requested by Croatia illustrates the consequences of different meanings attached to the phrase “final sentence”. According to Article 4(3) of the Framework Decision on the EAW, the executing judicial authority may refuse to execute the EAW “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”. Hungarian implementing legislation Act CLXXX in Article 5 g) states that surrender may be refused if “Hungarian judicial authorities (courts, or prosecutors) or the investigation authorities rejected the denunciation filed or terminated the investigation or the procedure.” But these decisions do not seem to be final even according to their Hungarian interpretation. According to Article 191(1) of the old CPC, as a general rule “termination of the investigation shall not prevent the subsequent resumption of the proceeding in the same case.”<sup>35</sup> Little wonder that the majority of Member States transposing the Framework Decision on the EAW (17 out of 27) meant a decision of the prosecutor, which brings the procedure to an end without the possibility of having it reopened.<sup>36</sup>

The Hungarian transposition had practical consequences in the case of Zsolt Hernádi, CEO of the company MOL, who was accused by the Croatian prosecutor of bribery in connection with the privatization of Croatian oil refinery INA. In October 2013, Croatia issued an EAW against him. This has been refused by the Hungarian court with regard to the *ne bis in idem* principle, due to the fact that the prosecutor’s office had previously started investigations, but later in January 2012 it decided to terminate it. (See also the separate paper authored in the frame of this project on the ‘*Overview of the national case law*’.)

22. *Do you think we should adopt an EU instrument that goes beyond existing measures and Eurojust’s competence in the field (e.g. Framework Decision 2009/948/JHA on conflicts of jurisdiction)?*

Eurojust is a demand driven organization, receiving demands from Member States. Should it have an increased amount of tasks, it would have to prioritise and potentially to deprioritise current objectives.<sup>37</sup> Furthermore it proactively provides support, can issue recommendations and non-binding opinions, even if these nuclear options are rather exceptional. The former rule is hardly ever applied, while this latter nuclear option has never been used,<sup>38</sup> since one of the disputing states would have to be downvoted, which again may result in that Member State giving lesser weight or even disregarding Eurojust recommendations in the future. Therefore Eurojust steps in if the judge or prosecutor initiates

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<sup>35</sup> Cf. A similar provision in Article 400(1) new CPC.

<sup>36</sup> Gert Vermeulen, Wendy De Bondt, Charlotte Ryckman (eds.): *Rethinking international cooperation in criminal matters in the EU. Moving beyond actors, bringing logic back, footed in reality*, Antwerpen, Apeldoorn, Portland: Maklu, 2012, 269-270.

<sup>37</sup><http://www.eurojust.europa.eu/doclibrary/budget-finance/workprogrammes/Eurojust%20work%20programme%202015/Eurojust-WP-2015-EN.pdf>

<sup>38</sup>[http://www.eurojust.europa.eu/doclibrary/Eurojust-framework/Casework/Report%20on%20Eurojust%20casework%20in%20the%20field%20of%20prevention%20and%20resolution%20of%20conflicts%20of%20jurisdiction%20%282018%29/2018\\_Eurojust-casework-on-conflicts-of-Jurisdiction\\_EN.pdf](http://www.eurojust.europa.eu/doclibrary/Eurojust-framework/Casework/Report%20on%20Eurojust%20casework%20in%20the%20field%20of%20prevention%20and%20resolution%20of%20conflicts%20of%20jurisdiction%20%282018%29/2018_Eurojust-casework-on-conflicts-of-Jurisdiction_EN.pdf), 9-10.

the process, or it advises Member States' authorities to conduct international cooperation. Should Eurojust receive more, or "stricter" competences, there is fear that trust on behalf of the Member States would be lost.

Member States need to report on a so-called Article 13 smart form jurisdictional conflicts of more serious crimes, which effect more than two countries, and is organised. In 2017 there were 168 such cases,<sup>39</sup> out of which Hungary reported 61 cases. There must be many more conflicts in the Member States then reported. Therefore it seems, that even existing obligations of member countries are not complied with.

## Victims

*23. What kind of protection measures are available for victims in your legal system? What is their nature (criminal measure, civil measure or both)?*

There are both civil and criminal measures available for victims in the Hungarian legal system. The old and the new CPC, Act CXXXV of 2005 on crime victim support and state compensation have been amended and/or drafted in a way as to protect victims' rights, but also lower pieces of legislation, such as Decree 1/2006. (I. 6.) of the Minister of Justice on the rules of the impressment of the using of victim support; Government Decree 233/2014. (IX. 18.) on the Office of Justice; Directive 2/2013 (I. 31.) of the National Police Headquarters on the victim protection tasks of the police; or Governmental Decree 354/2012. (XII. 13.) on identification process of the victims of trafficking in human beings.

Hungarian criminal theory distinguishes between and uses different terminology for injured parties in criminal proceedings (*sértett*) and the broader notion of victims (*áldozat*) taken from victimology.<sup>40</sup> It is the latter, broader term the Hungarian translation of the EU Victims' Rights Directive uses,<sup>41</sup> even if some rights are exclusively applicable to direct victims, while others are a broader personal scope. Hungarian laws always use the corresponding terminology.

The first group of victim services include those forms of services that can be used without ongoing criminal proceedings (for example, without having to file a complaint or any document proving that criminal processes are in progress). There are several reasons for not having to show the initiation of criminal proceedings. Assistance includes either providing information (such as information on criminal proceedings) or is of a type that would be meaningless if it could only be provided after having taken administrative steps (e.g. psychological support in a crisis). Victims of certain types of crimes, such as victims of domestic violence, need support even before initiating criminal proceedings, whether it is a sort of support to resolve a crisis situation, to create security of the victims, or to make a decision about reporting to the police. An additional common feature of these services is that the victim has no deadlines to respect to make use of them.

Examples of services in this first group include the help for making use of judicial assistance. The victim is informed about the system of victim protection assistance, the criminal justice system, and is given legal help that does not necessitate the involvement of a lawyer. Practice shows that these pieces of information are crucial, since victims typically are not aware of the average length of a criminal process, about whether compensation can be granted in the frame of a criminal proceeding, whether they will be informed about the release of the convict, etc. The first group of assistance also involves practical help beyond providing

<sup>39</sup> 30 JITs excluded. See Eurojust's Annual Report, 2017, [http://www.eurojust.europa.eu/doclibrary/corporate/eurojust%20Annual%20Reports/Annual%20Report%202017/AR2017\\_EN.pdf](http://www.eurojust.europa.eu/doclibrary/corporate/eurojust%20Annual%20Reports/Annual%20Report%202017/AR2017_EN.pdf), 37.

<sup>40</sup> See for example Ilona Görgényi, *Ötletek a készülő áldozatvédelmi törvényhez – az áldozat büntetőeljárásjogi helyzete de lege ferenda* [Ideas for the victim protection law in the making – the position of the victim in criminal proceedings de lege ferenda], *Kriminológiai Közlemények* 61, Budapest: Magyar Kriminológiai Társaság, 2004, 105-131.

<sup>41</sup> In a somewhat confusing manner the Hungarian version of Art. 82 (2) Point (c) uses the narrower term *sértett*.

information, such as reporting the crime to the insurance company, making sure social assistance is granted by the social security, or the enforcement of patients' rights. Another issue also included into this first group of victim services is the provision of shelters. For victims of trafficking in human beings, the service only serves as a dispatcher and does not maintain shelters. Witness support is a recent form of service, where a court employee gives information about the way a witness statement can be made, and other related issues relevant for the witness. Providing emotional and psychological support is one of the areas where the Hungarian victim protection system suffers from deficiencies.

The second group of victim support includes services to be provided once the crime has been reported. These can be given to the victim in a formalized procedure, but are still very flexible under lax statutory conditions. By granting immediate financial assistance, the victim support service will cover the victim's housing, clothing, food and travel expenses, as well as extraordinary medical expenses and costs related to the funeral, if the victim is not in a position to pay these. Immediate financial aid neither a form of compensation, nor is it social assistance, furthermore and as a consequence it is independent of the victim's income.

If a victim specifically requests a lawyer to intervene in a civil or a criminal procedure, he or she must turn to the so-called legal aid service. The victim assistance service issues a certificate testifying that the person concerned is indeed a crime victim, and thus a victim of less financial means may get legal assistance partially covered by the state.

In the framework of a criminal procedure, the victim may request to be informed about the convict's release; information on victims' rights obligations should be formulated in a manner understandable to the person concerned, taking into account his or her status and personal characteristics; unnecessary meetings between victim and suspect shall be avoided; victims of special need are specifically mentioned and special rules apply; the possibility of audio or video recording of witness statements is granted; a support person may be present; victims may be interviewed prior to other victims; and the possibility of interrogation through a closed-circuit telecommunications network is granted.

The third form of support includes state compensation, and is discussed in the next subchapter.

*24. Does your legal system foresee a compensation mechanism for victims of crime? Has your country been involved in cross-border compensation cases under Directive 2004/80/EC?*

Directive 2004/80/EC obliges Member States to bring into force the laws, regulations and administrative provisions necessary to comply with the Directive and to set up a system of cooperation to facilitate access to compensation to victims of violent intentional crimes, with a deadline of 1 January 2006. Act CXXXV of 2005 on crime victim support and state compensation was passed in order to achieve these objectives.

According to Article 1(1) the Act applies to victims of crime committed on the territory of Hungary and to any natural person who has suffered injuries as a direct consequence of criminal acts, in particular bodily or emotional harm, mental shock or economic loss. The personal scope of the Act covers Hungarian citizens, other European citizens, citizens of any non-EU country lawfully residing on the territory of the European Union, stateless persons lawfully residing in Hungary, victims of trafficking in human beings, and anyone else eligible by virtue of international treaties concluded between their respective states of nationality and Hungary or on the basis of reciprocity.

Social need is a prerequisite for compensation, while the provisions on services – except for legal assistance – apply to all crime victims irrespective of needs. State compensation furthermore is applicable to direct victims of intentional, violent crimes committed against the person, if the victims' bodily integrity or health is severely damaged, unlike provisions on services, which are applicable to all crime victims. While services can be used by the victim in case of any criminal offense, state compensation is only applicable to victims of intentional, violent offences against the person, if as a consequence of the crime they suffer direct physical damage and their bodily integrity and health are severely impaired.

Compensation may also be granted to relatives of victims mentioned above, if they live in the same household with the direct victim at the time the crime occurs; to the those who are dependent on the victim; and finally those who pay for the victim's funeral.

Compensation is made available in the form of lump-sum cash payment or in regular monthly instalments. A crime victim may apply for lump-sum cash payment as total or partial compensation for the economic loss he or she has incurred due to the crime. The victim may apply for partial compensation for the loss in his or her regular income in the form of regular payments, if the crime resulted in his or her disability to work for an estimated period of over 6 months. In none of the cases does the state cover the whole sum of the losses, but compensation is adjusted according to the amount of the damages or the losses, and has a pre-defined maximum value. In practice regular monthly instalments are hardly ever granted.

*25. Have you ever been involved in the cross-border recognition and implementation of a protection measure? If so, on which EU instrument did you rely: Directive on the European Protection Order (EPO – criminal matters) or Regulation on protection measures in civil matters?*

No.

*26. Have you ever issued an EPO where the issued protection measure was not available in the legal order of the executing state? If so, what happened?*

No.

*27. How would you make the EPO more effective? Could you identify issues not/insufficiently addressed in the directive that should be further developed/included?*

No.

*28. Has the implementation of the 2012 directive on victims' rights had a positive effect on the amount of issued/executed protection measures, including EPOs?*

Not relevant.

*29. Have gaps persisted in the implementation of Directive 2004/80/EC on compensation of victims and Directive 2012/29/EU on victims' rights?*

Experts interviewed agreed that all EU demands have been incorporated into Hungarian laws. The only gap that still persists is the psychological support to be offered to victims by victim support services.

*30. Have you identified weaknesses and gaps in the previously mentioned instruments and how would you make them more effective? Do you think new instruments on victims' rights should be tabled by the EU?*

Victims' rights have in the overall assessment been codified in compliance with EU expectations. Let me still mention instances, where improvement may be needed. As a Hungarian practicing judge remarked, "[n]o expressed provisions prevent victims from being questioned repeatedly[...] Although more and more special premises are adapted for hearing children, some other measures are still missing. There is no rule that interviews with a particularly vulnerable victim should be carried out by or through professionals trained for that purpose or that all such interviews should be made by the same person within one phase

of the procedure at least."<sup>42</sup> Another criticism is related to compensation. According to Professor Róth, compensation of the victim, which is often not realised, should have priority over financial sanctions.<sup>43</sup> As to victim-offender mediation, their number increases, but the legal institution could be used more efficiently.<sup>44</sup> In contrast to the restorative approach, mediation is currently invoked in case of defendants, who have a regular income, while persons charged of more modest financial means are less likely to benefit from the procedure.<sup>45</sup> It means that authorities regard victim-offender mediation more as an instrument that accelerates and makes procedures more efficient, in case the defendant can monetarily compensate the victim.

## Other areas of concern

*31. Were negotiations on the European Public Prosecutor Office (EPPO) hindered and/or slowed down by the presence of differences in national procedural criminal laws?*

The proposal regarding the establishment of the EPPO was debated by the Committee on European Affairs of the Hungarian Parliament at its meeting of 23 September 2013. Hungary summarized its initial concerns to EPPO in Parliamentary Decision 87/2013. (X.22.), which also asked the President of the Parliament to forward the Reasoned Opinion of the Hungarian Parliament on the rejection of Hungary's participation to the European Commission. The Reasoned Opinion<sup>46</sup> was adopted at the plenary meeting of 21 October 2013. 280 MPs voted in favour, 27 against, with one abstention. According to this document the proposal establishing the EPPO<sup>47</sup> violated the principle of subsidiarity. The potential violation of national sovereignty and the FL were also points of concern.<sup>48</sup>

According to the Reasoned Opinion the establishment of the EPPO did not comply with the principle of subsidiarity for the following reasons: it went beyond the authorisation enshrined in Article 86 TFEU, since the latter didn't provide exclusive competence to the European Public Prosecutor's Office; the proposed model of EPPO disproportionately limited national sovereignty in the field of criminal law; the exclusive right of instructions of the EPPO as foreseen in the proposal (Article 6 (5) of the Proposal) would have put into question the possibility of the operation of the delegated prosecutor's system integrated into the Member State's prosecutor system; and the European added value was not justified. Most importantly, the Reasoned Opinion highlighted difficulties concerning the implementation, for example with regard to the right to reallocate cases (Article 18 (5) of the Proposal), the determination of jurisdiction (Article 27 (4) of the Proposal) or the admissibility of evidence (Article 30 of the Proposal).

<sup>42</sup> Gergő Czédli, The Protection of Particularly Vulnerable Victims in Hungarian National Law, 57 *Hungarian Journal of Legal Studies* 3, 305-321 (2016), 318.

<sup>43</sup> Erika Róth, A sértett helyzete a büntetőeljárásban az Európai Unió elvárásainak tükrében [The victim's position in the criminal procedure in light of European Union expectations] 6 *Miskolci Jogi Szemle* 155-167 (2011), 164.

<sup>44</sup> Petra Bárd, Helyreállító igazságszolgáltatás [Restorative justice] In: Andrea Borbíró, Katalin Gönczöl, Klára Kerecsi, Miklós Lévy (eds.) *Kriminológia* [Criminology] Budapest: Wolters Kluwer, 2016, 930-952.

<sup>45</sup> Zsuzsanna Raduly A közlekedési bűncselekmények mediációs gyakorlata, [The practice of mediation in road traffic accident cases] 63 *Belügyi Szemle* 9: 69-91. (2015)

<sup>46</sup>For the summary of the Reasoned Opinion see <http://www.ipex.eu/IPEXL-WEB/dossier/files/download/082dbcc559522ecc01598e25b1e03a17.do>. For a summary including various national – also Hungary's – standpoints see the Communication from the Commission to the European Parliament, the Council and the National Parliaments on the review of the proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office with regard to the principle of subsidiarity, in accordance with Protocol No 2, Brussels, 27 November 2013, COM(2013) 851 final.

<sup>47</sup> Proposal for a Council regulation on the establishment of the European Public Prosecutor's Office, COM(2013)534; 2013/0255(APP).

<sup>48</sup> See the relevant information sheet by the Hungarian Parliament : [http://www.parlament.hu/documents/10181/1202209/Infojegyzet\\_2017\\_48\\_europai\\_uqyeszseg.pdf/a0de0d02-ae39-4970-9084-fab0eb5f74bb](http://www.parlament.hu/documents/10181/1202209/Infojegyzet_2017_48_europai_uqyeszseg.pdf/a0de0d02-ae39-4970-9084-fab0eb5f74bb)

Triggered by Hungary's and several other Member State's concerns, the European Commission conducted a review as provided for in Protocol 2 TFEU (yellow card procedure) and decided to uphold the Proposal without changes.<sup>49</sup>

On 26 February 2015 the delegation of the Committee on European Affairs of the Hungarian Parliament held exchange of views with Commissioner Vera Jourová regarding the state of play concerning the EPPO. On 9 March 2015 the Committee on European Affairs decided to launch a procedure on the legislative proposal. The Committee on Justice of the Hungarian Parliament was asked to draft an opinion on the matter. On 11 May 2015 the Committee on Justice discussed the key elements of the EPPO proposal and drafted its opinion which was then shared with the the Committee on European Affairs.<sup>50</sup> Simultaneously, in the Sopot Declaration<sup>51</sup> of Prosecutors General of the Visegrad Group on 15 May 2015, the Czech Republic, Hungary, Poland and Slovakia promoted the so-called "Network Model" relying more heavily on national institutions and legal systems, originally presented by the Hungarian Prosecutor General.<sup>52</sup>

During the meeting of the Committee on European Affairs of 9 November 2015, the official Hungarian position was highlighted by the Government Commissioner from the Ministry of Justice. On 5 December 2016 EU Commissioner Vera Jourová held an exchange of views regarding EPPO with Hungarian MPs in the framework of the meeting of the Committee on European Affairs. The Committee on European Affairs discussed the EPPO proposal at its meeting of 18 September 2017.<sup>53</sup>

Now that EPPO became a reality,<sup>54</sup> the Hungarian state authorities decided not to make use of enhanced cooperation and failed to opt in. According to the Government, there are currently institutions such as Eurojust or OLAF, which sufficiently address offenses against EU financial interests and a new entity such as the EPPO would only weaken these well-functioning organizations.<sup>55</sup>

*32. Please mention any other points of concern (linked to differences in national criminal procedures/procedural rights) that hindered or may hinder cross-border cooperation in criminal matters. If you think that differences in the articulation of competences between relevant bodies (e.g. judges, prosecutors, police, lawyers, etc.) might hinder cross-border cooperation in criminal matters, please elaborate.*

See Point D.

#### **D. Conclusion and policy recommendations you may have, including areas where you would recommend to intervene and how**

<sup>49</sup> Reasons by the European Commission are laid down in Communication from the Commission to the European Parliament, the Council and the National Parliaments on the review of the proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office with regard to the principle of subsidiarity, in accordance with Protocol No 2, Brussels, 27 November 2013, COM(2013) 851 final. The response the European Commission sent to Hungary on 14 March 2014 is available at <http://www.ipex.eu/IPEXL-WEB/dossier/files/download/082dbcc559522ecc01598e2313ec3a13.do>

<sup>50</sup> <http://www.ipex.eu/IPEXL-WEB/scrutiny/APP20130255/huors.do>

<sup>51</sup> For the full text please visit [http://ugyeszseg.hu/wp-content/uploads/sajto1/2015/06/sopot-declaration\\_final-15-v-2015.pdf](http://ugyeszseg.hu/wp-content/uploads/sajto1/2015/06/sopot-declaration_final-15-v-2015.pdf)

<sup>52</sup> See the habilitation theses by Péter Polt on Eurojust and EPPO at [https://jak.ppke.hu/uploads/articles/757135/file/Polt\\_Peter\\_tezis.pdf](https://jak.ppke.hu/uploads/articles/757135/file/Polt_Peter_tezis.pdf); Péter Polt, Die Europäische Staatsanwaltschaft-EPPO, *Österreichische Richterzeitung* 12: 262-268. (2016); Péter Polt, EPPO: Tendencies and Possibilities, In: György Vókó (ed.), *Tiszteletkötet Dr. Kovács Tamás 75. születésnapjára [Volume in honor of Dr. Tamás Kovács, on his 75th birthday]*, Budapest: Országos Kriminológiai Intézet, 2015, 109-120.

<sup>53</sup> <http://www.ipex.eu/IPEXL-WEB/scrutiny/APP20130255/huors.do>

<sup>54</sup> Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO')

<sup>55</sup> <https://mno.hu/kulfold/zold-utat-kapott-az-europai-ugyeszseg-2420128>

It is primarily the relation between mutual recognition based instruments and values the EU and Member States are supposed to share, which needs to be given more consideration.<sup>56</sup> The EU's legislative bodies have adopted a series of laws in the criminal justice area on the basis of mutual trust without leeway to opt out if doubts arise concerning the issuing Member State's respect for values common to the EU and its Member States according to Article 2 TEU. Yet it has turned out that mutual trust was premature and unjustified: as shown by attempts to have Article 7 TEU triggered, infringement procedures initiated due to alleged lack of judicial independence, and court cases – including ECtHR pilot judgments – certain member states violate the dictates and most basic tenets of the rule of law, engage in systemic human rights violations and jeopardize judicial independence. Whereas the majority of cross-border cases do not involve such concerns, those that do touch upon a fundamental tension between automatic mutual recognition and values the Member States and the EU share. In those cases, executing states that adhere to EU values find themselves between a rock and a hard place: they either follow mutual recognition-based laws and thereby become responsible for the proliferation of rule of law problems and human rights abuses across the Union, or they disrespect EU secondary laws.

For a long time, the CJEU insisted on a strict understanding of mutual recognition. In its Opinion 2/13<sup>57</sup> preventing the EU's accession to the European Convention on Human Rights under the terms agreed, the Court of Justice emphasised the importance of the principle of mutual trust between member states as the cornerstone of the area of freedom, security and justice. But in *Aranyosi and Căldăraru*<sup>58</sup> the Court departed from this strict reading: it established a two-prong-test for checking the general fundamental rights situation in a country and the potential risks of human rights violations in the individual case. If the risk of a human rights violation in general and in the specific case has been established, the execution of the warrant must be postponed.<sup>59</sup> The judicial test developed in *Aranyosi* could constitute a mandatory ground for refusal in mutual recognition-based instruments, beyond a proportionality test. The High Court of Ireland referred another vital case to the CJEU. The High Court suggested the Luxembourg court to conclude that “the rule of law in Poland has been systematically damaged by the cumulative impact of all the legislative changes that have taken place over the last two years”, therefore mutual trust between Ireland and Poland ceases to exist.<sup>60</sup> Should the Court agree, this will further refine the concept of mutual trust, as national courts – in addition to the state of human rights – might have to look into judicial independence in the issuing state, and not take it for granted. The wording of the proposed additional ground for refusal may incorporate this aspect of judge-made law, too.

The viability of the above suggestions is proven by the fact the European co-legislators introduced the above tools in the 2014 Directive on the EIO, enabling the exchange of evidence and mutual legal assistance between EU member states' authorities.<sup>61</sup> The EIO provides irrefutable proof that “[m]utual recognition and fundamental rights/proportionality exceptions are not a contradiction in terms. They can go like hands holding one another in

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<sup>56</sup> Petra Bárd, Saving EU criminal justice. Proposal for an EU-wide supervision of the rule of law and fundamental rights, *CEPS Policy Brief*, 2018, [https://www.ceps.eu/system/files/PBard\\_Saving%20Justice.pdf](https://www.ceps.eu/system/files/PBard_Saving%20Justice.pdf).

<sup>57</sup> CJEU, Opinion 2/13 of 18 December 2014, ECLI:EU:C:2014:2454, paragraph 192.

<sup>58</sup> CJEU, *Aranyosi*, *op. cit.*

<sup>59</sup> For a detailed assessment of the case see Wouter van Ballegooij, Petra Bárd, Mutual Recognition and Individual Rights: Did the Court get it Right? *New Journal of European Criminal Law* 7 (2016) 439-464.

<sup>60</sup> High Court of Ireland, *Minister for Justice and Equality v. Celmer* [2018] Record Nos. 2013 EXT 295, 2014 EXT 8, EXT 291, 12 March 2018. The High Court has high chances for a permission to suspend mutual trust to be granted by the CJEU, in light of the recent case C-64/16 *Associação Sindical dos Juizes Portugueses*, *op. cit.* For an immediate assessment see Mathias Wendel, *Die Rechtsstaatlichkeitskrise vor Gericht: der Anfang vom Ende gegenseitigen Vertrauens*, 17 March 2018, <https://verfassungsblog.de/die-rechtsstaatlichkeitskrise-vor-gericht-der-anfang-vom-ende-gegenseitigen-vertrauens/>, or Petra Bárd, Wouter van Ballegooij, *Judicial Independence as a Precondition for Mutual Trust*, 10 April 2018, <https://verfassungsblog.de/judicial-independence-as-a-precondition-for-mutual-trust/>.

<sup>61</sup> Directive 2014/41/EU of 3 April 2014 regarding the European Investigation Order in criminal matters, OJ L 130/1 of 1 May 2014.



the EU legal system.<sup>62]</sup> ... The EIO ‘benchmark’ in EU criminal justice cooperation should therefore be streamlined across the board of European legal acts in the same domain.”<sup>63</sup>

At the very minimum however, the presumption of mutual trust should be rebutted if a departure of EU values as laid down in Article 2 TEU is documented in the form of an Article 7 TEU procedure. This is also foreseen by mutual trust-based EU laws,<sup>64</sup> but there are two problems in practice. First, reaching consensus in an Article 7 TEU procedure today is more of a theoretical possibility. Owing to the high political and legal thresholds for triggering Article 7 TEU against non-compliant member states, the provision’s practical use is marginal (it was first invoked against Poland in December 2017); therefore, in practice it cannot be used as the basis for rebutting mutual trust. Second, an Article 7 procedure can seemingly only halt mutual recognition, if the breach of values has already been established, i.e. the procedure came to an end.<sup>65</sup> Taking the slouch nature of the proceeding into account and the immense harm that can be done on the way to an EU condemnation, a precautionary principle, suspending mutual recognition based instruments as soon as an Article 7 TEU process (including an Article 7(1) procedure) is launched, should be considered.

All the above *ex post* instruments and techniques are responsive, i.e. are designed to put a halt to the spread of rule of law and human rights violations when enforcing mutual recognition-based EU law. Still, they are neither capable of preventing fundamental rights abuses, nor are they suited to fostering mutual trust. Against this background, EU-wide procedural guarantees play a crucial role. The list of issues to be harmonized could be extended as far as the Lisbon Treaty allows, and preferably also minimum harmonisation of the rules on detention conditions should be agreed upon.<sup>66</sup>

Finally, the Union could create “a legal landscape of earned, rather than perceived trust in Europe’s area of criminal justice”<sup>67</sup> by way of establishing an all-encompassing monitoring mechanism for the rule of law, democracy and fundamental rights, including procedural rights and detention conditions, and with a special emphasis on judicial independence.

At present, there is no such systemic and all-encompassing monitoring of EU values in the criminal justice sector.<sup>68</sup> This is so despite the fact that Article 70 TFEU allows the adoption of measures for an objective and impartial evaluation of the implementation of Union policies

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<sup>62</sup> Wouter van Ballegooij, *The Nature of Mutual Recognition in European Law: Reexamining the Notion from an Individual Rights Perspective with a View to its Further Development in the Criminal Justice Area*, Maastricht: Intersentia (2015).

<sup>63</sup> Sergio Carrera, *Building a Common EU Justice Area: Reinforcing Trust and a Rights of Suspects-Centric Approach*, in: Petra Bárd, *The European Arrest Warrant in Hungary*, Budapest: OKRI, 2015, 133.

<sup>64</sup> Framework Decision on the European Arrest Warrant, Recital 10.

<sup>65</sup> “[I]mplementation 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) of the Treaty on European Union, determined by the Council pursuant to Article 7(1) of the said Treaty with the consequences set out in Article 7(2) thereof.” *Ibid.* Please note that the Framework Decision on the EAW was adopted before the adoption of the Nice Treaty adding a preventing arm to Article 7. Therefore when mentioning Article 7(1) and (2) current Article 7(2) and (3) TEU are meant.

<sup>66</sup> Also addressed by the Stockholm Programme of 2009 and European Parliament resolution of 27 February 2014 with recommendations to the Commission on the review of the European Arrest Warrant (2013/2109 (INL)), P7\_TA-PROV(2014)0174, Point 17.

The question however emerges whether the EU has competences to adopt minimum standards on detention conditions. Article 82(2)(b) TFEU covering criminal proceedings could unquestionably be extended to pre-trial detention. But it is debated whether post-trial detention, i.e. detention as a form of sanction is also covered in lack of express provisions. One could argue that Article 82(1) TFEU emphasising judicial cooperation is mutual recognition could not be enforced without minimum standards in detention conditions as the *Aranyosi* case, *op cit.* proves. For a detailed discussion of the problem see Wouter van Ballegooij/European Parliamentary Research Service, *European Added Value Unit, Procedural Rights and Detention Conditions. Cost of Non-Europe Report*, *op. cit.*, 66-69.

<sup>67</sup> Valsamis Mitsilegas, *The Symbiotic Relationship between Mutual Trust and Fundamental Rights in Europe’s Area of Criminal Justice*, 6 *New Journal of European Criminal Law* (2015), 460-485, 480. The President of the Court of Justice in a scholarly article reiterated this stance, but also added “where EU legislation complies with the Charter, limitations on the principle of mutual trust must remain exceptional and should operate in such a way as to restore mutual trust, thus solidifying all at once the protection of fundamental rights and mutual trust as the cornerstone of the AFSJ.” Koen Lenaerts, *La vie après l’avis: Exploring the principle of mutual (yet not blind) trust*, 54 *Common Market Law Review* 3 (2017) 805-840, 840.

<sup>68</sup> An ongoing project by Fair Trials entitled ‘Beyond surrender’ will provide insight into post-surrender treatment of people subject to indictment based on the European arrest warrant. Such a project may highlight deficiencies in the operation of the system, but cannot replace a systemic scrutiny. [http://ec.europa.eu/justice/grants1/files/2014\\_jcco\\_ag/summaries\\_of\\_selected\\_projects.pdf](http://ec.europa.eu/justice/grants1/files/2014_jcco_ag/summaries_of_selected_projects.pdf), 7.

in the area of freedom, security and justice, in order to facilitate the full application of the principle of mutual recognition. On 25 October 2016 the European Parliament passed a Resolution inviting the Commission to initiate legislation on a comprehensive rule of law, democracy and fundamental rights scoreboard (the DRF Resolution).<sup>69</sup> The European Parliament's legislative initiative report called upon the Commission to submit by September 2017 a proposal for the conclusion of a Union pact for democracy, the rule of law and fundamental rights (DRF Pact). The document was accompanied by a thorough assessment of European added value.<sup>70</sup>

The last recommendation is to realise the DRF Pact. Should the DRF Pact were be adopted, the EU may then be in a position to act without having to wait for rule of law backsliding or gross human rights infringements to occur in order to determine – via its respective legal procedures – violations of EU values. Instead it could warn the respective member state in due time and request a return to these values. Also, if a member state has already breached these values, the EU would not have to wait for external players, like the UNHCR, the Council of Europe, including the ECtHR, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) to indicate generic problems (as happened in the abovementioned *Aranyosi* case), but could rely on its own scoreboard system. It could act promptly with regard to mutual trust by suspending the application of mutual recognition-based EU laws (enhancing the effectiveness of the above recommendations on ex post instruments). Also, it could establish higher standards than those required by other external fora, such as the Council of Europe and the ECtHR.

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<sup>69</sup> European Parliament resolution of 25 October 2016 with recommendations to the Commission on the establishment of an EU mechanism on democracy, the rule of law and fundamental rights (2015/2254(INL)), P8\_TA-PROV(2016)0409.

For the time being the Commission followed up on this document in a rather hostile manner, which can be regarded as part of an inter-institutional dialogue on the matter. See Commission response to text adopted in plenary, SP(2017)16, 17 February 2017. For an assessment see Petra Bárd, Sergio Carrera, The Commission's Decision on 'Less EU' in Safeguarding the Rule of Law: A play in four acts, *CEPS Policy Insights* 2017:(08) 1-11, <https://www.ceps.eu/publications/commission's-decision-'less-eu'-safeguarding-rule-law-play-four-acts>.

<sup>70</sup> Wouter van Ballegooij, Tatjana Evas, *An EU Mechanism on Democracy, the Rule of Law and Fundamental Rights, Interim European Added Value Assessment accompanying the Legislative initiative report* (Rapporteur Sophie in 't Veld), European Parliamentary Research Service, October 2016, PE.579.328.

## VII. COUNTRY REPORTS ON THE NETHERLANDS

### National report No 1 on the Dutch jurisprudence

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#### 1. Case-law analysis

District Court of Amsterdam, 28<sup>th</sup> May 2010, ECLI:NL:RBAMS:2010:BM6381

Concerns: Execution of an EAW issued for prosecution of the requested person, Framework Decision 2002/584/JHA

Countries: Sweden (issuing country) and the Netherlands (executing country)

National provisions: Articles 27, 28 and 29 Dutch Code of Criminal Procedure, Swedish provisions unknown

##### i. Main issues and court ruling

The lawyer of the defendant/requested person has stated that surrender to Sweden should be refused, because it would result in a flagrant denial of the right to a fair trial (flagrante schending van het beginsel van fair trial). At an earlier time, the Swedish authorities did not clarify that they not only wanted to hear the requested person as a witness, but also as a suspect. This was during an interrogation on 26<sup>th</sup> February 2009. Dutch police intervened during that interrogation, which took place in the Netherlands. The defence refers to the Salduz-case of the ECtHR and the rights under Article 6 ECHR that flow from this case-law.

The court decides that an appeal on the basis of Article 11 Dutch Surrender Act can only be successful if it is founded on concrete facts and circumstances that lead to the legitimate presumption that the surrender will lead to a flagrant denial of a fair trial.<sup>1</sup> In this case there are no such concrete facts and circumstances. It has not been established that Sweden would violate the guarantees following from the Salduz-case-law if the requested person is surrendered. Neither has it been established that no effective remedy as follows from Article 13 ECHR will be available in Sweden.

##### ii. Differences between national criminal procedures and reasoning

The main difference between Sweden and the Netherlands in this case concerns the fact that Sweden does not provide suspects with the same procedural guarantees in conformity with the Salduz-case-law. The Dutch court does not regard this as an obstacle. Its reasoning reflects the settled case-law of the ECtHR that “a flagrant denial of justice” 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, and that “the proceedings as a whole” should be assessed in order to determine whether Article 6 ECHR has been violated. The Dutch court explicitly states that the requested person can call upon remedies ex Article 13 ECHR during the Swedish proceedings. Thus, the systemic differences between the Netherlands and Sweden do not mean that the trial in Sweden will be contrary to Article 6 ECHR and certainly do not justify the conclusion that they would lead

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<sup>1</sup> Article 11 Dutch Surrender Act does not transpose any provisions in the EAW Framework Decision. The Article provides: “Surrender shall not be allowed in cases in which, in the opinion of the court, there is justified suspicion, based on facts and circumstances, that granting the request would lead to flagrant breach of the fundamental rights of the person concerned, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms concluded in Rome on 4 November 1950”.

( Dutch version: “Overlevering wordt niet toegestaan in gevallen, waarin naar het oordeel van de rechtbank een op feiten en omstandigheden gebaseerd vermoeden bestaat, dat inwilliging van het verzoek zou leiden tot flagrante schending van de fundamentele rechten van de betrokken persoon, zoals die worden gewaarborgd door het op 4 november 1950 te Rome tot stand gekomen Europees Verdrag tot bescherming van de rechten van de mens en de fundamentele vrijheden”).

to “a flagrant denial of justice”. The ground for refusal ex Article 11 Dutch Surrender Act is not applicable.

District Court of Amsterdam, 14th June 2011, ECLI:NL:RBAMS:2011:BO9773

Concerns: Execution of an EAW issued for prosecution of the requested person, Framework Decision 2002/584/JHA

Countries: France (issuing country) and the Netherlands (executing country)

National provisions: Articles 27, 28 and 29 Dutch Code of Criminal Procedure

i. Main issues and court ruling

The defendant’s counsel has relied on several judgments of the ECtHR and on reports of Amnesty International regarding the prison conditions in France to contend that surrender to France should be refused. The defendant is at risk of suffering a violation of Article 3 ECHR. Moreover, the defendant’s lawyer put forward that a real risk exists that her client would be subjected to a trial contrary to Article 6 ECHR if surrendered. In France, there are systematic “Salduz”-violations during the phase of police custody. The defendant should not be surrendered to France on the basis of Article 11 Dutch Surrender Act.

The court considers that surrender cannot be refused in this case. The court decides that all Member States of the EU are party to the ECHR and, thus, are obliged to guarantee all rights therein. Article 13 ECHR ensures that an effective remedy before a national court exists. This means that it is firstly the duty and responsibility of the national – i.e. French – authorities to ensure the compliance with the ECHR. Having regard to the principle of trust between the Member States of the Union the court sees no reason to doubt that France will comply with its obligations under the ECHR. Moreover, Article 11 Dutch Surrender Act can only form an obstacle for surrender when concrete facts and circumstances lead to the presumption that surrender of the requested person would lead to a flagrant denial of his fundamental rights (flagrante schending van zijn fundamentele rechten). The arguments brought forward by the defence do not constitute such presumption of a flagrant denial.

ii. Differences between national criminal procedures and reasoning

The defence’s argument that there are systematic Salduz-violations in France implies that the French system is not in accordance with the case-law of the ECtHR and, thus, is incompatible with Article 11 Dutch Surrender Act. The rejection by the court of that argument is firmly based on the trust that governs the relation between the Member States of the ECHR and of the EU. The reasoning reflects the settled case-law of the ECtHR that “a flagrant denial of justice” 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, and that “the proceedings as a whole” should be assessed in order to determine whether Article 6 ECHR has been violated. The Dutch court also explicitly refers to the existence of remedies from Article 13 ECHR and mentions that it falls to the French authorities first to address shortcomings in the upcoming proceedings. Thus, the court shows that systemic differences between the Netherlands and France in regard to the Salduz-jurisprudence do not form an obstacle for the execution of an EAW and certainly do not justify the conclusion that they would lead to “a flagrant denial of justice”.

District Court of Amsterdam, 6<sup>th</sup> July 2011, ECLI:NL:RBAMS:2011:BR4144

Concerns: Execution of an EAW issued for prosecution and the execution of a sentence imposed upon the requested person, Framework Decision 2002/584/JHA

Countries: Poland (issuing country) and the Netherlands (executing country)

National provisions: Polish provisions unknown

i. Main issues and court ruling

The defence has argued that surrender to Poland should be refused, because surrender would constitute a flagrant denial of fundamental rights. The defence has, inter alia, pointed to the fact that the requested person has been convicted as a minor without the legal assistance of a lawyer. Furthermore, the defendant has stated that he will be convicted in Poland on the basis of forcefully obtained statements, i.e. statements extracted from him under physical or mental duress.

The court considers that the possibility that statements were forcefully obtained from the requested person does not constitute a ground for refusal on the basis of Article 11 Dutch Surrender Act. The unlawfulness of the statements can be addressed before a Polish court during the criminal trial. Poland is a party to the ECHR and, thus, the court should presume that that country will comply with its international obligations. Moreover, the court considers that the execution of a prison sentence does not constitute a flagrant denial of Article 6 ECHR. The argument that the requested person has been convicted as a minor without legal assistance is unsuccessful, because the court considers that this has not actually been proven.

ii. Differences between national criminal procedures and reasoning

Two alleged differences between Poland and the Netherlands concern the legal aid to minors and the use of forcefully made statements during the upcoming Polish trial. The reasoning of the Dutch court is firmly based on the fact that Poland is a party to the ECHR. The court emphasises that the guarantees under the ECHR are applicable and the Polish trial should be in accordance with Article 6 ECHR. In other words, the court expresses trust in the upcoming trial and guarantees in Poland. Although the court does not directly refer to judgments of the ECtHR it is clearly aware of the settled case-law of the Strasbourg court that “a flagrant denial of justice” 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, “the proceedings as a whole” should be assessed in order to determine whether Article 6 ECHR has been violated. The existence of an effective remedy ex Article 13 ECHR is also relevant.

