EUROPEAN STUDIES

Élodie Sellier
Anne Weyembergh (eds.)

CRIMINAL PROCEDURES AND CROSS-BORDER COOPERATION IN THE EU AREA OF CRIMINAL JUSTICE

Together but apart?

Éditions de l'Université de Bruxelles

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[1] https://www.europarl.europa.eu/thinktank/fr/document.html?reference=IPOL_STU%282018%29604977.

Foreword

This volume started as a study commissioned by the LIBE Committee of the European Parliament to Anne Weyembergh and Élodie Sellier in 2018, who sought to assess how differences in national criminal procedures impact EU cross-border cooperation in criminal matters. The goal of the project was to identify new areas of priorities for the (then upcoming) European Commission and offer recommendations in this respect, building on a comparative analysis of criminal procedures in nine member states. It was submitted in July 2018 and published in August 2018. In 2019, the authors decided to transform this study into an edited volume. The several contributions were revised, updated and adapted to a book format. The resulting product is a powerful tool for understanding what may be called the third phase of cooperation in criminal justice in the European Union.

In the first stage, between the treaties of Maastricht and Amsterdam, judicial cooperation was seen as a mere 'matter of common interest' in the ambit of the Third Pillar, which, at the legislative level, translated into little more than the adoption of instruments aiming at simplifying the application of the Council of Europe conventions. This legal-political framework was superseded by the concept of mutual recognition within the area of freedom, security and justice proclaimed by the Treaty of Amsterdam. A second phase thus started, which had its most emblematic and prototypical concretisation in the European arrest warrant (EAW). The new approach was underpinned by the purpose of replicating, in the field of cooperation in criminal matters, the so-called 'free circulation of judicial decisions' that flows as a logical consequence from the protection of the five freedoms in the internal market. However, after an initial period of fascination with the possibility of merging the two common areas, the fundamentally different nature of criminal justice has put limits to such transplant, calling for separate rules regarding judicial cooperation in this field. In the current stage of legal integration, foreign decisions on criminal matters are not directly enforceable, because the area of freedom, security and justice does not embody a general clause allowing for extraterritorial

(pan-European) *executive* jurisdiction. Foreign decisions require the mediation of *constitutive* decisions to be taken by the executing Member State (e.g., the decision on whether or not to collect the requested evidence, or to arrest and surrender the individual sought by the issuing State). Strictly speaking, the object of recognition is not the foreign decision, but the *claim* that it expresses.

In the said mediation, the authorities of the executing Member State will apply not only European law, but also the domestic (and international) rules binding on them, while remaining responsible and accountable, *inter alia*, for the protection of fundamental rights. Even when they are bound by common rules (under European or international law), they often interpret them in different ways, under the influence of several local factors (legal culture, history, financial constraints, etc.). The acknowledgment of the autonomy of cooperation in criminal matters vis-à-vis the logic of the internal market, both at the normative and empirical level, and the added complexity embedded in this framework may not mean a revolution as dramatic as the one brought by mutual recognition, but they are not less important. In my view, they inaugurate what can be deemed a third stage of judicial cooperation in the EU, focussed on the harmonisation of certain rules of procedural and executive law on which cooperation ultimately depends.

This book crucially anticipates the need for further work in 'nine areas of friction' where that tension between domestic, EU and international law, together with divergent practices, can somehow hinder cooperation; in particular, one should high-light the topics 'admissibility of evidence' and 'pre-detention and detention conditions', because they illustrate well the legal and empirical 'disharmony' that may affect cooperation.

In the absence of EU standards, differences in national laws governing evidence admissibility lead the authorities of the trial country to either find evidence inadmissible, or to simply refrain from looking at how it was gathered by the authorities of the country where it was collected ('non-inquiry'), which can easily lead to a race to the bottom in evidence admissibility standards. In either case, cooperation cannot be deemed satisfactory.

Differences on pre-trial detention procedures and detention conditions can also hamper on the application of the European Arrest Warrant. As regards the former, the main issue seems to be the differing understandings between common law and civil law systems on the need to apply pre-trial detention. The preference for bail in common law countries, as well as the divergences in how Member States are applying the case-law of the Court of Justice regarding detention conditions (namely in *Aranyosi / Căldăraru*), have prevented the execution of some warrants. In this field, one would say that further work on common standards is crucial in order to improve trust and, consequently, cooperation.

At a time when EU action in the field of cooperation in criminal matters (and criminal law in general) seems to need a new breath, the richness of the information and the thoughtful analysis provided in this volume, together with the policy-oriented matrix of the study, will certainly attract the reflection of policymakers and other stakeholders.

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List of abbreviations

AFSJ	Area of Freedom, Security and Justice
CCP	Code of Criminal Procedure
CISA	Convention Implementing the Schengen Agreement
CoE	Council of Europe
FRA	Fundamental Rights Agency
FL	Fundamental Law (2012) Hungarian Constitution
EAW	European Arrest Warrant
EC	European Commission
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EIGE	European Institute for Gender Equality
EIO	European Investigation Order
EJTN	European Judicial Training Network
EP	European Parliament
EPM	European Protection Measures
EPO	European Protection Order
EPPO	European Public Prosecutor's Office
ESO	European Supervision Order
EU	European Union
FD	Framework Decision
HCC	Hungarian Constitutional Court
INTCEN	European Union Intelligence Centre

JIT	Joint Investigation Teams
MAA	Mutual Administrative Assistance
MLA	Mutual Legal Assistance
MR	Mutual Recognition
MS	Member State(s)
OJ	Official Journal
OLAF	Office européen de lutte antifraude (EU anti-fraud office)
PIF	Protection des intérêts financiers (Protection of financial interests)
PO	Protection Order
PTD	Pre-trial Detention
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union

Introduction

Élodie Sellier and Anne Weyembergh

I. Background and objectives of the research[1]

For the past decade, the *modus operandi* of cross-border cooperation in the field of EU criminal law has been premised on the principle of mutual recognition (MR). Its operation presupposes the acceptance of mutual trust between the – as yet diverse – legal systems of the Member States. The Court of Justice of the EU (CJEU) acknowledged the existence of differences between national orders but noted that these should not prejudice mutual trust. Pursuant to this principle, each Member State "recognises the criminal law in force in other Member States even when the outcome would be different *if* its own national law were applied".[2] Moreover, in its controversial *Opinion 2/13*, the CJEU added that mutual trust is a principle "of fundamental importance in EU law … that allows an area without internal borders to be created and maintained".[3] As noted elsewhere, this resulted in the establishment of "a comprehensive system whereby national judicial decisions in criminal matters are recognised and executed across the EU quasi-automatically, with a minimum of formality and with the aim of speedy execution".[4] That being said, ensuring effective prosecutions was never the sole objective of mutual recognition (MR). MR was designed "not only to strengthen cooperation between Member States but also to enhance the protection of individual rights".[5] Its implementation hinges on the mutual trust of Member States in each

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[1] This comparative research draws on the findings of a study entitled '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' (PE 604.977) prepared for the European Parliament in June 2018. It is available for free and can be downloaded via the following link: https://www.europarl.europa.eu/thinktank/fr/document.html?reference=IPOL_STU%282018%29604977.

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[2] C-187/01, *Gözütok and Brügge*, 11 February 2003 EU:C:2003:87, paras. 32-33.

[3] Opinion 2/13 of the Court on Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms, 18 December 2014, EU:C:2014:2454, para. 191.

[4] V. Mitsilegas, *EU Criminal Law after Lisbon: Rights, Trust and the Transformation of Justice in Europe*, Oxford/Portland, Hart Publishing, 2016, 124.

[5] Programme of measures to implement the principle of mutual recognition of decisions in criminal matters, *OJ*, No. C 12, 15 January 2001, 1.

other's criminal justice systems and that trust "is grounded, in particular, on their shared commitment to the principles of freedom, democracy and respect for human rights, fundamental freedoms and the rule of law".[6]

This notwithstanding, multiple calls for EU action in the field of the rights of suspects and accused persons arose after the adoption in 2002 of the EU's flagship mutual recognition measure of EU criminal law, namely the European Arrest Warrant (EAW).[7] Despite the significant impact on the rights of individuals arising from the multiplication of EAWs,[8] along with the establishment of accelerated and simplified procedures for the recognition of judicial decisions, fundamental rights never featured as an explicit ground for refusal in the EAW Framework Decision (FD). Whereas some authors criticised the mutual trust principle for being eponymous with "blind faith",[9] it is noteworthy that all Member States examined for the purpose of this study incorporated a more or less explicit fundamental rights ground for refusal in the national laws transposing the EAW FD.

In 2001, a Framework Decision was adopted to establish minimum rights on the standing of victims.[10] The Commission went on with a Green Paper on procedural safeguards in 2003, this time for suspects and defendants.[11] Finally, the Commission put forward a proposal for a Council Framework Decision on certain procedural rights in criminal proceedings throughout the European Union in 2004.[12] The proposed FD sought to establish minimum standards covering suspects' and defendants' rights, and contained provisions on the right to free translation and interpretation, the right to legal advice (including legal aid), the right to communication and/or consular assistance, the right to specific attention for persons who cannot understand the proceedings and the right to information. Despite the relatively modest scope of its provisions (i.e. only aiming at minimum standards), the proposal gave rise to heated debates among the Member States. Opponents invoked, *inter alia*, the lack of legal basis in the Treaties for such a proposal and its potentially far-reaching

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[6] *Ibid.* See also Tampere European Summit, Presidency Conclusions, 15 and 16 October 1999, SN 200/99, para. 33: 'Enhanced MR of judicial decisions and judgements and the necessary approximation of legislation would facilitate co-operation between authorities and the judicial protection of individual rights'.

[7] V. Mitsilegas, *EU Criminal Law after Lisbon*, *Rights, Trust, and the Transformation of Criminal Justice in Europe* (above, n4).

[8] For an analysis of the multiple infringements to human rights caused by the operation of EAWs, see A. Weyembergh, I. Armada, C. Brière, 'Critical Assessment of the Existing European Arrest Warrant Framework Decision', 2014, Research Paper for DG EPRS, European Parliament.

[9] S. Peers, *EU Justice and Home Affairs Law*, Oxford, Oxford University Press, 2016, 160.

[10] Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings, 2001/220/JHA, *OJ*, No. L 82, 22 March 2001.

[11] Commission 'Green Paper on Procedural Safeguards for Suspects and Defendants in Criminal Proceedings', COM (2003) 75 final, 19 February 2003.

[12] Commission 'Proposal for a Council Framework Decision on certain procedural rights in criminal proceedings throughout the European Union' COM (2004) 328 final, 28 April 2004.

encroachments into national criminal justice systems[13], in particular into the legal balance between the pursuit of security and the protection of fundamental rights.[14] The staunch opposition of Member States, added to the rule of unanimity in decision-making under the Third Pillar, had the effect of delaying negotiations and significantly watering down the FD provisions, to the point where it became impossible to reach an agreement.

To address the fundamental rights concerns arising from the increasing use of mutual recognition and cross-border cooperation instruments, the Lisbon Treaty conferred an express competence to the EU under Article 82(2) Treaty on the Functioning of the European Union (TFEU) for the adoption of minimum standards in the field of domestic procedural criminal law, thus replacing the vague power of Article 31(1)(c) of the old Treaty on "ensuring compatibility in rules applicable in the Member States, as may be necessary to improve such cooperation".[15] As a result of the communautarisation of the Third Pillar by the Lisbon Treaty, a distinctive feature of Article 82(2) TFEU is that it applied the ordinary legislative procedure as the standard decision-making method in lieu of the prior rule of unanimity in the Council with the consultation of the European Parliament.

Despite a substantial increase in the EU's margin for manoeuvre in the ambit of procedural law, two points of caution should be raised. First, an emergency brake rule was inserted under Article 82(3) TFEU, allowing Member States to put an end to discussions when a measure proposed under Article 82(2) TFEU "would affect fundamental aspects of its criminal justice system", thus reflecting the particularly sensitive dimension of the field. Second, EU competence exists only 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". In other words, the approximation of criminal procedures is not an end in itself but rather a means to facilitate or achieve mutual recognition and cooperation in criminal matters more broadly. It is therefore believed that conferring an EU competence to set minimum requirements in the field of procedural criminal laws will enhance trust among the EU States involved, and, *in fine*, facilitate the operation of mutual recognition instruments.[16] Emphasis on the rights of individuals feeds into the broader momentum of a more values-based approach to EU criminal law, as demonstrated by the integration of the Charter of Fundamental Rights into primary law by the Lisbon Treaty. The Charter of Fundamental Rights has proved a

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[13] T. Spronken, 'Effective Defence: The Letter of Rights and the Salduz-directive', *in* G. Vermeuleun (ed.), *Defence Rights: International and European Developments*, Antwerp, Maklu, 2012, 86.

[14] Mitsilegas (above, n4).

[15] Consolidated version of the Treaty on European Union, 2002, *OJ*, No. C 325/5, 24 December 2002.

[16] On the articulation between mutual trust, mutual recognition and the competence conferred on the EU under Art. 82(2) TFEU, see P. Asp, 'European criminal and national criminal law', *in* V. Mitsilegas, M. Bergström, T. Konstadinides, *Research handbook on EU criminal law*, Cheltenham/Northampton, Edward Elgar Publishing, 2016, 331.

useful tool not only to interpret several provisions of EU law,[17] but also to bring EU human rights policies closer to European Convention on Human Rights (ECHR) standards.[18] Hence, the right to a fair trial under Article 6 ECHR also appears in Article 47 of the Charter of Fundamental Rights , along with Article 48 on the rights of the defence. In a similar vein, the CJEU confirmed in its case law that Article 6 of the Charter of Fundamental Rights incorporates ECHR standards on detention.[19]

The adoption of a roadmap on the procedural rights of suspects and defendants in 2009 under the leadership of the then Swedish Presidency of the EU gave a much-needed impetus for the adoption of an unprecedented and growing body of legislation in this area. Despite the many qualms about harmonisation of national law in such a 'sensitive and distinctive' field,[20] thus far six directives have been adopted on the rights of suspects and defendants. These include, in chronological order:

(i) Directive 2010/64/EU on the right to interpretation and translation;
(ii) Directive 2012/13/EU on the right to information;
(iii) Directive 2013/48/EU on the right to access to a lawyer and the right to have a third party informed upon deprivation of liberty and to communicate with relatives and consular authorities while deprived of liberty;
(iv) 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;
(v) Directive 2016/800/EU on safeguards for children in criminal proceedings; and
(vi) Directive 2016/1919/EU on the right to legal aid.

All six directives apply to suspects and accused persons on the one hand, as well as arrested and detained persons on the other hand, from the pre-trial stage to the end of the criminal proceedings and provide specific provisions for European Arrest Warrant proceedings. Another roadmap released in 2011 on victims' rights resulted in the adoption of Directive 2012/29/EU (hereafter, the Victims' Rights Directive), establishing a comprehensive set of minimum standards on the rights, support and protection of victims of crime, thus repealing the aforementioned Framework Decision of 2001.

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[17] Directive 2016/343/EU strengthening certain aspects of the presumption of innocence was interpreted in the *Milev* case in light of Article 48(1) of the Charter of Fundamental Rights. See, C-439/16 PPU, *Emil Milev*, 27 October 2016, EU:C:2016:818.

[18] According to the explanations relating to the Charter of Fundamental Rights, several provisions have the same meaning and scope as ECHR case law. Art. 48(1) of the Charter for example mirrors Art. 6(1) of the Convention.

[19] C-237/15 PPU, *Lanigan*, 16 July 2015, EU:C:2015:474.

[20] *Ibid.*

Despite the adoption of a body of legislation, this research purports to go beyond the realm of procedural rights where approximation has already been launched. Indeed, it aims to identify areas in which differences between national criminal procedures affect the functioning of both cooperation instruments and actors. This shift in the focus of the research is based on the empirical observation that the current framework on procedural rights is incomplete and needs to be further developed. Several limitations are inherent to the scope of Article 82(2) TFEU itself, which only purports to achieve a common denominator at a rather minimum level, thus leaving the door open to the persistence of divergences between national criminal procedural laws.[21] For instance, one may wonder why a specific reference to EAW proceedings was inserted under five out of six of these procedural rights directives and other cooperation instruments were left aside. This raises the question as to whether EU directives are 'fit for the purpose' in the sense of fulfilling their objective of facilitating mutual recognition in the absence of dedicated provisions spelling out how they should be interpreted in cooperation frameworks involving measures other than EAW FD. Administrative proceedings were excluded from the scope of EU directives despite the widening of cooperation frameworks in recent years to assign a central role to other, non-judicial actors.[22] Alongside limitations in terms of scope, the difficulty in finding a consensus on the provisions of some of the most contentious measures, such as the Access to a Lawyer Directive, sometimes resulted in broadly formulated provisions as well as the retention of a wide margin of discretion for the Member States.

In spite of these shortcomings, this research does not recommend a revision of EU directives in the near future. The transposition period has expired for all of them,[23] but they have suffered from transposition delays,[24] and from some incorrect transpositions. Instead, this study explores where and how additional instruments could act as a complement to the current framework of approximation, by focusing on crucial areas of cross-border cooperation which were insufficiently tackled or simply left unaddressed. As such, it feeds into current debates which, against the background of intense legislative activity in criminal matters,[25] question whether

[21] ECHR minimum standards, for example, were never fully implemented, or complied with by the Member States. However, in the case of ECHR, it is rather the lack of incentives for compliance, together with the absence of a proper enforcement mechanism established by the European Court of Human Rights that account for the persistence of disparities among criminal procedural laws.

[22] For example, the EIO Directive provides that administrative or any other competent authorities may be involved either in the issuing (with some restrictions) or the execution of EIOs (Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters, *OJ*, No. L 130, 1 May 2014).

[23] The last directives to be transposed were the Safeguards for Children and Legal Directives (on 11 June 2019 and 25 May 2019 respectively).

[24] Such as the Access to a Lawyer Directive and the Victims' Rights Directive.

[25] As evidenced by the adoption of the European Investigation Order, the adoption of a Regulation on the European Public Prosecutor's Office in October 2017 (Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO'), *OJ*, No. L 283, 31 October 2017),

further harmonisation efforts should be undertaken in the field of criminal procedure approximation to support the operation of mutual recognition instruments and allow effective cross-border cooperation in criminal matters.[26]

II. Literature review

The scope of this book feeds into an ever-expanding literature in the realm of EU criminal procedural law. Several authors have addressed the interplay between approximation of national criminal procedures and mutual recognition since the adoption of several cooperation instruments at the beginning of the 2000s.[27] Some emphasised the difficulty of reconciling effective cooperation in criminal matters and the diversity of legal traditions, either by following a 'theme-by-theme' methodology[28] or by putting national approaches into a comparative perspective.[29] Others focused more specifically on the difficulty of striking a balance between ensuring effective cooperation through the adoption of several mutual recognition instruments while, at the same time, ensuring respect for fundamental rights and enhancing mutual trust.[30]

Previous studies on procedural rights assessing the feasibility of the numerous instruments and proposals contained in the roadmap should be mentioned, in particular academic projects coordinated by Taru Spronken and Gert Vermeulen,[31] as well as

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and of Regulation (EU) 2018 / 1805 of 14 November 2018 on the mutual recognition of freezing orders and confiscation orders, *OJ*, No. L 303, 28 November. 2018 and a proposal for a Regulation and a Directive on cross-border access to electronic evidence (Proposal for a Regulation of the European Parliament and of the Council on European Production and Preservation Orders for electronic evidence in criminal matters COM (2018) 225 final, 17.4.2018. Proposal for a Directive of the European Parliament and of the Council laying down harmonised rules on the appointment of legal representatives for the purpose of gathering evidence in criminal proceedings, COM (2018) 226 final, 17.4.2018.).

[26] See the paper presented by ECBA President Holger Matt at the 2017 ECBA spring conference. Retrieved at: www.ecba.org/extdocserv/conferences/prague2017/ECBAAgenda2020NewRoadmap.pdf.

[27] Especially, A. Weyembergh, *L'harmonisation des législations : condition de l'espace pénal européen et révélateur de ses tensions*, Bruxelles, Éditions de l'Université de Bruxelles, 2004.

[28] On transnational investigations, see S. Ruggeri (ed.), *Transnational Evidence and Multicultural Inquiries in Europe*, Heidelberg, Springer, 2014; S. Ruggeri, *Transnational Inquiries and the Protection of Fundamental Rights in Criminal Proceedings*, Heidelberg, Springer, 2014; on the transfer of prisoners, see T. Marguery (ed.), *Mutual Trust under Pressure: The Transferring of Sentenced Persons in the EU*, Oisterwijk, Wolf Publishers, 2018.

[29] T. Wahl, 'The perception of the principle of mutual recognition of judicial decisions in criminal matters in Germany', *in* G. Vernimmen-Van Tiggelen, L. Surano, A. Weyembergh (eds.), *The future of mutual recognition in criminal matters in the European Union*, Bruxelles, Éditions de l'Université de Bruxelles, 2009, 115, 147; A.-G. Zarza, 'Mutual recognition in criminal matters in Spain', *in ibid*., 189, 219.

[30] A. Erbežnik, 'Mutual Recognition in EU Criminal Law and Fundamental Rights-The Necessity for a Sensitive Approach', *in* C. Brière, A. Weyembergh (eds.), *The Needed Balances in EU Criminal Law, Past, Present and Future,*Oxford/Portland, Hart Publishing, 2018.

[31] See in particular two major studies conducted during the pre-Lisbon era on the potential for harmonisation of procedural criminal laws across the Union on the basis of the 2004 Proposal for a Framework Decision on certain procedural rights in criminal proceedings throughout the

those comparing national criminal procedures.[32] Other comparative works focused on evidence and procedural criminal law carried out in the run-up to the establishment of a European Public Prosecutor's Office, those coordinated by the Max Planck Institute,[33] alongside those coordinated[34] and edited by Katalin Ligeti in particular.[35] Another strand of the literature puts a more narrow emphasis on either specific procedural safeguards, such as the right to information,[36] the right to translation[37] and the right to access to a lawyer[38] or those areas where the EU has only taken preliminary steps towards harmonisation, such as evidence law[39] and detention conditions.[40] Finally, a

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European Union. See T. Spronken, G. Vermeulen, D. de Vocht, L. van Puyenbroeck, EU Procedural Rights in Criminal Proceedings, Report funded by the European Commission, 2009; E. Cape, Z. Namoradze, R. Smith and T. Spronken, *Effective Criminal Defence in Europe*, Antwerp/Oxford, Intersentia, 2010.

[32] G. Vermeulen, W. De Bondt, C. Ryckman, *Rethinking International Cooperation in Criminal Matters in the EU, Moving beyond actors, bringing logic back, footed in reality*, Antwerp, Maklu, 2012.

[33] Rethinking European Criminal Justice, coordinated by the Max Planck Institute and funded by OLAF for 2006-2007, Freiburg.

[34] Study coordinated by the University of Luxembourg and funded by OLAF on EU model rules of evidence and procedural safeguards for the procedure of the proposed European Public Prosecutor's Office, 2012 and EU model rules of criminal investigations and prosecution for the procedure of the proposed European Public Prosecutor's office, 2011-2012.

[35] See K. Ligeti (ed.), *The Future of Prosecution in Europe*, Vol. 1, Oxford, Hart Publishing, 2013, 945, 985.

[36] S. Allegrezza, V. Covolo, 'The Directive 2012/13/EU on the Right to Information in Criminal Proceedings: Status Quo or Step Forward?', 2016, *Croatian Association of European Criminal law*, 41, 51; I.-M. Rusu, 'The right to information within the criminal proceedings in the European Union. Comparative examination. Critical opinions', 2016, 6, *Judicial Tribune*, 139, 150.

[37] E.-J. Van Der Vlis, 'The right to interpretation and translation' 2010 *The Journal of Specialised Translation*, 26, 40; E. Hertog, 'Directive 2010/64/EU of the European Parliament and of the Council on the Right to Interpretation and Translation in Criminal Proceedings: Transposition Strategies with regard to Interpretation and Translation', 2015, 7 *MonTI*, 73, 100; S. Quattrocolo, 'The Right to Information in EU Legislation', *in* S. Ruggeri (ed.), *Human Rights in Criminal Law: New Developments in European Legislation and Case Law after the Lisbon Treaty*, New York, Springer International Publishing, 2015; R. Vogler, 'Lost in Translation: Language Rights for Defendants in European Criminal Proceedings', *in* Ruggeri, *ibid*., 96-108.

[38] V. Mols, 'Bringing directives on procedural rights of the EU to police stations: Practical training for criminal defence lawyers', 2017, 8, *New Journal of European Criminal Law*, 300, 308; A. Soo, 'How are the Member States progressing on transposition of Directive 2013/48/EU on the right of access to a lawyer? An inquiry conducted among the Member States with the special focus on how Article 12 is transposed', 2017, 8, *New Journal of European Criminal Law*, 64, 76.

[39] M. Kusak, 'Common EU Minimum Standards for Enhancing Mutual Admissibility of Evidence Gathered in Criminal Matters', 2017, 23, *European Journal of Criminal Policy Research*, 337, 352.

[40] A. Bernardi, A. Martufi (eds.), *Prison overcrowding and alternatives to detention. European sources and national legal systems*, Naples, Jovene Edirore, 2016.

few authors analysed the challenge of implementing EU directives in national laws from the standpoint of individual Member States, such as France,[41] Romania,[42] Italy[43] and Portugal.[44]

Whereas this brief overview of academic works provides valuable insights on the state of procedural criminal laws at EU and national levels, the study at hand does not dwell on any of these. Rather, it constitutes an attempt at providing an assessment of the interplay between national criminal procedures and cross-border cooperation. Ten years after the entry into force of the Lisbon Treaty, and the granting of an explicit competence to the EU in the approximation of criminal procedures, the time is ripe to assess, in a comprehensive manner, the impact of EU legislative efforts in harmonising procedural safeguards, to analyse recent evolutions in the case law as well as to measure the complexity of the challenges that lie ahead for cross-border cooperation in criminal matters and to outline potential next steps to address them most effectively.

III. Methodology

In order to assess where differences can lead to problems in the application of mutual recognition tools and instruments, this research is based on a representative sample of nine Member States. The following countries have been selected: Finland, France, Germany, Hungary, Italy, Ireland, the Netherlands, Romania and Spain. Several factors were taken into account in the selection process. Besides the need to strike a fair geographical balance between western, Mediterranean, central, eastern and Nordic Member States, particular attention was paid to the diversity of national legal systems, namely those adhering to inquisitorial, accusatorial and mixed systems. Indeed, previous comparative research on the commonalities and differences in applying procedural rights in criminal proceedings across the EU opted for a selection of Member States based on the three different paradigms of legal traditions in the EU, namely inquisitorial, adversarial, and post-socialist legal systems.[45] As noted elsewhere, the development of an Area of Freedom, Security and Justice (AFSJ) as well as a single European area where freedom of movement is secured has not been accompanied by the creation of a single area of law.[46] The relevance of legal pluralism as a selection criterion should therefore not be overlooked and the above classification has been construed so as to be in line with the cautious approach pursued by the

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[41] See E. Vergès, 'Emergence européenne d'un régime juridique du suspect, une nouvelle rationalité juridique', 2012, *Revue de Science Criminelle*, 635.

[42] See I.-M. Rusu, 'The right to information within the criminal proceedings in the European Union. Comparative examination. Critical opinions' (above, n36).

[43] G. Laura Candito, 'The Influence of the Directive 2012/13/EU on the Italian System of Protection of the Right to Information in Criminal Procedures', *in* Ruggeri (n37), 229-261.

[44] P. Caiero (ed.), 'The European Union Agenda on Procedural Safeguards for Suspects and Accused Persons: the 'second wave' and its predictable impact on Portuguese law', 2015, University of Coimbra, Report.

[45] E. Cape, Z. Namoradze, R. Smith and T. Spronken, *Effective Criminal Defence in Europe*, Antwerpen/Oxford, Intersentia, 2010.

[46] The law remains territorial. See Mitsilegas (above, n4).

drafters of the Treaty under Article 82(2) TFEU, that is to "take into account the differences between the legal traditions and systems of the Member States" in the harmonisation process of procedural criminal law. It should be noted, however, that Member States adhere neither to purely inquisitorial (i.e. France, Spain, Finland) nor purely adversarial (i.e. Ireland)[47] traditions as a result of subsequent reforms of the criminal justice systems over the past decades. Others define themselves as belonging to truly mixed (i.e. the Netherlands, Italy, Germany) systems, and a last group of states represent post-socialist legal systems (i.e. Romania, Hungary).

The legal diversity underpinning EU criminal justice systems lends itself to the adoption of a comparative approach to the topic at hand. It is believed that putting a representative sample of national legal systems into a comparative perspective lays adequate groundwork for an accurate rethink and evaluation of the current framework underpinning cross-border cooperation in criminal matters. Moreover, the comparative approach facilitates the identification of best practices in some Member States' legal systems that could be replicated in others. These include techniques on how to address differences between national criminal procedures, how to fill the gaps left by EU instruments in procedural safeguards and how to foster inter-State cooperation in those areas where the EU has not legislated yet, to name only a few examples.

The research was conducted by relying on a combination of desk research and empirical research methods. Desk research involved trawling through the aforementioned existing literature as well as a variety of official and policy documents, such as the 2009 and 2011 roadmaps, relevant EU procedural legislation and new cooperation instruments relevant to the topic at hand where differences between criminal procedures pose, or are likely to pose, obstacles to their effective functioning. Particular attention was also paid to *ex post* assessments by the European Commission and other reports carried out by the European Parliament, in respect to, *inter alia*, the Victims' Rights Directive,[48] the European Protection Order Directive,[49] and the implementation of procedural rights directives and detention conditions.[50] The work of EU agencies was also taken into consideration, such as the studies written by the

[47] There are few inquisitorial elements in Irish criminal procedure. For example, a judge generally acts as a referee at trial. Moreover, Ireland has a Constitution, meaning that there has been a degree of codification of the case law. See National report No. 2 on Ireland, Section on general questions (point 1).

[48] A. Scherrer, I. K. Kristo, C. Chandler, S. Kreutzer, E. Lale-Demoz, J. Malan, 'The Victims' Rights Directive 2012/29/EU, European Implementation Assessment,' PE 611.022 December 2017.

[49] E. Cerrato, T. Freixes, M. Lutfi, V. Merino, N. Oliveras, L. Román, B. Steible and N. Torres, 'European Protection Order, European Implementation Assessment', PE 603.272, September 2017.

[50] W. Van Ballegooij, 'Procedural rights and detention conditions, Cost of non-Europe report' European Parliament (EPRS, European Added Value Unit) Report, PE 611.008, December 2017.

Fundamental Rights Agency[51] and Eurojust reports and case law analyses.[52] Another strand of the research includes a mapping of the extensive body of the case law of the European Court of Human Rights alongside recent judgments delivered by the Court of Justice of the European Union relating not only to procedural rights directives but also to mutual recognition instruments more broadly.

Turning to the gathering of empirical evidence, the research team identified national experts in the nine Member States selected. Each of those experts was responsible for preparing two different reports, covering respectively:[53]

– an overview of national case law where differences between the national criminal laws were perceived as an obstacle to the operation of mutual recognition instruments and cross-border cooperation in criminal matters at large (National Reports No. 1);
– the specificities of national procedural laws in areas covered by inter-State cooperation, such as the protection of victims, investigation measures and admissibility of evidence, to name but a few, on the basis of a questionnaire prepared by the research team (National Reports No. 2).

In order to complement the findings of national reports and to gain a clear picture of the state of play at EU level, the research process was complemented by conducting several semi-structured interviews. More than ten interviews were conducted with criminal law experts working at the European Commission, the Council of the EU and the European Parliament, as well as relevant EU agencies and networks, such as Eurojust and the European Judicial Network. Interviews also took place at the Belgian Federal Ministry for Justice in order to gain concrete insights as to the extent to which national diversity and perspectives hindered the negotiations of approximation and cooperation instruments.[54]

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[51] See, *inter alia*, country reports commissioned by the Fundamental Rights Agency for the following projects: 'Rehabilitation and mutual recognition – practice concerning EU law on transfer of persons sentenced or awaiting trial', 2015; 'Rights of suspected and accused persons across the EU: translation, interpretation and information', 2016.

[52] See, *inter alia*, 'EAW case work 2014-2016', Eurojust report, 11 May 2017; 'Conclusions of the Thirteenth Annual Meeting of National Experts on Joint Investigation Teams (JITs)', Eurojust Report, 17 and 18 May 2017.

[53] National reports are available at the following link: www.europarl.europa.eu/RegData/etudes/STUD/2018/604977/IPOL_STU(2018)604977(ANN01)_EN.pdf

[54] The interviewed practitioners (who all stressed that their responses reflect their personal opinion, and do not constitute the official position of their MS/institution) are Katarzyna Janicka, Team Leader, Procedural Criminal Law Unit, DG Just, European Commission; Isabelle Pérignon, Head of the Procedural Criminal Law Unit, DG Just, European Commission; Ingrid Gertrude Breit, Procedural Criminal Law Unit, DG Just, European Commission; Fabien Le Bot, Procedural Criminal Law Unit, DG Just, European Commission; Jesca Beneder, Procedural Criminal Law Unit, DG Just, European Commision; Peter Csonka, Head of the General Criminal Law Unit, European Commision; Steven Cras, Administrator, Justice and Home Affairs, Council of European Union; Anze Erbeznik, Administrator, Committee on Civil, Justice and Home Affairs, European Parliament; Wouter Van Ballengooij, Policy analyst, EPRS, European Parliament; Ola Lofgren, Secretary General, European Judicial Network; Vincent Jamin, Head of Joint Investigations Teams Network Secretariat, Eurojust; Laura Surano, Legal

Ultimately, the research team was helped by an advisory board composed of two leading researchers in the field, namely Pedro Caeiro and Valsamis Mitsilegas. The advisory board reviewed the questionnaire prepared for national rapporteurs and provided useful comments on the final version of the study.

IV. Structure

Scholars based in different countries and representing different traditions of research wrote the first five sections of this book. Whereas the comparative analysis relies on the aforementioned nine national reports, only the contributions of France, Germany, Hungary, the Netherlands and Romania are presented here (Part I).

Based on the national reports received and extensive desk and field research, this book identified a set of nine domains where differences between national criminal procedures affect, to a greater or lesser extent, the negotiation and operation of cross-border cooperation instruments in criminal matters, including supranational actors such as the EPPO (Part II). It should be noted at the outset that the list of differences and the obstacles to cross-border cooperation and mutual recognition that derive from them is of a non-exhaustive nature. Drawing up a comprehensive overview of differences among national procedural criminal laws is nigh on impossible, at least in sound methodological terms.

The nine areas of conflict between cooperation and diversity in criminal procedures include:

1. Investigative measures;
2. Admissibility of evidence;
3. Transnational procedures and equality of arms: the case of cross-border investigations;
4. Pre-trial detention regimes and alternatives to detention;
5. Procedures to assess detention conditions and surrender following the *Aranyosi and Căldăraru* judgment;
6. Compensation schemes for unjustified detention;
7. The right to be present at a trial and conditions for *in absentia* surrender;
8. Compensation systems for victims;
9. Protection measures for victims.

In almost every one of these nine areas of analysis, a description of the main points of divergence among the procedural laws of the Member State is provided. The comparative study relies on the inputs provided by the national rapporteurs and was sometimes complemented by the findings of other reports, in particular those carried out by the Fundamental Rights Agency,[55] Fair Trials,[56] the European Parliament

Officer, Eurojust; Daniel Flore, Belgian Ministry of Justice; Stéphanie Bosly, Belgian Ministry of Justice; Nathalie Cloosen, Belgian Ministry of Justice; Amandine Honhon, Belgian Ministry of Justice; Nancy Colpaert, Belgian Ministry of Justice.

[55] 'Victims of crime in the EU: the extent and nature of support for victims' Fundamental Rights Agency, Report, 2015; 'Rights of suspected and accused persons across the EU: translation, interpretation and information', Fundamental Rights Agency, Report, 2015.

[56] Fair Trials, 'A Measure of Last Resort? The practice of pre-trial detention decision-making in the EU', 2016. Retrieved: https://www.fairtrials.org/wp-content/uploads/A-Measure-

Research Service,[57] as well as various research projects commissioned by the EU institutions, on the European Protection Order in particular.[58] Then, a second part analyses how these differences impact mutual recognition, cross-border cooperation and/or mutual trust. The term 'hindrance' has been understood broadly so as to capture the various nuances and degrees that this very notion encapsulates. Therefore, the following examines not only impairments to the effective operation of cooperation mechanisms, but also infringements – actual or potential – to fundamental rights and mutual trust.[59] Where applicable, a prospective impact of EU directives on the rights of victims and defendants is made, looking in particular at their potential to narrow divergences between criminal procedures and mitigate the adverse impact of these differences on cross-border cooperation and mutual trust. Although this analysis is merely prospective, it was deemed necessary to assess whether and where it might be advisable to move forward with new legislative proposals.

Ultimately, a number of recommendations, comprising both legislative and non-legislative measures, are offered (Part III). The research sought to be realistic and weighed the benefits of further harmonisation with the imperative of preserving the diversity of legal traditions. For this reason, practical tools and soft law instruments were sometimes preferred to legislative action or proposed to complement legislative action.

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of-Last-Resort-Full-Version.pdf.

[57] W. Van Ballegooij, 'Procedural rights and detention conditions, Cost of non-Europe report'.

[58] E. Cerrato *et al*., 'European Protection Order, European Implementation Assessment' (n49).

[59] The first reports on national jurisprudence prepared by the nine rapporteurs were particularly helpful in this respect.

PART I

National contributions

CHAPTER I

France: Smooth cooperation in criminal matters and a minimalistic approach towards the harmonisation of criminal procedural law

Perrine Simon*

I. Introduction: the main features of the French criminal procedure, from the inquisitorial to the mixed model

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 a mixed model rather than an inquisitorial one in its pure form.[1] French criminal procedure has undergone numerous changes, introducing accusatorial features under the influence of the European Convention on Human Rights (ECHR), the process of constitutionalisation of criminal procedure and now the impact of EU law.

This is particularly true at the pre-trial phase, where the procedure is no longer secret and the rights of the private parties have been progressively developed. The role of the defence lawyer during police custody (*garde à vue*) has been refined and extended[2] and the role of the investigating judge has been slowly but surely declined in importance as the role of the public prosecution service has increased in importance.[3] The role of the judge in collecting evidence is actually not a major

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[1] S. Guinchard, J. Buisson, *Procédure pénale*, Paris, LexisNexis, 2014, 10th ed., 27.

[2] See Art. 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*'.

[3] The investigating judge has not yet been abolished in France but his powers have been 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, *Procédure pénale* (above, n1), No. 110 and No. 131.

one in France: the investigating judge only intervenes in approximately 5% of the cases, whereas the majority of investigations are carried out 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 takes place within the framework of police custody. Even when the investigating judge is referred to, it is common that he/she delegates the questioning and hearing of witnesses to police investigators. The trial phase also appears to be more accusatorial than in the past. For example, the defence lawyer can now question witnesses and experts[4] 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*).[5]

The protection of the rights of the defence and the rights of victims existing in French law derives – to a different extent for the defence and the victims – from the Constitution. The Constitution in France does not directly contain norms of criminal procedural law but the *Déclaration des droits de l'homme et du citoyen* of 1789, which has constitutional value, safeguards 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.[6] 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*'.[7] 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.*[8] This process of constitutionalisation of criminal procedure[9] has been strengthened by the introduction of a new procedure of preliminary ruling on the issue of constitutionality in 2008 (*Question prioritaire de constitutionnalité*, referred to as QPC).[10] The rights of the victims, as opposed to the rights of the defence, were not considered as a fundamental constitutional principle. However, the Constitutional Council now seems to ensure the rights of the civil party via the rights of the defence and the right to a fair trial.[11] The rights of the defence and of the victims have also been protected by statutory law since 2000 ('*loi n° 2000-516 du 15 juin 2000 renforçant la protection*

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[4] See Art. 312 CPP.

[5] See Art. 495-7 CPP and et seq.

[6] See Conseil constitutionnel, 16 July 1971, *Liberté d'association*, No. 71-44 DC.

[7] See Conseil constitutionnel, 2 December 1976, *Prévention des accidents du travail,* n° 76-70 DC; See also Conseil constitutionnel, 20 July 1977, *Service fait*, No. 77-83 DC; Conseil constitutionnel, 19 et 20 January 1981, *Sécurité et liberté*, No. 80-127 DC.

[8] See Conseil constitutionnel, 17 janvier 2008, No. 2007-561 DC. Only implicitly established before, see Conseil constitutionnel, 28 July 1989, No. 89-260 DC.

[9] 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*, Paris, Éditions Cujas, 1989; B. Bouloc, 'La constitutionnalisation du droit en matière pénale', *in* B. Mathieu (ed.), *50e anniversaire de la Constitution de la Ve République*, Paris, Dalloz, 2008, 445.

[10] See V. Tellier-Cayrol, 'La constitutionnalisation de la procédure pénale', 2011, *AJ Pénal* 283.

[11] 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', 2011, *RSC*, 188.

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.[12] It enshrined the necessary balance between the rights of suspected or accused persons and the rights of victims.[13]

The introduction of these changes may explain why diversity in legal traditions is generally not seen as an issue by French national authorities in the context of the EU area of criminal justice. Rather, the analysis of the case law on the implementation of EU procedural criminal law and mutual recognition instruments suggests a smooth cooperation between judicial authorities. Requests for additional information are filed when doubts regarding the respect of rights protected by these instruments are raised. Although there are a significant number of rulings on the European Arrest Warrant and, to a lesser extent, on other mutual recognition instruments, cases where differences between national criminal procedures were directly perceived as an actual obstacle to the application of EU criminal law and mutual recognition instruments could not be identified.[14] Regarding procedural rights' directives for defendants and victims, these recent instruments have, thus far, been almost only invoked in purely internal situations.

The following highlights some specific features of the French legal framework and case law as regards criminal procedural differences and their impact on cooperation in

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[12] '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.

[13] 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, see E. Vergès, 'Un corpus juris des droits des victimes : le droit européen entre synthèse et innovations', 2013, *RSC*, 121 et seq.

[14] See our report 'Country reports on France, National report No. 1 on the French jurisprudence', *in ANNEX I Country reports*, *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*, Study requested by the European Parliament [2018], 175 et seq. Available at: http://www.europarl.europa.eu/RegData/etudes/STUD/2018/604977/IPOL_STU(2018)604977(ANN01)_EN.pdf.

criminal matters. France has chosen to transpose the procedural rights' directives for defendants (I) '*a minima*', and one potential obstacle to mutual recognition could be the deficiencies of French evidentiary rules (II). Detention law could also constitute an obstacle as there is a wide gap between theory and practice when it comes to detention as an *ultima ratio* (III). If France does not appear as a model as regards detention issues, the strong focus on the protection of victims in French procedural criminal law is, to the contrary, an appealing feature (IV). Finally, cooperation in criminal matters is rather smooth as horizontal issues of judicial cooperation in criminal matters are scarce (V).

II. The '*a minima*' transposition of the procedural rights directives for defendants

The entry into force of the directives on suspects/defendants has only triggered relatively minor changes in French law. Often reforms were initiated before the adoption of EU instruments under the influence of the case law of the European Court of Human Rights (ECtHR). Furthermore, the legislator performed transpositions *a minima*.

Directive 2010/64 on the right to interpretation and translation in criminal proceedings[15] 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 out 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.[16] This last provision transposes the principle and the exception provided for in the Directive, namely 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 further defining its contours and modalities of application. Article 803-5 CPP has been interpreted by the Court of Cassation as being *a minima*: where documents supporting the proceedings have been read and orally translated by an interpreter, 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 access to a legal remedy existed.[17] This refusal to sanction the disregard for the right to translation of all documents essential

[15] 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, *OJ*, No. L 280, 26 October 2010.

[16] See, on this, E. Daoud et L. Rennuit-Alezra, 'Le droit à un interprète : la consécration d'un nouveau droit', 2013, *AJ pénal*, 527 et seq.; A. Cerf-Hollender, 'Transposition de la directive 2010/64/UE relative à l'interprétation et à la traduction dans le cadre des procédures pénales', 2013, 9, *EFDP*, 6.

[17] See Court of Cassation, Crim., 7 January 2015, No. 14-86.226 ; and Court of cassation, Crim., 26 January 2016, No. 15-80.299. The Court of Cassation has, however, upheld 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 quashed the refusal of the

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.[18]

Directive 2012/13 on the right to information in criminal proceedings[19] 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 the right to access certain materials of the case. The French transposition does not appear totally in line with the Directive, especially concerning access by the accused to the materials of the case during police custody.[20] After the provisions on police custody were substantially amended in 2011 as a result of the European Convention on Human Rights (ECHR) and Constitutional Council case law on the role of the lawyer during the *garde à vue*[21], 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 to the person arrested such that the right of access was no longer only granted 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.[22] Doubts were also raised about compliance with the Directive on this point.[23] Indeed, during police custody in France, access is still limited to some materials[24] and the question remains as to how Article 7§1 of the Directive, according to which 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 access to the materials of the case during judicial investigation, which can be restrained

investigative judge to translate certain essential documents, see Court of Cassation, Crim., 4 November 2015, No. 15-84.012.

[18] R. Mésa, 'La sanction de la transgression du droit à la traduction des pièces essentielles à l'exercice des droits de la défense', 2016, 12, *Gazette du Palais* 23.

[19] Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings, *OJ*, No. L 142, 1 June 2012.

[20] S. Pellé, 'Garde à vue : la réforme de la réforme (acte I)', 2014, *Recueil Dalloz*, 1508.

[21] See, on this, H. Matsopoulou, 'Une réforme inachevée. A propos de la loi du 14 avril 2011', 2011, *Semaine Juridique*, 908. See also E. Vergès, 'Garde à vue : le rôle de l'avocat au cœur d'un conflit de normes nationales et européennes', 2011, *Recueil Dalloz*, 3005.

[22] S. Pellé, 'Garde à vue' (n20); O. Bachelet, 'Droits de la défense: transposition 'ambivalente' de la directive information', 2014, 39, *Gazette du Palais* 9.

[23] *Ibid.*

[24] See Art. 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 garder à vue, les documents mentionnés à l'article 63-4-1'. Art. 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*'.

by the investigative judge.[25] The question was raised before the Court of Cassation without success; French judges refused to refer a question to the Court of Justice of the European Union (CJEU).[26] They considered that the Directive only prescribes Member States to ensure that arrested individuals be informed about the criminal act that they are suspected or accused of having committed. Nonetheless, it does not imply giving 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.[27]

Directive 2013/48 on the right of access to a lawyer in criminal proceedings[28] 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 in writing, by phone or via a meeting with a third person.[29] Article 3 of the Directive, which provides for the right to a lawyer once investigating or other competent authorities are carrying out an investigation 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 the identification of suspects.[30] On this particular point, as well as 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[31]. 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 of technical modifications at the expense of an overall vision.[32] In relation to the European Arrest Warrant, Article 695-27, §3 CPP states that the Public Prosecutor

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[25] See Art. 144 CP. See also O. Bachelet, 'Droits de la défense'. The investigative judge can decide to restrain the access to the materials of the case (n22).

[26] 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, No. 12-85.645; Court of Cassation, Crim., 25 February 2015, No. 14-86.453. The court refused to refer the question to the CJEU in Court of Cassation, Crim., 31 January 2017, No. 16-84.613.

[27] See in particular, Court of Cassation, Crim., 31 January 2017, No. 16-84.613 (n24).

[28] 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, *OJ*, No. L 294, 6 November 2013.

[29] With the limitation that the communication is not incompatible with the objectives mentioned in Art. 62-2 CPP and that there is no risk of the person committing an offence.

[30] See Art. 61-3 CP.

[31] E. Vergès, 'La procédure pénale à son point d'équilibre', 2016, *RSC*, 551.

[32] E. Vergès, 'La réforme par transposition : la nouvelle voie de la procédure pénale', 2015, *RSC*, 683.

must inform the arrested person that he/she can request to be assisted in the issuing Member State by a lawyer of his/her choice. If the person so requests the demand can be immediately transmitted to the competent judicial authority. The Court of Cassation has considered that omitting this transmission jeopardises the rights of the defence. This resulted in the release of the suspect whose surrender was sought for the purpose of prosecution in the court's case law.[33] The judges interviewed as part of this research indicated that the obligation to inform the foreign authorities of the request for a lawyer was delicate to implement. Besides, in practice, the issuing authorities would not respond to it.[34]

Concerning the directives adopted in 2016 – Directive 2016/1919/UE on legal aid[35], Directive 2016/343/EU on presumption of innocence[36] and Directive 2016/800/EU on procedural safeguards for children[37] – the French criminal procedure seems already largely in compliance with them.[38] 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 years old – to minors from 13 to 18 years old. The statute also provides for the assistance of a lawyer from the beginning of police custody.[39] However, the Directive on presumption of innocence could raise challenges in France given that the right not to incriminate oneself is alien to French civil tradition.[40] Nonetheless, so far these directives have rarely been invoked in criminal proceedings and it remains to be seen what their real impact will be.[41] The French legislator's perspective is, once more, to modify criminal procedure only marginally.

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[33] Court of Cassation, Crim., 24 May 2017, No.17-82.655.

[34] Interviews were carried out with: M.-J. Aubé-Lotte, Public Prosecutor at the Appeal Court of Paris; M.-A. Chapelle, President of the Investigating Chamber at the Appeal Court of Paris; P. Moulard, Investigating judge at the Tribunal de grande instance d'Avesnes-sur-Helpe.

[35] Directive 2016/1919/EU 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, *OJ*, No. L297, 4 November 2016.

[36] Directive 2016/343/EU 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, *OJ*, No. L65, 11 March 2016.

[37] Directive 2016/800/EU 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, *OJ*, No. L132, 1 May 2016.

[38] T. Cassuto, 'Dernières directives relatives aux droits procéduraux', 2016, *AJ pénal*, 314. See also the notifications made to the European Commission for the three directives.

[39] See Art. 63-3-1 to 63-4-3 CP.

[40] See T. Cassuto, 'Dernières directives relatives aux droits procéduraux'. The author takes the example of false testimony, which currently cannot be prosecuted if the person is under police custody, under judicial examination or indicted.

[41] We found only one case where Directive 2016/343 was invoked along with Art. 5 and 6 of the ECHR. See Court of Cassation, crim., 20 September 2016, No. 16-84.386.

III. The deficiencies of French rules on evidence, a potential obstacle to mutual recognition

A. The scarce general safeguards on evidence-gathering

There are only a few general safeguards that exist in national law related to evidence-gathering. Aside from the principle of presumption of innocence, which implies that the guilt has to be established by the prosecution, the guiding principle in evidence law is the one of the freedom of proof, pursuant to which evidence can be proven by all means. This rule applies principally at the trial phase, when the judge takes a decision on evidence. It also has implications at the pre-trial phase where the judicial police, the prosecutor and/or the investigating judge apply it by using all means of evidence available (within the limits of the principle of legality of evidence).