District Court of Amsterdam, 25<sup>th</sup> October 2011, ECLI:NL:RBAMS:2011:BU2123

Concerns: Execution of an EAW issued for prosecution of the requested person, Framework Decision 2002/584/JHA

Countries: United Kingdom (issuing country) and the Netherlands (executing country)

National provisions: Article 70 Dutch Criminal Code

i. Main issues and court ruling

Surrender is requested for the prosecution of several sexual offences that took place between July – September 1977 and July – September 1980. The lawyer of the defendant has stated that surrender to the United Kingdom should be refused on the basis of Article 11 Dutch Surrender Act. The requested person suffers from a disability and is in need of specialised care. His surrender would lead to an imminent risk of a flagrant denial of a fair trial from Article 6 ECHR (dreigende flagrante schending van het bij het EVRM gewaarborgde recht op een eerlijk proces). Moreover, the right to a fair trial is at risk because the criminal acts for which the surrender is requested took place more than thirty years ago. According to the defence the existence of a statute of limitation is a fundamental principle of law, but in the United Kingdom no such statute of limitation exists. Therefore, the court cannot trust that the upcoming trial will be in accordance with Article 6 ECHR.

The court recognizes that the requested person is in need of specialised medical care, but he can receive this in the United Kingdom as well. If the defendant is unfit to travel the public prosecutor in the Netherlands can postpone the actual surrender until the health of the requested person improves. There is no real risk of a flagrant denial of a fair trial. The argument that the criminal acts for which surrender is requested took place more than thirty years ago and, thus, would obstruct truth-finding has to be assessed by an English judge. This national judge has all the results of the investigation. The fact that there is no statute of limitation in the United Kingdom cannot be considered for the (non-)execution of an EAW.

ii. Differences between national criminal procedures and reasoning

According to Dutch criminal procedural law, the prosecution of the criminal acts for which surrender was requested can be statute-barred. On the contrary, no statute of limitations exists in the United Kingdom for such acts. Statutes of limitation in the executing state can lead to the refusal of surrender in accordance with Article 4 (4) of the EAW Framework Decision if the acts fall within the jurisdiction of the executing Member State in accordance with its national law (transposed in Article 9 of the Dutch Surrender Act).

In the present case, the prosecution of the sexual offences was actually statute-barred in the Netherlands: the acts from 1977 became statute-barred in 1995 and those from 1980 became statute-barred in 2007. However, only the acts from 1980 fell within the jurisdiction of the Netherlands. On October 1<sup>st</sup> 2002 Article 5a Dutch Criminal Code came into force. This Article established jurisdiction for several sexual offences in cases where the suspect acquired a permanent home or place of residence in the Netherlands after the alleged criminal acts were committed. Offences that became statute-barred after the entry into force of Article 5a Dutch Criminal Code could not be prosecuted, because the Netherlands had jurisdiction and the Dutch statute of limitations applied. Before October 1<sup>st</sup> 2002 no jurisdiction for the prosecution of certain sexual offences existed under Dutch law in case of a foreigner with a permanent home or place of residence in the Netherlands. Because the Netherlands had no jurisdiction over the sexual offences from 1977 the refusal ground in Article 9 Dutch Surrender Act does not apply. This is different for the offences in 1980. Thus, surrender is partially refused in accordance with Article 9 Dutch Surrender Act (only for the acts from 1980).

However, the arguments of the defence under Article 11 Dutch Surrender Act did not entail that the prosecution for the criminal acts was statute-barred in the Netherlands, but focused on the aforementioned systemic difference between the two Member States. The overall absence of a statute of limitation would have a negative effect on truth-finding. In other words, the defence did not argue that the surrender of the requested person should be refused because a term of limitation applied, but that the lack of a statute of limitation in the United Kingdom constituted a violation of Article 6 ECHR. The fact that the offences could still be prosecuted after thirty years would have a negative impact of the fairness of the trial.

The Dutch court does not consider the systemic difference between the Netherlands and the United Kingdom to be an obstacle to surrender. The court gives weight to the fact that an English judge will assess the results of the investigation and decide whether the long time-lapse has an impact on truth-finding, and if so, what the implications should be for the guarantee of a fair trial. It is also important for the court that the requested person can contest the fairness in the use of the results of the investigation in the issuing state. This reasoning fits well within the settled case-law of the ECtHR that "the proceedings as a whole" should be assessed in order to determine whether Article 6 ECHR has been violated, and the existence of an effective remedy from Article 13 ECHR in the issuing state is relevant. The systemic absence of a term of limitation in the English legal system as such does not constitute a "flagrant denial of a fair trial" and cannot be brought under any of the other refusal grounds in the EAW Framework Decision and the Dutch Surrender Act.

District Court of Amsterdam, 26<sup>th</sup> October 2011, ECLI:NL:RBAMS:2011:BU2956

Concerns: Concerns: Execution of an EAW issued for prosecution of the requested person, Framework Decision 2002/584/JHA

Countries: Belgium (issuing country) and the Netherlands (executing country)

National provisions: Articles 27, 28 and 29 Dutch Code of Criminal Procedure, Article 47bis Belgian Code of Criminal Procedure

i. Main issues and court ruling

The defence has stated that the requested person was not informed about his right of access to a lawyer during the first interrogation in Belgium. During the second interrogation the defendant was not informed that he was not obliged to answer any questions. At first, the requested person used a false name. The defendant was then shown a photograph of a man and he acknowledged that he saw himself on that photograph. The photograph was then linked to the requested person's real name. The defendant has incriminated himself through his comments. Because he had not been informed of his right not to answer questions the nemo tenetur principle was violated. A judge in Belgium will conclude that a fair trial is not possible because of both violations. Therefore, the surrender should be refused.

The court does not follow the arguments of the defence and does not refuse the surrender. The Belgian judge should assess the suspicions, the alleged violations of Article 6 ECHR and the possible consequences of those violations. It has not been proven that these arguments cannot be addressed before a Belgian court. Belgium is a party to the ECHR and because of the principle of trust between Member States the court sees no reason to doubt that Belgium will comply with its obligations under the ECHR.

ii. Differences between national criminal procedures and reasoning

Two alleged differences between Belgium and the Netherlands concern the right of access to a lawyer before the first interrogation and the right not to answer questions. In the present case, the fact that the requested person was not informed of his rights to access a lawyer and not to answer questions does not lead to the refusal of the execution of the EAW. The reasoning of the Dutch court is firmly based on the fact that Belgium is a party to the ECHR. The Dutch court explicitly mentions that the principle of trust governs the relationship between Member States of the ECHR and the EU. The court emphasises that the guarantees under the ECHR are applicable and the Belgian trial should take place in accordance with Article 6 ECHR. Moreover, an effective remedy ex Article 13 ECHR will be available to contest the use of statements made during the first and second interrogation. Although the court does not directly refer to judgments of the ECtHR it is clearly aware of the settled case-law of the Strasbourg court that "a flagrant denial of justice" 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, "the proceedings as a whole" should be assessed in order to determine whether Article 6 ECHR has been violated.

District Court of Amsterdam, 12<sup>th</sup> June 2015, ECLI:NL:RBAMS:2015:4114

Concerns: Execution of an EAW issued for the execution of a sentence imposed upon the requested person, Framework Decision 2002/584/JHA

Countries: Poland (issuing country) and the Netherlands (executing country)

National provisions: Article 12 Dutch Surrender Act, Article 132 Polish Code of Criminal Procedure

i. Main issues and court ruling

The defence contended that the surrender of the requested person to Poland should be refused because reasonable doubt exists that the requested person has actually been officially informed about the date and place of his trial. Article 12 Dutch Surrender Act (transposition of Article 4a of EAW Framework Decision) provides that it needs to have been

established unequivocally that a defendant was informed of the scheduled trial.<sup>2</sup> The explanation provided by the issuing judicial authority is unconvincing. According to the Polish authorities, the notice has been sent to the defendant by mail and has also been given to his mother. The requested person was not personally informed about the hearing or the verdict. The fact that the summon to attend was sent in accordance with Polish law does not mean that this is also in accordance with Article 12 Dutch Surrender Act. The ECtHR only accepts that a defendant has unequivocally waived his right to attend the trial if he has been informed in person of the scheduled trial. In the present case, the requested person was not informed in person. Thus, surrender without any additional guarantees would entail a flagrant denial of Article 6 ECHR.

The court decides that the wording of Article 12 Dutch Surrender Act – “in accordance with the procedural rules of the issuing state” – shows that the procedural rules of the issuing state are decisive for establishing whether an exception to the obligation to refuse surrender on the basis of that Article exists. On the basis of the principle of trust between the Member States the court should presume that the laws in the issuing state are in accordance with Article 6 ECHR. In earlier case-law the court has concluded that under Article 132 of the Polish Code of Criminal Procedure a defendant has been informed of his trial if a notice has been given to an adult housemate. In that case, one of the exceptions to the obligations to refuse surrender ex Article 12 Dutch Surrender Act applies. The issuing judicial authority has informed the court that the notice has been given to the defendant’s mother. Therefore, under Polish law the notice has been lawfully given to him. The fact that the requested person did not attend his trial does not lead to the refusal of surrender.

The court reiterates that Article 12 Dutch Surrender Act implements Article 4a (1) of the EAW Framework Decision. In Article 4a (1) the Union legislator provided an exhaustive list of the circumstances in which the execution of a European arrest warrant issued in order to enforce a decision rendered in absentia must be regarded as not infringing the rights of the defence. Referring to the judgment of the CJEU in Melloni,<sup>3</sup> the Dutch court decides that Article 4a is in accordance with Article 6 ECHR and Article 47 and 48 CFR. The fact that the requested person has not attended his trial cannot lead to the refusal of surrender on the basis of Article 11 Dutch Surrender Act either.

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<sup>2</sup> Article 12 Dutch Surrender Act provides: “Surrender will not be allowed in case where the European arrest warrant is issued for the purpose of executing a custodial sentence or a detention order if the person did not appear in person at the trial resulting in the decision, unless the European arrest warrant states that, in accordance with further procedural requirements defined in the national law of the issuing Member State:

(a) the person in due time was summoned in person and was thereby informed of the scheduled date and place of the trial which resulted in the decision, or by other means actually received official information of the scheduled date and place of that trial in such a manner that it was unequivocally established that he or she was aware of the scheduled trial and was informed that a decision may be handed down if he or she does not appear for the trial; or

(b) the suspect, being aware of the scheduled trial, had given a mandate to a legal counsellor, who was either appointed by the person concerned or by the State, to defend him or her at the trial, and was indeed defended by that counsellor at the trial [...].”

(Dutch version: “Overlevering wordt niet toegestaan indien het Europees aanhoudingsbevel strekt tot tenuitvoerlegging van een vonnis terwijl de verdachte niet in persoon is verschenen bij de behandeling ter terechtzitting die tot het vonnis heeft geleid, tenzij in het Europees aanhoudingsbevel is vermeld dat, overeenkomstig de procedurevoorschriften van uitvaardigende lidstaat:

a. de verdachte tijdig en in persoon is gedagvaard en daarbij op de hoogte is gebracht van de datum en plaats van de behandeling ter terechtzitting die tot de beslissing heeft geleid of anderszins daadwerkelijk officieel in kennis is gesteld van de datum en de plaats van de behandeling ter terechtzitting, zodat op ondubbelzinnige wijze vaststaat dat hij op de hoogte was van de voorgenomen terechtzitting en ervan in kennis is gesteld dat een vonnis kan worden gewezen wanneer hij niet ter terechtzitting verschijnt; of

b. de verdachte op de hoogte was van de behandeling ter terechtzitting en een door hem gekozen of een hem van overheidswege toegewezen advocaat heeft gemachtigd zijn verdediging te voeren en dat die advocaat ter terechtzitting zijn verdediging heeft gevoerd [...].”

<sup>3</sup> Case C-399/11, Judgment of the Court (Grand Chamber), 26 February 2013 *Stefano Melloni v Ministero Fiscale*, ECLI:EU:C:2013:107.



## ii. Differences between national criminal procedures and reasoning

The main question in this case is whether the Polish rules concerning in absentia decisions are compatible with Article 12 Dutch Surrender Act. In short, it is argued that even if the summon to attend was sent in accordance with Polish law execution of the EAW can still lead to a violation of fundamental rights and, thus, surrender should be refused. The argumentation of the court in rejecting this reasoning is twofold: (1) the Polish rules are decisive under the EAW Framework Decision and the Dutch implementation law and (2) these Polish rules are presumed to be in accordance with the ECHR and the CFR. Via its argumentation the Dutch court shows that differences between national rules on in absentia decisions and delivery of official notices form no obstacle for the recognition of an EAW in this case.

### (1) Polish procedure decisive

First, the EAW Framework Decision and the Dutch implementation law explicitly provide that the procedural rules of the issuing state are decisive in establishing whether the requested person was informed about the time and place of his trial. Based on the information provided by the Polish authorities and its earlier case-law, the court concludes that the summons to attend was sent in accordance with Polish law. Thus, the exception ex Article 12 Dutch Surrender Act is applicable.

### (2) Harmonisation and trust

The court then turns to the principle of trust. This principle governs the relation between Member States of the ECHR and of the EU and entails that the Dutch court should presume that Polish law is in accordance with fundamental right standards. The court explicitly states that the EAW mechanism and its rules on in absentia decisions have been fully harmonised by the Union legislator and, thus, are uniform within the EU. The Union legislator has decided that exceptions to refusal of surrender ex Article 4a (1) of the EAW Framework Decision and Article 12 Dutch Surrender Act are in accordance with the right to a fair trial. The court also refers to the influential judgment of the CJEU in Melloni to underpin that the rules are in accordance with fundamental rights.

District Court of Amsterdam, 23<sup>rd</sup> June 2015, ECLI:NL:RBAMS:2015:4325

Concerns: Execution of an EAW issued for prosecution of the requested person, Framework Decision 2002/584/JHA

Countries: Belgium (issuing country) and the Netherlands (executing country)

National provisions: Article 30 Dutch Code of Criminal Procedure, Articles 28quinquies and 57 Belgian Code of Criminal Procedure

#### i. Main issues and court ruling

The defence has brought forward several arguments why surrender would violate the fundamental rights of the requested person and why the prosecution should be transferred from Belgium to the Netherlands. Firstly, the requested person will not have a fair trial in conformity with Article 6 ECHR in Belgium, because of hostile media coverage in that country. Secondly, several applicable guarantees in the Netherlands are not available to the defendant in Belgium. The defence refers to the fact that the defendant will be heard in Belgium. Although this was initiated by a Belgian investigative judge, there will be no public prosecutor or investigative judge present during the interview. The defence would like to have access to

the case file (dossier), but the right to access the case file does not exist in Belgium at this stage of the proceedings. By contrast, under Dutch law the defence would have access to the case file as this is considered to be a fundamental right. Thus, a fundamental right that exists in the Netherlands would be violated if the requested person would be surrendered to Belgium. The defence contended therefore that the proceedings should be transferred to the Netherlands (presumably on the basis of European Convention on the Transfer of Proceedings in Criminal Matters, although this is not mentioned).

The court decides that the arguments of the defence are insufficient to refuse the surrender of the requested person to Belgium. It has not been established that the requested person is at risk of suffering a flagrant denial of fundamental rights (*flagrante schending van fundamentele rechten*); it has not been proven that the defendant will not receive a fair trial in Belgium. During the criminal proceedings in Belgium, he can use each and every guarantee and remedy available to him on the basis of the ECHR and Belgian law and he has already secured the legal assistance of Dutch and Belgian lawyers. The court follows the arguments of the Dutch public prosecutor with regards to the differences between the applicable guarantees in Belgium and in the Netherlands: the Dutch authorities cannot decide how Belgian criminal proceedings should take place and the fact that the transfer of proceedings would enhance the procedural position of the defendant does not form a ground for refusal under the EAW framework.

#### ii. Differences between national criminal procedures and reasoning explained

The main difference between the two national criminal procedures in this case concerns the access of the defence to the case file. Under Dutch law the suspect has the right to access his case file from the first interrogation onwards, but in Belgium such a right does not exist; the defence can only access the case file when the public prosecutor has decided that the investigation has been finished. This means that a defendant seemingly has a better position in the Netherlands during the investigative stage of the proceedings. This systemic difference between the two countries does not lead to the refusal of the surrender of the requested person. The judgment is based on two grounds: (1) insufficient evidence concerning the flagrant denial of fair trial and the non-application of a ground for non-execution of the EAW and (2) the fact that improvement of the procedural position of the defendant as a result of the transfer of proceedings does not constitute a refusal ground.

#### (1) It has not been shown that the defendant risks suffering a flagrant denial of fundamental rights because of the systemic differences

The court states that Belgium is a party to the ECHR and, as such, is bound to uphold Article 6 ECHR. Although the court does not directly refer to any specific judgments of the ECtHR it is clearly aware of the settled case-law of the Strasbourg court that “a flagrant denial of justice” 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, “the proceedings as a whole” should be assessed in order to determine whether Article 6 ECHR has been violated, and the existence of an effective remedy on the basis of Article 13 ECHR is also relevant. The Dutch court explicitly states that the defendant still has every opportunity to call upon guarantees provided for by Belgian law and the ECHR; the requested person has already secured the legal assistance of a lawyer. In other words, the systemic differences between the Netherlands and Belgium do not mean that Belgian proceedings are contrary to Article 6 ECHR and certainly do not justify the conclusion that they would lead to “a flagrant denial of justice”. The ground for refusal in Article 11 Dutch Surrender Act is not applicable.

#### (2) The fact that the position of the defence is stronger in the executing Member State is not one of the grounds for non-execution of the EAW

The arguments that the defendant has a stronger position in the Netherlands during the investigative phase – with regards to the right to access the case file – and, as a consequence, has requested the transfer of proceedings cannot be brought under one of the limited refusal grounds of the EAW Framework Decision and the Dutch Surrender Act. In other words, the differences between the Netherlands and Belgium and the possible advantage for the defendant of a transfer of proceedings is not to be considered by the Dutch court when deciding on the execution of an EAW, unless they give rise to issues under Article 6 ECHR. That is not the case in this procedure.

District Court of Amsterdam, 30<sup>th</sup> August 2017, ECLI:NL:RBAMS:2017:6273

Concerns: Execution of an EAW issued for the execution of a sentence imposed upon the requested person, Framework Decision 2002/584/JHA

Countries: Lithuania (issuing country) and the Netherlands (executing country)

National provisions: unknown

i. Main issues and court ruling

The requested person has been tried and convicted in Lithuania. He was present during his initial trial, but launched an appeal against the imposed sanction. According to the Lithuanian authorities the requested person was informed of the time and place of the court hearing on the appeal, because a court notice was sent to him. The defendant did not attend the court hearing, but a lawyer was present. The Lithuanian authorities did not provide any information that confirmed that the requested person received the court notice or that the lawyer was authorised by the requested person to represent him during the appeal.

The defence has contended that the request for surrender should be refused. The appeal against the sanction should be assessed in accordance with Article 12 Dutch Surrender Act. It cannot be established that the defendant received the summons in person and that he was informed of the time and place of the hearing. It can also not be established that he was lawfully represented by a lawyer. Lawful representation by a lawyer is only possible if the defendant has been informed of the place and time of the hearing, if the defendant authorised his lawyer and if the lawyer actually defended the defendant. It cannot be established that the lawyer present during the hearing of the appeal was authorised by the requested person who contends that he has never discussed his case with this lawyer.

The court refers to its preliminary questions posed in the cases *Tupikas*<sup>4</sup> and *Zdziaszek*<sup>5</sup> and to the answers provided by the CJEU of the EU. It follows from these judgments that cases where the final decision on the guilt and the final decision on the imposed sanction are two separate decisions as the decisions have been made in two subsequent instances, both the decision on the guilt and the decision on the imposed sanction should be assessed in accordance with the national law implementing Article 4a of the EAW Framework Decision. Article 6 ECHR applies not only to the finding of guilt, but also to the determination of the sentence. Thus, compliance with the requirement of a fair trial entails the right of the person concerned to be present at the hearing leading to a decision on his sanction because of the significant consequences his presence may have on the quantum of the sentence to be imposed. The requested person must be able to effectively exercise his rights of defence in order to influence favorably the decision regarding his sanction. The court establishes that in a case such as the present one – where decisions on guilt and sanction are made separately – the decisions should both be able to pass the test in the national legislation implementing Article 4a of the EAW Framework Decision. In case one of the two decisions does not pass the test, then surrender should be refused.

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<sup>4</sup> Case C-270/17 PPU, Judgment of the Court (Fifth Chamber) of 10 August 2017 *Openbaar Ministerie v Tadas Tupikas*, ECLI:EU:C:2017:628.

<sup>5</sup> Case C-271/17 PPU, Judgment of the Court (Fifth Chamber) of 10 August 2017 *Openbaar Ministerie v Sławomir Andrzej Zdziaszek*, ECLI:EU:C:2017:629.

The court accepts that the requested person has not attended the hearing of his appeal against the imposed sanction and acknowledges that there is neither information from which it can be concluded that the defendant received the writ or has been informed of the place and time of the hearing, nor that he gave his authorisation to the lawyer who was present during the hearing. Thus, on the basis of the available information the court cannot establish with sufficient certainty that the defence rights have been guaranteed during the relevant proceedings. Although Article 4a of the EAW Framework Decision provides an optional refusal ground the Dutch legislator has opted to implement that provision as a mandatory ground for non-execution of an EAW in Article 12 Dutch Surrender Act. Therefore, if a requested person has been tried in absentia and none of the circumstances from Article 12 Dutch Surrender Act apply the court should refuse the surrender of the defendant. The court concludes that it should refuse the surrender of the requested person to Lithuania.

ii. Differences between national criminal procedures and reasoning

The main question in the present case is whether both the decision on the guilt and the decision on the imposed sanction should be assessed in accordance with Article 12 Dutch Surrender Act in cases where a final decision on the guilt and a final decision on the imposed sanction have been made separately. Such a “division of decisions” is not possible in the Netherlands. In the Netherlands an appeal against a decision in first instance requires the court of appeal to assess all elements of the case – i.e. facts, guilt and the imposed sentence – again. It is not possible to launch an appeal against the sentence alone. Therefore, a decision in the Netherlands in first instance and in appeal will always constitute a decision on all elements of the case. This is different in other EU Member States. The present case shows that it is possible to launch an appeal against the imposed sentence in Lithuania; this appeal does not require the court to re-assess the merits of the case. Thus, there is a distinct difference between the legal systems of the Netherlands and Lithuania with regard to the scope of an appeal. This raises the question whether in case of a “division of decisions” (1) both proceedings should have taken place in accordance with Article 6 ECHR for the execution of an EAW and (2) what the consequence should be when that cannot be established.

(1) Both procedures in accordance with Article 6

The reasoning of the court in answering the first question builds on the case-law of the CJEU. The judgments in the cases *Tupikas* and *Zdziaszek* – both cases involved preliminary questions posed by the District Court of Amsterdam – are applied and used to interpret the EAW Framework Decision and the Dutch implementation Act. The rulings of the CJEU in *Tupikas* and *Zdziaszek* clarify that “Article 6 ECHR applies not only to the finding of guilt, but also to the determination of the sentence. Thus, compliance with the requirement of a fair trial entails the right of the person concerned to be present at the hearing leading to a decision on the sanction because of the significant consequences which that decision may have on the quantum of the sentence to be imposed. Given that such proceedings determine the quantum of the sentence which the convicted person will ultimately serve, that person must be able to effectively exercise his rights of defence in order to influence favourably the decision to be taken in that regard”.<sup>6</sup> In accordance with the case-law of the CJEU the Dutch court establishes that it should ensure that both Lithuanian procedures were in accordance with fundamental rights standards.

(2) Consequences

The second question is firmly based on the facts of the case and the legal framework of the EAW. It cannot be concluded from the available information that the appeal procedure in

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<sup>6</sup> Case C-270/17 PPU, Judgment of the Court (Fifth Chamber) of 10 August 2017 *Openbaar Ministerie v Tadas Tupikas*, ECLI:EU:C:2017:628, paragraphs 78, 83-84; Case C-271/17 PPU, Judgment of the Court (Fifth Chamber) of 10 August 2017 *Openbaar Ministerie v Sławomir Andrzej Zdziaszek*, ECLI:EU:C:2017:629, paragraphs 87 and 91.

Lithuania concerning the sanction imposed fulfills the test of Article 6 ECHR. The court turns to the EAW Framework Decision and the Dutch implementation law to establish which decision should be made on the execution of the EAW. Under Dutch law in absentia decisions should lead to the refusal of surrender, unless one of the exceptions is applicable. In the present case, they are not. Because the Dutch legislator implemented the ground for non-execution as a mandatory ground for non-execution the court must refuse the surrender to Lithuania on the basis of Article 12 Dutch Surrender Act. However, it is important to state that the systemic difference between the Netherlands and Lithuania does not form the direct obstacle in this case. It can be deduced from both the case-law of the CJEU and the Dutch court that the difference in the scope of appeal does not form a problem as long as the procedure(s) are (both) in accordance with fundamental rights. In this case, the apparent absence of the enforcement of fundamental rights guarantees in accordance with Article 6 ECHR during the appeal proceedings is the bottle-neck.

# National report No 2 on the Dutch criminal justice system

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## 1. Dutch criminal procedural law: general background

### *Legal tradition*

The Dutch Code of Criminal Procedure (*Wetboek van Strafvordering*, hereinafter: WvSv) dates from 1926. According to the Explanatory Memorandum (*Memorie van Toelichting*) the Dutch criminal procedure should be seen as 'moderately accusatorial' (*gematigd accusatoir*).<sup>7</sup> By using this term, the legislator wanted to show that the Dutch system is neither purely inquisitorial nor fully accusatorial; it should rather be qualified as a mix between these two legal traditions that leans more towards an accusatorial system. In the Netherlands, during the preliminary investigative phase (*voorbereidend onderzoek*) the defendant is an object of investigation and he has to endure the application of coercive measures. Therefore, this phase of the proceedings should be characterised as inquisitorial. After the preliminary investigation has been concluded, the court hearing takes place. The court hearing has a more accusatorial character; both the defendant and the public prosecutor are heard and are allowed to present their views on the case. However, there is no complete equality between both parties. Even during the court hearing, the defendant cannot use the same (coercive) measures as the public prosecutor.<sup>8</sup>

Although the Dutch criminal procedure should – in the words of the legislator – be seen as 'moderately accusatorial', it can be argued that it leans more towards the inquisitorial tradition in practise.<sup>9</sup> In the Netherlands, the emphasis is firmly on the preliminary investigative phase of the proceedings which, as seen, is inquisitorial. When the WvSv was introduced in 1926 the legislator established a two-phased system. It was established that all evidence should be presented directly at the court hearing and, thus, that court hearing was the central phase of the proceedings. The principle of immediacy (*onmiddellijkheidsbeginsel*) was seen as a central component of the accusatorial phase and – in a sense – as a counterbalance to the inquisitorial preliminary investigation; it forced the public prosecutor to present all evidence that was found during that investigation before the court and allowed the defence to challenge it. However, already in 1926 the Supreme Court of the Netherlands accepted that a written statement obtained during the preliminary investigative phase could be used as evidence at the hearing.<sup>10</sup> In general, witnesses no longer had to come to court to give evidence directly; an official report (*proces-verbaal*) containing their statements sufficed. Thus, the judgement of the Supreme Court shifted the emphasis from the accusatorial trial phase to the inquisitorial preliminary investigative phase.

### *The modernisation of the WvSv*

In 2014 the Dutch legislator started working on a new and modern WvSv. The present WvSv is considered to be outdated; national and international developments and technological progress have fundamentally changed society since 1926 and require a new legal framework. This modernisation effort is relevant in the present context for two reasons. Firstly, it is important to remark that in the Memorandum of Contours (*Contourennota*) that was published in 2015 the Minister of Security and Justice has stipulated that more emphasis should be put on the contradictory (i.e. accusatorial) character of criminal procedures.<sup>11</sup> Whether the Dutch proceedings will actually become more accusatorial in the future cannot

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<sup>7</sup> *Kamerstukken II 1913/14*, 286, 3.

<sup>8</sup> G.J.M. Corstens and M.J. Borgers, *Het Nederlandse strafprocesrecht*, Kluwer: Deventer 2011, p. 8.

<sup>9</sup> See also: F. Pakes, *Comparative Criminal Justice*, Routledge: London 2015, p. 123-124.

<sup>10</sup> Supreme Court of the Netherlands, 20<sup>th</sup> December 1926, ECLI:NL:HR:1926:BG9435 (*De auditu*).

<sup>11</sup> *Kamerstukken II 2015/2016*, 29 279, 278, p. 8.

yet be determined, but the intention of the legislator is there. Secondly, it is clear that the legislator has acknowledged that the Dutch legal order does not operate in a vacuum. Book 7 of the new WvSv is titled “International legal assistance in criminal matters” (*Internationale rechtshulp in strafzaken*) and in its Explanatory Memorandum it is stipulated that international legal assistance is of paramount importance for the effective investigation and prosecution of crimes.<sup>12</sup> During the work on Book 7 specific attention was given to minimalizing differences and discrepancies between the legal systems of the Netherlands and other (European) countries. Although the new WvSv has its own structure and logic, it was accepted that consultation with neighbouring countries during the modernisation efforts would benefit the legislator in his work and, in the long run, would also enhance international cooperation. In this regard, it is worth mentioning that an international conference titled “Comparative legal insights for the modernisation of the Dutch Code of Criminal Procedure” (*Rechtsvergelijkende inzichten voor de modernisering van het Wetboek van Strafvordering*) was held in October 2017. During this conference, challenges that all European countries face played a central role, for example the digitalisation of society. Legal scholars and lawyers working in legislation from, *inter alia*, Belgium, Germany, France, Norway and Switzerland came to the Netherlands to discuss their views and share their experiences from modernisation efforts in their respective countries.<sup>13</sup>

Although it is unclear when the entire modernisation effort will be finished and when the new rules of criminal procedure will apply, the provision of the future Book 7 already entered into force on December 20<sup>th</sup> 2017.<sup>14</sup> At present, they can be found in Book 5 of the current WvSv. Again, this is a testament to the importance of international legal assistance in criminal matters for the national legal order in the eyes of the Dutch legislator.

#### *Rights of the defence and the victim in the Netherlands*

In the Dutch Constitution (*Grondwet*, hereinafter: Gw) several fundamental rights are guaranteed, for example the right to privacy (Article 10), the right to freedom (Article 15) and the inviolability of the body (Article 11).<sup>15</sup> However, the right to a fair trial is not (yet) guaranteed by the Constitution. In July 2016 a proposal to incorporate the right to a fair trial and access to an independent tribunal into the Constitution was made by the Dutch government.<sup>16</sup> At present, the proposal has been through the first reading by the House of Representatives (*Tweede Kamer*) and is now before the Senate (*Eerste Kamer*). It is unknown when the Constitution will be changed.

It is important to remark that Article 120 Gw stipulates that a judge cannot assess the compatibility of laws or treaties with the Constitution. This means that during criminal proceedings the judge cannot review legal provisions or the use of coercive measure, for example those in the WvSv, on the basis of the Constitution. However, Article 93 Gw provides that provisions from treaties or international institutions which may be binding on all persons by virtue of their contents shall become binding after they have been published. Moreover, Article 94 Gw entails that statutory regulations will not be applicable if their application would conflict with the aforementioned provisions from treaties or international institutions. Thus, the two Articles combined establish that citizens can call upon provisions from treaties and Dutch law does not apply if it conflicts with those provisions.<sup>17</sup>

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<sup>12</sup> *Kamerstukken II 2015/2016*, 34 493, nr. 3, p. 2-4.

<sup>13</sup> *Kamerstukken II 2017/2018*, 29 279, nr. 395, p. 6.

<sup>14</sup> Besluit van 7 december 2017 tot vaststelling van het tijdstip van inwerkingtreding van de Wet van 7 juni 2017 tot wijziging van het Wetboek van Strafvordering en enkele andere wetten met het oog op het moderniseren van de regeling van internationale samenwerking in strafzaken (herziening regeling internationale samenwerking in strafzaken), *Stb.* 2017, nr. 246.

<sup>15</sup> J.J.M. Graat and others, ‘Dutch report’, in: T. Marguery (ed.), *Mutual trust under Pressure, the Transferring of Sentenced Persons in the EU*, Wolf Legal Publishers: Oisterwijk 2018, p. 175.

<sup>16</sup> *Kamerstukken II 2015/2016*, 34517.

<sup>17</sup> The requirement of being “binding on all persons” entails that the provision should have legal consequences affecting citizens; the provision imposes obligations on persons or provides them with rights. See: J.J.M. Graat and others, ‘Dutch report’, in: T. Marguery (ed.), *Mutual trust under Pressure, the Transferring of Sentenced Persons in the EU*, Wolf Legal Publishers: Oisterwijk 2018, p. 178.

In the light of the abovementioned Articles, the European Convention of Human Rights (hereinafter: ECHR) and – since 2009 when Member States act within the scope of EU law – the Charter of Fundamental Rights of the EU (hereinafter: CFR) have become the main source of fundamental rights in the Netherlands. The provisions from these international instruments are used to assess the compliance of investigative measures with human rights standards and to guarantee the rights of the defence. For example, the case law of the European Court of Human Rights (hereinafter: ECtHR) concerning, *inter alia*, Articles 3, 5 and 6 ECHR are important for Dutch criminal proceedings and guide the interpretation of national provisions in the WvSv; they feature very often in case law of both lower courts and the Supreme Court. Next to the international sources, the WvSv itself contains many rights for the defence, for example the right to a lawyer (Article 28), the right to remain silent during investigations (Article 29) and access to the case file (Article 30).

Since 2009 title IIIA of the WvSv provides the victim with certain procedural rights during criminal proceedings. These rights flow largely from European legislation, such as Directive 2012/29/EU on victim's rights and Directive 2004/80/EC on compensation of victims.<sup>18</sup> On the basis of the WvSv the victim has, for example, the right of access to the case file (Article 51b), legal assistance (Article 51c) and to give a victim statement (Article 51e). The victim can also claim compensation on the basis of Article 51f WvSv. Although this is technically a civil procedure it can be dealt with during the criminal proceedings, unless the case is too complex and requires the specific expertise of a civil court. Although the victim has rights under Dutch law he is not considered to be a party during the proceedings (*procespartij*) but rather a participant in the proceedings (*procesdeelnemer*).

#### *Compensation (restitution of property)*

In accordance with Article 94 WvSv objects can be confiscated to ascertain the truth or to establish the existence of illegally obtained profits (*wederrechtelijk verkregen voordeel*). If the confiscation is no longer in the interest of public prosecution the confiscation can be ended. In principle, objects are returned to the person who possessed the objects when they were confiscated. The WvSv does not provide for a compensation mechanism for possible damages that have resulted from the confiscation; the return itself should not be seen as compensation. Of course, it is possible to seek compensation in civil proceedings.<sup>19</sup>

#### *Diversity in legal traditions as an obstacle to cross-border cooperation*

From the Dutch perspective, we find that the diversity in legal traditions within the EU does not in itself form an obstacle to cross-border cooperation. Firstly, an analysis of Dutch case law, focused on EAW cases in particular, shows that systemic differences are rarely brought forward to oppose the execution of an EAW; the arguments rather concern violations of fundamental rights in a particular case. Secondly, when arguments concerning systemic differences are used as an argument, they are not regarded as a problem by the court. The main reason for this is that all Member States of the EU are bound by the ECHR and – since 2009 and when Member States act within the scope of EU law – by the CFR.<sup>20</sup> Although there is a variety of systems between the Member States they all have to ensure compliance with the same (minimum) standards of fundamental rights protection. As long as this level of fundamental rights protection is guaranteed, differences between the legal system of the Netherlands and that of the executing state are not considered to be problematic. The court of Amsterdam often emphasises the mutual trust that governs the relationship between

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<sup>18</sup> Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, *OJEU* 2012, L 315/57; Council Directive 2004/80/EC of 29 April 2004 relating to compensation to crime victims, *OJEU* 2004, L 261/15.

<sup>19</sup> R.M. Vennix, *Boef en beslag. De strafvorderlijke inbeslagneming van voorwerpen*, Ars Aequi Libri: Nijmegen 1998, p. 351.

<sup>20</sup> Court of Amsterdam, 14th June 2011, ECLI:NL:RBAMS:2011:BQ9773; Court of Amsterdam, 25th October 2011, ECLI:NL:RBAMS:2011:BU2123.



Member States of the Council of Europe and the EU and which lies at the very foundation of the principle of mutual recognition and the EAW Framework Decision. Moreover, it follows from the studied case law that Dutch courts consider themselves not to be in a position to review the systems in other Member States or to decide how criminal proceedings should take place abroad.<sup>21</sup> Those decisions have to be made by the Member States themselves. Thus, the Dutch courts also implicitly emphasise the importance of the principle of sovereignty.

## 2. Impact of Union legislation on Dutch criminal procedural law

### Directives on procedural rights: past, present and future

The entry into force of the Directives on suspect and victim rights under the Stockholm Programme have, in general, had an important effect on Dutch criminal proceedings.<sup>22</sup> Although some have been implemented without causing a tangible difference in practise, others have truly changed the functioning of Dutch criminal proceedings. Undeniably, Directive 2013/48/EU has had the biggest impact through the introduction of the right of access to a lawyer during interrogations.<sup>23</sup>

#### *Directive 2013/48/EU: end of a saga*

The judgement of the ECtHR in *Salduz* started a long discussion in the Netherlands as to the right of access to a lawyer during criminal proceedings.<sup>24</sup> In the Netherlands, a suspect did not have the right to have a lawyer present during an interrogation. Therefore, the question was raised what the ECtHR case law meant for Dutch proceedings. Although it was argued by many that the judgement in *Salduz* implied that a lawyer should be present during interrogations, this reasoning was not followed by the Minister of Justice.<sup>25</sup>

In June 2009, the Supreme Court had to decide on the implications of *Salduz* for the Netherlands and, seemingly reluctantly, agreed to a minimalistic approach. It was decided that adult suspects should have a right of consultation (*consultatierecht*) before the interrogations. Only minors and vulnerable suspects – i.e. feeble-minded individuals – could have a lawyer present during the interrogations. If this right was violated, the statement that was obtained could not be used as evidence.<sup>26</sup> Despite the fact that new case law from the ECtHR pointed strongly towards a right to have a lawyer present for all suspects, the Supreme Court refused to acknowledge this in later cases.

After the entry into force of Directive 2013/48/EU the Dutch legislator had to act, because the Directive clearly established that all suspects should be given the right to have a lawyer present during interrogations. However, the legislator did nothing for quite some time; no immediate steps were taken to implement the Directive. In April 2014, the Supreme Court was again forced to make a decision. Advocate General (*Advocaat-Generaal*) Spronken stated in her opinion that a right to have a lawyer present during the interrogation should be acknowledged and given effect by the Supreme Court. She also concluded that the Netherlands had acted contrary to the Directive and that this contrariety would have retroactive effect starting at the day of the entry into force of the Directive.<sup>27</sup> The Supreme

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<sup>21</sup> For example: Court of Amsterdam, 23rd June 2015, ECLI:NL:RBAMS:2015:4325.

<sup>22</sup> The Stockholm Programme – An Open and Secure Europe Serving and Protecting Citizens, *OJEU* 2010, C 115/01.

<sup>23</sup> 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, *OJEU* 2013, L 294/1.

<sup>24</sup> ECtHR, 27<sup>th</sup> November 2008, no. 36391/02 (*Salduz*).

<sup>25</sup> For example: T. Spronken, 'Na twee EHRM-uitspraken moet advocaat toegang krijgen tot verhoor. De gevolgen van *Salduz* en *Panovits*', *Advocatenblad* 2009, p. 17-18.

<sup>26</sup> Supreme Court of the Netherlands, 30<sup>th</sup> June 2009, ECLI:NL:HR:2009: BH3079.

<sup>27</sup> Opinion A-G Spronken, 26<sup>th</sup> November 2013, ECLI:NL:PHR:2013:1424.

Court did not follow Spronken's arguments and stated that the Dutch legislator should decide how the Directive should be implemented; such a decision did not fall within the competence of the judiciary.<sup>28</sup>

However, the legislator still did not act after this judgement of the Supreme Court. Therefore, in December 2015 the Supreme Court was once again forced to rule on the right to have a lawyer present during the interrogations and, finally, decided that from March 1<sup>st</sup> 2016 onwards a suspect should have that right.<sup>29</sup> Directive 2013/48/EU was finally implemented on 27<sup>th</sup> November 2016 – the very day of the transposition deadline – and several provisions in the WvSv were changed.<sup>30</sup> At present, all suspects have the right to have a lawyer present during the interrogation.<sup>31</sup>

#### *Impetus for victim rights: Directive 2012/29/EU*

Another domain where the influence of procedural Directives is clearly visible concerns the rights of victims. In the Netherlands, victim rights have received more attention since the late 1990s. At present, title IIIA of the WvSv provides the victim with certain procedural rights during criminal proceedings. As mentioned before, these rights flow largely from European legislation, such as Directive 2012/29/EU on victim's rights and Directive 2004/80/EC on compensation of victims.<sup>32</sup> For example, the victim has the right of access to the case file (Article 51b), the right to legal assistance (Article 51c), the right to make a victim statement (Article 51e) and the right to claim compensation (Article 51f).

The most recent change in the Dutch legislation on victim rights concerns the implementation of Directive 2012/29/EU.<sup>33</sup> It is important to remark that the transposition of Directive 2012/29/EU was – and still is – somewhat problematic. Firstly, the Dutch legislator did not succeed in implementing the provisions into national law before the transposition deadline of 16<sup>th</sup> November 2015. The implementation finally took place in January 2017; more than a year too late. Moreover, even after the implementation Dutch law is not fully in accordance with the provisions of the Directive.

Article 14 of the Directive provides victims with the right to reimbursement of expenses incurred as a result of their active participation in criminal proceedings. Article 2 (1) (a) of the Directive states that victims are not only natural persons who have suffered harm, but also family members of a person whose death was directly caused by a criminal offence and who have suffered harm as a result of that person's death. Therefore, those family members should also have the right to reimbursement of expenses in accordance with the Directive. This right should be provided for in national legislation.

Article 260 (2) WvSv states that the public prosecutor shall comply with a request in writing by the victim or a family member to be called in order to exercise the right to make a verbal statement. Persons that are called by the public prosecutor on the basis of Article 260 WvSv can rely on the Criminal Cases Fees Act (*Wet tarieven in strafzaken*, hereinafter: *Wet tarieven*). Because victims and family member are mentioned in Article 260 WvSv they should

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<sup>28</sup> Supreme Court of the Netherlands, 1<sup>st</sup> April 2014, ECLI:NL:HR:2014:770.

<sup>29</sup> Supreme Court of the Netherlands, 22<sup>nd</sup> December 2015, ECLI:NL:HR:2015:3608.

<sup>30</sup> Wet van 17 november 2016, houdende implementatie van richtlijn nr. 2013/48/EU van het Europees Parlement en de Raad van 22 oktober 2013 betreffende het recht op toegang tot een advocaat in strafprocedures en in procedures ter uitvoering van een Europees aanhoudingsbevel en het recht om een derde op de hoogte te laten brengen vanaf de vrijheidsbeneming en om met derden en consulaire autoriteiten te communiceren tijdens de vrijheidsbeneming, *Stb.* 2016, nr. 475.

<sup>31</sup> Besluit van 26 januari 2017, houdende regels voor de inrichting van en de orde tijdens het politieverhoor waaraan de raadsman deelneemt (Besluit inrichting en orde politieverhoor), *Stb.* 2017, nr. 29.

<sup>32</sup> Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, *OJEU* 2012, L 315/57; Council Directive 2004/80/EC of 29 April 2004 relating to compensation to crime victims, *OJEU* 2004, L 261/15.

<sup>33</sup> Wet van 8 maart 2017, houdende implementatie van richtlijn 2012/29/EU van het Europees Parlement en de Raad van 25 oktober 2012 tot vaststelling van minimumnormen voor de rechten, de ondersteuning en de bescherming van slachtoffers van strafbare feiten, en ter vervanging van Kaderbesluit 2001/220/JBZ (PbEU 2012, L 315), *Stb.* 2017, 90.

be able to rely on the *Wet tarieven* to receive reimbursement. Indeed, Article 1 of the *Wet tarieven* establishes that reimbursement is given for expenses relating to travelling and accommodation (*reis- en verblijfkosten*) if a person is called by the public prosecutor. Article 3 *Wet tarieven* provides the categories of persons that can claim the fees. In accordance with Article 6 of the *Wet tarieven*, those fees are established in a general administrative measure (*algemene maatregel van bestuur*): the Criminal Cases Fees Decree 2003 (*Besluit tarieven in strafzaken 2003*, hereinafter: *Besluit tarieven*). However, victims and family members are neither mentioned in Article 3 *Wet tarieven*, nor in the *Besluit tarieven*. Technically, this means that under Dutch law victims and family members cannot receive reimbursement of expenses incurred as a result of the active participation in criminal proceedings. This forms a gap in the transposition of Directive 2012/29/EU into national law.

In the judgement of the Court of Noord-Holland of 4<sup>th</sup> November 2016 the abovementioned gap was bridged by giving direct effect to Article 14 of Directive 2012/29/EU.<sup>34</sup> The court noted that the Directive should already have been implemented by November 2015, but that no national provisions existed that allowed for reimbursement. It also concluded that Article 14 was “sufficiently clear, precise and unconditional”. Thus, the court decided that the expenses made by the family members of the victims should be reimbursed by the State on the basis of the Directive. At the moment of writing, the *Wet tarieven* and *Besluit tarieven* have not yet been changed. The provisions were not amended in accordance with the Union law together with the implementation of the Directive. It is unknown when the Dutch legislation will be changed in that regard.

#### *National protection measures for victims and the European Protection Order*

In the Netherlands, a number of civil and criminal protection measures for victims exist. Civil protection measures are, virtually always, obtained via preliminary relief proceedings (*kort geding procedure*) in accordance with Articles 254 to 260 of the Code of Civil Procedure (*Wetboek van Burgerlijke Rechtsvordering*). The legal basis for such a protection measure is found in the existence of a civil wrongful act (*onrechtmatige daad*) and a court order to stop that wrongful act (*rechterlijk verbod*) on the basis of Articles 6:162 and 3:296 Dutch Civil Code (*Burgerlijk Wetboek*). For example, a person that is the victim of stalking can turn to a civil court and demand that the court orders the perpetrator to stop stalking. In criminal law, protection orders can be obtained via various routes; in total, fourteen modalities can be found in the *WvSv*.<sup>35</sup> For example, in the phase of pre-trial detention the judge can order the suspension of pre-trial detention under the condition that the suspect does not contact the victim (Article 80 *WvSv*). As part of the sentence, the court can impose a measure (*maatregel*) to restrict the sentenced person’s freedom in accordance with Article 38 Dutch Penal Code (*Wetboek van Strafrecht*, hereinafter: *WvSr*). Furthermore, the conditional release (*voorwaardelijke invrijheidstelling*) of a convicted person can be made subject to a special condition (*bijzondere voorwaarde*), for example that the convicted person does not contact the victim (Article 15a (2) *WvSr*).

Under Dutch law, protection measures can be obtained during all stages of the proceedings. The civil protection measures can be obtained by the victim itself. During the criminal proceedings, it is either the public prosecutor or the court that imposes a protection measures for the benefit of the victim. For example, the suspension of pre-trial detention under the condition that the suspect does not contact the victim (Article 80 *WvSv*) can be ordered by the court on its own motion (*ambtshalve*) or on the demand of the Public Prosecutors Office (*op vordering van de openbaar ministerie*); the victim itself cannot (directly) demand a protection order from the court.

<sup>34</sup> Court of Noord-Holland, 4<sup>th</sup> November 2016, ECLI:NL:RBNHO:2016:9089.

<sup>35</sup> Van der Aa and others, *Aard, omvang en handhaving van beschermingsbevelen in Nederland. Deel 2: Aard en omvang*, WODC: Intervict - Universiteit van Tilburg and WODC 2017.

Directive 2011/99/EU on the European Protection Order (hereinafter: EPO) has been implemented in Book 5, Title 4 of the WvSv.<sup>36</sup> In Dutch case law no examples have been found of cases involving the issuing or execution of an EPO. This is perhaps unsurprising as an EU implementation assessment of the EPO shows that the instrument is rarely used in the Member States.<sup>37</sup> A Dutch report on measures for the protection of victims states that there might not be much demand for cross-border protection and the EPO.<sup>38</sup>

#### *Directives that still require implementation*

Of the three Directives adopted in 2016, only one has been transposed into Dutch law at the moment of writing: Directive (EU) 2016/1919 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings.<sup>39</sup> However, this Directive did not require any changes to be made to Dutch law as it was already in line with the provisions of the Directive.<sup>40</sup> The other two Directives (Directive (EU) 2016/343 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings and Directive (EU) 2016/800 on procedural safeguards for children who are suspects or accused persons in criminal proceedings) still have to be implemented.<sup>41</sup> A quick scan of recent Dutch case law shows that these Directives have not yet played a role in many proceedings; only Directive (EU) 2016/343 is mentioned in a case. The defence briefly refers to the provisions of the Directive, but the court – surprisingly – does not even mention those same provisions in its judgement.<sup>42</sup> It seems that the value of these Directives – for example as a supporting argument in relation to the interpretation of legislation that is already in force – remains limited before the transposition deadline.

#### *Next steps for Directives on procedural rights?*

Under the Stockholm Programme the EU has introduced several procedural rights Directives. The question can be raised in which fields the Union legislator should act next. This discussion does, of course, not confine itself to the national borders of the Netherlands; articles and opinions on the topic are found in legal journals on other Member States.<sup>43</sup> Although many steps could be mentioned here, Directives on procedural guarantees for tapping of telecommunication and investigative acts concerning smartphones are certainly important. Technical developments have a distinctive impact on criminal proceedings, particularly in cross-border cases. These developments present new challenges for enforcement as well as for the protection of fundamental rights. Nowadays, it can be argued that a person's private life is reflected in his or her smartphone; that smartphone contains much private information. Which information can be copied from the smartphone and which authorities may use

<sup>36</sup> Directive 2011/99/EU of the European Parliament and of the Council of 13 December 2011 on the European protection order, *OJEU* 2011, L 338/2.

<sup>37</sup> *European Implementation Assessment European Protection Order Directive 2011/99/EU*, Brussels: European Parliamentary Research Service 2017.

<sup>38</sup> S. van der Aa and others, *Aard, omvang en handhaving van beschermingsbevelen in Nederland. Deel 2: Aard en omvang*, WODC: Intervict - Universiteit van Tilburg and WODC 2017, p. 79-80. See also: S. van der Aa & J. Ouwerkerk, 'The European protection order: No time to waste or a waste of time?', *European Journal of Crime, Criminal Law and Criminal Justice* (19) 2011, p. 267-287.

<sup>39</sup> Directive (EU) 2016/1919 of the European Parliament and of the Council of 26 October 2016 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings, *OJEU* 2016, L 297/1.

<sup>40</sup> Mededeling van de implementatie van richtlijn (EU) 2016/1919 van het Europees parlement en de Raad van 26 oktober 2016 betreffende rechtsbijstand voor verdachten en beklaagden in strafprocedures en voor gezochte personen in procedures ter uitvoering van een Europees aanhoudingsbevel (PbEU 2016, L 297), *Stcrt.* 2017, 59575.

<sup>41</sup> Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings, *OJEU* 2016, L 65/1; Directive (EU) 2016/800 of the European Parliament and of the Council of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings, *OJEU* 2016, L 132/1.

<sup>42</sup> Court of Limburg, 7th June 2017, ECLI:NL:RBLIM:2017:8566.

<sup>43</sup> For example: L. Salazar, 'EU's Criminal Policy and the Possible Contents of a New Multi-Annual Programme: From One City to Another', *EUCRIM* 2014 (1), p. 22-26; E. Herlin-Karnell, 'All Roads Lead to Rome: The New AFSJ Package and the Trajectory to Europe 2020', *EUCRIM* 2014 (1), p. 27-31.

investigative competences to deduct personal information? Although all Member States have to deal with these challenges, they do so in different ways.<sup>44</sup> Within the EU it could be good to harmonise the procedural guarantees in this regard to ensure common ground between the Member States.

It is important to state that as part of the Dutch case study, interviews have been conducted with legal scholars and lawyers responsible for the adoption and amendments of legislation. During these interviews it became clear that the implementation of EU Directives can be a tedious operation and that it requires time. This is particularly true for the Netherlands, because a strong national tradition exists of consultation with all stakeholders, for example the Public Prosecutors Office and the Dutch Association of Defence Counsel (*Nederlandse Vereniging van Strafrechtadvocaten, NVSA*). Moreover, it is often required that financial resources are allocated for the correct functioning of the implemented provisions in national law. Thus, there are significant budgetary implications that have to be dealt with on a national level. Lastly, it takes time to assess whether the introduced instruments are effective, i.e. that they work as intended. Sometimes instruments have been created with wonderful intentions, but seem to have little added value in practise. In that regard, the EPO is a good example. Therefore, new legislation should be more “evidence based” and address “real” problems that can only be solved in the EU context. Although the intention of the Union legislator to expand the present procedural framework is admirable, it should be realised that “too much, too soon” could have an adverse effect, both for the protection of citizens and for the Member States.

#### Differences between Member States

An analysis of Dutch case law, particularly of cases concerning the EAW, shows that differences between the criminal procedures of the Member States do not seem to affect cross-border cooperation and the functioning of mutual recognition instruments. During EAW proceedings the defence regularly puts forward arguments on the basis of Article 11 Surrender Act (*Overleveringswet*, hereinafter: OLW); this Article provides that the execution of a EAW shall be refused if surrender would lead to a flagrant denial of fundamental rights from the ECHR. Those arguments can concern systemic differences between the Netherlands and other Member States or the absence of certain procedural rights abroad. In the case law they often evolve around an alleged violation of Articles 3 and 6 ECHR.<sup>45</sup>

#### *Right to a fair trial*

In most cases, it is argued that surrender would lead to a violation of the right to a fair trial. An example is found in the judgement of the Court of Amsterdam of 23<sup>rd</sup> June 2015. The case concerns surrender from the Netherlands to Belgium for the purpose of prosecution. In Belgium, the requested person would not have access to the case-file (*dossier*) until very late in the proceedings. In the Netherlands the right to access the case-file was granted at an earlier time. The defence raised the argument that surrender would violate Article 6 ECHR, because the requested person would be worse off abroad. The court did not follow this argument and stated that the requested person can use each and every available guarantee on the basis of the ECHR and Belgian law in Belgium. In this case, the difference was not considered to be an obstacle, even if the requested person technically enjoyed less protection abroad.<sup>46</sup> In recent years, arguments like the one in the abovementioned case have never

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<sup>44</sup> See: Supreme Court of the Netherlands, April 4<sup>th</sup> 2017, ECLI:NL:HR:2017:584. Judgement on investigation of a smartphone.

<sup>45</sup> Although Article 11 Surrender Act only mentions the ECHR, it should be noted that the CFR is also applicable in accordance with Article 51 (1) CFR and that the provisions of the CFR are used, for example in Court of Amsterdam, 10<sup>th</sup> January 2017, ECLI:NL:RBAMS:2017:331. However, it is interesting to see that references to the CFR are still relatively scarce in the case law concerning the EAW. The defence, the public prosecutor and the court seem to rely on the ECHR more often than on the CFR as the primary source of fundamental rights; even if provisions from the CFR are mentioned, they are usually referred to after the provisions from the ECHR.

<sup>46</sup> Court of Amsterdam, 23<sup>rd</sup> June 2015, ECLI:NL:RBAMS:2015:4325.

been successful. The Court of Amsterdam often emphasises the importance of mutual trust and allows the execution of the EAW.

*Inhuman or degrading treatment: the influence of Aranyosi and Căldăraru for the Netherlands*

The judgement of the CJEU in the joined cases of *Aranyosi and Căldăraru* has significantly impacted the functioning of the EAW for the Netherlands in regard to (alleged) violations of Article 3 ECHR and Article 4 CFR.<sup>47</sup> In response to the case law of the CJEU, the Court of Amsterdam has adopted a two-step test to assess the argument that the execution of an EAW would subject the requested person to inhuman or degrading treatment because of detention conditions in the issuing state.<sup>48</sup> Firstly, the court will consider whether (1) *in abstracto* a real risk of inhuman or degrading treatment exists in the issuing state. In other words, the court should analyse if a real risk of a violation is found in general. To this end, the court looks at, *inter alia*, reports from the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (hereinafter: CPT) and case law of the ECtHR.<sup>49</sup>

After the court establishes that a real risk of a violation of Article 3 ECHR and Article 4 CFR exists *in abstracto* it should assess whether that risk also occurs (2) *in concreto*. In other words, the court should analyse if the risk exists in the specific case of the requested person. In this regard, specific information concerning the detention conditions should be requested from the issuing authorities. In accordance with the judgement *Aranyosi and Căldăraru*, these authorities are obliged to provide this information.<sup>50</sup>

If the court finds that a real risk of inhuman or degrading treatment exists both *in abstracto* and *in concreto* it will postpone the decision on the execution of the EAW.<sup>51</sup> According to the Court of Amsterdam the existence of a real risk of a violation of Article 3 ECHR and Article 4 CFR should, in principle, be considered to be only temporary and the issuing Member State should be given a reasonable term to remedy the situation. In this regard, the Court of Amsterdam has clarified that the postponement is not meant to allow the issuing state to extent its prison capacity or improve overall detention conditions, but rather to give the issuing authorities room to provide additional information which allows to exclude the specific risk for the requested person.<sup>52</sup>

In *Aranyosi and Căldăraru* the CJEU has ruled that if the existence of a real risk cannot be discounted within a reasonable time the executing judicial authority must decide whether the surrender procedure should be brought to an end.<sup>53</sup> The Court of Amsterdam has established that it depends on the specific circumstances of the case whether the reasonable term is exceeded. If the court decides that the reasonable term is exceeded, the surrender is not refused on the basis of Article 11 OLW, but the court will declare the public prosecutor inadmissible (*niet-ontvankelijk*) and not consider the EAW.<sup>54</sup>

<sup>47</sup> Judgement of the Court (Grand Chamber) in Cases C-404/14 and C-659/15 PPU (*Aranyosi and Căldăraru*), ECLI:EU:C:2016:198.

<sup>48</sup> Court of Amsterdam, 24<sup>th</sup> May 2016, ECLI:NL:RBAMS:2016:3081; Court of Amsterdam, 5<sup>th</sup> July 2016, ECLI:NL:RBAMS:2016:4596. For an elaborate analysis of the post-*Aranyosi and Căldăraru* case law, see: J.J.M. Graat and others, 'Dutch report', in: T. Marguery (ed.), *Mutual trust under Pressure, the Transferring of Sentenced Persons in the EU*, Wolf Legal Publishers: Oisterwijk 2018, p. 214-220.

<sup>49</sup> Court of Amsterdam, 25<sup>th</sup> October 2016, ECLI:NL:RBAMS:2016:7499.

<sup>50</sup> Court of Amsterdam, 28<sup>th</sup> April 2016, ECLI:NL:RBAMS:2016:2630; Judgement of the Court (Grand Chamber) in Cases C-404/14 and C-659/15 PPU (*Aranyosi and Căldăraru*), ECLI:EU:C:2016:198, par. 97.

<sup>51</sup> Court of Amsterdam, 25<sup>th</sup> October 2016, ECLI:NL:RBAMS:2016:7499.

<sup>52</sup> Court of Amsterdam, 28<sup>th</sup> April 2016, ECLI:NL:RBAMS:2016:2630; Court of Amsterdam, 26<sup>th</sup> January 2017, ECLI:NL:RBAMS:2017:414. For example, by providing information that entails that the requested person will be detained in another prison.

<sup>53</sup> Court of Amsterdam, 26<sup>th</sup> January 2017, ECLI:NL:RBAMS:2017:414. In this case, the court refers to a period of nine months in regard to the 'reasonable term'. In later cases, the same period of nine months is mentioned by the court. Therefore, it seems that nine months is the maximum time for the issuing authorities to exclude the real risk *in concreto*.

<sup>54</sup> Court of Amsterdam, 26<sup>th</sup> January 2017, ECLI:NL:RBAMS:2017:414; Court of Amsterdam, 18<sup>th</sup> April 2017, ECLI:NL:RBAMS:2017:2579; Court of Amsterdam, 12<sup>th</sup> September 2017, ECLI:NL:RBAMS:2017:7137.

### *The application of Aranyosi and Căldăraru in other cases than detention conditions*

In several judgements in the same EAW procedure, the Court of Amsterdam has applied its two-step test in a case that did not concern deplorable detention conditions.<sup>55</sup> An EAW for the purpose of the execution of a prison sentence was issued in Poland against the requested person. He had been part of an especially violent gang. By giving several incriminating statements, the requested person had helped the police in both Germany and Poland during their investigation into the criminal acts committed by the aforementioned gang. Because of these statements, many gang members could be prosecuted; they were sentenced to lengthy prison sentences. The requested person was admitted to a German witness protection programme. During the execution proceedings in the Netherlands, the defence stated that surrender to Poland could subject the requested person to a violation of Articles 2 and 3 ECHR and 4 CFR. The case file showed that members of the gang knew that the requested person had made incriminating statements against them and that, consequently, there was a real risk that he would be attacked in retaliation.

Even though the case did not concern a real risk of inhuman or degrading treatment because of bad prison conditions, the Court of Amsterdam used the same two-step test in assessing the possible violation of Articles 3 ECHR and 4 CFR. Based on the information in the case file, the court established that (1) a general real risk (*algemeen reëel gevaar*, in other words: *in abstracto*) existed for a person that had made incriminating statements about (the members of) a violent gang and that had been admitted into a witness protection programme. Although the Polish authorities had provided the court with general information on available protective measures in Polish prisons – for example, that there were guards present that would act in case of a dangerous situation – the court stated that there was also (2) a specific risk for the requested person himself (*voor de opgeëiste person [...] een reëel gevaar bestaat*). The information provided by the Polish authorities did not allow for the exclusion of the real risk *in concreto*.

The Court of Amsterdam did not refuse the execution of the EAW, but decided to stay the proceedings and request additional information. As seen, this is fully in accordance with its earlier case law and the CJEU judgements in *Aranyosi and Căldăraru*. The Polish authorities did provide additional information, but the court considered this information to be too vague and general to be able to exclude the real risk of inhuman or degrading treatment; no specific promises were made as to the protection of the requested person. The Court of Amsterdam concluded that the reasonable term in this case was violated and declared the public prosecutor inadmissible in accordance with its judgement of January 27<sup>th</sup> 2017.<sup>56</sup>

## **3. Domains that have not (yet) been harmonised**

### Detention

Title IV, Sections 1 and 2 WvSv contain provisions governing pre-trial detention in the Netherlands. These rules stipulate in which case and for how long a person can be detained. The Dutch pre-trial system has three consecutive phases: police custody (*inverzekeringstelling*, Article 57), remand in custody (*bewaring*, Article 63) and detention in custody (*gevangenhouding* or *gevangenneming*, Article 65). Each phase has a statutory time-limit: three (in exceptional cases six) days for police custody, fourteen days for remand in custody and 90 days for detention in custody. The trial phase should start when all time-limits have passed, i.e. at the latest 107 (or 110 days) after the moment that the suspect was taken into police custody. When the trial starts while the suspect is still in detention in custody, the detention continues until 60 days after the final verdict in the case (Article 66 (2)).

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<sup>55</sup> Court of Amsterdam, 17<sup>th</sup> October 2017, ECLI:NL:RBAMS:2017:8014.

<sup>56</sup> Court of Amsterdam, 16<sup>th</sup> January 2018, ECLI:NL:RBAMS:2018:348.

Under Dutch law, it has to be assessed whether the suspect can still be detained after each phase. The threshold for allowing pre-trial detention increases with each phase. For example, police custody requires a reasonable suspicion (*redelijk vermoeden van schuld*, Article 27), but for remand in custody and detention in custody grave presumptions against the suspect (*ernstige bezwaren*, Article 67 (3)) are needed. Also, the public prosecutor is competent to make a decision on police custody, but a judicial decision by an investigative judge (*rechter-commissaris*, Article 63) or the court (*rechtbank*, Article 65) is needed in case of remand in custody and detention in custody respectively.

In regard to the alternatives for pre-trial detention, Framework Decision 2009/829/JHA on mutual recognition of supervision measures as an alternative to provisional detention has been implemented in Article 5:3:1 and further (Fifth Book, Title 3) of the WvSv.<sup>57</sup>

In recent years, the high number of people in pre-trial detention in the Netherlands has led to a virulent discussion which focused on the apparent lack of reasoning in decisions leading to pre-trial detention.<sup>58</sup> Therefore, there is also more attention for possible alternatives. At present, there are strictly speaking no alternatives for pre-trial detention. The architecture of the Dutch rules forces the judge to first assess whether pre-trial detention is required or not.<sup>59</sup> Only after the decision to order the detention has been made can the judge – immediately or at a later stage – assess whether it is prudent to *suspend* it. Article 80 WvSv establishes that the judge – on his own motion, on the demand of the public prosecutor or at the request of the suspect – can suspend the pre-trial detention. Several general and special conditions can be imposed if the detention is suspended, such as the prohibition to contact the victim. Article 80 (3) WvSv also provides for the interesting, yet in practise very rare figure of the bail bond (*borgsom*).<sup>60</sup> This architecture is ill-suited to accommodate alternatives for detention and supervision measures. It is difficult for a judge to argue convincingly that the detention should be suspended, because he will have already concluded that a person should be in pre-trial detention before he can even address the possibility of a suspension.

After a conviction, several penalties can be imposed and combinations are possible. Article 9 (1) WvSr establishes that the main penalties are the custodial sentence, remand in custody, community sentence and fines. Thus, there are alternatives for detention in the Netherlands. In accordance with Article 14a WvSr it is possible to (partially) suspend the sentence. On the basis of Article 14c WvSr a suspension is always granted under the general condition that the convicted person will not commit another crime. If it is opportune, several special conditions (*bijzondere voorwaarden*) can also be imposed, for example that the convicted person seeks (psychological) help from a specialised institution. Article 14c (3) WvSr adds that the special conditions can be accompanied by electronic monitoring (*elektronisch toezicht*).

### *Detention in surrender proceedings*

The OLW provides for specific rules on detention during EAW proceedings. After a requested person has been arrested the public prosecutor or assistant public prosecutor (*hulpofficier van justitie*) can order the detention in police custody for three days (Article 21 (5)). If the requested person is arrested outside the court district (*arrondissement*) of Amsterdam he should be transferred to Amsterdam within those three days. Only the public prosecutor in

<sup>57</sup> 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, *OJEU* 2009, L 294/20.

<sup>58</sup> See *inter alia*: J.K. Janssen, F.W.H. van den Emster and T.B. Trotman, 'Strafrechters over de praktijk van de voorlopige hechtenis', *Strafblad* 2013, p. 430 e.v.; B. Berghuis, P. Linckens and A. Aanstoot, 'De voorlopige hechtenis een halt toegeroepen?', *Trema* 2016 (3); M.A. Docter and J.L. Baar, 'De motivering van voorlopige hechtenis schiet tekort. De gronden die tot eerdere artikelen en commentaren hebben geleid, zijn nog onverkort aanwezig', *TPWS* 2017/50, p. 178-184.

<sup>59</sup> J.H. Crijns, B.J.G. Leeuw and H.T. Wermink, *Pre-trial detention in the Netherlands: legal principles versus practical reality*, Eleven International Publishing: The Hague 2016, p. 35.

<sup>60</sup> B.J. Polman, 'Het instituut van de borgsom in het Nederlandse strafprocesrecht', *Ars Aequi* 2015, p. 437-447; A.R. Houweling, *Op borgsom vrij*, Boom Juridische uitgever: The Hague 2009.



Amsterdam can decide to hold the requested person in police custody until the Court of Amsterdam rules on the detention in custody (Article 21 (8)). If the public prosecutor finds that the EAW cannot be executed he informs the issuing authorities thereof immediately (*onmiddellijk*), but he demands (*vordert*) that the Court of Amsterdam considers the EAW after it has been received in all other cases (Article 23 (1) and (2)). Immediately after this demand, the presiding judge of the court (*voorzitter van de rechtbank*) decides on the time and place of the court hearing. During the court hearing a decision has to be made on the detention in custody until judgement is given by the court (Article 27). Judgement should be given within 60 days or in exceptional cases within 90 days. However, Article 22 (4) provides that in certain cases this term can be extended indefinitely (*voor onbepaalde tijd*).

Article 67 of the OLW provides that compensation can be awarded by the court to a requested person if the execution of the EAW has been refused. The general provisions from the WvSv are applicable. The person concerned can file a request for compensation within three months after the end of the proceedings (Article 89 (3)). A court in chambers (*raadkamer*) of the court that dealt with the case handles this request. Whether compensation is given and, if so, for what amount is to be considered equitably (*op grond van billijkheid*) by the judges; the standard of living of the requested person plays a role in this regard (Article 90 (1) and (2)).

#### *Differences concerning detention – from the Netherlands to another Member State*

Although differences between the rules on pre-trial detention in the various Member States are sometimes used as arguments against the execution of an EAW they have never been successful. In several cases, the defence did invoke possible violations of Article 5 and 6 ECHR because of long pre-trial detention or the lack of guarantees in general. The Court of Amsterdam does not follow these arguments and usually refers to the trust that exists between Member States regarding the protection of fundamental rights; the national authorities in the Member States should take a decision on the pre-trial detention and the court trusts that they will do so in a way that respects fundamental rights. The existence of an effective remedy (Article 13 ECHR) also has special significance according to the court to justify mutual trust and surrender to the country where the person will be detained awaiting trial.<sup>61</sup>

#### *Differences concerning detention – from another Member State to the Netherlands*

If the Netherlands issues an EAW for the purpose of prosecution or execution of a sentence the time spent in detention abroad will be deducted from the (prison) sentence that is (to be) imposed. This follows from Article 27 WvSr. This provision stipulates that the time spent in detention abroad after a Dutch request for the extradition or surrender was issued will be deducted from the Dutch prison sentence.

The transfer to the Netherlands of prisoners sentenced abroad takes place on the basis of the Measures Involving Deprivation of Liberty and Conditional Penalties (Mutual Recognition and Enforcement) Act (*Wet wederzijdse erkenning en tenuitvoerlegging vrijheidsbenemende en voorwaardelijke sancties*, hereinafter: WETS). The WETS implements Framework Decision 2008/909/JHA.<sup>62</sup> In accordance with Article 2:11 (2) and (3) (c) WETS the Court of Appeal of Arnhem-Leeuwarden (*Gerechtshof Arnhem-Leeuwarden*) should decide whether the foreign prison sentence should be adjusted on the basis of Article 2:11 (4) to (6). In principle, the sentence should not be adjusted. However, if the sentenced person has been surrendered by the Netherlands under the condition that, if convicted, he would be able to serve his sentence in the Netherlands the sentence can be adjusted (Article 2:11 (5)). If the sentence

<sup>61</sup> Court of Amsterdam, 9<sup>th</sup> November 2007, ECLI:NL:RBAMS:2007:BB7956; Court of Amsterdam, 17<sup>th</sup> August 2012, ECLI:NL:RBAMS:2012:BY1996; Court of Amsterdam, 15<sup>th</sup> September 2016, ECLI:NL:RBAMS:2016:5788.

<sup>62</sup> Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union, *OJEU* 2008, L 327/27.

has a longer duration than the maximum length in the Netherlands, the sentence should also be adjusted; then the duration is changed to the Dutch maximum. If the nature of the sentence is unreconcilable with Dutch law the foreign sentence is changed to a penalty or measure provided for in Dutch law that resembles the foreign sentence as much as possible. An adjustment should never lead to an aggravation of the sentence (Article 2:11 (7)). If no adjustments are necessary, the sentence can be executed in the Netherlands for the duration that was originally imposed in the other Member State. In accordance with Article 2:15 (2) WETS time spent in detention abroad will be deducted from the length of the prison sentence to be served in the Netherlands.

### Evidence

In principle, evidence gathered in another Member States can be used during criminal proceedings in the Netherlands.<sup>63</sup> For example, Articles 339 (1) 5° and 344 (1) 3° WvSv show that written statements by a person in public service of another State or international organisation can be used as evidence in Dutch proceedings. However, if the argument is raised that the evidence has been gathered unlawfully the competent court should conduct a review; this also applies to evidence gathered in another Member State. In its case law the Supreme Court has explained how arguments concerning unlawful investigations and evidence in States that are bound by the ECHR should be dealt with by the court.<sup>64</sup> This case law applies to Member States of the EU, because all Member States of the EU are also party to the ECHR. In this regard, it should be noted that the Supreme Court does not distinguish between countries that are a party to the ECHR *and* a member of the EU, and countries that are a party to the ECHR but are *not* part of the EU. The Supreme Court states that the nature and scope of judicial review depends on whether the investigation in another country was led by (1) foreign authorities or (2) Dutch authorities in accordance with Article 539a (1) WvSv.

(1) If the investigation abroad was led by foreign authorities the court should only assess whether the use of the evidence would not violate Article 6 ECHR. This means the court should not review whether the national provisions in the other country were all complied with, but only whether the right to a fair trial was guaranteed. For example, if it is argued that a suspect did not receive legal assistance from a lawyer and confessed to committing a crime this has to be assessed by the Dutch court. According to the Supreme Court, the mutual trust between the Member States of the ECHR and the existence of effective national remedies in accordance with Article 13 ECHR in the requested state – meaning the state in which the investigation was conducted – to address violations of other fundamental rights than the right to a fair trial means that the Dutch court should not check whether – in the light of Article 8 ECHR – a legal basis for the investigative measures existed in national law and if such a violation was necessary in a democratic society.<sup>65</sup> For example, if according to the law of the requested state a prior judicial warrant was needed for the search of a house but such a warrant was not given and the search was carried out nonetheless this falls outside the scope of review by the Dutch court even though Article 8 was violated. In this regard, the Supreme Court recalls the established case law of the ECtHR that a breach of Article 8 ECHR does not immediately lead to a violation of the right to a fair trial and that the national law – which cannot be reviewed by Dutch courts – is of paramount importance for the assessment of such a breach.<sup>66</sup>

(2) However, if the investigations abroad are led by Dutch authorities the review should be more stringent. Article 539a (1) WvSv provides that investigative powers from the WvSv can be used outside the jurisdiction of the court, i.e. abroad. Article 539a (3) clarifies that this is

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<sup>63</sup> In our view, this rule will also apply in regard to the EPPO and EIO. For example, Article 5 (3) of Regulation 2017/1939 on the establishment of the EPPO states that national law shall apply to the extent that a matter is not regulated by the Regulation. The Regulation does contain any specific provisions on the admissibility of evidence, but does state that the fact that evidence is obtained abroad should not constitute an obstacle for its admission before a national courts.

<sup>64</sup> Supreme Court of the Netherlands, 5<sup>th</sup> October 2011, ECLI:NL:HR:2010:BL5629.

<sup>65</sup> Supreme Court of the Netherlands, 5<sup>th</sup> October 2011, ECLI:NL:HR:2010:BL5629, par. 4.4.1.

<sup>66</sup> Supreme Court of the Netherlands, 5<sup>th</sup> October 2011, ECLI:NL:HR:2010:BL5629, par. 4.4.1.

only possible if international and interregional law allows it. *Inter alia*, the Convention implementing the Schengen Agreement (hereinafter: CISA) provides for such a legal basis. For example, CISA allows – provided that the applicable requirements are fulfilled – Dutch authorities to continue the observation of a suspect beyond the borders of the Netherlands (Article 40 CISA). In that case, the investigation is led by Dutch authorities. Then the court should assess whether the rules that regulate those actions under Dutch law have been complied with. The Supreme Court refers to the Dutch legal norms, but also to the ECHR. Under Dutch law, arguments concerning the unlawfulness of evidence and the possible consequences of unlawful actions have to be dealt with by the court under Article 359a WvSv and the case law of the Supreme Court explaining that provision.<sup>67</sup> Article 359a WvSv and the case law are applicable when Dutch authorities were in charge of the investigations in another State.<sup>68</sup>

### The prevention and settlement of conflicts of jurisdiction in criminal proceedings

In 2009, Framework Decision 2009/948/JHA on the prevention and settlement of conflicts of jurisdiction in criminal proceedings was introduced.<sup>69</sup> The Framework Decision has been implemented in the Netherlands in the Instruction on conflicts of jurisdiction in criminal matters (*Aanwijzing rechtsmachtgeschillen bij strafprocedures*).<sup>70</sup> The Framework Decision does not give a general rule and/or criteria to decide in which country the proceedings should take place, but only establishes an obligation for the Member States to enter into direct consultation with each other if a conflict of jurisdiction arises (Article 10).<sup>71</sup> Moreover, the scope of application of the Framework Decision is limited as it only contains provisions relating to cases of *parallel* criminal proceedings in different Member States against the *same person* in respect of the *same facts* (Article 1 (2) (a)). This means that parallel proceedings in respect of the *same facts* committed by *different persons* or parallel proceedings in respect of *multiple facts* committed by the *same person* or *different persons* do not have to be considered.<sup>72</sup> A Council Declaration stating that cooperation is also encouraged in cases other than the ones mentioned in Article 1 (2) (a) has been added to the Framework Decision, but the obligation to enter into direct consultation does not actually apply.<sup>73</sup> It is left to the discretion of the Member States to contact each other in such cases.

Although it might be good – either through amendments or the introduction of a new EU instrument – to extend the scope of application and to provide for clear criteria for the settlement of conflicts of jurisdiction, the Dutch case study did not provide indications as to extensive problems that arise on the basis of the present legal framework; This is logical, because such problems would not be dealt with before a court. Therefore, it would seem that conflicts of jurisdiction can be solved in most cases, even in the absence of binding criteria. The legislative history of the Revision of Jurisdiction Act (*Wet Herziening Rechtsmacht*) shows that the Dutch legislator takes this view.<sup>74</sup>

In the Netherlands, the public prosecutor is tasked with leading the investigative proceedings (*opsporingsonderzoek*, Article 148 WvSv) and, as such, with the gathering of evidence. The WvSv does not provide the defense with the same investigative powers as the public prosecutor. An example of asymmetry is found in the appointment of an expert (Article 150

<sup>67</sup> Supreme Court of the Netherlands, 30<sup>th</sup> March 2004, ECLI:NL:HR:2004:AM2533; Supreme Court of the Netherlands, 19<sup>th</sup> February 2013, ECLI:NL:HR:2013:BY5321.

<sup>68</sup> Supreme Court of the Netherlands, 5<sup>th</sup> October 2011, ECLI:NL:HR:2010:BL5629, par. 4.4.2.

<sup>69</sup> Council Framework Decision 2009/948/JHA of 30 November 2009 on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings, *OJEU* 2009, L 328/42.

<sup>70</sup> *Aanwijzing rechtsmachtgeschillen bij strafprocedures* (2012A013), *Stcrt.* 2012, 11716.

<sup>71</sup> The preamble of the Framework Decision does provide for some criteria in paragraph 9, but strictly those are not binding.

<sup>72</sup> F.C.W. de Graaf, "Samenloop van strafbare feiten binnen de Europese Unie. Naar een transnationale samenloopregeling als sluitstuk bij de (gelijktijdige) vervolging van meerdere strafbare feiten in verschillende EU-lidstaten?", in: *Delikt en Delinkwent* 2013/63, p. 3.

<sup>73</sup> Council Document 10225/09 COPEN 95, interinstitutional file: 2009/0802 (CNS).

<sup>74</sup> Wet van 27 november 2013 tot wijziging van het Wetboek van Strafrecht in verband met de herziening van de regels over werking van de strafwet buiten Nederland (herziening regels betreffende extraterritoriale rechtsmacht in strafzaken), *Stb.* 2013, 484; Kamerstukken II 2012/13, 33 572, 6, p. 16-17.

WvSv). The public prosecutor can appoint an expert on his own motion, whereas the defense can make a request to the public prosecutor to that end. Another example can be seen in the procedure before an investigative judge (*rechter-commissaris*). The public prosecutor can demand (*vorderen*) that the judge undertakes investigative acts on the basis of Article 181 WvSv, but the suspect can only request (*verzoeken*) this in accordance with Article 182 WvSv. Moreover, the public prosecutor can always attend the questioning of a witness before an investigative judge, but the access of the defense can be restricted in the interest of the investigation (Articles 186 and 187 WvSv).

The Dutch legislator has not opted for a system of “cross-examination” during the trial itself.<sup>75</sup> The law establishes in Article 292 WvSv that, in principle, the presiding judge (*voorzitter*) is the first to question witnesses. Then, the other judges and the public prosecutor can pose their questions. Lastly, the suspect can interview the witness. However, if a witness à décharge has not been questioned before the court hearing, the suspect has the right to ask questions first (Article 292 (4) WvSv).