The role of the judge in evidence-gathering is not a major one in France. As mentioned above, the investigating judge is seized only in a minority of cases and therefore the majority of investigations are led by the police under the supervision of the Public Prosecutor.[42] Generally, the questioning of suspects is done by the judicial police (*police judiciaire*) and not by the prosecutor himself, most of the time under the regime of police custody. In any case, the principle of proportionality of investigative acts, as set out in the preliminary article of the CPP, applies. Albeit enshrined in law, 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 who has competence to conduct a direct and immediate review of the measure.[43]

Although freedom of proof implies, in principle, that freedom to gather evidence is total, the CPP regulates quite a few acts. There are some specific procedures for special investigative measures such as search, hearing of witnesses, conduct of site visit and wiretapping where safeguards are reinforced.[44] Additionally, applicable safeguards derive mostly from the case law of the ECtHR, which states that investigators must respect fundamental rights. These include human dignity, private life and the rights of the defence.[45] As for national standards, the main contribution of the Court of Cassation was to develop the principle of loyalty in the search for evidence, which implies, among other things, that investigators must abstain from provoking the suspect to commit the offence and that they cannot use any techniques aiming at sidestepping legal safeguards.[46]

The existence of a limited number of safeguards in evidence-gathering sheds light on the French position during the negotiations on the European Investigation Order

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[42] Which in France is not independent from the Ministry of Justice. See *Medvedyev and Others v. France [GC]* (2010) EHRR 3394/03.

[43] 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 ?', 2011, 1, *RSC*, 1 et seq.

[44] See B. Bouloc, *Procédure pénale*, 127 et seq.

[45] J. Lelieur, 'La reconnaissance mutuelle' (n43).

[46] See B. Bouloc, *Procédure pénale*, Paris, Dalloz, 2017, 132 et seq.

(EIO). Although they were not part of the group of Member States who proposed the EIO, French authorities appeared to be rather in favour of it, thus mirroring the French position *vis à vis* the European Evidence Warrant and the European Commission's Green Paper on evidence-gathering.[47] The French position was, in general, very similar to that of the seven initiating Member States. France considered that certain grounds for refusal should be excluded, as well as the possibility to conduct a review on the merits of the case or on the proportionality principle.[48] This is linked to the very limited scope of the principle of proportionality under French law.

As a result, Directive 2014/41/EU on the EIO[49] was transposed before the deadline set by the *Ordonnance n° 2016-1636 du 1er décembre 2016* and introduced in the CPP under Article 694-20 and seq.[50] 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 collected in France upon the request of a Member State, Article 694-41 CPP provides that, when the measures executed on the national territory under the EIO could have been challenged by a request of nullity or other form of remedy if they would have been executed in national proceedings, the same remedies should be available to challenge them. Whenever evidence is collected in France upon the request of a foreign State, French authorities are competent to verify that evidence was collected in conformity with its domestic principles. This was already the case in international mutual legal assistance matters. Nonetheless, it should be noted that the case law has set conditions that considerably limit the review performed. The Court of Cassation requires that the procedural documents for which legality is being 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.

Overall, the guarantees offered concerning evidence collected appear very weak in France. To some extent, this explains why the move towards mutual recognition in this area seemed smooth from the French perspective. But, beyond the risk of a

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[47] 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', 2005, *RSC*, 437; 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 ?', 2011, 1, *RSC*, 2011, 1 et seq.

[48] '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', available at: http://ec.europa.eu/justice_home/news/consulting_public/0004/national_governments/france_en.pdf.

[49] Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters, *OJ*, No. L 130, 1 May 2014.

[50] 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.

condemnation by the ECtHR on the basis of Article 6 ECHR, such a low standard could also be detrimental to mutual trust among the Member States and therefore to the effectiveness of cooperation.[51]

Although we could not yet obtain statistics on the implementation of the EIO, an interviewee working near the Belgian border confirmed that the EIO is already being used very often 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 that it is impossible to make a general request as regards investigation steps to be taken; having to formulate instead specific requests often implies requesting supplementary investigating elements. The interviewee also considered the form to use too detailed and more complicated than the one used in the framework of the European Convention on Mutual assistance in criminal matters. However, she considered that cooperation worked smoothly with Belgium under the EIO – potentially due to the strong cooperation links between the two countries. There are some cases of refusal. An EIO issued by France requesting geo-tracking going beyond a year from the time of the alleged facts was, for example, refused by Belgium because it was not possible to do so under Belgium's procedural criminal law. Although the necessary hindsight on this instrument is lacking, there is arguably a risk that the EIO will not be able to operate successfully without minimum standards of evidence gathering in place that ensure admissibility of evidence in the issuing State.

B. The poor regulation of evidence admissibility

As we have seen, the principle of freedom of proof has implications at the pre-trial phase for actors in charge of the investigations. However, it applies principally at the trial phase, when the judge is to decide on the admissibility of evidence. As set out by Article 427 CPP, the principle entails that "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".

The French *Code de procedure pénale* provides for rules on improperly obtained evidence and introduced the mechanism of nullities. Evidence deemed null cannot serve as the basis of a judgment and has to be excluded from the investigation file. However, the occurrence of irregularities in the evidence collection process does not necessarily lead to its nullity. Outside the instances expressly provided by the law[52] only the violation of an essential formality can lead to the penalty of nullity. Besides,

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[51] J. Lelieur, 'La reconnaissance mutuelle' (n43), 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 termes d'efficacité des investigations transnationales*'.

[52] See, for example, Art. 59 of CPP on searches and house visits provides, under a penalty of nullity, that they may not be undertaken before 6 a.m. or after 9 p.m.

it is often required that the protected party demonstrates that this has jeopardised his/her interest.[53] This proof is hard to produce, the case law is quite vague and the system is therefore not an absolute filter.[54] Furthermore, the case law sometimes requires that any piece of evidence must be debated adversarially[55], which paradoxically undermines the requirements on the collection of evidence.[56]

The rules governing evidence admissibility appear even weaker when it comes to interstate cooperation. Regarding the review of evidence gathered in another Member State, Article 694-24 CPP states that: "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 (…)".[57] Grounds for refusal provided for in the EIO Directive have been transposed in Article 694-31 CPP, indicating in particular that the judicial authority seized can refuse to recognise or execute the EIO: "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".[58] However, it remains to be seen how this ground of refusal will be used. Indeed, it should be underlined that the judicial review of evidence gathered abroad is generally extremely limited, as evidenced by existing practice in international mutual legal assistance matters.[59] 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. However, the judicial oversight carried out in this context is very poor. The Court of Cassation has, to this day, considered that the legality of evidence collected can only be reviewed by the judicial authorities of the State executing the rogatory commission.[60] Therefore, when evidence is collected abroad, French judicial authorities are not competent to check how it was collected.

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[53] See Art. 171 and 802 CPP.

[54] J. Lelieur, 'La reconnaissance mutuelle' (n43), 8.

[55] Since 2000, the defence can also as the other party, question witnesses and experts during the trial phase 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'.

[56] J. Lelieur, 'La reconnaissance mutuelle' (n43) 8. The author points out that the Court of Cassation deemed the recording of a suspect, without his knowledge, shall not be null although the evidence was gathered in a disloyal manner and justified it on the basis that this piece of evidence had been debated in an adversarial way and was not the only piece of evidence submitted. See Court of Cassation, crim., 13 October 2004, No. 00-86726, 00-86727, 01-83943, 01-83944, 01-83945 and 03-81763.

[57] Free translation.

[58] *Ibid* (n43).

[59] J. Lelieur (n43), 9.

[60] J. Lelieur (n43), 9; see also Court of Cassation, Crim., 24 June 1997, Bull. crim. No. 252.

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".[61] Given the poor regulation of evidence admissibility, differences in evidence admissibility rules do not constitute, in the case of France, an obstacle to the execution of mutual recognition instruments.[62]

IV. Detention law, the gap between theory and practice

A. Pre-trial detention rules and pre-trial detention as a rule

The legal framework for detention pending trial (*détention provisoire*) is enshrined under 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/she may be subjected to one or more obligations of judicial supervision. If this does not serve its purpose, he/she may, in exceptional cases, be remanded in custody.[63] A person can be detained only 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.[64] Detention pending trial is also subject to statutory

[61] J. Lelieur (n43), 9 (free translation).

[62] See for example Court of Cassation, Crim., 3 February 2016, No. 14-84.259. The defendant, convicted on appeal for various offences to seven years of imprisonment, 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 considered 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'. Furthermore, 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 was 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 Amsterdam Court and on the contrary transmitted to the French investigating authorities the inquiry acts obtained in the Netherlands.

[63] Art. 137 CP.

[64] See Art. 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 Art. 144 CPP: 'Pre-trial detention may only be ordered or extended if it is the only way: 1º 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

time limits: four months in correctional matters[65], renewable by four months under certain conditions and within the absolute and exceptional limit of two years and four months[66]; one year in criminal matters renewable for six months and within the absolute and exceptional limit of four years and eight months.[67] Pre-trial detention automatically stops at the end of the judicial investigation in correctional matters. This is so 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.[68] 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, either following the opinion of the Public Prosecutor, or at the request of the Public Prosecutor or the person concerned (or his lawyer).[69]

Specific provisions apply to European Arrest Warrant (EAW) proceedings. Pursuant to Article 695-28 paragraph 1 CPP, the Public Prosecutor may request, after notifying the EAW to the arrested person, the release of the person or his/her incarceration. The person is brought before the Appeal Court, which orders the incarceration of the requested person. The prison must be located as close as possible to the appeal court within the jurisdiction in which he/she 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, regarding *détention provisoire*, the person on remand can request his release at 'any time'.[70] In the case of a decision not to incarcerate the person, he/she remains in principle free, but can be subjected to measures of 'judicial supervision'[71] or be assigned to house arrest under

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and their accomplices; 2º 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; 3º 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 at: https://www.legifrance.gouv.fr/Traductions/Liste-des-traductions-Legifrance.

[65] Correctional penalties are incurred for 'délits' (misdeamenours), for which the applicable penalties cannot go beyond ten years. Criminal penalties in French criminal law are incurred for 'crimes' (felony), for which applicable penalties go beyond ten years (see Art. 131-1 et 131-3 CPP).

[66] See Art. 145-1 CP. Or three years but only in case of terrorist association (Art 706-24-3 CPP).

[67] Art. 145-2 CP.

[68] See Art. 179 and 181 CPP.

[69] See Art. 147 et 148 CP. See also Art. 143-1 and 144 CP. The judge checks that there still are conditions and reasons for detention on remand.

[70] See Art. 695-34, paragraph 1 CP.

[71] The obligations are listed under Art. 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 […])'.

electronic surveillance.[72] According to the judges interviewed, detention is favoured in the majority of EAW cases. For the year 2016, under the jurisdiction of the Appeal Court of Paris, 124 EAW individuals whose surrender was sought were placed in detention, out of 180 EAWs executed. This represents approximately 70% of the cases.[73] According to the Public Prosecutor we met, decisions on detention depend on the importance of the case; the main disadvantage of judicial supervision is the risk that the person breaches his/her obligations and flees.

B. The strict application of the Aranyosi and Căldăraru *judgment*

Although the *Aranyosi and Căldăraru* case[74] has been taken into consideration by national courts in the area of detention conditions, the Court of Cassation has interpreted the solution developed by the CJEU narrowly.[75] 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".[76] In another case concerning Romania, the Criminal Chamber rejected the appeal against a decision on release whereby the lower court excluded any risk of detention in conditions deemed incompatible with human dignity, on the basis of a document established by the Romanian authorities.[77] Given France's repeated convictions by the

[72] See Art. 142-5 CPP.

[73] Figures communicated by the interviewees at the Paris Appeal Court for 2016.

[74] Joint Cases C-404/15 and C-659/15 *Aranyosi and Caldararu*, 5 April 2016, ECLI:EU:C:2016:198.

[75] See Court of Cassation, Crim., 12 July 2016, No. 16-84.000; Court of Cassation, Crim. 10 August 2016, No. 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', 2017, *RTDE*, 336 et seq. For an overview of the control carried out as regards fundamental rights by French courts, see J. Lelieur, 'Mandat d'arrêt européen', 2017. *Répertoire de droit pénal et de procédure pénale*, Dalloz, 2017, No. 422.

[76] Free translation, see Crim., 12 July 2016, No. 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'automaticité 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*'.

[77] Court of Cassation, Crim., 10 August 2016, No. 16-84.725.

ECtHR on prison conditions, it is difficult to conceive that French judges conduct an accurate assessment of other Member States' prison systems.[78]

The *Aranyosi and Căldăraru* judgment has had an impact on judicial cooperation when EAWs were issued by France. The judges interviewed reported sensitive discussions in 2017. In a case where the Netherlands was to execute EAWs issued by France, the Dutch authorities required assurances that the surrendered person would not be detained in certain French prisons such as Villepintes or Fleury-Merogis. In practice, it appears almost impossible because, should they be transferred, most inmates go through the detention house of Fleury-Merogis.. This led to diplomatic dialogue between ministries and in the end the surrender was made without these assurances. This suggests that citizens can be subject to discriminatory treatment when the *Aranyosi and Căldăraru* judgment is being relied on, as it leaves some leeway to national judicial authorities to decide *in fine* whether and what type of 'assurances' to require.[79] This indeed opens up the prospect of granting differentiated treatment to Member States depending on how good diplomatic relations are, thereby (re)introducing a degree of politicisation in the proceedings, which is contrary to the spirit of the EAW. In this regard, a European initiative to address the persistence of unacceptable detention conditions in some Member States – including France – should be envisaged to prevent obstacles to mutual recognition and enhance detention conditions as regards human dignity.

As regards 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. Custodial sentences already served in another EU Member State are, for example, used to impose concurrent sentences (*confusion de peines*) when a sentence was pronounced by a court of another Member State and entirely served at the time the request for having it taken it into account is being examined.[80] The Court of Cassation has recently interpreted Article 132-

[78] The ECtHR ruled that detention conditions in some French prisons were incompatible with human dignity. See, for example, ECtHR, 10 November 2011, *Plathey v. France*, No. 48337/09; ECtHR, 25 July 2013, *Canali v. France*, No. 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', 2013, *La Revue des Droits de l'Homme*.

[79] See *Aranyosi and Căldăraru* (n74), paras. 95 et seq.

[80] See Court of Cassation, Crim., 2 November 2017, No. 17-80.833. 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, 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 considered that the imposition of concurrent sentences requested could not 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

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 21 September 2017 (C-171/16), as allowing concurrent sentences to be imposed. Custodial sentences already served in another EU Member State are also taken into account by French courts to determine the finding of recidivism.[81]

C. The existence of a general compensation regime for unjustified detention applicable to EAWs

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 proceedings (Article 149 CPP and seq.). 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* 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 can request full compensation for any material or moral harm that this detention has caused to him, provided that the proceedings gave rise to a decision to drop the case, a discharge or an acquittal decision that has become final. The *Commission nationale de réparation des détentions* (CNRD), which is attached to the Court of Cassation, has held that the time spent in remand abroad during the execution of an EAW has to be taken into account to calculate the whole time spent in custody.[82] In a case where the identity of the person was mistaken and the surrendered person had been detained for five months, the person obtained €45,000 in compensation.[83] The judges interviewed also mentioned a case of mistaken identity in proceedings involving an EAW issued by the United Kingdom for identity theft. After his arrest, given the doubts raised by the employer of the person, a liaison magistrate was seized during the first 48 hours and the person placed under social and judicial supervision (*suivi socio-judiciaire*). A picture of the person was used to prove his innocence. In this instance however, unjustified detention in the course of EAWs issued by France should have been sought in the issuing Member State.

V. The strong focus on protection of victims in French procedural criminal law

A. The limited added value of Directive 2012/29/EU on victims' rights in France

The protection of victims has been a priority of the French legislator mainly since 2010 and the legislation was largely adapted before the adoption of the 2012

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of the decision of the CJEU of 21st of September 2017 (C-171/16), allows the imposition of 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 concurrent sentences.

[81] Court of Cassation, Crim., 24 March 2015, No. 15-80.023, detailed in the first report on French case law.

[82] See CNR détentions, 10 May 2016, No. 14 CRD 007 P.

[83] 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.

Directive on victims' rights.[84] This explains the limited added value of Directive 2012/29 establishing minimum standards on the rights, support and protection of victims of crime[85] in the French context. The Directive 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 out by the Directive.[86] The key innovations that it introduced 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 stage of the criminal investigation' (*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.[87] The victim is also subject to an individual assessment in order to determine if he or she should benefit from specific measures of protection during criminal proceedings. For this purpose, the Ministry of Justice proposed a guide to assess victims so as to harmonise assessment practices.[88] Once again however, the transposition has been done in a minimalist manner. It consisted of complementing the CPP to comply with the Directive and everything that was not strictly necessary was not modified.[89]

B. The precedence of the domestic victim's compensation scheme over Directive 2004/80/EC

As regards compensation of victims of crime, the case of France is interesting. If the compensation of the victim is, as a rule, provided by the perpetrator of the offence, compensation on the basis of national solidarity also exists. For a long time, France has been providing a system for the compensation of victims by the state generally seen as particularly generous. Its architecture has largely inspired Directive 2004/80/EC relating to compensation to crime victims[90] and explains the limited influence of

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[84] For an overview, see J. Alix, 'Le dispositif français de protection des victimes de violences conjugales', 2014, *AJ Pénal*, 208.

[85] 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, *OJ*, No. L 315, 14 November 2012.

[86] 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', 2015, *RSC*, 683. This statute also transposed into French law – with delay – the 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, the Framework Decision 2009/948/JHA on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings and the 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.

[87] *Ibid.*

[88] http://www.justice.gouv.fr/aide-aux-victimes-10044/un-guide-pour-levaluation-des-victimes-28155.html.

[89] E. Vergès, 'La réforme par transposition' (n86).

[90] Council Directive 2004/80/EC of 29 April 2004 relating to compensation to crime victims, *JO*, No. L 261/15.

this instrument on French legislation.[91] Several laws have been adopted in France since the late 1970s to offer to victims a remedy for compensation by the State but the turning point came in 1990 with the *loi n° 90-589, modifiant le code de procédure pénale et le code des assurances, relative aux victimes d'infractions.* [92] This statute has generalised the full compensation of victims of serious crimes against the persons for the acts leading to death, to temporary or permanent total or partial loss of working capacity equal or superior to a month, for rape, sexual assault or indecent assault.[93] From then on, France also foresaw compensation for EU citizens having suffered harm caused by an offence. For this reason, France strongly supported a European system in order for its nationals to have access to an equivalent compensation for offences committed against them on European territory.[94]

In a nutshell, Article 2 CPP sets out 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 also provides the victim with 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.[95] 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 provided that the confiscation was ordered by a final decision. Close relatives (persons entitled on behalf of the victim or indirect victims) can also claim damages. To a lesser extent, bodily injuries resulting in work leave for a period of less than a month as well as several offences against goods (theft, scams and breach of trust) can also be partially compensated.[96] If

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[91] D. Blanc and J. Alègre, 'Vers un statut communautaire de la victime ? À propos de la directive 2004/80/CE du conseil du 29 avril 2004 relative à l'indemnisation des victimes de la criminalité', 2006, *Revue du Marché commun et de l'Union européenne*, 195.

[92] Starting with the 'loi No. 77-5 du 3 janvier 1977 garantissant l'indemnisation de certaines victimes de dommages corporels résultant d'une infraction'. For a detailed presentation, see R. Cario and S. Ruiz-Vera, 'Victimes d'infraction', *in Répertoire de droit pénal et de procédure pénale*, Dalloz, 2018, 133 et seq.

[93] R. Cario and S. Ruiz-Vera, 'Victimes d'infraction' (n92), 134.

[94] D. Blanc and J. Alègre, 'Vers un statut communautaire de la victime ?'.

[95] See, in particular, Art. 99 and 420-1 CP. 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', available at : http://www.protectingvictims.eu/upload/pages/85/Participation-des-victimes.it.en.pdf.

[96] R. Cario and S. Ruiz-Vera, 'Victimes d'infraction' (n92), 134.

compensation cannot be provided by the perpetrator of the offence, victims bring their action before the *Commission d'indemnisation des victimes d'infractions* (CIVI).[97]

C. The wide range of civil and criminal protection measures for victims

A wide range of protection measures exist under French law, including civil and criminal law measures, and apply at all stages of the proceedings. First, it is possible to protect the victim by a removal procedure of the author of the crime, which can be of civil or criminal nature. On the civil side, the family court (*juge aux affaires familiales*) can impose a protection order, including, in the absence of criminal proceedings or conviction, whenever there are serious reasons to believe that the victim is exposed to danger or has already suffered from alleged facts of violence.[98] The order can be imposed upon the request of the person in danger or with the latter's agreement upon the request of the Public Prosecutor. Breaching the order constitutes a criminal offence.[99] On the other hand, penal measures also exist. On the criminal side, removal measures can be taken at every stage of the proceedings: as a condition to close the case[100] or as an alternative measure to prosecution[101]; pending trial as an obligation under judicial supervision during the judicial investigation.[102] Beyond that, a ban on seeing the victim can also be a modality of the sentence, which is part of a social and judicial supervision process[103] or as a suspension with probation.[104] It can also be pronounced instead of a penalty of imprisonment or as an additional sentence that takes effect at the end of the detention.[105] Furthermore, the removal order can be imposed in order to adjust the sentence.[106] Second, it is indeed possible to protect the victim by the conviction and imprisonment of the offender.

From a transnational perspective, there is no data showing if and how the European Protection Order has been actually used by judicial authorities. The existence of Regulation 606/2013 on mutual recognition of protection measures in civil matters, which provides for a direct and automatic circulation of the protection measure, could account for this. This is all the more relevant as the civil or criminal nature of the protection order determines which instrument applies. It should also be underlined that grounds of non-recognition are different; the weight of sovereignty

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[97] Art. 706-3 CP. Some special compensation funds also exist, in particular for the victims of terrorism. See Art. 706-3-1 CP. See also R. Cario and S. Ruiz-Vera, 'Victimes d'infraction' (n92), 135.

[98] Art. 515-9 and req. of the Civil Code.

[99] Art. 227-4-2 and 227-4-3 CP.

[100] Art. 41-1, 6° CP. This is at the initiative of the Public Prosecutor, who has to request the opinion of the victim beforehand.

[101] Art. 41-2 CP. This is also at the initiative of the Public Prosecutor.

[102] Art. 138, 9° and 17°. Judicial supervision is ordered by the investigating judge or the liberties and detention judge.

[103] Art. 131-36-2 CP.

[104] Art. 132-4, 13° and 19° CP.

[105] Art. 131-6, 14° CP.

[106] Art. 731 CP. See also 723-10 CPP (electronic bracelet) and 721-2 CPP (reduction of sentence).

is more relevant in criminal matters.[107] Besides, whereas Directive 2011/99/EU on the European Protection Order only sets out that double criminality *can* be a ground of refusal, the French transposition makes it an obligatory ground of refusal (Article 696-100 CPP).[108]

VI. The scarcity of horizontal issues of judicial cooperation in criminal matters

Diversity in legal traditions is generally not seen as an issue by French national authorities in the context of the EU area of criminal justice. Cases where differences between national criminal procedures were directly perceived as an obstacle to the application of EU tools and mutual recognition instruments could not be found in French case law.[109] On the contrary, a glance at the jurisprudence reveals that judicial authorities cooperate smoothly; requests for additional information are usually made when doubts regarding the respect of rights protected by these instruments are raised.[110] French authorities, acting as executing judges, exert control over the respect of defence rights regarding EAW proceedings taking place both in France and in the issuing Member State. As regards the issuing Member State in particular, a review of defence rights takes place prior to the issuing of the EAW as well as after the person is surrendered.[111] Although we cannot speak of obstacles or of a general reluctance to cooperation based on existing differences between national criminal procedures, two types of situation were identified as particularly problematic: cases involving the *ne bis in idem* principle and cases involving *in absentia* convictions.[112]

Tensions in cooperation have arisen in particular in the *Bamberski/Krombach* case concerning the *ne bis in idem* principle.[113] This case, largely covered by the media in France and Germany, started in 1982 with the death of a French 14 years old girl in Germany, Kalinka Bamberki, daughter of André Bamberski. D. Krombach, the father-in-law and companion of the mother of Kalinka Bamberski, was suspected by the German authorities, who opened an investigation led by the German Public Prosecutor. The investigation concluded that the evidence was insufficient and despite the use of several remedies by André Bamberski, the Public Prosecutor decided to bring a halt to the proceedings and not to prosecute D. Krombach. The father of the

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[107] D. Porcheron, 'Le principe de reconnaissance mutuelle au service des victimes de violences' 2016, *Rev. crit. DIP*, 267 et seq.

[108] D. Porcheron underlined that this could be an important brake on the 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, 212, available at: http://poems-project.com.

[109] See national reports on France.

[110] *Ibid.*

[111] See Court of Cassation, Crim., 20 May 2014 No. 14-83.138 ; and Court of Cassation, Crim., 12 July 2016, No. 16-84.000. See also J. Lelieur, 'Mandat d'arrêt européen' (n75).

[112] *Ibid.* On *ne bis in idem*, see Court of Cassation, Crim., 2 April 2014, No. 13-80.474, *Dieter X.*, publié au Bulletin; on *in absentia* judgments, see Court of Cassation, Crim., 25 mars 2014, No. 14-81.430, inédit; Court of cassation, Crim., 29 oct. 2014, No. 14-86.480, inédit.

[113] Court of Cassation, Crim., 2 April 2014, No. 13-80.474, *Dieter X.*

victim subsequently brought the proceedings before French justice, who opened parallel investigations leading to the conviction by contumacy of D. Krombach in 1995, which was then challenged before the CJEU and the ECHR.[114] The case went through many twists and turns: 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 handed over to the French authorities.[115] 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 of *ne bis in idem.* The case was brought before the Court of Cassation.[116] In its decision of the 2nd of April 2014, the Criminal Chamber of the Court endorsed the decision of the trial judges that 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 judgment" within the meaning of the French penal code and Article 54 of the Convention implementing the Schengen Agreement.[117] The differences in the criminal procedures in France and in Germany were indirectly considered as an obstacle – or instrumentalised as an obstacle to reject the application of the principle of *ne bis in idem* as interpreted by the Court of Justice of the European Union. Indeed, the Court of Cassation associated the closing of the proceedings by the Public Prosecutor (*Einstellung des Verfahrens*, § 170 II StPO) with the French *classement sans suite* by the Public Prosecutor, which is not considered as a final judgment. Some commentators have underlined the misleading dimension of this equivalence, which results from a mere comparison of institutions.[118] Because the office of the investigating judge no longer exists in Germany, German proceedings tend to be only institutionally measured against the ones led in France by the Public Prosecutor. Instead, the substance of the legal regimes can be used as an element of comparison.[119] As noted elsewhere, the decision in the Krombach case 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

[114] See C-7/98, *Krombach c/ Bamberski*, 28 March 2000, ECLI:EU:C:2000:164 and ECtHR, 13 févr. 2001, *Krombach c/ France*, No. 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', 2005, *Annuaire de droit européen*, 889.

[115] After he was kidnapped by men acting on behalf of Kalinka Bamberski.

[116] For an overview of the proceedings, see B. Aubert, 'Application par les juridictions internes', 2015, *RSC*, 471 ; also J. Lelieur, 'Le dernier mot de la Cour de cassation dans l'affaire Krombach, degré zéro de la coopération judiciaire pénale dans l'UE', 2014, *AJ pénal*, 365.

[117] 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*'.

[118] J. Lelieur, 'Le dernier mot de la Cour de cassation dans l'affaire Krombach' (n116).

[119] *Ibid.*

affected by the offence (see article 186 al. 2 of the Criminal Procedural Code).[120]. This last *Krombach* decision has been rightly qualified as the *degré zéro de la coopération judiciaire pénale dans l'UE*.[121] As noted by commentators, the reasoning of the court appears questionable in light of the case law of the CJEU regarding the principle of *ne bis in idem* and its refusal to refer the question to the CJEU for a preliminary ruling is hard to understand.[122] This case shows both the need to clarify in which cases the principle can or should apply and the need to act upstream, instead of using *ne bis in idem* downstream.[123] The deficiencies of Framework Decision 2009/948/JHA on the prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings have also been largely pointed out, in particular its non-prescriptive nature.[124] It would be appropriate in our view to develop additional instruments, including the *ne bis in idem* rule and the transmission of proceedings.

The existence of differing procedures regarding *in absentia* trials has also generated friction in the EU's area of criminal justice. Several cases involving Italian procedural criminal law were brought before the Court of Cassation, relating in particular to the execution of EAWs and the meaning of article 4*bis*, 1 b of Framework Decision 2009/299/JHA.[125] In a 2014 case, the French judicial authorities had, in the first instance, authorised surrender to the Italian authorities for the purpose of executing a custodial sentence pronounced *in absentia.* Prior to this, the French authorities had solicited additional information from the Italian authorities and considered that the defendant, because he/she had elected domicile at the office of his lawyer, had been informed of the proceedings in compliance with the provisions of Article 161 of the Italian Procedural Criminal Code and FD 2009/299/JHA. The Criminal Chamber of the Court of Cassation found that these elements were insufficient. The Court of

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[120] *Ibid.* Furthermore, J. Lelieur noted that the assertion of the 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.

[121] *Ibid.*

[122] Especially regarding C-398/12, M., 5 June 2014, ECLI:EU:C:2014:1057; C-187/01, *Gözütok* c/ *Brügge,* 11 February 2003, ECLI:EU:C:2003:87; C-491/07 *Turanski*, 22 December 2008, ECLI:EU:C:2008:768. For critical comments see B. Aubert, 'Application par les juridictions internes'; J. Lelieur 'Le dernier mot de la Cour de cassation dans l'affaire Krombach'; S. Fucini, 'Confiance mutuelle : la décision de refus de poursuivre n'est pas une décision définitive', 2014, *Dalloz actualité*.

[123] B. Aubert, 'Application par les juridictions internes', 2015, *RSC*, 471 et seq.

[124] See, for example, M. Massé et L. Abou Daher, 'Les conflits de compétence entre juridictions nationales' *in* H. Ascensio, E. Decaux and A. Pellet (eds.), *Droit international pénal*, Paris, Pedone, 2012 ; 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', 2015, *AJ pénal*, 528. The author notes the late – loi No. 2015-993 du 17 août 2015 – and deficient transposition of FD 2009/948/JAI. See Art. 695-9-54 CPP and seq.

[125] See Court of Cassation, Crim., 29 October. 2014, No. 14-86.480, inédit ; see also Crim., 25 March 2014, No. 14-81.430, inédit. For a presentation of these cases, see National Reports on France, 175.

Cassation quashed the judgment on the basis that the investigating chamber should have "better inquired if, firstly, M. X had been defended before the appeal court by a counsellor to whom he had given mandate for this purpose and, secondly, if he had at his disposal, after his surrender, the ability to request a retrial".[126] Here, in contrast to the aforementioned *ne bis in idem* case, the court did not consider Italian law as an obstacle to mutual recognition. Nor did it challenge the compliance of Italian law with the Framework Decision. It simply recalled that, according to Article 695-22-1 of the French Code of Criminal Procedure, the surrender of a person may be authorised 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°); had received the notification of the decision and was informed that a new procedure allowing a further examination on the merits but 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 indicated that judges should request additional information to make sure that these conditions are fulfilled. The court, on an another occasion, agreed with the lower executing court, which had authorised the surrender of the requested person – 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.[127] The Court of Cassation even specified that it was not the role of the requested judicial authority to assess the conformity of Article 161 of the Italian Procedural Criminal Code with EU law on the notifications of proceedings.

The existence of difficulties in *in absentia* cases[128] was also confirmed during the interviews carried out with judges. It appears to be the most common ground for refusal.[129] The practice is to request additional information to verify that the person was notified of 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 the non-execution of EAWs issued by Romania, Portugal or also Poland. However, according to the judges interviewed, it is not an issue of standards/level

[126] Crim., 25 March 2014, No. 14-81.430, inédit. The defendant was arguing 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 and that the possibility to exercise his right to contest the case against the appeal court decision was not certain.

[127] See Court of Cassation, Crim., 29 October 2014, No. 14-86.480, inédit ; see also Crim., 25 March 2014, No. 14-81.430, inédit.

[128] 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 (Art. 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 in the judgment of the Court of Assizes and renounce, in the presence of his lawyer, to the re-examination of his/her case (Art. 379-4 CPP).

[129] 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, three were related to *in absentia* proceedings.

of protection set by Framework Decision 2009/299/JHA, which was transposed almost by a copy-paste into Article 695-22-1CPP. [130] It is rather a question of rigour in practice (precision, translation, etc.). The main obstacle is to know how in practice the notification was made to the accused in the issuing Member State. Answers to requests for complementary information are sometimes too short and limited to the (re)affirmation that the notification was duly made. This may exacerbate feelings of distrust as it is difficult to discern what stands behind these affirmations.

VII. Conclusion

This contribution suggests that cooperation is genuinely working well among authorities. However, it also highlights that the French legislator has been generally speaking reluctant to significantly amend national criminal procedures. In this regard, it seems that harmonisation of legislation and cooperation/mutual recognition are operating as two separate entities – at least it seems to be perceived as such by the French legislator and French judicial authorities. Based on French case law and legislation, this research does not suggest, however, that European instruments should be amended. As things stand now, the minimalist approach pursued by France – not to say reluctance towards harmonisation – makes it hard to realistically foresee rules on procedural rights that go beyond minimum rules. This is also in line with the limitations inherent in the legal basis of Article 82 of the Treaty on the Functioning of the European Union (TFEU). Besides, it is premature to amend instruments on procedural criminal law. Most of them have been adopted recently and their scope has yet to be clarified by the CJEU through the preliminary ruling mechanism or through infringement proceedings if they were to be launched in order to remedy unsatisfactory transpositions.

As regards mutual recognition and transnational cooperation writ large, it is clear that improvements to the EAW framework could be made. Practitioners interviewed in the course of this research insisted on the recurring problems of translation and the need to improve the training of translators, but at the same time on the need to ensure smooth cooperation among the Member States. Interestingly, the 'rise' of mutual distrust in the EU area of criminal justice does not seem to have an impact on French judicial authorities. [131] A European initiative devised to address unacceptable detention conditions in some Member States should also, in our view, be developed to prevent obstacles to mutual recognition. Recently adopted mutual recognition instruments such as the European Investigation Order or the European Protection Order have yet to prove their efficiency in practice. Lessons could be learnt from the practice of the EIO in order to sketch out possible future minimum rules on evidence, in the same way as the EAW led to legislating on *in absentia* proceedings.

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[130] 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.

[131] See, lately, Case C-216/18 PPU, *LM,* 25 July 2018, ECLI:EU:C:2018:586; Case C-220/18 PPU, *ML*, 25 July 2018, ECLI:EU:C:2018:589.

Ultimately, it is above all important to have the necessary hindsight before legislating on new matters. Information needs to be available and data should be collected in order to properly assess existing instruments. A duty to collect figures, possibly through a central national authority, could be an interesting way to facilitate the assessment of instruments, as well as a first step towards a more coherent criminal law policy.

CHAPTER II

European criminal procedural law in Germany: Between tradition and innovation

Thomas Wahl* and Alexander Oppers**

I. Introduction

A. Basic axioms of the German criminal legal order

It may sound like a truism to say that EU law increasingly influences German law in terms of criminal procedure. From the turn of the millennium, debate in Germany has focused, however, on the impact of EU harmonisation measures on substantive criminal law[1] and the implementation of the EU cooperation instruments (in particular the European Arrest Warrant) into the rather specific field of international judicial cooperation in criminal matters.[2] Only a few authors have considered the existing influence of European Community law on the national criminal procedure.[3] Several 'contact points' between European Community (EC)/European Union (EU) law and German criminal procedure law, such as detention, due process requirements, admissibility of evidence and the position of the defence counsel, have not been discussed for a long time.[4] This changed after the 'Lisbonisation' of European criminal law and the increasing effect of EU acts specifically designed to harmonise national procedure law, namely the procedural rights' directives.

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[1] See H. Satzger, *Die Europäisierung des Strafrechts*, Cologne, Carl Heymanns Verlag, 2001.

[2] W. Schomburg and O. Lagodny and S. Gless and T. Hackner, *Internationale Rechtshilfe in Strafsachen*, 5th ed, Munich, C.H. Beck, 2012, Einleitung, mn. 71 et seq.

[3] J. Jokisch, *Gemeinschaftsrecht und Strafverfahren*, Berlin, Duncker&Humblot, 2000.

[4] Jokisch, *Ibid.*, 253.

This development was not only welcome but also led to criticism; European criminal procedure law remains a sensitive topic that touches on the fundamentals of sovereignty and legal culture, in particular if one recalls a solid German viewpoint that criminal procedure law is the 'citizen's *magna carta*' and the 'ventricle of the rule of law'.[5] In order to understand the extent of influence of EU law on German procedural law, the main features and sources of criminal procedure as well as the status of the defendant and 'victim' are explained in the following analysis.

The Federal Republic of Germany is constitutionally considered a democratic, social and federal state. These 'leading rules' – enshrined in Art. 20 para. 1 of Germany's constitution, i.e. the Basic Law (*Grundgesetz – GG*) – also have an impact on criminal law (see also below). The federation is made up of 16 semi-autonomous *Länder* (federal states). The federal structure (*inter alia*) aims at preventing the accumulation of state power at the central level after the negative experience of the Third Reich. The most important aspect is the division of competences and tasks between the Federation (*Bund*) and the *Länder*. This triggers three important notes:

(1) The legislative competence of the Federation is limited to areas defined in the Basic Law. Criminal law and criminal procedure law belong to the so-called 'concurrent legislation'; the *Länder* have the competence to legislate as long as the Federation has not done so (Art. 72, 74 para. 1, No. 1 GG). The Federation regulates criminal law and criminal procedure law. This means that the rules defined in these areas are applicable in all the German *Länder* and, unlike in the United States, *Länder* are barred from legislating in these ambits.[6] The *Länder* retain legislative competence for regulating the system of enforcing penalties (*Strafvollzug*), including the law enforcement of pre-trial detention,[7] and for policing, including the prevention of crime.
(2) To be distinguished from the legislative competence is the competence to execute statues. The *Länder* exercise most of the state powers (see Art. 83 GG). The Federation is only allowed to create a few federal authorities. Federal laws, are, in general, executed by the administrative and judicial authorities of the *Länder*. This includes the administration of criminal justice, which represents the procedure from the start of criminal investigations to the execution of the penal authority of the state. Prosecution services are assigned to the court structure at the level of the *Länder*.[8] The Federation's possibilities of supervision in this area vary.
(3) In principle, all courts are courts of the *Länder*. There are only a few federal courts. Federal courts are regularly involved as appeal courts within the criminal procedure. They are, in principle, designed to maintain consistency and uniform interpretation in legal decision-making at the national level.

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[5] B. Schünemann, 'Vorwort', *in* C. Roxin, B Schünemann, *Strafverfahrensrecht*, 29th ed., Munich, C.H. Beck, 2017, p. V.

[6] See H. Jarass, B. Pieroth, *GG Grundgesetz für die Bundesrepublik Deutschland – Kommentar*, 15th ed., Munich, C.H. Beck, 2018, Art. 72, mn. 11 et seq.

[7] I.e. not pre-trial detention itself as part of the criminal procedure.

[8] 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. at supreme level of the *Länder*.

The Federal Constitutional Court (hereinafter FCC) is not an integral part of the judicial or appeal process. However, unlike supreme/constitutional courts in other countries, it has a very powerful and highly influential position, especially in criminal law-related matters. It exercises judicial review on constitutional issues and the compliance of all governmental institutions with the constitution. Procedures, including the constitutional complaint procedure that can be brought by an individual who alleges that his/her constitutional rights have been violated, enable the FCC to declare a legislative act, an act/a measure of the executive branch or a court decision unconstitutional.

An important feature of the constitution is the '*Rechtsstaatsprinzip*' (enshrined in Art. 20, para. 3 GG.[9] 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,[10] the terms of which override ordinary legislation.[11] 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. It is closely (but not exclusively) connected with fundamental rights where the principle of proportionality serves as a limit to state action. Accordingly, any measure interfering with the fundamental rights of the individual must comply with the principle of proportionality. To this extent, the measure must be based upon a legitimate purpose, suitable, necessary and adequate to that end (proportionality *strictu senso*).

The proportionality principle applies at all stages of the criminal procedure. It is also applicable to citizens' rights other than fundamental rights or rights of state

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[9] 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 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*, 4th edition, New York, OUP, 2010, 178.

[10] Hillgruber, *in* J. Isensee, P. Kirchhof (eds.), *Handbuch des Staatsrechts der Bundesrepublik Deutschland*, Band IX, Allgemeine Grundrechtslehren, 3rd ed., Heidelberg, CF Müller, 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.).

[11] See e.g. Section 74b Criminal Code (confiscation) and Section 111m (1) Code of Criminal Procedure (seizure of printing devices).

institutions. Sometimes, the proportionality principle is explicitly mentioned in the provisions of the criminal procedure or the criminal code. At first glance, the conditions of the proportionality principle mirror those construed in European Union law. However, a closer look reveals that legal requirements, applicability and results of the principle of proportionality may differ from its European counterpart.[12] The principle of proportionality is a recurring theme through the following analysis and therefore most important to understand the German way of legal thinking.

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 are put forward:[13]

– 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;[14]
– 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*; hereafter: GCCP)[15] and the Courts Constitution Act (*Gerichtsverfassungsgesetz – GVG*; hereafter: CCA).[16] As mentioned above, the German Constitution (Basic Law; *Grundgesetz – GG)*[17] plays an important role since criminal procedure law is considered *"the seismograph of the State's constitution".*[18] 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); Art. 101(1) (ban of extraordinary courts and right to lawful judge); Art. 103 (fair trial) and Art. 104 (deprivation of liberty).

The European Convention of Human Rights (ECHR) contains fundamental procedural guarantees directly applicable by German courts. It forms, hierarchically, a statutory federal law, below the Constitution. However, the case law of the FCC strengthened the legal position of the ECHR by arguing that the Convention should

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[12] For details on the concept of proportionality in the German legal order, see M. Böse, T. Wahl, 'Country Report Germany', *in* P. Albers *et al.*, *Towards a common evaluation framework to assess mutual trust in the field of EU judicial cooperation in criminal matters* (2013), 213 et seq. (the report is also available at: www.jura.uni-bonn.de/fileadmin/Fachbereich_Rechtswissenschaft/Einrichtungen/Lehrstuehle/Boese/Aushaenge/J-18664_WEB_Rapport_Rechtsstaatmonitor__EN_.pdf).

[13] W. Beulke, S. Swoboda, *Strafprozessrecht*, 14th ed., Heidelberg, C.F. Müller, 2018, mn. 3 et seq.; Roxin, Schünemann, *Strafverfahrensrecht*, § 1, mn. 3 et seq.

[14] Federal Court of Justice (Bundesgerichtshof – BGH), official case reports (St) 38, 215, 219 et seq.

[15] An English translation is available at: http://www.gesetze-im-internet.de/englisch_stpo/index.html.

[16] *Ibid.*

[17] *Ibid.*

[18] Roxin, Schünemann, *Strafverfahrensrecht*, § 2, mn. 1.

be taken into account when interpreting national law.[19] The German legislator cannot therefore enact a law that contradicts the ECHR. Similarly, the German courts must abide by the ECHR when they are to render a decision.[20]

The substantive criminal law is enshrined in the (German) Criminal Code (*Strafgesetzbuch – StGB*; hereafter GCC).[21] 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 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)*, hereafter AICCM).[22] It also contains the national provisions implementing the instruments on the mutual recognition of judicial decisions (EU cooperation), such as the European Arrest Warrant or the European Investigation Order. 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 does not contain any special procedural rules. As a result, for instance, some procedural safeguards in international cooperation can be inferred from the GCCP and other acts.

B. 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.[23] Inquisitorial elements consist in, for instance, the leading role of the presiding trial judge who actively conducts the trial, e.g. by questioning witnesses or hearing experts. Furthermore, there is 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 keeping control of the presentation of evidence. It is also the only one that has the power to discontinue the proceedings.

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[19] BVerfGE 74, 358.

[20] However, in recent years conflicts arose between the jurisprudence of the FCC and the ECHR. See further A. Nussberger, 'The European Court of Human Rights and the German Federal Constitutional Court' published at: www.cak.cz/assets/pro-advokaty/mezinarodni-vztahy/the-echr-and-the-german-constitutional-court_angelika-nussberger.pdf.

[21] An English translation is available at: http://www.gesetze-im-internet.de/englisch_stgb/index.html.

[22] An English translation of the 2012 version of the act (i.e. recent reforms not considered) is available at: www.gesetze-im-internet.de/englisch_irg/englisch_irg.html#p0461. A new translation is currently under elaboration.

[23] B. Huber, 'Criminal Procedure in Germany', *in* R. Vogler, B. Huber (eds.), *Criminal Procedure in Europe*, Berlin, Duncker & Humblot, 2008, 283.

A decisive element that counteracts a purely inquisitorial process is the principle of accusation (*Anklagegrundsatz,* Sec. 151 GCCP).[24] Accordingly, the opening of a court investigation shall be conditional upon preferment of charges. The institution responsible 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 were hallmarks of the German criminal procedure for a long time in the past.[25] The investigatory or pre-trial procedure (*Ermittlungsverfahren*) is now formally in the hands of the state prosecution ('master of the investigative phase').[26] 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 proceeded to trial by indictment.

As the German criminal procedure was undergoing a reform process, adversarial elements have been introduced and further developed. The court is, for instance, actively supported in its functions 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/her rights.[27] German criminal procedure law assumes that the defendant takes an active role during the proceedings. He/she has the right (or even the duty) to participate in the process.[28] He/she can, for instance, put forward questions (Sec. 240 GCCP); file applications to take evidence (Sec. 244(3)-(6), 245(2), 246(I) GCCP); make statements after evidence has been taken in each individual case (Sec. 257 GCCP); and present arguments or file applications after the closure of the taking of evidence (Sec. 258 GCCP).

A rather new, recent element that is characteristic of the adversarial dimension of German procedure is the legislation on 'plea bargaining'. The court can negotiate

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[24] Beulke, Swoboda, *Strafprozessrecht*, mn. 18.

[25] The institution of the 'investigating judge' was abolished in 1975.

[26] In practice, however, it is the police that undertakes investigations, for the most part acting on their own authority.

[27] Huber, 'Criminal Procedure in Germany', 283. R. Schlothauer, 'Europäische Prozesskostenhilfe und notwendige Verteidigung', 2018, *Strafverteidiger (StV),* 169, 174 submits that adversarial elements will characterise the pre-trial proceedings in future after implementation of the EU's legal aid Directive 2016/1919 (see also below I. 3a).

[28] For the right to be present and actively participate in the criminal proceedings, see 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,* Milan, Giuffrè Editore, 2017, 131 et seq. and 137 et seq.

agreements with the participants on the further course and outcome of the proceedings (Sec. 257c GCCP).[29]

C. The status of the defendant and the victim as an outcome of democracy, liberty and the welfare State

German criminal procedure takes account of the three main demands of the Age of Enlightenment: democracy, liberty and a welfare State.[30] 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).

Defendants

The liberal idea of criminal procedure is mainly reflected in the rights of the individual because his/her sphere of freedom must be protected from arbitrary and excessive intrusion by the State.[31] The search for a balance between an effective judicial system and of the protection of the State's citizen on the one hand, and the safeguarding of individual rights of the defendant on the other, characterises the German criminal procedure. Only a few individual rights are explicitly mentioned in the German Constitution (see below). Others are referred to in the criminal procedure code, such as the right not to be the 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 for by the State (Sec. 140 GCCP). Other rights are derived from general principles of the 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 as an overriding procedural right, against which all norms of criminal procedure must be measured.[32]

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.[33] The right to be heard is further expressed in various provisions of the GCCP.

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[29] Introduced in 2009. See further T. Weigend, J. Iontcheva Turner, 'The Constitutionality of Negotiated Judgements in Germany', 2001, 15, *German Law Journal*, 81, 89 et seq; Beulke, Swoboda, *Strafprozessrecht*, mn. 394 et seq.

[30] Roxin, Schünemann, *Strafverfahrensrecht*, § 2, mn. 2 et seq.

[31] Roxin, Schünemann, *Strafverfahrensrecht*, § 2, mn. 9.

[32] *Ibid.*

[33] Beulke, Swoboda, *Strafprozessrecht*, 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.[34] The ban on double jeopardy is considered a guarantee to individual liberty, which is also founded on human dignity.[35] 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 only applies to decisions of internal tribunals.[36] As a result, German authorities are not prevented from prosecuting a person anew in Germany or extraditing a person, although (s)he may have been sentenced or acquitted for the same criminal offence in a foreign country.[37]
- 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.[38]
- 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. 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 has developed a mixed system of the defendant's fundamental rights. An explicit and a general reference to defence rights for persons against whom criminal proceedings have been brought, did not make it to the Constitution.[39] The Constitution expressly mentions only a 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 as 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). Other defence rights – regulated in the criminal procedure code, i.e. simple federal law – are considered fundamental only.[40]

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[34] *'No person may be punished for the same act more than once under the general criminal laws.'*

[35] E. Schmidt-Assmann, *in* Maunz-Dürig, *Grundgesetz Kommentar*, Munich, C.H. Beck, 1993, Abs. III Art. 103, mn. 260; S. Kadelbach, *in* O. Dörr, R. Grote, T. Marauhn (eds.), *EMKR/GG Konkordanzkommentar*, 2nd ed., Tübingen, Mohr Siebeck, 2013 Kap. 29, mn. 4.

[36] 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).

[37] BVerfGE, *Ibid.* (16).

[38] See further Beulke, Swoboda, *Strafprozessrecht*, mn. 29 with further reference.

[39] 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 for various reasons (Rüping *in Bonner Kommentar zum Grundgesetz*, Heidelberg, C.F. Müller, 2005, Art. 103, Abs. 1, mn. 3).

[40] T. Wahl, 'Fair trial and defence rights', 134 et seq.

German criminal procedure also takes into account social considerations. Law enforcement authorities are obliged, for instance, to take account of the personal situation of a suspect (Sec. 136(3), 160(3) GCCP). Other elements of the 'welfare State' are the appointment of a mandatory defence counsel already in the pre-trial stage of the proceedings (Sec. 140, 141 GCCP) or the appointment of a defence counsel for the purpose of preparing proceedings to be reopened (Sec. 364b GCCP). The provisions on mandatory defence mirror a very paternalistic approach of the German legislator towards the defendant.[41] The appointment of mandatory defence is independent of the financial means of the defendant, but rather orientated towards – partly broadly formulated – case groups defined by law.