#### 4. Other areas of concern

##### European Public Prosecutor's Office

Based on interviews with legal experts and lawyers, it has become clear that systemic differences did not form a real obstacle during the negotiations on the European Public Prosecutor's Office (hereinafter: EPPO). Of course, from the start it was clear to the parties involved that such differences existed; all Member States have their own system with its peculiarities. For example, during the negotiations on the various methods of disposal of a case that could be used by the EPPO it came to light that only the Netherlands and Luxemburg had in their national law a so called “settlement transaction” (*transactie*) without any involvement of a judge. Although this was an important difference compared to all other Member States, it did not constitute a problem; the present EPPO Regulation simply states in Article 40 that the European Delegated Prosecutor may use simplified prosecutions procedures aimed at the final disposal of a case if those are provided by the applicable national law.<sup>76</sup> Similar solutions for other systemic differences have been found as well in the context of the EPPO.

It is important to remark that during the (national) discussion on the EPPO in the Dutch House of Representatives and the Senate questions were raised as to the differences between procedural criminal law in the various Member States. These questions focussed, primarily, on two points: the procedural safeguards for Dutch nationals that become involved in cross-border cases and the possible complexity of proceedings because of systemic differences.<sup>77</sup> The most important concern regarding Dutch participation in the EPPO was not found in the existence of differences between the criminal justice systems of the Member States, but rather in the surrender of sovereignty to the EPPO, particularly in regard to the discretionary principle (*opportuïteitsbeginsel*) of the Dutch Public Prosecutor's Office.<sup>78</sup> In October 2017, the Dutch government stated in the new coalition agreement (*regeerakkoord*) that the Netherlands will participate in the EPPO, because cooperation within the EU was “inevitable” and the EPPO would make this cooperation easier.<sup>79</sup> Thus, the earlier decision not to

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<sup>75</sup> G.J.M. Corstens and M.J. Borgers, *Het Nederlandse strafprocesrecht*, Kluwer: Deventer 2011, p. 613-614.

<sup>76</sup> Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO'), *OJEU* 2017, L 283/1.

<sup>77</sup> *Kamerstukken I* 2016/17, 33 709, nr. 10, p. 5; *Kamerstukken II* 2016/17, 33 709, nr. 12, p. 13. Although systemic differences are mentioned, they are not elaborated upon. It remains unclear what kind of differences are conceived as problematic.

<sup>78</sup> *Kamerstukken II* 2016/17, 33 709, nr. 12; *Kamerstukken I* 2016/17, 33 709, nr. 10.

<sup>79</sup> *Vertrouwen in de toekomst: regeerakkoord 2017 – 2021* VVD, CDA, D66 en ChristenUnie (available: <https://www.kabinetsformatie2017.nl/documenten/publicaties/2017/10/10/regeerakkoord-vertrouwen-in-de-toekomst>, last accessed: 28-02-2018).

participate was recalled. However, in the coalition agreement it was again stipulated that the discretionary principle of the Dutch Public Prosecutor's Office would not be weakened.

### Provisions of the OLW

As seen before, Framework Decision 2002/584/JHA on the European Arrest Warrant has been implemented in the OLW.<sup>80</sup> The OLW features two provisions that are, in our view, relevant in regard to (possible) obstacles to cross-border cooperation in criminal matters. Firstly, the fundamental rights refusal ground in Article 11 should be addressed. Then, the Dutch transposition of Article 4a of the EAW Framework Decision into Article 12 OLW requires attention.

#### *Article 11 OLW*

Article 11 OLW states that the execution of a EAW shall be refused if surrender would lead to a flagrant denial of fundamental rights from the ECHR. Thus, the Article entails a general fundamental rights refusal ground. Article 1 (3) of the EAW Framework Decision establishes that the Framework Decision shall not have 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, but it does not feature a fundamental rights ground of refusal. Thus, Article 11 OLW adds an extra ground of refusal to the exhaustive list from the Framework Decision.<sup>81</sup> This ground of refusal is often relied upon by the defence, although arguments on the basis of Article 11 are rarely successful.<sup>82</sup> However, Article 11 is still in the OLW and could potentially block cross-border cooperation on the basis of the EAW mechanism.

In that regard, the legislative history of Article 11 OLW is interesting. It follows from this legislative history that the first draft of the OLW did not provide for a general ground of refusal.<sup>83</sup> This was, however, strongly opposed by the House of Representatives. It was feared that the protection of human rights abroad did not meet the appropriate standards and, thus, the question was raised whether mutual trust between Member States and the lack of a fundamental rights ground of refusal was justified.<sup>84</sup> The Minister of Justice did not agree with this criticism. He strongly opposed two amendments that tried, unsuccessfully, to incorporate an obligation for the executing judicial authority to review *in abstracto* the compliance with the ECHR in the issuing state. Such a duty would require a Dutch court to assess compliance with fundamental rights in general.<sup>85</sup> In the end, a review *in concreto* was proposed by the Minister of Justice and the criterion of "a flagrant breach" was introduced.<sup>86</sup> Although this allows the judicial authorities to assess the specific circumstances of the requested person, it does not entail a general review of the human rights situation in the issuing state.

#### In absentia trials

Under Dutch law, the defendant has the *right* to be present during his trial.<sup>87</sup> In accordance with the case law of the Strasbourg Court, a defendant can waive this right, but such a waiver should be made unequivocally. If a person does not attend the trial, the court will assess whether there is an unequivocal waiver; the court should, *inter alia*, check if the summons have been served correctly (Article 278 (1) WvSv). Under certain circumstances, it is possible for the court to order a person to attend the trial and, if that is necessary, order a person to

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<sup>80</sup> Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, *OJEU* 2002, L 190/1.

<sup>81</sup> Judgement of the Court (Grand Chamber) in Case C-123/08 (*Wolzenburg*), ECLI:EU:C:2009:616.

<sup>82</sup> Arguments on the basis of Article 11 Surrender Act have only twice led to the refusal of surrender. Court of Amsterdam, 1<sup>st</sup> July 2005, ECLI:NL:RBAMS:2005:AT8580; Court of Amsterdam, 19<sup>th</sup> August 2005, ECLI:NL:RBAMS:2005:AU1314.

<sup>83</sup> *Kamerstukken II* 2002/03, 29042, 1-2, p. 6.

<sup>84</sup> *Kamerstukken II* 2002/03, 29042, 5, p. 12-15.

<sup>85</sup> *Kamerstukken II* 2002/03, 29042, 27, p. 21-22.

<sup>86</sup> *Kamerstukken II* 2002/03, 29042, 21.

<sup>87</sup> G.J.M. Corstens and M.J. Borgers, *Het Nederlandse strafprocesrecht*, Kluwer: Deventer 2011, p. 595.

be brought before the court (Article 258 (6) and 278 (2) WvSv, *medebrenging gelasten*). In accordance with Article 280 WvSv, it is possible for the court to declare an accused who fails to appear to be in default of appearance (*verstek verlenen*). The court will then try the case as usual and pass judgement *in absentia*.

#### Article 12 OLW

Article 12 OLW implements Article 4a of the EAW Framework Decision which provides an optional ground of refusal in the case of a decision rendered *in absentia*. The European provision establishes that the execution of an EAW *can* be refused, *unless* the situations mentioned in Article 4a (a) to (d) of the Framework Decision are applicable. If that is the case, the possibility of refusal ceases to exist and there is again an obligation to surrender the requested person in accordance with Article 1 (2) of the Framework Decision. If a person was tried *in absentia*, the executing judicial authority should establish whether the procedural rights of the person concerned were guaranteed during the proceedings. To this end, the court should assess if one of the situations in Article 4a is applicable. However, the wording of Article 4a leaves open the possibility of executing an EAW even if those situations do not apply, because the procedural rights of the requested person were still guaranteed in the issuing country.<sup>88</sup>

Article 12 OLW does not contain an optional ground of refusal, but a *mandatory* ground of refusal; it stipulates that surrender “shall not be allowed (*wordt niet toegestaan*)”, unless one of the situations listed is applicable. This transposition has two important implications for the functioning of the EAW mechanisms under Dutch law. First of all, it means that the logic of the Framework Decision is reversed, because it transforms “the *possibility* of non-execution unless (a) to (d) into a *requirement* of non-execution unless (a) to (d)”.<sup>89</sup> Secondly, it transforms the list of situations from Article 4a into an *exhaustive* list; only if one of those situations applies in a case can an EAW be executed if the requested person was tried *in absentia*.<sup>90</sup> Recent case law of the Court of Justice and the Court of Amsterdam in the case of *Tupikas* shows that the Dutch transposition of Article 4a of the EAW Framework Decision can form an obstacle for cross-border cooperation.<sup>91</sup>

In the *Tupikas* case the Netherlands received an EAW from Lithuania for the execution of the sanction imposed on Tupikas. He had been present during his initial trial, but launched an appeal against the imposed sanction. According to the Lithuanian authorities Tupikas was informed of the time and place of the court hearing of the appeal complaint, because a court notice was sent to him. The defendant did not attend the court hearing, but a lawyer was present. After the trial, an EAW was issued for the purpose of the execution of the imposed custodial sentence. The Lithuanian authorities did not provide any data that confirmed that Tupikas received the court notice or that the lawyer was authorised to represent him. Therefore, the defence stated that surrender should be refused.

The appeal against the sanction should be assessed in accordance with Article 12 Dutch OLW. It cannot be established that Tupikas received the summons in person and that he was informed of the time and place of the hearing. It can neither be established that he was represented by a lawyer; lawful representation by a lawyer is only possible if the defendant has been informed of the place and time of the hearing, the defendant authorised his lawyer and the lawyer actually defended the defendant. In *Tupikas*' case, it could not be established that the lawyer was authorised by the requested person.<sup>92</sup> The Court of Amsterdam referred the case to the Court of Justice for a preliminary ruling. The court wanted to know, in short,

<sup>88</sup> Judgement of the Court (Fourth Chamber) in Case C-108/16 PPU (*Dworzecki*), EU:C:2016:346, par.50-51.

<sup>89</sup> Opinion A-G Bobek in Case C-270/17 PPU (*Tupikas*), ECLI:EU:C:2017:609, par. 75; Opinion A-G Bobek in Case C-271/17 PPU (*Zdziaszek*), ECLI:EU:C:2017:612, par.108.

<sup>90</sup> Opinion A-G Bobek in Case C-270/17 PPU (*Tupikas*), ECLI:EU:C:2017:609, par. 76; Opinion A-G Bobek in Case C-271/17 PPU (*Zdziaszek*), ECLI:EU:C:2017:612, par.109.

<sup>91</sup> Judgement of the Court (Fifth Chamber) in Case C-270/17 PPU (*Tupikas*), ECLI:EU:C:2017:628; District Court of Amsterdam, 30th August 2017, ECLI:NL:RBAMS:2017:6273.

<sup>92</sup> Judgement of the Court (Fifth Chamber) in Case C-270/17 PPU (*Tupikas*), ECLI:EU:C:2017:628, par. 25-40.

whether the appeal proceedings concerning only the sentence was to be considered as a “trial resulting in the decision” within the meaning of Article 4a of the EAW Framework Decision.

In its judgements in the cases of *Tupikas* and *Zdziaszek* the Court of Justice decided that in cases where a final decision on the guilt and a final decision on the imposed sanction are made separate because the decisions have been made in two, subsequent instances, both the decision on the guilt and the decision on the imposed sanction should be assessed equally in accordance with the national law implementing Article 4a of the EAW Framework Decision.<sup>93</sup> Article 6 ECHR applies not only to the finding of guilt, but also to the determination of the sentence.<sup>94</sup> Thus, compliance with the requirement of a fair trial entails the right of the person concerned to be present at the hearing because of the significant consequences which it may have on the quantum of the sentence to be imposed. Given that such proceedings determine the quantum of the sentence which the convicted person will ultimately serve, that person must be able to effectively exercise his rights of defence in order to influence favourably the decision to be taken in that regard.<sup>95</sup> If the executing judicial authority finds that it does not have enough information to establish whether the procedural rights were guaranteed, it should request additional information on the basis of Article 15 (2) of the Framework Decision. However, it is not under the obligation to ask for additional information more than once.<sup>96</sup>

Referring to the judgements of the Court of Justice, the Court of Amsterdam established in the national EAW procedure that in a case such as *Tupikas*’ the first decision and the decision in appeal should *both* be able to stand the test of Article 12 OLW.<sup>97</sup> If either decision does not stand the test surrender should be refused under Dutch law in accordance with Article 12. The court accepted that *Tupikas* did not attend the hearing of his appeal against the imposed sanction and acknowledged that there was no information available from which it can be concluded that the defendant received the writ or has been informed of the place and time of the hearing, nor that he gave his authorisation to the lawyer. Thus, on the basis of the available information the court could not establish with sufficient certainty that the defence rights have been guaranteed during the relevant proceedings. Therefore, surrender was refused in the case of *Tupikas*.<sup>98</sup>

It follows from the *Tupikas* case that the manner in which Article 4a of the EAW Framework Decision was transposed into Article 12 OLW can cause serious problems. This was also concluded by A-G Bobek in his Opinions in the cases of *Tupikas* and *Zdziaszek*; he states that the rigid Dutch transposition is “incorrect” and leads to “difficulties”.<sup>99</sup> The mandatory ground of refusal does not allow the executing judicial authority to check the concrete circumstances of the requested person and whether his procedural rights were guaranteed. Bobek notes that “[...] the person concerned was aware of the decision in first instance and brought an appeal (and was therefore aware of those proceedings). If, moreover, such a person was duly represented, it is difficult to see how his rights of defence were not respected”.<sup>100</sup> The exhaustive list in Article 12 OLW prohibits the Dutch court from taking such situations into account. Even if, in practice, the fundamental rights of the requested persons are guaranteed the OLW does not allow the surrender. As such, this is clearly at odds with the general objective – ensuring the effective surrender of persons whilst guaranteeing a high level of fundamental rights protection – and the obligation to execute an EAW on the basis Article 1 (2) of the Framework Decision.

<sup>93</sup> Judgement of the Court (Fifth Chamber) in Case C-270/17 PPU (*Tupikas*), ECLI:EU:C:2017:628, par. 80-81; Judgement of the Court (Fifth Chamber) in Case C-271/17 PPU (*Zdziaszek*), ECLI:EU:C:2017:629, par. 93.

<sup>94</sup> Judgement of the Court (Fifth Chamber) in Case C-271/17 PPU (*Zdziaszek*), ECLI:EU:C:2017:629, par. 87.

<sup>95</sup> Judgement of the Court (Fifth Chamber) in Case C-271/17 PPU (*Zdziaszek*), ECLI:EU:C:2017:629, par. 91.

<sup>96</sup> Judgement of the Court (Fifth Chamber) in Case C-271/17 PPU (*Zdziaszek*), ECLI:EU:C:2017:629, par. 103-105.

<sup>97</sup> District Court of Amsterdam, 30th August 2017, ECLI:NL:RBAMS:2017:6273, 4.3.

<sup>98</sup> District Court of Amsterdam, 30th August 2017, ECLI:NL:RBAMS:2017:6273.

<sup>99</sup> Opinion A-G Bobek in Case C-270/17 PPU (*Tupikas*), ECLI:EU:C:2017:609, par. 78-79; Opinion A-G Bobek in Case C-271/17 PPU (*Zdziaszek*), ECLI:EU:C:2017:612, par.110.

<sup>100</sup> Opinion A-G Bobek in Case C-270/17 PPU (*Tupikas*), ECLI:EU:C:2017:609, par. 79.

## 5. Conclusion and recommendations

In recent years, the EU has had a distinct influence on the Dutch legal order. The various Directives that have entered into force have triggered important changes and formed an impetus for the development of procedural rights in national law. For example, Directive 2013/48/EU unequivocally provided defendants with the right of access to a lawyer during the interrogation and, thus, brought a long discussion in the Netherlands on the existence of that right to an end. The EU has also played an important role in regard to the procedural rights of victims; the rights of victims in Title IIIA of the WvSv flow largely from European legislation. Most Directives that were introduced in 2016 still require implementation in the Netherlands; it is yet unknown when these will be transposed into national law.

Although the EU has harmonised some procedural rights, there are still differences between the Member States in regard to their criminal procedural laws. From a Dutch perspective, these systemic differences within the EU do not seem to have a negative impact on cross-border cooperation in criminal matters and the effective operation of mutual recognition instruments. The analysis of the case law of the Court of Amsterdam shows that differences between the legal orders of the Member States are rarely relied upon in EAW cases and, if they are used as a defence, are unsuccessful. The court often emphasises the mutual trust that governs the relationships between Member States of the EU on the basis of the ECHR and the CFR. This trust is, essentially, also seen in regard to the use of foreign evidence in Dutch proceedings. According to the Supreme Court, Dutch courts should only assess whether the use of foreign evidence would violate Article 6 ECHR when foreign authorities were in charge of the investigation; the court should not review whether all foreign national provisions were complied with or whether other fundamental rights, for example Article 8 ECHR, were violated. The reason for this is found in the mutual trust between the Member States of the ECHR and the importance of effective remedies in foreign countries under their national law as required by Article 13 ECHR.

Despite the fact that systemic differences do not seem to affect cross-border cooperation in most cases, recent Dutch case law shows that mutual trust is not absolute in the eyes of Dutch courts. After the judgements of the CJEU in the joined cases *Aranyosi and Căldăraru* the Court of Amsterdam has accepted that a possible violation of Article 3 ECHR and Article 4 CFR can form an obstacle for the execution of an EAW. It has adopted its own two-step test to assess the argument that the execution of an EAW would subject the requested person to inhuman or degrading treatment because of detention conditions in the issuing state. In several cases, the Court of Amsterdam has declared the public prosecutor inadmissible and has not considered the EAW in question, because of the possible violation of Article 3 ECHR and Article 4 CFR. Recently, the Court of Amsterdam has also applied the aforementioned two-step test in a case that did not concern deplorable prison conditions, but a real risk of inhuman or degrading treatment because the requested person made incriminating statements on an especially violent gang and was admitted into a witness protection programme as a consequence.

It also follows from the Dutch case study that the House of Representatives seems to be more critical overall on the existence of mutual trust within the EU. A virulent discussion in the House of Representatives that centred on distrust towards other countries led to the introduction of Article 11 into the OLW and the discussion on Dutch participation in the EPPO also featured questions on the differences between the Member States of the EU.

### *Recommendations from a Dutch perspective*

Which recommendations can be made on the basis of the Dutch case study? Three aspects deserve attention. First of all, it is advisable to improve the close monitoring of the implementation of the EU's Directives in the national legal order. Secondly, the Dutch case study has shown that it might be prudent for the EU legislator to focus on consolidating the present framework instead of introducing new Directives. Lastly, if the legislator should decide to take new steps in the coming years, four areas are most suited. The differences between detention conditions seem to be the biggest threat to cross-border cooperation and



the effective operation of mutual recognition instruments at present. Therefore, improving the detention conditions across the Union deserves the EU legislator's attention. New harmonisation could also be prudent in the fields of procedural guarantees for tapping of telecommunication, investigation of smartphones and admissibility of evidence.

#### Monitoring of the implementation

The analysis of the Dutch legal system shows that the implementation of the EU's legislation sometimes leaves room for improvement. Several examples have been addressed in this regard. First of all, the transposition of Directive 2012/29/EU on victim rights into national law was not completed until after the transposition deadline and, even today, features an important flaw in regard to the implementation of Article 14 of the Directive. Secondly, the Dutch implementation of the EAW Framework Decision can form an obstacle for cross-border cooperation in criminal matters. The Dutch legislator has introduced a new refusal ground in Article 11 OLW that does not feature in the Framework Decision, but has also, to use the words of A-G Bobek, transposed Article 4a "incorrectly". The judgements of the CJEU and the Court of Amsterdam in the case of *Tupikas* show that the Dutch transposition of that Article can indeed block the operation of the EAW mechanism in a particular case.

Based on these findings, the Commission could in theory start infringement proceedings against the Netherlands; the same applies for other Member States that struggle with the same problems. However, during the case study it has become clear – *inter alia*, on the basis of interviews with legal scholars and lawyers – that the implementation of Directives is sometimes more complex and time consuming than anticipated. Moreover, procedural rights Directives often have pecuniary implications and, thus, require the national legislator to make available sufficient funds. Having regard to these circumstances, in order to ensure the timely implementation and to minimize the risk of problematic and/or incomplete transposition it is advisable to improve monitoring of the implementation of EU legislation in the Member States rather than launching infringement proceedings. Member States such as the Netherlands may need more help and/or more time to improve the implementation of new European legislation into national law.

#### Preference for consolidating the present framework...

Although there are more than enough options for further harmonisation in the field of criminal matters, the Dutch case study has shown that it might be prudent to first consolidate the present legal framework before taking the next steps. Under the Stockholm Programme many Directives on procedural rights were introduced in a relatively short time frame. These Directives are, in some cases, just starting to have an impact in the national legal order. From the interviews that were conducted as part of the Dutch case study, it can be concluded that Member States need time to implement the current provisions fully and correctly, make sufficient funds available to guarantee the effectiveness of the Directives, and assess whether the goals of the Directives are fulfilled. It is good and admirable to have high ambitions, but at the same time it should be ensured that the Member States are not confronted with a constant flow of new European legislation they simply cannot cope with. That could negatively influence the overall goal that is aimed for by all parties involved: the strengthening of fundamental rights and cooperation within the EU in the field of criminal matters.

#### ...but open-minded towards new steps for harmonisation in certain fields

In recent cases, the Court of Amsterdam has been confronted with arguments concerning the risk for the requested person of being subjected to inhuman or degrading treatment in the prisons of an issuing Member State. On several occasions, the court has declared the public prosecutor inadmissible because the aforementioned risk could not be excluded. Arguments that do not involve deplorable prison conditions and the inherent risk of a violation of Article 3 ECHR and Article 4 CFR have not been successful in recent years. Thus, it follows from the case law of the Court of Amsterdam that differences in the detention conditions within the EU can form an obstacle for the effective operation of the EAW mechanism. Because these conditions play a central role in ensuring compliance with fundamental rights standards, it is recommended that they receive attention from the Union legislator in the

near future. It should be ensured that prison conditions in all Member States are in accordance with – at least – minimum standards.

Another step relating to harmonisation that could be taken by the Union legislator, concerns procedural guarantees for tapping of telecommunication and investigative acts concerning smartphones. Telecommunication and smartphones have become increasingly important over the last decade. As said before, nowadays the smartphone often contains much sensitive information about one's private life. Citizens of the EU can travel freely within the territory of the Union and take their personal belongings with them. This means that they could potentially be subject to different regimes governing tapping of telecommunication and the search of a smartphone. Harmonisation could ensure that the same minimum level of protection applies across the EU.

A third option for harmonisation could be focused on establishing minimum standards in regard to evidence gathering. Although the case study of the Netherlands has shown that evidence that has been obtained abroad can be used in Dutch criminal proceedings it would be good to create a level-playing field, especially in light of the establishment of the EPPO.

## VIII. COUNTRY REPORTS ON ROMANIA

### National report No 1 on the Romanian jurisprudence

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#### I. Introduction

Having in mind the latest jurisprudence of national courts of Romania, especially last instance decisions, and more particularly the Romanian Supreme Court's case law ("High Court of Cassation and Justice"), we must underline from the beginning of our national report that there is a considerable reluctance on behalf of our courts (whatever their position in the regular judiciary) regarding the application of other EU instruments than the European Arrest Warrant. For example, we have not encountered (yet!) any discussions regarding extremely sensitive subjects, such as special safeguards for vulnerable groups other than child suspects, admissibility of evidence etc.

When drawing such a conclusion, we should stress out that we speak both from a theoretical perspective (from our academic position in the University) and from a practical one (as a lawyer, specialized in Criminal Law and in European cooperation in criminal matters). As well, our conclusions are also based on reactions offered by the Prosecutor's Office attached to the High Court of Cassation and Justice who was kind enough to permit access to internal statistics on matters regarding European cooperation in criminal matters<sup>1</sup>. Taking advantage of our position (trainer of judges and prosecutor, within the National Institute for Magistrates) we have asked on our last meeting (Bucharest, 11 – 12 December, 2017<sup>2</sup>) a number of approximately 100 magistrates (most of them working at the Court of Appeals level and specialized units within the Public Prosecutor's Office) about the issues met in their practice regarding the aforementioned subject, general speaking, obstacles met in the application of EU tools and mutual recognition instruments. The answers all corresponded to the following "sensitive" issues: European Arrest Warrant, mutual recognition of foreign judgments imposing custodial sentences (both the more recent Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union and the already "classical" European Convention on the International Validity of Criminal Judgments of 28 May 1970), problems regarding the recognition of ancillary and complementary penalties and, although less mentioned, mutual recognition of financial penalties (Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties)<sup>3</sup>.

For the reasons mentioned above, our analysis will focus on the cases involving the European Arrest Warrant and on recognition of foreign judgments imposing custodial sentences (within this section, we will cover the topic of additional and ancillary penalties). A final, smaller sized section will be dedicated to mutual recognition cases of financial penalties.

#### II. European arrest warrant

In this section, we will focus on issues found in Romanian case law regarding the execution of European arrest warrant. As we will see, most problems are due to the discrepancies and differences between national criminal procedures (although we make reference to national

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<sup>1</sup> Document entitled "Evidence on Law no 302 of 2004 on international cooperation in Criminal Matters" – it contains all the conclusions of all decisions rendered by the High Court of Cassation and Justice starting 2014, as well as selected issues of decisions previous to this date. Unfortunately, the document is considered classified and we were not allowed to make it public. Still, we express our sincerest appreciation to the Prosecutor's Office and, especially, prosecutor Georgina Bodoroncea and prosecutor Irina Kuglay.

<sup>2</sup> See for the details of the event - <http://inm-lex.ro/displaypage.php?p=164&d=2001>.

<sup>3</sup> The author expresses his gratitude to Mihail Udrouiu, judge at the Oradea Court of Appeal, Criminal Division.

transposition of Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States) and, more recently, to pre-trial and even post-trial detention conditions.

### **1. Issuing a European arrest warrant. Prior existence of a national arrest warrant in the issuing state. No implicit ground for non-execution of the warrant by the Romanian Courts**

*The Supreme Court considers that the Hungarian authorities made explicit reference that the request is based on a judicial decision and that in the domestic legislation the court shall issue immediately a European arrest warrant with a view to that person's arrest and surrender in any Member State of the European Union, provided that this is warranted by the seriousness of the offence. Therefore, in the Hungarian legislation the European arrest warrant is simultaneously to be considered a national arrest warrant and no implicit ground for non-execution can be invoked by the Romanian Courts.*

*High Court of Cassation and Justice, Criminal Division, decision no 657/2016<sup>4</sup>*

The judicial issuing authority – the Tata First Instance Court from Hungary - relied on its legislation, namely Article 25 of Law no CLXXX of 2012 on cooperation between the Member States of the European Union in criminal law matters (*Európai Unió tagállamival folytatott bűnügyi együttműködésről szóló 2012. évi CLXXX. törvény - Magyar Közlöny 2012/160*). Article 25 provides as follows: "(1) Where it is necessary to commence criminal proceedings in respect of a suspected person, the court shall issue immediately a European arrest warrant with a view to that person's arrest and surrender in any Member State of the European Union, provided that this is warranted by the seriousness of the offence (...)". Thus, according to the domestic Hungarian legislation – Article 25(7) of Law no CLXXX of 2012 – which provides that the European arrest warrant is also valid on Hungarian territory, no prior national arrest warrant is issued.

The Criminal Division of Cluj Court of Appeal considered that the European arrest warrant cannot be issued without the prior pre-existence of a national arrest warrant, as any other interpretation would contradict the system laid down by the Framework Decision. As a consequence, it refused to execute the warrant issued by the Hungarian authorities (sentence no 57 of 19 April 2016). The sentence was appealed by the Cluj Public Prosecutor and the Supreme Court rendered its final decision on 5 May 2016. According to the latter court, the Hungarian authorities explicitly mentioned that the European Arrest warrant is simultaneously a national arrest warrant. Thus, the inexistence of a prior national arrest warrant cannot be invoked by the Romanian executing authority as a ground for refusal. In the end, the European arrest warrant was executed and the person subject of the warrant was surrendered.

#### *Commentary:*

The issue at stake has its origin in the differences between the national procedure system of Hungary and the ones of the other Member States, in this particular case Romania. According to the wording of the Framework Decision on the European arrest warrant, a prerequisite condition for issuing such a warrant is that an enforceable judgment, an arrest warrant or any other enforceable judicial decision, coming with the scope of Article 1 and 2 pre-exists in the issuing state. This is not the case in the Hungarian system.

The Romanian courts take divergent views on the appropriate course of action to be taken in response to such a European arrest warrant. The majority view is that in such a situation a distinction must be made as regards both formal and substantive requirements and the request for execution of the European arrest warrant must be refused on the ground that it does not make up for the absence of a national arrest warrant or an enforceable judicial decision. This is the case especially with first instance courts dealing with the execution of

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<sup>4</sup> See Annex 1.

European arrest warrants – the Courts of Appeal<sup>5</sup>. However, other courts have accepted the request for execution of a European arrest warrant on the ground that the statutory requirements were satisfied, in so far as the issuing judicial authorities have expressly indicated that the European arrest warrant issued also constituted a national arrest warrant for the purposes of the law of the issuing Member State. This is the case especially with the Criminal Division of the High Court of Cassation and Justice, which has crystallized jurisprudence in this sense, overruling the previous sentences from the Court of Appeal level.

The “conflict” between the Court of Appeals and the Supreme Court was apparently settled in favour of the latter one and, therefore – as was the solution in this particular case – the European arrest warrants were executed, despite the scope of Article 1 and 2 of the Framework Decision.

In the following section we will see that the case law of Romanian courts has switched radically.

## **2. Issuing a European arrest warrant. Prior existence of a national arrest warrant in the issuing state. Implicit ground for non-execution. Bob-Dogi case**

*Article 8(1)(c) of Framework Decision 2002/584, as amended by Framework Decision 2009/299, is to be interpreted as meaning that, where a European arrest warrant based on the existence of an ‘arrest warrant’ within the meaning of that provision does not contain any reference to the existence of a national arrest warrant, the executing judicial authority must refuse to give effect to it if, in the light of the information provided pursuant to Article 15(2) of Framework Decision 2002/584, as amended, and any other information available to it, that authority concludes that the European arrest warrant is not valid because it was in fact issued in the absence of any national warrant separate from the European arrest warrant*

*Cluj Court of Appeal, Criminal Division, sentence no 89/2016<sup>6</sup>*

Once again, the Hungarian authorities – this time District Court Mateszalka – issued a European arrest warrant in the absence of a prior national arrest, making reference to domestic legislation, Article 25 from Law no CLXXX of 2012 on cooperation between the Member States of the European Union in criminal law matters.

The Court observed that the European arrest warrant mentioned at the heading “Decision on which the arrest warrant is based”, only “public prosecutor’s office attached to Nyíregyházi járásbíróság (District Court, Nyíregyház, Hungary)”. As well, the details of the national arrest warrant or judicial decision of equivalent effect mentioned only “European arrest warrant No 1.B.256/2014/19-II, issued by the Mátészalkai járásbíróság (District Court, Mátészalka), also covering the territory of Hungary, thus constituting, at the same time, a national arrest warrant”.

Having in mind the divergent views on the appropriate course of action to be taken in response to such a European arrest warrant by the Romanian courts and especially the case law of the Romanian High Court of Cassation and Justice, the first instance, Cluj Court of Appeal, Criminal Division, decided *ex officio* to make reference for a preliminary ruling on the interpretation of Article 8 (1) (c) of Council Framework Decision 2002/584/JHA of 13 June

<sup>5</sup> See also, Oradea Court of Appeal, Criminal Division, sentence no 22 from 7 February 2012 – the court did not execute the warrant issued by the Hungarian authorities, due to the lack of the national arrest warrant. For a critical comment, see C. Pătrăuș, *Comentariu în M. Radu (coord.), Buletinul Rețelei Judiciare Române în materie penală*, Hamangiu Publishing House, Bucharest, 2014, p. 65-66, expressing the view that the absence of a prior national arrest warrant is “covered” by the express provisions of Article 25 (7) of Law no CLXXX of 2012.

See also, Bucharest Court of Appeal, First Criminal Division, sentence no 197 from 14 May 2012, where the European arrest warrant issued by Bulgarian authorities was rejected, due to the lack of a national arrest warrant (there was only a custody / remand ordinance from a Public Prosecutor). For more info, see A. Nedelcu, *Comentariu în M. Radu (coord.), Buletinul Rețelei Judiciare Române în materie penală*, Hamangiu Publishing House, Bucharest, 2014, p. 85-87.

<sup>6</sup> See Annex 3.

2002 on the European arrest warrant and the surrender procedures between Member, as amended by Council Framework Decision 2009/299/JHA of 26 February 2009.

The referring court considered that, in the procedure for the execution of a European arrest warrant, the decision that must be recognized by the executing judicial authority must be a national judicial decision issued by the competent authority in accordance with the rules of criminal procedure of the Member State issuing the European arrest warrant. The referring court considered that there are fundamental differences between a European arrest warrant and a national arrest warrant. In particular, a European arrest warrant is issued with a view to the arrest and surrender of a person — charged or convicted — who is in the territory of the executing Member State, whereas a national arrest warrant is issued with a view to the arrest of a person who is in the territory of the issuing Member State. Moreover, the issue of a European arrest warrant is based on an arrest warrant or a decision relating to the execution of a custodial sentence, whereas a national arrest warrant is issued on the basis of conditions and situations expressly governed by the criminal law procedure of the issuing Member State. In the court's view, in the absence of a national arrest warrant, a person cannot be arrested and held in custody and that it cannot be accepted that the European arrest warrant is "transformed" into a national arrest warrant after the surrender of the requested person. Such an interpretation would also be at odds with the fundamental rights conferred by EU law. That court concludes that the European arrest warrant must be based on a national arrest warrant issued in accordance with the rules of criminal procedure of the issuing Member State, namely a warrant that is distinct from the European arrest warrant. Lastly, the referring court considered that, in addition to the optional and mandatory grounds for refusal set out in the Framework Decision, other, implied, grounds for refusal are invoked in judicial practice. That would be the case where the formal or substantive requirements specific to the European arrest warrant are not satisfied, *inter alia* where no national arrest warrant exists in the issuing Member State, as is the case in the main proceedings.

In those circumstances, the Cluj Appeal Court decided to stay proceedings and refer the following questions to the Court for a preliminary ruling (***court resolution of 15 April 2015***<sup>7</sup>):

1. *For the purposes of the application of Article 8(1)(c) of the Framework Decision, must the expression "evidence of ... an arrest warrant" be understood to refer to a national arrest warrant issued in accordance with the procedural rules of the issuing Member State, and therefore distinct from the European arrest warrant?*
2. *If the first question is answered in the affirmative, may the non-existence of a national arrest warrant constitute an implied reason for non-execution of the European arrest warrant?*

The European Union Court of Justice decided on June the 1<sup>st</sup>, 2016 in the case C-241/15 now known as *Bob-Dogi* case the following:

1. *Article 8(1) (c) of the 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, is to be interpreted as meaning that the term 'arrest warrant', as used in that provision, must be understood as referring to a national arrest warrant that is distinct from the European arrest warrant.*
2. *Article 8(1)(c) of Framework Decision 2002/584, as amended by Framework Decision 2009/299, is to be interpreted as meaning that, where a European arrest warrant based on the existence of an 'arrest warrant' within the meaning of that provision does not contain any reference to the existence of a national arrest warrant, the executing judicial authority must refuse to give effect to it if, in the light of the information provided pursuant to Article 15(2) of Framework Decision 2002/584, as amended, and any other information available to it,*

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<sup>7</sup> See Annex 2.

*that authority concludes that the European arrest warrant is not valid because it was in fact issued in the absence of any national warrant separate from the European arrest warrant.*

Following the Court's judgment, the Cluj Court of Appeal decided to refuse to execute the warrant issued by the Hungarian authorities. *Nota bene!*, the Cluj Court opted for this solution, although the issuing authorities have already withdrawn the warrant, following the Bog Dogi solution.

*Commentary:*

All the observations made at the previous case are here, as well, applicable. The smooth functioning of the European arrest warrant was hindered by the differences found in the domestic legal order of a Member State (here Hungary) then transposing Council Framework Decision 2002/584/JHA of 13 June 2002. The obstacles so met were initially surmounted by the Romanian Supreme in an illegal manner, going beyond the scope and function of the European arrest warrant, in a flagrant disregard of all the reasoning at the Court of Appeals level. The correct and fundamental understating of the principles of the European arrest warrant (mutual trust and respect of human rights) made the Cluj Court of Appeal not to rest on the solutions of the Supreme Court and to make reference for a preliminary ruling to the only instance competent and able to offer an answer. Once the judgment made by the European Union Court of Justice was given, both the Hungarian and the Romanian authorities reacted - by withdrawing the warrant in the first case and by not appealing the sentence of the Cluj Court in the later one.

### **3. Content of the European arrest warrant. Insufficient information**

*If the European arrest warrant does not contain the information provided in Article 79 para. (1) letter c) of Law no 302/2004 and in Article 8 para. 1 letter c) of the Framework Decision no. 2002/584/ JHA, the court should request this information to the issuing judicial authority. According to Article 90 para. (12) of Law no 302/2004 if the court considers that it is necessary to request additional information or guarantees to the issuing judicial authority, the case will be postponed by setting a deadline for receiving the requested data, which cannot exceed 10 days.*

*In such a case, the Galați Court of Appeal's decision - to send the case to the prosecutor for the supplementary information provided in Article 8<sup>1</sup> para. (2) of Law no. 302/2004 - is illegal, as it exceeds the solutions that the court may adopt, according to art. 90 of the same law, in the procedure for the execution of the European arrest warrant.*

*High Court of Cassation and Justice, Criminal Division, decision no 1344/2011<sup>8</sup>*

In this case, the executing judicial authority – Galați Court of Appeal – noticed that that the European arrest warrant issued by the Spanish authorities (Criminal Court no 20 of Barcelona) did not contain the information requested by Article 8 para. (1) letter c) from Framework Decision 2002/584/JHA, namely “evidence of an enforceable judgment, an arrest warrant or any other enforceable judicial decision having the same effect, coming within the scope of Article 1 and 2”. Instead of acting according to Article 15 of the Framework decision (direct request of supplementary information from the issuing authority), the court referred the case to the Public Prosecutor (Galați Court of Appeal, Criminal Division, judgment of 7 March 2011). In reaching such a conclusion, the Court considered that Article 15 is applicable only when new information is needed, not when the initial data is incomplete – in the court's reasoning, any other interpretation would mean that the Public Prosecutor will address the court without making a minimal inquiry in the case.

Against this judgment, the Public Prosecutor appealed to the High Court of Cassation and Justice. In its decision from 4 April 2011, the Romanian Supreme Court quashed the initial decision and rendered the case back to Galați Court of Appeal, in order to decide on whether to execute or not the warrant. The Court underlined that the first court made two blatant

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<sup>8</sup> See Annex 4.

mistakes of law: first, it made a personal (and wrong) interpretation of Article 15 para. (2) from Framework Decision and secondly, it invented a legal possibility to circumvent the law and send the case back to the Prosecutor, although the law does not provide for such an option (third, but least important, the first court pronounced a resolution and not a sentence, as the law requested).

*Commentary:*

In this particular case, the first court tried to avoid making direct contact with the issuing judicial authority from Spain and imposed such a task on the Public Prosecutor. Although not permitted by law and therefore sanctioned by the Supreme Court, the problem's origin rests in the errors made by the issuing authority from Barcelona, who didn't provide the information in the original warrant.

As well, the Romanian Courts are sometimes reluctant regarding European arrest warrants issued by the Spanish authorities. For example, warrants were issued in several occasions making use of Article 487 of the Spanish Criminal Procedure Code, which provides that if a person does not compare before a court, the citation can be converted into an arrest warrant. Such warrants can be issued in cases where the citation address is wrong, but in all cases the person is cited only to be informed about the charges etc. and afterwards is released. We have a similar provision in Romanian procedural law (*mandat de aducere*) but this is in no case considered an arrest warrant and can not be used in order to issue a European arrest warrant. When contact is made with the Spanish authorities, in most cases they revoke either the warrant or only the alert in the SIS<sup>9</sup>.

A possible solution to these discrepancies which can hinder the mutual trust between authorities from Member States could consist in sending the complete information requested by Article 8 from the beginning. As well, close contact must be made between the executing and issuing authorities, in order to prevent abuses, especially when European arrest warrants can be issued so easily in a domestic legislation and for purposes which do not correspond to the scope of the European arrest warrant, as provided by Article 2 from the Framework Decision. In these cases, the issuing authorities should opt for alternative solutions – e.g. international rogatory commission to summon the person.

#### **4. Content of the European arrest warrant. Right to family life versus principle of mutual recognition and mutual trust**

*The analyses of the court in the execution of the European arrest warrant is, according to Law no 302 on international judicial cooperation in criminal matters, focusing only on formal aspects of the European arrest warrant - the objections concerning the identity of the requested person or grounds for refusal of surrender. The objections of requested person regarding his family life in Romania go beyond the subject matter of this proceeding.*

*High Court of Cassation and Justice, Criminal Division, decision no 1/2017<sup>10</sup>*

The Grand Instance Court of Paris issued a European arrest warrant for person A, Romanian citizen living in Romania. Mr. A was investigated in France for taking part in a criminal association and allegedly committing numerous crimes (e.g., aggravated theft) in France, as provided by Article 450-1, 450-3, 450-5, 132-71, 311-1, 311-9, 311-14 and 311-15 from the French Criminal Code.

After a scrutiny of all conditions provided by Law no 302 of 2004 on international cooperation in criminal matters (the domestic legislation which transposed *inter alia* the Framework Decision on European arrest warrant), Cluj Court of Appeal considered that no mandatory or

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<sup>9</sup> See, S. Bogdan, *European arrest warrant. Applying on the Spain-Romania relationship the "Process" by Kafka, reloaded*, 23 April 2013 (<https://www.juridice.ro/255040/mandatul-european-de-arestare-aplicarea-pe-relatia-spania-romania-sau-procesul-de-kafka-reloaded.html>).

<sup>10</sup> See Annex 5.



option non-execution ground are present. Therefore, it decided to surrender the person (**sentence no 203 of 14 December 2016**), but Mr. A appealed the sentence to the Romanian Supreme Court.

In front of the higher court, Mr. A's lawyer made reference to the sensitive family situation of A, who is living and working in Romania, and stressed out the fact that he is the only one providing support for his two under aged children.

The High Court of Cassation and Justice decided to reject the appeal as the procedure set up by law permits only close verification regarding the identity of the requested person, respectively a close analysis of the incidence of grounds for refusal of surrender. From this perspective, the Court concluded that the initial assessment made by the Cluj Court of Appeal is correct, as no ground for non-execution were identified.

#### *Commentary:*

The present case puts in balance fundamental principles of the EU, but seen from different perspectives: on one side, you have the principle of mutual recognition and the principle of mutual trust between Member States and on the other side you have the need to respect fundamental human rights, as provided in Article 6 on the Treaty on European Union and detailed in the Charter of Fundamental Rights of the European Union of 7 December 2000.

Both the Cluj Court of Appeal and the Supreme Court approached the matter in a cautious way, artful focusing on the formal aspects of the execution procedure of the European arrest warrant set by both the domestic legislation and the Framework Decision. In this way, it circumvented the difficult task of providing a general solution to cases when such conflict of principles seems to arise. No one can criticize the formal aspects of the analysis made by both courts and, as well, we can offer more support to the solution provided – as the general principle of trust between Member States provides a moral comfort that the family life of Mr. A will not be jeopardized by the decision taken in his particular case. Still, what seems unclear is whether the executing authority asked for guarantees to be given by the issuing Member States, due to the particular case, when Mr. A explicitly refused to be surrendered and invoked pertinent arguments on his behalf due to his family situation. We make reference to Article 5.3 from the Framework Decision, disposition transposed in the domestic legislation, but to which neither the Cluj Court of Appeal or the Supreme Court seem to take into consideration.

To conclude, after this decision we can see that:

(1) the Supreme Court takes on a formal approach of the execution procedure, referring only to certain crucial aspects (mistaken identity, grounds for refusal) and denying an analysis of pretty much anything else;

(2) both courts tend to rely more on the other Member States (increased confidence / trust), even if it may infringe in the particular case the fundamental rights of the requested person.

Regarding this last aspect, we should mention that in another case, both the first instance Court (**Constanța Court of Appeal, sentence no 146/P/2012**) and the Supreme Court (**decision no 4030/2012<sup>11</sup>**) identified in a similar case the possibility of postponing the execution of the warrant. In this case, the Courts interpreted in a very generous manner the provisions of Article 24 (4) of the Framework decision – although explicit reference is made only the health or life conditions of the requested person, it was considered that the text was incident, as well, in the case where the person's child was only 3 months old and needed his mother presence in order to be fed<sup>12</sup>.

So, it might seem that we are witnessing a shift in the Court's case law towards a more formal approach in such cases. Still, we are – at this time – quite reluctant to give more

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<sup>11</sup> See *Annex 6*.

<sup>12</sup> See, A. Ipaș, *Comentariu în M. Radu (coord.), Buletinul Rețelei Judiciare Române în materie penală*, Hamangiu Publishing House, Bucharest, 2014, p. 87-90

importance to decision no 1/2017, as not all factual circumstances are well established (due to a superficial reasoning of both courts) and due to the fact that this apparent shift comes in a period when relevant judgments from the European Union Court of Justice are giving more weight on the need to respect fundamental rights, even in cases involving the European arrest warrant<sup>13</sup> and the limitations on the right of entry and the right of residence on grounds of public policy or public security<sup>14</sup>.

### **III. Mutual recognition to judgments in criminal matters imposing custodial sentences for the purpose of their enforcement in the European Union**

We dedicate this section to the analysis of the principle of mutual recognition to judgments imposing custodial sentences between Member States, as provided by Council Framework Decision 2008/909/JHA of 27 November 2008.

The aforementioned Framework Decision was transposed into Romanian law by Law no 300 of 2013, which amended Law no 302 of 2004 on judicial cooperation in Criminal matters. As we will see, the flaws in the transposition process, combined with the particularities of the Romanian Criminal Law and Criminal Procedure Law have triggered a sequence of problems in the case law, partially blocking the application of the new EU mutual recognition instrument.

Due to the controversy and contradictory case law, the Romanian Supreme Court had to intervene and pronounce more decisions aimed at either ensuring the uniform interpretation and application of the law (the so called *motion of appeal in the interest of law*, regulated by Articles 471 - 474<sup>1</sup> Criminal Procedure Code), either at settling complex and controversial legal issues (the so called *preliminary ruling to settle legal issues*, regulated by Articles 475 - 477<sup>1</sup> Criminal Procedure Code).

For these reasons, we will focus in the follow-up more on these types of decisions rendered by the Romanian Supreme Court rather than the regular ones, as these decisions are binding for all courts starting with the date of publication in the Official Gazette.

#### **1. Judicial cooperation in criminal matters. Framework Decision 2008/909/JHA. Law governing enforcement. Interpretation of a national rule of the executing State providing for deduction from the custodial sentence a part considered to be executed according to the legislation of the issuing State**

*After the recognition of the foreign judgment and the transfer of the sentenced person to Romania, the enforcement of a sentence shall be governed by Romanian law. The part of the penalty considered to be executed in the issuing State, according to its legislation (liberazione anticipate) cannot be deduced from the penalty, according to Romanian law, which does not provide for such an institution.*

*According to Article 477 (3) from the Criminal Procedure Code, this decision is binding to all courts, starting with the date of its publication in the Official Gazette.*

*High Court of Cassation and Justice, Special Panel on Preliminary Rulings to Settle Legal Issues, Decision no 15/2015<sup>15</sup> (published in the Official Gazette no 455 from 24 June, 2015)*

Mr. M.G., a Romanian citizen, was convicted by the Italian authorities and forced to serve a custodial sentence of imprisonment of 8 years, 9 months and 28 days. The judgment was recognized by the Romanian authorities and Mr. M.G. was consequently transferred to serve in Romania. Until the transfer of the sentenced person, the Italian authorities granted M.G.

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<sup>13</sup> See Pál Aranyosi (C-404/15) and Robert Căldărăru (C-659/15 PPU) decision.

<sup>14</sup> Case C-304/14 in the context of Article 20 TFUE and article 3 of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States

<sup>15</sup> See Annex 7.

360 days considered to be executed, as a benefit for his good behaviour and work executed during the time served in Italy.

On 15 September 2014, Mr. M.G. requested that the 360 days granted in the Italy to be recognized by the Romanian court and therefore, deduced from his penalty. The Arad County Court admitted this request and the 360 days granted by the Italian authorities as *liberazione anticipata* were deduced from the penalty (**sentence no 824 from 11 December, 2014**). The Public Prosecutor appealed the sentence and the superior court, arguing that the Romanian law does not provide for an institution similar to the Italian *liberazione anticipata* and a Romanian court cannot apply foreign law. In these circumstances, Timișoara Court of Appeal decided to stay the proceedings and refer the following questions to the Special Panel within the High Court of Cassation and Justice:

1. *After the transfer of the sentenced person in Romania, the part of the penalty considered to be executed in the issuing State (based on good behaviour and work in the penitentiary) must be considered by the executing State?*

2. *In the case of a positive answer to question no 1, that part of the penalty must be deducted from the actual penalty or from the part which is considered to be executed on behalf of the work and is taken into consideration regarding conditional release?*

The Special Panel of the Supreme Court had the task of answering difficult questions, due to the improper transposition of Council Framework Decision 2008/909/JHA of 27 November 2008 into domestic law. According to Article 17 from the Framework Decision:

“1. The enforcement of a sentence shall be governed by the law of the executing State. The authorities of the executing State alone shall, subject to paragraphs 2 and 3, be competent to decide on the procedures for enforcement and to determine all the measures relating thereto, including the grounds for early or conditional release.

2. The competent authority of the executing State shall deduct the full period of deprivation of liberty already served in connection with the sentence in respect of which the judgment was issued from the total duration of the deprivation of liberty to be served.

3. The competent authority of the executing State shall, upon request, inform the competent authority of the issuing State of the applicable provisions on possible early or conditional release. The issuing State may agree to the application of such provisions or it may withdraw the certificate.

4. Member States may provide that any decision on early or conditional release may take account of those provisions of national law, indicated by the issuing State, under which the person is entitled to early or conditional release at a specified point in time”.

So, the European legislator regulated the principle that the governing law is the one of the executing State, and the cases in which the law of the issuing State is to be considered by the court of the first state are explicitly provided (see, Article 19 on amnesty and pardon). Even more, Article 17 (1) underlines that only the authorities of the executing State alone shall be competent to decide on the procedures for enforcement and to determine all the measures relating thereto, including the grounds for early or conditional release. Still, Article 17 (4) mentions the possibility for domestic legislation of the executing State to take account of those provisions of national law, indicated by the issuing State.

The Romanian law – namely Article 144 from Law no 302 of 2004 – covers only Article 17 (1) – (3) of the Framework Decision, so there is no possibility for the Romanian courts as executing authorities to make any reference to the legislation of the issuing State. May it be the specific intention of the Romanian legislator when transposing the Framework Decision or only a simple mistake of not understating the rationale of Article 17 (4), but at this time it's irrelevant, as a judge cannot correct the flaws or minuses of the law.

For pretty much the same reasons, the Special Panel of the High Court of Cassation and Justice answered that the period considered to be executed in the issuing State cannot be deducted from the serving penalty in Romania.

*Commentary:*

Whatever solution the Special Panel would have embraced, the problem still wouldn't be solved. As we will show, the matter in debate can (and was) solved (eventually) only by the legislator.

On one scenario, the one corresponding to the reality, the Court embraced the correct solution, although it's more than unfair for the sentenced person. The Romanian legislation does not provide for *liberazione anticipata* and it's impossible to apply on Romanian soil foreign law dispositions, but nobody can deny that for Mr. M.G., his penalty was just "increased" by one year only as a consequence of his transfer. In fact, the ECHR has also made some comments on similar cases (see *Szabo vs. Sweden*, 2006), and tried to propose a standard due to the differences between issuing and executing State legislation, regarding the likely additional period of detention in the executing state. Although the ECHR mentioned that it does not exclude the possibility that a flagrantly longer *de facto* term of imprisonment in the executing State could give rise to an issue under Article 5, it also affirmed that "to lay down a strict requirement that the sentence served in the administering country should not exceed the sentence that would have to be served in the sentencing country would also thwart the current trend towards strengthening international cooperation in the administration of justice". We have some reserves regarding this later conclusion as exactly these kinds of episodes can become obstacles in the smooth functioning of EU mutual recognition instruments, as the sentenced person will probably try to fight the transfer, although for private and family life it would prefer to execute the sentence in the potential executing State.

On the other side, if the Special Panel opted for a broad interpretation of the Court (as the Arad County Court), new problems could arise: first, the ones already mentioned regarding the absence of a procedural mechanism to apply the dispositions of the issuing state. Secondly, moving on, discrimination could appear between persons who have been transferred from other countries and ones executing the penalty from the beginning in the executing state. For example, if the execution of the penalty started in Italy, Mr. M.G. would have benefited from a reduction of 360 days from his penalty; but if he were to execute the same penalty from the beginning in Romania, no such possibility would have existed.

The only solution is for an intervention from the Romanian legislator – and we mention that there were several law projects aimed at amending Law no 302, including Article 144. In fact, in the Official Gazette from 14 December 2017 was published Law no 236 of 2017, which amends – *inter alia* – Article 144 (1) by providing that from the penalty served in Romania will be deducted the days considered as executed, according to the legislation of the issuing state. The new provision will be in force starting with December 17, 2017.

## 2. Note

**a)** The Special Panel was referred a similar question by the Galați Court of Appeal (***Court resolution from 20 February 2015***), when decision no 15 was still pending trial.

The case was declared inadmissible on 20 July, 2015 (***decision no 18/2015***)<sup>16</sup>, for two reasons: first, a condition provided by Article 475 Criminal Procedure Code was not fulfilled (the Court of Appeal was not the last instance court) and secondly, the Special Panel within the High Court of Cassation and Justice already dealt with the issue in its previous decision no 15 of 2015.

**b)** As already mentioned, a judgment rendered by the Special Panel like decision no 15/2015, a so called *preliminary ruling to settle legal issues* has binding effect for all courts, starting the day it is published in the Official Gazette (here 24 June, 2015).

From that moment on, all courts (and implicit all judicial organs, including the Public Prosecutor Office, regarding its competence) must follow that solution, otherwise the

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<sup>16</sup> See *Annex 8*.

judgment so pronounced is contrary the law (the Romanian doctrine already mentioned among the source of law preliminary rulings to settle legal issues and appeals in the interest of law).

Having this in mind, one will understand why after the publication of decision no 15, all the courts followed the abovementioned reasoning. For example, we refer to a recent decision pronounced by the Criminal Division of the High Court of Cassation and Justice (**decision no 44/2017**)<sup>17</sup> – the Court rejected the motion of appeal raised by the sentenced person against the solution of the Bucharest Court of Appeal, First Criminal Division (sentence no 187/F/2016). The Supreme Court underlined that the 450 days granted by Italian authorities as *liberazione anticipata* cannot produce effect in Romanian law, as already stated in decision no 15 of 2015. The law governing enforcement is solely the one of the executing state (Romania here), so the sentenced person will be eligible for conditional release according to the condition laid down by the Romanian Criminal Code and the Romanian Law governing execution of custodial sentences no 254 of 2013<sup>18</sup>.

c) To conclude, the binding character of decision no 15 of 2015 exists as long as the legal provision / provisions mentioned are in force and not amended. Once the legal provision is no longer in force or amended, the decision will no longer have effects for the future – so, once Law no 236 of 2017, *liberazione anticipata* granted by the Italian authorities, for example, will have to be considered by the Romanian courts.

### **III. Mutual recognition to judgments in criminal matters imposing custodial sentences for the purpose of their enforcement in the European Union. Recognition of additional and ancillary penalties**

*In respect of Member States which have transposed into domestic legislation Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union any other sanction than the custodial ones which correspond the additional or ancillary penalties from Romanian Criminal Code cannot be recognized by Romanian authorities within the procedure set by Chapter II. Title VI from Law no 302 of 2004 on international cooperation in criminal matters.*

*These sanctions or interdictions, if applied by judicial authorities of Member States which did not transpose Council Framework Decision 2008/909/JHA of 27 November 2008 can be recognized and consequently enforced by Romanian authorities if the issuing State explicitly requests. In all other cases, the recognition of such sanctions or interdictions is not possible within the framework of Chapter II, Title V from Law no 302 of 2004.*

*High Court of Cassation and Justice, Special Panel for appeals in the interest of law, Decision no 26/2015<sup>19</sup> (published in the Official Gazette no 64 from January 28, 2016)*

The first admissibility condition for an appeal in the interest of law is that in different cases, which involve the exact legal problem, the courts render different solutions. This was the case here, where the legal problem at stake consisted of the possibility for the Romanian courts, acting as executing State within the sense of Council Framework Decision 2008/909/JHA of 27 November 2008 to recognize in the same procedure sanctions and interdictions to which additional and ancillary penalties from Romanian law corresponded.

In the first orientation of the case law it was considered that additional and ancillary penalties cannot be recognized in procedures involving Member States which transposed in their domestic legal order Council Framework Decision 2008/909/JHA of 27 November 2008 on

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<sup>17</sup> See *Annex 9*.

<sup>18</sup> See also, High Court of Cassation and Justice, Criminal Division, decision no 371/A from 27 October 2017 (not published, text not available). The court quashed the sentence pronounced by the Constanța Court of Appeal (sentence no 146/P from 19 September 2017), where 225 days accorded as *liberazione anticipata* were deducted in Romania. The Supreme Court considered the sentence to be plain wrong, contrary to its decision no 15 of 2015.

<sup>19</sup> See *Annex 10*.

the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union.

Another part of the Romanian jurisprudence considered that this type of sanctions and interdiction can be recognized and thus executed in the same procedure with the custodial sentence.

As mentioned by the General Public Prosecutor's Office, the lack of uniform case law was generated by the interpretation of the provisions of Law no 302 of 2004 in cases involving the recognition and transfer of sentenced persons in Romania, after the transposition of Council Framework Decision 2008/909/JHA of 27 November 2008 in the domestic law, by Law no 300 of 2013.

The Special Panel from the Romanian Supreme Court made some initial distinctions. According to Article 155 from Law no 302, the procedure dealt only with final decision or order of a court of the issuing State imposing a custodial sentence on a natural person. Thus, the procedure is not applicable to other cases such involving the recognition and the enforcement of sentences referring to financial penalties, confiscation orders or any other sanctions or interdictions. The aforementioned provision corresponds to the scope of Framework Decision 2008/909/JHA, which governs only the recognition and enforcement of custodial sentences and any measure involving deprivation of liberty imposed for a limited or unlimited period of time on account of a criminal offence on the basis of criminal proceedings. Still, these restrictions are to be met only in regard with Member States which have transposed in their legal order the provisions of Framework Decision 2008/909/JHA.

In cases involving Member States which have not yet transposed the Framework Decision or states that are not part of the European Union, the procedure will be dealt by Article 135 Chapter II Title V from Law no 302, generally governing the recognition and transfer with third states (other than Member States which have transposed the EU instrument). In this regard, the main object of the procedure is the custodial sentence, except the case where the issuing State explicitly requests that financial penalty, freezing or confiscation orders or any other sanction or interdiction deriving from the judgment to be as well recognized and enforced. In this case, sanctions that correspond in Romanian law to additional and ancillary penalties will also be recognized and enforced.

In all other cases, if the issuing State did not make such a formal and explicit request, any other consequence, sanction, interdiction deriving from the judgment – other than custodial sentence – can be recognized only in a distinct procedure, regulated by Article 139 Chapter III Title V from Law no 302 of 2004.

*Commentary:*

The decision pronounced in the appeal in interest of law has as a main objective the uniform interpretation and application of the same law by all courts. In this specific case, the different views of the courts were generated by the ambiguous transposition of Framework Decision 2008/909/JHA in the domestic law.

As already shown, after the amendments brought by Law no 303 of 2013, the procedural frameworks differ.

On one side, we have the framework of Member State which transposed the EU mutual recognition instrument. On the other side, we have a more general, but more familiar framework (applicable to all other cases than the first scenario) and which was tailored following the model of The European Convention on the International Validity of Criminal Judgements of 28 May 1970. In this later case, we have two distinct hypotheses: the first one, when the issuing State requests that all consequences of the judgment to be recognized by the Romanian authorities and the second, when such a requests is not made. In the first hypothesis, sanctions and interdiction corresponding to Romanian additional or ancillary

penalties will be recognized<sup>20</sup>, while in the second hypothesis the procedure will deal (just as in the case involving the EU Member State which transposed Framework Decision 2008/909/JHA) only with the custodial sentence, leaving the recognition of ancillary and additional penalties for a different procedure (if the issuing State will request this at a later stage).

The Special Panel correctly identified the three different scenarios and proposed solutions for each. While the last two were quite known for the Romanian courts, the first case was the one that seemed problematic, as some courts “bended” the law, in order to recognize as well additional and ancillary penalties, all in the same principal procedure. While the Special Panel concluded that this approach is plain wrong and going against the law (which transposed Framework Decision 2008/909/JHA and, accordingly deals only with custodial sentences), it did not imagine a solution or a clear answer to the problem of additional or ancillary penalties for this specific case. Can the special procedure regulated by Article 139 Chapter III Title V from Law no 302 of 2004 be activated at a later stage or will these penalties never be recognized? The Special Panel should have taken the responsibility of offering its own solution, due to the fact that this problem is still unresolved and causes frustration – in the case where recognition works at the later stage, the sentenced person considers an analogy *in malam parte* was made, as Article 139 regulates the relations with non EU Member States; if recognition is blocked for good, the victim and the issuing State have a sense of no justice, as not all sanctions imposed, although considered necessary, are enforced.

To conclude, we consider that only an intervention on behalf of the Romanian legislator can solve the case, as both the Special Panels for appeals in the interest of law and the preliminary rulings ruling to settle legal issues deal only with the interpretation and application of the law – and in this case we haven’t, unfortunately, any legal provision.

#### **IV. Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties. Notion of “decision” and “court having jurisdiction in particular in criminal matters”. The particular case of contraventions (misdemeanours)**

In this topic, we will make only some consideration regarding the inapplicability of the principle of mutual recognition to financial penalties in any other case than that of committing a crime and where Romania is the issuing State, as defined by Article 15 of the Romanian Criminal Code.

According to Article (1) a) (ii) of Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties a “decision” shall mean a final decision requiring a financial penalty to be paid by a natural or legal person where the decision was made by: (ii) an authority of the issuing State other than a court in respect of a criminal offence under the law of the issuing State, ***provided that the person concerned has had an opportunity to have the case tried by a court having jurisdiction in particular in criminal matters.***

In cases where a crime (offence) according to the notion from Article 15 of the Romanian Criminal Code was committed and a final decision requiring a financial penalty to be paid was rendered, our authorities can make use of the provisions of Law no 302 transposing Council Framework Decision 2005/214/JHA (Title VII Chapter II Section 4<sup>th</sup>) and initiate the procedure as issuing state.

In cases where contraventions (misdemeanours) were committed (e.g. speeding or traffic violations etc.), although in the ECHR’s view these are to be seen as criminal in nature (*Engel* criteria), the jurisdiction provided in order for the person to have the case tried is strictly civil. In no case will the case be tried by a court having jurisdiction in criminal matters.

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<sup>20</sup> See A. Nedelcu, *Comentariu în M. Radu (coord.), Buletinul Rețelei Judiciare Române în materie penală*, Hamangiu Publishing House, Bucharest, 2014, p. 215-218. For an example – see Bucharest Court of Appeal, First Criminal Division, sentence no 194/2012 (*Annex 11*).

Therefore, in this kind of situation, Romania cannot act as issuing State and try to recognize the financial penalties in other Member States.

On the other side, if in a particular legal order, such contraventions have the possibility to be challenged in front of a court which has jurisdiction in criminal matters (e.g., Germany), the authorities can act as issuing ones. In this case, Romanian must fulfil its obligations as an executing state, presuming that all legal conditions are met<sup>21</sup>.

The situation – where Romanian authorities must act as executing ones but cannot act as issuing ones, although the “crime” is identical in both legal orders – is generated by the different approaches regarding jurisdiction in different legal orders and thus partially blocking the functioning of the EU mutual recognition instrument, in so far as Romania is the issuing state of a financial penalty imposed on a misdemeanour.

## **Annexes**

**Annex 1** – High Court of Cassation and Justice, Criminal Division, decision no 657/2016;

**Annex 2** – Cluj Court of Appeal, Criminal Division, court resolution of 15 April 2015;

**Annex 3** – Cluj Court of Appeal, Criminal Division, sentence no 89/2016;

**Annex 4** – High Court of Cassation and Justice, Criminal Division, decision no 1344/2011;

**Annex 5** – High Court of Cassation and Justice, Criminal Division, decision no 1/2017;

**Annex 6** – High Court of Cassation and Justice, Criminal Division, decision no 4030/2012;

**Annex 7** – High Court of Cassation and Justice, Special Panel on Preliminary Rulings to Settle Legal Issues, Decision no 15/2015;

**Annex 8** – High Court of Cassation and Justice, Special Panel on Preliminary Rulings to Settle Legal Issues, Decision no 18/2015;

**Annex 9** – High Court of Cassation and Justice, Criminal Division, decision no 44/2017;

**Annex 10** – High Court of Cassation and Justice, Special Panel for appeals in the interest of law, Decision no 26/2015;

**Annex 11** – Bucharest Court of Appeal, First Criminal Division, sentence no 194/2012;

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<sup>21</sup> For examples where Romanian authorities acted as executing ones, see High Court of Cassation and Justice, Criminal Division, court resolution no 911/2011; Ploiești Court of Appeal, sentence no 105/2012, in both cases establishing the correct jurisdiction for recognition. As well, see Cluj-Napoca District Court, sentence no 447/2012, regarding the recognition and enforcement of a small traffic violation, which is only a contravention in Romanian law and for which Romanian authorities couldn't have acted as issuing State. The cases are quoted from M. Radu (coord.), *Buletinul Rețelei Judiciare Române în materie penală*, Hamangiu Publishing House, Bucharest, 2014, p. 244-248 and are to be found in *Annex 12*.



**Annex 12** – High Court of Cassation and Justice, Criminal Division, court resolution no 911/2011; Ploiești Court of Appeal, sentence no 105/2012, Cluj-Napoca District Court, sentence no 447/2012.

## National report No 2 on the Romanian criminal justice system

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### A. General features of the Romanian criminal procedure system

#### 1. Romanian Criminal justice system – from the inquisitorial paradigm to the mixed system

From a historical perspective, French legislation was the main source of inspiration of the Romanian criminal procedure. Therefore, both the **1865 Code of Criminal Procedure** and the **1937 Code** had a strong *inquisitorial character* and the “search of the truth” principle dominated the entire criminal trial.

After the Communism’s instauration, the search for material truth strengthened its place in the criminal procedure, being stipulated as a basic principle in the new **1969 Code of Criminal Procedure** (Article 3). Thus, the inquisitorial character was even more highlighted. For example, the accused person did not have the right to be assisted by a counsel during the interviews conducted by the police or prosecutor and the prosecutor had the right to file an indictment to the court without a preliminary control. As for the trial, the duty of the court to be actively involved in the presentation of evidence was underlined. To that effect, it was expressly stipulated that the court had, alongside the prosecutor, the burden of proof. This rule consolidated the prosecutorial bias that already governed the criminal trial.

The Communism’s fall in December 1989 brought Romania to the start of a transition period from a dictatorship towards a democracy. This transition was also reflected in the criminal legislation and, as a result, the 1969 Code of Criminal Procedure was repeatedly amended (e.g., in 1990, 1996, 2003, 2006 and 2010). As any transition, this process did not mean a sudden abolishment of the legacies from the past, as the distortions caused by the Soviet model outlasted the Communist era long after its fall<sup>22</sup>.

**The 2014 Code of Criminal Procedure** was adopted by Law no 135/2010, as amended by the Law no 255/2013 and entered into force on 1<sup>st</sup> February 2014. One policy ground often mentioned in the Explanatory Statement is the efficiency of criminal proceedings, while other changes brought forward tried to reflect the case-law of the European Court of Human Rights against Romania.

In the Explanatory Statement of the Code, the drafters pointed out that the continental paradigm is preserved, but, in the same time, some adversarial rules, adapted to the Romanian legal culture, are stipulated. Still, the 2014 Code of Criminal Procedure does not imply a broad reform in order to introduce adversarial culture in the Romanian criminal procedure. Initially, the law drafters’ view was to introduce more items from this culture in an attempt to break with the communist past and to remove the prosecutorial bias exercised at trial. During the drafting process this intention was abandoned and the cultural conservatism, together with new purposes like efficiency and expediency, has become the driving force of the new legislation. Thus, only disparate elements from the adversarial system were introduced (e.g., the preliminary hearing; the taking of the evidence from a witness by a judge during the criminal investigation; the initial questioning of the witnesses by the party that called them to testify during the trial; the reasonable doubt standard<sup>23</sup>), but the whole structure of the criminal proceedings and the dominant mentalities were not subject to change (e.g., the prosecutors’ duty to supervise the legality at trial, was maintained).

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<sup>22</sup> E.g., the importance of the role of the prosecutor, the flagrant breach of the presumption of innocence, the use and abuse of preventive measures, all leading to numerous convictions at the European Court of Human Rights regarding, especially, Article 5 and 6 from the Convention.

<sup>23</sup> As for the adversarial rules and not only (e.g., the purpose of procedural laws; the classification of protective measures for witnesses taking into account the witnesses under threat and vulnerable witnesses; the way in which the technical measures of surveillance and investigation were regulated), an important source of inspiration, even though it was not explicitly mentioned in the Explanatory Statement, was the Model Code of criminal procedure.

To a great extent, the content of the adversarial rules was largely amended in order to be adapted to the legal culture of the Romania criminal justice system (e.g., the preliminary hearing during which the judge has the duty to analyse the legality of evidence was not regulated as an adversary hearing, but only as a “paper review”; the examination of witnesses in advance of the trial was not justified as an unique investigative opportunity since, anyhow, the statements made to the police or prosecutor can be used as evidence by the trial courts).

So, even after the new Code entered into force, the trial therefore remained mainly an inquisitorial proceeding. It is not a confrontation between the parties after which the court must decide whether the prosecutor proved “beyond reasonable doubt” that the defendant committed the criminal offences charged for.

Therefore, elements from the adversarial system were introduced, but in a disparate fashion and always downplayed by the “efficiency and expediency” rules that supported the new legislation, due to large number of cases pending and the decisions rendered by the European Court of Human Rights regarding the length of trials. The best example is the new institution of the preliminary chamber, which was one of the most important changes brought by the new legislation and probably the most visible element imported from the accusatorial system. Initially, it was regulated as a simple “paper review” – no adversary hearing of the parties; the challenge of legality of evidence collected by the investigators, was possible only by written submissions<sup>24</sup> etc. The Constitutional Court had an opposite view regarding the new institution and intervened in several occasions, last time just at the end of 2017. We make reference to Decision no 641 of 11 November 2014<sup>25</sup>, where the Court considered that the procedure must be an “open one”, where each party is summoned to appear in front of the court, in order to respect the constitutional standards of a fair trial<sup>26</sup>. In December 2017, the Constitutional Court pronounced another highly important decision, where it considered that the provision of Articles 345 para. (1) from the Code of Criminal Procedure - which permits the challenge of legality of evidence collected by the investigators only by written submissions -, are unconstitutional as regarding the standard of the fair trial provided by the Romanian Constitutional and Article 6 from the European Convention of Human Rights. This Decision was published just recently in the Official Gazette<sup>27</sup> and, according to Article 147 para. 2 from the Constitution, the unconstitutional provision – namely, Articles 345 para. (1) from the Code of Criminal Procedure – is suspended for a term of 45 days. During this, the Parliament or the Government must intervene and amend the law, other wise the text is repealed automatically. To conclude, the preliminary chamber hearing was amended (due to the interventions of the Constitutional Court) from an inquisitorial prototype to a pure adversarial institution, looking now more alike the Pre Trial Chamber of the International Court or the similar proceedings from the Italian or German law<sup>28</sup>.

As a general conclusion, we consider that the nowadays criminal justice in Romania tends to become a mixed one – the fundamental institutions are still inquisitorial in nature, as well as the perceptions of the major actors involved, but more and more accusatorial elements are introduced, especially due to the recent case law of the Constitutional Court.

From this perspective, a positive aspect can be drawn: the numerous changes and amendments brought to our criminal procedure law, the import of adversarial elements into

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<sup>24</sup> For example, even if coercion or improper inducements were issues of fact that could be proved only by presenting evidence (e.g., the examination of a person which attended the interrogation, the examination of the defendant himself), no adversary hearing and no presentation of evidence were deemed necessary for the preliminary hearing. However, it is almost impossible to prove the existence of coercion by using only the written statements found in the case file as long as, usually, the potential illegal behaviours are not officially recorded.

<sup>25</sup> Published in the Official Gazette no 885 from 5 December 2014.

<sup>26</sup> Following the Court’s Decision, the Government passed Emergency Ordinance no 82 of 2014 (published in the Official Gazette no 911 from 15 December 2014), reshaping the preliminary chamber hearing. Later, the Ordinance was approved by Law no 75 of 2016 (published in the Official Gazette no 334 from 29 April 2016).

<sup>27</sup> Official Gazette no 116 from 6 February 2018.

<sup>28</sup> In fact, the special commission of experts who drafted the initial version of the Code of Criminal Procedure had the support of German experts from IRZ (The German Foundation for International Legal Cooperation) and made explicit reference to the German and Italian model – see, M. Udriou, *Procedură penală. Partea specială*, C.H. Beck Publishing House, Bucharest, 2017, p. 167 et seq.

a traditional inquisitorial and the constant debate on topic as constitutionality, conventionality, Europeanization and (better) legal models from the comparative law have raised awareness of the diversity of legal traditions regarding criminal procedure law across, especially Europe, and more precise European Union member states. Therefore, from the perspective of the Romanian system, we don't consider that legal diversity will hinder (negative impact) international cooperation in criminal matters.

## 2. Status of the rights of defence

The right of defence is explicitly provided as a constitutional right. According to Article 24 from the Romanian Constitution (entitled "Right to defence"):

"(1) The right to defence is guaranteed.

(2) Throughout the trial, the parties have the right to be assisted by a lawyer, either elected or appointed *ex officio*".

More detailed rules are contained in Article 10 of the Code of Criminal Procedure. The right to defence is provided not only for the accused person (suspect, prosecuted person and defendant), but also for any other private party (the victim, the civil party and the civilly liable party), including during the pre-trial proceedings.

Under Article 10, the elements of the right to defence are the following: 1) the right to defend oneself personally or through a counsel; 2) the right to adequate time and facilities for the preparation of the defence; 3) the right of the accused person to be informed promptly and before any interrogation of the alleged facts and their legal characterization; 4) the right of the accused person to be informed of the right to silence before the interrogation.

In order to guarantee this right, the 2014 Code of Criminal Procedure provides two obligations. Firstly, the judicial authorities have the duty to ensure the effective exercise of the right to defence throughout the proceedings (Article 10 para. 5). Secondly, the parties and their counsel have the duty to exercise this right in good faith (Article 10 para. 6).

The infringement of the first duty is sanctioned with the nullity, as provided by Articles 281 and 282. The express nullity is provided by law in only one situation, namely the absence of the counsels when their presence is mandatory (e.g., the interrogation of an accused person held in detention). As to the rest, the applicable sanction is the relative nullity. As indicated previously, the infringement of the second duty constitutes misconduct before the judicial authorities.

## 3. Status of the rights of victims

As mentioned before, both Article 24 from the Constitution and Article 10 from the Code of Criminal Procedure mentioned the right for defence both for the alleged wrong doer and for the victim. Therefore, regarding the right of defence, this is a constitutional right.

Other explicit provision can be found in the Code of Criminal Procedure, where the rights and the role of the victim are regulated. In Romania, the victim has an important role in the criminal proceedings. Due to the French influence, the Romanian criminal process has also a civil side aiming to compensate the losses. The compensation claim is, usually, submitted by the victim.

Thereby, the victim can participate in the proceedings, both in the criminal action (from this perspective, the victim sustains a public claim against the offenders asking their conviction) and in the civil one (from this perspective, the victim, who receives the status of civil party, sustains a private claim against the offenders in order to obtain compensation for the damages arising from the offence). Where the victims do not want to actively participate in the proceedings, they can be examined as witnesses. There are no special rules concerning the probative value of their testimony.

The victims have extensive rights (Article 81 from the Code of Criminal Procedure):

- a) to be informed of their rights;
- b) to present evidence during the investigation and at trial and to argue in court;
- c) to make any requests related to the adjudication of the criminal action;
- d) to be informed, within a reasonable time, on the progress of the criminal investigation, upon explicit request;
- e) to access the case file;
- f) to give statements;
- g) to ask questions to the prosecuted person, to witnesses and experts;
- h<sup>1</sup>) to have the assistance of an interpreter, free of charge, when they cannot understand or cannot properly express themselves in Romanian;
- i<sup>2</sup>) to receive a translation of any decision not to prosecute, when they cannot understand properly Romanian;
- j) to be assisted by counsel;
- k) to use a mediator.

The victim also has the right to appeal the trial court's judgment, with respect to both the verdict and the penalty. The victim has no right to submit a cassation appeal (*recurs în casație*) to the High Court of Cassation and Justice.

Where the victims are underage or have no legal capacity (e.g., a mentally ill person), their legal assistance is mandatory (Article 93 para. 4 of the Code of Criminal Procedure). In addition, taking into account the personal circumstances of the victims and their ability to defend personally, the judicial authorities may appoint a counsel to assist them. The victim's counsel has the right to attend the investigative actions in the same conditions as the accused person's counsel (Article 93 para. 1 of the Code of Criminal Procedure).

## **B. Impact on national law of procedural rights directives**

### **B1. State of transposition of directives for which the transposition deadline has already passed**

#### *4. Entry into force of the directives on suspects / defendants and victims*

Enacted under the influence of the European Law and the ECHR case-law, the 2014 Code of Criminal Procedure proposed itself to represent an up to date transposition of all major European instruments, both regarding procedural rights and cooperation in criminal matters. E.g., regarding the *Forum Maritime v. Romania*, judgment of 4<sup>th</sup> October 2007, the 2014 Code of Criminal Procedure wanted to change the rules and permit – as a principle – access to the case file to all parties even during the investigation stage (nowadays, Article 94 para. 1 provides that all parties have the right to access the case file, with few exceptions).

Unfortunately, the drafting process of the Code and the period between the adoption of the project by the Parliament (2010) and its actual entry into force moment (1<sup>st</sup> February, 2014) meant that valuable time has passed and that when entered into force, the Code was not longer as up to date as the drafters initially wanted. For example, the special commission which worked on the draft project referred to all existing Framework Decision (as well as projects of future Directives), trying to embed all into the content of the new Code<sup>29</sup> at the level of mid 2010.

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<sup>29</sup> During that time, I was personally involved in the special commission working within the Ministry of Justice drafting the special law designed to help the application of the new Criminal Code. From that position, I had contact with the

Therefore, as a general rule, we consider that the new Code of Criminal Procedure tried to incorporate all the principles derived from both the ECHR case law and the EU legal instruments, raising the standards of protection for both the right of the suspects / defendants and the protection of victims.

When looking into the case law of Romanian courts, one will not see explicit reference to Articles from EU legal instruments, as the tradition in our system is to make reference to legal provisions from domestic legislation. Still, this is applicable for the operative part of the judgment (*dispositif*), not for the largest part of the judgment, containing the reasoning. In this later part, the courts already are used to making extensive reference to judgements of the ECHR, especially regarding Article 6 (when dealing with the merits) and Article 5 (in cases of preventive measures). More recently, references are made to ECJ case law (especially in cases of *ne bis in idem* or when dealing with the European arrest warrant) or to provisions or even the Preamble of EU directives (this is the case especially when dealing with procedural directives which are yet not fully transposed)<sup>30</sup>.

### 5. Transposition gaps

Regarding EU procedural directives, transposition gaps do exist, as the Romanian legislator is currently not respecting entirely its obligation regarding several EU instruments.

The reasons behind lie in the following: first, the 2014 Code of Criminal Procedure covers sufficient areas of the Directives so it was fair enough for the Romanian legislator to communicate to the Commission that at least partial transposition was realized (examples will follow); second, it was not an easy task for the Ministry of Justice to identify exactly which provision from which Directive was not implemented by the new set of legislation in force since 2014; last, but not least, due to political agenda, the Government was periodically changed, so it was a constant wave of changes within the Ministry of Justice, leading to a not so clear agenda and missed deadlines.