Victims

An important component with regard to the social responsibility of the State is the strengthening of victims' rights, which have considerably increased in the last three decades. This notwithstanding, there is no general provision in the Constitution that ensures the protection of victims of criminal offences or a 'right to prosecution'[42]. It is nonetheless acknowledged that the legal status of victims derives from constitutional norms, such as human dignity (Art. 1 para. 1 GG); the guarantee of access to justice (Art. 19 para. 1 GG); the principle of fair trial (which applies to all parties involved and thus also to the victim); the State's obligation to ensure that criminal justice functions properly (deduced from the *Rechtsstaats*-principle and meaning that the interests of the victim must also be taken into account); or the right to be heard (Art. 103 GG, as this right is intended to benefit all parties involved in legal proceedings).

The German legal order distinguishes between the 'victim' as described in substantive criminal law and victims' rights enshrined in the German criminal procedure.[43] The GCCP does not use the term 'victim', but instead refers to 'aggrieved person'. The law does not define this term, which may also be due to the fact that the German criminal procedure assigns different functions, or roles, to the aggrieved person. He/she may be, for instance, an 'applicant to compel public charges', a 'private prosecutor' (*Privatkläger*), a 'private accessory prosecutor' (*Nebenkläger*), or an applicant for civil compensation (within the criminal proceedings)[44].

The legal position of victims of crime has considerably and continuously improved since the mid-1980s. Today, the GCCP and other laws confer several rights to victims (apart from the said functions). These rights can be grouped by typology, i.e. rights that pursue the interest of the aggrieved person for punishment and/or compensation, and

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[41] K. Lüderssen, M. Jahn, *in* Löwe-Rosenberg, *Die Strafprozessordnung und das Gerichtsverfassungsgesetz – Großkommentar*, 26th ed., Berlin, De Gruyter, 2007, § 140, mn. 12; M. Bohlander, *Principles of German Criminal Procedure*, Oxford, Hart, 2012, 60.

[42] BVerfGE 51, 187.

[43] P. Velten, *in* Rudolphi *et al*. (eds.), *Systematischer Kommentar zur Strafprozessordnung und zum Gerichtsverfassungsgesetz (SK-StPO)*, München, Luchterhand, 2007, Vor §§ 374-406h, mn. 1.

[44] Commonly referred to as *Adhäsionsverfahren* – a distant cousin of the French *action civile*.

those that ensure the protection of the person, for example if the victim is a witness.[45] Although the number of victims' rights has considerably increased in recent years, the position of victims is always subject to a degree of tension between the interests of the injured and those of the accused, which must be balanced by the legislator.[46]

D. 'United in diversity' – legal traditions and their impact on cooperation

In general, Germany favours a rather 'cooperation-friendly' approach. It was particularly shaped by the case law of the FCC, first and foremost developed in extradition law. It is, however, also applicable to other forms of international cooperation in criminal matters.[47] The FCC acknowledges that the level of protection of the German Constitution cannot be applied if it comes to cooperation in criminal matters. Its view can be summarised as follows:[48]

The German Constitution (the Basic Law) assumes that the state of which it is the Constitution is integrated into the system of international law of the international community of States. This approach is due to the 'openness' of the German Constitution to international cooperation and its 'friendliness' towards international law.

The Basic Law therefore also orders foreign legal systems and legal views to be respected in principle even if they are not identical to German domestic views in every detail.

In mutual assistance concerning extradition, 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.

The only insurmountable obstacle to extradition 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 the German constitutional order.

Interviewees confirmed that the existing diversity of legal traditions regarding criminal procedure law across the EU is, in principle, not considered an obstacle by the German authorities. In particular, they pointed out that requirements of each other's criminal procedure are widely accepted and mutually recognised. 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.

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[45] See also details below IV.

[46] B. Schünemann, 'Zur Stellung des Opfers im System der Strafrechtspflege', 1986, *Neue Zeitschrift für Strafrecht (NStZ),* 193, 196.

[47] P. Schädel, *Die Bewilligung internationaler Rechtshilfe in Strafsachen in der Europäischen Union*, Baden-Baden, Nomos, 2005, 179.

[48] See e.g. BVerfGE 59, 280; E 63, 332; E 75, 1; BVerfG, Beschl. v. 24.6.2003 – 2 BvR 685/03, 2003, *Neue Zeitschrift für Verwaltungsrecht (NVwZ),* 1499. See also K. Grasshof and R. Backhaus, 'Verfassungsrechtliche Gewährleistungen im Auslieferungsverfahren', 1996, *Europäische GRUNDRECHTE-Zeitschrift (EuGRZ),* 445. For the approach of the FCC when it comes to cooperation within the EU, see below III A 1.

Only a few issues have been mentioned where the different legal traditions have an impact on cooperation. One main aspect is pre-trial detention, where the authorities in common law countries (in particular the UK) consider it problematic that a person can already be remanded in custody at an early stage of the investigative proceedings (as 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.[49]

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 prescribed 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 looked at from both sides. The Dutch approach has seemingly not changed after the entry into force of the Framework Decision on mutual recognition of foreign sentences. As a result, German authorities are distrustful and smooth cooperation in the enforcement of sentences is hindered.

Finally, interviewees raised the point that problems occur 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 receives assistance from social workers, probation officers, etc. who speak French.

II. Transposition and implementation of procedural rights' directives for defendants

A. State of transposition

Germany has transposed four out of the six procedural rights' directives (as of December 2018), i.e. Directives 2010/64 (interpretation and translation), 2012/13 (right to information), 2013/48 (access to a lawyer), and Directive 2016/343 (presumption of innocence and right to be present). As regards Directive 2016/800 (safeguards for children) and Directive 2016/1919 (legal aid), ministerial drafts (*Referentenentwürfe*) were presented in October 2018.[50]

[49] 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, 34. The CCBE report is available in the Internet at: www.ccbe.eu/fileadmin/speciality_distribution/public/documents/CRIMINAL_LAW/CRM_projects/EN_CRM_20161117_Study-on-the-European-Arrest-Warrant.pdf.

[50] Note: This article reflects legislation and case law through March 2019. Later developments could not be considered. This also applies for the following sections.

1. Transposed Directives

In essence, the German legal system was already in line with the obligations of the aforementioned directives.[51] It was only necessary to bring a few refinements to German laws during the transposition of 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 in the European obligations have not emerged.

An example of this is the implementation of Directive 2016/343. The bill argued that the Directive only requires selective adjustments of German procedural law as regards certain aspects of the right to be present at a trial. The law contains obligations to inform the defendant about the consequences of his/her absence at the trial and a clarification that German law already complies with the Directive and the ICCPR as far as the presence of the defendant who was deprived of liberty at the hearing stage of an appeal on law (*Revision*) is concerned.[52] Some of the provisions of Directive 2016/343 were not deemed necessary for transposition.[53] In particular, exceptions from the principal defendant's duty to be present throughout the trial[54] were held to be in line with Art. 8 of the Directive.

There was criticism that the legislator did not make full use of the Directive and particularly did not positively regulate the presumption of innocence which is still deduced from the '*Rechtsstaats*-guarantee' of the Basic Law.[55] Furthermore, there was criticism that the legislator seized the opportunity to dilute mandatory defence at the stage of the proceedings of the appeal on law.[56] Others conceded that the Directive only provides for legislative content at the lowest level by reviewing ECtHR case law, i.e. the minimum standards in Europe, so that the leeway of the legislator was indeed limited.[57]

From a legal point of view, the implementation of Directive 2013/48 brought about rather considerable changes, by improving the suspect's right to access a lawyer: the suspect who wants to consult a defence lawyer before his/her examination

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[51] For Directive 2010/64 and Directive 2012/13, see BT Drucks. 17/12578, 10; E. Christl, 'Europäische Mindeststandards für Beschuldigtenrechte – Zur Umsetzung der EU-Richtlinien über Sprachmittlung und Information im Strafverfahren', 2014, *NStZ*, 376, 383. For the Directive 2013/48, see M. Heim, 'Stärkung der Beschuldigtenrechte', 2016, *NJW-Spezial*, 440, and A. Oehmichen, 'Beschuldigtenrechte', *in* Knierim, Oehmichen, Beck, Geisler, *Gesamtes Strafrecht aktuell*, Baden-Baden, Nomos, 2017, chap. 17, mn. 8, who notes that legislative amendments further clarified existing case law of the higher German courts. For Directive 2016/343 see BT Drucks. 19/4467.

[52] BT Drucks. 19/6138.

[53] See BT Drucks. 19/4467, 10 et seq.

[54] See Wahl, 'Fair trial and defence rights', 138. Exceptions which justify holding or continuing criminal proceedings without the accused concern, for instance, voluntary absence, unfitness to stand trial or disorderly conduct.

[55] H. Pollähne, 'Stellungnahme des RAV zum Entwurf eines ‚Gesetzes zur Stärkung des Rechts des Angeklagten auf Anwesenheit in der Verhandlung vom 4.4.2018', www.rav.de.

[56] Deutsche Strafverteidiger e.V., 'Stellungnahme Nr. 01/2018', 6.

[57] Bundesrechtsanwaltskammer, 'Stellungnahme Nr. 24/2018', www.brak.de.

must be provided with information that facilitates contact with a lawyer, including information on emergency legal services.[58] The defence lawyer of the accused has a right to be present and actively participate in the very early stages of investigations, i.e. at the stage of examinations of the accused by the police.[59] Equally, the defence counsel has a right to be present at confrontations (*Gegenüberstellung*).[60] However, it must be noted that these rights and duties of the authorities were already exercised in practice beforehand,[61] meaning that the actual effects of the new law are limited.

In the context of changes in the AICCM, which establishes the right of the person sought by means of an EAW to be informed of his/her right to legal assistance in the issuing state, the 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 when it comes to the standards of the 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 is (still) lagging behind.[62] The assignment of a lawyer to a person sought under an arrest warrant (extraditee) is, for instance, made dependent upon requirements that are applied rather strictly in practice.[63] An early involvement of lawyer's assistance in cases of international cooperation is (still) rather rare.[64]

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.[65]

2. *Directives in the process of transposition*

More far-reaching changes to German legislation can be expected in view of the two remaining pieces of EU law, Directive 2016/1919 and Directive 2016/800.

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[58] See Sec. 136(1) sentence 2 GCCP new version.

[59] Sec. 163a(4) GCCP new version.

[60] Sec. 58(2) GCCP new version.

[61] L. Meyer-Gossner, B. Schmitt, *Strafprozessordnung*, 59th ed., München, C.H. Beck, 2016, § 163, mn. 16; W. Beulke, *Strafprozessrecht*, 13th ed., Heidelberg, C.F. Müller, 2016, mn. 156.

[62] R. Esser, 'Entwurf eines Zweiten Gesetzes zur Stärkung der Verfahrensrechte von Beschuldigten in Strafverfahren und zur Änderung des Schöffenrechts', 2017, *Kriminalpolitische Zeitschrift (KriPoZ),* 167, 179.

[63] See further Sec. 40 AICCM. See also T. Wahl, 'The perception of the principle of mutual recognition of judicial decisions in criminal matters in Germany', *in* G. Vernimmen-Van Tiggelen, L. Surano, A. Weyembergh (eds.), *The future of mutual recognition in criminal matters in the European Union*, Bruxelles, Éditions de l'Université de Bruxelles, 2008, 132 et seq.

[64] Or is at least not handled uniformly among the Higher Regional Courts, as one interview partner confirmed.

[65] Oehmichen, 'Beschuldigtenrechte', *op. cit.*, chap. 17, mn. 75, 76.

Legal aid

The Directive on legal aid is closely connected to the rules on access to a lawyer in criminal proceedings. German law does not yet fully comply with the requirements of the Directive on legal aid. The main difficulty is to integrate the obligations set out by Directive 2016/1919 into a rather special (in Europe perhaps unique) system of 'mandatory defence' provided for by German law. Before we look at the envisaged amendments for the implementation of the Directive, it is worth briefly explaining this system of 'mandatory defence':

As indicated in the introduction, Germany has no legal aid system *stricto sensu*, as far as defendants are concerned.[66] Although it is well established that the accused may enjoy the assistance of a defence counsel at any stage of the proceedings (Sec. 137 para. 1 GCCP), the German system distinguishes between mandatory and discretionary representation.[67] The law defines certain scenarios where representation by a defence counsel is 'mandatory' (better said: 'necessary'), which is called *notwendige Verteidigung*.[68] A 'necessary defence counsel' may be a lawyer of the defendant's own choice, or – if he/she does not have one – a lawyer appointed by court either upon application or *ex officio* (appointed defence counsel – *Pflichtverteidiger*). The lawyer is then appointed irrespective of the financial means of the defendant and irrespective of his/her will. Therefore, a 'necessary defence counsel' (*notwendiger Verteidiger*) is not necessarily a 'mandatory defence lawyer' (*Pflichtverteidiger*), but a mandatory (better said: appointed) defence counsel is always a 'necessary' one.[69]

There are different provisions in the GCCP that set out situations where defence is 'necessary'. The most important provision, however, is Sec. 140 GCCP para. 1 defines certain scenarios of defence being mandatory, such as:

The main hearing at first instance is held at the Higher Regional Court or at the Regional Court;

The accused is charged with a felony[70];

The proceedings may result in an order prohibiting the pursuit of an occupation;

Remand detention is executed against an accused;

An attorney has been assigned to the aggrieved person pursuant to Sections 397a and 406g GCCP.

Para. 2 of Sec. 140 GCCP provides for a general clause, i.e. a defence counsel shall be appointed if the assistance of defence counsel appears

(1) necessary because of
   (a) the seriousness of the offence, or
   (b) the difficult factual or legal situation, or

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[66] This is different to the situation of aggrieved persons acting in their functions as private prosecutor (*Privatkläger*) or 'private accessory prosecutor' (*Nebenkläger*, see above) where certain legal aid aspects apply, see Sec. 379 and 397a para. 2 GCCP.

[67] Bohlander, *Principles of German Criminal Procedure*, 60.

[68] The idea is mainly based on the public interest. in a properly functioning system of administration of justice and emanates from the *Rechtsstaatsprinzip* (see Bohlander, *Ibid.*).

[69] Beulke, Swoboda, *Strafprozessrecht*, mn. 165.

[70] I.e. the offense at issue carries a minimum sentence of one year (Sec. 12 GCC).

(2) if it is evident that the accused cannot defend himself/herself.

Applications filed by accused persons with a speech or hearing impairment shall be granted.

Another feature of the German system of 'necessary defence' is that – as a rule – a lawyer must be appointed 'as soon as' the accused is indicted (Sec. 141 para. 1 GCCP), i.e. at a rather late stage of the criminal proceedings. During preliminary proceedings, a defence counsel 'may' be appointed upon request of the public prosecution office, i.e. leaving a certain discretion to the appointment of a necessary defence counsel to the prosecutors. At a first stage, the appointed defence counsel is paid by the State. Depending on the outcome of the criminal proceedings, the defendant may bear the costs of the appointed defence counsel, in particular if he/she is convicted.[71]

According to the ministerial draft, 'introducing new provisions into the law of mandatory defence' of October 2018,[72] the current system of 'necessary defence' will be maintained. As a consequence, no general shift towards a proper legal aid system, as it exists in other EU countries, can be expected. The regime of 'necessary defence' can be seen as a 'functional equivalent' to a means and merits test.[73] The Directive, however, triggered several amendments, such as extending the scenarios for which participation of a defence counsel is mandatory; abolishing time constraints, in particular by ensuring an early appointment of the defence counsel (e.g. if the accused is interviewed or is to appear before the court which is deciding on his/her detention);[74] and opening the possibility for the defendant to file his/her own motion to appoint a defence lawyer at the pre-trial stage. Other amendments include new rules on the quality of 'appointed defence lawyers', on the replacement of lawyers and on legal remedies.[75]

Several issues regarding the implementation of the Directive into German law are currently being discussed. In particular, stakeholders disagree, *inter alia*, on the following issues:[76] What forms of deprivation of liberty trigger mandatory defence? Which procedural measures must be included in the catalogue of mandatory

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[71] Another question is, however, whether the costs can actually be enforced against indigent perpetrators. Thus, there is a certain 'means test' at the level of execution of costs. See in this context: M. Jahn and S. Zink, 'Verteidiger der ersten Stunde *ante portas:* Legal Aid und das Pflichtenheft des deutschen Strafprozessgesetzgebers', *in* B. Czerwenka, M. Korte, B.M. Kübler (eds.), *Festschrift zu Ehren von Marie Luise Graf-Schlicker*, Cologne, RWS, 2018, 475, 487.

[72] Referentenentwurf des Bundesminsiteriums der Justiz und für Verbraucherschutz zu einem Gesetz 'zur Neuregelung des Rechts der notwendigen Verteidigung', available at: https://www.bmjv.de/SharedDocs/Gesetzgebungsverfahren/DE/notwendige_Verteidigung.html.

[73] Referentenentwurf 'notwendige Verteidigung', 2.

[74] See also R. Schlothauer, 'Europäische Prozesskostenhilfe und notwendige Verteidigung', 2018, *StV*, 169, who considers decisive adaptations of German law to the Directive's scope in terms of points of time when a defence lawyer must be appointed.

[75] Referentenentwurf 'notwendige Verteidigung', 2-3.

[76] See, for instance, R. Schlothauer, R. Neuhaus, H. Matt, D. Brodowski, 'Vorschlag für ein Gesetz zur Umsetzung der Richtlinie (EU) 2016/1919 betreffend Prozesskostenhilfe für Verdächtige und Beschuldigte in Strafverfahren', 2018, *HRRS*, 55; 'Policy Paper der Strafverteidigervereinigungen', *Neuordnung der Pflichtverteidigerbestellung*, Berlin

participation of the defence counsel? Above which threshold of criminal sanction is participation necessary? To what extent are exceptions from the participation of the defence counsel acceptable? Which should be the conditions for replacing an appointed defence lawyer? Which criteria must be met to ensure the quality of mandatory defence lawyers?[77]

Major changes will also be brought to the system of mandatory defence in cases of international cooperation in criminal matters. The ministerial draft intends to generate a major paradigm shift when it declares each extradition as a scenario of necessary assistance (*notwendiger Rechtsbeistand*).[78] Limitations that the law currently stipulates would be fully abolished.[79] Hence, the draft goes beyond the obligations from the Directive that limit legal aid to EAW cases. To that extent, the Directive may have an indirect effect since 'legal aid' (in the German sense of the term) would be extended to all extradition cases. Regarding the EAW, the draft provides for additional specific rules as to ensure the necessary participation of a lawyer's assistance when the person sought exercises his/her right of dual defence (see Art. 5 para. 2 Directive 2016/1919).[80] Further adaptations are made as regards assistance of counsel in cases of enforcement of foreign orders for confiscation or deprivation (enforcement cooperation). Although the Directive does not regulate this field, amendments are deemed necessary in order to ensure consistency with the extradition rules.[81]

Children's rights

Rather complex issues must also be solved in the course of the implementation of Directive 2016/800 on procedural safeguards for children who are suspects or accused persons in criminal proceedings. 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*, hereafter: YCL) with several references to the GCCP.

2018; Jahn and Zink, 'Verteidiger der ersten Stunde', *in* FS Graf-Schlicker, 475 et seq.; Bundesrechtsanwaltskammer, *Stellungnahme*, No. 34/2018, October 2018.

[77] Quality is a very sensitive issue in the discussion. Lawyers observed that Germany lags behind as regards ensuring a high quality of appointed defence lawyers (see Schlothauer, Neuhaus, Matt, Brodowski, 2018, *HRRS*, 55-56; M. Jahn, *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* Berlin, De Gruyter, 2014. Schlothauer, 'Europäische Prozesskostenhilfe', 2018, *StV,* 173 points out that Germany is to introduce a certified quality assurance. For the discussion on the quality of mandatory defence lawyers, see the EU funded QUAL-AID project: www.qualaid.vgtpt.lt/en.

[78] Referentententwurf 'notwendige Verteidigung', 11, 51.

[79] See Sec. 40 AICCM and below III A 2.

[80] See Referentententwurf 'notwendige Verteidigung', 55.

[81] However, in this case the existing restrictions for the appointment of the assistance of counsels are upheld (Sec. 53 para. 2 AICCM). See, in detail, Referentenentwurf 'notwendige Verteidigung', 12, 54-55.

The focus of implementation lies on the right to assistance by a lawyer (Art. 6 of Directive 2016/800). By comparison with the existing law, further scenarios of 'necessary' assistance[82] by a lawyer will be introduced. Considerable further changes will be necessary as to the points in time when the appointment must be enforced.[83] The implementation must, in particular, ensure that deprivation of liberty as a sanction can only be imposed if the accused 'child'[84] has received effective assistance by a lawyer during the criminal proceedings. 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. The role of defence lawyers will considerably increase with implementation. Actually, participation of a defence counsel in criminal proceedings involving 'children' is not very frequent.[85]

Similarly, the roles of other parties to the German criminal procedure involving juveniles and young adults are expected to evolve after the Directive has been transposed. This concerns first the situations allowing for removal of the rights of the 'holder of parental responsibility'[86] under Art. 5 (2) Directive 2016/800. A far-reaching right of – possibly final – removal of the rights is not known in the YCL yet.[87] In particular, the implementation of the Art. 7 Directive 2016/800 is going to change the way in which the youth courts' assistance service[88] 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 in the preliminary proceedings than it is to date. Furthermore, it must be implemented under which conditions indictment can be filed without a prior report of the youth courts' assistance service and under which conditions participation of a representative of the youth courts' assistance service at trial is dispensable.[89]

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[82] For the use of the term 'necessary assistance/defence counsel' (*notwendiger Rechtsbeistand/notwendige Verteidigung*), see above, a).

[83] See Referentenentwurf des Bundesministeriums für Justiz und Verbraucherschutz zu einem Gesetz 'zur Stärkung der Verfahrensrechte von Beschuligten im Jugendstrafverfahren', October 2018, 1; M. Sommerfeld, 'Was kommt auf den deutschen Gesetzgeber, die Landesjustizverwaltungen und die Justizpraxis zu?', 2017, *Zeitschrift für Jugendkriminalrecht und Jugendhilfe (ZJJ)*, 165, 173 et seq.

[84] German law does not use the term 'child' as in the Directive, but distinguishes, see 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.

[85] F. Schaffstein, W. Beulke, S. Swoboda, *Jugendstrafrecht*, 15th ed., Stuttgart, Kohlhammer, 2014, mn. 673.

[86] German law distinguishes in this regard between the legal notions of 'parent or guardian' and of 'legal representative' (see Sec. 67 YCL).

[87] See Sommerfeld, 2017, *ZJJ*, 165, 169.

[88] For details on this institution, see I. Pruin, *Alternatives to Custody for Young Offenders – National Report on Juvenile Justice Trends: Germany*, available at: www.oijj.org/sites/default/files/baaf_germany1.pdf, 2.

[89] Referentenentwurf 'Verfahrensrechte von Beschuligten im Jugendstrafverfahren', 31 et seq.

B. Implementation of procedural rights' directives in practice

EU directives on strengthening procedural safeguards have become more and more subject to the case law of German courts. As far as purely national cases are concerned, an important issue is whether the defendant can claim the translation of the entire judgment if he/she does not have 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 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) according to which the interpretation of passages of the judgment is regularly sufficient to maintain an effective defence of the accused.[90]

Another area of concern is the application of Directive 2010/64 and Directive 2012/13 to special types of criminal procedure which are not brought to an end 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*).[91] 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 of up to one year.[92] 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/her right to be heard.

German courts brought 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 *Gavril Covaci*[93] case, the CJEU that Directive 2010/64 on interpretation/translation

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[90] 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. The approach goes back to a decision of the FCC in 1983: BVerfG, Beschl. v. 17.5.1983 – 2 BvR 731/80. For a comparison between the former and current legal situation, see Christl, 'Europäische Mindeststandards für Beschuldigtenrechte', 2014, *NStZ,* 378 et seq. Critical to the approach chosen by the German legislator: Ü. Yalçin, 'Das Stigma des Finanzierungsvorbehalts – Stärkung der Beschuldigtenrechte im Strafverfahren', 2013, *Zeitschrift für Rechtspolitik (ZRP)*, 104. The Federal Court of Justice ruled that neither EU nor national law entitle the defendant to request a translation of the judgment of the last instance court (BGH, Beschluss vom 13.9.2018 – 1 StR 320/17).

[91] See also Case C-278/16, *Frank Sleutjes*, 12 October 2017, ECLI:EU:C:2017:757.

[92] For details see Huber, 'Criminal Procedure in Germany', 350-351.

[93] Case C-216/14, 15 October 2015, ECLI:EU:C:2015:686.

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 it 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 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 the foreign language meets the two-week deadline and can therefore be considered admissible.[94] The Federal Court of Justice has now ruled that, if the defendant is represented by a lawyer, the time limits for legal remedies are only met when the document was translated.[95] Thus, the FCJ limits the CJEU's *Covaci* judgment only to accused persons who are not represented by a lawyer.[96]

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 (i) 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 (ii) 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 nor 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 be conferred a two-week period instead of one week (as stipulated by law) for his/her objections from the moment when he/she actually became aware of the order.[97]

However, it is doubtful whether the approach via the provisions on re-storing the *status quo ante* is the right one, since it seemingly puts persons who are not defended by a German lawyer at a disadvantage. They might ignore the German penal order procedure or react too late, meaning that they would then be confronted with a *res*

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[94] Supporting: M. Böhm, 'Anmerkung', 2016, *Neue Juristische Wochenschrift (NJW),* 306; sceptical D. Brodowski, 'Anmerkung', 2016, *StV*, 210. Denying the applicability of 'essential document' to objections, T. Kulhanek, 'Anmerkung', 2016, *Juristische Rundschau (JR),* 208, 209. The Federal Court of Justice now ruled that, if the defendant is represented by a lawyer, the time limits for legal remedies are only met when the written document is translated.

[95] BGH, Beschl. v. 30.11.2017 – 5 StR 455/17 = *NStZ-RR* 2018, 57.

[96] See also BGH, Beschl. v. 9.2.2017 – StB 2/17.

[97] C-124/16, C-188/16 and C-213/16, *Ianos Tranca and Others*, 22 March 2017, ECLI:EU:C:2017:228.

iudicata decision which might be enforced under the terms of Framework Decision 2005/214/JHA.[98]

Together with the difficulties in reaching people in the context of trials *in absentia*, issues relating to penal orders raise the question of how the law can be applied effectively when people exercise their European 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.

C. Perceived added value of the procedural rights' directives

Interviewees expressly raised the point that, due to the exception clauses stipulated in the directives 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 for 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 by an interpreter are held, in principal, to be sufficient. Therefore, some interviewees noted that 'all remains the same' and it remained unclear where the added value of EU law lied. They added that it is understandable that compromises must be found at EU level with the Council and its 28 EU Member States as the dominant force in putting out 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 EU legislation should duly take into account the impacts of exception clauses. An assessment of the real added value of the EU harmonisation process should be conducted before the adoption of new instruments.

According to the defence lawyers interviewed, Directive 2016/1919 raised high expectations for favourable changes. Interviewees argued that a reform of the German rules on 'legal aid' should be aligned with the defendant's 'material right' to have access to a lawyer from the outset of the investigative proceedings. Furthermore, the compensation of appointed defence counsels should increase. In this context, defence lawyers request a considerable improvement when it comes to the assistance of clients in extradition/surrender proceedings. In addition, it is hoped that a quality control for mandatory defence counsels is introduced by the German implementing law. It was advocated that Directive 2016/1919 should be the occasion to introduce a new system of assigning defence lawyers *ex officio*, which limits the discretion of judges.

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 maintain the current system. Here, again interviewees referred to the Directive's too far-reaching 'exception clauses', which means that the impact of the harmonisation process of EU law remains low.

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[98] Instead, 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. T. Wahl, 'Die EU-Strafverfahrensrichtlinien vor deutschen Gerichten', 2017, *Eucrim,* 50, 52.

As regards the expected changes from the implementation of the children's rights' Directive, interview partners voiced criticism that the regulations on the assistance of the defence counsel laid down in the Directive may even lead to a distortion of the German criminal procedure against children. To date, the majority of cases are dealt with bilaterally, during the preliminary proceedings, between the prosecutor/police on the one side and the juvenile and his/her parents on the other side. Under German law, prosecutors and judges specialised in proceedings involving juveniles have far-reaching possibilities to dispense 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 top' of the criminal proceedings involving juveniles, but may be done away with 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. The 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 the 'education of the client' and most defence lawyers lack training in criminal proceedings involving juveniles or young adults. Whether this *caveat* can be remedied by increasing training measures in the 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) Directive 2016/800 in order to maintain the current state of play, i.e. a dispensation without participation of the defence counsel and without (formal) court proceedings.

Regarding other issues of judicial practice, the EU Directives on procedural safeguards have had a very low impact. Special training sessions 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:[99] German practitioners hardly take into consideration EU law. Instead, they apply the national law (after it enters into force). Only a few specialists deal with questions as to what extent general principles of EU law, e.g. the requirement to interpret national law in conformity with the Directives, may serve as lines of argument in favour of a person concerned in a given case. Similarly, CJEU case law does not have a major impact on daily judicial practice. An exception – as remarked by a prosecutor who was interviewed – is the CJEU's case law on the service of penal orders to non-resident accused persons (living abroad).

[99] 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*, 2008.

III. Evidence law

A. Evidence-gathering

1. Principles of evidence collection and actors involved in the German law of criminal procedure

As indicated in the introductory remarks, there are basically two layers during criminal proceedings in Germany. Whereas the court exercises the leading role for the trial, the pre-trial phase is under the control of the State prosecution service. The prosecution service is also called the 'master of the criminal pre-trial procedure' (*Herrin des Ermittlungsverfahrens*). The investigations carried out by the prosecutor are primarily intended to decide whether a case should proceed to the court for trial, i.e. whether public charges should be preferred (Sec. 160 para. 1 GCCP). Once a case is admitted to trial, control is taken out of the hands of the prosecution and given to the court. It is then up to the presiding judge to take the evidence. The procedure to establish the truth during the trial is regulated formally and strictly (*Strengbeweis*), with the law acknowledging only four types of evidence: witnesses, experts, documentary evidence and inspection.

In the pre-trial or investigative phase, the prosecutor has the duty to "ascertain not only incriminating but also exonerating circumstances, and shall ensure that evidence, the loss of which is to be feared, is taken" (Sec. 160 para. 2 GCCP). For this purpose, the public prosecutor's office shall be entitled to request information from all authorities and to make investigations of any kind. It shall hear witnesses and experts; and the accused must be examined prior to conclusion of the investigations (unless the proceedings result in termination). Sec. 136 and 136a of the GCCP stipulates rules for the first examination of the accused and prohibited measures of examination.

In practice, however, it is the police that undertakes the investigations. The police is called 'state prosecution auxiliary officers' (*Hilfsbeamte der Staatsanwaltschaft*). In theory, this means that they are legally obliged to support the prosecutor and follow the instructions of the State prosecution service. In the vast majority of cases, the police – after having informed the prosecutor of an offence – leads the investigations independently, drafts a police report and submits its findings to the prosecutor. The State prosecutor then prepares the indictment, so, in practice, his/her role is rather prosecutorial than investigative.[100] The *de facto* role of the police is, however, without prejudice to the reliability of evidence that remains with the prosecution service.

Since the bulk of the investigative measures infringe the fundamental rights of the suspect or third parties, most measures are subject to statutory control. The GCCP contains specific rules for coercive measures, such as search and seizure, surveillance, interception of telecommunications, online search, long-term observation, use of technical means, use of undercover agents, bodily examinations, taking of blood samples, photographs, fingerprints, DNA analysis, etc.

The individual measures are often regulated in a very detailed manner. This also emanates from the specific case law of the FCC that gave guidance to the legislator on how measures (in particular covert investigative measures with technical means) must be construed in order to comply with the requirements of the constitution. In addition,

[100] HUBER, 'Criminal Procedure in Germany', 298.

the FCC remarked, that – as an overarching principle – the powers under the GCCP are only valid if carried out in a manner that is proportionate to the object in view.[101] As a rule, violations of this principle of proportionality render evidence inadmissible for trial.[102]

Against this background, courts (in most cases a single pre-trial judge at the local court – *Ermittlugnsrichter*) are involved in order to legitimate measures that intrude on the suspect's or third party's rights. For this purpose, the prosecutor must apply to the judge for authorisation. Which conditions are to be observed and how a judge must be addressed is regulated in the provisions on the specific investigative measure. Under certain circumstances and for some measures (e.g. search and seizure, bodily examination of persons, interception of telecommunications, surveillance by technical means), an order can be directly made by the prosecution service.

This applies above all in exigent circumstances, in which there is a danger that the evidence may otherwise be lost or interfered with and a court order cannot be obtained in time. In cases of urgency, when no judicial orders can be obtained, the police may also be entitled to execute an investigative measure immediately. The police then enjoys similar powers to the State prosecution service (see Sec. 163 GCCP).

Such actions are, however, subject to subsequent judicial oversight, i.e. the pre-trial judge must affirm the measure (see e.g. Sec. 100b para. 1 of the GCCP with respect to the interception of telecommunications). In addition, the person affected may seek court rulings on the lawfulness of a measure. In the pre-trial phase, this can also be done if the measure was finished and the person affected became aware of it. As a consequence, a court may decide on the admissibility of evidence before the trial.

Furthermore, the pre-trial judge may be involved for reasons relating to ensuring a higher quality and reliability of evidence, e.g. for a judicial examination of the suspect or witness.[103]

Notwithstanding, German criminal procedure today cannot be compared with systems like France or Spain where a strong role is devolved to the investigative judge. This is because the pre-trial judge cannot influence the process of evidence collection and his/her role is limited to judicial oversight.

2. Evidence-gathering in the transnational context

For evidence gathering abroad, the AICCM does not contain specific rules. In the pre-trial stage, it is for the prosecution service to decide whether evidence located in another country must be collected in order to underpin his decision for prosecution. Ministerial guidelines (*Richtlinien für den Verkehr mit dem Ausland in strafrechtlichen Angelegenheiten (RiVASt)*) provide for advice in case of outgoing requests for mutual legal assistance. General guidelines for outgoing requests are provided for in No. 25 et seq. RiVASt. According to No. 26 RiVASt, German authorities must consider that foreign authorities execute a request for mutual legal assistance in accordance with the procedural and formal rules of their own law. It is said in these guidelines that

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[101] BVerfG, 44, 353, 383. For the significance of the proportionality principle in the German legal order, see the introduction.

[102] BVerfG, *Ibid.*

[103] Bohlander, *Principles of German Criminal Procedure*, 67.

compliance with this law is, as a rule, sufficient for the German criminal procedure. Foreign authorities may be requested to consider certain rules of German criminal procedure, in particular if treaties or conventions provide for that.

In addition, the RiVASt provides for specific rules on how to file a request for search and seizure, conditions for the service of documents abroad (including summoning), examination of suspects, witnesses and experts, requests for information on the foreign law and for getting files, the temporary transfer from and to a foreign country for German proceedings and the direct communication with persons abroad.[104]

In the context of international cooperation in the trial phase, the most fiercely discussed topic is to what extent applications to summon witnesses abroad can be rejected. The underlying provision is Sec. 244 para. 5 sentence 2 of the GCCP, which stipulates that an application to take evidence by examining a witness may be rejected if the witness has to be summoned from abroad and if the court, in the exercise of its duty-bound discretion, deems the witness not to be necessary for establishing the truth. The provision is an exception from the rule that the trial court must, *proprio motu*, extend the taking of evidence to all facts and means of proof relevant to the decision (Sec. 244 para. 2 of the GCCP) and opens the path to an anticipatory assessment of the facts and guilt of the defendant.[105] The ratio of this exception related to witnesses abroad goes back to the idea that the trial court should not be obliged to take evidence that is beyond the limits of its jurisdiction.[106] Notwithstanding, modern developments of faster mutual legal assistance and modern techniques, such as the cross-border video examination of witnesses, cannot be set aside when interpreting Sec. 244 para. 5 GCCP.[107]

As regards incoming requests for mutual legal assistance, Germany takes the view that assistance for foreign countries should be rendered as far as possible. This concept is followed, e.g. by the fundamental provision in the AICCM, Sec. 59 para. 2, according to which

> '[l]egal assistance [in criminal matters] shall be any kind of support given for foreign criminal proceedings regardless of whether the foreign proceedings are conducted by a court or by an executive authority and whether the legal assistance is to be provided by a court or by an executive authority.'

The limits are laid down in Sec. 59 para. 3 AICCM:

> 'Legal assistance may be provided only in those cases in which German courts and executive authorities could render mutual legal assistance to each other.'

This means that the measure to be taken must comply with the German (regularly criminal procedure) law and potentially existing limits to the use of evidence or to the exchange of information must be observed by the executing authorities.[108] Hence, here again the principle of proportionality takes effect, so

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[104] See No. 115 et seq. RiVASt.

[105] Meyer-Gossner, Schmitt, *Strafprozessordnung*, § 244, mn. 78a.

[106] Meyer-Gossner, Schmitt, *Ibid.*, with further references.

[107] Gless and Schomburg, *Internationale Rechtshilfe in Strafsachen*, III B 1, EU-RhÜbk, Art. 10, mn. 28.

[108] Lagodny, *in* Schomburg *et al.*, *Internationale Rechtshilfe in Strafsachen*, I, § 59 mn. 31.

that a requested measure cannot be executed if it is deemed disproportional under the German yardsticks.[109]

B. Evidence admissibility

1. National rules on evidence admissibility

German criminal procedure as regards evidence features two fundamental principles: First, the inquisitorial principle (also known as 'instruction' or 'investigation' principle – *Ermittlungsgrundsatz*) requires that the aim of any investigation and trial is to find out the material truth (*materielle Wahrheit*). It is up to the trial court to establish the facts and evidence. The trial court is not in a position to rely solely upon the motions or statements as adduced by the parties taking part in the proceedings, in particular the prosecution and the defence. The second important principle is the principle of free evaluation of evidence (*freie Beweiswürdigung*). According to Sec. 261 of the GCCP, the court shall decide on the result of the evidence taken according to its free conviction gained from the hearing as a whole. It essentially means that the judge is free from strict rules on evidence or guidelines. As a rule, no specific conditions are laid down which have to be satisfied before a judge can find a fact proven. However, the principle of free evaluation of evidence reaches its limits because the material truth cannot be established 'at any price'.[110] As a consequence, by means of exclusion of evidence, higher legal interests break through both the 'inquisition' principle and the principle of free evaluation of evidence. They stem from the idea that each State action is limited by the fundamental rights as enshrined by the Basic Law, in particular the fair trial principle (deriving from the *Rechtsstaatsgarantie*). Therefore, exclusionary rules are an instrument to ensure that individual rights are respected.[111]

If a piece of evidence is taken into account in the conviction although it was not allowed to be used, the principle of free evaluation of evidence is violated. This may relate to evidence obtained in violation of the rules governing its collection in the pre-trial phase if evidence supports the findings of the court in its judgement. An example of this is when a policeman does not properly instruct the suspect about his/her rights at his/her examination and the court takes into account the suspect's statement during the police interview in the conviction. If evidence must be excluded, the exclusion is comprehensive, i.e. it cannot be circumvented by recurring to another means of evidence.[112]

German law distinguishes between exclusionary rules explicitly stipulated in the law and those that must be deduced implicitly. Explicit exclusionary rules are regulated, for example, for certain surveillance measures (such as the interception of telecommunications) when statements are recorded that concern the 'core area

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[109] Lagodny, *Ibid.*, mn. 33.

[110] BGHSt 14, 358, 365; St 52, 11, 17.

[111] Beulke, Swoboda, *Strafprozessrecht*, mn. 454.

[112] Beulke, Swoboda, *Strafprozessrecht*, mn. 455. For example, if the statement of the suspect during his examination by the police is inadmissible, the judge cannot hear the police officer as a witness on the suspect's statements.

of private life'.[113] The law also regulates that evidence cannot be used if statements are collected from persons who have the rights to refuse testimony (i.e. persons who enjoy privileges). Another important exclusionary rule is included in Sec. 136a of the GCCP, which stipulates prohibited methods of examination. Exclusionary rules may also be included in other laws outside the GCCP.[114]

It is acknowledged that evidence can also be excluded although a rule is not explicitly mentioned in legal provisions. Often – but not always – evidence is excluded when evidence was obtained in violation of the rules of its collection. Hence, it is hard to predict whether an illegal collection of evidence will result in an exclusion of evidence. Doctrine further distinguishes whether an exclusion of evidence must be accepted if the evidence was wrongly collected *(unselbständiges Beweisverwertugnsverbot*) or whether a piece of evidence was legally collected but cannot be used for the conviction *(selbständiges Beweisverwertungsverbot*).

In sum, it must be stressed that neither the doctrine nor the case law developed general rules on when violations of evidence gathering may lead to an exclusion of evidence. The approach is very casuistic and decisions are made on a case-by-case basis. There is, above all, considerable disagreement on the criteria which determine the admissibility and non-admissibility of evidence.[115]

Some lines of jurisprudence and scholars focus on the protective purpose of the norm that governed the collection of the evidence. Other areas of the case law weigh up the State interest for prosecution against the fundamental rights of the person affected, in particular by taking into account the gravity of the offence and the importance of the violation. Others combine both approaches depending on the type of the exclusionary rule, i.e. whether it is a '*unselbständiges*' or '*selbständiges*' *Beweisverwertungsverbot*.[116]

In recent time, the case law resorts more and more to an older theory that made the question on admissibility dependent on whether the violation touched upon the 'legal sphere' (*Rechtskreis*) of the defendant in its essence or whether the violation was of minor importance in view of the person's 'legal sphere'. Hence, statements of an accused were held admissible evidence in proceedings against co-defendants although the accused had no proper access to his/her defence counsel in pre-trial investigation.[117] Similarly, the statement of an accused before the pre-trial judge can be used for the conviction of a co-defendant although the defence lawyer of the accused was not notified about the examination before the pre-trial judge.[118]

In practice, the following cases play an important role if it comes to a question as to whether a piece of evidence is admissible or not: i) refusal of testimony by

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[113] See Sec. 100d para. 2 GCCP.

[114] Beulke, Swoboda, *Strafprozessrecht*, mn. 456.

[115] Overview of the different theories at Beulke, Swoboda, *Strafprozessrecht*, mn. 458 et seq.

[116] Advocated by Beulke, Swoboda, *Strafprozessrecht*, mn. 458.

[117] BGH *NStZ-RR* 2016, 377.

[118] BGHSt 53, 131; critical S. Gless, 'Anmerkung', 2010, *Neue Zeitschrift für Strafrecht (NStZ)*, 98; W. Beulke, 'Einleitung', *in* H. Satzger and W. Schluckebier (eds.), *StPO Strafprozessordnung Kommentar*, 3rd ed., Cologne, Luchterhand, 2018, mn. 265.

witnesses in the trial; ii) false or omitted advice on the defendant's rights (in particular *nemo tenetur* and consultation with a lawyer) at the examination of the suspect/accused;[119] iii) unlawful interception of telecommunication or unlawful interception of the private speech on private premises; iv) interferences into privacy, such as diary entries or tape-recordings by private persons; v) non-respect of the requirement that an investigative measure must be ordered by a judge, in particular as regards physical examination/blood tests or searches.

In general, one can state that the Federal Court of Justice (*Bundesgerichtshof, hereafter FCJ*) follows a rather restrictive line to accept an exclusion of evidence.[120] Another important feature in this context of exclusion of evidence is the so-called '*Widerspruchslösung*' developed by case law of the FCJ.[121] In several cases of possible exclusion, the FCJ requires that the defendant (or better said his/her defence counsel) must object to the use of evidence in time in the proceedings before the first instance court. 'In time' means after evidence has been taken in each individual case where the law allows the defendant to add anything.[122] Jurisprudence also applies this rule to defendants who have no defence counsel if the defendant was sufficiently informed by the judge as regards the need of objection and its consequences. If the defendant does not object in time, his/her argument on the exclusion of an individual piece of evidence is not heard on appeal. Areas where the requirement to object apply are as follows:

- Failure of advice on the defendant's rights (in particular *nemo tenetur* and consultation with a lawyer) at the first examination of the suspect/accused;
- Non-observance of the duty to notify persons who are permitted to be present at judicial examinations;
- Violation of the requirements to order the interception of telecommunications or undercover investigators;
- Non-respect of the judicial authority to order physical examination or blood tests;
- Violation of the right to confrontation under Art. 6 para. 3 lit. d) ECHR.

2. Evidence admissibility in a transnational context

Specific approaches are followed if it comes to the admissibility of evidence gathered abroad. As explained above, German criminal procedure law contains several restrictions and prohibitions when it comes to the gathering of evidence and therefore the question arises as to whether (and if yes, to what extent) these

[119] The Federal Court of Justice ruled that the failure of the police officer to inform the suspect of his/her right to get mandatory defence (a new provision that was introduced in the course of implementation of Directive 2012/13) does not lead to the exclusion of the suspect's statement as evidence in trial (BGH, Beschluss vom 6.2.2018 – 2 StR 163/17). This is criticised in legal literature since the FCJ devalues and undermines rights designed to strengthen suspects' position in the criminal proceedings and so marginalises the spirit of EU law (see C. Jäger, 'Praxiskommentar', 2018, *NStZ*, 672; A. Lilie-Hutz, *FD-StrafR* 2018-406438).

[120] H. Kudlich, 'Wenn Sie sich keinen Anwalt leisten können, wird Ihnen einer gestellt', 2018, *JA*, 792.

[121] Germany's highest court of civil and criminal jurisdiction.

[122] Sec. 257 GCCP.

restrictions/prohibitions must be observed in transnational cases. This question must be treated on the two sides of the coin, i.e. (1) how 'German restrictions' may have an impact on the admissibility of evidence in the foreign country (outgoing evidence with incoming MLA requests) and (2) how evidence that is gathered abroad for a German criminal procedure can be held admissible although German standards were not maintained (incoming evidence upon a German MLA request).[123] In the first scenario, the main question is as to what extent conditions can be set by the requested country that must be observed in the requesting country under international public law and to which extent the individual can rely on these conditions in the foreign criminal proceedings.[124]

We will focus here on the second scenario. The topic under which conditions evidence gathered abroad is admissible in German criminal procedure is much discussed in legal literature.[125] The main problem is whether evidence abroad can be used if the foreign standards of evidence gathering do not comply with German criminal procedure law. Although there are different approaches and solutions, practice is considerably marked by an important decision of the Federal Court of Justice taken in 2012.[126] In this decision, the court set far-reaching guidelines as far as cooperation within the EU is concerned.

In the case at issue, upon a request by 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 for the following reasons:

First, 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

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[123] See T. Wahl, 'Exchange of Intercepted Electronic Communication Data between Foreign Countries', *in* U. Sieber, N. von zu Mühlen (eds.), *Access to Telecommunication Data in Criminal* Justice, Berlin, Duncker & Humblot, 2016, 571, 589.

[124] See details: Wahl, *Ibid.*

[125] Fundamental: S. Gless, *Beweisrechtsgrundsätze einer grenzüberschreitenden Strafverfolgung*, Baden-Baden, Nomos, 2007; see further S. Gless, 'Das Verhältnis von Beweiserhebungs- und Beweisverwertungsverboten und das Prinzip 'locus regit actum'', *in* E. Samson (ed.), *Festschrift für Gerald Grünwald*, Baden-Baden, Nomos, 1999, p. 197 et seq.; S. Gless, 'Zur Verwertung von Erkenntnissen aus verdeckten Ermittlungen im Ausland im inländischen Strafverfahren', 2000, *NStZ*, 57 et seq; M. Böse, 'Die Verwertung im Ausland gewonnener Beweismittel im deutschen Strafverfahren', 2002, 114, *Zeitschrift für die gesamte Strafrechtswissenschaft (ZStW)*, 148 et seq.; W. Perron, 'Auf dem Weg zu einem europäischen Ermittlungsverfahren?', 2000, 112, *ZStW*, 202 et seq.; T. Hackner and C. Schierholt, *Internationale Rechtshilfe*, 3rd ed., Munich, C.H. Beck, 2017, mn. 237.

[126] BGH 1 StR 310/12 – Beschluss vom 21. November 2012 (LG Hamburg) = BGHSt 58, 32 = *HRRS* 2013, Nr. 314.

such measure were carried out on the territory of the requesting party;[127] this order or warrant was lacking in the present case;

Second, 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 a listed offence was not given at the time when the interceptions were carried out in the Czech Republic;

Third, the evidence was gathered unlawfully on Czech territory since the interception order of the Prague court was ill-founded.

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.

The FCJ 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 of the lawfulness of the measure in the requested EU state (here: the law of the Czech Republic). The FCJ mainly argues that, in an area like the EU, which is based 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 involved the 'core area of the private conduct of life' or conversation with privileged persons pursuant to Sec. 160a of the GCCP.

By applying these rather restricting standards (*eingeschränkter Prüfungsmaßstab*),[128] 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 and ruled that the relevant provision of the bilateral treaty must be interpreted as having a meaning relating to 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 GCCP). In other words, it does not have 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.

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[127] 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.

[128] 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).

In conclusion, the ruling of the FCJ opens up 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 of the ECHR are considered the only limitation for declaring evidence inadmissible. It can be assumed that such grounds are only successful in exceptional cases.

C. Perceived impact on cross-border cooperation and negotiations of new instruments

Many interviewees replied that the different procedural orders of the EU Member States do not lead to problems in practice when it comes to the problem of evidence gathering abroad. 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 applied in practice. As a consequence, formalities and procedures requested by the foreign State are respected and implemented. The exception to the *forum regit actum* principle, i.e. that 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 a theoretical nature.

One interviewee pointed out, however, that the strict German rules of criminal procedure, according to which a judge must authorise most of the coercive measures, may hinder cross-border cooperation. Others disagreed and argued that the aim of MLA is not to let a specific measure be carried out as required, but to achieve the evidentiary result. The way this result is achieved should be left open to the executing authorities and the Directive EIO explicitly provides for the necessary leeway to the executing State.

Another interviewee pointed out that he faces problems in investigating assets or property, which is assumed to be 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 that is the problem. 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 (2)(a) TFEU should not be triggered. It is first argued that the added value of an EU action is expected to remain low. Should EU standards of admissibility be envisaged, 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.[129] This is considered to give the necessary leeway to decide on the relevant cases. This approach was criticised by one interviewed defence lawyer, who argued that German courts can justify ‘all

[129] See the jurisprudence explained above, and the approach of the courts to weigh up the interests at stake (*Abwägungslösung*).

or nothing' by this concept. This being said, it is was considered doubtful that EU legislation would entail improvements, since regulations much in favour of the defendant (preferably followed the Swiss model relating to the exclusion of evidence in MLA procedures) cannot be expected.