*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* had as deadline for transposition 27 October 2013. The Romanian legislator was not stressed by the deadline, as the new Code of Criminal Procedure was about to enter into force and Law no 255 of 2013 already amended the Code, in order to transpose the Directive. In fact, as the doctrine already underlined the amended provisions did not fully implement all the provisions of the Directive – for instance, Article 329 para. 3 of the Code of Criminal Procedure provided that only the indictment act (*rechizitoriul*) will be translated, not “all documents which are essential”, as Article (1) of the Directive requested. As well, other provisions of the Directive, such as the necessity of interpretation and the availability of interpretation when lodging an appeal have no correspondent in the Romanian law<sup>31</sup>. In a report from the Ministry of Foreign Affairs dated 31 January 2016, this Directive was the first mentioned for incomplete transposition. Still, in a report dated 9 June 2017 which contained all the directives whose transposition deadline passed 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

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members of the commission drafting the new Code of Criminal Procedure and I've seen first hand their *modus operandi* regarding EU legal instruments.

<sup>30</sup> Special trainings session for both judges and public prosecutors are constantly being organized both at a centralized level (in Bucharest, at the headquarters of the National Institute for Magistrates) and at the Courts of Appeal level (under the supervision of the National Institute for Magistrates). We mention here the following projects: *Strengthening the capacity of the Romanian judiciary to respond to the new legislative and institutional changes*, financed by the Norwegian Financial Mechanism 2009 – 2014; *Assistance for Strengthening the Institutional Capacity in the Training of Judges and Prosecutors for the Application of the New Laws*, funded by the Security Thematic Fund of the Swiss-Romanian Cooperation Program for reducing the economic and social disparities within the enlarged European Union; *The Romanian-Swiss Project Assistance for Institutional Capacity Building in the Field of Judges and Prosecutors Training for the Application of the New Laws* etc.

<sup>31</sup> See, A.-R. Trandafir (Ilie), D. Părgaru, *Directiva privind dreptul la interpretare și traducere în cadrul procedurilor penale, netranspusă în legislația românească*, 12 November 2013, available at <https://www.juridice.ro/290884/directiva-privind-dreptul-la-interpretare-si-traducere-in-cadrul-procedurilor-penale-netranspusa-in-legislatia-romaneasca.html>.

proceedings was no longer mentioned. This was due to Law no 76 of 2016<sup>32</sup> which amended special law no 178 of 1997 regarding interpreters, thus transposing eventually Article 5 from the Directive, nearly with a 3 years delay.

*Directive 2011/99/EU of the European Parliament and of the Council of 13 December 2011 on the European protection order* was eventually transposed by Law no 151 of 2016 on the European protection order and to amend and supplement other normative acts<sup>33</sup>

*Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings* was transposed by the Criminal Code of Procedure, amended by Law no 255 of 2013. Eventually, Government Ordinance no 18 of 2016 realized the full transposition, but only by end of May, 2016.

*Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime of 25 October 2012, and replacing Council Framework Decision 2001/220/JHA* was partially transposed into national legislation by the 2014 Code of Criminal Procedure; as well, pre-existing legislation (Law no 211 of 2004 regarding the protection of victims of crime<sup>34</sup>) partially correspond to requirements set by the Directive. Still, future steps needed to be done and Government Ordinance no 18 of 2016 partially transposed other elements. The transposition process is not yet completed – Law no 211 of 2004 still needs amendments and at this time, as a draft project of Emergency Ordinance is going through phases of inter-ministerial processing<sup>35</sup>.

*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* was eventually transposed into domestic legislation by Law no 236 of 2017<sup>36</sup> amending Law no 302 of 2004 regarding judicial cooperation in criminal matters. According to the Explanatory memorandum, Law no 236 transposed the provisions of Article 10 para. 4-6 from the Directive, and thus the Romanian legislator fulfilled its obligations. This conclusion was recently criticized by the Romanian Bar Association, which claimed that the Directive was not fully transposed and the Ministry of Justice's opinion that the current Code of Criminal Procedure already provided for the rest of the obligations set in the Directive is inaccurate<sup>37</sup>. Still, no example was given about obligations provided by the Directive which are not met by the current state of the Code of Criminal Procedure and the adjacent legislation.

## **B2. Directives that are still in process of being transposed**

### *6. Transposition process of Directives adopted in 2016*

*Directive 2016/343/EU on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings of 9 March 2016* has a transposition deadline of 1 April, 2018. The transposition process is still ongoing in Romania. The draft law amending the Criminal Procedure Code and Law no 304 of 2004 on judicial organization contains provisions which will transpose, *inter alia*, the Directive. The draft law was adopted by the Senate on 13 June 2018 and by the House of Deputies (decisional chamber in this case) on 18 June, 2018. The draft law was not promulgated by the President, as the Constitutional Court was seized regarding certain aspects of

<sup>32</sup> Published in the Official Gazette no 334 of 29 April 2016.

<sup>33</sup> Published in the Official Gazette no 545 of 20 July 2016.

<sup>34</sup> Published in the Official Gazette no 505 of 2004.

<sup>35</sup> As well, the foreword of the draft project of Emergency Ordinance makes reference to amendment brought to Law no 192 of 2006 on mediation and organisation of the profession of mediator (see [http://gov.ro/fisiere/subpagini\\_fisiere/NF\\_OUG\\_18-2016.pdf](http://gov.ro/fisiere/subpagini_fisiere/NF_OUG_18-2016.pdf)).

<sup>36</sup> Published in the Official Gazette no 993 of 14 December 2017.

<sup>37</sup> Gh. Florea, *Stadiul de transpunere al directivelor europene vizând dreptul la apărare și consolidarea drepturilor persoanelor suspectate și acuzate prin stabilirea unor standarde minime comune privind drepturile la un proces echitabil. Impactul acestora asupra exercițiului profesiei de avocat (1)*, 10 January 2018, at <https://juridice.ro/essentials/1908/stadiul-de-transpunere-al-directivelor-europene-vizand-dreptul-la-aparare-si-consolidarea-drepturilor-persoanelor-suspectate-si-acuzate-prin-stabilirea-unor-standarde-minime-comune-privind-drepturile>.

unconstitutionality regarding other provisions from the law than the ones transposing the Directive<sup>38</sup>. The Constitutional Court was seized by the High Court of Cassation and Justice<sup>39</sup>, by 94 members of the House of Deputies from opposition parties<sup>40</sup> and by the President himself<sup>41</sup>.

When transposed, the Directive will certainly enhance the right to a fair trial in Romanian criminal justice system, as nowadays the presumption of innocence tends to be more like an abstract idea, which is breached sometimes by the authorities (e.g., public statements made by public authorities<sup>42</sup> or, in most important cases, the use of measures of physical restraint in public, as a method used by investigative authorities in order to put pressure on the defendant).

*Directive 2016/800/EU on procedural safeguards for children who are suspects or accused persons in criminal proceedings of 11 May 2016* – we have no official data of any progress regarding the transposition process, so most probably the transposition process did not begin. The 2014 Code of Criminal Procedure provides already a distinct status for children who are suspects or accused in criminal proceedings, so most part of the Directive is covered by domestic legislation<sup>43</sup>.

*Directive 2016/1919/EU on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings of 26 October 2016* – we have no official data of any progress regarding the transposition process, so most probably the transposition process did not begin. Most provisions of the Directive are already incorporated in the 2014 Code of Criminal Procedure, which considers that access to a lawyer (either a selected one, either one ex officio) is a fundamental principle. However, the provisions of Article 1 (c) are not *per se* covered at the given time by domestic legislation.

As a conclusion at this stage, we consider that only Directive 2016/343/EU on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings will lead to certain important changes in the Romanian law.

Regarding the other two directives, as previously mentioned, most part of the requirements are already met in the Code of Criminal Procedure and adjacent law, so only small corrections and amendments need to be done. From the perspective of Directive 2016/343/EU on the presumption of innocence, its correct transposition will only make current legal provisions from our law more clear and coherent, as the general principles are regulated even now. What we need is a more balanced approach from the people applying the law (from all sides of the Criminal trial paradigm) and we are not convinced that better legislation will surely solve this. Still, better legislation is the first step, followed by legal and coherent approach from all those responsible in the law making process (prosecutors, lawyers, judges).

## *7. The ECJ Milev judgment. Provisions of EU directives on procedural rights and the interpretation of national procedural law by national courts*

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<sup>38</sup> The presentation of the full legislative process regarding the draft law is available at: <https://parlament.openpolitics.ro/politici/propuneri/fe6c6bdc-d649-406d-8183-a1bc71fa1818>.

<sup>39</sup> On 21 June 2018, case file no 945A/2018 (available at: <http://www.cdep.ro/proiecte/2018/300/70/3/sesiz373.pdf>).

<sup>40</sup> On 22 June 2018, case file no 961A/2018 (available at: <http://www.cdep.ro/proiecte/2018/300/70/3/codppsesezarepnlusr.pdf>).

<sup>41</sup> On 12 July 2018, case file no 1091A/2018 (available at: <http://www.cdep.ro/proiecte/2018/300/70/3/sprCPP.pdf>).

<sup>42</sup> See, for example, the Press communicates of the National Directorate Department, available at <https://www.pna.ro/comunicate.xhtml>.

<sup>43</sup> As a rule, the same procedure will be applicable as in the ordinary cases, with the exceptions provided by Chapter III (*Procedure in cases with children who are suspects or accused*: Articles 504 - 520) from Title IV (*Special procedures*) from the Code of Criminal Procedure.



Although the *Milev* judgment is relatively new and – more important – not very well known in Romanian case law, provisions of EU directives on procedural rights have been taken into consideration by Romanian courts when interpreting national procedural law.

For example, when the 1969 Code of Criminal Procedure was in force, some courts made reference to the provision 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, stressing out that the legislative solution provided by (then in force) law, according to which the suspect had access to the case file only when the investigative phase was at its end, was not fully consonant with the fair trial principles and could hinder the possibilities of defence. As well, before the full transposition of the aforementioned Directive, but after the transposition deadline expired, the defence invoked directly the provisions of Article 1 para. 1 letter c) from the Directive, when criticizing the irregularities of the indictment acts which did not describe properly the accusations.

At the current time, the actual debate in the case law of Romanian courts regards the direct applicability of Directive 2016/343/EU on the strengthening of certain aspects of the presumption of innocence. Since the transposition deadline has passed, we consider that the conditions for the direct applicability of the Directive are fulfilled.

### **B3. Effectiveness and adequacy of EU law on criminal procedure**

#### *8. Domestic legislation going beyond the standards provided by EU Directives*

At this stage, it is not the case for the Romanian legislator to go beyond the standards set by the EU Directives.

The Constitutional Court has developed recently a tendency to raise the standards regarding fair trial and jurisdictional control, going beyond the standards set at the ECHR level; so, theoretically speaking, there is a (small) possibility for such an approach regarding the national legislation which will transpose in the near future the EU directives.

#### *9. Procedural issues not addressed by EU directives / at EU level?*

A major concern for the Romanian legislator was for efficiency and expediency and, although this was not successful due to numerous interventions of the Constitutional Court, one may wonder if such a theoretical desiderate should not be incorporated as a principle in major EU directives?

Besides the rhetorical question set above, we do not identify at the given time other procedural aspects which might have been circumvented by the European legislator.

#### *10. Transposition gaps. Differences between Member States. Postponing / blocking cross-border cooperation*

As we have already seen in the first part of the Romanian report, the Romanian courts stumbled upon a serious problem regarding the application of domestic legislation transposing Framework Decision 2008/909/JHA. According to Article 17 para. 4 from the Framework Decision provided that “Member States may provide that any decision on early or conditional release may take account of those provisions of national law, indicated by the issuing State, under which the person is entitled to early or conditional release at a specified point in time”. Still, Romanian law – namely Article 144 from Law no 302 of 2004 – transposed only Article 17 (1) – (3) of the Framework Decision, probably due to the fact that para. 4 was regulated not as an obligation. Due to this formally correct transposition, but, in reality, an improper one, there was no possibility for the Romanian courts as executing authorities to make any reference to the legislation of the issuing State. Still, the national courts tried to circumvent this and cases appeared where the legislation from the issuing

state was taken into consideration, although such possibility did not exist (at least according to the law). Due to the controversy and contradictory case law, the Romanian Supreme Court had to intervene and pronounce a decision aimed at settling complex and controversial legal issues (the so called *preliminary ruling to settle legal issues*, regulated by Articles 475 - 477<sup>1</sup> from the Code of Criminal Procedure). According to decision no 15/2015 pronounced by the Special Panel on Preliminary Rulings to Settle Legal Issues within the High Court of Cassation and Justice "after the recognition of the foreign judgment and the transfer of the sentenced person to Romania, the enforcement of a sentence shall be governed by Romanian law. The part of the penalty considered to be executed in the issuing State, according to its legislation (*liberazione anticipata*) cannot be deduced from the penalty, according to Romanian law, which does not provide for such an institution"<sup>44</sup>.

This was only one example when transposition gaps (e.g., the improper transposition of Article 17 para. 4 from the Framework Decision), combined with the differences existing between domestic legislation of Member States created serious problems regarding the functionality and application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union. As we already mentioned, this issue was, eventually, solved domestically by the Romanian legislator, who intervened through Law no 236 of 2017 and amended *inter alia* Article 144 para. 1 from Law no 302 of 2004 regarding international cooperation in judicial matters, permitting the Romanian court to take into account the days considered as executed, according to the legislation of the issuing state.

#### *11. Recent ECJ case law that impacted cross-border cooperation*

From our perspective, the most important decision of the ECJ in the field of mutual cooperation was the *Aranyosi and Căldăraru* judgment, as one of the "targeted" Member States was Romania. In this regard, we will give more details in the following section, regarding detention conditions.

Other decisions rendered by the ECJ which had an impact noticeable in our case law was the 8 November 2016 decision *Atanas Ognyanov* in case C-554/14, which came to consolidate the approach of the Romanian Supreme Court in decision no 15 of 2015. As well, the recent amendments of Law no 302 of 2004 are in conformity with this decision, as the Romanian courts will give effect to time served in the issuing state, only if the conditions requested by that specific legislation were fulfilled (when necessary the fulfilment of these conditions may imply a decision previously taken by a court from the issuing state).

Last, but not least, another decision which must be considered is the *Grundza judgment* (case C-289/15), where the ECJ dealt with the meaning of the condition of double criminality. Although the Court's analysis was focused on Article 9(1)(d) of Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union, the reasoning was perceived by Romanian case-law as being applicable in all cases involving mutual cooperation and where double criminality condition needs to be fulfilled.

### **C. Other domains that have not, or to little extent, been subject to harmonisation measures at EU level**

#### **Detention Conditions**

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<sup>44</sup> The decision was published in the Official Gazette no 455 from 24 June 2015.

## 12. Specific detention conditions

The 2014 Code of Criminal Procedure provides several preventive measures (Article 202).

The only measure that can be ordered against the suspect (i.e., a person against whom the decision to open an investigation *in persona* was issued) is the arrest for up to 24 hours. It can be ordered by the police officers or by the prosecutors for a period of up to 24 hours and it cannot be extended. Even when the arrest is ordered by the prosecutor, the arrested person is held into police custody.

All the other preventive measures limiting the accused person's freedom can be imposed only upon a prosecuted person (i.e., only after the prosecutor has taken the decision to prosecute)

Preventive detention may be ordered only by a judge and during the investigative phase it can be a period of up to 30 days. After that, the prosecutor may request the extension of detention for another period of up to 30 days. The maximum period of pre-trial detention during the investigation is 180 days since the enforcement of the preventive detention.

Usually, the preventive detention is ordered during the criminal investigation. However, the law provides that a detention warrant can also be ordered during the preliminary hearing and trial. In such a case, the preventive detention can be ordered against the defendant for a maximum period of 30 days. Afterwards, the court must review the necessity of detention at intervals of up to 60 days. According to Article 239 of the Code of Criminal Procedure, during the trial in front of the first court the preventive detention cannot exceed a reasonable time and in no case can exceed half the length of the maximum penalty provided by law for the offence allegedly committed. In all cases, the length cannot exceed 5 years during the trial in the first court<sup>45</sup>.

As previously mentioned, one of the "targeted" Member States from *Aranyosi and Căldăraru* judgment was Romania. Since then, there have been numerous cases when EAWs issued by the Romanian Courts have been refused as the execution would imply a breach of Article 3 from the European Convention and Article 4 of the Charter<sup>46</sup>. Despite the several refusals that have already been encountered, the Romanian courts don't refrain from issuing EAWs, due probably to the fact that is the most common and known instrument of cooperation. We insist on this aspect, as one of the objectives behind Law no 300 of 2013 (which amended Law no 302 of 2004 on international cooperation in criminal matters, transposing *inter alia* Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union) was to force the Romanian courts to apply in more cases the principle of mutual recognition to judgments in criminal matters imposing custodial sentences, instead of the classical EAW<sup>47</sup>.

*Alternatives to detention: What alternatives to detention are available at the national level? Is pre-trial detention generally preferred to supervision measures? If so, could you please explain why?*

### *Pre-sentencing phase*

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<sup>45</sup> The same time-limits are applicable in case of house arrest. Even more according to Article 222 para. 10 (introduced by Law no 116 of 2016, following Constitutional Court decision no 740 of 2015), the house arrest is also taken into consideration when checking the time-limits for preventive detention (e.g., if a person was in preventive detention for 3 years and one year in house arrest, if preventive detention is once again needed, its duration cannot exceed one year).

<sup>46</sup> Information is provided by professor, Ph.D., Fabian Gyula, prosecutor at the Public Prosecutor Office from the Cluj Court of Appeal.

<sup>47</sup> This approach of the legislator was even more obvious, when checking the penalty limits needed in order to issue an EAW for the Romanian courts (2 years and 1 year in cases where a sentence has been passed). As well, in the Explanatory memorandum, the legislator explicitly requested the Romanian courts to refrain from using EAWs and opt for the new mechanism of principle of mutual recognition to judgments in criminal matters imposing custodial sentences. All these efforts were made in order to reduce the prison population from Romanian penitentiary system, the major factor for the *Aranyosi and Căldăraru* judgment.

As alternatives to detention during the pre-sentencing phase, we find the non custodial preventive measures and the house arrest.

As from the 1<sup>st</sup> of February 2014, the Romanian Criminal Procedure Code provides three new non custodial preventive measures, namely: judicial control, judicial control on bail and house arrest. According to Article 202 of the Criminal Procedure Code, as a general rule, preventive measures may be ordered if there is evidence or probable cause leading to a reasonable suspicion that a person committed an offence and if such measures are necessary in order to ensure a proper conducting of criminal proceedings, to prevent the suspect or defendant from avoiding the criminal investigation or trial or to prevent the commission of another offence.

The judicial control is the least restrictive non custodial preventive measure. Its *sedes materiae* is provided by Article 215 and the following within the Criminal Procedure Code. The judicial control measure can be ordered by the prosecutor, the Preliminary Chamber Judge, the Judge for Rights and Liberties or the Court, under the following conditions.

Judicial control on bail can be ordered by the same judicial bodies as the judicial control measure, with the only element of specificity being the imposing of the bail. Everything we mentioned regarding the judicial control measure applies *mutatis mutandis* to the judicial control on bail.

The house arrest was meant to be the primary solution for prison overpopulation, as it combines intrinsic elements from both the pre-trial arrest and the judicial control measure.

Being a preventive measure that implies privation, more than a restriction of liberty, in accord with the ECHR's point of view, as opposed to the judicial control and judicial control on bail measures, the house arrest cannot be ordered (only proposed) by the prosecutor, but exclusively by the Judge for Rights and Liberties, by the Preliminary Chamber Judge or by the Court, if such a measure is necessary and sufficient for the attainment of the purposes set by Article 202 paragraph 1 from the Criminal Procedure Code. The fulfilment of the above mentioned terms is assessed by considering the threat level posed by the offence, the purpose of such measure, the health condition, age, family status and other circumstances related to the person against whom such measure is taken, thus generating a series of factors that must be taken into account in order to chose between pre-trial arrest and house arrest.

As for the content of the measure, the house arrest consists of a general obligation imposed on a defendant, for a determined time period, not to leave the building where they reside, without permission from the judicial bodies having ordered such measure or with which the case is pending, and to observe certain restrictions imposed by those.

As a general conclusion, we consider that pre-trial detention is not preferred to supervision measures. Still, a slight preference of this measure may be identified when dealing with corruption cases, as the National Anticorruption Department has the tendency to ask for such measures almost in all relevant cases.

### *Sentencing phase*

In the sentencing phase, the Courts have four different non custodial solutions that can be ordered against the defendant, namely: waiving enforcement of the penalty, postponing service of the penalty, suspending service of a sentence under supervision or the criminal fine.

The waiver of enforcement of the penalty comes as an extension of the above mentioned principle during the sentencing phase and is meant to replace and revise the former “lack of social danger of an offence” institution provided by the old penal legislation, which could have been applied by both prosecutors (during the criminal investigation) or judges (during the trial). For the conditions provided by law in order for the court to opt for this solution, see Article 80 – 82 from the Criminal Code.

The postponement of penalty enforcement is a new institution meant to replace the conditional suspension provided by the former penal legislation, and implies that a penalty shall be established, but not applied, as the defendant will be observed for a period of 2 years, while having to respect a set of measures and obligations that have been imposed upon him. For the conditions provided by law in order for the court to opt for this solution, see Article 83 – 90 from the Criminal Code.

Suspending of service of a sentence under supervision also existed in a similar form within the former Criminal Code – the conditions are provided by Article 91 to 98 from the Criminal Code.

The criminal fine consists of the amount of money a convicted individual is compelled to pay to the State.

In accordance to the new Criminal Code, the criminal fine can be scarcely found as the sole penalty for a given offence. In general, the criminal fine is provided as an alternative to imprisonment in case of offences punished by a maximum of 5 years. In opposition with the former criminal legislation’s paradigm, the current Criminal Code generates the premises for applying the criminal fine more often, as it should be applied, in our opinion.

The amount of the fine shall be established in the system of fine-days. The amount for one fine-day ranges from 10 lei and 500 lei, and will be multiplied by the number of fine-days, which ranges from 30 and 400. This fine-day system represents a novelty under Romanian criminal law and finds its utility in the fact that the Courts will easily replace the number of fine-days with an equivalent number of days of detention or community service days.

The Court shall establish the number of fine-days according to the general criteria for customization of sentencing. The amount that corresponds to one fine-day shall be calculated on the basis of the financial status of the convicted defendant and their legal obligations towards persons they are supporting.

### *13. Taking account of custodial sentence served in other EU state*

According to Article 73 from the Criminal Code:

“(1) The part of the penalty and the duration of pre-trial arrest served outside Romanian territory shall be deducted from the length of the sentence enforced for the same violation in Romania.

(2) Para. 1 applies accordingly in the case where the sentence served outside the country is a penalty by fine”.

More detailed provisions are found in Law no 302 of 2004 on international cooperation in criminal matters – Article 144 para. 1 (as amended by Law no 236 of 2017) stipulates that: “(1) Where Romania is a state of execution, the execution of a custodial sentence or measure of deprivation of liberty imposed by a court order recognized by the Romanian court is governed by the Romanian law. For the duration of the custodial sentence to be enforced in Romania, the length of the custodial sentence enforced in the issuing State is deducted, as well as a result of the effects of the amnesty or pardon granted earlier and, if applicable, the

number of days deduced from the total penalty as a result of any other measures ordered under the law of the issuing State”.

So, the Romanian legislation takes in all cases into consideration the custodial sentence or preventive measure executed in the other EU state prior to a transfer or executing an EAW. Even more, even other institution which have as effect the penalty to be executed (e.g., work or *liberazione anticipata* in Italian system etc.) are now taken into consideration, with the same effect as in the issuing State.

#### 14. Compensation regime for unjustified detention

There is no special provision regarding the case procedure of executing an EAW, but the general provision from the Code of Criminal Procedure will be incident, if the conditions there provided are fulfilled. Chapter VI (*Procedure for material or moral compensation in case of judicial error or illegal deprivation of freedom or other cases*) from Title IV (*Special procedures*) regulates the “Right to receive compensation in case of judicial error” (Article 538<sup>48</sup>) and “Right to receive compensation in case or illegal deprivation of freedom (Article 539). According to Article 539:

“(1) Also entitled to compensation is the person who, during the criminal procedure, was deprived of their freedom unlawfully.

(2) Unlawful deprivation of freedom must be a finding, as the case may be, by prosecutorial order, final judgment by the Judge for Rights and Liberties or the Preliminary Chamber Judge, or by final judgment or sentence by the court of law that tries the case”.

#### 15. Recommendations for EU institutions in the area of detention

First of all, a brand new approach on EU instruments regarding recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union. An even more simple procedure is needed, as currently Romanian courts are refraining from using this instrument as they are not “accustomed with”. This unfortunate scenario is to seen even more in case of other instruments, e.g., Council Framework Decision 2008/947/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions (we have no information on the application of this instrument in Romanian courts). The Romanian courts have reserves to the actual functioning of this instrument so, especially in cases where the offender does not live or work in Romania tend to consider all custodial sentences, thus aggravating the prison overcrowding situation.

Secondly, harmonization of punishments must represent an objective for the EU policy in the future, as the significant differences between domestic legislation of Member State hinder the functioning of mutual recognition instruments.

Possible courses of action at the European level in light of best practices would be – at least in our opinion – the following: the establishment of a European monitoring body on prisons (and detention conditions) and alternatives to detention; drafting a European support

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<sup>48</sup> (1) A person who received a final conviction, irrespective of whether the penalty or custodial educational measure was enforced, is entitled to receive compensation from the government for their losses in the situation where a final acquittal judgment is returned following retrial of the case, nullification or quashing of the conviction judgment on grounds of a new or recently-discovered fact that proves a judicial error has taken place.

(2) Par. (1) also applies in the situation where a criminal trial is reopened in the case of a convicted individual who was tried in absentia, if the retrial returns a final acquittal.

(3) The person described at par. (1) and the person described at par. (2) shall not be entitled to demand compensation from the government if they caused the conviction judgment by misrepresentation or otherwise, unless they were compelled to act that way.

(4) Also not entitled to compensation is the convicted individual who carries the entire or part of the blame for the failure to make timely discovery of the new or recently-discovered fact

program / project for the modernization of prison facilities in Member States and, respectively, for the implementation of alternatives to detention<sup>49</sup>.

## Evidence gathering and admissibility

### 16. Negotiations on the European Investigative Order

From our information, the Romanian legislator was quite willing to transpose the provisions of the European Investigation Order. So, probably the different rules in evidence gathering and admissibility were a factor that delayed the transposition, as a balance between the requirements of the Directive and the provisions of the 2014 Code of Criminal Procedure had to be found<sup>50</sup>. Still, the process was not that difficult for the Romanian legislator, due to the fact that the 2014 Code of Criminal Procedure – as already mentioned – tried to embed more elements from comparative criminal procedure.

### 17. Evidence gathered in another EU Member State

Evidence gathered in other member state is admissible in criminal proceedings in Romania, if a mutual assistance in criminal matters instrument was used (e.g., the European Union Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union).

The request of the Romanian authorities will comply with both the 2014 Code of Criminal Procedure and Law no 302 of 2004 (Title VII deals only with mutual assistance requests). The requested authorities from the other Member state will comply with the formalities and procedures expressly indicated by the Romanian authorities. Still, the gathering of evidence will – most probably – been done according to the domestic legislation on evidence<sup>51</sup> (plus, eventually the explicitly provided exceptions by domestic law due to the fact that a mutual assistance procedure is involved<sup>52</sup>).

### 18. Authority in charge of reviewing how evidence has been gathered in other EU state

During the criminal investigation phase, the prosecutor in charge of the case file analyses the legality of the evidence gathered (even in other EU Member State). Eventually, a formal complainant can be made to his superior, according to the general procedure provided by Article 336 et seq. from 2014 Code of Criminal Procedure. At this stage, there is no legal possibility to be heard in front of a judge as regards evidence gathering.

After the indictment acts (*rechizitoriu*) has been issued, the preliminary chamber judge will have the competence to review the legality of the entire evidence at the case file, including the one gathered from other EU state (Article 342 – 346 2014 Code of Criminal Procedure). The exclusion of unlawfully obtained evidence can be requested by the defendant and, following decision no 641 of 2014 of the Constitutional Court, by the other private parties (by that time only the defendant had the right to submit written motions at the preliminary

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<sup>49</sup> See also, G.L. Gata, E. Dolcini, *Final proposals on possible guidelines of the EU- policy in order to implement the best practices in the fields of detention conditions and alternatives to detention*, in A. Benardi, A. Martufi (eds.), *Prison overcrowding and alternatives to detention. European sources and national legal systems*, Jovene Editore, Milano, 2016, p. 514 et seq.

<sup>50</sup> The Explanatory Memorandum to Law no 236 of 2017, which transposed the European Investigation Order in domestic legislation, by amending Law no 302 of 2004 on judicial cooperation in criminal matters.

<sup>51</sup> I have personally witnessed this, as a lawyer involved in international mutual assistance procedures where Romania was a requesting state and Poland and Hungary requested states.

<sup>52</sup> E.g., in the Romanian law a warrant for home search may be granted by the judge for rights and liberties only if the criminal investigation has officially started, at least regarding the crime (*in rem*) – see Article 158 et seq from the 2014 Code of Criminal Procedure. In cases of international mutual assistance, the special provisions of Law no 302 of 2004 provide that when Romania is a requested state, the beginning of the criminal investigation is no longer needed (Article 176 para. 6 from Law no 302 of 2004).

hearing) or *ex officio* by the judge. This motion can be submitted only until the preliminary hearing is completed. Within 3 days after the communication of this judgment, the prosecutor, the defendant and the other private parties can challenge the judgment. The challenge will be solved by the preliminary chamber judge from the hierarchal superior court (Article 347 2014 Code of Criminal Procedure).

*How does the defence challenge evidence gathered by the prosecution?*

During the entire trial, there is no express provision regarding the right or possibility of the defence to conduct its own parallel investigation.

Still, both during the investigation stage and the trial stage, the defence can collect evidence – identify information, witnesses etc. Still, all of these can be considered as evidence only after approval by the case prosecutor (during the investigation stage) or the court (during the trial stage). After such an approval, the persons identified by the defence will testify as witnesses in front of the prosecutor / court, the documents gathered by the defence will become part of the case file etc.

During both the investigation stage and the trial one, the defence can contact witnesses, even the ones of the accusation, as there is no formal interdiction, with the sole exception when a preventive measure was ordered and this includes the interdiction to contact witnesses. In cases where no preventive measure is taken and no interdiction is provided, the defence can freely contact the witnesses. Still, an attempt to influence them or corrupt them is punishable – first, a preventive measure can be ordered against the defendant (if he / she directly or indirectly tried to influence the witnesses). Secondly, there are several offences in the special part of the Criminal Code which deal with this – e.g., Article 272 Criminal Code (“tampering with evidence”).

During the trial, cross-examination of witnesses is provided by the Criminal Procedure Code – see Article 381 Criminal Procedure Code (“hearing the witness and the expert”). Until 2006, the former 1968 Code of Criminal Procedure provided that questions of the defence will be addressed through the court (which could censure it). After the reform brought by Law no 278 of 2006, the legislation provided that the questions will be addressed directly to the witness, thus making it a genuine cross-examinations procedure. The 2014 Code provides for the same solution.

Regarding the general challenge of the evidence gathered by the prosecution, one must have in mind a distinction made by the Romanian legislation: we have a procedure of challenging the legality (and loyalty) of the actual gathering of evidence and, a distinct procedure of challenging the evidence by itself. To exemplify, in the first procedure, one could challenge the fact that the witness was tortured or threatened, while in the second procedure, although no challenge is made regarding the legality of the witness declaration, one will challenge the actual content of the declaration.

The first procedure is the object of the preliminary chamber judge, as provided by 342 – 338 Code of Criminal Procedure.

According to the Article 345 (1) from the Code of Criminal Procedure, the analysis of the preliminary chamber judge is made only by checking the case file and no evidence (other than documents) is permitted in this stage. Still, the Constitutional Court decided (see Decision no 802/2017, published in the Official Gazette no 116 of 6 February, 2018) that the provision is unconstitutional, because it does not permit the judge to administrate other evidence than documents. Therefore, although until present date, the text of Article 345 (1) was not amended, the Romanian court permit to challenge the legality and loyalty of evidence gathering even by invoking new evidence to be administered. Still, the evidence thus proposed must be relevant to the legality and loyalty, not to the actual content of the evidence.

The second procedure, which aims at challenging the actual content of the evidence, is then object of the trial stage. At the beginning of the trial, after the public reading of the indictment



act, the judge asks is new evidence is proposed or if evidence from the investigation stage is challenged. If such a challenge exists, the courts usually administrate once again the entire probation. Starting the last 1 – 2 years, the case law is slightly evolving and now the courts tend to re-administrate the evidence from the investigation phase only if the defence argues clearly what and why is challenged. Such an approach is justified from the perspective of the case load of the courts, which are nowadays suffocated by the number and length of criminal trials.

### *19. Evidence gathered unlawfully*

Romanian law is very reluctant to the automatic rules of exclusion of evidence. Therefore exclusion of evidence can be triggered by a case of absolute nullity or by a case of relative nullity, provided a breach of the person's right was demonstrated.

Regarding evidence, an absolute nullity is triggered by only two violations of the law. These are: (1) the participation of the accused when this is mandatory - e.g., the questioning, the re-enactment of the criminal offence; (2) the presence of the counsel when the legal assistance and the counsel's presence are mandatory - e.g., the interrogation of an accused person held into custody [Article 281 para. 1) letters e) and f)]. From these, the first one is almost with no practical relevance. Usually, the accused persons attend their interrogation. The second one has more chances to occur in practice, but, commonly, this happens rarely. If an accused held in detention is questioned by the police without his counsel being present, the interrogation is declared void and the statement obtained is inadmissible as evidence during the trial. This outcome is mandatory. No harm has to be proved and no balancing test has to be used, but the motion has to be submitted *ex officio* or by the parties at the latest at the preliminary hearing. A recent decision of the Constitutional Court (no 302 of 2017) added as case of absolute nullity the lack of substantive or personal jurisdiction of the prosecutor, aside the court (as provided by law). So, theoretically such a case can be imagined, when the evidence was gathered by a prosecutor with no jurisdiction (e.g., such a prosecutor requested the gathering of evidence by his homologous from other state).

The violation of all the other procedural rules is sanctioned by a relative nullity. The value that this nullity seems to promote is the protection of individual rights. Article 282 paragraph 2 makes reference to the existence of harm to the private parties' rights as rationale for the relative nullity. Recently, the Constitutional Court intervened again (Decision no 554 of 2017) and decided that the solution that relative nullity can not be invoked *ex officio* is unconstitutional, so theoretically the preliminary chamber judge can invoke this (still the harm to a private party's rights need to be proved).

### *20. Different rules on gathering and admissibility of evidence – obstacle to the operation of mutual recognition instruments*

The existing differences in domestic criminal procedure legislation are obviously from our perspective, "working" as an obstacle regarding all mutual recognition instruments regarding gathering of evidence. This can be seen from a two-folded perspective: *first*, the requesting authorities are not sure how the provisions of the requested state regulated specifically the desired evidence, or what is the interpretation by courts. Although "help" is provided (e.g., the clarifications of the special direction from the Ministry of Justice or the advices the magistrate from the European Judicial Network / Eurojust etc.), in some cases these aspects tend to abandon the requests, especially when there is no pressure from the parties (e.g., the defendant is not requesting the evidence). *Second*, if such a request was made and evidence was gathered, the problems rest again with the preliminary chamber judge. The evidence gathering was realised according to the domestic law of the requested state, so when dealing with the legality of the evidence in the preliminary chamber the judge is under

pressure as probably the defence will argue that specific provisions of the requested state legislation were not fully respected<sup>53</sup>.

## Criteria allocating jurisdiction

### 21. Absence of binding criteria

Absence of binding criteria in an EU instrument can lead to multiple prosecution, breach of the *ne bis in idem* principle, waste of valuable human resources and, last but not least, waste of money. The absence of clear principles establishing a hierarchy of jurisdictions leads to a lack of confidence in authorities from other states and even to some kind of competition. As well, the opposite situation can appear, when authorities from different Member States although having jurisdiction to deal with the case will refrain from doing so, in order not to violate a number of principles and to waste their own limited resources.

### 22. A new EU instrument?

Without a doubt, an EU instrument that provides criteria for determining the competent forum in case of conflict of jurisdiction is needed. We underlined that Framework Decision 2009/948/JHA contains only recommendations for Member States (thus being considered *soft law*) and even these so called recommendations refer merely to contact and consultation. Not even with the power of recommendations the Framework Decision does not provide for any criteria to be regarded in order to solve the conflict of jurisdiction.

Therefore, we stress out the need for a brand new EU instrument which sets for clear and mandatory criteria to be used for solving conflicts of jurisdiction. In this regard, we consider that the *Freiburg Proposal on Concurrent Jurisdictions and the Prohibition of Multiple Prosecutions in the European Union*<sup>54</sup> must be considered and this document should represent the model for inspiration for a new Directive.

## Victims

### 23. Protection measures for victims in domestic law

The applicable law in this particular domain is the 2014 Criminal Code, 2014 Code of Criminal Procedure, Law no 211 of 2004 on the protection of victims (last amended by Law no 255 of 2013 regarding the applicability of the 2014 Code of Criminal Procedure and adjuvant procedural legislation), Law no 151 of 2016 transposing the European Protection Order<sup>55</sup> and, last but not least, Law no 217 of 2003 on preventing and combating domestic violence<sup>56</sup>.

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<sup>53</sup> This was the case regarding an international rogatory commissions realized during the criminal investigation phase (Romania – requesting state, Poland – requested state) in a recent file, still pending trial (where I'm currently the lead attorney of the defendant). Although, the provision of the Poland Code of Criminal Procedure seemed not be fully respected as regards witness hearings, the Romanian judge of preliminary chamber refused to take this into consideration and exclude from the case file the aforementioned declarations. The judge invented a compensatory mechanism, ordering that in the trial phase the witness will be heard once again, either by video conference, either by a new rogatory commission, this time with the competent Poland court.

<sup>54</sup> See A. Biehler, R. Kniebühler, J. Lelieur-Fischer, S. Stein (eds.), *Freiburg Proposal on Concurrent Jurisdictions and the Prohibition of Multiple Prosecutions in the European Union*, Max Planck Institute for Foreign and International Criminal Law, Freiburg i.Br., November 2003 available online at <https://www.mpicc.de/files/pdf2/fa-ne-bis-in-idem.pdf>. We are not able to understand why this proposal was not taken into consideration by the European legislator.

<sup>55</sup> Published in the Official Gazette no 545 of 2016.

<sup>56</sup> Republished in the Official Gazette no 205 of 2014, last amended by Law no 35 of 2017 (published in Official Gazette no 214 of 2017) and by Constitutional Court decision no 264 of 2017 regarding the interpretation of the notion "if they live together" from Article 5 letter c).

As a general rule, the protection measures are criminal measures, ordered by the competent court either during trial (as “restrictions” within the content of certain preventive measures), either at the end of the trial, when a final judgment is pronounced. The civil court is competent as well to emit a restraining order, in cases of domestic violence.

During trial, the judicial authority ordering the judicial supervision (prosecutor, judge or rights and liberties, preliminary chamber judge, first court, appeal court) may also impose numerous restrictions (Article 215 para. 2 2014 Code of Criminal Procedure). Among these, some are protection measures for the victim, namely:

b) not to travel to certain places or to travel only to allowed places;

d) not to return to their family's dwelling, not to get close to the victim, the other co-defendants, witnesses or experts or other certain persons and not to communicate with them;

Failure to comply with any of these duties may result in the replacement of judicial supervision with house arrest or preventive detention

As part of another preventive measure, namely house arrest, the law provides [Article 221 para. 2 letter b) 2014 Code of Criminal Procedure] that during house arrest, the defendant has the obligation “not to communicate with the victim or with members of their family, with other participants in the commission of the offence, with witnesses or experts, as well as with other persons established by the judicial bodies”.

At the end of the trial, subsequent establishing that the defendant is guilty of the offence charged with, the court has the possibility to pronounce a judgment named *Postponement of penalty enforcement* (Article 83 et seq. 2014 Criminal Code). Among the obligations which can be imposed during the supervision term of 2 years, the offender must respect the following [Article 85 para. 2 letter e) and f)]:

“e) not communicate with the victim or the victim's family, with the persons together with whom they committed the offence or with other persons as established by the Court, or to not go near such persons;

f) not be in certain locations or attend certain sports events, cultural events or public gatherings established by the Court”.