Interviewees 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 (EIO). 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 of the grounds for refusal was widely discussed in the debates in the Council. Given the different procedural systems of the EU countries, discussions boiled down to the question as to what extent mutual trust should be accepted in the EU. As decided in the EIO (in particular after the intervention of the European Parliament) the EU is moving in 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.

IV. Detention law

A. Pre-trial detention and alternatives to detention

1. National rules of pre-trial detention and existing alternatives

The starting point of the national law on detention is Art. 104 of the Basic Law. It sets out the framework for detention and ensures, as a procedural safeguard, the material fundamental right to liberty and freedom of the person (Art. 2 para. 2, sentence 2 of the Basic Law). Art. 104 para. 1 contains a parliamentary reservation of restriction of a person's liberty (*Freiheitsbeschränkung*), i.e. this is only possible pursuant to a formal law and only in compliance with the procedures prescribed therein. Art. 104 paras. 2-4 sets the framework for the most intensive form of restriction of liberty, i.e. the deprivation of liberty (*Freiheitsentziehung*), in particular by requiring the involvement of a judge. The norm expresses that the freedom of individuals is a very high-ranking value of the German constitutional order. This refers back to the experiences of injustice during the Third Reich.[130]

The effective application of this constitutional safeguard is very much dependent on the detailed level of legislation and the implementation by the courts in practice. Although the non-compliance with statutory law triggers a violation of the Constitution, the FCC only examines whether the interpretation of statutory law by the courts is within the limits of the Constitution or not. The FCC also supervises the guarantee of the proportionality of measures depriving the person of their liberty.[131]

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[130] See M. Müller-Franken, 'Art. 104 (Rechtsgarantien bei Freiheitsentziehung)', *in* K. Stern and F. Becker (eds.), *Grundrechte-Kommentar*, 2nd ed., Cologne, Heymanns, 2016, mn. 3, 5.

[131] For this restricted control of the FCC, see Müller-Franken, *Ibid.*

Further requirements for the deprivation of liberty are detailed in the GCCP.[132] It should be distinguished between detention of non-convicted persons (i.e. remand detention) and detention of convicted persons after judgment. The following focuses on the first scenario, i.e. pre-trial or remand detention.[133] 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.[134] In other words, remand detention is a security measure and not a first taste of prison.[135] Therefore, as a rule, the suspect has to remain at liberty; remanding someone in custody should be the exception.

Admissibility of remand detention 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 under a number of conditions (Sec. 112 GCCP): i) strong (i.e. high degree of) suspicion of the offence; ii) there is a ground for arrest; iii) the order is not disproportionate to the significance of the case and to the penalty[136] likely to be imposed[137]). The following grounds for arrest exist: i) flight or risk of flight,[138] and risk of tampering with evidence[139]; ii) strong suspicion of having committed certain serious offences exhaustively listed in the law, such as murder or homicide, or forming terrorist organisations;[140] iii) risk

[132] 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 analysed in the following section.

[133] For further information on detention of convicted persons after judgment, see the internet publication of the study at: www.europarl.europa.eu/RegData/etudes/STUD/2018/604977/IPOL_STU(2018)604977(ANN01)_EN.pdf, 43 et seq.

[134] Bohlander, *Principles of German Criminal Procedure*, 75 with further references to the jurisprudence of the Federal Constitutional Court.

[135] Huber, 'Criminal Procedure in Europe', 305.

[136] Or measure of reform and prevention.

[137] 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 units).

[138] Sec. 112(2) nos 1 and 2 GCCP.

[139] 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.

[140] 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 in this alternative too. Only, the burden of judicial justification of the grounds for arrest (risk of flight and tampering) are

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.;[141] iv) risk of non-appearance at the main hearing in accelerated proceedings[142].

Detailed and rather complicated rules lay down the rights of the accused and the mechanisms of judicial oversight 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's rights without delay and in writing in a language that 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.

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lowered (see Bohlander, *Principles of German Criminal Procedure*, 76; Beulke, Swoboda, *Strafprozessrecht*, mn. 214).

[141] See further Sec. 112a GCCP. This provision clearly pursues preventive purposes which is why its proportionality is criticized (see Bohlander, *Principles of German Criminal Procedure*, 77).

[142] See Sec. 127b GCCP.

The accused is also to be advised of the 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 that he/she understands that he/she 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/she may demand notification of the consular representation of his/her native country and have messages communicated to the same.

Judicial remedies

The accused can invoke certain judicial remedies. The law distinguishes between judicial remedies against the warrant of arrest and against decisions and measures in execution of detention.

Starting with the former, if the accused is apprehended on the basis of the warrant of arrest, he/she 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/she shall be given an opportunity to remove grounds for suspicion and arrest and to present those facts which speak in his/her favour (see Sec. 115 GCCP).

If remand detention is continued, the accused can lodge a complaint (*Beschwerde*)[143] aiming at revoking the warrant of arrest.

As long as the accused is in remand detention, he/she 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.[144] This remedy is called review of detention (*Antrag auf Haftprüfung*). By contrast with 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.[145]

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).[146]

Regarding measures in execution of detention, 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

[143] Regulated in Sec. 304 et seq. GCCP.

[144] Sec. 117(1) GCCP.

[145] 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.

[146] The accused may also be located in another place than the court and the hearing is simultaneously transmitted audiovisually to his place, e.g. because of great distance or sickness of the accused (Sec. 118a(2), sentence 2 GCCP).

the accused, etc. The accused in remand detention can lodge a complaint against these restrictions pursuant to Sec. 304 GCCP.[147]

Judicial oversight ex officio

After a detention period of six months, the Higher Regional Court *Oberlandesgericht* (the highest courts at the level of the *Länder*)[148] 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. Each extension can be ordered only for three months.

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 detention increases.[149] According to the FCC, 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.[150] 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;[151]
- Remand detention cannot be maintained in order to investigate other offences not subject to the current warrant of arrest;[152]
- Delay of investigations attributable to matters falling within the sphere of the State do not legitimise an extension of the time period of retention detection;[153]
- An overload of work 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 organisational level.[154] The same holds true for situations of absences or vacation periods of judges or prosecutors.[155]

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[147] Beulke, Swoboda, *Strafprozessrecht*, mn. 229a. This must also be considered as a rule. For exceptions see Sec. 119(5) GCCP and Meyer-Gossner, Schmitt, *Strafprozessordnung*, § 119 mn. 36, 37.

[148] 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.

[149] Beulke, Swoboda, *Strafprozessrecht*, mn. 227.

[150] BVerfGE, 103, 21, 35.

[151] Thüringisches OLG, *StraFo* 2004, 318.

[152] BVerfG, *NStZ* 2002, 100.

[153] BVerfG, *StV* 2006, 2013; 2007, 644; Bohlander, *Principles of German Criminal Procedure*, 79.

[154] BVerfG, *StV* 1999, 328.

[155] Bohlander, *Principles of German Criminal Procedure*, 80.

As a consequence of these approaches, remand detention periods exceeding one year are rare in practice. If the detention is based on grounds of serious offences, it must by law be terminated after one year (Sec. 122a GCCP). Hence, whether there is a maximum length of remand detention depends on the ground for arrest.

2. Detention in the transnational context: extradition detention

Procedure and judicial oversight

Particular rules apply 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 a person sought is only possible after an extradition arrest order (*Auslieferungshaftbefehl*)[156] 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/her decisions are final and not subject to an ordinary remedy.[157] An extradition arrest order can be issued either upon receipt of an extradition request (Sec. 15 AICCM) or even prior to the receipt of an extradition request. In the latter case, the order is called a '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 arrest 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 Schengen Information System (SIS). However, the information must contain the minimum content 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 i) there is danger that the person may attempt to avoid the extradition proceedings or the extradition (risk of flight); or ii) 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 request 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.[158] 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

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[156] Also translated as 'extradition arrest warrant'. In order to avoid confusion with the term 'European arrest warrant', the term 'order' is used.

[157] As an extraordinary remedy, constitutional complaint is possible.

[158] See 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

identity and citizenship of the accused. The magistrate also advises the accused that he/she may at any time during the proceedings be represented by counsel (Sec. 40 AICCM) and that he/she is free to make or not make any statements regarding the charges against him/her. 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 on 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 takes 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.[159] 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.[160]

The procedure relating to the extradition arrest order must be distinguished from the following formal extradition procedure, which is characterised 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 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).

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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.

[159] P. Pfützner, *Country report – Germany*, www.eurowarrant.net, 3.

[160] OLG Düsseldorf, *MDR*, 1990, 466; Schomburg and Hackner, I § 26, *in* Schomburg, Lagodny, Gless, Hackner (eds.), *Internationale Rechtshilfe in Strafsachen*, mn. 7.

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/she is free to make or not make any statements regarding the charges against him/her. The magistrate will also ask the accused whether, and if so on what grounds, he/she 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 that 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/her 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/her first examination. The examinations can, according to Sec. 28 and Sec. 21/22 of the AICCM, 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.[161]

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 hindrances in relation to approval of the European Arrest Warrant.

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 to do so. 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 purely formal requirements.[162] 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/her legal counsel must be advised of the decision. The accused must

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[161] Lagodny, '§ 28', *in* Schomburg, Lagodny, Gless, Hackner (eds.), *Internationale Rechtshilfe in Strafsachen*, mn. 1.

[162] Lagodny, '§ 30', *in* Schomburg, Lagodny, Gless, Hackner (eds.), *Internationale Rechtshilfe in Strafsachen*, mn. 30.

receive a copy.[163] 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 until the final decision of the Federal Constitutional Court has been taken, which it normally does.[164]

However, the Higher Regional Court 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*).[165]

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 summarised in the following section:

– Review of the admissibility of the extradition by the Higher Regional Court;[166]
– Higher Regional Court's review of the abuse of discretion exercised by the State Attorney on the grounds for approving the extradition;[167]
– 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) 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),

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163 See Art. 32 of the AICCM.

164 Hackner, Schierholt, *Internationale Rechtshilfe in Strafsachen*, mn. 67, fn. 90.

165 For further details on the surrender phase, see Hackner, Schierholt, *Internationale Rechtshilfe in Strafsachen*, mn. 78.

166 Sec. 12 AICCM.

167 Sec. 79 AICCM.

(2) it is apparent that the accused cannot himself adequately protect his/her rights, or
(3) the accused is under 18 years of age.

– Right to be informed of the right to nominate an assistance of counsel in the issuing state (in case of EAWs, Sec. 83c para. 2 AICCM);
– 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);[168]
– 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;[169]
– Right to be informed, right to notification of decisions/orders;[170]
– Right to advice;[171]
– Right to remain silent;[172]
– Right to be heard;[173]
– Right to make statements and objections;[174]
– Right to suspension or stay of execution of an extradition arrest order;[175]
– Right to review remand in custody at least twice a month;[176]
– Right to examine probable causes of suspicion if special circumstances justify a review;[177]
– Right to reconsider the decision of the Higher Regional Court after new circumstances become known;[178]
– Right to file a constitutional complaint against the Higher Regional Court's decision before the Federal Constitutional Court.[179]

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.

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[168] In case of applicability of Sec. 83c para. 2 AICCM, the defence counsel in the issuing state has no right to access the files (so OLG Bremen, Beschluss vom 5.9.2018, 1 Ausl. A 13/18).

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

[170] Sec. 20, 32 AICCM, Sec. 77 in conjunction with Sec. 114b, c GCCP (e.g. notification of relatives before detention).

[171] Sec. 21, 22, 28, 79 para. 2 AICCM.

[172] See Sec. 21, 22, 28 AICCM.

[173] Sec. 28, 30 para. 2, 31 para. 4, 79 para. 2 AICCM.

[174] Sec. 21, 22, 23, 28 AICCM.

[175] Sec. 24, 25 AICCM.

[176] Sec. 26 AICCM.

[177] Sec. 10 para. 2 AICCM.

[178] Sec. 33, 79 para. 3 AICCM.

[179] 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.

3. Perceived impact on cross-border cooperation instruments

In the interviews, defence lawyers criticised 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 finalised. 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, 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 for bringing people to other jurisdictions.[180]

B. Interpretation and application of the Aranyosi and Căldăraru *judgment*

1. Peculiar German context of the Aranyosi and Căldăraru *judgment*

As a preliminary remark, it should first be highlighted that the CJEU's judgment in the *Aranyosi and Căldăraru* case (C-404/15) was – at least indirectly – triggered by the FCC's landmark decision of 15 December 2015, also known as the 'identity control/review decision'.[181]

The FCC's decision set the limits of mutual recognition by the German legal order if it comes to a conflict between obligations in favour of EU cooperation and fundamental rights. The FCC expressed its dissatisfaction with previous approaches of the CJEU. It seized the opportunity to establish an opposing concept to the CJEU's lines of argument, especially developed in *Radu* (C-396/11) and *Melloni* (C-399/11) to deny considerations of the national constitution's fundamental rights in the context of executions of EAWs. The relationship between the FCC and the CJEU has always been a 'special' one, in particular with the FCC's doctrine not to absolutely recognise the supremacy of EU law and to develop certain 'German-like' limits of this supremacy with its *Solange* case law. Hence, as a rule, the FCC will not examine acts or legal measures of EU law as long as they are not considered *ultra vires*[182] or touch upon the constitutional identity guaranteed by Art. 79 para. 3 of the Basic Law.[183]

With its decision of 15 December 2015, the FCC sent a clear warning shot towards the CJEU, since German courts have been critical from the outset towards tendencies

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[180] Problems in the context of the proportionality control with regard to extradition arrest and detention were presented in previous studies. See M. Böse, T. Wahl, 'Country Report Germany', *in* Albers *et al.*, *Evaluation framework*, 245 et seq.

[181] BVerfG, Beschluss vom 15. Dezember 2015 – 2 BvR 2735/14. For a short summary of the decision in English see T. Wahl, 'Federal Constitutional Court Invokes Identity Review in EAW Case', 2016, *Eucrim*, 17. Case analyses in English are provided for by: F. Meyer, 'From Solange II to Forever I', 2017, *NJECL*, 277-294; J. Nowag, 'EU law, constitutional identity, and human dignity: A toxic mix?', 2016, 53, *Common Market Law Review*, 1441-1453; T. Reinbacher and M. Wendel, 'The Bundesverfassungsgericht's European Arrest Warrant II Decision', 2016, *Maastricht Journal*, 702-713.

[182] See BVerfG, Beschl. vom 6 Juli 2010, 2 BVR 2661/06 (*Honeywell*), paras. 55 et seq.

[183] This identity control was mainly developed in the FCC's decision on the constitutionality of the Lisbon Treaty, BVerfG, Urteil vom 30. Juni 2009, 2 BvE 2/08 *et al.*, paras. 240 et seq.

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 FCC clearly states that there are limits to the mutual recognition principle enshrined in the EAW and that German courts reserve the right, as an executing authority, to verify fundamental rights' infringements if there are sufficient grounds to believe that mutual trust has been shaken.

In the case at issue, the *Oberlandesgericht* (Higher Regional Court – hereafter: HRC) of Düsseldorf 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. 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. Despite these doubts, the HRC held the EAW admissible and favoured surrender. The FCC quashed this decision by arguing that 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 para. 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 established by the German legal order[184]. Both principles protect the constitutional identity guaranteed by Art. 79 para. 3 of the Basic Law which the FCC is entitled to review even if sovereign acts determined by EU law are the subject of the procedure.

The FCC stressed that it is not the German implementation law on the EAW that is unconstitutional, but rather the decision of the HRC, 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.

The decision triggered more questions and uncertainties than it solved problems. One may wonder, for instance, which concrete principles and rights can trigger the identity review, to which types of cooperation the identity review is applicable, what consequences the identity control has and to what extent it forms a (possibly new) ground for refusal in EU cooperation. Nevertheless, the decision must be seen in the wider context of the '*ordre public*' discussion[185] that entails every cooperation instrument, be it mutual recognition, international treaty or non-treaty based. It is all about the question as to what extent a state can refuse extradition or surrender of

[184] See introduction above, I.

[185] Also sometimes referred to under the heading public policy reservation.

a person because certain standards that exist in the requested state are not upheld in the requesting state. This could be different substantive criminal law, other standards of criminal procedure or diverging fundamental rights standards in the 'enforcement phase', such as detention conditions.

Germany, including the German legislator, opposed, from the outset, the view that surrender cannot be denied even if another EU Member State does not maintain certain standards. Therefore, the human rights clause in Art. 1 para. 3 of the Framework Decision on the European Arrest Warrant was considered a ground for refusal of *ordre public* to be implemented. The implementing norm, Sec. 73 Sentence 2 AICCM, applies to all mutual recognition instruments given that 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,[186] IX[187] and X[188] shall not be granted if compliance would violate the principles in Article 6 of the Treaty on the European Union.' The FCC's approach is therefore different from the one followed by the CJEU in its *Aranyosi* judgment in several respects; the FCC established its own 'constitutional' refusal ground when it invokes the identity control test.[189] This approach seemingly differs diametrically from the approach of the CJEU, which concluded in the *Melloni*, *Radu* and *Aranyosi and Căldăraru* cases that there is no additional refusal ground next to Art. 3, 4, and 4a of the Framework Decision on the EAW. Besides, European fundamental rights are no longer the yardstick of examination while the German Constitution is the yardstick for examination. The FCC shifts away from the European *ordre public* which should – also according to the CJEU – exclusively govern 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.[190] In contrast to the CJEU in *Aranyosi*, the FCC does not restrict a possible suspension of surrender to 'exceptional circumstances' or a 'systematic lack of human rights standards' but calls on the German courts to carry out an assessment of a possible fundamental rights' infringement in each individual

[186] Part VIII = Extradition and Transit between Member States of the European Union.

[187] Part IX = Assistance by Enforcement to Member States of the European Union.

[188] Part X = Other Legal Assistance with the Member States of the European Union.

[189] In this sense also D. Brodowski, "Die drohende Verletzung von Menschenrechten bei der Anerkennung Europäischer Haftbefehle auf dem Prüfstand: Die zweifelhafte Aktivierung der Verfassungsidentität durch das BVerfG und eine Kurskorrektur durch die Rechtsprechung des EuGH", 2016, *Juristische Rundschau* (JR), 415, 431.

[190] The FCC expressly states 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, …'. This can be considered a not very European-minded part of the decision.

case.[191] Lastly, the FCC does not prescribe a certain procedure to be followed by a German court before deciding on the admissibility of a surrender/MLA request.[192]

2. The issue of detention conditions and evolving uncertainties

The Bremen court's reference for a preliminary ruling

In parallel to the new case law of the FCC, the Higher Regional Court (HRC) of Bremen referred some questions to the CJEU that specifically touch on the issue of detention conditions. Cases brought by defendants that claim inhuman and degrading treatment because of detention conditions in certain EU countries have increased in the last three to four years. They are 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.[193] The HRC of Bremen was, however, the first court in Germany that dared to seek guidance from the CJEU when it filed its request for preliminary rulings on 23 July and 8 December 2015 (received at the CJEU on 24 July and 9 December 2015 respectively) in the *Aranyosi and Căldăraru* proceedings.

As confirmed in interviews, the HRCs, which are the competent courts in Germany to rule on the admissibility of an extradition/a surrender request, are caught in between the (as has been seen, not uniform) requirements posed by Germany's constitutional court on the one hand and the case law of the Court of Justice of the European Union on the other. The HRCs are increasingly struggling with constitutional obligations of better reasoning and investigation of facts.[194] Nonetheless, German courts have tried to implement the *Aranyosi and Căldăraru* judgment. From recent case law of the Higher Regional Courts, it can be observed that the reaction is far from uniform. This demonstrates that there are legal uncertainties that could not be sufficiently dispelled by the CJEU's decision in *Aranyosi and Căldăraru*. By contrast, the decision seems to have resulted in more problems, when the court states that surrender is possible in 'exceptional circumstances'.[195]

Consequently, in order to ensure respect for Article 4 of the Charter of Fundamental Rights of the EU 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

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[191] K. M. Böhm, "Das Rechtshilfeverfahren", *in* Ahlbrecht, Böhm, Esser, Eckelmans, *Internationales Strafrecht*, 2nd ed., 2018, mn. 1066.

[192] Nevertheless, the FCC set certain thresholds for admissibility of future constitutional complaints. The complainant must succeed in corroborating his/her claim that an identity review is indispensable to protect the constitutional identity guaranteed by Art. 79 para. 3 of the Basic Law. This corroboration must be done in a detailed and substantiated manner.

[193] Süddeutsche.de, 20. 9. 2017 '17 Häftlinge auf 30 Quadratmeter', www.sueddeutsche.de/politik/eu-haftbefehl-haeftlinge-auf-quadratmetern-1.3675711, accessed 12 December 2018.

[194] See also K. M. Böhm, 'Aktuelle Entwicklungen im Auslieferungsrecht', 2018, *Neue Zeitschrift für Strafrecht (NStZ),* 197.

[195] Joined cases C-404/15 et C-659/15 PPU, *Pál Aranyosi and Robert Căldăraru*, 5 April 2016, ECLI:EU:C:2016:198, § 94.

Member State, he/she will run a real risk of being subject in that Member State to inhuman or degrading treatment, within the meaning of Article 4.

Follow-up of the identity review by the constitutional court's decisions

Further uncertainties have arisen in follow-up decisions of the FCC where hopes that the FCC would clarify its 'identity review' approach have not been fulfilled.

In a decision of 6 September 2016,[196] the FCC had to deal with the defendant's argument that, if he was extradited to the UK, the UK criminal court and the jury would be allowed to draw inferences from his silence to his guilt which, in his opinion, would conflict with the status of the accused's right to remain silent in the German legal order and therefore affects constitutional identity. Although the FCC reiterated the viewpoints in its order of December 2015, it surprisingly came to the conclusion that extradition is only not permissible if the 'core content' of the right in question (i.e. the right not to incriminate oneself as an inherent part of human dignity) is affected. In the view of the FCC, the core content is not affected when the silence can be used as evidence under certain circumstances and can be used to the defendant's detriment, as is the case with Sec. 35 of UK's Criminal Justice and Public Order Act 1994.

A second follow-up case specifically concerned detention conditions in the context of an ordered surrender of a Romanian national to Romania for the purpose of prosecution. The defendant reprimanded the Higher Regional Court of Hamburg 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 the Romanian judicial authorities and obtained assurances from the Romanian Ministry of Justice, the HRC mainly argued that the size of the cells[197] will meet the necessary conditions, such that Art. 3 of the 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 oversight 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 *Aranyosi and Căldăraru* 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.

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[196] 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 summary of the decision in English see T. Wahl, 'Federal Constitutional Court: UK Law on Use of Accused's Silence Does Not Hinder Surrender', 2016, *Eucrim*, 132-133.

[197] At least 3m² in a more severe enforcement regime, 2m² in case of a regime of daily release.

By contrast, the defendant argued that the HRC put too much emphasis on the size of prison cells, but did not recognise 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 out by the ECtHR, are not respected in Romanian prisons.

In a preliminary injunction *(einstweilige Anordnung)* of 18 August 2017 that stopped the surrender for the time being, the FCC indicated that it may follow the argumentation of the complainant.[198] In particular, it pointed out that the principle of mutual trust is infringed 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. It also raised doubts as to whether the prison conditions on the basis of the information gathered so far are beyond the fundamental rights standards and hinted that the instance court had not fully assessed all circumstances that may lead to an infringement of human dignity.

In its final decision of 19 December 2017, the FCC did not, however, rule on the substantial issues of the case but instead blamed the HRC of Hamburg for not having made a reference for a preliminary ruling to the CJEU. This failure is considered a violation of the right to one's lawful judge (Art. 101 para. 1 sentence 2 of the Basic Law).[199] The FCC mainly argued that it cannot be discerned from the case law of the CJEU in *Aranyosi*/*Căldăraru* which specific minimum standards derive from Art. 4 of the Charter of Fundamental Rights (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.

The consequences of this decision remain unclear. On the one hand, the FCC clearly maintains its identity review approach. On the other hand, it refers the instance court to take the path towards addressing the CJEU when it comes to detention conditions. It remains vague whether – and despite differences in concepts (see above) – the FCC acknowledges the CJEU's case law in *Aranyosi* in the specific case of detention conditions that is an undoubted threat to human dignity. The FCC is avoiding confrontation with the CJEU and is calling for a constructive dialogue with the judges in Luxembourg.[200] This does not mean, however, that the FCC maintains its reservation to intervene if the reply from the CJEU may not comply with the – at least core spheres of – national fundamental rights standards.

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[198] BVerfG, Beschl. v. 18.8.2017 – 2 BvR 424/17 = HRRS 2017 Nr. 832. The order is available in the Internet (in German) at: www.bverfg.de/SharedDocs/Entscheidungen/DE/2017/08/rk20170818_2bvr042417.html.

[199] BVerfG, Beschl. vom 19.12.2017 – 2 BvR 424/17 = HRRS 2018 Nr. 92. A press release is available both in German (www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/DE/2018/bvg18-003.html;jsessionid=A462BD449A4632A34668A74D561EC771.2_cid393), and English (www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2018/bvg18-003.html). A summary of the decision of 19 December 2017 is provided by T. Wahl, 'Federal Constitutional Court Calls for German Courts to Consult CJEU on Detention Conditions', 2018, *Eucrim*, 32-33.

[200] A. Edenharter, Anmerkung, 2018, *Juristenzeitung (JZ),* 313.

In a decision of 16 August 2018, the FCC reprimanded the HRC of Munich for not having sufficiently cleared up the law and practice of detention conditions in Hungary.[201] In the case at issue, the HRC of Munich declared surrender of a Serbian national to Hungary for the purpose of criminal prosecutions of fraud admissible. The argument of the defendant that he may be detained under inhuman and degrading conditions was not followed up by the court in Munich. Instead the court briefly argued that detention conditions in Hungary have improved.

The FCC found that the Munich court was obliged to clear up the legal situation and practice of detention conditions in Hungary. Since the HRC failed to do so, it violated the defendant's right to an effective legal remedy pursuant to Art. 19 para. 4 sentence 1 of the Basic Law. The FCC reiterated its viewpoint that, in principle, the HRCs do not need to reason compliance with fundamental rights standards in the issuing State because the EAW system is governed by mutual trust. However, the principle of mutual trust is shaken if there are factual indications that the requirements of Art. 4 of the CFR are not maintained after the surrender of the defendant. In this case, the competent court that decides on the admissibility of an EAW is obliged to ascertain the legal situation and practice in the issuing State under the condition that the defendant and its defence counsel provided enough information.[202] These requirements were met in the case at issue because the defendant provided sufficient arguments to believe that there are continuing systemic deficiencies in Hungarian prisons. The FCC particularly rejected the HRC's argument that there are no longer deficiencies in Hungary. The FCC stated that the judgment of the ECtHR in *Domján*[203] did not change the ECtHR's viewpoint of 2015 in its pilot judgment *Varga & Others* that there are still systemic deficiencies in Hungary.[204]

As a result, the FCC referred the case back to the HRC of Munich, which now has to seek additional information from the issuing authorities and other sources on detention conditions in Hungary. Although in *Aranyosi*, the CJEU established a concrete procedure to follow, interestingly the FCC did not take up this point in its decision. This can be interpreted as a signal that the FCC has not finally decided whether it accepts the CJEU's approach in *Aranyosi* or not. It rather seems that the FCC is keeping an 'open door' that allows the FCC to intervene if it finds incompatibility between the interpretation of fundamental rights at the EU level and the core standards of fundamental rights' protection as guaranteed by the German Constitution. The FCC only agrees with the CJEU that the possibilities of subsequent judicial review of detention conditions in the issuing State are not sufficient to avert a real risk of inhuman treatment. The executing authority is still bound to undertake an individual assessment.[205]

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[201] BVerfG, Beschl. v. 16.08.2018 – 2 BvR 237/18. A summary of this decision is provided by A. Oehmichen, 2018, *FD-StrafR*, 40837 and M. Hiéramente, 2018, 22, *jursPR-STrafR*, Anm.

[202] In this context, the FCC pointed out that the defendant has no 'burden of proof' in extradition cases, so it is to the court to clear up the facts and law *ex officio*.

[203] ECtHR, 14 November 2017, application No. 5433/17, *Domján v. Hungary.*

[204] ECtHR, 10 March 2015, application nos. 14097/12, 45135/12, 73712/12 *et al.*, *Varga and Others v. Hungary*.

[205] See case C-220/18 PPU, *ML*, 25 July 2018, ECLI:EU:C:2018:589.

Reactions of instance courts

Meanwhile, the HRC of Hamburg raised the requested reference to the CJEU.[206] The HRC posed numerous questions related to the minimum standards of detention conditions pursuant to Art. 4 of the CFR and the effects of these standards on the presumption of a 'real risk' of a violation of fundamental rights.

The Hamburg court's first decision was particularly criticised for its argument that the functioning of justice should prevail over the protection of fundamental rights.[207] Furthermore, it must be doubted whether references to ECtHR case law should be relativised since the HRC of Hamburg stated that the lines of argument of the ECtHR are partly detrimental to the EU principles of mutual trust and mutual recognition.[208] Other Higher Regional Courts followed different approaches in this regard. One decision of the HRC of Bremen and two decisions of the HRC of Celle may illustrate this.

In the subsequent decision after the preliminary ruling of the CJEU in the *Căldăraru* case, the HRC of Bremen ordered the repeal of the warrant against *Căldăraru*.[209] The HRC argued that – in accordance with the requested examination by the CJEU – it asked for additional information from the Romanian authorities. The Romanian authorities stated that the defendant was likely to be placed in a correctional facility located near to his domicile and that this facility was initially designed for 330 prisoners, but is currently occupied by 659 prisoners. The HRC stated that, as a consequence, each prisoner has a personal space available of approximately 2m², so that an infringement of Art. 4 of the CFR does exist.[210]

The HRC of Celle refused surrender of individuals to Romania in two soundly reasoned decisions of 2 and 31 March 2017. The first case concerned an EAW for the purpose of execution of a sentence of one year of imprisonment for driving without a licence,[211] and the second an EAW for the purpose of execution of a sentence of three years and nine months of imprisonment for robbery.[212] 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*.[213] The HRC referred first to the case law of the CJEU in *Aranyosi and Căldăraru* and stated 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 considered both requirements fulfilled in the two cases. It mainly concludes that the conditions for the form of semi-open detention that the defendant

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[206] The case is referred to as C-128/18, *Dorobantu*. The CJEU passed judgment on 15 October 2019.

[207] See the preliminary injunction of the FCC of 18 August 2017, *op. cit*.

[208] OLG Hamburg, Beschl. v. 3.1.2017 – Ausl 81/16. This is the underlying decision that led to the constitutional complaint before the FCC.

[209] See press release of the Hanseatisches Oberlandesgericht in Bremen of 10.6.2016.

[210] In the case *Pál Aranyosi*, the EAW was withdrawn by the Hungarian authorities – see also Case C-496/17, *Pál Aranyosi*, 15 November 2017, ECLI:EU:C:2017:866.

[211] OLG Celle, Beschl. v. 2.3.2017 – 1 AR (Ausl) 99/16.

[212] OLG Celle, Beschl. v. 31.3.2017 – 2 AR (Ausl) 15/17.

[213] Sec. 73 sentence 2 AICCM, Art. 6 para. 3 TEU, Art. 3 ECHR.

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 first and foremost based on the 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. It reasons that this approach is the most modest way of not interfering too much in national systems since each national system has its peculiarities and finds its own way of balancing the various interests at stake.

In sum, the Celle court particularly stresses that:[214]

– 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;
– Greater importance cannot be attributed to the functioning of criminal justice than to human treatment of convicted persons (in contrast to the HRC of Hamburg).

Nevertheless, the HRCs' case law on detention conditions is very diverse.[215] The courts seem unsure regarding the extent to which clarification of facts is necessary, to which detention facilities enquiries must be extended, and/or whether (diplomatic) assurances can (still) be the basis for their judicial decisions. Furthermore, the case law of the HRCs differs 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". The case law has developed in a very casuistic way where the HRCs take into account the individual circumstances in each case.

In some cases, execution of EAWs was refused on the basis of inhuman prison conditions in the issuing EU Member State. These concerned: Bulgaria;[216] Greece[217] Hungary;[218] Latvia;[219] Lithuania;[220] Romania[221].

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[214] See also L. Mühlenfeld, *jurisPR-StrafR* 12/2017 Anm. 3.

[215] For further details see the internet publication of this study at: www.europarl.europa.eu/RegData/etudes/STUD/2018/604977/IPOL_STU(2018)604977(ANN01)_EN.pdf, 14 et seq.; K. M. Böhm, "Teil 3 – Das Rechtshilfeverfahren", in: H. Ahlbrecht and M. Böhm and R. Esser and F. Eckelmans (eds.), *Internationales Strafrecht*, 2nd ed., Heidelberg, C.F. Müller, 2018, mn. 1062 et seq.

[216] All cases before the *Aranyosi/Căldăraru* judgment: OLG München, Beschl. v. 14.12.2015 –1 AR 392/15.OLG Dresden, Beschl. v. 11.8.2015 – OLG Ausl 78/15; OLG Celle, Beschl. v. 16.12.2014 – 1 Ausl 33/14; KG, Beschl. v. 15.4.2015 – (4) 151 AuslA 33/15 (36/15).

[217] OLG Stuttgart, Beschl. v. 21.4.2016 – 1 Ausl 321/15 and OLG Stuttgart, Beschl. v. 8.6.2016 – 1 Ausl. 321/15; OLG Düsseldorf, Beschl. v. 14.12.2015, III-3 AR 15/15, 3 AR 15/15;

[218] OLG Karlsruhe, Beschl. v. 26.04.2017 (unpublished) and OLG Karlsruhe, Beschl. v. 26.5.2017, Ausl 301 AR 54/17.

[219] OLG Bremen, Beschl. v. 3.8.2016 -1 Ausl A 14/15.

[220] OLG Saarbrücken, Beschl. v. 11.7.2016 – OLG Ausl 12/17; but see OLG Saarbrücken, Beschl. v. 15.11.2017 – OLG Ausl 12/17.

[221] See also the mentioned decisions of the HRCs of Bremen and Celle above; furthermore: OLG Köln, Beschluss vom 27.06.2017 – 6 AuslA 27/17; OLG München, Beschl. v. 13.4.2017 – 1 AR 126/17; OLG Nürnberg, Beschl. v. 5.7.2017 – 2 Ausl AR 14/17; OLG Hamm, Beschl.

Despite general deficiencies in the issuing State, a concrete risk for the requested person was denied (second stage) in the following countries; Bulgaria;[222] Hungary[223]; Latvia;[224] Romania[225]. The execution of requests has been invoked i) on the basis of recent information showing improvements in the issuing State;[226] ii) on the basis of assurances of the issuing State concerning prison conditions of the requested person;[227] iii) on the basis that execution is made subject to conditions by the executing State concerning conditions of imprisonment[228].

In general, one can see increasing uncertainties at the level of the HRCs as instance courts in relation to extradition on how to follow up with the decisions of the 'supreme courts' (i.e. both CJEU and FCC) when it comes to alleged human rights' violations in the surrender scheme of the EAW. As confirmed in interviews, most judges are of the

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v. 23.08.2016 – 2 Ausl. 125/16. 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 (OLG Celle, Beschl. v. 22.12.2016 – 1 AR (Ausl) 59/16). 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.

[222] OLG München, Beschluss v. 04.04.2017 – 1 AR 68/17; OLG München, Beschl. v. 8.3.2016 – 1 AR 2/16.

[223] OLG Karlsruhe, Beschl. v. 15.02.2018 – Ausl 301 AR 135/17 and OLG Karlsruhe Beschl. v. 31.1.2018 – Ausl 301 AR 54/17; OLG Köln, Besch. v. 22.11.2017 – 6 AuslA 125/17 – 102 -; OLG Hamm, Beschl. v. 1.12.2015 – III-2 Ausl 131/15, 2 Ausl 131/15; OLG Dresden, Beschl. v. 13.7.2015 – OLGAusl 98/1.

[224] OLG Celle, Beschl. v. 16.6.2017 – 2 AR (Ausl) 31/17 = NStZ-RR 2017, 325-327.

[225] OLG Hamburg, Beschl. v. 3.1.2017 – Ausl 81/16. This is the underlying decision that was quashed by the FCC (see further above). In favour of admissibility despited voiced concerns of detention conditions in Romania, see OLG Schleswig, Beschl. v. 20.12.201 – 1 Ausl (A) 53/17 (54/17). The FCC blocked surrender until its decision on the Hamburg case (see BVerfG, Beschl. v. 12.1.2018 – 2 BvR 37/18). But see now: KG, Beschl. v. 24.8.2018 – (4) 151 AuslA 185/17 (228/17).

[226] OLG Celle, Beschl. v. 16.6.2017 – 2 AR (Ausl) 31/17 (Latvia); OLG Hamburg, Beschl. v. 3.1.2017 – Ausl 81/16; OLG Dresden, Beschl. v. 27.8.2018 – OLGAusl 107/18; KG, Beschl. v. 24.8.2018 – (4) 151 AuslA 185/17 (228/17) (all three Romania); OLG Rostock, Beschl. v. 04.12.2017 [not published] (Hungary). Different: OLG Bamberg, Beschl. v. 22.12.2017 – 1 Ws 508/17 which stated that due to the lack of improvements in Bulgarian prisons (based on a 2015 CPT report) detention in Bulgaria cannot be credited 1:1 but 1:2 in Germany.

[227] OLG München, Beschl. v. 8.3.2016 – 1 AR 2/16 (Bulgaria) – but see OLG München, Beschl. v. 04.04.2017 – 1 AR 68/17 which considered that assurances are no longer necessary after having interpreted the Aranyosi/Căldăraru judgment of the ECJ; it is sufficient when the issuing State provided "additional information"). Further decisions that based their findings on assurances: OLG Hamm, Beschl. v. 1.12.2015 – III-2 Ausl 131/15, 2 Ausl 131/15; OLG Dresden, Beschl. v. 13.7.2015 – OLGAusl 98/1 (all Hungary).

[228] OLG Karlsruhe, Beschl. v. 15.02.2018 – Ausl 301 AR 135/17 and OLG Karlsruhe Beschl. v. 31.1.2018 – Ausl 301 AR 54/17: in both decision the HRC of Karlsruhe set several conditions as to the correctional facilites and detention conditions which the Hungarian authorities must fulfil. Conditions (less comprehensive) were also set by: OLG München, Beschl. v. 04.04.2017 – 1 AR 68/17.

opinion that the CJEU's guidance in the *Aranyosi and Căldăraru* ruling needs further clarification and substantiation. This also led the HRC of Bremen, which brought up the *Aranyosi and Căldăraru* case, to subsequent references to the CJEU. The Bremen court reacted to this judgment by asking a list of questions to the issuing authorities in subsequent surrender cases. This resulted ultimately in a kind of game of 'ping pong' between the German judicial authorities and the issuing authorities in the other EU Member States. Nevertheless, in its reference for a preliminary ruling before the CJEU in case C-220/18 PPU ('*ML*'), the judges in Bremen were essentially concerned with the following four issues:

– Does the existence of a legal remedy – in the issuing state – enabling the person sought under an arrest warrant to challenge the detention conditions rule out the existence of a real risk of inhuman and degrading treatment?
– If the answer is negative, to what extent can the executing authority assess the conditions in the prisons, i.e. all prisons in which the person sought could potentially be detained in or only the prison in which he is *likely* to be detained in for most of the time?
– Which information must the executing authority take into account for assessment of the prison conditions?
– What is the value of assurances given by an institution in the issuing State other than the issuing judicial authority?

By judgment of 25 July 2018,[229] the CJEU held, *inter alia*, that the executing judicial authority is solely required to assess the detention conditions in the prison in which the person concerned is *specifically* intended to be detained, including on a temporary or transitional basis. Requests for additional information must concentrate on the determining factors of the ECtHR case law. The list of 78 questions submitted by the Bremen court to the issuing authorities, which included questions on opportunities for religious worship or laundry arrangements, went too far, according to the CJEU. As regards assurances, the CJEU held that the Framework Decision on the EAW allows the request for assurances on the actual and precise detention conditions. Since the EAW system is based on mutual trust, the executing authority must, however, rely on the assurance given, at least if – as in the present case – there are no specific indications that the detention conditions in a particular prison centre are in breach of Art. 4 of the CFR.[230]

3. Perceived impact on cross-border cooperation instruments

In the interviews, the practitioners mentioned that the approach chosen by the CJEU is simply not practicable. Even today, one of the most practical problems in

[229] C-220/18, *ML*, 25 July 2018, ECLI:EU:C:2018:589. See also T. Wahl, 'CJEU Clarifies Position on Non-Surrender in Case of Poor Detention Conditions ("Aranyosi III")', 2018, *Eucrim,* 103-104.

[230] In the subsequent decision in this *ML* case, the HRC of Bremen declared surrender admissible. The defendant's objection as to inhuman detention conditions in Hungary was rejected. See OLG Bremen, Beschl. v. 21.9.2018 – 1 Ausl. A 21/17. See also OLG Dresden, Beschl. v. 27.8.2018 – OLGAusl 107/18 (Romania), which explicitly followed the CJEU's judgment in *ML*.

relation to cooperation within the EU is the lack of communication. Although the CJEU requests, in *Aranyosi and Căldăraru*, increased obligations for the executing authorities to start a dialogue with the issuing authorities and seek sufficient information, they often either do not receive replies or do not receive adequate replies from the issuing authority.[231] Consequently, extradition detention cannot be upheld and the person sought must be released from custody. Otherwise, extradition detention will be disproportionate.

In addition, Higher Regional Courts are confronted with increasing obligations from the FCC to investigate more deeply into the foreign legal order in order to substantiate possible *ordre public* infringements. The implementation of these obligations has also posed problems in practice. In this context, interviewees confirmed that the approaches of the CJEU and the FCC differ and the Higher Regional Courts must find a way to cope with both approaches in practice.

However, all interviewees found that a solution regarding insufficient detention conditions in certain EU countries or certain prison centres in Europe cannot be remedied by legislation. They found, instead, that the issue of detention conditions is a factual remedy. In this context, an objective and impartial EU evaluation procedure was also recommended as a pre-condition for tackling the problem. These insufficient detention conditions can only be solved by the governments of the countries concerned. It is widely seen as a problem of financing and interviewees suggested that 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 countries concerned to initiate improvements. Another aspect in this regard is the recommendation that, as a first step, the standard of individual prison centres in which extradited persons could be imprisoned is raised. This may lead, however, to a 'first/second-class' enforcement of sentences in the domestic systems and may therefore be denied by the countries concerned.

Ultimately, solutions must be found for the situation when a requested person expresses concerns about his surrender where he might face fundamental rights' infringements in the issuing State. Often, people prefer family ties in their home country to fundamental rights' protection in the executing State. This poses the question as to whether a person can waive protection of their fundamental rights.[232]

C. Compensation for unjustified detention

1. National rules on compensation for unjustified detention

German law provides for compensation of loss and damages both for unlawful and lawful law enforcement measures.[233] If a measure was unlawful, e.g. remand detention was ordered in violation of the principle of proportionality according to

[231] 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.

[232] K. M. Böhm, 'Aktuelle Entwicklungen im Auslieferungsrecht', 2018, *NStZ,* 200.

[233] In 2011, Germany introduced specific rules on the compensation for excessive length of criminal proceedings (Sec. 198-201 of the Court's Constitution Act (*Gerichtsverfassungsgesetz – GVG*). These are not dealt with in the following.

Sec. 112 para. 1 sentence 2 GCCP (see above), the person concerned may claim State liability under the conditions of Sec. 839 of the German Civil Code (*Bürgerliches Gesetzbuch – BGB*) and Art. 34 of the Basic Law. Both provisions establish liability if a person, in the exercise of a public office entrusted to him, violates his official duty to a third party. However, the breach of this duty must be intentional or negligent. If there is no intention or negligence (so-called objective unlawfulness), the person concerned may claim compensation directly on the basis of Art. 5 para. 5 of the ECHR.[234]

Although a law enforcement measure was *per se* lawfully ordered, a defendant may claim financial compensation on the basis of the *Gesetz über die Entschädigung von Strafverfolgungsmaßnahmen* (*StrEG* – Act on the compensation of prosecutions).[235] 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.[236] The law further distinguishes as to whether the defendant was finally convicted or not. In the first case (final conviction), he/she may claim financial compensation if he/she was acquitted or the penalty was lowered after the reopening of the case (*Wiederaufnahme*).[237] Compensation is excluded here if the person concerned caused the prosecution by intention or negligence or by providing wrong or untruthful information. The initially convicted person can obtain compensation for pecuniary loss as well as for non-material damage. The law confers a rather low rate for the non-material damage, i.e. €25 per day of deprivation of liberty.[238]

If the defendant was not convicted, he may claim compensation under the conditions of Sec. 2 StrEG, which regulates financial compensation for damages suffered because of unlawful or disproportionate measures during the prosecution of a criminal offence. The law lists (exhaustively) only a few measures for which compensation is eligible, including remand detention, measures in the context of the suspension of execution of remand detention, provisional placement in a psychiatric hospital, arrest[239], search and seizure, provisional withdrawal of permission to drive and provisional prohibition of the pursuit of an occupation. Compensation can only be conferred if the defendant were acquitted, or criminal proceedings were dispensed/dismissed, or the opening of the main proceedings were refused by the court. Furthermore, the law provides for clauses that exclude compensation or give the State authority the possibility to deny compensation (Sec. 5, 6 StrEG).

In case of dispensation/dismissal of a case against a defendant, the law further distinguishes: If the prosecution must be dismissed, the defendant must be compensated. If the prosecution can be dismissed,[240] compensation for the mentioned

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[234] Roxin, Schünemann, *Strafverfahrensrecht*, § 60, mn. 2.

[235] There is no official English translation of this Act. The German version of the Act is available at: www.gesetze-im-internet.de/streg/index.html.

[236] D. Meyer, *StrEG*, commentary, 10th ed., Cologne, Carl Heymanns Verlag, 2017, § 2 StrEG, mn. 1.

[237] Sec. 1 StrEG.

[238] See Sec. 7 StrEG.

[239] For the distinction between arrest and pre-trial detention under German law, see Huber, 'Criminal Procedure in Europe – Germany', 304.

[240] E.g. cases of discretionary prosecution in accordance with Sec. 153, 153a GCCP.

prosecution measures can be conferred if this complies with considerations of equity (*Billigkeit*).[241] The same applies if the defendant was discharged[242] or the defendant was convicted for consequences of the offence which were below the ones for which the prosecution measure was ordered.[243] Practice often connects the discretionary dispensation of a case with the waiver to compensation – a practice that is held inadmissible in legal literature.[244]

As regards the procedure of the claim to compensation, German law distinguishes between the decision on the merits of the claim and the amount of compensation. The decision on the merits of the claim is regularly taken by the court in the final judgment or decision on the case. If the case was dismissed by the prosecution service, the local court at the seat of the prosecution decides on the claim. The claimant can immediately appeal against the court decision. If the court affirmed the claim for compensation, the indemnification (amount of compensation) must be claimed from the prosecution service (which conducted the prosecution in the first instance) within six months. The defendant must be advised about this right. His/her application is taken forward by the judicial administration of the *Land* concerned. The defendant may appeal against the decision setting the amount of compensation of the judicial administration before the civil chambers of the regional court within three months.

The StrEG is only applicable to defendants, i.e. persons who suffered criminal prosecution against them. It is not applicable to other persons who may be affected by law enforcement measures, such as persons with property rights in the cases of seizures. However, there may be other provisions that allow compensation of these 'third persons', such as Sec. 74f GCC, Sec. 28 of the Regulatory Act (OWiG) or the above-mentioned state liability provisions of Sec. 839 BGB and Art. 34 of the Basic Law.

2. Compensation in the transnational context

German law also takes into account compensation for time 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 – Germany as an issuing country – placement to Germany) and situations where Germany is executing a foreign extradition request/EAW (incoming requests – Germany as an executing country).

Compensation for detention abroad (Germany as an issuing country)

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 between 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.

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241 Sec. 3 StrEG.

242 Applies for minor offences, see, for instance, Sec. 60 GCC.

243 Sec. 4 StrEG.

244 Roxin, Schünemann, *Strafverfahrensrecht*, § 60, mn. 5.

In the first case, i.e. extradition for the purpose of conducting a criminal prosecution, Sec. 51(3), 2nd sentence GCC sets out that any detention suffered abroad shall be credited to the German sentence.[245] The notion of '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 depending on the conduct of the convicted person after the offence was committed.[246]

If time in detention abroad is to be credited, the court shall determine the rate as it sees fit (Sec. 51(4), 2nd sentence GCC). In determining the rate, the court has to take into account the specific prison centre and not the detention conditions in a country in general. Often, a statement of the Foreign Office[247] is requested. The rate must also be determined if a life-long sentence is delivered.[248]

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 a 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 prosecutor's 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. If the court gives such an order, credit shall not be given in any other proceedings, for deprivation of liberty undergone abroad, insofar 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) 2nd sentence GCC.[249]

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.[250] 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

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[245] Sec. 51(1) 1st 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) 1st 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)).

[246] Sec. 51(1), 2nd sentence GCC which also applies for detentions abroad.

[247] German name for Ministry for Foreign Affairs.

[248] See T. Fischer, *Strafgesetzbuch*, commentary, 65th ed., Munich, C.H. Beck, 2018, § 51, mn. 18. Details on the criteria for the determination of the rate at D. Bock, 'Zur transnationalen Wirkung ausländischer Strafe oder Freiheitsentziehung gem. § 51, Abs. 3, Abs. 4, S. 2 StGB', 2010, *Zeitschrift für Internationale Strafrechtsdogmatik (ZIS)*, 482.

[249] See the references at: Meyer-Goßner, Schmitt, *Strafprozessordnung*, § 450a, mn. 3.

[250] See also the overview at: Fischer, *Strafgesetzbuch*, § 51, mn. 19.

as regards detention conditions in other EU countries.[251] It was also noted, 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 been considerably reduced or is rather short.

The aforementioned 'Act on the compensation of prosecutions', which contains rules on the financial compensation of damage that occurred as a result of unlawful or disproportionate measures during the prosecution of a criminal offence, also applies in certain situations of international cooperation in criminal matters. Sec. 2(3) StrEG clarifies that the compensation scheme for damage suffered as a result of prosecution measures before the final conviction extends to the extradition detention, the provisional extradition detention, the freezing, 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 treated equally as for measures for purely domestic cases since it is felt unjust that the order is carried out towards a person being/residing abroad.[252] 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.[253] By contrast to Sec. 51(3) GCC, Sec. 2 StrEG requires a formal MLA/extradition request. Otherwise, compensation cannot be taken into account.[254]

Compensation 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.[255] In the vast majority of cases, the responsibility of German authorities is denied by the German courts.[256] If, for instance, a country issues an EAW against a person and 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 compensation for the damage suffered. The same holds true if the Higher Regional Court concludes inadmissibility of extradition/surrender after a

[251] See now OLG Bamberg, Beschl. v. 22.12.2017 – 1 Ws 508/17 which stated that due to the lack of improvements in Bulgarian prisons (based on a 2015 CPT report) detention in Bulgaria cannot be credited 1:1 but 1:2 in Germany.

[252] MEYER, *StrEG*, §2, StrEG, mn. 75.

[253] MEYER, *StrEG*, §2, StrEG, mn. 79.

[254] MEYER, *StrEG*, §2, StrEG, mn. 77.

[255] 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.

[256] 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 (BGH, Urteil vom 29.04.1993, Az.: III ZR 3/92 = BGHZ 122, 268).

longer examination of the request, e.g. because replies by the issuing authorities (after having sought information from the German authorities) reveal that a proper re-trial of an initial *in absentia* trial is not guaranteed.[257] 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.[258]

The legal literature is debating whether an exception must be affirmed if there is a case of mistaken identity of the person sought by the German authorities.[259]

Independently 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.[260] 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.[261] The 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.[262] Therefore, the claim based on the ECHR is denied if the extradition order is seen as justified in order to secure a foreign request for criminal prosecution or execution of a sentence and the principle of proportionality is upheld.[263]

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[257] OLG Frankfurt Beschluss vom 4.5.2009 – 1 W 10/09, BeckRS 2009, 13811 (case with Egypt).

[258] OLG Karlsruhe, Beschluss vom 25. März 2013 – 1 AK 102/11 (case with Austria).

[259] Hackner, vor § 15 IRG, *in* Schomburg, Lagodny, Gless, Hackner, *Internationale Rechtshilfe in Strafsachen*, 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, *StrEG*, § 2 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 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 para. 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.

[260] BGHSt 32, 221, 227.

[261] Hackner, vor § 15 IRG, *in* Schomburg, Lagodny, Gless, Hackner, *Internationale Rechtshilfe in Strafsachen*, mn.14.

[262] Unless inadmissibility is manifestly given at the time of the decision on extradition detention. For example, the court overlooks that the person sought is a German national and cannot be extradited.

[263] OLG Frankfurt Beschluss vom 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 three years of imprisonment.

The Higher Regional Court of Frankfurt considered, however, an additional possibility for compensation, e.g. for losses of business due to *ex post* unjustified extradition detention.[264] 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.

V. Victims' 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 the authority to dispose of certain aspects of criminal procedure, monitoring rights, offensive and defensive rights, information rights, rights to be protected as well as rights of reparation or compensation.[265] These victims' rights have been continuously strengthened since the 1970s/1980s.[266] The following is limited to an analysis of the victims' rights in the context of the relevant pieces of EU law, namely Directive 2012/29/EU, Directive 2004/80/EC and Directive 2011/99/EU. Nonetheless, it should be mentioned that German law provides for victim protection mechanisms that go beyond the scope of the legal framework established at EU level.[267]

A. Transposition and application of Directive 2012/29/EU on victims' rights

1. Transposition of the victims' rights' Directive 2012/29/EU

Implementation at the 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).[268]

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[264] OLG Frankfurt, *Ibid.*

[265] Velten, *SK-StPO*, Vor §§ 374-406h, mn. 36; referring to B. Schünemann, 'Zur Stellung des Opfers im System der Strafrechtspflege', 1986, *Neue Zeitschrift für Strafrecht (NStZ)*, 198 et seq.; see also H. Schöch, 'Opferrechte im Strafprozess in Deutschland', *in* L. Sautner, U. Jesionek (eds.), *Opferrechte in europäischer, rechtsvergleichener und österreichischer Perspektive*, Innsbruck, Studienverlag, 2017, 119, 124, who also lists the rights of recognition and respect as an additional category.

[266] See J. Herrmann, 'Die Entwicklung des Opferschutzes im deutschen Strafrecht und Strafprozessrecht – Eine unendliche Geschichte', 2010, *ZIS*, 236 et seq.; M. Kilchling, *Opferschutz innerhalb und außerhalb des Strafrechts*, Berlin, Duncker&Humblot, 2018, 25; K. Schroth, M. Schroth, *Die Rechte des Verletzten im Strafprozess*, 3rd ed., Heidelberg, C.F. Müller, 2018, mn. 1 et seq.

[267] See details in the Internet publication of this study: www.europarl.europa.eu/RegData/etudes/STUD/2018/604977/IPOL_STU(2018)604977(ANN01)_EN.pdf, 68 et seq.

[268] BT-Drucks. 18/4621, 2.

In addition, the so-called psychosocial procedural support has been established by law, which, as such, goes beyond the requirements of the Directive and is now standardised in Sec. 406g GCCP and the new law on psychosocial procedural support (PsychPbG).[269]

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.[270] In addition, key areas of the Directive are within the legislative competence of the federal states (*Länder*). Accordingly, only a limited need for implementation was envisaged by the German federal legislature.[271]

This concerns, in particular, the information rights of Art. 4, 5, 6 (1) b), (5), 7 (4), (5), 22 of Directive 2012/29/EU.[272] The implementation process mainly focused on the restructuring of the duty to provide information to the victim, which was implemented in §§ 406i to 406k GCCP. Besides, the provision of information in connection with the filing of a criminal charge, § 158 (1) GCCP, was also revised, as was the need for translation of written information, §§ 158 (4), 406d (1) GCCP. Attention was additionally paid to the need for translation services in all hearings and proceedings, §§ 161a (5), 163 (3) GCCP, § 185 CCA.[273]

A general standard of protection within the meaning of Art. 18 of 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 Germany.[274] In order to take account of Art. 22 of the Directive, Sec. 48(3) GCCP 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 awareness of public authorities and to

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[269] Schöch, 'Opferrechte im Strafprozess in Deutschland', *in* Sautner, Jesionek (eds.), *Opferrechte*, 121.

[270] BT-Drucks. 18/4621, 1; Bundesministerium der Justiz und für Verbraucherschutz (BMJV), *Bericht zur Umsetzung der Richtlinie 2012/29/EU*, www.bmjv.de/DE/Themen/OpferschutzUndGewaltpraevention/OpferhilfeundOpferschutz/Bericht_BundLaender_AG.pdf;jsessionid=7C061D850583703861CF75BA8F15EDEF.2_cid324?__blob=publicationFile&v=2, 1; S. Kotlenga, B. Nägele and S. Nowak, *Bedarfe und Rechte von Opfern im Strafverfahren*, http://www.befund-gewalt.de/polizei.html?file=tl_files/pdf-downloads/INASC%20Toolkit.pdf, 8; R. Esser, 'Gerät der Strafprozess in eine Schieflage?', *in* LTO, www.lto.de/recht/hintergruende/h/drittes-opferrechtsreformgesetz-strafprozess-opfer-straftat-psychosoziale-prozessbegleitung/ who believes that deficits in victim protection have sometimes even been more than compensated; likewise the statement of DAV regarding implementation of Directive 2012/29/EU, www.bmjv.de/SharedDocs/Gesetzgebungsverfahren/Stellungnahmen/2014/Downloads/12162014_Stellungnahme_DAV_RefE_Staerkung_Opferrechte_Strafverfahren.pdf?__blob=publicationFile&v=1, 2.

[271] BT-Drucks. 18/4621, 13 et seq.

[272] *Ibid*.

[273] BT-Drucks. 18/4621, 14-15, 25; see also Schöch, 'Opferrechte im Strafprozess in Deutschland', *in* Sautner, Jesionek (eds.), *Opferrechte*, 121.

[274] BT-Drucks. 18/4621, 18.

initiate any protective measures that may be appropriate.[275] This standard also applies via Sec. 161(1) sentence 2 GCCP for the public prosecution service as well as for the police according to Sec. 163(3) sentence 1 GCCP. 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.[276] This means that a mandatory examination is now necessary as to whether there is a need for protection and this already needs to be done when potentially injured persons make their first official appearance at the prosecution authorities.[277] The relevance of this provision is seen in the fact that it is not so much a victim protection right in the narrow sense, but rather has a declaratory effect which is intended to underline the importance of victim protection in criminal proceedings.[278]

Federal State (*Länder*) level

As mentioned in the introduction, federal states *(Länder)* retain legislative competences in many areas, so that – in the federal system of Germany – different regulations may exist in the 16 federal states. Major areas of the Directive lie within the responsibility of the federal States. This applies in particular to Art. 8, 9, 12, 19, 23, 25,[279] which deal mainly with the practical realisation of victim protection. However, the report on the implementation of Directive 2012/29/EU issued by the German Ministry of Justice and Consumer Protection (BMJV) 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.[280] More precisely, the report sets out the following:[281]

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*[282] 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.[283] In addition, the BMJV offers links to many victim support sites on its

[275] *Ibid.*, 18-19.

[276] Esser, LTO, 2; G. Kett-Straub, 'Wieviel Opferschutz verträgt das Strafverfahren', 2017, *ZIS,* 341, 343.

[277] BT-Drucks. 18/4621, 23; Kett-Straub, 'Opferschutz' (2017) *ZIS*, 343.

[278] BT-Drucks. 18/4621, 23; Kilchling, *Opferschutz innerhalb und außerhalb des Strafrechts*, 32.

[279] BMJV, *Bericht zur Umsetzung der Richtlinie 2012/29/EU*, 1.

[280] *Ibid*.

[281] See www.bmjv.de/DE/Themen/OpferschutzUndGewaltpraevention/OpferhilfeundOpferschutz/Bericht_BundLaender_AG.pdf;jsessionid=7C061D850583703861CF75BA8F15EDEF.2_cid324?__blob=publicationFile&v=2.

[282] www.odabs.org.

[283] www.krimz.de/forschung/opferhilfe-atlas/.

own homepage.[284] Particularly noteworthy is the WEISSER RING e.V., an association 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.[285] 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*, hereafter TOA), which has long been anchored in Sec. 46 (2), 46a No. 1 GCC, Sec 10 (1) No. 7, 45 (2) sentence 2, 47 (1) YCL[286], and Sec. 136 (1) sentence 4, 153a (1) sentence 2 No 5, 155a, 155b GCCP as an 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 require the establishment of 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 meet 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

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[284] www.bmjv.de/SharedDocs/Abteilungen/DE/AbtII/IIA3.html?nn=1470246.

[285] BMJV, Bericht zur Umsetzung der Richtlinie 2012/29/EU, 3.

[286] Youth Courts Law – JGG. For an English translation, see: www.gesetze-im-internet.de/englisch_jgg/index.html.

conferences, some of which are offered by the German Judicial Academy (*Deutsche Richterakademie*). 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[287] as well as the criminal prosecution statistics[288].

Implementation gaps

Whether implementation gaps have occurred in the implementation of Directive 2012/29/EU has been much discussed by stakeholders and the legal literature. Already the term 'victim' provokes discussion. The definition of the term, which has intentionally[289] not been implemented (see also introduction), 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.[290] Even though the legal term is, in essence, clear in German law and case law, it has been criticised that relatives are not subsumed under the term 'victim'.[291] In addition, concerns are occasionally raised that the law does not make clear that – according to the presumption of innocence – the victim can only be regarded a 'potential victim'.[292] Here, for example, reference is made to the Austrian provision in § 65 No 1a of the Austrian Criminal Procedure Code.

Another line of criticism relates to the implementation of Art. 8 of the Directive. The article requires that victim support services have to be confidential. However, 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.[293] Reference is made to the provisions of Austrian and Swiss law, both of which provide for the right to refuse testimony.[294]

A shortfall in the implementation of the Directive also exists in the context of Arts. 11, 6 (1) a) and (3), which call for review possibilities insofar as public authorities refrain from criminal prosecution. In German law, a procedure to compel

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[287] PKS: www.bka.de/DE/AktuelleInformationen/StatistikenLagebilder/PolizeilicheKriminalstatistik/pks_node.html.

[288] www.destatis.de/DE/Startseite.html.

[289] BT-Drucks. 18/4621, 13.

[290] Statement of ANUAS regarding implementation of Directive 2012/29/EU, p1; Statement of bff, 3; Statement of kok, 20 et seq.; Statement of WEISSER RING e.V., 3; Statement of Opferhilfe Sachsen e.V., 2, 11; Statement of djb, 2; Statement of dbh, p.4; All statements are available at: www.bmjv.de/SharedDocs/Gesetzgebungsverfahren/DE/Staerkung_Opferrechte_Strafverfahren.html.

[291] Statement of ANUAS, 1, 2.

[292] Statement of ado, 6 et seq.; statement of DAV, 3 et seq.; Kett-Straub, 'Opferschutz', 2017, *ZIS*, 343-344; S. Bock, 'Das europäische Opferrechtspaket: zwischen substantiellem Fortschritt und blindem Aktionismus', 2013, *ZIS*, 201 209.

[293] Statement of ado, 9 et seq.; statement of bff, 3, 10; statement of Opferhilfe Sachsen e.V., 9, 15 et seq.; statement of TDF, 5; statement of kok, 3.

[294] See Statement of ado, 10.

public charges is only possible if the prosecution dismisses the proceedings for lack of sufficient suspicion in accordance with Sec. 170 (2) GCCP. However, the victim may not initiate a further examination if the public prosecutor dismisses the case for opportunistic reasons (e.g. Sec. 153 et seq. GCCP). Even a person entitled to an accessory private prosecution (*Nebenklage*, see above), is not involved in the dismissal proceedings.[295]

As mentioned above, a noteworthy German instrument of restorative justice is the TOA, to which the victim must agree for it to apply. In this respect, a contradiction is seen in relation 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.[296] In this context, it has been pointed out that the requirement for confession by the offender is not stipulated in law.[297]

Furthermore, it is stated that training in accordance with Art. 25 of the Directive is not provided for under German legislation[298] and is not carried out in a systematic, mandatory manner[299].

Ultimately, the newly introduced standards on interpreting services are considered to be inadequate.[300] In particular, the German legislature points out that sufficient communication in the case of filing a complaint (see Sec. 158 (4) sentence 1 GCCP) in a common foreign language or the support of an attendant of the injured person with sufficient language skills would suffice.[301] However, a complete translation is requested.[302]

2. Practical implementation of Directive 2012/29/EU

Aside from the described legislative implementation deficits, practical problems with the application of the victim protection mechanisms are often raised in Germany. In general, some victim protection institutions are missing a needs-oriented and comprehensive support system.[303] It should be noted, however, that these institutions argue from their own particular point of view. By contrast, legal experts have found an

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[295] See Statement of ado, 12 et seq.; statement of bff, 11; statement of WEISSER RING e.V., 8; statement of Opferhilfe Sachsen e.V., 13 et seq.; Bock, 'Das europäische Opferrechtspaket', 2013, *ZIS*, 206.

[296] Statement of ado, 16; statement of WEISSER RING e.V., 5; R. Müller-Piepenkötter, 'Die EU-Opferschutz-Richtlinie 2012/29/EU: Handlungsbedarf bei Unterstützungsdiensten in Deutschland', 2016, 28, *Neue Kriminalpolitik (NK),* 9, 10.

[297] Statement of ado, 16.

[298] Statement of ANUAS, 3; statement of bff, 11 et seq.; statement of Opferhilfe Sachsen e.V., 16 et seq.; statement of TDF, 6; statement of kok, 29 et seq.

[299] Statement of ado, 17 et seq.

[300] Statement of ANUAS, 4.

[301] BT-Drucks. 18/4621, 24, 25.

[302] See also statement of kok, 5 et seq.

[303] See Statement of bff, 9 et seq.

excessive level of victim protection for some time, which is held no longer compatible with the rights of the defendant and his/her legal status.[304]

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 assess how effective the far-reaching victim protection laws are in reality. This means that possible differences between the 'law in the books' and 'law in action' cannot be analysed in a reliable manner.

Müller-Piepenkötter analysed, in a journal article, the impacts of Art. 8 of the Directive and the situation of victim support services in Germany. She refers to various studies commissioned by the Federal Ministry for Labour and Social Affairs in the run up to the victim rights' reform of 2015 (see above, 1), in particular a survey of the stock of victim support services of 2014. She acknowledged a rather dense network of victim support services in the Federal Republic of Germany but pointed out that this network is unevenly distributed. She also sees a lack of equal access to services, especially in cities with fewer than 20,000 inhabitants.[305] She concludes, however, that the studies seem to suggest that there is some catching up to be done, but that the survey does not allow a definitive assessment of actual victim support provision within the meaning of the Directive.[306]

Case law on the interpretation of the EU victims' rights Directive is even more scarce in Germany, because court decisions tend not to address possible conflicts between EU law and national law. As far as can be seen, the issue of a possible interpretation of German law in conformity with the EU obligations has not been raised so far. Problems occurred in court practice about the scope of the term 'aggrieved person', to which the GCCP confers certain rights (see introduction above).

The Higher Regional Court of Stuttgart ruled that capital investors damaged by market manipulation cannot be considered as an '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 GCCP).[307] The court argued that the then Council Framework Decision on the standing of victims in criminal proceedings from 2001 does not change the view of German courts and practitioners and 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 into 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 exchanges.

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[304] Kett-Straub, 'Opferschutz', 2017, *ZIS*, 343 et seq.; statement of DAV, 1 et seq.

[305] Müller-Piepenkötter, 'Die EU-Opferschutz-Richtlinie' 2016, *NK*, 11-12.

[306] Müller-Piepenkötter, 'Die EU-Opferschutz-Richtlinie', 2016, *NK*, 12 et seq.

[307] OLG Stuttgart, Beschluss vom 28.06.2013 – 1 WS 121/13.

3. Perceived added value of Directive 2012/29/EU

The effects of the implementation of Directive 2012/29/EU have been assessed positively during 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. 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.[308]

B. Compensation for victims

1. 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, Sec. 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, Sec. 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.

2. Compensation vis-à-vis the offender

In the context of compensation for victims, the so called *Adhäsionsverfahren* (a distant cousin of the French *action civile*) according to Sec. 403 et seq. StPO as well as the TOA (offender-victim-mediation) referred to above should be mentioned.[309] The *Adhäsionsverfahren* is a procedure in which the 'aggrieved person' or his/her heir can assert civil claims against the offender in criminal proceedings in order to avoid another proceeding before the civil courts.[310]

As already mentioned, the TOA is an out-of-court attempt to resolve a conflict,[311] which can either lead to the termination of the criminal proceeding (Sec. 153a, 153b GCCP in conjunction with Sec 46a GCC or Sec. 45, 47 YCL) or at least be taken into account in sentencing (Sec. 46a, 46 (2) GCC).[312] 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 right of compensation. This recovery aid ensures that the

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[308] See below, point C.

[309] Velten, *SK-StPO*, Vor §§ 374-406h, mn. 54.

[310] See Meyer-Gossner, Schmitt, *Strafprozessordnung*, Vor § 403, mn. 1.

[311] Schroth, Schroth, *Die Rechte des Verletzten im Strafprozess*, mn. 177.

[312] See further: Schroth, Schroth, *Die Rechte des Verletzten im Strafprozess*, mn. 187 et seq.

victim's claims for damages are secured by means of coercive measures in criminal proceedings during the investigations.[313]

Eventually, 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)*.

3. Implementation gaps

Implementation gaps in Directive 2004/80/EC are not evident. As mentioned, 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.[314]

4. Compensation in practice

When it comes to the question as to whether compensation schemes work well in practice, there are only a few studies that have dealt with the topic in recent times. As noted elsewhere, research on state compensation in favour of victims of crime was mainly done in the 1980s and 1990s but decreased afterwards.[315] Nonetheless, criticism as to the legal arrangements and managing of the OEG has increased in recent years.[316] Thus, there is a need for legal and/or empirical-criminological studies in this respect. The authors take up the criticism and scrutinise the evaluation of the OEG. They conclude, however, 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.[317] Accordingly, it is not possible to give a definite answer as to whether the OEG works in practice or not.[318] They also conclude that a comprehensive evaluation is needed to identify problems with the practical implementation, although there might be some indications thereof.[319] On the other hand, however, the authors emphasise that there is no gap in legislative implementation of the EU Directives, since European standards do not go beyond what German law allows in principle.[320]

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[313] Schöch, 'Opferrechte im Strafprozess in Deutschland', *in* Sautner, Jesionek (eds.), *Opferrechte*, 133.

[314] See below, point D.

[315] T. Bartsch, H. Brettel, K. Blauert, D. Hellmann, 'Staatliche Opferentschädigung auf dem Prüfstand – Entschädigungsanspruch und Entschädigungspraxis', 2014, *ZIS*, 353.

[316] The authors*, inter alia*, refer to an article in the newspaper 'Frankfurter Allgemeine Zeitung' (published in September 2012) entitled 'Du Opfer, du' in which a victim when faced with legal and practical problems raised the question of whether the OEG should be abolished. In addition, statements of victims of sexual abuse voiced their dissatisfaction with the rules and concrete implementation of the OEG. The big 'victim organisation', Weisser Ring e.V., elaborated several socio-political demands and called for a reform of the law.

[317] Bartsch, Brettel, Blauert, Hellmann, 2014, *ZIS*, 360.

[318] *Ibid.*, 361.

[319] *Ibid.*, 362.

[320] *Ibid.*, 357.

Kett-Straub considers the financial compensation of victims to be highly unsatisfactory. In particular, she asserts financial compensation at the low level of applied 'actions civiles' (*Adhäsionsverfahren,* see above), which have not risen significantly despite further legislative expansion.[321] She also sees problems in the practical application of the OEG and pointed out a number of issues. *Inter alia*, these include that only a few victims of violent crime lodge claims despite an entitlement to do so, many victims do not fall within the scope of application of existing frameworks and there are considerable regional differences with regard to the granting of compensation.[322]

The INASC (Improving Needs Assessment and Victims Support in Domestic Violence Related Criminal Proceedings) study also sees problems in the application of the OEG and the *Adhäsionsverfahren*. In particular, judges at criminal courts consider the latter less favourable, since the criminal proceedings would be delayed and civil law competences were sometimes lacking.[323] 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.

Equally, the case law does not contribute to a thorough assessment of the compensation schemes in Germany, in particular when it comes to the compensation of victims in the transnational context as envisaged by EU law. Nonetheless, the following two decisions are worth mentioning.

(1) In a case in 2011, the Federal Court of Justice (*Bundesgerichtshof – BGH*) 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 then 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 principle, 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 guilty of a criminal offence) or not suitable. The latter ground – not suitable – poses problems in practice as in the case at issue.[324]

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[321] Kett-Straub, 'Opferschutz', 2017, *ZIS*, 346.

[322] *Ibid.*, 347. Reference is made in this context, *inter alia*, to statistics of the Weisser Ring e.V. (www.weisser-ring.de/media-news/publikationen/statistiken-zur-staatlichen-opferentschaedigung).

[323] Kotlenga, Nägele, Nowak, *Bedarfe und Rechte von Opfern im Strafverfahren*, 19 et seq.

[324] It should be noted that, pursuant to Sec. 406 para. 1 last sentence GCCP, the ground of lack of suitability cannot be invoked, where the applicant has asserted a claim in respect of

However, the FCJ left open whether his previous case law must still be considered unequivocally valid after the reform and in the light of EU law.[325] 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 compensation. Therefore, the refusal ground of Sec. 406 para. 1 sentence 5 (risk of protracting criminal proceedings) was applicable. Compensation claims had therefore to be brought by the aggrieved persons before civil litigation courts.

(2) 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 EU 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,[326] 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 a risk to the operation of the criminal court in view of the proper investigation of the facts of the criminal offence.[327] 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.

C. Protection measures for victims

1. National rules on protection measures

Protection against violence within the meaning of the European protection order is designed as a civil and not a criminal procedure in Germany.[328] 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 Act on European Violence Protection Procedures (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, a very efficient domestic system of protection against violence in Germany already existed, which could also be used by citizens of other EU Member States residing in Germany.[329]

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.[330] No such request can be made by Germany itself since the scope of the Directive is limited to criminal matters (Art. 2

damages for pain and suffering (Sec. 253 subsection (2) of the Civil Code).

[325] BGH, Beschluss vom 14.04.2011 – 1 StR 458/10 = *wistra* 2011, 335.

[326] Expressly indicated as an example in the CCP.

[327] OLG Hamburg, Beschluss vom 29. Juli 2005 – Az. 1 Ws 92/05 = *wistra* 2006, 76.

[328] BT-Drucks. 18/2955, 23.

[329] BT-Drucks. 18/2955, 3.

[330] *Ibid.*, 24.

No. 2 and Recital 10 of the Directive) and German criminal law does not know such protective measures, but instead regulates them in a civil law manner (see above).[331]

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.[332] It was also necessary to regulate the recognition and enforcement of civil protection measures in other Member States. This was completely done by the 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. Lastly, it should be mentioned that, beyond the EPO, other important protective victims' rights are granted during the criminal procedure.[333]

2. Practical implementation of victim protection measures

As far as the question is concerned as to how victim protection measures are applied in practice, the INASC project (Improving Needs Assessment and Victims Support in Domestic Violence Related Criminal Proceedings) should be highlighted. The project was funded by the Criminal Justice Programme of the European Union. Researchers conducted interviews with ten 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, where summary brochures can also be found.[334] The study focuses on the obligations of the victims' rights Directive 2012/29//EU in the context of domestic violence, but also makes general conclusions as to protective measures for victims.

The study provides double-edged results.[335] 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 police laws. Nevertheless, the corresponding procedural steps are not always being complied with.

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[331] *Ibid.*, 24-25.

[332] *Ibid*.

[333] These include secrecy of place of residence and identity (Sec. 68 GCCP); restriction of the right to ask questions on personal matters (Sec. 68a (1) GCCP) transfer of jurisdiction from the local court (*Amtsgericht*) to the regional court (*Landgericht*) (Sec. 24 (1) No. 3 CCA), so that vulnerable victims in particular do not have to be heard in two instances; exclusion of the public in trial (Sec.171b (1) to (3), 172 No. 1a, 3 and 4 CCA); and limitations as to the presence of the accused (Sec. 247 sentence 2 GCCP), if this has damaging effects on the victim. See details at Kilchling, *Opferschutz innerhalb und außerhalb des Strafrechts*, 35 et seq.

[334] See www.inasc.org/reports.php. The results were published in February 2016. See S. Kotlenga, B. Nägele, S. Nowak, *Bedarfe und Rechte von Opfern im Strafverfahren*, www.befund-gewalt.de/polizei.html?file=tl_files/pdf-downloads/INASC%20Toolkit.pdf.

[335] For the following see Kotlenga, Nägele, Nowak, *Bedarfe und Rechte von Opfern im Strafverfahren*, 13-20.

In principle, there are also suitable instruments available in the judiciary for collecting special victims' 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.

3. Perceived impact on cross-border cooperation instruments

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. One interviewee argued that 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 to be 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, alongside the Regulation on protection measures in civil matters, has proven to be a paper tiger, of 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. The coexistence of the Regulation and the Directive complicates matters.

Possible improvements

Against this background, it is difficult to make suggestions on how to make the EPO more effective. 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. Similarly, lawyers are not always willing to participate in training sessions. This comes as little surprise as not only has the use of the EPO been very rare so far at EU level, but it is also non-existent in Germany. 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 that they therefore rarely deal with victim protection proceedings. Specialised victim lawyers are quite rare.

As far as the frictions generated by the coexistence of the Directive and the Regulation are concerned, a full harmonisation would, of course, be the easiest way out. This harmonisation should conceive of 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 since national procedures offer sufficient protection from the outset.

VI. Horizontal issues of implementation, coordination and cooperation

A. Conflicts of jurisdiction

Interviewees affirmed that (positive) conflicts of jurisdiction do not 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.[336]

It was remarked that the allocation of jurisdiction might play a more important role in European Public Prosecutor's Office (EPPO) proceedings in the future. Nevertheless, German lawyers argue that it must be seen whether the rules in the EPPO Regulation will turn out to be 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, the precondition for any EU action would be to overcome these reservations. In other words: the willingness of the Member States is more important than legislation.

Despite the low level of significance 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).[337] The debate mainly focuses on the question of whether

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[336] Drug smuggling is perhaps the most major offence where questions of jurisdiction are posed, in particular in the relationship 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.

[337] F. Zimmermann, *Strafgewaltkonflikte in der Europäischen Union. Ein Regelungsvorschlag zur Wahrung materieller und prozessualer strafrechtlicher Garantien sowie staatlicher Strafinteressen*, Baden-Baden, Nomos, 2014; M. Böse, F. Meyer, A. Schneider (eds.), *Conflicts of Jurisdiction in Criminal Matters in the European Union, Volume I: National Reports and Comparative Analysis*, Baden-Baden, Nomos, 2013; M. Böse and F. Meyer and A. Schneider (eds.), *Conflicts of Jurisdiction in Criminal Matters in the European Union, Vol. II: Rights, Principles and Model Rules*, Baden-Baden, Nomos, 2014; A. Sinn (ed.), *Jurisdiktionskonflikte bei grenzüberschreitender Kriminalität – Ein Rechtsvergleich zum internationalen Strafecht*,

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.

B. In absentia *trials*

Trials held *in absentia* remain an ongoing issue, which leads to problems of recognising the enforcement of other EU Member States' judicial decisions. Quite tellingly, it was an Italian trial held *in absentia* that triggered the aforementioned landmark decision of the FCC on the 'identity review' (see III B 1). Problems continue despite the stricter, pro-recognition rules introduced by Framework Decision 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.[338]

Increasingly problematic are cases where the defendant was only partly present at the trial. In this context, the HRC of Cologne, for instance, 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 five 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*.[339] 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

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Göttingen, V&R unipress, 2012; B. Schünemann (ed.), *Ein Gesamkonzept für die europäische Strafrechtspflege – A Programme for European Criminal Justice*, Cologne, Carl Heymanns Verlag, 2006, 5 et seq.; A. Biehler, R. Kniebühler, J. Lelieur-Fischer, S. Stein, *Freiburg Proposal on Concurrent Jurisdictions and the Prohibition of Multiple Prosecutions in the European Union*, Freiburg i.Br., 2003, available at: www.mpicc.de/files/pdf2/fa-ne-bis-in-idem.pdf; T. Vander Beken, G. Vermeulen, O. Lagodny, 'Kriterien für die jeweils "beste" Strafgewalt in Europa', 2002, *NStZ,* 624; O. Lagodny, 'Empfiehlt es sich, eine europäische Gerichtskompetenz für Strafgewaltskonflikte vorzusehen?' *Gutachten im Auftrag des Bundesministeriums der Justiz*, Berlin, March 2001, available at: www.uni-salzburg.at/fileadmin/oracle_file_imports/460066.PDF.

[338] OLG Stuttgart, Beschl. v. 5.2. 2015 – 1 Ausl 6/15: no sufficient guarantee of retrial or appeal without discretion (Romania). The situation is considered similar with regard to the Netherlands, Poland, and Italy (overview at K. M. Böhm, 'Rechtshilfeverfahren', *in* Ahlbrecht, Böhm, Esser, Eckelmans, *Internationales Strafrecht*, mn. 1042, 1043. The HRC of Karlsruhe found that connection of the defendant (who was imprisoned in Germany) 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 particular the issuing authorities (Romania) were unable to prove the representation of a lawyer (see OLG Karlsruhe, Beschl. v. 27.4.2017, Ausl 301 AR 35/17).

[339] OLG Köln, Beschl. v. 8.6.2015 – 6 AuslA 29/15-25 = *Strafverteidiger (StV)* 2016, 239.

of his status as 'unwanted foreigner' in order to secure 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 so much that German views on the right to be present at trial (which is in fact stipulated in the GCCP as a duty to be present)[340] 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 their national law into line with the European standards as defined in FD 2009/299 and the case law of the ECtHR.[341]

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 recognised by German courts as "frustrating the trial through flight" since this exception provided for by Sec. 83 para. 2 No. 2 AICCM requires a wilful conduct to escape justice.[342]

Lately, cases involving procedures in the issuing state that implement suspended sentences on probation have increasingly occurred. The question is whether the provisions implementing FD 2009/299 apply and whether the right to a fair hearing (Art. 6 ECHR) is infringed if the person does not attend the proceedings revoking the suspension of a sentence. The case law of the HRCs distinguishes between a revocation made in a judgment and a revocation made by a separate order. If the revocation is made in a judgment, the provision of Art. 83 AICCM implementing the FD 2009/299 applies. If the revocation is made by separate order (as is regularly the case), the HRCs assess whether the proceedings infringe the *ordre public* clause of Sec. 73 sentence 2 AICCM. 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 of the new address.[343] However, a violation of Art. 6 ECHR is considered if the authorities in

[340] See introduction.

[341] See further Wahl, 'Fair Trial and Defence Rights', *in* Sicurella, Mitsilegas, Parizot, Lucifora (eds.), *General Principles for a Common Criminal Law Framework in the EU*, Chapter 4, Section I, 2.2.2 and Section II, 2.2 with further references to the national laws of seven EU Member States.

[342] OLG Stuttgart, Beschl. vom 9. 1. 2008 – 3 Ausl. 134/07 = *NStZ-RR* 2008, 175; K. M. Böhm, 'Rechtshilfeverfahren', *in* Ahlbrecht, Böhm, Esser, Eckelmans, *Internationales Strafrecht*, mn. 1033, 1035. For a case on the legal effects of a 'notice of judgment' under Dutch law, see OLG München, Beschl. v. 3.3.2016 – 1 AR 5/16 (critical to this approach, Böhm, *Ibid.*, mn. 1038).

[343] OLG Celle, Beschl. v. 14. März 2012 – 1 Ausl 4/12 = OLGSt IRG § 81 Nr. 1.

the issuing state knew that the person concerned moved to Germany and summoning could have been served there under his/her new address.[344]

C. Other obstacles to cooperation

Differing competences as an obstacle

The different articulation of competences between law enforcement and judicial bodies in the investigation and prosecution of crimes can also 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 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 an MLA request.

In this context, it was also submitted that many European countries do not maintain 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 become involved in criminal proceedings. This is not only the case in the UK where, for instance, intelligence services are competent for telephone interceptions, but also in the neighbouring country of Austria. There, 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 is unclear.[345]

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 with 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 procedural 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 a 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. the 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.

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[344] OLG Karlsruhe, Beschl. v. 4.8.2017, Ausl 301 AR 64/17.

[345] For the German law, see C. Gusy, 'Gesetz über den Bundesnachrichtendienst', *in* R. Schenke, K. Graulich, J. Ruthig (eds.), *Sicherheitsrecht des Bundes*, Munich, C.H. Beck, 2014, § 9 BNDG, mn. 11 et seq.

Practical problems

Interviewees also mentioned several factual problems that currently hinder cooperation within the EU. Prosecutors responded that the execution of issued requests are still not executed in a timely manner in foreign EU countries. A reason may be the lack of human resources or the concept of prioritising cases pursued in other EU countries. This situation leads to questions pertaining to the state of affairs. In some cases, the German procedure may be brought to an end if no answer to the required assistance is provided. This concerns especially minor offences. Waiting too long for replies would contradict the principle of proportionality.

Sometimes, German MLA requests are not completely executed, i.e. evidence is submitted to the German authorities only in a selective way by the foreign authorities. 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 in the end 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 there are considerable differences regarding the quality of the lawyers' advice, especially in cross-border cases. In particular, the level of knowledge of lawyers assigned as mandatory defence lawyers to an MLA/ extradition case differs considerably 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 people.

VII. Conclusion and policy recommendations

Interview partners generally submitted that no further action should be initiated at the EU level at the moment.[346] Instead, the time is considered ripe for entering into a consolidation phase and for a thorough evaluation of the existing instruments.[347]

The example of the European Protection Order shows that existing instruments are 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 and thus the impacts on the rule of law procedure in general must always be taken into account as well.

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[346] But see the proposal of German defence lawyer and former president of the ECBA H. Matt for a new roadmap on minimum standards of certain procedural rights – an Agenda 2020 in 2017, *Eucrim*, 1.

[347] This also holds true for the area of victim protection where many lawyers are of the opinion that a thorough evaluation is needed first. Furthermore, many lawyers are concerned that further regulation may further distort the balanced criminal procedure system.

The majority of interviewees stressed that more training measures are needed in order to adequately prepare all those involved in international cooperation in criminal matters, such as judges, prosecutors, and defence lawyers. Those involved 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.

Experts on the part of defence lawyers conceded that lack of knowledge on the part of defence lawyers should be remedied. Most defence lawyers are neither trained nor specialised 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.

A similar picture emerged in the area of protection of victims. Victims' rights and protection mechanisms are designed effectively from a legal point of view, but more problematic is the practical application. 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 the national level to increase the awareness of them 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. Beyond appropriate training measures, the general availability of victim support and victim protection institutions should be strengthened. These improvements on a low-threshold basis are preferred to an expanding system of standards driven by political activism.[348]

The majority of interview partners are of the view that attempts to harmonise procedural criminal law across the EU are not feasible and not reasonable. It was also stressed that, in the case of legal orders that share a common legal culture, differences remain that cannot be overcome by EU harmonisation. 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), there are vast differences between them. These concern, for instance, the role of the public prosecutor and investigating judge during the criminal procedure; the rights of the defence (e.g. access to the files); the confidentiality of lawyer-client communication;[349] the rights to refuse testimony on professional grounds;[350] and exclusionary rules for evidence.

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[348] See also KOTLENGA, NÄGELE, NOWAK, *Bedarfe und Rechte von Opfern im Strafverfahren*, 5: the implementation of the victims' rights 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.

[349] See in this regard, F. ROITNER, 'Die Überwachung des Gesprächs zwischen dem Beschuldigten und seinem Verteidiger im Lichte der EMRK', *in* O. LAGODNY (ed.), *Strafrechtsfreie Räume in Österreich und Deutschland*, Vienna, facultas, 2015, 129 et seq.

[350] See in this regard, J. TAFERNER, 'Die Legitimation von Vernehmungsverboten nach § 155 StPO', *in* O. LAGODNY (ed.), *Strafrechtsfreie Räume in Österreich und Deutschland*,

Against this background, one interview partner advocated that the EU should not be called to answer the question of further harmonisation 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; and proportionality of coercive measures.

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

Legislative measures:

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

Practical measures:

- Better and continued language training of practitioners involved in MLA;
- Establishment of certified interpreters/translators particularly competent for MLA/extradition procedures;
- Establishment of fora where practitioners of all EU Member States meet to discuss current problems in 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).

Vienna, facultas, 2015, 185 et seq.

CHAPTER III

Hungary

Petra Bárd[*1]

I. Main features of national criminal procedure

A. 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 (hereafter: ECHR or Convention) on 6 November 1990. The ECHR and its eight protocols were ratified back in 1992.[2]

Before ratification it was decided to thoroughly scrutinise Hungarian legislation as to its compatibility with Strasbourg case law and to first prepare legislation in

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[1] When compiling this 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 valuable information shared by 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. Since experts provided responses in their individual capacity, references to affiliations have been omitted.

[2] 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. 14*bis*.

areas where compliance with the jurisprudence of the Convention organs called for modifications. Thus, an Inter-Ministerial Committee was set up and chaired by the then Ministry of Justice deputy secretary of state. It was 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.[3] The committee identified relatively few areas where the Convention required the modification of Hungarian laws.

This was partly explained by the fact that the 1989 amendment of the 1949 Constitution radically modified the chapter on human rights. The text of Act XX of 1949, i.e. the 1949 Hungarian constitution originally mirroring the 1936 Soviet 'Stalinist' constitution, was substantially reformed during and after the political changes. Hungary – unlike other countries in the region – after an ambitious 1989 amendment[4], failed to formally adopt a new constitution despite the fact that the 1989 constitution's drafters did not foresee it as a lasting document.[5] 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 has 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 realised whereby the 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.[6] The Hungarian Constitutional Court (HCC) has been created[7], exercising an important corrective role against the majoritarian dangers of parliament.[8] In line with the idea of the judiciary as 'the least dangerous branch

[3] For a detailed summary of the findings, see Doc. H(95)2 of the Council of Europe published also, *in* A. Drzemczewski, 'Ensuring Compatibility of Domestic Law with the European Convention on Human Rights Prior to Ratification: The Hungarian Model. Introduction to a Reference Document', 1995, 16, *Human Rights Law Journal*, 7-9, 241-260.

[4] Act XXXI of 1989 on the modification of the Constitution of 18 October 1989.

[5] The preamble, as modified in 1989, stated that the Constitution was established 'until the adoption of the new constitution'.

[6] 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.

[7] 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.

[8] For a comprehensive evaluation, see Ch. Boulanger, 'Europeanization Through Judicial Activism? The Hungarian Constitutional Court's Legitimacy and the "Return to Europe"', *in* W. Sadurski, A. Czarnota, M. Krygier (eds.), *Spreading Democracy and the Rule of Law?*, Dordrecht, Springer, 2006, 263-280.

of government'[9] and recognising that apex *fora* are the 'most principled guardians of constitutional rights and of 'deliberative, constitutionally limited democracy',[10] 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 based on such procedures. The HCC was consistently among the most respected political institutions.[11] 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 and the State Audit Office provided additional checks and balances. An effective fundamental rights' protection mechanism has been established. Aside from 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 constitutional, human rights and criminal laws.[12]

B. Hungary's mixed criminal justice system

It is difficult to determine with the utmost precision to which legal tradition the Hungarian criminal procedure belongs, not least because of the differences in terminology, such as continental, inquisitorial, mixed, or Anglo-Saxon, accusatorial and adversarial proceedings. Still, in an 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 (hereafter also referred to as 'old CPC') brought the Hungarian system closer to the party driven common law model (e.g. examination through the parties as an alternative to interrogation by the presiding judge), the dominant procedural features of continental law have been preserved.[13]

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[9] A. Hamilton, 'The Federalist No. 78. The Judiciary Department', 1788, June 14, *Independent Journal Saturday*.

[10] E.-U. Petersmann, 'From State-Centered towards Constitutional "Public Reason"', *in* G. Bongiovanni, G. Sartor, Ch. Valentini (eds.), *Reasonableness and Law*, Dordrecht, Springer, 2009, 421-458.

[11] 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.

[12] For further details see P. Bárd, K. Bárd, 'The European Convention on Human Rights and the Hungarian Legal System', *in* S. Panović-Đurić (ed.), *Comparative Study on the Implementation of the ECHR at the National Level,* Belgrade, Council of Europe, 2016, 147-166.

[13] K. Bárd, 'A büntető eljárási törvény tervezete az európai jogfejlődésben' ['The draft Criminal Procedural Code in light of European legal developments'], 1998, 4, *Jogtudományi Közlöny,* 121-125.

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 takes place right before the court procedure only. After the conclusion of the investigation, the prosecutor or the investigating authority hands the documents of the investigation over to the suspect and the defence counsel. With the exception of classified information, all pieces of evidence that may serve as the basis for pressing charges have to be disclosed to the suspect and the defence counsel.

The discretionary powers of the public prosecutor have been 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 investigative 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 to a probation order, but issued not by the court but by the prosecutor); or files an indictment, or makes a decision to drop some of the charges. The prosecutor is responsible for presenting all the 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.

C. The impact of the diversity of legal traditions regarding criminal procedure law across the EU

Among other reasons, a practical necessity resulted in the approximation of legal systems. Dissatisfaction with one's own legal system propelled policy-makers and lawmakers to 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 corresponded more to the contradictory procedure than the mixed one. For nearly one and a half centuries, we witnessed the 'triumph' of the adversarial process. From the 19th century onwards, Spain and Norway, and then at the beginning of the 20th century, Denmark, made significant steps towards the adversarial process. Japan decided to follow the US pattern in the middle of the 20th century. In 1948, the 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 interest in borrowing certain continental law elements of the criminal procedure.[14] 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 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 as in continental law, the prosecutor and the defence lawyer have different roles in the criminal proceedings. 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.[15] International criminal courts also knowingly combine elements belonging to various legal families, whereas the ECtHR increasingly imposes the common law understanding of fair trial on High Contracting Parties.[16]

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, facilitate 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 need 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 *infra* in chapter V. Here it shall suffice to say that Irish citizen Francis Ciarán Tobin was not surrendered to Hungary due to a

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[14] 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. P. J. van Koppen, S. D. Penrod (eds.), *Adversarial versus Inquisitorial Justice: Psychological Perspectives on Criminal Justice Systems*, London, Springer, 2003, 1-2.

[15] G. P. Fletcher, *American law in a global context: the Basics*, New York, Oxford University Press, 2005, Steve Sheppard, 533.

[16] A. Cassese, *International Criminal* Law, Oxford, Oxford University Press, 2008, 365-388.

mistake in the Irish legislation implementing EU law. The Irish act implementing the Framework Decision on the European Arrest Warrant (EAW)[17] allowed the convict to be surrendered for the purposes of execution only if he or she fled from the issuing State before starting to serve the sentence or before completing the punishment. The court found that Mr. Tobin could not be surrendered to Hungary since he did not 'flee'; after he had arranged due legal representation for the *in absentia* trial, he left the country in the lawful possession of his passport.[18]

Following the unsuccessful attempt to surrender Mr. Tobin, the Irish legislator amended national criminal law and removed the condition according to which, prior to the commencement or the completion of the punishment, the convicted person must have 'fled the issuing State'.[19] The legislator included 'fleeing' in the original version of the law since, in the common law, there is very little if any room for *in absentia* hearings. But since the main text of the Framework Decision on the European Arrest Warrant (EAW)[20] makes no mention of absconding, the implementation should have taken into account the possibility of prosecution *in absentia*, which is legal under continental law.[21]

Apart from the need to consider foreign law, mutual recognition-based instruments contribute to bringing legal traditions closer in another way. Initially, the principle of mutual recognition 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.[22] 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

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[17] Council Framework Decision 2002/584/JHA of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States, *OJ*, No. L 190, 18 July 2000.

[18] High Court of Ireland, *Minister for Justice Equality & Law Reform v. Tobin* [2007] IEHC 15, 12 January 2007.

[19] No. 28 of 2009 Criminal Justice (Miscellaneous Provisions) Act 2009, being effective from 25 August 2009.

[20] Council Framework Decision 2002/584/JHA of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States, *OJ*, No. L 190, 18 July 2000.

[21] P. Bárd, 'Traps of Judicial Cooperation in Criminal Matters: The Tobin Case' in, M. Szabó, P. L. Láncos, R. Varga (eds.), *Hungarian yearbook of international law an European law, 2013*, Hague, Eleven International Publishing, 2014, 469-505. For a more detailed analysis see P. Bárd, *Az európai elfogatóparancs Magyarországon = The European Arrest Warrant in Hungary*, Budapest, P-T Műhely, 2015, 175-218.

[22] Stockholm Programme, Section 3.1.1. See http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=URISERV:jl0034&from=EN.

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.[23]

D. The status of defence rights

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 Fundamental Law (hereafter: FL) is the relevant part. Before getting into the actual provision on defence rights, 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 and Article XVI on the rights of the child.

The provisions of direct relevance are Article IV on the right to liberty and security of the person, Article XXIV on fair trial in general, and Article XXVIII on defence rights and procedural guarantees in the narrow sense. These are in full compliance with and incorporate rights enshrined in the ECHR, especially Articles 5, 6, 7 and 13 respectively.

Article IV (1) declares everyone's right to liberty and security of the person. Paragraph (2) declares the prohibition on depriving persons of their liberty, except for reasons specified by and in accordance with the procedure laid down by an Act enacted by Parliament. The provision also entrenches the possibility of life imprisonment without parole for intentional and violent criminal offences. Paragraph (3) states that any suspect in detention shall, as soon as possible, be released or brought before a court. The court has to render a written decision, including a reasoning, on the release or the arrest of the person. According to paragraph (4), everyone whose liberty has been restricted without a well-founded reason or unlawfully has the right to compensation.

According to Article XXIV (1) everyone has the right to have his or her affairs handled impartially, fairly and within a reasonable time. Authorities must reason their decisions. Paragraph (2) lays down the right to compensation for any damage unlawfully caused by the authorities in the performance of their duties.

Article XXVIII provides for the right to have any charge adjudicated within a reasonable time in a fair and public trial by an independent and impartial court established by a parliamentary Act. It also declares the presumption of innocence,

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[23] P. Bárd, 'Saving EU criminal justice. Proposal for an EU-wide supervision of the rule of law and fundamental rights', 2018, *CEPS Policy Brief,* https://www.ceps.eu/system/files/PBard_Saving%20Justice.pdf.

the right to a defence at all stages of the criminal proceedings, the prohibition of the retroactive determination of guilt or imposition of sanctions for an act which at the time when it was committed did not constitute a criminal offence under Hungarian law, according to an international treaty, a piece of law of the European Union or under the law of another State. It also lays down the widely acknowledged exception from the previous rule on the prohibition of retroactive laws, according to which it is permitted to prosecute or convict persons for acts which, at the time when it was committed, was a criminal offence according to the generally recognised rules of international law. The provision constitutionally entrenches the principle of *ne bis in idem* and declares the right to legal remedy.

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. Act XIX of 1998 on the Criminal Procedural Code was replaced by Act XC of 2017, entering into force on 1 July 2018 (hereafter also referred to as the 'new CPC').

E. The status of victims' rights

Crime victims' rights are not constitutionally embedded in Hungary.

However, victims' rights have been on the agenda for almost 25 years. For example, the codification guidelines of Act XIX of 1998 on the Criminal Procedural Code put a heavy emphasis on victims.[24]

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 so as to protect victims' rights.

Lower level pieces of legislation lay down detailed rules on the protection of victims of crime. 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 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 to 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 into 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 the CPC was being drafted.

[24] See Point 6 of Government Decision 2002/1994 (I.17.).

II. Transposition and implementation of procedural rights directives for defendants

The new CPC 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 submitted by the government on 11 February 2015 mention EU obligations as a trigger for legislative solutions at several instances.[25] 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 jeopardised. This is not an absolute limitation, meaning that the suspect may designate another person to be notified. Notification may not be delayed beyond eight hours.

The circumstances of seizure and sequestration were refined by Articles 333-4 new CPC so that the objectives of investigation could be reached by causing less damage. 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 sequestrated is not more reduced than otherwise in their natural state. When managing the goods, actions may only be taken if they are aimed at maintaining the value of the goods.

Rules on judicial review in Article 374 new CPC have been drafted with a view to incorporating the requirements of Directive 2012/13/EU.

Articles 468-473 new CPC on the arrangement of public sessions take into account the provisions of Directive 2012/13/EU. The law prescribes that the suspect and his or her legal 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). The old CPC was already 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

[25] In Hungarian: *Az új büntetőeljárási törvény szabályozási elvei, A Kormány 2015. február 11. napján megtartott ülésén elfogadott előterjesztés*.