In all other cases, at the end of the trial, ancillary penalties of a ban on the exercise of a number of rights for one to five years can be imposed. If the court considers that the victim must be protected, the following rights can be banned [Article 66 para. 1 letters l) – o) 2014 Criminal Code]:

“l) the right to be in certain localities as established by the Court;

m) the right to be in certain locations or attend certain sports events, cultural events or public gatherings, as established by the Court;

n) the right to communicate with the victim or the victim's family, with the persons together with whom they committed the offence or with other persons as established by the Court, or the right to go near such persons;

o) the right to go near the domicile, workplace, school or other locations where the victim carries social activities, in the conditions established by the Court”.

In cases when a custodial sentence was imposed, the same rights will be banned during the execution of the imprisonment, as an accessory penalty with the same content as the ancillary penalty (Article 65 2014 Criminal Code). The ancillary penalty will be executed for the established period of 1 to 5 years after the imprisonment penalty if fully executed or in cases when a suspension of this penalty is ordered by the Court (Article 68 para. 1).

In cases where conditional release is ordered from the execution of imprisonment or life imprisonment, Article 101 para. 2 letter d) or e) from the 2014 Criminal Code provides that during the supervision time, the convicted person may be obliged by the court to respect the following interdictions:

"d) not be in certain locations or attend certain sports events, cultural events or public gatherings established by the Court;

e) not communicate with the victim or the victim's family, with the persons together with whom they committed the offence or with other persons as established by the Court, or to not go near such persons".

As well, during this period, accessory penalties will operate, if the court initially imposed ancillary penalties (which will begin operating after the supervision time passed).

Last, in cases where the offender was a minor at the time when the crime was committed, the 2014 Criminal Code provides that only educational measure can be applied (Article 114). In cases of non-custodial educational measure, Article 121 para. 1 stipulates that the court can impose the following restrictions during the period of execution of the educational measure:

"c) not to be in certain places or at certain sporting cultural events or other public meetings indicated by the Court;

d) to stay away from and not communicate with the victim or members of their family, the participants in the offence or other persons indicated by the Court".

As we have seen, in all above-mentioned cases, the criminal court was competent and all these interdictions were either penalties (ancillary or accessory) or part of the content of other institution (postponement or suspension of penalty, conditional release, non-custodial educational measures). The civil court has competence in one particular case, namely the issuance of a protection order in cases of domestic violence. According to Article 23 para. 1 from Law no 217 of 2003: "A person whose life, physical or mental integrity or freedom is endangered by an act of violence by a member of the family may request the court to issue a protection order in order to eliminate the state of danger by to provisionally have one or more of the following measures - obligations or prohibitions:

a) temporary evacuation of the aggressor from the family home, regardless of whether he is the owner of the property right;

b) reintegration of the victim and, where appropriate, of the children into the family home;

c) limitation of the aggressor's right to use only on part of the common dwelling where it can be so shared that the abuser does not come into contact with the victim;

d) oblige the aggressor to keep a minimum distance from the victim, his / her children or other relatives or the residence, workplace or educational establishment of the protected person;

e) prohibition for the aggressor to move to certain localities or designated areas that the protected person frequent or visit regularly;

f) prohibiting any contact, including by telephone, by correspondence or in any other way, with the victim;

g) obliging the aggressor to surrender the weapons to the police;

h) entrustment of minors or establishment of their residence".

The protection order can be requested by the victim, the prosecutor, any other authority (e.g., the child protection agency) and it's solved in maximum 72 hours (an appeal can be lodged in 3 days from the moment of pronouncement or communication, depending if the parties were present at the pronouncement). The duration of the order can not exceed 6 months, but the victim can request another order. The breach of the imposed obligation is a crime, sanctioned with imprisonment from one month to one year.

#### *24. A compensation mechanism for victims*

As previously mentioned, due to the French influence, the Romanian criminal process has also a civil side aiming to compensate the losses. The compensation claim is, usually, submitted by the victim. Thereby, the victim can “bring” its civil action in the criminal trial - from this perspective, the victim, who receives the status of civil party, sustains a private claim against the offenders in order to obtain compensation for the damages arising from the offence.

Compensation is as well provided in an extensive manner in Law no 211 of 2004 on victims. Chapter V is entitled “State compensation for financial compensation for crime victims” and regulates cases of compensation when the offence was committed on the territory of Romania and the victim is either a Romanian citizen, a foreign citizen or stateless person legally residing in Romania, a citizen of a Member State of the European Union, legally present on the territory of Romania at the time the offence was committed, or foreign citizen or a stateless person residing in the territory of a Member State of the European Union, legally present on the territory of Romania at the time the offence was committed. In the case of the victims who do not fall into the categories of persons mentioned, the financial compensation shall be granted on the basis of the international conventions to which Romania is a party. The compensation mechanism is triggered by the request of the victim or the spouse, children and dependents of deceased persons in cases of certain offences (Article 21 from Law no 211): murder and qualified murder (Articles 188 and 189 of the 2014 Criminal Code), bodily injury (Article 194), a deliberate offence which resulted in the victim's bodily injury, rape, sexual intercourse with a minor and sexual assault (Article 218-220), trafficking in human beings and trafficking in minors (Articles 210 and 211), a terrorist offence, as well as any other intentional offence committed with violence.

The financial compensation is granted to the victim only if she or he has notified the criminal investigation bodies within 60 days from the date of the offence – detailed provision regulate how to calculate the term, as well the exception from this condition in cases of victims who were under 18 or who have been forbidden to notify the authorities. The financial compensation shall not be granted: if it is established that the deed does not exist or is not provided for by the Criminal law or that it was committed in self defence; if the victim is finally convicted of participating in an organized crime group or for one of offences mentioned in Article 21 from Law no 211; or if the court retains in favour of the perpetrator the attenuating circumstance of overcoming the limits of self defence against the victim's attack, or the attenuating circumstance of the provocation. As well, Law no 211 (Article 27 et seq. from) regulates the procedure for the compensation – the competent court, the format of the request, the categories of prejudice for which financial compensation is granted and the maximal amount available.

Chapter V1 regulates financial compensation in cross-border situations. This Chapter was included as an amendment brought to Law no 211 of 2004 by Government Emergency Ordinance no 112 of 2007<sup>57</sup> which transposed in Romanian law the provisions of Directive 2004/80/EC on compensation of victims.

## **Confiscation**

Confiscation is a safety measure in the Romanian criminal legislation. Therefore, in no case is to be considered as a form of compensation.

In case of Article 112 (1) e) from the Criminal Code, when dealing with assets acquired by perpetrating any offence, the law provides that such a confiscation will be ordered only if the assets are not returned to the victim and to the extent they are not used to indemnify the victim. In cases of returning the goods to the victim or when he / she is indemnified, this is not a confiscation procedure, but a civil restoration of the situation, regulated by the Civil Code.

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<sup>57</sup> Published in the Official Gazette no 729 of 26 October 2017.

*25. Cross-border recognition and implementation of a protection measure?*

We have never been involved in a cross-border recognition and implementation of a protection order<sup>58</sup>. Still, due to my specialization – lawyer working only in the field of criminal law – most probably I will rely on the provisions of the Directive on the European Protection Order (EPO), especially that it was recently transposed into domestic legislation (Law no 151 of 2016).

*26. Issuance of an EPO*

We did not have access to such procedures<sup>59</sup>.

*27. Effectiveness of the EPO*

The EPO is a legal instrument of judicial cooperation therefore its limits are both substantial and procedural. From *the substantial view*, the protection measures from the EPO depend on the domestic legislation of both the issuing state and the executing one. Therefore, the EPO will suffer in so far as there are significant differences and inconsistencies between the legislation of the states involved (e.g., the different legal nature of the measures, their durations, the possibility of extending, modifying, revoking or withdrawing them etc. So, in order for the EPO to work better (smoothly) the first thing to do would be, at least in our opinion, the focusing on aspects on harmonization of domestic legislations on criminal sanctions (for the offender) and protective measures (for the victim), as the more different the domestic legislation are, the more inefficient and problematic will be for the EPO to work.

From the procedural part, we stress out that immediacy and urgency are the key elements of the EPO – these were recognized and mentioned most probably in all domestic transposition laws. Still, due to the fact that the Directive itself does not contain time limits for issuing the EPO, probably most domestic legislations omitted to do this. This is the example of Romanian Law no 151 of 2016, which is merely a translation of the Directive, with few amendments, in order to shape it to the particularities of our system. Therefore, we underline the need for fixing time limits, as the best way to guarantee the objective set by the adoption of such an instrument as the EPO.

*28. Implementation of the 2012 Directive on victims' rights*

As previously mentioned, Law no 211 of 2004 regarding the protection of victims of crime was not yet amended in order to implement Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime. Therefore, there will be no direct link between number of protection orders issued (EPOs included) and the aforementioned Directive, or at least until the full transposition of the Directive.

*29. Gaps in implementation of Directive 2004/80/EC and of Directive 2012/29/EU*

Directive 2004/80/EC was transposed only by the end of October 2007, but this was partially explainable as Romania became an EU Member State only in 2007<sup>60</sup>.

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<sup>58</sup> As well, information was requested from prosecutors working to different offices within the Office of the Prosecutor attached to the Cluj Court of Appeal, as well as to the Directorate for Investigating Organized Crime and Terrorism – Cluj Territorial Services. None of the respondents were involved in such proceedings.

<sup>59</sup> Information was requested from judges operating within the Cluj Court of Appeal – criminal and minors division, but no answer was received regarding issuing an EPO until this time.

<sup>60</sup> Of course, better solutions could have been provided – for example in the case of the European arrest warrant, the transposition law was included in the original version of Law no 302 of 2004 on international cooperation in criminal matters, stipulating that the provisions will be in force only upon accession to the European Union.

Directive 2012/29/EU is still in process of implementation, as Law no 211 of 2004 and Law no 192 of 2006 on mediation and organisation of the profession of mediator need to be amended.

### *30. Weakness and gaps. Should there be new instruments on victim's rights?*

As for weakness and gaps, we have underlined our main concerns when answering previous points – these refer both the procedural aspects which need to be more detailed (especially deadlines regarding terms), as well as to substantive elements which all derive from lack of harmonization at the domestic level.

As a personal conclusion, we don't consider that new additional instruments are needed, but maybe refining the existing ones, in order to solve at least the issues already identified as problematic.

## **31. Other area of concern**

### *European Public Prosecutor*

The differences in national procedural criminal laws are one of the main factors that made the Council acknowledge on 7 February 2017 the lack of unanimity in the EPPO file and decide to start the procedure on enhanced cooperation.

Still, from the Romanian perspective, we were strong supporters of the EPPO – e.g., at the beginning of April 2017, Romania was one of the 16 member states that notified their intention to launch an enhanced cooperation to establish the EPPO.

In fact, at current time there is a working group established at national level – comprised of magistrates and academics, under the auspices of the National Anticorruption Directorate – which tries to find best solutions for the future work of the EPPO, in the context of the domestic system<sup>61</sup>.

### *In absentia trials*

In Romania, a trial is appreciated as being conducted *in absentia* and, consequently, it constitutes a ground for retrial only when - Article 466 (2) Code of Criminal Procedure:

- (i) the defendants were not summoned by the trial court and they have not been informed thereof in any other official manner;
- (ii) the defendants were aware of the criminal proceedings, but they absented upon well-grounded reasons and were unable to inform the court thereupon.

However, in such a case, there is no trial *in absentia* when the counsel of the accused was present at any of the court sessions or when, following the notification of the conviction verdict, the defendant did not file an appeal.

The defendants convicted *in absentia* may request a retrial no later than 1 month since the day they were informed, by an official notification, that a final judgment has been delivered. If the defendants are brought in the country on the basis of extradition or an European Arrest Warrant, the term starts since their arrival in Romania. All these rules apply also when the court decided *in absentia* the waiver of penalty or the postponement of the service of penalty.

The defendant's application must be submitted to the trial court or to the appellate court, depending upon which court has tried the case *in absentia*. The court has to schedule a hearing at which the defendant and all the other private parties have the right to attend. If the

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<sup>61</sup> The first meeting group is scheduled on 6 March in Bucharest, at the National Anticorruption Directorate's Headquarters. The undersigned will participate in a double capacity – as an academic from the Faculty of Law, Babeş-Bolyai University and as an active lawyer in the field of criminal law and, more particularly, European criminal law.

applicant is held in detention, as a result of the final verdict, he/she must be brought to trial. In such a case, legal assistance is mandatory.

If the court accepts the application, the judgment delivered *in absentia* is quashed and a new trial is conducted following the ordinary rules. If the court denies the application, the decision can be appealed to the superior court following the same rules as the judgment delivered *in absentia* (e.g., if the trial was conducted *in absentia* by a district court, the decision to deny the application can be appealed to the court of appeal).

The current provisions regarding the *in absentia* trials date after the last amendment brought to the EAW Framework Decision and thus, there is no hindrance noticed regarding the operation of the EAW.

#### **D. Conclusions. Policy recommendations**

##### *32. EU legislator intervention beyond the scope of minimum standards*

In order to help the functionality of new instruments of mutual recognition, more harmonization is needed to be achieved at the level of domestic legislation. For example, the mutual recognition of custodial sentence will be more successful, provided that in all Member States detention conditions are at a similar level, as well provided that laws governing execution are more alike (e.g., the discrepancies between the Italian law, after the 2013 ECHR judgment in *Torregianni* and the Romanian law<sup>62</sup>). As well, the European Investigative Order will work smoothly provided that gathering of evidence is governed by same rules, conditions and principles at the domestic legislation level.

Therefore, we consider that maybe the Directives should be more precise and define and impose not only minimum standards, but precise and concrete standards.

##### *33. Kind of action at EU level*

The EPPO Regulation and the brand new draft regulation on the mutual recognition of freezing and confiscation orders make one question if directives will still be the main instruments used to regulate criminal matters at the EU level in the future.

As well, the fact that EPPO is established by means of a regulation, while its substantive (material) competence is regulated by a directive (Directive 2017/1371 on the fight against fraud to the Union's financial interests by means of criminal law) might seem problematic in the future. So, more as a rhetorical question, as an answer is premature at this moment, we ask whether if the legislative measure as regards the mutual recognition instruments, the procedural rights in criminal proceedings and even the specific area of crimes adopted at the EU level would not be more beneficial if it were to be regulations? Of course, preliminary rulings of the ECJ, infringement procedures or new directives are always an option, but we have to be realistic and to see to what extent all of these worked in the past. After a clear answer, maybe a general shift regarding the kind of action to be taken at EU level will be the solution.<sup>63</sup>

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<sup>62</sup> We must mention that Law no 253 of 2014 on execution of custodial sentences was amended by Law no 169 of 2017, providing a sort of compensation for improper detention conditions. Still, this is of no use regarding mutual recognition instruments and its sole purpose was to prevent future convictions at the ECHR level.

<sup>63</sup> To quote professor Martin Böse from Bonn University, after seeing the reluctance of Member States regarding the transposition of Directive 2014/42/EU on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union, what does the Commission? It presents a proposal on the mutual recognition of freezing and confiscation orders on 21 December 2016. And – we add – it started the infringement procedure on 24 November 2016 regarding the delay in the transposition of Directive 2014/42/EU.



## IX. COUNTRY REPORTS ON FINLAND

### National report No 1 on the Finnish jurisprudence

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#### Introduction

Under the terms of reference<sup>1</sup> we reviewed all summaries of the Finnish Supreme Court (Korkein oikeus, KKO) judgments (the court of last instance in criminal matters) after the entry into force of the Lisbon Treaty. We examined first, whether they were criminal cases; then whether the case had a cross-border element, and finally considered from those that met both requirements whether there was a procedural criminal law issue at hand. We then selected these cases with a procedural element for further examination. We also surveyed the literature on EU criminal law and criminal procedure to review whether our method omitted known cases.

In the period from 1.12.2009-14.12.2017, quite a few cases with precedent value involve procedural law in cross-border criminal cases. They deal with classic issues of EU criminal procedure: *ne bis in idem*, where the KKO changes its practice in 2013 as opposed to earlier judgments; the European Arrest Warrant (EAW), where the KKO has asked for several preliminary references in order to then interpret Finnish law in line with the Framework Decision, sentencing and taking account of previous sentences, procedural rules involving the recognition of financial penalties, costs involved in the rights to translation and interpretation, and conditions for pre-trial detention. The overall picture is one where the KKO fashions solutions that enable the effective application of cross-border rules and downplay limits to procedural cooperation. Thus, considering the scope of this study, identifying case law in particular of the courts of last instance which deal with bars to effective cross-border cooperation, very few real difficulties can be identified. This observation holds true especially as regards difficulties that arise because of *differences in national procedural laws* that would preclude cross-border cooperation. Where a difficulty might have arisen in the context of rules implementing EU law, national law was generally interpreted so as to facilitate cooperation.

In addition to these 'yearbook decisions' intended to have precedent value, there is a pending reference concerning the surrender of EU nationals to third countries (C-247/17 Raugevicius, reference 16.5.2017), and a previous reference in *C-105/10 Gataev* also involving extradition of EU nationals to third countries was withdrawn following the withdrawal of the initial request. We include references to two pre-Lisbon cases where the KKO interprets national law in line with the EAW and another, more notable case (as it goes against the trend and finds an obstacle to a cross-border procedure) where *ne bis in idem* is a bar for issuing an EAW in Finland.

KKO 2017:60 Sentencing and previous convictions, FD 2008/675/JHA

This case deals with sentencing and taking into account previous judgments.<sup>2</sup> The applicant had been sentenced in Sweden for four years prison sentence. The crimes in question had been committed before the applicant had been sentenced in the district court and the sentence in Sweden had been given before the court of appeal in Finland had given its judgment in the case. The court of appeal did not take the Swedish sentence into account in its sentencing.

The KKO noted, that the national law implemented framework decision 2008/675/JHA.<sup>3</sup> The Prosecutor argued that because the judgment had been given after the main hearing in the

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<sup>1</sup> Criminal procedural laws across the Union - a comparative analysis of selected main differences and the impact they have over the development of EU legislation

<sup>2</sup> KKO:2017:60 ECLI:FI:KKO:2017:60

<sup>3</sup> Rikoslaki 19.12.1889/39 (The Criminal Code of Finland). Chapter 7, section 9. Implementing Council Framework Decision 2008/675/JHA of 24 July 2008 on taking account of convictions in the Member States of the European Union in the course of new criminal proceedings, OJ L 220, 15.8.2008, p. 32, art 3(1).

appeals court, according to Finnish procedural rules it need not be taken into account.<sup>4</sup> The KKO noted that while the procedural rules do state so,<sup>5</sup> the court of appeal may decide to have a supplementary hearing if it deems it necessary.<sup>6</sup> The KKO noted that based on its previous case law, the court needs to take into account previous sentences *ex officio*.<sup>7</sup> Because the court of appeal had not taken the previous conviction of the applicant into account, the KKO ruled that it had made a mistake and rendered a reduced sentence.<sup>8</sup>

Although looking at the court of appeal judgment it seems that the national procedural rules would hinder the application of EU law, the KKO pointed out that the procedural rules would have allowed the court of appeal to reach a different decision as well. It is possible that the court of appeal did not feel obligated to take the sentence into account. The reason for this could be that in the Criminal Code of Finland, chapter 7 section 9, a previous sentence in another EU member state *can be taken* into account. The KKO interpreted this provision based on the framework decision and preparatory works of the national legislation to mean that the previous sentence *must be taken* into account if in the same situation a domestic one would be.<sup>9</sup> As in some other EU-linked contexts, discretion which exists under national law may not be available in the scope of application of relevant EU instruments that require a particular outcome.

### **KKO 2017:30 EAW and speciality principle**

This judgment of the KKO concerns the speciality principle. In the judgment, the speciality principle is a partial bar to prosecution which follows from a surrender under the EAW. The defendant P had been surrendered from Estonia under an EAW issued on the basis of suspected direct involvement in serious theft offences. P was later prosecuted in the alternative for aiding and abetting the actual perpetrator V and for money laundering. Neither of these had been specified in the original EAW that formed the basis for his surrender. P argued the speciality principle in national implementing law and the EAW prevented prosecution. The KKO concurred only in part.

The KKO considered that the accused had been prosecuted for crimes other than those for which the EAW had been issued: Although the acts had been linked to the same historical chain of events, the description of the new facts related to aiding and abetting took place entirely before the dates of the crimes to which the EAW referred. (para 14) and the place where these new facts took place was in another country (para 16, Estonia, the country from which P was surrendered). This meant the Estonian surrendering authority had not had the opportunity to consider a discretionary ground for refusal in Article 4 of the EAW FD based on place of commission of the crimes (para 17-8). For this reason, section 58.1 of the national implementing law as interpreted in accordance with Article 27(2) EAW and the case law interpreting it<sup>10</sup> required the consent of either P or the executing state (para 18). Consent had not been given for the investigation or prosecution of the crimes of aiding and abetting (19).

However, P was also accused of money laundering, a crime equally not specified in the original EAW that formed the basis of his surrender. For this crime, the national authorities in the executing state had later given consent to the prosecution, thus lifting the bar based on speciality. Here, the KKO considered whether P's liberty had been restricted based on the new money laundering charges. It held that the deprivation of liberty had not been due to the money laundering charges before the consent for this prosecution had been given (23), as this had been based on the alleged aiding and abetting offence. Thus, the specialty principle in the EAW as interpreted in *Leymann and Pustovarov* did not bar prosecution or conviction. (24).

<sup>4</sup> Para 17.

<sup>5</sup> Para 18. Laki oikeudenkäyneistä rikosasioissa 11.7.1997/689 (Criminal Procedure Act) Chapter 11, Section 2(1); Oikeudenkäymiskaari 1.1.1734/4 (Code of Judicial Procedure), Chapter 24 section 19.

<sup>6</sup> *Ibid*, chapter 6 section 13 and chapter 26 section 25 respectively.

<sup>7</sup> Para 19.

<sup>8</sup> Para 21.

<sup>9</sup> Paras 6-9.

<sup>10</sup> Case C-388/08 PPU, *Leymann and Pustovarov*, EU:C:2008:669; KKO 2008:118 and KKO 2010:59.

### **KKO 2017:11 Surrender under the EAW was not precluded by prison conditions in the issuing state or ties to the executing state**

This judgment concerns grounds for refusing surrender to Bulgaria under the EAW and national implementing legislation. Two separate issues arose: whether the prison conditions in Bulgaria should be considered an absolute bar to surrender under the Finnish law implementing the EAW and whether the defendant's family or financial ties warranted, in the circumstances, refusing surrender.<sup>11</sup>

Under the national implementing law,<sup>12</sup> the risk of i.a. torture and degrading treatment constitutes an absolute bar to surrender. The preparatory work to the national implementing legislation considered this linked not to Articles 3 and 4 of the EAW FD, but to other rules in the FD as well as Finnish international human rights obligations.<sup>13</sup> Referring to Lopes Da Silva Jorge,<sup>14</sup> the KKO noted its obligation to interpret national law as far as possible in line with the wording and purpose of the FD.<sup>15</sup> This, according to the national court, was based on mutual recognition and mutual trust in the Member States' ability to guarantee equivalent and effective protection of fundamental rights. According to the national court, the general prison conditions in the issuing state could not in themselves lead to refusal. Instead, the national court must evaluate based on the facts of the case ("konkreettisesti ja tarkasti arvioitava") whether there are weighty grounds for considering that the person would be subject to this danger. The evaluation must be based on objective, trustworthy, precise and up-to-date information on prison conditions ('arvioinnissa tulee nojautua objektiivisiin, luotettaviin, tarkkoihin ja asianmukaisesti päivitettyihin tietoihin vankeusolosuhteista'). Where necessary, further information on prison conditions must be requested from the authorities of the issuing state (paragraph 6, referring to Caldaru).<sup>16</sup>

The national court then reviewed the judgment of the ECtHR in *Muršić v. Croatia*<sup>17</sup> and claims by the defence based on a 2015 report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) and *Neshkov and others v Bulgaria*, also from 2015,<sup>18</sup> and information in the public domain regarding the risk of physical and sexual violence at a prison in the issuing state. The KKO asked the prosecution to provide additional evidence on prison conditions in Bulgaria. According to this information, A would indeed be imprisoned at the prison in question. However, based on the facts presented about the current state of the prison (paragraphs 10-11) and the likelihood that conditions were further improving with works scheduled to conclude in June 2017 and that the national authorities had also taken action to combat violence, the prosecutor had in the view of the Court demonstrated that there was no actual danger of inhumane or degrading treatment in that prison (para 12). Therefore, there was also no basis to refuse surrender based on this provision of the national extradition law (para 13).

The defence also raised a ground for refusal based on 6§ 6 of the national law, which concerned refusal for the surrender of a person who requests serving the sentence in Finland and who resides permanently in Finland and whose personal circumstances or other weighty reasons give reason for the execution of the sentence in Finland. This concerns in particular the right to family life in Art 8 ECHR according to the national preparatory work to this

<sup>11</sup> EU-luovuttamisL 5 § 1 mom 6 kohta; EU-luovuttamisL 6 § 6 kohta.

<sup>12</sup> EU-luovuttamislain 5 §:n 1 momentin 6 kohta

<sup>13</sup> HE 88/2003 vp s. 22

<sup>14</sup> asia C-42/11, Lopes Da Silva Jorge, tuomio 5.9.2012, EU:C:2012:517, kohta 54

<sup>15</sup> KKO 2017:11 para 6.

<sup>16</sup> . (Yhdistetyt asiat C-404/15 ja C-659/15 PPU, Pál Aranyosi ja Robert Căldăraru, tuomio 5.4.2016, EU:C:2016:198 kohdat 77, 89 ja 91 - 94.)

<sup>17</sup> Para 7, KKO referred to the fact that when personal space in prison cell is under 3 m2, there is a strong assumption on violation of article 3. This presumption may be overturned when the state can show, that keeping the prisoners in such small cells is limited, random and temporary in nature and the prisoner is guaranteed sufficient freedom of movement and activity outside the cell and otherwise impeccable conditions. Also when a personal space is 3-4 m2 per prisoner, it might constitute a violation of human rights if other conditions are inappropriate.

<sup>18</sup> *Neshkov and Others v. Bulgaria* 27.1.2015, and the Public statement concerning Bulgaria of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) which highlights the bad conditions and vast structural problems in prisons in Bulgaria, 17, 26.3.2015. <https://rm.coe.int/16806940ef>

provision (para 14). Referring to the possibility of reintegration in society and CJEU case law<sup>19</sup> and previous Finnish case law allowing the consideration of other aspects such as criminal behaviour in Finland (KKO 2011:8), the KKO considered that the defendant's family ties to Finland were not sufficient to warrant refusal (para 18) and that he could be surrendered despite having resided in Finland for over five years.

#### **KKO 2016:27 recognition of financial penalties, FD 2005/214/JHA**

In this judgment the KKO ensures the effective recognition of a financial penalty by interpreting national law so as to allow the national authority responsible for mutual recognition of financial penalties to take part in appeal proceedings against its decision recognising the financial penalty. This results in the annulment of a judgment that itself annulled that authority's decision on recognition. In effect, the national executing authority must, following this judgment, before a decision on recognition is overturned.

A national court of first instance had annulled a decision concerning the mutual recognition and execution of a financial penalty issued in another Member State that amounted to under 70 euros. In doing so, it had relied on a discretionary ground for refusal in Article 7(2)(h) of the FD. However, under Article 6 of the FD this was for the executing national authority rather than the court to apply, and in Finland under national law this was not the court handling the appeal but the legal Register Centre (oikeusrekisterikeskus) (para 16). The KKO considered whether the legal register centre had standing to challenge this as a manifestly incorrect application of the law. Although it did not have standing as a party to the proceedings, it had the right to be heard (para 18) which had not been respected in the proceedings. The effective implementation of EU rules (para 19, with reference to Baláž, C-60/12, EU:C:2013:733, para 29) should be taken into account when determining whether the Centre should be permitted to apply for annulment despite not having standing as a party to criminal proceedings, and it was the only authority within whose responsibilities ensuring effective application of the rules could fall. The failure to hear the Legal Register Centre in the appeal process was considered a manifest error which therefore allowed the judgment to be challenged by the Centre. 29

#### **KKO 2016:4 Costs of the EU right to translation and interpretation are borne by the state**

Under national law, a convicted defendant was required to reimburse the any expenses paid from state funds to their defense if they did not meet the financial requirements for legal aid. In this case, the defendant did not meet the conditions for legal aid. This meant that in addition to his own legal costs, the letter of the national law (Rikosoikeudenkäyntilaki, 2 luvun 11 §), required that he was liable to pay the costs of interpretation and translation. However, the implementation of Directive 2010/64 led to the introduction of another provision in the national law which provided that reasonable expenses of translation for consultation between counsel and the accused would fall to the state if the accused's legal protection so required. This was interpreted in line with the directive and the national preparatory work to its implementation so that the costs fell to the state even in circumstances where the applicant was not otherwise entitled to legal aid (paras 17-20).

#### **KKO 2015:99 Refusal to surrender only statute barred where Finnish interest in the crime; Surrender is conditional on return where D has sufficiently integrated in Finland**

This case concerns the EAW and whether a discretionary ground for refusal could be identified or whether the surrender should be made conditional on the right to return to serve the sentence in Finland. The competent Irish authority had issued an EAW for the prosecution of a Polish citizen who resided in Finland. Two questions arose before the KKO: Whether there was a discretionary ground for refusal under section 6.5 of the national implementing legislation and whether the person could serve any possible sentence in Finland.<sup>20</sup>

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<sup>19</sup> C-66/08, Kozłowski 17.7.2008, EU:C:2008:437, para 45 and 15. C-42/11, Lopes Da Silva Jorge, para 42 - 43.)

<sup>20</sup> EU-luovuttamisL 8 § 2 mom

The discretionary ground for refusal concerns situations where Finnish law could apply to the crime and prosecution or the execution of a penalty is statute-barred in Finland. The KKO considered that the defendant A resided permanently in Finland (para 8). Finnish law could be applied to the crimes (para 9). Based on the facts of the case, the crime would under Finnish law have been statute barred (para 10). However, in applying a discretionary ground for refusal, the KKO considered that the connection to Finland was limited as A did not live in Finland at the time of commission and the crimes did not take place in Finland (para 11). The national preparatory works suggested that refusal should take place only where Finland had an interest and the crime was closely connected to Finland (para 12, also citing C-42/11, Lopes Da Silva Jorge, judgment 5.9.2012, EU:C:2012:517, para 54 on the duty to interpret national law to give effect to the EAW). Without a close connection to Finland, there was no reason to refuse surrender despite the discretionary ground for refusal.

The second issue concerned whether surrender should be conditional on the return of A to serve any sentence in Finland. Here, the national implementing legislation included a discretionary ground for refusal that was interpreted in line with the CJ rulings (in C-66/08 Kozłowski, EU:C:2008:437, C-123/08, Wolzenburg, 6.10.2009, para 62 and C-306/09, I.B., 21.10.2010, EU:C:2010:626, para 52.) The KKO considered A had sufficiently integrated in Finland and that therefore this condition should be attached to the surrender.

#### **KKO 2014:51 ne bis in idem: prosecution and punitive tax penalties are *idem***

This case concerns the application of *ne bis in idem*. A and B were prosecuted for unlawfully importing oral tobacco. They had also been subject to tax penalties for the same imports because they had not reported the commercial imports. These were considered *idem* with the later prosecution for smuggling and therefore the later, overlapping prosecution was considered barred by the *ne bis in idem* rule. In this case, the KKO refers to Article 50 of the Charter of Fundamental Rights and a wide range of case law of the CJ on *ne bis in idem*.

#### **KKO 2014:29 pre-trial detention requires a real risk of absconding**

The case concerns whether there are grounds for pre-trial detention because of a risk that the defendant may not return for a trial from another Member State where he permanently resides. Procedural cooperation between EU Member States is one of the reasons why, in this case, the defendant may not be detained whilst awaiting trial. According to the KKO, in deciding whether pre-trial detention was warranted, the EAW and the Nordic Arrest Warrant (D was a Swedish national) should be considered. Given D's connection to Sweden, the established procedural cooperation between Swedish and Finnish authorities, and ECHR right to liberty and personal security requirement that pre-trial detention should be reasonable, pre-trial detention purely because D resided in another Member State was not reasonable.

#### **KKO 2013:59 Ne bis in idem now prohibits concurrent tax penalties and criminal proceedings (changing earlier precedent from 2010).**

Several KKO cases deal with the application of *ne bis in idem* in cases where the accused has been ordered a punitive tax increase before the accused is prosecuted for tax fraud.<sup>21</sup> In the earlier cases the KKO had taken the view, that *ne bis in idem* prevents criminal proceedings only in cases where the punitive tax increase has become final. However, in KKO 2013:59 it changed its approach and ruled, that it already prevents the criminal proceedings after the punitive tax increase has been ordered. The cases refer to the ECHR and the case law of the European Court of Human Rights but in the reversal (KKO 2013:59), the KKO refers to the Charter and to the Case C-617/10 Åkerberg Fransson.

The KKO held in 2013:59 that the earlier interpretation given in its case-law is not without problems, since it allows for two different sanctions.<sup>22</sup> It also held that, while its earlier interpretation (emphasising finality of the judgment) would correspond to the wording in article 50 of the Charter of Fundamental Rights of the European Union, this interpretation

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<sup>21</sup> Cases KKO:2013:59, KKO:2010:45, 2010:46, 2010:82.

<sup>22</sup> Para 23.

would include serious problems.<sup>23</sup> This, inter alia, because it would be completely random which proceeding would be final first.<sup>24</sup>

The KKO also referred in its judgment to the Court of Justice ruling in *Åkerberg Fransson*,<sup>25</sup> but did not further explain the significance of that case to the case at hand.<sup>26</sup> In *Åkerberg Fransson* the Court stated that 'the *ne bis in idem* principle laid down in Article 50 of the Charter does not preclude a Member State from imposing successively, for the same acts of non-compliance with declaration obligations in the field of VAT, a tax penalty and a criminal penalty in so far as the first penalty is not criminal in nature, a matter which is for the national court to determine.'

### **KKO 2012: 87 Surrender could not be postponed due to pending proceedings where the alternative was surrender conditional on return**

This case involves surrender to Sweden. The KKO quashes a district court decision postponing surrender due to pending criminal proceedings in Finland. The applicant had agreed to the surrender and asked to be temporarily surrendered to Sweden. The district court had agreed to surrender but decided to postpone the surrender until the charges against the applicant had been resolved and the judgment completed. The applicant appealed the decision and demanded that he be immediately temporarily surrendered to Sweden. KKO held that there must be serious grounds for postponement if the alternative is a short temporary surrender to Sweden.<sup>27</sup> It further held that the dates for the trial in other Nordic countries need to be sufficiently known before the surrender trial in order to set the conditions of the surrender.<sup>28</sup> This case differs slightly from other EAW cases since the implementing legislation is different in case of Nordic countries than other EU Member States.

### **KKO 2012:76 Breach of MLA requirements was a procedural error under national law**

This case dealt with sending and serving procedural documents in other member states in accordance with Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union.<sup>29</sup> The applicant had been sent an invitation by the court of appeal to arrive to the court hearing. If he would not, the court would not investigate his appeal in accordance with Finnish procedural rules.<sup>30</sup> The invitation was first sent by mail to the applicants address. It was sent in Finnish although the applicant only spoke Russian. Later, 11 days before the trial, it was also sent to the applicant's representative who stated that he did not have the applicants address.

The KKO noted that when the recipient is staying abroad, the courts need to take into account also the relevant international agreements.<sup>31</sup> In this case, the relevant agreement was the Convention on Mutual Assistance in Criminal Matter. Article 5(3) of the convention states that 'Where there is reason to believe that the addressee does not understand the language in which the document is drawn up, the document, or at least the important passages thereof, must be translated into (one of) the language(s) of the Member State in the territory of which the addressee is staying. If the authority by which the procedural document was issued knows that the addressee understands only some other language, the document, or at least the important passages thereof, must be translated into that other language.'<sup>32</sup> Therefore, the

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<sup>23</sup> Para 27.

<sup>24</sup> Para 28.

<sup>25</sup> Case C-617/10 *Åkerberg Fransson* [2013] ECR, ECLI:EU:C:2013:105.

<sup>26</sup> Para 8.

<sup>27</sup> Para 13.

<sup>28</sup> Para 15.

<sup>29</sup> 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, OJ C 197, 12.7.2000, p. 1.

<sup>30</sup> Code of judicial procedure (n 5), Chapter 26 section 20(1).

<sup>31</sup> Para 3.

<sup>32</sup> N 29, art 5(3).

initial request did not fulfil the requirements of the convention.<sup>33</sup> For other reasons, the second invitation did not comply with Finnish procedural rules.<sup>34</sup> For these reasons the KKO found that the Court of Appeal had wrongly dismissed the appeal and returned the case there.<sup>35</sup>

In this case, there was no actual contradiction with national and international rules. However, the rules on cross border sending of procedural documents contained more requirements than national rules and the Court of Appeal did not take them into account. It should also be noted that the sending of the documents did not fully comply with national procedural rules either and the fact that the Court of Appeal did not comply with the Convention was only one of several reasons why the decision was quashed.

### **KKO 2012:67: Onward surrender requires only the consent of the last surrendering state**

This case dealt with European Arrest Warrant. The applicant had been surrendered from the UK to Hungary, and from Hungary to Finland. From Finland, France sought his surrender. The applicant resisted his surrender based on the fact that the UK which had originally surrendered him, had not given its consent. The question was whether he could be surrendered to France solely based on the approval of Hungary. The Finnish implementing measure, Act on Extradition on the Basis of an Offence Between Finland and Other Member States of the European Union,<sup>36</sup> could be interpreted both ways.

The KKO decided to stay the proceedings and refer the case to the Court of Justice for a preliminary ruling.<sup>37</sup> In its ruling, the Court of Justice held that the Framework decision must be interpreted as meaning that only the consent of the last surrendering state is needed. The Supreme Court held, that as it is under a duty to interpret national law in light of the framework decision,<sup>38</sup> the national law should be interpreted as meaning that only the consent of the last surrendering state is needed.

In this case, the differences were not considered an obstacle as such. The question was only on how to interpret the provisions of national law. The case was resolved by the Supreme Court by asking for the Court of Justice to provide an interpretation of the EU law and then interpreting the national law in the same way.

### **KKO 2012:62 Future surrender to serve a sentence in another Member State does not necessarily require keeping a person in custody**

A court had decided that the applicant be surrendered to Estonia from Finland to complete his sentence there. The decision stated that the surrender could only take place after the completion of a criminal trial against the applicant in Finland and the completion of a sentence pronounced in it. The court order did not mention that the applicant should be kept under arrest until then. The applicant had later started his sentence in Finland as planned but after he had been moved to open prison, the prosecutor had decided that the applicant be placed in custody. The question was whether the prosecutor could decide to keep the applicant incarcerated under said circumstances.

The Supreme Court noted that the EAW framework decision only obligates the member states to ensure that the person whose surrender is sought, does not escape and leaves the means to do this to national legislation.<sup>39</sup> The KKO refers to *Pupino* judgment,<sup>40</sup> and held that the national rules should be interpreted to mean that the decision to place into custody can be made also after the decision to surrender has been made and the prosecutor has had the

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<sup>33</sup> Para 12.

<sup>34</sup> Ibid.

<sup>35</sup> Paras 13-14.

<sup>36</sup> Laki rikoksen johdosta tapahtuvasta luovuttamisesta Suomen ja muiden Euroopan unionin jäsenvaltioiden välillä, 30.12.2003/1286 (the Finnish Act on European Arrest Warrant).

<sup>37</sup> Case C-192/12 PPU *West* [2012] ECR ECLI:EU:C:2012:404.

<sup>38</sup> Para 3, referring to Case C-105/03 *Pupino*, ECLI:EU:C:2005:386 [2005] ECR I-05285, para 43.

<sup>39</sup> Paras 5-6.