2015, the rule applies with regard to a motion for prolongation too.[26] This also meant that suspects who were not arrested were worse off than those arrested, as the former did not have access to all pieces of evidence. In the 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, they prohibited the person from leaving his/her residence. Similarly, house arrest could be ordered, so that disclosure of evidence was not triggered.

This practice went against Article 7(1) of the Directive, which covers defendants 'arrested and detained'. 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.[27]

Article 100 new CPC brought this abusive practice to an end: 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 lawmakers would not have drafted the above provisions without EU obligations arising from Article 7 of Directive 2012/13/EU. Still, as the Hungarian Helsinki Committee has shown, certain issues are still 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 and video recordings. Also, electronic copies are not provided.[28]

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 (Article 408(1) e) and Article 409(3), old CPC; Article 637(1) g) and Article 644(2), new CPC). As the explanation to the law states,[29] 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 by taking into account

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[26] A lower piece of legislation, Instruction of the Prosecutor General 11/2003 (Ü.K. 7.) and more specifically its Art. 21 (4) has also been amended mirroring the modifications of the old CPC.

[27] *Süveges v. Hungary*, Application No. 50255/12, 5 January 2016, para. 77.

[28] For this and further criticism see Hungarian Helsinki Committee (A. K. Kádár, N. 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.

[29] For the explanation of the bill as submitted by the Minister of Justice see http://www.parlament.hu/irom40/13972/13972.pdf, especially page 558.

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.

The above rules enable Hungary to comply with EAWs in line with Article 4a(1)d) of the Framework Decision on the EAW. However, in cases where 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 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).

Act XC of 2017 on the new Criminal Procedural Code entered into force on 1 July 2018. Rights enshrined therein will only be evaluated once the judicial authorities develop a body of case law in future criminal proceedings.

Overall, it is fair to say that, within the Hungarian legal framework, structures and processes are often in place, but the desired outcome is missing.[30] This was the case with the Letter of Rights, which, as the Hungarian Helsinki Committee has proven, 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.[31] In another piece of research, the Hungarian Helsinki Committee pointed at deficiencies in the practical realisation of the Hungarian provisions that implement Directive 2013/48/EU.[32]

Some practising lawyers pointed at the lack of training sessions, which undermines the effectiveness of the rights enshrined in EU Directives in practice.

III. Evidence law

A. Evidence gathering and admissibility

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

[30] For the structure-process outcome models see UN OHCHR (2012), Human rights indicators: a guide to measurement and implementation, HR/PUB/12/5Fundamental Rights Agency (2014), Fundamental rights: challenges and achievements in 2013 – Annual report 2013, Focus Chapter, Luxembourg, Publications Office, 7-20.

[31] Hungarian Helsinki Committee (M. Bencze, J. Koltai, Zs. Moldova, A. Kádár), *Accessible Letters of Rights in Europe. Research Report on the Accessibility of Letters of Rights in Hungary*, 2016, 6, https://www.helsinki.hu/wp-content/uploads/Accessible_LoRs_sociolinguistic-testing_HHC.pdf. The alternative Letter of Rights the HHC and the legal, plain language and sociology experts drafted was accessible by 62% of defendants.

[32] Hungarian Helsinki Committee (A.K. Kádár, N. Novoszádek), *The Right of Access to a Lawyer and Legal Aid in Criminal Proceedings in Hungary*, 2018, https://www.helsinki.hu/wp-content/uploads/HHC_Access_to_a_Lawyer_and_Legal_Aid_201803.pdf.

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.[33]

Beyond the above mentioned general rule, there are also special provisions on evidence to be excluded. These are: (i) witness statements, if prior to the examination, the information of the witness on the grounds of exemption as well as on the grounds of his or her rights not having been recorded in the minutes; (ii) witness statements made in violation of the provisions on taking a testimony; (iii) witness statements, which were given without recording in the minutes a prior warning as to the obstacles to testify as a witness, about the witness's obligation to tell the truth to best of their knowledge and conscience and the consequences of giving false evidence; (iv) 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; (v) 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; (vi) the outcome of a house search, if the search is to be confirmed by a court and the court refuses to issue a warrant; (vii) 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); (viii) 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 a witness or someone who can deny witness testimony; and (ix) the statement of the defendant and the victim made in the course of the victim-offender mediation process.

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. In reverse situations, the Hungarian version of search of a house, body search and seizure do constitute 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. Evidence gathering is reviewed by the public prosecutor and by the judiciary.

B. The effect of differing rules on gathering and admissibility of evidence on EU instruments

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 level pieces of legislation. Therefore, even if all procedural steps are flawless with regard to the issuing of a European Investigation

[33] Art. 78 (1) and (4) old CPC, Art. 167 (1) and (5) new CPC. For more information, and the possibility of remedying the violation of procedural rules when obtaining evidence, see B. 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'], 2018, 2, *Magyar Jog*, 94-104.

Order (EIO)[34] or in relation to Joint Investigation Team (JIT)[35] cooperation, the above mentioned States will refuse cooperation, and courts will not accept evidence collected, in case no legal representative was informed.

Interviewees supported the thesis that negotiations on the EIO 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, no 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 lists all grounds of refusal and Point e) incorporated the scenario when an investigative act is not known in or is contradictory with Hungarian law. However, the provision has never been invoked in practice.

The proposal regarding the establishment of the European Public Prosecutor's Office (EPPO)[36] was debated by the Hungarian Parliament's Committee on European Affairs at its meeting of 23 September 2013. Hungary summarised its initial concerns to the 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 in the European Commission. The Reasoned Opinion[37] was adopted at the plenary meeting of 21 October 2013. 280 MPs voted in favour, 27 against, one abstained. According to this document, the proposal establishing the EPPO[38] violated the principle of subsidiarity. Potential breaches of both national sovereignty and the Fundamental Law were also points of concern.[39]

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 did not provide exclusive competence to the European Public Prosecutor's Office; the proposed model of

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[34] Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters, *OJ*, No. L 130, 1 May 2014.

[35] Council Resolution on a Model Agreement for setting up a Joint Investigation Team (JIT), *OJ*, No. C 18, 19 January 2017.

[36] Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO'), *OJ*, No. L 283, 31 October 2017.

[37] 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.

[38] Proposal for a Council regulation on the establishment of the European Public Prosecutor's Office, COM(2013)534; 2013/0255(APP).

[39] See the relevant information sheet by the Hungarian Parliament : http://www.parlament.hu/documents/10181/1202209/Infojegyzet_2017_48_europai_ugyeszseg.pdf/a0de0d02-ae39-4970-9084-fab0eb5f74bb.

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).

Because of Hungary's and several other Member State's concerns, the European Commission conducted a review, pursuant to its obligations enshrined under in Protocol 2 TFEU (yellow card procedure) and decided to uphold the Proposal without changes.[40]

On 26 February 2015, the delegation of the Hungarian Parliament's Committee on European Affairs held an 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 Hungarian Parliament's Committee on Justice 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 Committee on European Affairs.[41] Simultaneously, in the Sopot Declaration[42] 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.[43]

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 the EPPO with Hungarian MPs in the framework

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[40] Reasons by the European Commission are laid down in a 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 of the European Commission sent to Hungary on 14 March 2014 is available at http://www.ipex.eu/IPEXL-WEB/dossier/files/download/082dbcc559522ecc01598e2313ec3a13.do.

[41] http://www.ipex.eu/IPEXL-WEB/scrutiny/APP20130255/huors.do.

[42] For the full text please visit http://ugyeszseg.hu/wp-content/uploads/sajto1/2015/06/sopot-declaration_final-15-v-2015.pdf.

[43] See the habilitation theses by Péter Polt on Eurojust and EPPO at www.jak.ppke.hu/uploads/articles/757135/file/Polt_Peter_tezis.pdf; P. Polt, 'Die Europäische Staatsanwaltschaft-EPPO', 2016, 12, *Österreichische Richterzeitung,* 262-268; P. Polt, 'EPPO: Tendencies and Possibilities' *in* Gy 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.

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.[44]

Now that the EPPO has become a reality,[45] the Hungarian State authorities decided not to make use of enhanced cooperation and failed to opt in. According to the Hungarian government, existing institutions such as Eurojust or OLAF sufficiently address offences against EU financial interests. As a result, according to the Hungarian government, the introduction of a new entity such as the EPPO would only weaken these well-functioning organisations.[46]

IV. Detention law

A. Pre-trial detention and alternatives to detention

The new CPC provides time limits for detention at each stage of the proceedings. 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 one month. Detention may be extended by the investigating judge by three months several times, but the overall period may not exceed one year after detention has been first ordered. Thereafter, detention may be extended by the investigating judge by two months.

The detention shall cease in the following cases:

a) if the period thereof reaches one year and the procedure is conducted against the defendant for a criminal offence punishable by not more than three years;
b) if the period thereof reaches two years and the procedure is conducted against the defendant for a criminal offence punishable by not more than five years;
c) if the period thereof reaches three years and the procedure is conducted against the defendant for a criminal offence punishable by not more than 10 years; or
d) if the period thereof reaches four years and the procedure is conducted against the defendant for a criminal offence punishable by more than 10 years.

There are exceptions to the aforementioned rules: those limitations may 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 six months and the court of first instance has not delivered a conclusive decision yet;

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[44] See www.ipex.eu/IPEXL-WEB/scrutiny/APP20130255/huors.do.

[45] Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO').

[46] See www.mno.hu/kulfold/zold-utat-kapott-az-europai-ugyeszseg-2420128.

b) by the court of appeal, if the period of the preliminary arrest has exceeded one year.

After the one year period has elapsed, 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 six months.

Interviewees highlighted the overuse of detention for lesser crimes or even petty offences and emphasised that 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.

B. The effect of the Aranyosi and Căldăraru *judgment*

Interviewees confirmed that the *Aranyosi* judgment and the substandard detention regime of Hungary did not have a significant effect on the execution of mutual recognition-based instruments such as the EAW. Nor has Hungary as an executing State raised doubts as to the detention conditions in other member countries of the EU, or at least this is what can be concluded on the basis of the interviews conducted.

Two aspects of the *Aranyosi* jurisprudence's impact on future surrender cases to Hungary deserve greater attention. Both issues have been extensively dealt with in *ML*, another surrender case, where – similarly to *Aranyosi* – a German court had doubts as to whether the convict should be handed over to Hungary with still substandard prison conditions. The Higher Regional Court of Bremen asked the CJEU what information it needed to obtain about the conditions in which *ML* would be detained in Hungary.[47]

First, the court held that, when assessing the effects of potential cramped and substandard prisons on the individual suspect, the executing judicial authorities are only required to assess the detention conditions in those prisons where the issuing authorities intend to detain the suspect. It means that the application of the second prong of the *Aranyosi* test will in practice not necessarily lead to effectively protecting detainees.[48]

Second, in *ML* the difficulties of the *Aranyosi* test took their toll. *Aranyosi* placed too much of a burden on executing authorities to check possible systemic fundamental rights violations in the issuing Member States. Among others, it was left open what pieces of evidence need to be used to prove the general problem.

The judgment in *Aranyosi* heavily depended on the ECtHR's judgment *Varga and Others v. Hungary*.[49] In this pilot judgment, the court held that prison conditions in Hungary violated Article 4 EU Charter (Article 3 ECHR). That said, after the judgment in *Aranyosi* was rendered, Hungary adopted a new law,[50] which provided for a combination of preventive and compensatory remedies, guaranteeing in principle genuine redress for ECHR violations originating from cramped prisons and

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[47] Case C-220/18 PPU, *ML*, 25 July 2018, ECLI:EU:C:2018:589.

[48] See https://www.fairtrials.org/publication/beyond-surrender.

[49] ECtHR, 10 March 2015, Application No. 14097/12, 45135/12, 73712/12 *et al.*, *Varga and others v. Hungary*.

[50] Act No. CX of 2016 amending Act No. CCXL of 2013 on the enforcement of punishments, measures, certain coercive measures and confinement for regulatory offences.

other unsuitable detention conditions.[51] Therefore, the question in *ML* was whether surrender still had to be postponed in light of the new Hungarian law. To make matters more complicated, in *Domján v. Hungary*,[52] the ECtHR ruled that the complaint filed by another Hungarian detainee on prison conditions – and all the others in his position, was premature and therefore inadmissible. In particular, it stated that Mr. Domján should make use of the remedies introduced by the new domestic law before turning to the Strasbourg court.

The ECtHR's decision in *Domján* led the Advocate General (AG) to believe, in the *ML* case, that surrender cannot be postponed any longer on the grounds of poor prison conditions in Hungary.[53] In contrast to the AG's Opinion, the CJEU realised that procedures enabling authorities to grant redress for violations of fundamental rights cannot rule out the existence of a real risk of a violation and it is this latter aspect that the executing authority needs to assess. Even though the *Domján* decision is no ultimate proof that detention conditions changed for the better in Hungary, the CJEU in *ML* also noted that the existence of the new proceedings of preventive and compensatory remedies may be taken into account when deciding on surrender.[54] Despite this refined reliance on ECtHR case law, the court implies that "in the absence of minimum standards under EU law regarding detention conditions"[55] the ultimate bar for determining the potentiality of human rights violations remains to be determined by the Strasbourg court.

Instead of this heavy reliance on Strasbourg jurisprudence, this author proposes a regular, context-specific, objective, equal and scientifically sound evaluation, possibly in the form of the 'democracy, rule of law and fundamental rights' mechanism,[56] which would not only alleviate the burden from the national judiciaries to assess each other's legal systems, but also be tailored to the expedited intra-EU judicial cooperation based on the principle of mutual recognition requiring higher standards than those established by the Council of Europe, an entity incorporating a number of States with dismal human rights records.[57]

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[51] For compensation procedures to remedy the harm resulting from fundamental rights violations during detention see Art. 70/A-B; for administrative measures taken due to the complaint on fundamental rights violations during detention; and transfer, see Art. 75/A of the Act CCXL of 2013 on the execution of punishments, criminal measures, certain coercive measures and confinement for administrative offences.

[52] ECtHR, 14 November 2017, Application No. 5433/17 *Domján v. Hungary.*

[53] Opinion of Advocate General Campos Sánchez-Bordona of 4 July 2018, Case C-220/18 PPU, *ML*, ECLI:EU:C:2018:547, paras. 51-54.

[54] Case C-220/18 PPU, *ML*, 25 July 2018, para. 117.

[55] *Ibid*., at para. 90. See W. VAN BALLEGOOIJ, *Procedural Rights and Detention Conditions: Cost of Non-Europe Report*, PE 611.008, European Parliamentary Research Service, European Added Value Unit, Brussels, 2017, http://www.europarl.europa.eu/RegData/etudes/STUD/2017/611008/EPRS_STU(2017)611008_EN.pdf.

[56] 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.

[57] See conclusions of this chapter for further details.

V. Victims' law

A. Transposition and application of the Victims' Rights Directive 2012/29/EU

The codification of victims' rights in Hungary had fit into the international trend of the reinvention of victims' rights in the 1990s. Later, the adopted Framework Decision 2001/220/JHA 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.[58]

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 the victim's rights. (ii) The victim is entitled to know if the defendant has escaped or has been released. (iii) The victim has the right to representation by legal aid counsel in all criminal proceedings. (iv) The victim is entitled to clear communication both 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 offences, 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 whom they request. (x) In the case of a victim requiring special treatment, it is possible to have a closed hearing.[59]

Article 50 of the new CPC clarifies that a victim can be both a natural and a legal person. The law summarises victims' rights at one place, thereby overcoming previous problems of the scattered nature of victims' rights in the law;[60] 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 it does not alleviate his or her responsibility from appearing at the trial. The victim may withdraw the declaration at any time during the process.

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[58] E. 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'], 2011, 6, *Miskolci Jogi Szemle*, 155-167.

[59] For details see B. Lencse, 'A büntetőeljárási 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 disadvataged position of the victim in the criminal procedure'], 2016, 1-2, *Büntetőjogi Szemle*, 50-61.

[60] A. Kiss, 'A sértett hátrányos helyzete a büntetőeljárásban' ['The disadvantaged position of the victim in the criminal procedure'], 2003, 2, *Ügyészek lapja*, 5-18.

B. Compensation for victims

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 support for victims of crime 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 is, furthermore, 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 offence, 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 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 a lump sum cash payment or in regular monthly instalments. A crime victim may apply for a lump sum cash payment as total or partial compensation for the economic loss that 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 inability to work for an estimated period of over six 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.

C. Protection measures for victims

The Hungarian legal system comprises both civil and criminal protection measures. Relevant legal instruments include the old and the new CPCs, Act CXXXV of 2005 on support for victims of crime and state compensation which have been amended and/or drafted in such a way as to protect victims' rights, but also lower level pieces of legislation, such as Decree 1/2006. (I. 6.) of the Minister of Justice

on the rules of the impressment of the use 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 the 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.[61] It is the latter, broader term that the Hungarian translation of the EU Victims' Rights Directive uses,[62] even if some rights are exclusively applicable to direct victims, while others have 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 generate a sense of security for the victims or to make a decision about reporting to the police. An additional common feature of these services is that the filing of a claim by the victim is not subject to a particular deadline.

Examples of services in this first group include support for making use of judicial assistance. Information is on the system of victim protection assistance as well as the criminal justice system. Besides, the victim is granted legal help that does not necessitate the involvement of a lawyer. Practice shows that these pieces of information are crucial since victims are typically not aware of the average length of a criminal process, about whether compensation can be granted in the context 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 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. Second, victim services include the provision of shelters. For victims of trafficking in human beings, the service only helps victims to find, but does not maintain shelters. Third, for judicial personnel, witness support implies informing witnesses on how to make statements, as well any other issues that may be relevant to them. Providing emotional and psychological support is one of the areas where the Hungarian victim protection system suffers from deficiencies.

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[61] See for example I. Görgényi, *Ötletek a készülő áldozatvédelmi tövényhez – 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], 2004, 61, *Kriminológiai Közlemények*, 105-131.

[62] In a somewhat confusing manner, the Hungarian version of Art. 82 (2) Point (c) uses the narrower term *sértett*.

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 formalised 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 is neither a form of compensation nor is it social assistance. Logically therefore, its amount is independent from 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, which in turns allows a victim of less financial means to obtain 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 his or her status and personal characteristics into account; unnecessary meetings between victim and suspect shall be avoided; victims with special needs 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. It was discussed in the previous subchapter.

D. Outstanding issues

Victims' rights have, in the overall assessment, been codified in compliance with EU expectations. 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.

One should also mention a number of instances where improvements may still be needed. As a Hungarian practising judge noted, "[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".[63] Another criticism is related to compensation. According to Professor Róth, compensation for the victim, which often does not take place, should have priority over financial sanctions.[64] As for victim-offender mediation, the number of instances of this is

[63] G. Czédli, 'The Protection of Particularly Vulnerable Victims in Hungarian National Law', 2016, 57, *Hungarian Journal of Legal Studies*, 3, 305-321, 318.

[64] E. 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], 2011, 6, *Miskolci Jogi Szemle*, 155-167, 164.

increasing, but the legal institution could be used more efficiently.[65] By contrast with the restorative approach, mediation is currently invoked in the case of defendants who have a regular income, while persons with more modest financial means are less likely to benefit from the procedure.[66] 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, but apparently they are not trained in making use of the concept of reconciliation and restoring peace between the victim, the defendant and communities.

VI. Horizontal issues of implementation, coordination and cooperation

A. The AY *case and the different interpretations of* ne bis in idem

1. Denying surrender in the first round with reference to ne bis in idem

Different understandings of the *ne bis in idem* principle hindered cross-border cooperation in the seminal AY case. Hungarian citizen Zsolt Hernádi, CEO of the company MOL, was accused in March 2014 by the Croatian prosecutor of bribery in connection with the privatisation of the Croatian oil refinery INA. The case was widely discussed in the media. According to the news, back in 2008 or 2009, Mr. Hernádi paid the then Croatian Prime Minister Ivo Sanader €10 million before MOL acquired a 47.47% stake in INA.[67] Details were unclear, but Mr. Sanader resigned on 1 July 2009 and left Croatia for Austria, from where he was extradited.[68] By July 2011, Croatia decided to review the 2003 and the 2009 agreements signed between MOL and the government of Prime Minister Sanader. The case had strong political undertones on both sides.[69] The *Sanader* case was initiated in June 2011 and Mr. Hernádi was named as a suspect for his involvement in the alleged bribery. Several requests were submitted by the Croatian prosecutor for legal aid, but the Hungarian prosecutor's office could not help with the request because providing such information was said to endanger Hungarian national interests.[70]

Still, in July 2011 the Hungarian Prosecutor General initiated investigations since there were reasonable grounds to believe – in light of materials shared by the Croatian

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[65] P. Bárd, 'Helyreállító igazságszolgáltatás' ['Restorative justice'] *in* A. Borbíró, K. Gönczöl, K. Kerezsi, M. Lévay (eds.), *Kriminológia* [Criminology], Budapest, Wolters Kluwer, 2016, 930-952.

[66] Zs Raduly, 'A közlekedési bűncselekmények mediációs gyakorlata' ['The practice of mediation in road traffic accident cases'], 2015, 63, *Belügyi Szemle*, 9, 69-91.

[67] 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.

[68] https://www.vecernji.hr/vijesti/sanader-uzeo-10-milijuna-eura-mita-i-dao-inu-madjarima-303028.

[69] Hungarian PM Viktor Orbán, whose government has a 25% share in the company MOL, made the following statement at a press conference: 'It's our firm stance as an owner of MOL that we won't agree to any changes in the contract between the Hungarian and the Croatian oil companies.' See https://www.bloomberg.com/news/articles/2011-07-05/hungary-opposes-changes-in-mol-ina-agreements-orban-says-2-.

[70] Http://hungarianspectrum.org/2012/11/21/hungarys-oil-company-a-possible-bribery-charge-in-croatia/.

authorities – that corruption-related provisions of the Hungarian Criminal Code had been breached. The case was not conducted against Mr. Hernádi as a suspect but against an unknown person. In January 2012, the Hungarian prosecutors were no longer investigating the case as they had not found any pieces of evidence of a crime.

In November 2012, Mr. Sanader was sentenced to ten years for bribery in Croatia.

After its EU accession, in October 2013, Croatia issued both an international arrest warrant, but importantly for the present analysis, also a European Arrest Warrant for Mr. Hernádi. The latter was refused by the Hungarian court on the basis of the *ne bis in idem* principle – with reference to the fact that the prosecutor's office had previously started investigations, but later in January 2012 decided to bring them to a close.

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 European Arrest Warrant (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". The majority of Member States transposing the Framework Decision on the EAW meant a decision of the prosecutor, which brings the procedure to an end without the possibility of having it reopened.[71] Hungary does not follow the line of the majority. The Hungarian implementing legislation Act CLXXX of 2012 in Article 5 g) states that surrender may be refused if the "Hungarian judicial authorities (courts, or prosecutors) or the investigation authorities rejected the denunciation filed or *terminated the investigation or the procedure*" (emphasis added). However, according to Article 191(1) of Act XIX of 1998, the Criminal Procedural Code then in force, as a general rule termination does not incorporate finality since "termination of the investigation shall not prevent the subsequent resumption of the proceeding in the same case".[72] So the decision in the corruption case was not terminated finally, as required by Article 4(3) of the Framework Decision, but it was in line with the Hungarian implementing law.

2. The intervention of the substitute public prosecutor

A problem that had not been raised at the time, but was expected to be raised at some point was whether a case conducted against unknown persons will be deemed irrelevant in an actual suspect's surrender case (See also the discussion below with regard to the *AY* case decided by the Court of Justice of the European Union). But 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, which they first read about in the news. In May 2014, however, the court of first instance ruled that Mr. Hernádi could not be made liable for the fall in the value of MOL shares

[71] G. Vermeulen, W. De Bondt, Ch. 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.

[72] See a similar provision in Art. 400(1) of the Act XC of 2017 on the new Criminal Procedural Code.

nor could the substitute private prosecutor prove that Mr. Hernádi had bribed Croatia's former Prime Minister. It partially terminated the procedure and partially exonerated Mr. Hernádi. In October 2015, the court of second instance ruled that the substitute private prosecutor was not a 'victim' to the alleged crime and therefore the court could not go into the merits and decide on the issue of whether Mr. Hernádi was guilty or not. Ultimately therefore, there was no decision rendered with regard to Mr. Hernádi's guilt.

3. *Denying surrender in the second round and the CJEU discussing what* ne bis in idem *is not*

After Mr. Hernádi's indictment in Croatia, in December 2015 a new EAW was issued, which was never executed by Hungary. The EAW was issued again in January 2017. It emphasised the change in circumstances in the issuing State: whereas previous EAWs were issued before a criminal procedure was initiated against Mr. Hernádi, the 2015 and 2017 EAWs were issued after this procedural step.

Given the fact that Hungary remained silent even beyond the 60-day-deadline after the 2017 EAW was issued, the Croatian court approached the Croatian member of Eurojust. With his help, it was clarified that the Hungarian authorities did not consider themselves obliged to act on the EAW; they claimed that a decision on surrender had already been taken during the pre-trial phase of the Croatian criminal proceedings.

This was indeed the point when, in May 2017, the issuing court in Zagreb filed a preliminary reference to the CJEU asking whether Hungary and the other Member States refusing surrender of Mr. Hernádi violated EU law.

On 25 July 2018, the CJEU handed down its judgment[73] in the Hernádi case, referring to the requested person as AY.[74] The court answered negatively to the question as to whether the previous denial of surrender is relevant to the new EAW issued after the indictment against AY was filed in Croatia. According to the court, Article 1(2) FD EAW must be interpreted as requiring the court of the executing State to adopt a decision on any EAW. This holds true even when, in the executing State, a ruling has already been made on a previous EAW concerning the same person and the same acts and the second EAW has only been issued on account of the indictment, in the issuing Member State, of the person requested.

The court then examined four further questions of the referring court together, since all of them touched upon the issue as to whether Article 3(2) and Article 4(3) of the EAW FD must be interpreted as meaning that a decision of the public prosecutor terminating an investigation opened against an unknown person, during which the

[73] Case C-268/17, Request for a preliminary ruling under Art. 267 TFEU from the Županijski Sud u Zagrebu (County Court, Zagreb, Croatia), *in Proceedings relating to the issuing of a European Arrest Warrant against AY*, 25 July 2018, ECLI:EU:C:2018:602.

[74] The CJEU renamed the case as *AY*, but Mr. Hernádi can be identified unmistakably according to the description of the court: 'a Hungarian national, the chairman of a Hungarian company, against whom criminal proceedings have been brought (…) is alleged to have agreed to pay a considerable amount of money to the holder of a high office in Croatia, in return for the conclusion of an agreement between the Hungarian company and the Croatian Government.' See Opinion of Advocate General Szpunar, delivered on 16 May 2018, Case C-268/17, *Ured za suzbijanje korupcije i organiziranog kriminaliteta v AY*, ECLI:EU:C:2018:317, para. 6.

person subject to the EAW was interviewed as a witness and not as a suspect, may be relied on for the purpose of refusing to execute that EAW.

The court first examined the exact meaning of Article 3(2) of the EAW FD. In line with the principle of *ne bis in idem*, also enshrined in Article 50 of the Charter of Fundamental Rights of the EU, Article 3(2) incorporates a mandatory ground for refusing the EAW if the requested person has been 'finally judged' in a Member State in respect of the same acts provided in the EAW. Even though the language of the EAW FD refers to 'judgment', the discussed provision is also applicable to decisions issued by other criminal justice authorities. Such a judgment is considered to be 'final' if, "further prosecution is definitively barred or when the judicial authorities of a Member State have adopted a decision by which the accused is finally acquitted in respect of the alleged acts".[75] This definition, according to the court, implies that criminal proceedings have been conducted previously and that they have been conducted against the person requested.[76] *Ne bis in idem* logically does not apply to persons interviewed as witnesses.[77] Since the Hungarian investigations concerned an unknown person, as opposed to AY as a suspect or accused, he was not 'finally judged' and the respective investigations could not serve as the basis for denying surrender within the meaning of Article 3(2).

The court then moved on to assess Article 4(3) EAW FD, a provision that lays down three optional grounds for refusing EAWs. The first such ground is if the executing authorities earlier decided to discontinue criminal proceedings. This ground for non-execution is irrelevant in light of the facts of the present case. The second ground for non-execution implies a situation where, in the executing Member State, judicial authorities have halted proceedings regarding the offence for which the EAW was issued. Here, the court noted that the first part of Article 4(3) only refers to the offence concerned by the EAW without referring to the requested person. However, an interpretation that provides a ground for non-execution where the proceedings have been halted, without taking into account the identity of the person against whom criminal proceedings are brought, would be too broad. The EAW is not only issued with regard to an offence, but also in respect to a specific person.[78] The EAW instrument was designed to combat crime; its very objectives would be undermined if the overly broad interpretation of the court resulted in suspected criminals going unpunished.[79] Since the Hungarian investigation was conducted against an unknown person, and not AY, the decision which terminated that investigation was not taken in respect of the requested person. Therefore, the second optional ground for refusal could not be invoked either. Finally, the third ground of optional non-execution concerns a case where a final judgment has been rendered upon the requested person, in the issuing State, which prevents further proceedings. The conditions of this third ground are not filled in the case at hand.

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[75] *Ibid.*, para. 42.
[76] *Ibid.*, para. 43.
[77] *Ibid.*, para. 44.
[78] *Ibid.*, paras. 53-54.
[79] *Ibid.*, para. 57.

The court consequently held that a decision of the prosecutor terminating the investigation, which was opened against an unknown person, during which the person subject to the EAW was interviewed as a witness only, and not as a suspect, cannot be relied on for the purpose of refusing to execute the EAW, neither according to Article 3(2) nor according to Article 4(3).

4. Denying surrender in the third round: fair trial rights in danger, and back to procedure initiated by the private prosecutor

On 23 August 2018, the Hungarian executing authority, the Budapest-Capital Regional Court, refused to surrender Mr. Hernádi again. The public prosecutor alleged, on the one hand, that the procedure with regard to the crime in question is barred by the statute of limitation and, on the other, it held that the right to a fair trial of the suspect would be violated in case of surrender.

The Budapest-Capital Regional Court held that the statute of limitation had not yet expired since it was restarted when another EAW had been issued.

However, the court agreed with the prosecutor in finding that the fair trial rights of the defendant would be jeopardised in Croatia, with special regard to the decisions rendered in the same case at the Croatian constitutional court and at the United Nations Commission on International Trade Law (UNCITRAL).

The Budapest-Capital Regional Court made a reference to the May 2014 decision, where a national court of first instance exonerated Mr. Hernádi. Interestingly, the Budapest-Capital Regional Court failed to note that the second instance court ruled, in October 2015, that the plaintiff, the substitute private prosecutor, could not be regarded as a 'victim' to the alleged bribery and therefore that the court could not go into the merits and decide on the issue as to whether Mr. Hernádi was guilty or not. Even though there was never a final judgment rendered on the guilt of Mr. Hernádi, the Budapest-Capital Regional Court nevertheless referenced it as one of the grounds for refusing surrender.[80]

B. The Tobin *case and the importance of comparative law during implementation of EU laws*

The difficulties resulting from *in absentia* trials were illustrated by the Tobin case, where the issue of the convict's surrender was on the table for more than a decade.

The Pest County Chief Prosecutor's Office brought charges against Mr. Tobin for recklessly causing a road traffic accident in April 2000, resulting in the death of two small children. At the time of the offence, Mr. Tobin was resident in Hungary and working as a senior manager at 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' Office, the Buda Surroundings District Court allowed the passport to be returned to Mr. Tobin and, pursuant to the CPC in force at the time, the court also

[80] The press release of the judgment is available on the court's website in Hungarian: Budapest-Capital Regional Court – The Budapest-Capital Regional Court refused the surrender of Zs.H. to the Croatian authorities, https://birosag.hu/aktualis-kozlemenyek/fovarosi-torvenyszek-fovarosi-torvenyszek-megtagadta-h-zs-atadasat-horvat, 24 August 2018.

ordered the defendant to deposit HUF 500,000 as a so-called insurance. The sum of the insurance was deposited and Mr. Tobin authorised his defence attorney to receive official documents on his behalf before leaving 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 any interest in 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 fixed term labour contract expired and he travelled back to Ireland with his family.

On 7 May 2002, Mr. Tobin was convicted, *in absentia*, by the Buda Surroundings District Court to three years of imprisonment for recklessly causing a road traffic accident resulting in death. Then, in the procedure of second instance, the Pest County Court approved the judgment with the condition that the convict could be released on probation after serving at least half of his punishment.[81] The convict did not, however, return to Hungary to serve his sentence.

Pursuant to the EAW FD, 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 four months prison term and if the Framework Decision does not set out grounds for non-execution. In the case of Mr. Tobin, such non-execution grounds did not exist and yet the question as to 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.

On 12 January 2007, the High Court of Ireland refused the request for surrender on the following grounds: According to Section 10 of the Irish Act adopted in 2003 to implement the Framework Decision, as 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.

The court found that, pursuant to the act implementing the Framework Decision, Mr. Tobin did not 'flee' Hungary as he had 'left' the country following the expiry of his fixed term labour contract and was in lawful possession of his passport. Therefore, the requirements for surrender were not met.

The court was not in a position to remedy a faulty implementation of the Framework Decision. Yet, following the unsuccessful attempt to extradite Mr. Tobin, the Irish legislator tackled the discrepancies existing under national law: it amended

[81] As a general rule, a convict should have served at least two thirds of his sentence before being conditionally released but the court of second instance took the foreign nationality of the convict into account and the resulting disadvantages of not speaking the language, having less chance to keep family contact, etc.

the Irish criminal law with the introduction of the Criminal Justice (Miscellaneous Provisions) Act 28 of 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 content, the Irish legislative also deleted the requirement that arrest warrants need to be 'duly' formulated. The amendment also removed the conjunctive conditions according to which prior to the commencement of or the completion of 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.

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 for 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.

In order to provide a full picture, it needs to be stated that the legislative change did not enable Mr. Tobin's surrender but will prevent other convicts from escaping justice in the future. After this legislative issue had been remedied, Hungary issued another arrest warrant in September 2009. Following several hearing postponements, Judge Peart, contemplating the Irish amendment in due course, approved the surrender request repeated in the new European Arrest Warrant on 11 February 2011. On appeal however, on 19 July 2012, the Supreme Court of Ireland adopted its 3:2 judgment and reversed the judgment of first instance resulting in a decision refusing the surrender of Mr. Tobin to Hungary.

Several legal issues were identified and discussed. Among these were the decisive questions as to whether the surrender procedure in the second round constituted an abuse of process under common law, whether it violated the separation of powers or whether it contravened Section 27 of the Interpretation Act 2005. All judges based their reasoning on different aspects of these issues and so there was no reasoning that was shared by the majority. But the majority of judges decided against surrender.

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 held that no procedural *res iudicata* exists in the case but he found it important to clarify whether Mr. Tobin had the right to the finality of the first instance judgment, in particular considering the principle of fair procedure. The question for Justice

O'Donnell was 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 did not aim at the alteration of the Tobin decision passed in 2007. Justice O'Donnell underlined repeatedly that his judgment does not have precedent-setting value: due to the special circumstances of the case it was 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 take place 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 had 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 to the differences in the Hungarian and Irish legal systems. In his concurring opinion, he profoundly supported 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 specified and referred 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 referenced differences between the Irish and the Hungarian legal systems and by identifying some 'mistakes' for declining surrender. However, his opinion about another Member State's legal system should be regarded as irrelevant from the perspective of a surrender case – unless there is persuasive evidence to underpin systemic problems, which was not the case here. A national judge is not allowed to 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 did not believe in the principle of mutual recognition. He stated that, if he had not refused the surrender on other grounds, he would have assessed, in detail, the questions raised concerning the legal process in the issuing State, given that from his perspective, as someone who is not familiar with Hungarian law, mutual trust cannot exclude scrutiny of the Hungarian proceedings where a complaint is made by the individual concerned.

After a number of twists and turns that are irrelevant as regards the present discussion, Mr. Tobin decided to serve his punishment. Since there were no means to enforce the prison sentence, he could design the choreography of events to some

extent and insist on an Irish prison. After lengthy negotiations, he travelled to Hungary, spent five days in a Budapest prison in the course of January 2014, then requested his transfer to Ireland. The Hungarian and Irish justice ministers, in addition to the Irish supreme court, approved the request.[82] Thus, with the assistance of Interpol's associates, Mr. Tobin was transferred to Ireland on 17 January 2014 in order to serve the remaining part of his custodial sentence.[83]

VII. Conclusions

It is primarily the relationship between mutual recognition based instruments and values that the EU and Member States are supposed to share which needs to be given more consideration.[84] The EU's legislative bodies have adopted a series of laws in the criminal justice area on the basis of mutual trust without any 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. However, it has emerged that mutual trust was premature and unjustified. As shown by attempts to have Article 7 triggered, infringement procedures initiated due to an 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 jeopardise judicial independence. Whereas the majority of cross-border cases do not involve such concerns, some do touch upon a fundamental tension between automatic mutual recognition and values that the Member States and the EU share. Those 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[85] preventing the EU's accession to the European Convention on Human Rights under the terms agreed, the Court of Justice of the European Union 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*[86], the court departed from this strict interpretation.I It established a two-pronged test for checking the general fundamental rights' situation in a country and

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[82] Az ír hatóságok engedélyezték, hogy Tobin a hazájában töltse le büntetését, 17 January 2014, http://www.kormany.hu/hu/kozigazgatasi-es-igazsagugyi-miniszterium/hirek/az-ir-hatosagok-engedelyeztek-hogy-tobin-a-hazajaban-toltse-le-bunteteset; Brigitta Lakatos, Papp Gergő: Végre börtönbe került az ír gázoló!, 14 January 2014, http://www.hir24.hu/bulvar/2014/01/14/papp-gergo-vegre-bortonbe-kerult-az-ir-gazolo/.

[83] Jövő szeptemberig börtönben marad az ír gázoló, 14 January 2014, http://www.kormany.hu/hu/kozigazgatasi-es-igazsagugyi-miniszterium/hirek/jovo-szeptemberig-bortonben-marad-az-ir-gazolo.

[84] P. Bárd, 'Saving EU criminal justice. Proposal for an EU-wide supervision of the rule of law and fundamental rights', 2018, *CEPS Policy Brief,* https://www.ceps.eu/system/files/PBard_Saving%20Justice.pdf.

[85] Opinion 2/13, 18 December 2014, ECLI:EU:C:2014:2454, para. 192.

[86] C-404/15 and C-659/14 PPU, 5 April 2016, ECLI:EU:C:2016:198.

the potential risks of human rights' violations in the individual case. If the risk of a violation of human rights in general and in the specific case has been established, the execution of the warrant must be postponed.[87] The test was further developed in the case *LM*[88] with regard to the right to a fair trial, which incorporates the requirement of judicial independence. The judicial test developed in *Aranyosi* and *LM* could constitute a mandatory ground for refusal in mutual recognition based instruments, beyond a proportionality test.

The viability of the above suggestions is proven by the fact that European co-legislators introduced the above tools in the 2014 Directive on the European Investigation Order (EIO), enabling the exchange of evidence and mutual legal assistance between EU Member States' authorities.[89] 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 the EU legal system.[90]] … The EIO 'benchmark' in EU criminal justice cooperation should therefore be streamlined across the board of European legal acts in the same domain."[91]

According to its Recital (10), the implementation of the FD EAW may only be suspended in the event that a Member State seriously and persistently breaches the principles set out in Article 2 TEU and is sanctioned by the Council pursuant to Article 7 TEU, with the consequences set out in that provision. This is consequential, since judicial cooperation in criminal matters, where fundamental rights are directly at stake, cannot operate smoothly where there are serious concerns regarding, for instance, the independence of judicial authorities. But do Article 7 procedures have to reach an end in order to generally suspend mutual trust? So far, the CJEU has answered in the affirmative. The CJEU in *LM* does not accept "a clear risk of a serious breach" of EU values (Article 7(1)) as a benchmark.[92] It reserves the task of suspending mutual trust exclusively to the European Council[93] and only if the sanctioning prong of Article 7

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[87] For a detailed assessment of the case, see W. van Ballegooij, P. Bárd, 'Mutual Recognition and Individual Rights: Did the Court get it Right?', *in* 7, 2016, *New Journal of European Criminal Law*, 439-464.

[88] Case C-216/18, *Minister for Justice and Equality v. LM*, 25 July 2018, PPU, ECLI:EU:C:2018:586. For an assessment, see W. van Ballegooij, P. Bárd, 'Mutual recognition and individual rights, Did the Court get it right?', *in* 7, 2016, *New Journal of European Criminal Law*, 439-464.

[89] Directive 2014/41/EU of 3 April 2014 regarding the European Investigation Order in criminal matters, *OJ*, No. L 130/1, 1 May 2014.

[90] W. 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.

[91] S. Carrera, 'Building a Common EU Justice Area: Reinforcing Trust and the Rights of a Suspects-Centric Approach', *in* P. Bárd, *Az európai elfogatóparancs Magyarországon = The European Arrest Warrant in Hungary*, Budapest, P-T Műhely, 2015, 175-218, 133.

[92] Case C-216/18 PPU, *Minister for Justice and Equality v LM*, Requests for a preliminary ruling from the High Court (Ireland), para. 7,70.

[93] *Ibid*., para. 71,72.

TEU (current Article 7(2)–(3)) is invoked and the Council determines a breach of EU values.

But reaching the end of an Article 7(2)-(3) procedure is practically impossible. The Lisbon Treaty prescribes different voting majorities to the different prongs. Reaching consensus on even a risk of a serious breach is difficult as it requires a four-fifths majority in the Council. But the process under the second prong, i.e. Article 7(2), is even more unlikely to be carried out since the procedure can be vetoed by any Member State save for the one concerned. Therefore, the CJEU in effect precludes the possibility of having the EAW regime suspended *vis à vis* a State that violates Article 2 TEU values. In light of Hungary's worldwide identification as a 'competitive authoritarian' regime,[94] underpinned by various rule of law indices, a general suspension of mutual trust would be preferred *vis à vis* Hungary.

There is also a more technical problem of interpretation regarding Recital (10). The above understanding is based on a reading which disregards the historical evolution of Article 7 TEU. The reason Recital (10) is silent regarding current Article 7(1) TEU, the so-called 'preventive arm' of Article 7, is that it did not exist at the time when the FD EAW was drafted. Since this provision was added in the meantime, one could argue that the drafters of the FD EAW intended to refer to Article 7 as such and the preventive arm should also be read into Recital (10). Such an interpretation would be preferable in light of the inherent asymmetry between the individual and the State, especially in the area of criminal law. 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 harmonised 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.[95]

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[94] A. Bozóki, D. Hegedűs, 'An externally constrained hybrid regime: Hungary in the European Union', 2018, *Democratization*, 25:7, 1173-1189. Lest there be any doubt, the originators of the concept of competitive authoritarianism, Lucan Way of University of Toronto and Steven Levitsky of Harvard University, have stated that the Orbán regime fits in this category. L. Way, S. Levitsky, 'How autocrats can rig the game and damage democracy', *Washington Post*, 4 January 2019, https://www.washingtonpost.com/news/monkey-cage/wp/2019/01/04/how-do-you-know-when-a-democracy-has-slipped-over-into-autocracy/?utm_term=.32a0dd543512.

[95] 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 as to whether the EU has competences to adopt minimum standards on detention conditions. Art. 82(2)(b) TFEU covering criminal proceedings could unquestionably be extended to pre-trail detention. But it is debated whether post-trial detention, i.e. detention as a form of sanction, is also covered in a lack of express provisions. One could argue that Art. 82(1) TFEU emphasising judicial cooperation in 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 W van Ballegooij/European

Finally, the EU could create "a legal landscape of earned, rather than perceived trust in Europe's area of criminal justice"[96] 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.[97] 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 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).[98] The European Parliament's legislative initiative report called upon the Commission to submit, by September 2017, a proposal for the conclusion of an EU pact for democracy, the rule of law and fundamental rights (DRF Pact). The document was accompanied by a thorough assessment of European added value.[99]

Parliamentary Research Service, European Added Value Unit, *Procedural Rights and Detention Conditions. Cost of Non-Europe Report*, *op. cit.*, 66-69.

[96] V. Mitsilegas, 'The Symbiotic Relationship between Mutual Trust and Fundamental Rights in Europe's Area of Criminal Justice', 2015, 6, *New Journal of European Criminal Law*, 460-485, 480. The President of the Court of Justice reiterated this stance in a scholarly article 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'. K. Lenaerts, 'La vie après l'avis: Exploring the principle of mutual (yet not blind) trust', 2017, 54, *Common Market Law Review*, 3, 805-840.

[97] 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 systemic scrutiny. http://ec.europa.eu/justice/grants1/files/2014_jcco_ag/summaries_of_selected_projects.pdf, 7.

[98] 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 has 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 P. Bárd, S. Carrera, 'The Commission's Decision on "Less EU" in Safeguarding the Rule of Law: A play in four acts', 2017, 8, *CEPS Policy Insights*, 1-11, https://www.ceps.eu/publications/commission's-decision-'less-eu'-safeguarding-rule-law-play-four-acts.

[99] W. van Ballegooij, T. 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), (Brussels, European Parliamentary Research Service, 2016) PE.579.328.

The last recommendation is to put the DRF Pact into practice. Should the DRF Pact 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, such as 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.

CHAPTER IV

The European Union's influence on criminal procedural law in the Netherlands: Driving forces, critical notes and possible future steps in criminal matters

Aart de Vries*, Joske Graat* and Tony Marguery*

I. Introduction

At the outset, the aims of the European Union and its predecessors focussed on economic integration, cooperation and the creation of a single European market.[1] Although it can be argued that the single market is a cornerstone of and is still at the core of the EU, it is clear that its goals are more diverse nowadays. Article 3(2) Treaty on European Union (TEU) establishes that the EU shall offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime. Even though the rules and standards in criminal procedures vary between the Member States, criminal matters can no longer be perceived as a purely national affair. Especially since the adoption of the Treaty of Maastricht, the EU has exerted its influence in the field of criminal law. The EU's involvement in criminal matters has taken off further since the entry into force of the Treaty of Lisbon. At present, the EU has a (functional) competence to harmonise procedural criminal law

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[1] P. De Hert, 'EU criminal law and fundamental rights', *in* V. Mitsilegas, M. Bergström, K. Konstadinines (eds.), *Research Handbook on EU Criminal Law*, Cheltenham, Edward Elgar Publishing, 2016, 107-108. See also G. Di Federico, 'Fundamental Rights in the EU: Legal Pluralism and Multi-Level Protection after the Lisbon Treaty', *in* G. Di Federico (ed.), *The Charter of Fundamental Rights. From Declaration to Binding Instrument*, Dordrecht, Springer, 2011, 18.

in the Member States with the aim of facilitating the principle of mutual recognition in the Area of Freedom, Security and Justice (AFSJ).[2] Since 2009, the EU legislator has introduced several directives to bolster procedural rights for both suspects and victims and to create a level playing field within the EU. Moreover, it follows from the cases of *Åkerberg Fransson* and *Melloni* that the fundamental rights guaranteed in the legal order of the EU are applicable in all situations governed by EU law. In particular, the Charter of Fundamental Rights (CFRand its interpretation by the CJEU are binding on the Member States when they are acting within the scope of EU law. The influence exerted by the Charter of Fundamental Rights on national law can go as far as imposing standards of fundamental rights that are lower than the national standards if the primacy, unity and effectiveness of EU law are compromised.[3]

The Netherlands was one of six countries that signed the Treaty of Paris in 1951 and the Treaty of Rome in 1957 to establish, respectively, the European Coal and Steel Community, and the European Economic Community and European Atomic Energy Community.[4] Thus, the Netherlands has been at the centre stage of European integration from the very beginning. Unsurprisingly, the increased involvement of the EU in the realm of criminal matters is also clearly visible in Dutch criminal proceedings. In this chapter, we will provide an overview of the main features of Dutch criminal procedural law, assess the influence of the EU's cooperation instruments and procedural rights directives on its functioning and establish whether existing differences between procedural criminal law in the Member States constitute an obstacle to EU-wide cooperation from the Dutch perspective. Our main conclusions are that EU law has had a distinct impact on criminal procedural law in the Netherlands. The Dutch implementation of EU directives and framework decisions from the AFSJ do not pose many problems and the issues identified relate to specific points or provisions. From a Dutch perspective, differences between the procedural rules in the Member States do not seem to constitute an obstacle for cross-border cooperation. The Dutch courts emphasise the mutual trust that exists within the EU, but in the wake of the CJEU's judgement in *Aranyosi and Căldăraru* and the recent case of *LM*, this mutual trust is no longer unconditional.[5]

This contribution does not endeavour to draw up a detailed description of the whole field of criminal matters or to offer an in-depth analysis of the impact of each EU instrument and judgement of the CJEU. Instead, we identify the most important tendencies. For this purpose, we first provide an image of the basic principles of Dutch criminal procedural law in Section II. Then, we address topics that are particularly

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[2] See Art. 82 (2) TFEU. The first paragraph constitutionalises the principle of mutual recognition in criminal matters.

[3] Case C-617/10, *Åklagaren v. Hans Åkerberg Fransson*, 26 February 2013, ECLI:EU:C:2013:105, para. 19-22; Case C-399/11, *Melloni*, 26 February 2013, ECLI:EU:C:2013:107, para. 60. See D. SARMIENTO, 'Who's afraid of the Charter? The Court of Justice, National Courts and the New Framework of Fundamental Rights Protection in Europe', 2013, *Common Market Law Review*, 50, 1267-1304.

[4] A. KLIP, *European Criminal Law: An Integrative Approach*, Antwerp, Intersentia, 2016, 15.,

[5] Cases C-404/14 and C-659/15 PPU, *Aranyosi and Căldăraru*, 5 April 2016, ECLI:EU:C:2016:198; Case C-216/18 PPU, *LM*, 25 July 2018, ECLI:EU:C:2018:586.

relevant from an EU perspective. In Section III, the transposition and implementation of the procedural rights directives adopted in the context of the AFSJ are elaborated upon and, in Section IV, we analyse the gathering and admissibility of national and foreign evidence under Dutch law. In Section V, we address the detention regime in the Netherlands and the impact of the CJEU's judgement in the cases of *Aranyosi* and *Căldăraru* on the functioning of the EAW Framework Decision. In recent years, the position of victims has been strengthened under Dutch law. In Section VI, we dive into the national legal framework in that context and also look into the EU's instruments for victims. Lastly, we assess specific topics that can create obstacles in a cross-border setting (Section VII). After we have described and analysed the architecture of Dutch criminal procedural law, the impact of EU legislation in that field and discussed cross-border complexities, we draw conclusions and provide recommendations for future (legislative) action in Section VIII.