<sup>40</sup> Case C-105/03 *Pupino*, ECLI:EU:C:2005:386 [2005] ECR I-05285.

right to make such a decision.<sup>41</sup> A whole other question was whether this decision should be kept in force (since the court has the power to review the decision). The Supreme Court held for reasons relating to the circumstances of the applicant that it is not necessary to keep the applicant in custody.<sup>42</sup>

**KKO 2011:14 Temporary surrender must be for a defined period of time and by a multilateral agreement rather than a unilateral order.**

The defendant A challenged an agreement between Finland and Estonia concerning his temporary surrender. A was serving a sentence in Finland and demanded that this sentence be completed before his surrender. Finnish authorities had agreed to surrender A to Estonia for a trial and to serve any possible sentence that might result. A conviction would mean that A would have to serve the remainder of a previous sentence for which he had been conditionally released. This raised the question of whether the matter should be dealt with by provisions concerning prior sentences or whether the issuing authority was in fact dealing with a new offence.<sup>43</sup>

The KKO resolved the case by first noting that the grounds for surrender for a new prosecution were valid;<sup>44</sup> that this new surrender was nevertheless subject to grounds for postponement in order to serve a pre-existing sentence and that rather than defer surrender, the law also permitted temporary surrender;<sup>45</sup> and that this was advisable since the purpose of the EAW was to facilitate the timely prosecution of offences.<sup>46</sup> However, no competent authority in the surrendering state had entered into an agreement with the competent authorities in the issuing state as required under the national implementing law. Instead, the court issued a unilateral order permitting surrender on particular terms. This breached the requirements of the national law.<sup>47</sup> National law was unclear on the terms of temporary surrender and on the authority that was competent to agree surrender. Temporary surrender for an indefinite period would unreasonably complicate serving the remainder of the sentence left in Finland, and could therefore not be permitted.<sup>48</sup> Therefore, the decision to surrender for new proceedings was returned to the national court for reconsideration. The KKO approved the substance of decision to surrender as regards the pre-existing crime, as both based on the nature of the crime and the time remaining to serve this surrender under an EAW would have been possible.<sup>49</sup>

**KKO 2011:8 National law is interpreted in line with *Kozłowski***

The case dealt with the question of whether there existed discretionary ground to refuse surrender. The defendant had been sentenced to a custodial sentence in Estonia. Estonia sought his surrender from Finland. The applicant claimed that the surrender should be denied because he had lived in Finland permanently for several years. Although the applicant did not have official address in Finland, his immediate family lived in Finland and based on this and other factors, the district court denied the request for his surrender and determined that he could serve the sentence in Finland.

The prosecutor appealed the decision and requested that the defendant be surrendered to Estonia. The question facing the KKO was how the national rule on optional basis to deny surrender should be interpreted and whether the district court had thus the right to deny surrender. The national implementing legislation states that the court may deny the surrender if the request concerns a custodial sentence, the person lives permanently in Finland, and based on his or her personal circumstances or other reason it is reasonable that the sentence be served in Finland.<sup>50</sup> It should be noted that the wording of this section differs

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<sup>41</sup> Para 13.

<sup>42</sup> Paras 15-21.

<sup>43</sup> EU-luovuttamislaki 2§2; para 8-9.

<sup>44</sup> Para 12.

<sup>45</sup> Para 13

<sup>46</sup> Para 15

<sup>47</sup> Para 17.

<sup>48</sup> Paras 18-20.

<sup>49</sup> Para 21.

<sup>50</sup> N 14 Section 6(1)(6).



from the wording of article 4(6) of the framework decision.<sup>51</sup> Nevertheless, the KKO interpreted the national legislation in accordance with the interpretation given by the Court of Justice in *Kozlovski*.<sup>52</sup> Applying the circumstances of the defendant to definitions given in *Kozlovski*, the KKO came to the conclusion that there is no basis to deny surrender.<sup>53</sup>

This case shows that although there might be differences in the wording of an EU instrument and national implementing legislation, the KKO interprets national rules consistently with EU law. In this particular case the KKO noted that the Court of Justice had said in *Kozlovski* that the terms of the Framework decision must be interpreted independently and consistently,<sup>54</sup> and added that in its own case law it has ruled that the national legislation must be interpreted in accordance with the Framework decision as much as possible.<sup>55</sup>

### **KKO 2010:59 Speciality principle requires consent for prosecution of offences not in the EAW**

The case concerned the question of whether the prosecutor could secondarily charge the applicant for crimes which were not mentioned in the European Arrest Warrant. The applicant had been surrendered to Finland from Lithuania pursuant to an EAW. The crimes mentioned in the EAW were, *inter alia*, fraud. In the appeals stage the applicant was charged secondly on embezzlement. The KKO held, that the secondary charges were in several details different to the charges mentioned in the arrest warrant.<sup>56</sup> It should further be noted that in the Framework decision, in article 2(2), fraud is listed as a crime where double criminality need not to be verified, and embezzlement is not.<sup>57</sup> For these two reasons the Supreme Court ruled, that the charges in question were different than for which the applicant was surrendered and thus prevented by article 27(2) of the framework decision as well as the national implementing legislation unless a consent has been given by the applicant or the surrendering state.<sup>58</sup> The KKO referred to the Court of Justice decision in *Leymann and Pustovarov* that prosecuting and sentencing in these situations is not prevented as long as the liberty of the defendant is not restricted prior to obtaining a consent.<sup>59</sup> The KKO thus did not change the decision of the lower court but halted the execution of the custodial sentence until such time as the consent has been received.<sup>60</sup>

### **Cases beyond the primary focus of the study (lower courts/before the entry into force of the Lisbon Treaty)**

There is also pre-Lisbon case law on the EAW (KKO 2015:139) in which and the meaning of 'same acts' for the purposes of a bar to surrender (HeiH 2008:21).

### **KKO:2005:139 National law must be interpreted so as to be compatible with the EAW**

This case dealt with European Arrest Warrant. The applicant (A) was a Finnish citizen who was ordered into a forensic psychiatric treatment by a court in Sweden. Sweden sought his surrender to Sweden. The applicant resisted the surrender based on the fact that according to Finnish law, he has the right to opt for doing his sentence in Finland.

The issues in the case were; 1) Whether the forensic psychiatric treatment can form a basis for EAW surrender, 2) Whether there is basis to deny surrender, and 3) whether the Finnish authorities can exercise discretion regarding the execution of the sentence.

For the first issue the KKO noted that the Finnish implementing legislation is worded more narrowly than the Framework decision.<sup>61</sup> Section 1 of the Finnish implementing legislation

<sup>51</sup> Para 18; Sakari Melander, *EU-Rikosoikeus* (2nd ed, Talentum 2015), 276.

<sup>52</sup> Paras 15-19, citing case C-66-08 *Kozlovski*, ECLI:EU:C:2008:437 [2008] ECR I-06041.

<sup>53</sup> Paras 20-23.

<sup>54</sup> Para 15; *Kozlovski* (n 19), para 42.

<sup>55</sup> Para 15 referring to case KKO:2005:139.

<sup>56</sup> Para 20.

<sup>57</sup> Paras 23-24; *Prosessioikeus* (Alma Talent Fokus) <<https://fokus.almatalent.fi/>> accessed 14.12.2017.

<sup>58</sup> Para 25.

<sup>59</sup> Para 28 referring to Case C-388/08 PPU, *Leymann and Pustovarov*, EU:C:2008:669.

<sup>60</sup> Para 30.

<sup>61</sup> Paras 5-7.

states that 'a person staying in Finland may be extradited from Finland to another Member State of the European Union for prosecution or for the *enforcement of a custodial sentence*.'<sup>62</sup> On the other hand article 1(1) of the Framework decision states that 'a requested person, for the purposes of conducting a criminal prosecution or executing *a custodial sentence or detention order*.'<sup>63</sup> The KKO concluded that as it is under a duty to interpret national legislation in the light of the framework decision, it must be ruled that the judgment in question is included in the national implementing legislation.<sup>64</sup>

For the second question, the KKO noted that in the Finnish implementing legislation (section 5(1)(4)), it is grounds for mandatory non-execution if a Finnish citizen demands to serve the sentence in Finland while in the Framework decision (article 4(6)) it is merely an optional ground for non-execution.<sup>65</sup>

The third issue deals with potential discretion in the execution of the judgment. The Finnish implementing legislation refers to another decree which gives the authorities discretion on whether or not to execute the sentence in Finland.<sup>66</sup> However, the KKO held that the wording of article 4(6) of the Framework decision would clearly not allow for a national legislation where the national court would have to refuse extradition and still the execution of the sentence would be left at the discretion of the executing authorities, and because of the principle of harmonious interpretation, the Finnish legislation must be interpreted so that the authorities have no discretion as to whether or not to execute the sentence in Finland.

In this decision national procedural rules were not directly considered an obstacle to cooperation. However, the KKO had to resort to interpreting the national rules in accordance with the Framework decision. A ruling based purely on national law would most likely have resulted in an outcome which would have been contrary the framework decision.

### **HelHO 2008:21 Ne bis in idem prevents surrender for the same 'acts' as interpreted in CJEU case law**

The case in the Helsinki Court of Appeal involved ne bis in idem expressed in article 54 of the Schengen acquis and article 3(2) of the European Arrest Warrant Framework decision. The district court had issued an arrest warrant for the applicant for series of frauds. The applicant was at that time imprisoned in Germany for similar crimes. The material question was whether the arrest warrant could be executed despite the *ne bis in idem* principle.

It would appear from the Court of Appeal judgment that the district court (court of first instance) did not evaluate whether the ne bis in idem principle applied. In its submission to Court of Appeal, the prosecutor replied that the applicant had not been convicted of the same crimes and the crimes committed in Finland had not been dealt with in any court.

Article 54 of the Convention Implementing the Schengen Agreement states: '[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.'<sup>67</sup> The Finnish criminal code, chapter 1 section 13(1)(4) states that it is not permitted to bring charges against a person for conduct for which a verdict has been handed by a court in the country the crime took place in or in another EU member state and the judgment has been completed or is currently being completed.

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<sup>62</sup> N 14. Emphasis added. This is an unofficial translation provided by the Finnish Ministry of Justice.

<sup>63</sup> 2002/584/JHA: Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States - Statements made by certain Member States on the adoption of the Framework Decision, OJ L 190, 18.7.2002, p. 1. Emphasis added.

<sup>64</sup> Para 8, referring to Case C-105/03 *Pupino*, ECLI:EU:C:2005:386 [2005] ECR I-05285, para 43.

<sup>65</sup> Paras 12-13.

<sup>66</sup> Para 14.

<sup>67</sup> 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, OJ L 239, 22/09/2000 P. 0019.

Helsinki Court of Appeal referred to CJEU judgments C-436/04 and C-150/05 that dealt with article 54 CISA.<sup>68</sup> The CJEU had interpreted article 54 the following way: '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'.<sup>69</sup> Helsinki Court of Appeal found that the acts for which the applicant was convicted in Germany belong to the same chain of events and are inextricably linked together to the acts for which the warrant was issued. Therefore, it reversed the decision of the district court and ruled that there is no longer any basis for an arrest warrant.

In this case, the national rules were not as such in contradiction with each other, but the question was how to interpret certain provisions (ie. what constitutes as same acts). The district court seemed to have taken a very restrictive approach to this question,<sup>70</sup> while Helsinki Court of Appeal sought guidance in the case law of the CJEU and came to an opposite decision. The result was that the national decision which would allow for an EAW to be issued was reversed.

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<sup>68</sup> Case C-436/04 *Van Esbroeck* [2006] ECR-I-02333, ECLI:EU:C:2006:165; Case C-150/05 *van Straaten* [2006] ECR-I-09327, ECLI:EU:C:2006:614.

<sup>69</sup> C-150/05, para 53.

<sup>70</sup> The original judgment of the district court is unavailable and there is only a brief summary of the judgment in the Court of Appeal judgment.

## National report No 2 on the Finnish criminal justice system

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### A. General questions on the features of national criminal procedure systems

1. Do you consider your criminal justice system as inquisitorial, accusatorial, or mixed?

The Finnish System is, in terms of the prosecution of crimes, generally considered accusatorial. Criminal cases are initiated by the prosecutor or victim (*asianomistaja*). Obtaining evidence is for the prosecution, rather than the courts; in limited exceptional cases the court may obtain evidence other than that which would clearly be to the detriment of the accused. The court is limited to considering the acts for which punishment is sought, although it may apply a provision of law other than the crime for which the proceedings are initially brought, and with the Court's permission, other charges can be brought later as long as the accused is then given an opportunity to mount an effective defence. The Court may also apply penalties other than those demanded by the prosecution.

1.1. If your country has been under communist rule, does your criminal justice system still bear the influence of that regime? Could you please describe it briefly?

N/A

1.2. If mixed, could you briefly explain which elements belong to which tradition? Have judicial or legislative changes occurred recently in your country that had an effect on the functioning of your criminal justice system?

The key changes involve the development of an independent prosecutorial service and the accompanying clear shift towards an accusatorial system. This, however, predates EU-membership and can be considered completed with amendments in the 1993 to the first instance criminal process and to criminal procedure more generally in 1997. Other key changes involve accession to the ECHR in the 1990s and the subsequent emphasis on procedural trial rights in Article 6, coupled with Finnish constitutional fundamental rights reform in 1995 which imported these ideas into the national constitutional system (See Report 23 of the Constitutional Law Committee of the Finnish Parliament).

1.3. How do you think the diversity of legal traditions regarding criminal procedure law across the Union may impact cross-border cooperation in criminal matters?

Due to geographic factors, Finnish cross-border cooperation in the EU context is generally cooperation with Sweden and Estonia.

International cooperation is a central pillar of the Ministry of Justice's EU strategy. For example, the strategy document for 2017 emphasises the development of mutual trust and the development of mutual recognition as an alternative to far-reaching harmonisation. Thus, an official position which has been consistent in recent years is identified in favour of diverse legal traditions in the substantive sense and facilitating cooperation despite this diversity. For criminal procedural cooperation the same document highlights the need to further develop practices related to convicted persons; developing Eurojust and founding EPPO (p.9). In terms of rights of victims, policy emphasises the effective implementation of victims' rights and restraining order rather than further harmonisation. For rights of the accused, Finland emphasises the need to ensure ECHR standards are met and to ensure procedures outside the courtroom, for example related to fines and penalty payments, are also considered (p.10).

*2. What is the status of the rights of the defence in your country (e.g. fundamental right, constitutional right)?*

The rights of the defence are founded in the constitution of Finland in the section concerning fundamental rights. These rights include the principle of legality (sections 7 and 8) and a right to be heard in a competent court, to receive a founded decision and the ability to appeal (section 21). More detailed rules are laid down in different acts.

Finland is also a member of the European Convention on Human Rights (ECHR) which in practice has a huge influence on rights of the defence.

*3. What is the status of the rights of victims in your country (e.g. fundamental right, constitutional right)?*

Rights of the victims are not as such regulated in the constitution. The rights of the victims were enhanced from 1st of March 2016 when the national legislation transposing the directive 2012/29/EU on victims rights came into effect changing several acts concerning rights of the victims and their access to support services.

## **B. Impact on national law of procedural rights directives**

### **B.1. State of transposition of directives for which the transposition deadline has already passed**

*4. Has the entry into force of the directives on suspects/defendants and victims triggered important changes in:*

*4.1. The criminal procedure of your country? If so, has the implementation of directives made the national system raise its standards and thus comply with ECHR case law?*

The changes made to Finnish legislation pursuant to directive 2013/48/EU are rather limited and of minor nature. The government proposal notes, that the legislation (then) in force corresponds largely to the requirements of the directive.

ECtHR judgment in *Salduz v Turkey* concerned right to access to a lawyer during criminal investigation. In Finnish legislation, this right existed before the directive and the judgment. This right has existed at least since the legislation preceding the current Criminal Investigation Act of 2011, came into force in 1989. The legislation implementing the directive added some more specific rules on the duties of investigative officials when the accused wishes not to use a lawyer. *Salduz* judgment impacted Finnish case-law – the Finnish Supreme Court (KKO) has held that the statements made in investigation by the defendant could not be used against him when it was not shown that he had without a doubt relinquished his right to an attorney.

The implementation 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 resulted in lots of small changes in the relevant procedural legislation. Although the Finnish legislation to some extent already went beyond the standard demanded by the directive, the implementing legislation made lots of changes to ensure that the directive is complied with. For example, including rules on the competences of the translators/interpreters.

Implementation 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 resulted in changes in the legislation, more specific rules on information given to suspects were added. This directive resulted in, arguably, most significant changes in Finland out of the four procedural directives, whose implementation is complete.

The implementation is not yet complete for other directives.

*4.2. How have national courts interpreted national legislation transposing the relevant EU directives thus far? Have significant changes been brought to the judicial practice of your country?*

Nothing of note has taken place since the date of our part I report on case law. The general conclusions of that report are that Finnish courts tend to seek conforming interpretations and applications which enable the effectiveness of relevant EU rules. This is in line with the general approach of Finnish courts also outside the field of criminal law.

*4.3. To what extent have national courts in the transposition process taken into account general principles of EU law and ECJ case law on EU procedural directives?*

Referring to our report on the Finnish case-law, the Finnish Supreme Court has generally interpreted EU legislation in the light of general principles as well as the CJEU case-law. This is particularly true of the mutual recognition instruments, however this tendency extends to all areas where there are questions of EU law.

*5. Have transposition gaps persisted? If so, could you briefly point them out?*

There are no notable transposition gaps as regards the implemented directives.

## **B.2. Directives that are still in the process of being transposed**

*6. Has the transposition process of directives adopted in 2016 begun? Do you think it will lead to important changes in the national law of your country?*

Transposition of the directive 2016/343 is at the stage where the Ministry of Justice has requested expert statements regarding the directive but more specific timeline on the transposition is not yet known. The publication by the ministry of justice shows that most experts agreed, that the directive does not require any changes to legislation. With this in mind, any major changes to the legislation are unlikely.

The implementation of directives 2016/800 and 2016/1919 has not yet begun.

*7. In light of the Milev judgment recently delivered by the Court of Justice, are the provisions of EU directives on procedural rights being taken into consideration by national courts when interpreting national procedural law?*

Higher courts in Finland have not referred to the Milev judgment in their case-law. Considering that the procedural rights directives have not led to any major changes in Finnish legislation, it is reasonable to assume that the question has not emerged in the proceedings.

## **B.3. Effectiveness and adequacy of EU law on criminal procedure**

*8. In some cases, has the national legislator gone beyond the standard provided by EU directives?*

Concerning the directive 2010/64/EU, the Finnish legislation goes beyond what is required by the directive. The directive states that the essential documents that need to be translated include at least the decisions concerning the persons detention, indictments and judgments. The Finnish Criminal investigation act requires (section 13), that any relevant document or a

part of it in the investigation dossier is translated if it is necessary in order to supervise the rights of the accused. This was already the case before the directive was implemented.

*9. Do you think some procedural issues have not been addressed by EU directives/at EU level?*

We have no suggestions relevant to Finland at this time.

*10. To what extent do you think transposition gaps and persisting differences between the Member States may postpone/block cross-border cooperation in criminal matters, including the operation of mutual recognition instruments? If this occurred in the past, please explain which cross-border/mutual recognition measure was at stake*

From the Finnish perspective, this is not a problem.

*11. Has recent ECJ case law on mutual recognition measures impacted cross-border cooperation? Has the national law of your country conformed to the case law of the ECJ?*

As shown by the report which was drafted in the 1st stage of this study, the Finnish legislation on procedural matters conforms largely with EU measures and when there have been any questions, the Finnish courts have interpreted national provisions in harmony with EU law, including ECJ judgments.

### **C. Other domains that have not, or to a very little extent, been subject to harmonisation measures at EU level**

#### **Detention conditions**

*12. Does your criminal justice system provide for specific detention conditions (e.g. time-limits for custody or detention at each stage of the proceeding)?*

The Coercive Measures act (Pakkokeinolaki) 806/2011 includes detailed provisions on how long detention, arrest, etc. may be and who has the authority to order which measure, and what are the conditions under which those measures may be used.

According to section 11, the conditions for using detention are that there are probable reasons to suspect that the person has committed a crime and: 1. That the minimum sentence for the crime in question is at least 2 years; 2. The maximum penalty for the crime is at least 1 years and there are reasons to believe that the person would flee, destroy evidence or influence a witness or a crime partner or would continue the criminal activity; 3. The person is unknown and refuses to inform his or her name or address or gives false information; 4. He or she doesn't have an address in Finland and would escape the investigation or trial by leaving the country. Even if there does not exist probable reasons, the suspect may be detained if the other conditions are fulfilled and the detention is important because of expected additional information.

The police makes the initial assessment on the need of detention. The prosecutor then makes the request for detention, and the court finally decides on the detention. There is no set time-limit for pre-trial detention. If the charges have not yet been brought up, the court when deciding on the detention also sets a time limit for bringing up the charges. During the detention, the court must decide on whether the detention shall be continued, when the defendant requests (section 15). The court must release the person if the conditions for which she or he was held in detention, no longer exist (section 17).

The alternatives for using pre-trial detention are travel ban, enhanced travel ban (which includes a technical supervision of the travel ban and may also include an obligation to stay home minimum of 12 and maximum of 22 hours per day), and confinement (which includes an obligation to stay at home from 12 to 22 hours per day and is supervised with technical equipment, and may also include restrictions on leaving the town, obligation to contact the supervising authorities at given intervals etc.). Enhanced travel ban and confinement were added to the Coercive measures act in 2018 and they will only become effective from the beginning of 2019. The new methods were introduced as part of a legislation to introduce alternatives to pre-trial detention.

*12.1. If so, do differing/absence of similar conditions regulating detention regimes in other member states constitute a ground to refuse the execution of a mutual recognition instrument, such as the EAW?*

The Act on European Arrest Warrant (Laki rikoksen johdosta tapahtuvasta luovuttamisesta Suomen ja muiden Euroopan unionin jäsenvaltioiden välillä 1286/2003), sections 5 and 6 define the mandatory and optional (respectively) grounds for refusal of the arrest warrant. The grounds specified in the question are not among those included in these sections. However, section 5(1) point 6 states as a mandatory ground for refusal that there are reasons to believe that the person's human rights or due process rights, freedom of speech or freedom of association, would be violated. Arguably this could be used in such a case. However, no cases where this provision has been relied upon in such a case could be identified.

*12.2. Has the Aranyosi and Caldaru judgment impacted the decisions taken by the judicial authority of your country on the operation of the EAW? Have some EAWs been suspended/refused on those grounds by the judicial authorities of your country?*

The Finnish Supreme Court (KKO) examined this issue in the case 2017:11. The question was whether the applicant's transfer to Bulgaria would violate Section 5, point 6 of the Act on the European Arrest Warrant. In this case, the KKO assessed the question in light of the Aranyosi and Caldaru judgment and examined the prison conditions in the light of the ECtHR judgment in *Muršić v Croatia*. Due to these judgments, the KKO requested that the prosecutor present further evidence on the prison conditions that the applicant personally would be subject to. The court took into account the amount of living space per prisoner, which in this case was 3,8m<sup>2</sup>. In *Muršić v Croatia*, the ECtHR ruled that if the space per prisoner is less than 3m<sup>2</sup>, it creates a strong presumption that there would be a violation of article 3, and if the space is between 3-4m<sup>2</sup> it could be a violation of article 3 if other conditions are not sufficient. In this case however, the KKO held that the measures taken in the specific prison that the applicant would be held are sufficient to conclude that there is no concrete risk of inhuman or degrading treatment. The court stated that the evidence presented to it showed, that the Bulgarian authorities had undertaken construction work in order to improve the prison conditions so that it would fulfil the European standards. Also the court noted that the authorities had alleviated the problems caused by the crowding by adding possibility to go outside as well as organizing activities outside of the cells. There had also been concerns about violence in prison but the information from public sources indicated that the authorities had taken steps to address the matter. Based on these considerations, the KKO held that the prosecutor had shown that the applicant does not face a concrete risk of inhuman or degrading treatment.

*13. Does your criminal justice system take into account a custodial sentence (or part of it) already served in other EU state after a prisoner is transferred to your country?*

The Act on European Arrest Warrant, section 67, states that when the custodial sentence is pronounced by the court, the court must deduct the time served as a result of the EAW procedure.



The same section states, that if the transfer is made for the purpose of serving a custodial sentence, the prison officials must make the same deduction as mentioned above.

*14. Does your criminal justice system provide for a compensation regime for unjustified detention for the purpose of executing an EAW (e.g. in case of mistaken identity of the suspect/accused)? If so, could you please describe the features of such regime?*

The Act on Compensation from State Funds for the Arrest or Detention of an Innocent Person (Laki syyttömästi vangitulle tai tuomitulle valtion varoista vapauden menetyksen johdosta maksettavasta korvauksesta, 422/1974) regulates how a person is entitled to a compensation. This act does not specify EAW or other extradition measures. However, the Finnish supreme court held in its judgment 1991:155 that this act is also applied in such situations. In this judgment, the person had been extradited to Norway and even though the determination of guilt or innocence was the responsibility of Norwegian authorities, the person was entitled to compensation from Finnish authorities. In light of this judgment, if the Finnish authorities would mistakenly arrest someone for the purpose of executing EAW, this same act would be applied.

The Act, section 1, states that the person who has been arrested or detained has the right to a compensation if: 1. the investigation is ended without any charges being filed; 2. the charges are dismissed; 3. He has been found guilty of a crime but it is obvious that based on this he could not have been arrested or detained; 4. There has not been a legal basis for arrest or detention. These will also apply from 2019 to travel ban, enhanced travel ban and confinement (see question 12). The compensation needs to be applied within six months after the person in question has received information that charges are not brought up or have been dismissed or the judgment has become final or the judgment has been voided (section 5). The compensation is applied from state treasury. The compensation can cover the expenses and loss of income during the arrest or detention, suffering caused by it, and the expenses for applying the compensation. The act does not specify particular sums to be paid. The state treasury compensates based on the application of the person and it is affected to a great extent by the length of the detention, publicity of the case and personal circumstances. For a shorter detention, the normal rate has been around 100-120€/day. For a more public cases with longer detentions the compensations may be tens of thousands of euros.

*15. What would you recommend as further action for EU institutions in the area of detention (e.g. action for failure to act, harmonisation measures, etc.)?*

We have no recommendation based on the Finnish experience.

Evidence gathering and admissibility

*16. Were negotiations on the European Investigation Order hindered and/or slowed down by the existence of different rules in evidence gathering and admissibility?*

The conflict that the Finnish system had with the directive in the negotiations stage was that in the Finnish system it is the police (or border guard or customs in certain cases) that leads the investigation. This conflicted with the initial proposal of the directive, that the investigation order is issued by a judge, a court, an investigative judge, or public prosecutor (currently Article 2(4)(i) of the directive). In the final stage, the directive included an option (Article 2(4)(ii) of the directive) where another official may issue the order, but it must be confirmed by an authority referred to in 2(4)(i). In Finnish transposing legislation this was resolved so that the order is issued by investigative authorities in Finnish legislation, and it is confirmed by a public prosecutor.

*17. Is evidence gathered in another EU state admissible in criminal proceedings in your country? If so, must evidence conform to domestic rules on evidence gathering?*

In general, it is up to the court to determine what evidence it admits and what not, and what kind of weight it gives to the evidence. There are very few limitations on the admissibility of evidence in Finnish proceedings. Chapter 17 of the Code of judicial procedure (oikeudenkäymiskaari 4/1734) regulates evidence in judicial proceedings and it does not impose many conditions on what kind of evidence may be used.

*18. Which authority is in charge of reviewing how evidence has been gathered in the other EU state?*

The free admissibility of evidence means this is not particularly relevant to Finland. The review of evidence takes place during judicial proceedings (the judges are entitled to decide, with few limitations (see below), how to treat evidence).

There are no specific rules concerning admissibility of evidence in proceedings with transnational elements. The principle of free admissibility of evidence allows for the court to take into consideration the evidence presented to it. The method of collecting evidence may be taken into account by the court when assessing the value of the evidence in the judgment but there are only two absolute prohibitions for the use of evidence as stated below in question 19. In this sense, the rules on evidence gathered abroad do not differ from the ones gathered in Finland.

The code of Judicial procedure, chapter 17, section 24 states that in general, a statement made by the witness in the investigations phase may not be used in the court proceedings, unless the person who has made this statement may not be heard in the trial. This also applies to when the witnesses living abroad. The main rule however is, that the witnesses should be present at the trial and it is for the court to do what it can in order to achieve this.

*19. Can evidence that is gathered unlawfully or may entail a breach of fundamental rights be used during the trial? If not, are there exceptions to this rule?*

Before 2016, there was virtually no regulation on what kind of evidence was or was not allowed in the court. In the beginning of 2016 the Code of Judicial procedure (Oikeudenkäymiskaari 4/1734) was amended to include a provision that prevents certain evidence from being used. Chapter 17, section 25 contains two absolute prohibitions and one conditional. Section 25(1) states, that evidence which has been acquired by the use of torture may not be used. Section 25(2) states that evidence acquired in the breach of a person's right not to self-incriminate, may not be used. Section 25(3) states that in other cases the court may use evidence gathered illegally, unless the use of such evidence would endanger the right to a fair trial when taking into account the nature of the case, the seriousness of the violation that led to the acquisition of the evidence, the impact of the mean of acquisition to the credibility of the evidence, the importance of the evidence concerning the case, and other circumstances.

Even though there was no regulation on what evidence may be used, there were some limitations set by the case-law of the KKK and the European Court of Human Rights. For example in the KKO case 2012:45, the court held that the applicant had not waived his right to an attorney and therefore the statements made by the applicant in the police interview were not admissible as an evidence against him. Before the 2016 amendment, the question of admissibility of an evidence was determined on a case-by-case basis by the courts. The government proposal for the amendment stated, that the free admissibility of evidence has been the main rule and all the evidence should be allowed to be presented in the court and it is up to the court to decide what value to give to the evidence. However, because of the case-law and the development of human rights, it was seen as necessary to include these two absolute prohibitions in the Code of judicial procedure.

There are also certain limitations on giving oral testimony in the proceedings. The Code of Judicial procedure, chapter 17 sets some limitations on what is allowed as an oral testimony. For example, what is said in deliberations between judges may not be used in the proceedings, what an interpreter or an attorney has heard from their client or an information obtained by a doctor are also not subject to testimony. In certain cases, the court may compel a witness to testify taking into account the gravity of the crime in question. Only the prohibition to testify by the attorney (and the interpreter) and a priest or other religious person regarding what is said in the confession, is absolute (sections 13 and 16 respectively). There are also several cases where a person is allowed to decline from testifying, e.g. the spouse of the defendant.

*20. To what extent do you think differing rules on gathering and admissibility of evidence have constituted obstacles to the operation of mutual recognition instruments, including in the case of the EAW?*

For Finland, this is not typically an issue for the reasons specified above.

### **Criteria allocating jurisdiction**

*21. To what extent the absence of binding criteria allocating jurisdiction hinders cross-border cooperation?*

The relatively recent processes reforming the Eurojust and establishing the EPPO did not provide any official position on this matter of which we are aware beyond that discussed below. The predictability and transparency of the models has been the focus of academic research, especially the doctoral thesis of Dan Helenius (*Straffrättslig jurisdiktion, Suomalainen Lakimiesyhdistys 2014*). This can be achieved even without binding criteria as such.

*22. Do you think we should adopt an EU instrument that goes beyond existing measures and Eurojust's competence in the field (e.g. Framework Decision 2009/948/JHA on conflicts of jurisdiction)?*

The position of Finland has been – and is – that it is important that the amendments to Eurojust's competence are finalized. Finland has stated that the current competences of Eurojust are inefficient and should be updated to correspond to the possibilities offered by the Lisbon treaty.

### **Victims**

*23. What kind of protection measures are available for victims in your legal system? What is their nature (criminal measure, civil measure or both)?*

The victims may be allowed to resort to protective measures during the trial (in order to protect the identity etc.), may be offered protection by the officials during investigation and trial. The victim may also ask for their personal information to be kept secret (i.e. no one except for the officials would have access to their information and for example they would not appear in phone directories etc.) or a restraining order, or even may request to change their name and social security number.

These measures can be classified as administrative as well as criminal measures in nature.

*24. Does your legal system foresee a compensation mechanism for victims of crime?*

Victims may request compensation from the perpetrator in the criminal proceedings. If the victim allows, the prosecutor may demand it on their behalf in court. In case of violence or sexual assault cases, the victim may also be entitled to compensation from the State treasury under certain conditions. The compensation awarded to victims is meant to cover the actual damages (material or mental) caused by the crime, Finnish legislation does not recognize punitive damages which are better known in common law systems. This means that the compensation should reflect the actual harm occurred.

The victim must demand compensation during the investigation or at the latest during the trial. The victim has the right to demand compensation for broken/missing property, doctors and medical expenses, pain and suffering and in some cases mental suffering.

Criminal Procedure Act (Laki oikeudenkäynneistä rikosasioissa 11.7.1997/689), Chapter 3, deals with civil claims in criminal proceedings. Civil claim may also be demanded in a civil procedure, however if the two claims are dealt with at the same time, the court may order them to be dealt with in the same proceedings. As per section 10, the court must reserve, to the injured party, an opportunity to present their claim in writing to the court.

If the victim of a crime has a claim in the trial, he or she will be appointed an attorney. Apart from most other forms of legal aid, the expenses of the attorney will be paid by the government regardless of the victim's financial situation.

In certain cases, the victims of a crime may request compensation from State treasury. This is regulated in the Act on Compensation of Crime Damage (Rikosvahinkolaki, 935/1973). These cases concern personal injuries suffered as a result of a crime. It is not necessary for the crime to be tried in a court for this act to apply. The compensation in these cases is secondary in nature, i.e. other possible means of compensation gained e.g. from the perpetrator or insurance company is deducted from the compensation. The time limit for applying this compensation is three years starting from the court judgment or if the crime has not been tried in court, within 10 years starting from the perpetration of the crime.

*25. Have you ever been involved in the cross-border recognition and implementation of a protection measure? If so, on which EU instrument did you rely: Directive on the European Protection Order (EPO – criminal matters) or Regulation on protection measures in civil matters?*

No.

*26. Have you ever issued an EPO where the issued protection measure was not available in the legal order of the executing state? If so, what happened?*

No.

*27. How would you make the EPO more effective? Could you identify issues not/insufficiently addressed in the directive that should be further developed/included?*

The question of why the EPO has not been relied on more is a difficult one. However, couple of potential answers have been identified. Firstly, that the scope of application of the directive is not sufficiently clear, which could lead to issues of compatibility between national implementation. Secondly, that protection measures in national laws differ considerably and in important aspects between the Member States. Thirdly, in the Finnish context, the general problems with effectiveness of protection measures have been seen as a problem.

*28. Has the implementation of the 2012 directive on victims' rights had a positive effect on the amount of issued/executed protection measures, including EPOs?*

The statistics of issued EPOs could not be found. However, the amount of restraining orders has declined from the almost 2000 in the year 2013 to around 1500 in 2017.

*29. Have gaps persisted in the implementation of Directive 2004/80/EC on compensation of victims and Directive 2012/29/EU on victims' rights?*

Finland was one of the 15 States implementing the Directive 2004/80 on time and as far as we know there have been no gaps identified since the 2009 review by the Commission. In this data only 7 cases were identified as deciding/assisting authority. The Commission review does not offer any insights into the nature or the content of the cases except for the fact that from these 7 cases, Finland had acted as assisting authority in 6 cases and as deciding authority in 1 case.

As regards Directive 2012/29, this was implemented with changes which entered into force in Finland 1.3.2016. We are not aware of gaps in implementation (see the government bill, HE 66/2015, for details).

As of March 2018 the Ministry of Justice is conducting a project on developing good practices in recognising the needs of crime victims. The project is expected to conclude in September 2018.

*30. Have you identified weaknesses and gaps in the previously mentioned instruments and how would you make them more effective? Do you think new instruments on victims' rights should be tabled by the EU?*

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#### **Other areas of concern**

*31. Were negotiations on the European Public Prosecutor Office hindered and/or slowed down by the presence of differences in national procedural criminal laws?*

It should be said that generally the position of Finland was that the regulation should not contain detailed provisions on investigative powers and evidence. An issue which was seen as a potential problem in Finland was the role of the prosecutor in the investigation stage. In Finland, the investigation is led by a senior police, customs or border guard official. A prosecutor leads investigations only in cases where a police officer is suspected of a crime. In the original EPPO proposal, it was evident from the wording that the prosecutor would lead the investigation. Although the wording was later changed from 'shall be led' to 'shall be responsible', this was still seen as unclear and potentially conflicting with the Finnish system. The Legal Affairs committee insisted that the regulation should be such that it would be compatible with the Finnish system of the relationship between the prosecutor and investigative officials without the need for changes in legislation. As the negotiations have progressed, these have been further clarified in the text, and the most recent version considered by the Finnish Parliament would not seem require any changes to Finnish legislation on this point. The legal affairs committee however stressed that this needs to be the case for the proposal to be acceptable to Finland.

Another initially problematic issue from Finland's standpoint concerned the provisions on investigative measures. The original catalogue of measures that were to be available to the EPPO was very broad and included measures that are only available for certain serious offences according to Finnish legislation (e.g. interception of electronic communications and covert operations). The proposal would thus have required broadening the current scope of certain coercive measures, which was regarded as problematic.

The proposal was, however, developed in a positive direction from Finland's point of view, i.e. by making it possible to subject the more intrusive measures to further conditions and limitations as provided for by national law. The current wording of article 25 on investigation measures and other measures seems to be sufficiently flexible so that Finland would not have

to expand the pre-requisites for the use of any coercive measures according to its national legislation.

*32. Please mention any other points of concern (linked to differences in national criminal procedures/procedural rights) that hindered or may hinder cross-border cooperation in criminal matters. If you think that differences in the articulation of competences between relevant bodies (e.g. judges, prosecutors, police, lawyers, etc.), in absentia trials, might hinder cross-border cooperation in criminal matters, please elaborate.*

For Finland, the very liberal approach to evidence means cross-border cooperation is not generally problematic.

As regards in absentia trials, according to Criminal Procedures Act, the trial may not be started if the defendant has not arrived to court. This means that trials in absentia are not possible in Finnish criminal proceedings. There are three exceptions to this rule however. Chapter 8, section 11 states that it is possible to complete the trial if the defendant is not present and he or she has been invited and told that the trial may be conducted even without his or her presence. In these cases, the defendant may be sentenced to fine, a prison sentence of maximum three months and forfeiture up to 10 000 euros. Section 12 states that the case may be tried without the defendant present if the defendant has consented to this and his or her presence is not necessary. In these cases the defendant may be sentenced to prison sentence not exceeding six months. Section 13 re-iterates that a person may not be sentenced to prison in absentia except for the cases described in section 11 and 13. However, it allows for the court of appeal to sentence a person to prison if that person is clearly evading the proceedings and his or her presence is not necessary, defendant's defence has been properly conducted during the trial in the first instance and the defendant has been informed of the possibility that the case may be tried in his or her absence.

The Finnish implementing act on European Arrest Warrant, section 6a, lists a trial in absentia as an optional basis for refusing surrender. It lists 5 situations where the surrender is however granted:

- The defendant had been given a subpoena containing the information on the proceedings in due time and had been informed that the trial may be concluded in his or her absence
- Had in other ways received an official information on the proceedings in a way that it is beyond doubt that he or she was aware of the proceedings and that the trial may be concluded in his or her absence
- Had authorized an attorney to represent him or her in the trial and the attorney had in fact done so
- Had clearly stated not to contest the judgment or request a re-trial after receiving information on the judgment and he had clearly been advised to his right to appeal or request a re-trial
- Has not personally received information on the judgment but will be given it after the surrender along with information on his or her right to appeal or re-trial and conditions relating to it.

#### **D. Conclusion and policy recommendations you may have, including areas where you would recommend to intervene and how**

*33. Should the EU legislator intervene beyond the scope of the minimum standards provided by the set of directives adopted in the field of procedural criminal law?*

From the perspective of the Finnish legal system, an exclusionary principle (excluding evidence which has been collected without a lawful basis) would be a novel development and may add value to the pre-existing system. This is particularly important when overlapping

administrative, regulatory and criminal investigations or information gathering and sharing is involved, and where evidence or information which could not have been collected in the context of a criminal investigation nevertheless is available during such a process. Although national law was recently changed so as to require exclusion in certain circumstances, it is not clear that evidence used in the criminal process must always be collected using the same safeguards. It is a personal opinion and is not, as far as the authors are aware, an official national position. The law in force in Finland reflects the reverse (i.e. broad admissibility of evidence, except in limited circumstances).

*34. If so, what kind of action should be taken at EU level and in which area(s)? Please explain your choice and possible obstacles that the EU may encounter*

Clearly this will have to begin with studies focusing on the extent to which evidence and information is excludable and/or must be excluded from criminal proceedings, and the extent to which evidence and information collected unlawfully or for other purposes becomes available in criminal investigations and proceedings.

Section 6a was added to implement the Framework decision 2009/299/JHA enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial.





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