II. A bird's-eye view of Dutch criminal procedural law

Before we address the EU's influence on criminal procedural law in the Netherlands, the main characteristics of the Dutch system are spelled out. In this context, we provide a general overview of the criminal law tradition and the rights of the defence and the victim that are guaranteed under Dutch national law. We also assess how the judiciary and the legislator in the Netherlands deal with systemic differences between the Member States. Of particular relevance in this respect are the emphasis on mutual trust in Dutch case law and the negotiations on the European Public Prosecutor's Office.

A. Between inquisitorial and accusatorial traditions

The Dutch criminal law tradition is heavily influenced by the French and, to a lesser extent, German traditions. It also has some distinct common law aspects.[6] The current Code of Criminal Procedure (*Wetboek van Strafvordering*, hereafter: WvSv) dates back to 1926. According to the explanatory memorandum (*Memorie van Toelichting*), the Dutch criminal procedure should be seen as 'moderately accusatorial' (*gematigd accusatoir*).[7] By using this term, the legislator wanted to show that the Dutch system is neither purely inquisitorial nor fully accusatorial; it should be qualified as a mix between these two legal traditions that leans more towards an accusatorial system. In 1926, the legislator introduced a two-phased system in the WvSV: the preliminary investigation and the court hearing. In the Netherlands, during the preliminary investigation (*voorbereidend onderzoek*) the defendant is a subject of investigation (*voorwerp van onderzoek*) and he can be faced with the application of coercive measures (*dwangmiddelen*) and investigative powers (*onderzoeksbevoegdheden*).[8] For example, the defendant's telecommunication can be recorded and he can be remanded in custody. Therefore, this phase of the proceedings should be characterised as inquisitorial. After the preliminary investigation has been concluded, the court

[6] J. M. Reijntjes, *Nederlandse Strafvordering*, Deventer, Kluwer, 2017, 10-12.

[7] *Kamerstukken*, II, 1913/14, 286, 3.

[8] G.J.M Corstens, M.J. Borgers, *Het Nederlandse strafprocesrecht*, Deventer, Kluwer, 2011, 75.

hearing takes place. All evidence should be presented at this stage. The court hearing has a more accusatorial character; both the defendant and the public prosecutor are heard and allowed to present their views on the case. However, there is no complete equality between both parties, since the defendant cannot – not even during the court hearing – use the same investigative powers as the public prosecutor.

The Dutch legislator designated the court hearing as the central phase of the criminal trial in 1926. The principle of immediacy (*onmiddelijkheidsbeginsel*) was seen as an essential 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, in 1926 the Supreme Court of the Netherlands (*Hoge Raad*) already accepted that a written statement obtained during the preliminary investigative phase could be used as evidence at the hearing.[9] In general, witnesses no longer had to come to court to give evidence directly; an official report (*proces-verbaal* containing their statements) acquired during the preliminary investigative phase sufficed. Thus, the judgement of the *Hoge Raad* shifted the emphasis from the accusatorial trial phase to the inquisitorial preliminary investigative phase. Thus, 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 practice.[10]

B. The reform of the Dutch Code of Criminal Procedure

In 2014, the Dutch legislator started working on a new and more modern WvSv. The current WvSv is considered to be outdated; national and international developments as well as technological progress have fundamentally changed society since 1926 and require a new legal framework. This modernisation effort is relevant in the current context for two reasons. Firstly, it is important to remark that, in the policy outline (*Contourennota*) that was published in 2015, the Minister of Security and Justice stipulated that more emphasis should be put on the contradictory (i.e. accusatorial) nature of criminal procedures.[11] Whether the Dutch proceedings will actually become more accusatorial in the future cannot yet be determined. However, the intention of the legislator is interesting, especially in the light of the history of the present WvSv that has been mentioned above.

Secondly, the legislator acknowledged that the Dutch legal order does not operate in a vacuum. Book 7 of the new WvSv is entitled 'International legal assistance in criminal matters' (*Internationale rechtshulp in strafzaken*) and its explanatory memorandum stipulates that international legal assistance is of paramount importance for the effective investigation and prosecution of crimes.[12] During the work on reforming Book 7, specific attention was given to minimalising differences and

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[9] Hoge Raad, 20 December 1926, *NJ* (*Nederlandse Jurisprudentie*), 1927, 85. See M. C. VAN WIJK, *Cross-border evidence gathering. Equality of arms in the EU?*, The Hague, Eleven International Publishing, 2017, 110.

[10] See F. PAKES, *Comparative Criminal Justice*, London, Routledge, 2015, 123-124.

[11] *Kamerstukken*, II, 2015/2016, 29279, No. 278, 6.

[12] *Kamerstukken*, II, 2015/2016, 34493, No. 3, 2-4.

discrepancies between the legal systems of the Netherlands and other European countries.[13] Although the new WvSv has its own structure and logic, it was accepted that consultation with neighbouring countries during the modernisation effort would benefit the legislator in his work and, in the long run, enhance international cooperation. In this regard, an international conference entitled '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, such as digitalisation and cybercrime and its implications for the architecture of procedural rules in criminal proceedings. Legal scholars and lawyers from, *inter alia*, Belgium, Germany, France, Norway and Switzerland, came to the Netherlands to discuss their views and share their experiences during modernisation efforts in their respective countries.[14]

The modernisation efforts pursued by the Netherlands have not yet come to an end and it remains unclear when the new rules on criminal procedure will apply. However, the provisions of the future Book 7 already entered into force on 20 December 2017.[15] At present, they can be found in Book 5 of the current WvSv. This is a clear testament to the importance of international legal assistance in criminal matters for the national legal order in the eyes of the Dutch legislator.

C. Procedural rights of the defence and the victim under Dutch law

The Dutch Constitution (*Grondwet*, hereinafter: Gw) guarantees several fundamental rights, for example the right to privacy (Article 10), the right to freedom (Article 15) and the inviolability of the body (Article 11).[16] However, the right to a fair trial is not (yet) guaranteed by the Constitution. In July 2016, the Dutch government proposed incorporating the right to a fair trial and access to an independent tribunal into the Constitution.[17] At the time of writing, the proposal had been accepted by both the House of Representatives (*Tweede Kamer*) and the Senate (*Eerste Kamer*). It is unknown when the Constitution will be changed.[18]

Procedural rights for the defence can be found in the WvSv, for example the right to a lawyer (Article 28), the right to remain silent during investigations (Article 29) and right of access to the case file (Article 30). Some of these rights have been strongly

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[13] These countries are not necessarily Member States of the EU.

[14] *Kamerstukken*, II, 2017/2018, 29279, No. 395, 6.

[15] 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, No. 246.

[16] J.J.M. Graat *et al.*, 'Dutch report', *in* T. Marguery (ed.), *Mutual trust under Pressure, the Transferring of Sentenced Persons in the EU*, Oisterwijk, Wolf Legal Publishers, 2018, 175.

[17] *Kamerstukken*, II, 2015/2016, 34517.

[18] In February 2018, the law was published in the Bulletin of Acts and Decrees (*Staatsblad*), see Wet van 21 februari 2018, houdende verklaring dat er grond bestaat een voorstel in overweging te nemen tot verandering van de Grondwet, strekkende tot het opnemen van een bepaling over het recht op een eerlijk proces, *Stb,* 2018, 88. In April 2018 the reform of the Constitution was postponed until further notice.

influenced by EU legislation and amended accordingly. This will be addressed later in this chapter. 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 investigative powers and coercive measures, for example those in the WvSv, on the basis of the Constitution. However, Article 93 Gw provides that provisions from treaties or international institutions that are to be binding on all persons by virtue of their contents shall become binding after they have been published. Moreover, Article 94 Gw states 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 invoke provisions from treaties and that Dutch law does not apply if it conflicts with those provisions.[19] In the light of the abovementioned articles, the ECHR has become the main source of fundamental rights in the Netherlands. Moreover, since 2009 and when acting within the scope of EU law, the (CFR) has become increasingly important. The provisions from these international instruments are relied on to assess compliance with human rights standards and guarantee the rights of the defence. For example, the case law of the ECtHR concerning, *inter alia,* articles 3, 5 and 6 ECHR are particularly relevant in Dutch criminal proceedings and guide the interpretation of national provisions in the WvSv; they feature very often in the case law of both lower courts and the *Hoge Raad*.

Alongside the rights of the defence, since 2009 title IIIA of the WvSv provides the victim with certain procedural rights during criminal proceedings. These rights have been strongly influenced by European legislation, such as Directive 2012/29/EU on victims' rights and Directive 2004/80/EC on compensation of victims.[20] 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 a compensation claim 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. Whereas 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*). Victims' rights and the influence of Directive 2012/29/EU will be addressed in more detail below.

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[19] 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 *et al.*, 'Dutch report', *in* T. Marguery (ed.), *Mutual trust under Pressure, the Transferring of Sentenced Persons in the EU* (n16), 178.

[20] 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, *OJ*, No. L 315, 14 November 2012; Council Directive 2004/80/EC of 29 April 2004 relating to compensation to crime victims, *OJ,* No. L 261, 6 August 2004.

D. Unity in diversity – the emphasis on mutual trust in the Dutch legal system

From the Dutch perspective, diversity in legal traditions within the EU does not in itself form an obstacle to cross-border cooperation. An analysis of Dutch case law – in particular cases concerning the execution of an EAW – shows that systemic 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,* hereafter: OLW). This Article provides that the execution of an EAW shall be refused if surrender would lead to a flagrant denial of fundamental rights from the ECHR. The arguments brought forward by the defence may refer to systemic differences between the Netherlands and other Member States but often entail violations of specific fundamental rights in a case. Thus, the defence does not put into question the system as such, but rather its functioning in a particular case. An example can be found in the Court of Amsterdam's judgement of 6 July 2011. The case concerned a Polish EAW. The defence pleaded that surrender should not be allowed because the requested person would be convicted in the issuing State on the basis of statements that were extracted from him under physical and mental duress and, thus, constituted forcefully obtained statements. The defence did not argue that statements in Poland were *always* or *systematically* forcefully obtained, but rather that this was so in the particular case of the requested person.[21]

Whenever systemic differences are invoked as an argument, they are usually not perceived as an issue by the court. The main reason for this is that all Member States of the EU are bound by the ECHR.[22] The overarching idea is that, although the legal systems of the Member States vary to a more or less greater extent, they all have to ensure compliance with the same (minimum) standards of fundamental rights protection. These standards lay a common foundation for the various criminal justice systems. In other words, they create (minimum) unity in diversity. As long as this level of fundamental rights protection is guaranteed, differences between the legal system of the Netherlands and that of the issuing State are not considered to be problematic. The Court of Amsterdam often emphasises the mutual trust which governs the relationship between 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. This is in line with the authoritative Opinion 2/13 of the CJEU.[23] Moreover, it can also be seen as an implicit recognition of the principle of sovereignty.

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[21] Court of Amsterdam, 6 July 2011, ECLI:NL:RBAMS:2011:BR4144.

[22] Court of Amsterdam, 14 June 2011, ECLI:NL:RBAMS:2011:BQ9773; Court of Amsterdam, 25 October 2011, ECLI:NL:RBAMS:2011:BU2123. Emphasis on the ECHR is also laid down as regards the use of foreign evidence in Dutch criminal proceedings, which is addressed later in this chapter.

[23] Opinion C-2/13, 18 December 2014, ECLI:EU:C:2014:2454.

A good example of this reasoning is found in the judgement of the Court of Amsterdam of 23 June 2015. The case concerned 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 on the merits of his case. In the Netherlands, the right to access the case file would have been 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 rely on 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 would enjoy less protection abroad.[24] In recent years, the type of arguments brought forward by the defence in the aforementioned case have never been successful.

E. Mutual trust and the European Public Prosecutor's Office (EPPO)

The establishment of the EPPO is one of the major developments in the field of EU criminal matters. Participation in the EPPO is a highly-debated topic in Dutch politics. At first, it was decided that the Netherlands would not participate. Interestingly, during the (national) discussions on the EPPO at the Dutch House of Representatives and the Senate, questions were raised as to the differences between procedural criminal laws in the various Member States. These questions focused primarily on two points: the procedural safeguards for Dutch nationals who would be involved in cross-border cases and the possible complexity of proceedings because of systemic differences.[25] However, the most important concern regarding Dutch participation in the EPPO did not lie 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 (*opportuniteitsbeginsel*) of the Dutch Public Prosecutor's Office.[26] In October 2017, the new Dutch government stated in its coalition agreement (*regeerakkoord*) that the Netherlands would participate in the EPPO because cooperation within the EU was "inevitable" and the EPPO would make this cooperation easier.[27] Thus, the earlier decision not to participate was recalled. However, in the coalition agreement it was again stipulated that the discretionary principle (*opportuniteitsbeginsel*) of the Dutch Public Prosecutor's Office would not be weakened.

Based on interviews with legal experts and lawyers working in legislation, it has become clear that systemic differences did not form a real obstacle during the

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[24] Court of Amsterdam, 23 June 2015, ECLI:NL:RBAMS:2015:4325.

[25] *Kamerstukken*, I, 2016/17, 33 709, No. 10, 5; *Kamerstukken*, II, 2016/17, 33 709, No. 12, 13. Although systemic differences are mentioned, they are not elaborated upon. It remains unclear what kind of differences are conceived as problematic.

[26] *Kamerstukken*, II, 2016/17, 33709, No. 12; *Kamerstukken*, I, 2016/17, 33709, No. 10.

[27] *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: 30 August 2018).

EU-wide negotiations on the EPPO.[28] 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 Luxembourg have in their national law a so-called settlement transaction (*transactie*) without any involvement of a judge. Although this was an important difference compared to the 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.[29] Similar solutions for systemic differences have been found in other areas covered by the EPPO Regulation.

III. The EU's instruments and their impact on Dutch criminal proceedings

In recent years, several procedural rights Directives have been adopted.[30] Broadly speaking, the Directives did have an impact on Dutch criminal procedural law but the extent of this impact differs from one instrument to the other. Some of them have been implemented without causing a tangible change in practice whereas others have truly altered the functioning of Dutch criminal proceedings. Firstly, we discuss the procedural rights Directives that have not triggered a fundamental change. Then, we address Directive 2013/48/EU on the right of access to a lawyer. In this Section, we do not elaborate upon the Directive on victims' rights as the position of the victim under Dutch law is specifically dealt with later in this Chapter.

A. The implementation of procedural rights directives

The first instrument from the Stockholm Programme to be implemented in the Netherlands is Directive 2010/64/EU on the right to interpretation and translation.[31] The Dutch transposition act was passed in 2013; it amended, among other things, several provisions in the WvSv and the OLW to ensure that suspects in national and EAW proceedings have the right to a translator or interpreter if their command of the Dutch language is limited or if they have a speech or hearing impediment.[32] In 2014, the Netherlands implemented Directive 2012/13/EU on the right to information.[33]

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[28] The interviews took place in February 2018.

[29] Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO'), *OJ*, No. L 283, 31 October 2017.

[30] The Stockholm Programme – An Open and Secure Europe Serving and Protecting Citizens, *OJ*, No. C 115, 4 May 2010.

[31] 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, *OJ*, No. L 280, 26 October 2010.

[32] Wet van 28 februari 2013 tot implementatie van richtlijn nr. 2010/64/EU van het Europees Parlement en de Raad van 20 oktober 2010 betreffende het recht op vertolking en vertaling in strafprocedures (PbEU L 280), *Stb*, 2013, 85. The rights are guaranteed in all phases of the criminal procedure, from the first interrogation until the court hearing.

[33] Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings, *OJ*, No. L 142, 1 June 2012.

The transposition act introduced, *inter alia*, a new provision in the WvSv. At present, Article 27c states that the suspect should be informed of his rights.[34] At the time of writing, two of the three Directives adopted in 2016 have been transposed into Dutch law. Directive 2016/1919/EU on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European Arrest Warrant proceedings did not require any changes to be made to Dutch law as it was already in line with the provisions of the Directive.[35] 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 was transposed on 1 April 2018.[36] The last instrument, Directive 2016/800/EU on procedural safeguards for children who are suspects or accused persons in criminal proceedings, still has to be transposed.[37] The transposition deadline was set for 11 June 2019. A quick scan of recent Dutch case law shows that these three most recent Directives have not yet played a role in many proceedings; only Directive 2016/343/EU has been mentioned in a case. The defence briefly referred to the provisions of the Directive, but the court – surprisingly – did not even mention those same provisions in its judgement.[38]

B. A European conclusion in a virulent national discussion

Undeniably, Directive 2013/48/EU has had the most tangible impact on Dutch criminal procedural law. The instrument introduced the right of access to a lawyer during interrogations.[39] Already before the adoption of Directive 2013/48/EU, the

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[34] Wet van 5 november 2014, houdende implementatie van richtlijn No. 2012/13/EU van het Europees Parlement en de Raad van 22 mei 2012 betreffende het recht op informatie in strafprocedures (PbEU L 142), *Stb*, 2014, 433. See also Besluit mededeling van rechten in strafzaken, *Stb*, 2014, 434. Not all provisions from the Directive have been directly implemented into the WvSv. This is due to the instrumental architecture of Dutch criminal procedural law. The main rights – e.g. the right to information – are found in the WvSv, but specifics feature in a general administrative measure (algemene maatregel van bestuur).

[35] 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, *OJ*, No. L 297, 4 November 2016; 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.

[36] 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, *OJ*, No. L 65, 11 March 2016; *Stcrt*, 2018, No. 18991.

[37] 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, *OJ*, No. L 132, 21 May 2016.

[38] Court of Limburg, 7 June 2017, ECLI:NL:RBLIM:2017:8566.

[39] 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

judgement of the ECtHR in *Salduz* had caused a long and ongoing discussion in the Netherlands as to the right of access to a lawyer during criminal proceedings.[40] At the time *Salduz* was released, a suspect did not have the right to have a lawyer present during an interrogation. Therefore, the question was raised as to what the case law of the ECtHR meant for Dutch proceedings. In short, many legal scholars argued that the judgement in *Salduz* implied that a lawyer should be present during interrogations, especially in the light of later judgements by the ECtHR. However, neither the Minister of Justice or the *Hoge Raad* attuned to this view.[41]

In June 2009, the *Hoge Raad* had to decide on the implications of *Salduz* for the Netherlands and, seemingly reluctantly, opted for a minimalistic approach. It was agreed 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. Should this right be violated, the statement that was obtained could not be used as evidence.[42] Despite the fact that new case law from the ECtHR pointed strongly towards a right to have a lawyer present for all suspects, the *Hoge Raad* refused to acknowledge this in later cases.

In the end, the EU legislator settled debates with the introduction of Directive 2013/48/EU. Or so it seemed. After the entry into force of the instrument, the Dutch legislator had to act. The Directive clearly established that all suspects should be given the right to have a lawyer present during interrogations. However, the legislator took no immediate steps to implement the Directive after its adoption. In April 2014, the *Hoge Raad* was again forced to make a decision on the matter. 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 *Hoge Raad*. She also concluded that the Netherlands had acted contrary to the Directive and that this contrariety would have retroactive effect starting on the day of the entry into force of the Directive.[43] The *Hoge Raad* 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.[44] However, the legislator still did not act after this judgement of the *Hoge Raad*. Therefore, in December 2015 the *Hoge Raad* was once again forced to rule on the right to have a lawyer present during the interrogations and decided that, from 1 March 2016 onwards, a suspect should have that right.[45] Directive 2013/48/EU was finally implemented on 27 November 2016 – the very day of the transposition deadline

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communicate with third persons and with consular authorities while deprived of liberty, *OJ*, No. L 294, 6 November 2013.

[40] *Salduz v. Turkey,* App. No. 36391/02, 27 November 2008, ECHR 1542.

[41] T. Spronken, 'Na twee EHRM-uitspraken moet advocaat toegang krijgen tot verhoor. De gevolgen van Salduz en Panovits', 2009, *Advocatenblad*, 17-18.

[42] Hoge Raad, 30 June 2009, *NJ*, 2009, 349.

[43] Opinion A-G Spronken 26 November 2013, ECLI:NL:PHR:2013:1424.

[44] Hoge Raad, 1 April 2014, *NJ*, 2014, 268.

[45] Hoge Raad, 22 December 2015, *NJ*, 2016, 52.

– and several provisions in the WvSv were amended.[46] At present, all suspects have the right to have a lawyer present during the interrogation.[47]

C. The practical side of implementation

After the entry into force of the Lisbon Treaty, several Directives on procedural rights were adopted within a few years. At the outset, it is worth noting that the transposition and implementation of EU law is a complex and tedious operation which takes place in the Member States. The implementation should not only encompass the passing of a transposition act, but it should be ensured that the provisions from the Directives are absorbed into national law and become a fitting part of a coherent criminal justice system. This means that the implementation takes time.[48] In our view, this is particularly true for the Netherlands as there is a strong national tradition of consultation with all stakeholders, such as the Public Prosecutors Office and the Dutch Association of Defence Counsel (*Nederlandse Vereniging van Strafrechtadvocaten (NVSA)*). Moreover, the implementation of procedural rights Directives has budgetary consequences that have to be dealt with at a national level. These implications do not only concern the implementation itself but also the subsequent functioning of the system to be amended. The fact that implementation is complex and requires funds to be allocated in the Member States should not constitute an obstacle for EU legislative activity but it should be ensured that this burden remains bearable.

IV. Investigations and evidence under Dutch criminal law

In this section, we discuss the criminal investigation and the use and admissibility of evidence under Dutch law. Firstly, we describe the investigative phase, the authorities that are involved in criminal investigations and the investigative powers that they enjoy. Then, we dive into the rules on admissibility of evidence. In that context, we explain which kinds of evidence are admissible in the Netherlands but also discuss admissibility rules in the event that evidence is obtained unlawfully. In that context, Article 359a WvSv and the case law of the *Hoge Raad* are relevant. Lastly, we discuss the use and review of foreign evidence under Dutch law and the European Investigation Order (EIO).

A. Criminal investigations under Dutch law

Articles 132 and 132a WvSv define the preliminary investigation (*voorbereidend onderzoek*) and the criminal investigation (*opsporing*) respectively. The preliminary investigation refers to the investigation that takes place *before* the court hearing. Its

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[46] 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.

[47] 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.

[48] This has become even more apparent for us during interviews (February 2018) with experts working in legislation.

wording shows that Article 132 WvSv aims to clearly establish the existence of an investigative *phase*. The definition of the criminal investigation is the investigation of criminal offences under the supervision of the public prosecutor with the aim of making decisions pertaining to criminal law (*met als doel het nemen van strafvorderlijke beslissingen*). As such, it establishes the *material aim*. In the Netherlands, the public prosecutor is tasked with leading the criminal investigation (*opsporingsonderzoek,* Article 148 WvSv). This does not mean that the public prosecutor is the only person involved in the criminal investigation as police officials are also tasked with investigating offences (141 WvSv) and so-called special investigation officials (*buitengewone opsporingsambtenaren*, 142 WvSv) have this competence too for their specific policy fields. For example, special investigation officials working for the Dutch Tax and Customs Administration (*Belastingdienst / Douane*) are tasked with investigating fiscal and customs fraud. Another important actor during the preliminary investigation is the investigative judge (*rechter-commissaris*). In principle, more coercive measures require a prior written authorisation by an investigative judge. An example is given below.

During the preliminary investigation, many investigative powers can be used. Again, these are primarily laid down in the WvSv itself. To name just a few: a suspect can be questioned by the authorities (29 WvSv), the authorities can perform a body search (Article 56 WvSv) and they can conduct a search of a premises or a house (Articles 96c and 97 WvSv). Title IVA of the WvSv deals with the so-called 'special investigation powers' (*bijzondere opsporingsbevoegdheden*). These powers concern, among other things, systematic surveillance (Article 126g WvSv), infiltration (126h WvSv) and the recording of confidential communication with the use of technical devices (126l WvSv).[49] Investigative powers can also be found in special laws. These powers can only be relied upon if they are used for the investigation of offences from that specific law. Prime examples are the Opium Act (*Opiumwet*), Weapons and Ammunition Act (*Wet wapens en munitie*) and the General Customs Act (*Algemene douanewet*).[50]

Of course, the use of investigative powers is governed by procedural rules. In general, more stringent procedural rules apply as the investigative measures become more intrusive. An example can be found in the provisions on the entering of premises and dwellings for the purpose of seizure of objects. Article 96c WvSv establishes that the public prosecutor can search all premises *except* dwellings and the offices of a

[49] The WvSv also provides specific investigation powers for the context of organised crime (Title V) and terrorism (Title VB). In the case of terrorism, there is no requirement of "a reasonable suspicion". Instead, the WvSv states that a hint of terrorist offences (*aanwijzingen van terroristische misdrijven*) is necessary. Obviously, the requirement of a hint is less stringent than that of a reasonable suspicion.

[50] The investigation powers in the special laws are often broader than the general ones in the WvSv, but can, in principle, only be used in the enforcement of the special law. For example, Art. 11:4 of the General Customs Act provides that investigation officials can demand the transfer (*uitlevering vorderen*) of objects to them, even from a suspect. On the basis of the general provision in Art. 96a WvSv, officials cannot demand this from the suspect. This is an important difference of course.

professional entitled to privilege if an offence has been caught in the act (*heterdaad*) or a suspicion exists that a crime was committed that would allow for pre-trial detention in accordance with Article 67 (1) WvSv. The search of dwellings or the offices of a professional entitled to privilege is only allowed with a written authorisation (*schriftelijke machtiging*) of the investigative judge. Evidently, the search of one's house is more intrusive and thus requires an independent judicial authority to decide on the use of that investigative power.[51]

The WvSv does not provide the defence with the same investigative powers as the public prosecutor. An example of asymmetry is found in the appointment of an expert (Article 150 WvSv). The public prosecutor can appoint an expert on his own motion, whereas the defence can only make a request to the public prosecutor to that end. Another example can be seen in the procedure taking place before an investigative judge (*rechter-commisaris*). 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*) further investigation in accordance with Article 182 WvSv. Moreover, during the questioning of a witness before an investigative judge, the public prosecutor can always attend, but the attendance of the lawyer of the defendant 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.[52] The law establishes in Article 292 WvSv that, in principle, the presiding judge (*voorzitter*) is the first party to question witnesses. Then, the other judges and the public prosecutor can raise their own questions. Finally, the suspect is the last person to be entitled to interview the witness. However, if a defence witness has not been questioned before the court hearing, the suspect has the right to ask questions first (Article 292 (4) WvSv).

B. General rules on admissibility of evidence under Dutch law

Article 339 WvSv establishes a limited number of sources of legal evidence (*wettelijke bewijsmiddelen*) that are admissible under Dutch law: (i) the judge's own perception, (ii) statements that are made by the suspect, (iii) statements that are made by a witness, (iv) statements that are made by an expert, and (v) written documents. On the basis of these legal sources and his own conviction, the trial judge should decide whether the suspect has committed the offence of which he is accused. The WvSv provides some minimum evidence rules, for example that a suspect cannot be convicted on the basis of the statement of only one witness (342 WvSv) or of anonymous witnesses (344a (1) WvSv).

It cannot be excluded that procedural rules are not complied with during the preliminary investigation. In such cases, the trial judge rules on the admissibility of evidence on the basis of Article 359a WvSv.[53] In short, this provision establishes that

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[51] This is required in accordance with Art. 12 of the Constitution and the General Act upon Entry into Dwellings (*Algemene wet op het binnentreden*).

[52] G.J.M. Corstens, M.J. Borgers, *Het Nederlandse strafprocesrecht,* Deventer, Kluwer, 2011, 613-614.

[53] M.J. Borgers, L. Stevens, 'The Use of Illegally Gathered Evidence in the Dutch Criminal Trial', 2010, 14 (3), *Electronic Journal of Comparative Law*. See also R. Kuiper,

the deciding court has several options to sanction breaches of procedural rules when they cannot be remedied and the legal consequences are not established in the relevant provision.[54]

In 2004, the *Hoge Raad* gave a detailed explanation on the scope of Article 359a WvSv, which was followed by an important ruling focussing specifically on the possible exclusion of evidence in accordance with Article 359a (1) (b) WvSv in 2013.[55] In its judgement of 30 March 2004, the *Hoge Raad* established that the scope of Article 359a WvSv should be interpreted restrictively. First of all, only breaches of procedural rules that take place during the preliminary investigation against the suspect can be addressed on the basis of the provision and the Article cannot be relied upon to contest decision on the deprivation of liberty in the pre-trial phase. Moreover, the wording of the provision clarifies that only breaches that cannot be remedied should be reviewed in accordance with Article 359a WvSv. If a breach of procedural rules falls within the scope of the Article, the judge should decide which effect should be given to that breach. For this purpose, the judge should first give regard to (i) the significance of the rule or principle that has been breached (*belang van het geschonden voorschrift*), (ii) the gravity of the breach (*ernst van het verzuim*) and (iii) the disadvantage that was caused by it (*nadeel*). These criteria are found in Article 359a (2) WvSv.

The wording of Article 359a WvSv and the interpretation of the *Hoge Raad* are quite interesting. It follows from the Article and the case law that the provision establishes a discretionary power rather than an obligation for the trial judge to attach consequences to a breach of procedural rules. The *Hoge Raad* uses the term 'can' instead of 'should'. In other words, no exclusionary *rule* exists under Dutch law. The trial judge can acknowledge that a breach has taken place without it giving rise to further consequences. In practice, this happens regularly.[56] The *Hoge Raad* also establishes that only breaches that concern the procedural rights of the suspect himself can be brought under the protective scope of Article 359a WvSv. This is referred to as the *Schütznorm*.[57] It also becomes clear that only breaches during the preliminary

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Vormfouten: juridische consequenties van vormverzuimen in strafzaken, Deventer, Kluwer, 2014.

[54] This last criterion is (almost) never problematic. Few provisions from the WvSv establish their own legal consequences. A rare example is found in Article 21 (4) WvSv, which provides that an investigative judge cannot take pArt in a court in chambers (*raadkamer*). If this does happen, the court in chambers is declared void.

[55] Hoge Raad, 30 March 2004, *NJ*, 2004, 376; Hoge Raad, 19 February 2013, *NJ*, 2013, 308.

[56] See for example Court of Midden-Nederland, 17 July 2018, ECLI:NL:RBMNE:2018:3330. This judgement concerns a high-profile case that received much attention in the media. During his arrest, the suspect was (intentionally) not informed of his right to remain silent and considerable violence was used against him. The Court of Midden-Nederland acknowledges that there was a breach of procedural rules, but stated that the defendant was not deprived of a fair trial. Thus, no consequences were attached to the breach.

[57] See M.J. Borgers, L. Stevens, 'The Use of Illegally Gathered Evidence in the Dutch Criminal Trial', 2010, 14 (3), *Electronic Journal of Comparative Law*, 4. Borgers and Stevens provide the following example. A suspect rents a room in a house to store drugs but does

investigation within the meaning of Article 132 WvSv fall under the scope of Article 359a WvSv.[58]

After the judge has assessed the breach in accordance with the criteria from Article 359a (2), he should decide whether the breach should have repercussions and, if so, which ones. If the judge decides that the breach should be sanctioned, three options are available to him: (i) reduction of the sentence (*strafvermindering*), (ii) exclusion of evidence (*bewijsuitsluiting*) and (iii) statement of inadmissibility of the public prosecutor (*niet-ontvankelijkverklaring*). According to the *Hoge Raad*, a reduction of the sentence is appropriate if the suspect has actually been put at a disadvantage provided that such disadvantage has been caused by the breach and can be remedied by reducing the sentence. Moreover, sentence reduction should be justified in the light of the significance of the rule or principle that has been violated and the gravity of the breach. Then, exclusion of evidence will be appropriate only if evidence has been obtained as a result of the breach and if an important rule or principle of criminal procedural law has been violated as a result of the illegal collection of evidence. Lastly, the statement of inadmissibility only occurs in exceptional circumstances. It requires that officials who are tasked with the investigation or prosecution have seriously breached the principles of due process (*behoorlijke procesorde*) which has resulted in a of the interests of the suspect to receive a fair trial (*doelbewust of met grove veronachtzaming van de belangen van de verdachte aan diens recht op een eerlijke behandeling van zijn zaak is tekortgedaan*).[59] This violation may have been intentional of resulting from a gross negligence. As such, the last sanction has a dual rationale: guaranteeing the defendant's right to a fair trial and ensuring norm compliant (*normconform*) actions by the investigative authorities.[60]

In its judgement of 19 February 2013, the *Hoge Raad* elaborated upon the option to exclude evidence on the basis of Article 359a WvSv. The CJEU reiterated that exclusion of evidence will be appropriate if evidence has been obtained as a result of the breach and if an important rule or principle of criminal procedural law – of which the right to a fair trial constitutes an important example – has been violated as a result of the unlawful collection process. In this light, the *Hoge Raad* stated that a violation of the right to privacy within the meaning of Article 8 ECHR does not necessarily lead to a violation of the right to a fair trial as per Article 6 ECHR. This flows from both national jurisprudence and the case law of the ECtHR. Therefore, such a violation should not be addressed if it has had no negative impact on the right

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not live there himself. The house is searched without the required warrant and the drugs are found. Because the procedural rules on the search of dwellings aim to protect the occupants, no consequences have to be attached to the breach. This follows from the *Schütznorm*.

[58] This is particularly interesting in cases where evidence is being gathered illegally outside the context of an investigation, for example by civilians. See Hoge Raad, 14 January 2003, *NJ*, 2003, 288; Hoge Raad, 18 March 2003, *NJ*, 2003, 527.

[59] In Dutch legal literature, this criterion is known as the 'Zwolsman criterion'. See HR, 19 December 1995, *NJ*, 1996, 249.

[60] See R. Kuipers, *Vormfouten. Juridische consequenties van vormverzuimen*, Deventer, Kluwer, 2014, 401-410. In the case law, emphasis is given to guaranteeing the right to a fair trial.

to a fair trial. One may wonder: when will the exclusion of evidence be required on the basis of Article 359a WvSv then? The *Hoge Raad* stated that exclusion can be necessary to (i) secure the right to a fair trial; it referred to, *inter alia*, the case law on violations of the right to have access to a lawyer. Such violations have a direct and clear impact on the right to a fair trial and, consequently, the margin of appreciation of the judge is very limited in that context; evidence should be excluded. The exclusion of evidence can also come into play if (ii) the right to a fair trial itself is not directly involved, but another important procedural rule or principle has been breached in a significant way. In those cases, the exclusion will be required if it constitutes an appropriate tool to preclude similar violations and the subsequent unlawful gathering of evidence in the future. Lastly, exclusion of evidence can – in exceptional cases – be required if (iii) it can be established on the basis of objective information that a breach has occurred so often (*zozeer bij herhaling voorkomt*) that its structural character is clear and that the authorities, from the moment that they have become aware of the structural violations onwards, have undertaken insufficient efforts to preclude these breaches from occurring.

In exceptional circumstances, the exclusion of evidence may also be invoked outside the scope of Article 359a WvSv. In 2013, the *Hoge Raad* ruled that the exclusion of evidence outside the scope of that Article is only possible if an important rule or principle of procedural criminal law has been violated to such a considerable extent (*in zodanig aanzienlijke mate geschonden is*) by the breach of procedural rules that the evidence should be excluded.[61] The criterion introduced by the *Hoge Raad* is quite obscure and seems to be a prime example of circular reasoning; evidence should be excluded if the breach of procedural rules requires that the evidence is excluded. Although it is possible to rely on the jurisprudence of the *Hoge Raad* with a view to excluding irregularly obtained evidence, the judgment seems to lay down stricter criteria compared with the standards encapsulated in Article 359a WvSv.

C. Use of foreign evidence

In principle, evidence gathered in another Member State can be used during criminal proceedings in the Netherlands. Articles 339 (1) 5° and 344 (1) 3° WvSv, for example, show that written statements by a person in public service of another State or international organisation can be used as evidence in Dutch proceedings. In its case law, the *Hoge Raad* has explained how arguments concerning unlawful investigations and collection of evidence in States that are bound by the ECHR should be dealt with by the court.[62] 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 *Hoge Raad* 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 *Hoge Raad* states that the nature and scope of judicial review depends on whether the investigation in another country was led by (i) foreign authorities or (ii) Dutch authorities in accordance with Article 539a (1) WvSv.

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[61] Hoge Raad, 29 January 2013, *NJ*, 2013, 414.
[62] Hoge Raad, 5 October 2011, *NJ*, 2011, 169.

(i) If the investigation abroad was led by foreign authorities, the court should only assess whether the use of the evidence would violate Article 6 ECHR. This means that the court should not review whether the national provisions in the other country were complied with, but only whether the right to a fair trial was guaranteed. For example, if a suspect did not receive legal assistance from a lawyer and confessed to committing a crime, this has to be considered by the Dutch court. According to the *Hoge Raad*, the mutual trust between the Member States of the ECHR and the existence of effective national remedies in accordance with Article 13 ECHR to address violations of other fundamental rights than the right to a fair trial – i.e. Article 8 ECHR – means that the Dutch court should not establish whether a legal basis for the investigative measures existed in national law and if such a violation was necessary in a democratic society.[63] For example, if 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 *Hoge Raad* recalled 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.[64] Besides, national law – which cannot be reviewed by Dutch courts – is of paramount importance for the assessment of such a breach.[65]

(ii) However, if the investigation carried out abroad is led by Dutch authorities, the review should be 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 only possible if international and interregional law allow it. *Inter alia,* the Convention Implementing the Schengen Agreement (hereafter: 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 this case, the investigation is led by the Dutch authorities. Then the court should assess whether the rules that regulate those actions under Dutch law have been complied with. The *Hoge Raad* 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 *Hoge Raad* explaining that provision.[66] Article 359a WvSv and the case law are applicable when Dutch authorities were in charge of the investigations in another State.[67]

D. Evidence and the EIO

Directive 2014/41/EU has introduced the European Investigation Order (hereafter: EIO).[68] The Directive is based on the principle of mutual recognition and establishes

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[63] Hoge Raad, 5 October 2011, *NJ*, 2011, 169, para. 4.4.1.

[64] *Ibid.*

[65] *Ibid.*

[66] Hoge Raad, 30 March 2004, *NJ*, 2004, 376; Hoge Raad, 19 February 2013, *NJ*, 2013, 308.

[67] Hoge Raad, 5 October 2011, *NJ*, 2011, 169, para. 4.4.2.

[68] Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters, *OJ*, No. L 130, 1 May 2014.

in Article 6 that an EIO can only be issued by the competent authorities in a Member State if the criteria for the use of the investigative measure are fulfilled under its national law. In other words, if the issuing authorities are not allowed to use certain investigative measures under its national law, they cannot issue an EIO to have those acts carried out abroad. This is so even if the national law of the executing Member State provides for the deployment of such investigative measures. In turn, Article 9 states that the procedural rules in the executing state should be followed when an EIO is issued. This principle is known as *locus regit actum*. In the Netherlands, the Directive has been implemented in Title 4 Book 5 WvSv in 2017. In Dutch case law and legal literature we have not found problems that relate to the admissibility of evidence that was gathered abroad through the use of an EIO. Evidence collected by foreign officials acting on the basis of an EIO should be reviewed in accordance with the judgement of the *Hoge Raad* of 11 October 2011 if the defence argues that evidence was obtained illegally. Thus, 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.

At present, it is perhaps premature to discuss the use and admissibility of evidence in EPPO proceedings in the Netherlands. However, it is prudent to acknowledge here that 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.[69] The Regulation does contain any specific provisions on the admissibility of evidence but does state that the fact that evidence that is obtained abroad should not constitute an obstacle for its admission before a national courts. As the foregoing suggests, foreign evidence is admissible under Dutch law.

V. The system of pre-trial detention in the Netherlands and prison conditions in other Member States – central questions on detention from a Dutch perspective

In this section, we firstly discuss pre-trial detention and its alternatives under Dutch law. In that context, we also address detention in EAW proceedings in the Netherlands. Then, we switch to the cross-border context of detention. We assess whether differences in pre-trial detention can constitute an obstacle for cross-border cooperation. Finally, we analyse the impact of the CJEU's judgement in *Aranyosi and Căldăraru* in Dutch EAW proceedings.

A. An ill-suited system to accommodate alternatives – discussion on pre-trial 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

[69] Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO'), *OJ*, No. L 283, 31 October 2017.

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 held in custody, detention may continue until 60 days after the final verdict is rendered in the case (Article 66 (2)).

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 after each phase. For example, policy 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.

Pre-trial detention and alternatives for detention

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.[70] Consequently, nowadays more attention is dedicated to possible alternatives. The architecture of the Dutch rules forces the judge to first assess whether pre-trial detention is required or not.[71] 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 detention is suspended, such as a prohibition to contact the victim. Article 80(3) WvSv also provides for the interesting yet in practice rarely used option of the bail bond (*borgsom*).[72] This architecture is ill-suited to accommodate alternatives for detention and supervision measures. It is difficult for a judge to argue

[70] J.K. Janssen, F.W.H. van den Emster, T.B. Trotman, 'Strafrechters over de praktijk van de voorlopige hechtenis', 2013 *Strafblad*, 430; B. Berghuis, P. Linckens, A. Aanstoot, 'De voorlopige hechtenis een halt toegeroepen?', 2016, 3 *Trema*; M.A. Docter, J.L. Baar, 'De motivering van voorlopige hechtenis schiet tekort. De gronden die tot eerdere artikelen en commentaren hebben geleid, zijn nog onverkort aanwezig', 2017, 50, *Tijdschrift Praktijkwijzer Strafrecht*, 178-184.

[71] J.H. Crijns, B.J.G. Leeuw, H.T. Wermink, *Pre-trial detention in the Netherlands: legal principles versus practical reality*, The Hague, Eleven International Publishing, 2016, 35.

[72] B.J. Polman, 'Het instituut van de borgsom in het Nederlandse strafprocesrecht', 2015, *Ars Aequi*, 437-447. See also A.R. Houweling, *Op borgsom vrij*, The Hague, Boom Juridische uitgevers, 2009. In accordance with Art. 80 WvSv the trial judge can order that pre-trial detention is suspended (*geschorst*) from the moment the suspect has agreed to follow instructions. The trial judge can also require a security deposit (*zekerheidstelling*). This security deposit constitutes the bailbond (*borgsom*). The deposit can be made by the suspect himself or via a guarantee by a third party. In recent years, the number of cases where the bailbond is used has increased.

convincingly that the detention should be suspended after he has already concluded that the suspect should be held in pre-trial detention.

After the person has been convicted, several penalties can be imposed and combinations are possible. Article 9(1) Dutch Penal Code (*Wetboek van Strafrecht*, hereafter: WvSr) establishes that the main penalties are the custodial sentence, remand in custody, community sentence and fine. Thus, there are alternatives to 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 those special conditions can be complemented with 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 the assistant public prosecutor (*hulpofficier van justitie*) can order 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 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 of that fact immediately. Otherwise, he requests that the Court of Amsterdam considers the EAW (Article 23(1) and (2)). Immediately after his request, the presiding judge of the court (*voorzitter van de rechtbank*) must decide 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 rendered within 60 days or, in exceptional cases, within 90 days.[73] 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 dealing with compensation in the WvSv are applicable, which means that the person concerned can file a request for compensation within three months of the end of the proceedings (Article 89(3)). A court in chambers (*raadkamer*) of the court that dealt with the case handles this request.[74] The granting of compensation as well

[73] Art. 22(3) OLW. After the term of 90 days has passed, the Court of Amsterdam may extend the term indefinitely while simultaneouly suspending the detention of the requested person. On this obligatory suspension of the detention after 90 days, see J. J. M. Graat, 'Een dilemma voor de Overleveringskamer: Gebrek aan een deugdelijke wettelijke basis voor overleveringsdetentie na negentig dagen', 2018, *Strafblad*, 76. The Court of Amsterdam has referred a case to the CJEU for a preliminary ruling on Art. 22 OLW. See Court of Amsterdam, 27 July 2018, ECLI:NL:RBAMS:2018:5389.

[74] Because Art. 89 WvSv constitutes a general provision, it is also applicable to criminal cases dealt with by 'regular' courts in the Netherlands. In EAW cases, the 'court that dealt with the case' is the Court of Amsterdam (*rechtbank Amsterdam*).

as its amount are 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)).

B. Questions on detention in a cross-border context

Differences concerning sanctioning modalities – from the Netherlands to another Member State and vice versa

Although differences between rules on pre-trial detention in the various Member States are sometimes used as arguments against the execution of an EAW in national proceedings, they have never been successful. In several cases, the defence did invoke possible violations of Articles 5 and 6 ECHR because of the risk of lengthy pre-trial detention in the issuing State 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; it is for the national authorities of the issuing Member States to take a decision on pre-trial detention and the Amsterdam Court generally trusts that they will do so in a way that respects fundamental rights. The court also emphasised the significance of the existence of an effective remedy (Article 13 ECHR).[75]

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 or might be imposed. This follows from Article 27 WvSr. This provision stipulates that the time spent in detention abroad after a Dutch request for extradition or surrender was issued will be deducted from the prison sentence served in the Netherlands.

The transfer to the Netherlands of prisoners sentenced abroad takes place on the basis of the OLW and the Measures Involving Deprivation of Liberty and Conditional Penalties (Mutual Recognition and Enforcement) Act (*Wet wederzijdse erkenning en tenuitvoerlegging vrijheidsbenemende en voorwaardelijke sancties*, hereafter: WETS). The WETS implements Framework Decision 2008/909/JHA.[76] Even though the starting point is that, in principle, the foreign sentence should not be adjusted, the Court of Appeal of Arnhem-Leeuwarden (*Gerechtshof Arnhem-Leeuwarden*) has this competence in certain situations according to Article 2:11 (2) and (3) (c) WETS. The sentence should always be adapted if it exceeds the maximum length that could have been imposed on the basis of Dutch law; then the duration is changed to the Dutch maximum (Article 2:11(4)). The same applies in a situation where the nature of the foreign sentence is *irreconcilable* with Dutch law; the foreign sentence is changed to a penalty or measure provided for in Dutch law that resembles the foreign

[75] Court of Amsterdam, 9 November 2007, ECLI:NL:RBAMS:2007:BB7956; Court of Amsterdam, 17 August 2012, ECLI:NL:RBAMS:2012:BY1996; Court of Amsterdam, 15 September 2016, ECLI:NL:RBAMS:2016:5788.

[76] 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, *OJ*, No. L 327, 5 December 2008.

sentence as closely as possible (Article 2:11(6)). An adjustment should never lead to an aggravation of the sentence (Article 2:11 (7)). In addition, 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)).[77] 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.

Limits to mutual trust in the field of detention?

The judgement of the CJEU in the joined cases of *Aranyosi and Căldăraru* has had a significant impact on the functioning of the EAW for the Netherlands in regard to (alleged) violations of Article 3 ECHR and Article 4 CFR.[78] 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.[79] Firstly, the Court of Amsterdam will consider whether (i) *in abstracto* a real risk of inhuman or degrading treatment exists in the issuing state. In other words, the Court of Amsterdam should analyse if a real risk of a violation is found in general. To this end, the Court of Amsterdam looks at, *inter alia*, reports from the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment and case law of the ECtHR.[80]

After the Court of Amsterdam 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 (ii) *in concreto.* In other words, the Court of Amsterdam 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 *Aranyosi and Căldăraru* judgement, the issuing authorities are obliged to provide this information.[81]

If the Court of Amsterdam 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.[82] According to the Court of Amsterdam, the existence of a real risk of a

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[77] The Court of Amsterdam has requested the CJEU for a preliminary ruling relating to the conformity of Art. 2:11 (5) WETS with Art. 25 of Framework Decision 2008/909/JHA. Court of Amsterdam, 1 May 2018, ECLI:NL:RBAMS:2018:2835.

[78] Cases/C-404/14 and C-659/15 PPU, *Aranyosi and Căldăraru,* 5 April 2016, ECLI:EU:C:2016:198.

[79] Court of Amsterdam, 24 May 2016, ECLI:NL:RBAMS:2016:3081; Court of Amsterdam, 5 July 2016, ECLI:NL:RBAMS:2016:4596. For an elaborate analysis of the post-*Aranyosi and Căldăraru* case law, see J.J.M. Graat *et al*., 'Dutch report', *in* T. Marguery (ed.), *Mutual trust under Pressure, the Transferring of Sentenced Persons in the EU*, (n16) 214-220.

[80] Court of Amsterdam, 25 October 2016, ECLI:NL:RBAMS:2016:7499.

[81] Court of Amsterdam, 28 April 2016, ECLI:NL:RBAMS:2016:2630; Cases C-404/14 and C-659/15 PPU, *Aranyosi and Căldăraru*, para. 97.

[82] Court of Amsterdam 25 October 2016, ECLI:NL:RBAMS:2016:7499.

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 extend its prison capacity or improve overall detention conditions, but rather to give the issuing authorities room to provide additional information which allows the specific risk for the requested person to be excluded.[83]

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.[84] 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 of Amsterdam decides that the reasonable term is exceeded, the surrender is not refused on the basis of Article 11 OLW, but the Court of Amsterdam will declare the public prosecutor inadmissible (*niet-ontvankelijk*) and not consider the EAW.[85]

VI. Increased rights for the victim in Dutch criminal proceedings

In the Netherlands, attention has been increasingly paid to victims' rights since the early 1990s.[86] At present, title IIIA of the WvSv provides the victim with certain procedural rights during criminal proceedings. These rights have been influenced by EU legislation, such as Directive 2012/29/EU on victim's rights and Directive 2004/80/EC on the compensation of victims.[87] 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). Major changes have taken place over the last few years. It can be concluded that the victim's star is rising in the Netherlands, but – as mentioned before – the victim is still

[83] Court of Amsterdam, 28 April 2016, ECLI:NL:RBAMS:2016:2630; Court of Amsterdam, 26 January 2017, ECLI:NL:RBAMS:2017:414. For example, by providing information that entails that the requested person will be detained in another prison.

[84] Court of Amsterdam, 26 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*.

[85] Court of Amsterdam, 26 January 2017, ECLI:NL:RBAMS:2017:414; Court of Amsterdam, 18 April 2017, ECLI:NL:RBAMS:2017:2579; Court of Amsterdam, 12 September 2017, ECLI:NL:RBAMS:2017:7137.

[86] In December 1992, the so-called Terwee Act (*Wet Terwee*) was passed. It entered into force on 1 April 1995 and – arguably – constitutes one of the most important developments in Dutch criminal procedural law of the last three decades. The Act paved the way for a stronger and more visible position for victims in criminal proceedings. See *Stb,* 1993, 29 and *Stb*, 1995, 160.

[87] 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, *OJ*, No. L 315, 14 December 2012; Council Directive 2004/80/EC of 29 April 2004 relating to compensation to crime victims, *OJ,* No. L 261, 6 August 2004.

not a party in the procedure. The victim can neither initiate prosecution of a suspect nor act as a prosecutor during those proceedings.[88]

A. National and European protection measures for victims

The relevance of protection measures for this chapter stems from the fact that EU cooperation instruments in the realm of victims have, thus far, only focused on this area. Therefore, it is important to address the nature and functioning of national and EU protection measures. In the Netherlands, there are a number of protection measures for victims. These protection measures can be civil or criminal in nature. 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*, hereafter: BW). In criminal law, protection orders can be obtained via various routes; in total, fourteen modalities can be found in the WvSv.[89] For example, in the pre-trial detention phase, 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 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).

Thus, under Dutch law protection measures can be obtained during all stages of the proceedings. Civil protection measures can be obtained by the victim itself. During the criminal proceedings, however, it is either the public prosecutor or the court that imposes a protection measure 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 at the request of the Public Prosecutors Office (*op vordering van de openbaar ministerie*); the victim himself cannot (directly) request a protection order from the court.

Directive 2011/99/EU on the European Protection Order has been transposed into Dutch law in Book 5, Title 4 of the WvSv.[90] In Dutch case law, no examples have been found of cases involving the issuing or execution of an EPO. This is

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[88] This is different in many other European countries. Well-known examples are the German figures of *Privatklage* and *Nebenklage* in criminal proceedings in accordance with §§ 374 and 395 Strafprozeßordnung. See M. Zwartjes, 'Slachtoffer: van toeschouwer naar procespartij', 2008, *Strafblad*, 491.

[89] S. van der Aa *et al.*, *Aard, omvang en handhaving van beschermingsbevelen in Nederland. Deel 2: Aard en omvang*, Tilburg, Intervict – Universiteit van Tilburg and WODC, Tilburg, 2017.

[90] Directive 2011/99/EU of the European Parliament and of the Council of 13 December 2011 on the European protection order, *OJ*, No. L 338, 21 December 2011.

perhaps unsurprising as an EU implementation assessment of the EPO shows that the instrument is rarely used in all Member States.[91] A Dutch report on measures for the protection of victims suggests that there might not be much demand for cross-border protection of victims and the EPO, but a clear reason is not found.[92]

In accordance with Article 51f WvSv, the person who has incurred direct damage as a result of a criminal offence may join the criminal proceedings in his capacity as an injured party and claim compensation. This figure is known as the claim of the injured party (*vordering benadeelde partij*).[93] The procedure entails a civil liability claim but is integrally dealt with during the criminal proceedings. In fact, the Dutch legislator has – in accordance with Article 16 of Directive 2012/29/EU – stated that addressing the civil claim of the victim is an independent function of criminal proceedings.[94] However, this does not mean that every claim is dealt with during the criminal trial as some are quite complex and might require the specific expertise of a civil court. In Article 361 (3) WvSv, the legislator has established the important criterion that the civil claim should not impose a disproportionate burden (*onevenredige belasting*) on the criminal proceedings. It is for the competent court to decide whether this is the case.[95]

Given that the claim of the injured party is essentially a civil law procedure, the general provisions on civil liability are applicable. In this chapter, we will neither dive into the precise architecture of Dutch liability law nor into the wealth of case law from the *Hoge Raad* in that field. However, it is important to briefly address what kind of damages can be claimed and by whom. In accordance with Articles 6:95 and 6:106 BW, the victim himself is entitled to compensation for material – e.g. medical bills – and immaterial – e.g. physical or psychological trauma – damages. If the victim is deceased, the next of kin can claim compensation in accordance with Article 51f (2) WvSv and 6:108 BW. In those cases, compensation can only be given for material damage and so-called 'shock damage'. Shock damage entails the emotional trauma suffered as a result of witnessing or being confronted with a seriously shocking event.[96] In the Netherlands, there is no basis for the compensation of emotional loss

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[91] *European Implementation Assessment European Protection Order Directive 2011/99/EU* (Brussels, European Parliamentary Research Service, 2017).

[92] S. VAN DER AA *et al.*, *Aard, omvang en handhaving van beschermingsbevelen in Nederland. Deel 2: Aard en omvang*, Tilburg, Intervict – Universiteit van Tilburg and WODC, 2017, 79-80. See also S. VAN DER AA, J. OUWERKERK, 'The European protection order: No time to waste or a waste of time?', 2011, 19, *European Journal of Crime, Criminal Law and Criminal Justice*, 267-287.

[93] See for a detailed description and analysis R. S. B. KOOL, J.M. EMAUS *et al.*, *Civiel schadeverhaal via het strafproces. Een verkenning van de rechtspraak en regelgeving betreffende de voeging benadeelde partij*, The Hague, Boom Juridische uitgevers, 2016.

[94] Policy memorandum *Recht doen aan slachtoffer,* 22, annex of *Kamerstukken*, II, 2012/13, 33552, No. 2.

[95] If the court decides that the civil claim indeed forms a disproportionate burden, it will declare it inadmissible. The court will not dismiss the claim so as to allow the victim to seek redress via a separate civil law procedure.

[96] The figure of shock damage was introduced under regular civil law. Nowadays, more examples are found in the sphere of criminal law. See Hoge Raad 22 February 2002, NJ 2002,

(*affectieschade*). However, this will soon change. In April 2018, the Dutch legislator passed a new law that enables the compensation of emotional loss.[97] At the time of writing, it was unknown when the law would enter into force.

As stated before, apart from the options in the context of the criminal trial, a victim can claim compensation on the basis of Article 6:162 BW. He should then start a separate civil law procedure. It is important to see that the civil claim during criminal proceedings has some important benefits for the victim compared to its civil law counterpart. On the basis of Article 36f WvSr, the judge can impose a compensation order (*schadevergoedingsmaatregel*) on the suspect. In that case, the collection is taken care of by the Central Fine Collection Agency (*Centraal Justitieel Incassobureau*). Moreover, the State will provide for an advance payment in accordance with Article 36f (7) WvSv (*voorschotregeling*) if a swift collection is not possible. Thus, the victim is not only relieved of his burden to collect compensation, but will also receive the awarded sum even if the amount has not (yet) been collected.

B. The implementation of Directive 2012/29/EU

The most recent changes in the Dutch legislation on victims' rights concerns the implementation of Directive 2012/29/EU.[98] Nonetheless, 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 November 2015. The implementation finally took place in January 2017; more than a year after the transposition deadline expired. Even though the implementation process has been formally completed, 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

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240 (civil); Hoge Raad, 9 October 2009, *NJ*, 2010, 387 (civil); Hoge Raad, 27 September 2016, *NJ*, 2017, 88 (criminal). See also A.H. Sas, 'Shockschade in het strafproces: recente ontwikkelingen', 2017, 3, *Letsel & Schade*.

[97] Wet van 11 april 2018 tot wijziging van het Burgerlijk Wetboek, het Wetboek van Strafvordering en het Wetboek van Strafrecht teneinde de vergoeding van affectieschade mogelijk te maken en het verhaal daarvan alsmede het verhaal van verplaatste schade door derden in het strafproces te bevorderen, *Stb*, 2018, 132.

[98] 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.

to make a verbal statement. Persons who 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*). Given that victims and family members are mentioned in Article 260 WvSv, they should 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 travel 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*, hereafter: *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 constitutes a gap in the transposition of Directive 2012/29/EU into national law.

In a judgement of 4 November 2016, the Court of Noord-Holland remedied the above-mentioned gap by giving direct effect to Article 14 of Directive 2012/29/EU.[99] The court noted that the Directive should have already 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".[100] 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 time of writing, the *Wet tarieven* and *Besluit tarieven* had not yet been changed. It is unknown when the Dutch legislation will be amended in that regard.

VII. Cross-border complexities

The foregoing shows that the Dutch courts emphasise mutual trust between the Member States of the EU. In this respect, there seem to be no major obstacles caused by differences in criminal procedures between the Member States in the cross-border context. However, we feel that it is necessary to analyse some specific topics that have led, lead or might lead to difficulties. 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. We will also touch upon the lack of a binding cross-border forum choice instrument. Last, but certainly not least, we address the newest national and EU case law on the EAW mechanism. In the section on (pre-trial) detention, the decisions of the Court of Amsterdam following the landmark judgement of the Court of Justice in *Aranyosi and Căldăraru* have been dealt with. Unsurprisingly, this case law concerned the possible violation of Article 4 CFR due to deplorable *prison conditions*. Recently, the Court of Amsterdam has expanded the scope of application of its two-step test to a case that did not concern detention conditions. Moreover, the CJEU case of *LM* did not involve a possible

[99] Court of Noord-Holland, 4 November 2016, ECLI:NL:RBNHO:2016:9089.

[100] Court of Noord-Holland, 4 November 2016, ECLI:NL:RBNHO:2016:9089, para. 7.1.

violation of Article 4 CFR, but rather a violation of the right to a fair trial. This judgement of the Luxembourg Court has already been invoked before the Court of Amsterdam several times. Given that it was inappropriate to discuss this recent case law in the section on (pre-trial) detention, it is addressed in detail here.

A. At odds with the EAW Framework Decision? A general fundamental rights refusal ground in the Overleveringswet

As seen above, Framework Decision 2002/584/JHA on the European Arrest Warrant has been implemented in the OLW.[101] Article 11 OLW states that the execution of an 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. The legislative history of Article 11 OLW is interesting in this respect. Indeed, the first draft of the OLW did not provide for a general human rights refusal ground.[102] This was, however, strongly opposed by the House of Representatives. It was feared that the protection of human rights abroad would not meet the appropriate standards and, thus, the question was raised as to whether mutual trust between Member States and the lack of a fundamental rights refusal ground were justified.[103] 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 of the issuing State with the ECHR. Such a duty would require a Dutch court to assess compliance with fundamental rights in general.[104] Ultimately, a review *in concreto* was proposed by the Minister of Justice and the criterion of 'a flagrant breach' was introduced.[105] Although the current framework 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.

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 refusal ground. Thus, Article 11 OLW adds an extra refusal ground to the exhaustive list in the Framework Decision.[106] This refusal ground is often relied upon by the defence, although arguments on the basis of Article 11 are rarely successful.[107] Technically, therefore, it can be inferred that Article 11 OLW is contrary to the EAW Framework Decision. However, it has not resulted in major difficulties because the Court of Amsterdam uses a very stringent test.

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[101] Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, *OJ*, No. L 190, 18 July 2002.

[102] *Kamerstukken*, II, 2002/03, 29042, 1-2, 6.

[103] *Kamerstukken*, II, 2002/03, 29042, 5, 12-15.

[104] *Kamerstukken*, II, 2002/03, 29042, 27, 21-22.

[105] *Kamerstukken*, II, 2002/03, 29042, 21.

[106] Case C-123/08, *Wolzenburg*, 6 October 2009, ECLI:EU:C:2009:616.

[107] Arguments on the basis of Article 11 Surrender Act have only twice led to the refusal of surrender. Court of Amsterdam, 1 July 2005, ECLI:NL:RBAMS:2005:AT8580; Court of Amsterdam, 19 August 2005, ECLI:NL:RBAMS:2005:AU1314.

B. Article 4a of the EAW Framework Decision – the 'incorrect' implementation and the 'difficulties' it causes

Under Dutch law, the defendant is not under any obligation to attend his trial. However, he does have the *right* to be present.[108] In accordance with the case law of the ECtHR, 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 has 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 necessary, order a person to 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 person 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*.

The Dutch substantive rules on *in absentia* trials have not amounted to obstacles in a cross-border context. It is rather Article 12 OLW that is problematic. This provision transposes Article 4a of the EAW Framework Decision, which provides an optional refusal ground in the case of a decision rendered *in absentia* in the issuing State. The EU 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 so, the possibility of refusal ceases to exist and surrender of the requested person is obligatory 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 whether one of the situations laid down 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.[109]

Article 12 OLW does not contain an optional refusal ground, but a *mandatory* refusal ground; 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, according to Advocate General Bobek, it transforms "the *possibility* of non-execution unless (a) to (d) into a *requirement* of non-execution unless (a) to (d)".[110] Secondly, it changes 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*.[111] Recent case law of the Court of Justice of the EU and the Court

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[108] G.J.M. Corstens, M.J. Borgers, *Het Nederlandse strafprocesrecht*, Kluwer, Deventer, 2011, 595.

[109] Case C-108/16 PPU, *Dworzecki*, 24 May 2016, ECLI:EU:C:2016:346, paras. 50-51.

[110] Opinion A-G Bobek in Case C-270/17 PPU, *Tupikas*, 26 July 2017 ECLI:EU:C:2017:609, para. 75; Opinion A-G Bobek, *in* Case C-271/17 PPU, *Zdziaszek*, 26 July 2017 ECLI:EU:C:2017:612, para. 108.

[111] Opinion A-G Bobek, *in* Case C-270/17 PPU, *Tupikas*, para. 76; Opinion A-G Bobek, *in* Case C-271/17 PPU, *Zdziaszek*, para. 109.

of Amsterdam in the case of *Tupikas* shows that the Dutch transposition of Article 4a of the EAW Framework Decision can form an obstacle to cross-border cooperation.[112]

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 initiated 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 could not be proven 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.[113] The Court of Amsterdam referred the case to the Court of Justice of the EU for a preliminary ruling. The Court of Amsterdam wanted to know, in short, 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 of the EU 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.[114] Article 6 ECHR applies not only to the finding of guilt, but also to the determination of the sentence.[115] Thus, compliance with the requirement of a fair trial entails the right of the person concerned to be present at the hearing concerning the sentence because of the significant consequences which it may have on the *quantum* of the sentence to be imposed. In this light, the person must be able to effectively exercise his rights of defence in order to influence favourably the decision to be taken in that regard.[116] 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

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[112] Case C-270/17 PPU, *Tupikas*, 10 August 2017 ECLI:EU:C:2017:628; Court of Amsterdam, 30 August 2017, ECLI:NL:RBAMS:2017:6273.

[113] Case C-270/17 PPU, *Tupikas*, paras. 25-40.

[114] Case C-270/17 PPU, *Tupikas,* paras. 80-81; Case C-271/17 PPU, *Zdziaszek*, 10 August 2017, ECLI:EU:C:2017:629, para. 93.

[115] Case C-271/17 PPU, *Zdziaszek*, para. 87.

[116] *Ibid.,* para. 91.

the Framework Decision. However, it is not under the obligation to ask for additional information more than once.[117]

Referring to the judgements of the Court of Justice of the EU, 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* meet the test of Article 12 OLW.[118] 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 could be concluded that the defendant received the writ or had 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 had been guaranteed during the relevant proceedings. Therefore, surrender was refused in the case of Tupikas.[119]

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 the argument of AG Bobek in his Opinions in the cases of *Tupikas* and *Zdziaszek*, where he stated that the rigid Dutch transposition is "incorrect" and leads to "difficulties".[120] The mandatory refusal ground does not allow the executing judicial authority to check the concrete circumstances of the case of the requested person and whether his procedural rights were guaranteed. Bobek noted 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".[121] The exhaustive list in Article 12 OLW prohibits the Dutch court from taking such matters into account; even if, in practice, the fundamental rights of the requested persons are guaranteed, the OLW does not allow 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 of Article 1(2) of the Framework Decision. Moreover, it is contrary to the strict interpretation that should be given to a refusal ground in accordance with the CJEU's judgement in *Popławski*.[122]

C. The prevention and settlement of conflicts of jurisdiction

In 2009, Framework Decision 2009/948/JHA on the prevention and settlement of conflicts of jurisdiction in criminal proceedings was adopted.[123] The Framework

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[117] *Ibid*., paras. 103-105.

[118] Court of Amsterdam, 30 August 2017, ECLI:NL:RBAMS:2017:6273, para. 4.3.

[119] Court of Amsterdam, 30 August 2017, ECLI:NL:RBAMS:2017:6273.

[120] Opinion A-G Bobek in Case C-270/17 PPU, *Tupikas*, paras. 78-79; Opinion A-G Bobek, *in* Case C-271/17 PPU, *Zdziaszek*, para. 110.

[121] Opinion A-G Bobek, *in* Case C-270/17 PPU, *Tupikas*, para. 79.

[122] Case C-579/15, *Popławski*, 29 June 2017, ECLI:EU:C:2017:503, para. 19.

[123] Council Framework Decision 2009/948/JHA of 30 November 2009 on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings, *OJ*, No. L 328,

Decision does not provide a general rule 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).[124] 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* in principle fall outside its scope.[125] 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.[126] It is left to the discretion of the Member States to contact each other in such cases.

The Dutch case law suggests that obstacles have yet to arise on the basis of the present legal framework. This does not mean that the lack of binding criteria is not (perceived as) a problem. The possibility of parallel proceedings in the EU and the limited scope of the Framework Decision have been acknowledged and criticised in legal literature and many projects have been written on the establishment of a binding system of forum choice to combat arbitrariness.[127] In this light, it is clear that the Framework Decision remains an important topic in the sphere of criminal matters and that legislative action – e.g. amendments or the introduction of a new EU instrument – to extend its scope of application and provide for clear criteria for the settlement of conflicts of jurisdiction might be needed.

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15 December 2009. The Framework Decision has been implemented in the Netherlands in the Instruction conflicts of jurisdiction in criminal cases (*Aanwijzing rechtsmachtgeschillen bij strafprocedures*, *Stcrt*, 2012, 11716).

[124] The preamble of the Framework Decision does provide for some criteria in paragraph 9, but strictly those are not binding.

[125] 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?', 2013, 63, *Delikt en Delinkwent*, 3.

[126] Council Document 10225/09 COPEN 95, interinstitutional file: 2009/0802 (CNS).

[127] A comparison between the earlier versions of the Framework Decision and the accepted instrument shows that the scope of application has been limited considerably. At first, the instrument did provide for clear(er) criteria. See M.J.J.P. Luchtman, 'De normering van de strafrechtelijke forumkeuze in de ruimte van vrijheid, veiligheid en rechtvaardigheid', 2009, 68, *Delikt en Delinkwent*. See also M. Böse, F. Meyer, A. Schneider (eds.), *Conflicts of Jurisdiction in Criminal Matters in the European Union*, Baden-Baden, Nomos Verlag, 2014; M.J.J.P. Luchtman, *Choice of forum in cooperation against EU financial crime: freedom, security and justice and the protection of EU-specific interests*, The Hague, Eleven International Publishing, 2013; A. Sinn, *Conflicts of jurisdiction in cross-border crime situations*, Osnabrück, Universitätsverlag Osnabrück, 2012.

D. Recent developments in EU and national case law concerning the EAW

The two-step test of the Court of Amsterdam – an expanded scope of application

In October 2017, the Court of Amsterdam applied its post-*Aranyosi* two-step test in a case that did not concern deplorable detention conditions.[128] 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. The requested person had helped the police in both Germany and Poland during their investigation into the criminal acts committed by the aforementioned gang by giving several incriminating statements. 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 as a means of 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 contained in the case file, the court established that (i) 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 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 are guards present who would act in case of a dangerous situation – the court stated that there was also (ii) a specific risk for the requested person himself (*voor de opgeëiste persoon 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 requested additional information. As seen, this is fully in accordance with its earlier case law and the CJEU's judgements in *Aranyosi and Căldăraru*. The Polish authorities did provide additional information, but the court considered this information 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 its decision of 16 January 2018.[129]

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[128] Court of Amsterdam, 17 October 2017, ECLI:NL:RBAMS:2017:8014.

[129] Court of Amsterdam, 16 January 2018, ECLI:NL:RBAMS:2018:348.

In the wake of LM – mutual trust further under pressure

In July 2018, the CJEU rendered its eagerly anticipated judgement in the case of *LM*. The case concerned the possible violation of Article 47 CFR in Poland due to political developments that threatened the rule of law. It was argued that the judiciary in that Member State was no longer independent, which is at odds with the right to a fair trial as guaranteed by the Charter of Fundamental Rights. The Court of Justice ruled, in short, that the EAW Framework Decision must be interpreted as meaning that, where the executing judicial authority has material indicating that there is a real risk of breach of the fundamental right to a fair trial guaranteed due to systemic or generalised deficiencies that concern the independence of the judiciary in the issuing Member State, that authority must determine whether there are substantial grounds for believing that that person will run such a risk if he is surrendered to that State.[130]

At the time of writing, the judgement of the CJEU has featured in several EAW cases before the Court of Amsterdam.[131] The first case where *LM* was successfully invoked concerned a Polish EAW for the purpose of prosecution. The defence argued that surrender should not be allowed because structural and fundamental deficiencies exist in Poland that have a negative impact on the judiciary's independence. In that regard, the requested person stated before the Court of Amsterdam that his lawyer in Poland told him that judges were appointed by the Polish government and were no longer independent. The Court of Amsterdam decided to stay the proceedings and await the judgement of the CJEU in *LM*.

In its interlocutory decision of 16 August 2018, the Court of Amsterdam interpreted the ruling of the CJEU.[132] According to the CJEU, it should first be established that there is a real danger that the core of the right to a fair trial is breached (*grondrecht op een eerlijk proces in de kern wordt aangetast*) due to structural or fundamental deficiencies as far as the independence of the issuing State's judiciary is concerned. This is referred to as the first step. The assessment of this step should take place on the basis of Article 47 CFR and the standard of judicial independence as elaborated by the CJEU in paragraphs 63 to 67 of the judgement in *LM*. When the general risk has been established, the CJEU should review whether (i) that risk also applies to the court before which the requested person will be tried in the issuing Member State and whether (ii) the risk exists in the case of the requested person himself. These two assessments constitute the second step. In its interlocutory decision of 16 August, the Court of Amsterdam allowed the defence and public prosecutor to provide further information and their views with regard to the first step.[133]

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[130] Case C-216/18 PPU, *LM*, 25 July 2018, ECLI:EU:C:2018:586.

[131] Court of Amsterdam, 16 August 2018, ECLI:NL:RBAMS:2018:5925 (interlocutory decision). See also Court of Amsterdam, 5 July 2018, ECLI:NL:RBAMS:2018:4720. The last case concerns an EAW for the purpose of execution of a prison sentence that was imposed in 2014. The Court of Amsterdam ruled that the judgement of *LM* was not relevant for this case and allowed the surrender to Poland.

[132] Court of Amsterdam, 16 August 2018, ECLI:NL:RBAMS:2018:5925, para. 6.4.2.

[133] Interestingly, the Court also remarked that the Irish court that asked the preliminary questions to the CJEU in the case of *LM* decided on 1 August that a general risk indeed existed in Poland.

On 4 October, the Court of Amsterdam rendered another interlocutory decision in the abovementioned case and in two other cases concerning Polish EAW's. In all three cases, the Court of Amsterdam ruled on the existence of a real danger that the core of the right to a fair trial had been breached due to structural or fundamental deficiencies which concern the independence of the issuing State's judiciary.[134] In its judgements, the Court of Amsterdam refers to reports and other sources that concern the developments in Poland.[135] These reports and other sources constitute objective, reliable, accurate and properly updated information and show that drastic changes have occurred as to the Polish judiciary. Most notably, the Court of Amsterdam states that the legislative and executive powers have a far-reaching power to intervene in the administration of justice, which threatens judicial independence. Therefore, the Court of Amsterdam concluded that there is a real danger that the core of the right to a fair trial had been breached.[136]

In accordance with its decision of August 2018, the Court of Amsterdam then addressed the second step: it should review concretely and precisely whether – in the specific circumstances of the case – there are compelling grounds which are based on facts to believe that the requested person is in danger of not receiving a fair trial. In that context, the Court of Amsterdam should establish to which extent the deficiencies have consequences for the independence of the specific Polish court that will deal with the case of the requested person after surrender. In accordance with the CJEU judgement in *LM*, the Court of Amsterdam ruled that a request for actual and concrete information should be made to the competent court in Poland which allows for the establishment of the consequences of the political reforms in that Member State for that court.[137] In its decision, the Court of Amsterdam provides a list with more than a dozen questions that address (i) changes in personnel, especially concerning judges and presidents of the court, (ii) the rules and procedures that govern the allocation of a case to a particular chamber, (iii) disciplinary proceedings that have taken place against judges, (iv) procedures under Polish law that allow the defendant to address violations of the right to a fair trial, and (v) rules on extraordinary appeal (*buitengewoon beroep*).[138] The Court of Amsterdam made a request to the public prosecutor to send

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[134] Court of Amsterdam, 4 October 2018, ECLI:NL:RBAMS:2018:7032; Court of Amsterdam 4 October 2018, ECLI:NL:RBAMS:2018:7042; Court of Amsterdam 4, October 2018, ECLI:NL:RBAMS:7211.

[135] See e.g. Court of Amsterdam 4 October 2018, ECLI:NL:RBAMS:2018:7032, para. 4.4.1. The Court mentions, e.g. Proposal for a Council Decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law (COM (2017) 835 final); Position Paper of the Board of the ENCJ on the membership of the KRS of Poland (16 August 2018); White Paper on the Reform of the Polish Judiciary (7 March 2018).

[136] See e.g. Court of Amsterdam 4, October 2018, ECLI:NL:RBAMS:2018:7032, para. 4.4.1.

[137] Case C-216/18 PPU, *LM*, paras. 74-76. The Court of Amsterdam fittingly adopts the terminology of the 'judicial dialogue' between the courts involved.

[138] See e.g. Court of Amsterdam, 4 October 2018, ECLI:NL:RBAMS:2018:7033, paras. 4.4.2-4.4.3.

these questions to the Polish authorities and suspended the court hearing indefinitely and until further notice.

At the time of writing, the Polish authorities have not yet responded to the questions from the Court of Amsterdam. It is unknown when the next court hearing will take place in all three EAW cases and what the final decision in each case will be.

VIII. To sum it all up – conclusions and recommendations from the Dutch perspective

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 major changes and generated an impetus for the development of procedural rights in the Netherlands. For example, Directive 2013/48/EU unequivocally provided defendants with the right of access to a lawyer during the interrogation phase and, thus, brought to an end the longstanding debates over the existence of that right. The EU has also played an important role with regard to the procedural rights of victims; the rights of victims in Title IIIA of the WvSv have been directly influenced by European legislation. The EU's instruments therefore constitute a driving force for the further development of procedural rights in the Netherlands.

However, some critical remarks are in order. It should be noted that the implementation of the procedural rights Directives leaves room for improvement, for example in the case of Directive 2012/29/EU. This is also seen in the context of one of the most important EU instruments in the field of criminal matters: the EAW Framework Decision. The Dutch implementation of the Framework Decision is problematic because it introduced a general human rights refusal ground in Article 11 OLW and, to use the words of Advocate General Bobek, incorrectly transposed the provisions on *in absentia* trials in Article 12 OLW. Although the former provision is technically at odds with the EAW Framework Decision, it has never caused problems in practice in recent years, but the latter has proven a real obstacle in *Tupikas* and *Zdziaszek*.

Although the EU has taken some steps towards the harmonisation of some procedural rights, differences remain between the Member States with regard to their criminal procedural laws. From a Dutch perspective, these systemic differences within the EU do not seem to have a major 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 systemic differences between the legal orders of the Member States which relate to the right to a fair trial are rarely brought forward in EAW cases. Arguments of the defence rather concern (possible) violations in a particular case but, in recent years, such arguments have never been successful. The Amsterdam 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 also seen in regard to the use of foreign evidence in Dutch proceedings. According to the *Hoge Raad*, 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 lies in the relative importance of the principle of mutual trust between the Member States of the ECHR and the existence of effective remedies in foreign countries under their national law, as required by Article 13 ECHR. 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 than the judiciary.[139]

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 to the execution of an EAW. It has adopted the 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 about an especially violent gang, feared for his life and was admitted into a witness protection programme as a consequence. In the wake of the CJEU judgement in *LM*, it has adopted a similar test in the context of the right to a fair trial. We will see how the jurisprudence of the Court of Amsterdam will develop in this regard.

The road ahead – which steps should be taken?

In the light of these findings, the question of the next steps to be taken in the field of EU criminal matters is of particular interest. This discussion is not, of course, confined to the national borders of the Netherlands; articles and opinions on the topic can be found particularly in legal journals across the Member States.[140] Should new steps be taken and, if so, which terrain is most suited for EU action?

First of all, the Dutch case study shows that it might be prudent to first consolidate the present legal framework before taking new legislative action. Under the Stockholm Programme, many Directives on procedural rights were introduced in a relatively short timeframe. These Directives are, in some cases, just beginning to have an impact on the national legal order. The analysis of the Dutch legal system shows that sometimes the implementation of EU legislation leaves room for improvement. An example can be found in Directive 2012/29/EU; the implementation was not completed until after the transposition deadline and still has a majorflaw with regard to the reimbursement

[139] The virulent discussion in the House of Representatives that centred on distrust towards other countries which led to the introduction of Art. 11 into the OLW and the discussion on Dutch participation in the EPPO illustrate this.

[140] See L. Salazar, 'EU's Criminal Policy and the Possible Contents of a New Multi-Annual Programme: From One City to Another', 2014, 1, *Eucrim*, 22-26; E. Herlin-Karnell 'All Roads Lead to Rome: The New AFSJ Package and the Trajectory to Europe 2020', 2014, 1, *Eucrim*, 27-31.

of travel and accommodation costs. We have also seen that the Dutch transposition of the EAW Framework Decision can form an obstacle for cross-border cooperation in criminal matters. Taking these findings into account, it is advisable to improve monitoring of the implementation of EU legislation in the Member States to ensure timely implementation and to minimise the risk of a problematic and/or incomplete transposition.

A high level of ambition in the process of constructing the EU's area of criminal justice is welcome and desirable, but at the same time it should be ensured that the Member States are not confronted with a constant flow of new EU legislation that they simply cannot cope with. After all, such a situation would not further the overall goal that everyone is striving to achieve: the strengthening of fundamental rights and cooperation within the EU in the field of criminal matters. Indeed, the introduction and implementation of EU law is often a complex and tedious operation – it should not simply encompass the passing of a transposition act but it should also be ensured that the substantive provisions become an integrated part of a coherent (national) criminal law system. Therefore, the implementation process takes time and also requires resources. The fact that implementation requires efforts and financial investments from the Member States is, of course, no reason for the EU legislator to refrain from taking further steps in the field of criminal matters, but it should be ensured that this burden remains manageable. Although the intention to expand the procedural framework quickly and extensively is admirable, it is fair to say that 'too much, too soon' could have the opposite effect.

However, it is possible to distil an area from the study of Dutch criminal procedural law that is well-suited for EU legislative action in the (near) future. In recent cases, the Court of Amsterdam dealt with cases 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. The position of the Court of Amsterdam contrasts with other cases which do not involve deplorable prison conditions and the inherent risk of a violation of Article 3 ECHR and Article 4 CFR. Thus, it follows from the case law of the Court of Amsterdam that differences in detention conditions within the EU can form an obstacle for the effective operation of the EAW mechanism. Therefore, it is first up to the Member States to ensure that prison conditions in national jurisdictions comply with Council of Europe standards. However, given that these conditions play such a central role in ensuring the proper functioning of the system of mutual recognition, it is recommended that they receive attention from the EU legislator if the Member States do not succeed in achieving a level playing field in this regard.[141] It should be ensured that prison conditions in all Member States are in accordance with – at least – minimum EU standards.

[141] See T.P. Marguery, 'Towards the end of mutual trust? Prison conditions in the context of the European Arrest Warrant and the Transfer of Prisoners Framework Decisions', 2018, 25(6), *Maastricht Journal of European and Comparative Law*, 704-717.

CHAPTER V

Romanian criminal procedure at a crossroads: Legacies of the past and current challenges

Daniel NIŢU* and Diana IONESCU*

I. General background

The study aims to present the reader with an insight into Romania's criminal procedure system. One must bear in mind the fact the Romanian law, which was initially under the influence of French law, has undergone significant changes since 1944 in order to be aligned with Soviet-inspired law. After the fall of the Communist regime in December 1989, the legislator tried to adapt both criminal law and criminal procedure law to European standards. This legal reform has been greatly influenced, at least regarding the criminal procedure, by the ECtHR case law against Romania.

During the process of reform, the challenges met by both the legislator and the courts were quite serious. Given that the law and the administration of justice have been regarded as instruments through which the Communist regime was set up and consolidated, the legal reform had to overcome both the law and the professional culture of criminal justice actors.

The new Code of Criminal Procedure and the new Criminal Code of February 2014 were important steps in this legal reform. The recent case law of both ordinary courts and Constitutional Court revealed numerous problems in the interpretation and application of the new Code of Criminal Procedure. Furthermore, the measures taken at the EU level in order to strengthen judicial cooperation and enforce the protection of procedural rights have not been fully transposed into Romanian law.

The analysis starts with a presentation of the main features of Romania's criminal procedure system and the way in which it has evolved over time. Another section is dedicated to the transposition and implementation process of procedural rights' Directives for defendants at domestic level, with an emphasis on the delays and gaps. In the follow-up, the study presents the system of evidence law, namely the gathering and admissibility of evidence at the domestic level and in cases

involving cross-border cooperation. The analysis continues with the presentation of particular issues regarding detention law in the Romanian system, especially on the choices made by the domestic authorities between a preventive measure and an anticipated penalty. The final part of the study deals with victim law and general aspects regarding horizontal issues of implementation, coordination and cooperation.

II. Main features of Romania's criminal procedure

A. Historical background. The French model and the Soviet one

Historically, French legislation was the main source of inspiration for Romania's criminal procedure. As a result, the 1865 Code of Criminal Procedure reflected a strong civil law (continental) paradigm: the search for truth was a basic rule which dominated criminal proceedings; the latter followed a two-stage process, the pre-trial stage and the trial, united by the idea of a common inquiry in order to ensure the discovery of the truth; there was no contest between the prosecution and the defence; the court had the right to be an active actor in the evidential stage of the trial and the victim could claim compensation under the civil law of tort. The types of judicial authorities involved also mirrored the French system, thereby including the judicial police, the investigating judge, the prosecutors (which were part of the Public Ministry), the courts, the juries and the Court of Cassation. The 1937 Code of Criminal Procedure was predicated on a similar paradigm. Nonetheless, some amendments have been inspired by the 1930 Italian Code of Criminal Procedure.

On the eve of World War II, Romania's criminal procedure mirrored the emerging authoritarian regimes, namely the authoritarian monarchy of Carol II (1938-40) and the authoritarian regime of General Ion Antonescu (1940-44). Following the same path, the 1938 Constitution repealed the juries. In 1944, the establishment of the Communism regime under the supervision of the Soviet army brought a new paradigm of criminal procedure to Romania. This totalitarian regime used the law as a tool in order to strengthen its power (i.e. the instrumental role of the law). As a result, the 1937 Code of Criminal Procedure was extensively amended and, to this end, the Soviet type of criminal process was used as a guiding model. The 1969 Code of Criminal Procedure followed the same model.

The socialist model of criminal process contains two main features, which are closely intertwined: the prosecutorial bias at trial and the search for material truth. These features were included in statutory law but, most importantly, they created structural frameworks in people's minds which dominated the professional culture of the criminal justice system. These structural frameworks in people's minds and informal practices were necessary in order to make the system function according to the Communist ideology.

The investigating judge function was abolished in 1952 and prosecutors took exclusive control of criminal investigations. Furthermore, according to the new Law on Procuracy[1], largely inspired by the Soviet one, the prosecutors had the right to

[1] Law No. 6 of 1952.

supervise the courts' activities[1]. This rule had an important role in consolidating the prosecutorial bias at trial because it pressurised judges towards being deferential to prosecutors. As a result, acquittals were avoided.

The search for material truth became the main basic rule of criminal procedure under the socialist model. It promoted close affinity between judges and prosecutors and therefore, consolidated the prosecutorial bias at trial. The courts' right to order additional evidence (as inspired by the French system) was replaced by a duty to bear the burden of proof. As a consequence, where the prosecutor's evidence was not strong enough and guilt could not be proven, the court was under the obligation to present *ex officio* additional evidence in order to find the material truth. In reality, the judge's duty was to support the prosecutor, thus reinforcing the prosecutorial bias. As noted by Strogovici, "If the prosecution did not present sufficient evidence during the trial, if it did not adduce conclusive evidence, the court is obliged to fill in the gaps left by the prosecutor and to order on its own motion new evidence".[2] The infringement of the judge's duty to bear the burden of proof was a ground for appeal.

The duty to find the truth was an element that blurred the boundaries between judges and prosecutors. According to the Soviet model, both prosecutors and judges have a duty to find the material truth and, as a result, they are part of the same team. An active defence or any kind of defence would be in contradiction with this purpose. Consequently, the most important limits brought to fundamental rights, including defence rights (e.g. the suspect did not have the right to be assisted by counsel during the pre-trial interviews), were justified mainly on the grounds of material truth. The search for truth principle illustrates how the socialist model of criminal procedure borrowed rules from the continental paradigm. Although in appearance the principle remained the same, different content applied. This created confusion as to the real significance of the rules promoted by the socialist model of criminal procedure.

The ideas promoted by the socialist model were strongly embodied in informal practices and beliefs which were not regulated in statutory laws. These practices created an important network of attitudes and mentalities, which is the most important legacy of the past and the main current challenge for Romania's criminal procedure. A long time practice has considerable influence over a professional culture. The way in which the criminal trial was dominated by the material truth, the close intertwining between judges and prosecutors and the prosecutorial bias at trial had (and still have) a strong influence over the understanding of the presumption of innocence, the separation of judicial functions and defence rights. Against this background, it is fair to say that Romania's criminal justice system is underpinned by strong cultural conservatism.

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[1] Law No. 6 of 1952, Art. 5 letter d).

[2] M. Strogovici, *Procesul penal sovietic*, Bucureşti, Editura de stat pentru literatura juridică, 1949, 178.

B. Romania's criminal procedure under post Communist rules

The fall of Communism in December 1989 brought Romania onto a path towards democratic reforms. This transition was also reflected in criminal legislation and, as a result, the 1969 Code of Criminal Procedure was repeatedly amended (e.g. in 1990, 1996, 2003, 2006 and 2010). However, this process did not deliver a sudden abolition of the legacies from the past. In post Communist Romania the professional culture of the system remained strongly attached to conservatism. This is because the introduction of new legal frameworks, designed to challenge pervading socialist culture, should be accompanied by special training aimed at changing mentalities and informal practices[3]. If such training is missing, despite the regulation of new rules, legal reform is unlikely to have a tangible impact.

Cultural conservatism seems to be a special feature of the criminal procedure in countries where the socialist model had been the dominant paradigm. As pointed out by Alexei Trochev,

> (T)his Soviet-era informal judge-prosecutor relationship, as shown by a surprisingly stable detention and acquittals' rate, is so strong that it resists any change in international shaming, formal institutions, political regimes, crime rates and court case loads. Its strength lies in the blend of trust, mutual understanding and fellow feeling between judges and law enforcements officials, who exert occasional pressure against recalcitrant judges, judges who dare to disagree with the wishes of prosecutors.[4]

Reforms were brought to Romania's criminal procedure especially under the pressure of the ECHR and EU law. Thus, the prosecutorial bias at trial, which had resulted in a low rate of acquittals, serious violations of the presumption of innocence, an extensive use of pre-trial detention and a low level of supervision as to the legality of evidence, all led to numerous convictions at the ECtHR regarding, especially, Article 5 and 6 of the ECHR. For a better understanding of Romania's criminal justice conservatism it is to be noted that the incentives for reform came mostly from outside the country.

C. The prominence of the principle of efficiency and expediency

The 2014 Code of Criminal Procedure was adopted by Law no 135 of 2010[5], as amended by Law no 255 of 2013[6], and which entered into force on 1 February 2014. In the Explanatory Statement of the Code, the drafters pointed out that the continental paradigm is preserved while including a few adversarial rules adapted to Romanian

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[3] Lately, especially around and after the entry into force of the new criminal legislation, training sessions for both judges and prosecutors are being organised as part of 'continuous professional training'. More information is available at http://inm-lex.ro/displaypage.php?p=49.

[4] A. Trochev, 'How judges arrest and acquit. Soviet legacies in Postcommunist criminal justice', *in* M.R. Beissinger, S. Kotkin (eds.), *Historical legacies of Communism in Russia and Eastern Europe*, New York, Cambridge University Press, 2014, 174.

[5] Published in the *Official Gazette*, No. 486 from 15 July 2010.

[6] Published in the *Official Gazette*, No. 515 from 14 August 2013.

legal culture.[7] For the drafting of the adversarial rules the main source of inspiration was the Model Code of Criminal Procedure for post-conflict criminal justice.[8] Other important rules were also inspired from this source.[9]

Initially, the drafters intended to introduce more items from the adversarial model in an attempt to mark a shift from the Communist past and remove the prosecutorial bias exercised by the judges. During the drafting process, this intention was abandoned. Cultural conservatism, together with new purposes like efficiency and expediency, became the driving force of the new legislation. Thus, only disparate elements from the adversarial system were introduced. These include, *inter alia*, 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 and the reasonable doubt standard. However, the whole structure of criminal proceedings and the dominant mentalities were not subject to change.

The drafting of the 2014 Code of Criminal Procedure was governed by the need to ensure efficiency and expediency of criminal proceedings. According to the Explanatory Statement, this new purpose of procedural law was the outcome of five reasons.[10] Firstly, overloading of the courts and prosecutors' offices. Secondly, the excessive length of proceedings and the undue delays in criminal cases. This argument has been a ground for several decisions rendered by the ECtHR in cases against Romania. Thirdly, unfinished cases due to procedural reasons. Fourthly, the social and human costs reflected in the high consumption of time and money. Fifthly, the lack of trust of individuals in the efficiency of criminal justice.

However, the means to achieve the purpose of efficiency and expediency of the criminal proceedings were not found by the drafters in a further development of the administrative capacity of justice (e.g. increasing the number of court rooms, increasing the number of law enforcement officials). To a considerable degree, the efficiency and expediency of the proceedings took precedence over the procedural rights of the individuals and over the adversarial rules.

The preliminary chamber is a good example of this adaptation of adversarial rules to the principles of efficiency and expediency. Before the beginning of the trial, the 2014 Code of Criminal Procedure provides that a preliminary proceeding has to take place. Its purpose is to ensure a judicial review focused only on the legality of the indictment and evidence collected during the investigation. Under the 1969

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[7] This being said, the 2014 Code of Criminal Procedure does not imply a broad reform in order to introduce adversarial culture in Romanian criminal procedure.

[8] V. O'Connor, C. Rausch, H.J. Albrecht, G. Klemencic (eds.), *Model Codes for post-conflict criminal justice*, Washington, United States Institute of Peace Press, 2008.

[9] See 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.

[10] The Explanatory Memorandum attached to the legislative project of the 2014 Code of Criminal Procedure was published in 2009 (at the same time as the submission of the project to the Parliament) on the website of the Chamber of Deputies (http://www.Cdep.ro/proiecte/2009/400/102/em412.pdf).

Code of Criminal Procedure, the trial began with this judicial review on legality and, consequently, the rules governing the trial were applicable (e.g. a public session and an adversary hearing). Under the 2014 Code, the same review was conducted in closed session and without an adversary hearing. In this regard, the preliminary chamber, as regulated by the 2014 Code, represents a step backwards.

The main function of 'the preliminary chamber' is the judicial review of the legality of evidence. Originally, this transplant from the adversarial culture was designed to minimise the prosecutorial bias at trial and to give a strong incentive to the judges to examine defence motions regarding exclusionary rules. Finally, this aim was considerably watered down by the efficiency and expediency principles. Thus, in the original drafting of the 2014 Code of Criminal Procedure (provisions no longer in force due to several judgements of the Constitutional Court), 'the preliminary chamber' was only a 'paper review' exercised on the case file and the defendant's written submissions. Even if coercion or improper inducements were issues of fact that could be proven only by presenting evidence (e.g. the examination of a person who 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.

However, the Constitutional Court brought back the adversarial spirit of 'the preliminary chamber'. In 2014, soon after the entry into force of the 2014 Code of Criminal Procedure, the court ruled that all private parties, including the defendant and the civil party, have the right to be present at this preliminary proceeding and to present motions.[11] The 'chamber' has to be a real hearing. Actually, the court expressly ruled that the principle of fair trial, as provided by the Romanian Constitution and Article 6 of the ECHR, requires an adversarial hearing, a simple 'paper review' being insufficient. In 2017, the Constitutional Court ruled again and stated that, in order to argue motions during the preliminary hearing, all the parties have the right to present evidence (e.g. the examination of a witness in relation to a motion aiming to exclude a coerced statement).[12]

To conclude, the Romanian 'preliminary chamber' is a good example of how longstanding mentalities have persisted among criminal justice actors. Furthermore,

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[11] Decision No. 641 of 11 November 2014, published in the *Official Gazette*, No. 885 from 5 December 2014. Following the Court's Decision, the Government passed Emergency Ordinance No. 82 of 2014 (published in the *Official Gazett*e, 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).

[12] Decision No. 802 from 5 December 2017, published in the *Official Gazette*, No. 116 from 6 February 2018. According to Article 147 paragraph 2 from the Constitution, the unconstitutional provision – namely, Art. 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; otherwise the text is repealed automatically. At this time (28 December 2018), Art. 345 para. 1 was still not amended by the Parliament or the Government, as the draft law amending the CPP was challenged to the Constitutional Court, as we will show.

under new principles, the professional culture dominated by conservatism is ready to reinvent itself. Thus, the special relationship between judges and prosecutors and the prosecutorial bias not only resisted after the collapse of Communism, but they were also able to consolidate under new grounds.[13] In Romania, these new grounds focused on the efficiency and expediency of the criminal trial.

Despite the Constitutional Court's ruling that transformed the preliminary hearing into an adversarial procedure, the idea of focusing only on legality is still mistrusted by Romanian judicial actors. Firstly, the judges are reluctant to admit defence motions on the exclusionary rules.[14] Secondly, the Parliament wants to repeal the preliminary hearing and to return to the statutory solution from the 1969 Code of Criminal Procedure, meaning an examination of legality as part of the trial.[15]

Therefore, even after the 2014 Code of Criminal Procedure entered into force, Romania's criminal procedure remained attached to the continental paradigm as it was influenced by the socialist model. Some rules have been repealed, such as the judges' duty to bear the burden of proof, but others are still in force, including, for example, the prosecutors' duty to supervise the legality at trial and the common duty of judges and prosecutors to search for the truth. This, together with a strong cultural conservatism, resulted in the preservation of some important features of the socialist model, the prosecutorial bias at trial being a case in point.

D. The persistence of legal conservatism

Against the background of legal conservatism, acquittal rates have remained very low. In addition, the denial of prosecutors' motions regarding investigative measures

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[13] See especially A. Trochev, 'How judges arrest and acquit. Soviet legacies in Postcommunist criminal justice' (n5). Several examples from Eastern Europe are presented at p. 166-167 and 175.

[14] See, C. Ghigheci, *Cereri şi excepţii de camera preliminară I. Procedura, regularitatea actului de sesizare, legalitatea actelor de urmărire penală*, Bucureşti, Hamangiu, 2017, and C. Ghigheci, *Cereri şi excepţii de camera preliminară I. Legalitatea şi loialitatea administrării probelor Comentarii şi jurisprudenţă*, Bucureşti, Hamangiu, 2018.

[15] See Art. I.224 from the draft law amending the Criminal Procedure Code and Law No. 304 of 2004 on judicial organisation. The draft law was adopted by the Senate on 13 June 2018 and by the House of Deputies (decision-making 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 unconstitutionality (for the full legislative process see the House of Deputies' official website at http://www.cdep.ro/pls/proiecte/upl_pck2015.proiect?idp=17179). The Constitutional Court was seized by the High Court of Cassation and Justice (on 21 June 2018, case file No. 945A/2018, available at: http://www.cdep.ro/proiecte/2018/300/70/3/sesiz373.pdf), by a number of 94 members of the House of Deputies from opposition parties (on 22 June 2018, case file No. 961A/2018, available at: http://www.cdep.ro/proiecte/2018/300/70/3/codppsesizarepnlusr.pdf) and by the President himself (on 12 July 2018, case file No. 1091A/2018, available at: http://www.cdep.ro/proiecte/2018/300/70/3/sprCPP.pdf). The court admitted, partially, the objections on 12 October 2018. As a result, the law is to be once again examined by the Parliament and has to reflect the Constitutional Court' decision – see Decision No. 633 from 12 October 2018, published in the *Official Gazette,* No. 1020 from 29 November 2018.

which amount to limits to the right of privacy (e.g. wiretapping) are almost non-existent. In 2017, the percentage of acquitted defendants of the total number of tried defendants was 1.72% (1,036 acquitted persons out of 60,185 tried persons, meaning 59,839 individuals and 346 legal entities). Out of these, 12 acquitted persons were minors and 63 have been held in detention. 123 persons out of 1,036 were acquitted because of decriminalisation or insanity.[16] Regarding pre-trial detention, it seems that, lately, a slight increase in judges' decisions rejecting such a motion and ordering judicial supervision instead can be observed[17].

In a similar vein, the trial is not a confrontation between parties, after which the court must decide whether the prosecutor proved 'beyond reasonable doubt' that the defendant committed the criminal offences that he/she is charged with. As for the judges and prosecutors, the criminal trial is still a common inquiry aiming to find the truth. However, nowadays, judges must no longer bear the burden of proof. Judges are still entitled to seek further evidence but this right can be exercised only in a subsidiary manner compared with the parties' presentation of evidence (CCP, Article 100 paragraph 2). This means that the court can present *ex officio* evidential motions only when the parties, the prosecutor and the private parties have finished presenting their own motions. Subject to this condition, the court may adduce additional evidence in order to find the truth (CCP, Article 374 paragraph 10). At least in statutory law, the judges' duty to bear the burden of proof was repealed.

As a general conclusion, we appreciate that the current criminal procedure in Romania is a mixed one. The basic premises are part of the continental, civil law paradigm, as it was influenced by the socialist model. As a result of considerable cultural conservatism, some of the legacies of the past are still in place, not only in statutory law, but also in the form of some informal practices internalised by criminal justice actors. According to this paradigm, a couple of adversarial rules have been implemented. Thanks to the Constitutional Court's rulings, these have remained part of Romania's statutory law. However, training of judges and prosecutors should be considered in order to facilitate the application of these rules.

As for cross-border cooperation, the subject of the following section, the numerous changes and amendments introduced to Romanian criminal procedural law, the import of adversarial elements into a continental paradigm and the constant debate on topics such as constitutionality, conventionality, Europeanisation and (better) legal models from comparative law have a positive effect. The process of carrying out legal reforms has raised awareness about the diversity of legal traditions regarding criminal procedural law across Europe in particular and, more precisely, across EU Member States. The Romanian criminal justice system is therefore accustomed to the idea of legal diversity and, from this point of view, legal diversity is not an issue. However, it can be an issue when we are talking about international cooperation. Without minimum harmonisation, this legal diversity can have a negative impact in this area

[16] The information is available in the 2017 Activity Report of Public Ministry (Annexes No. 2, No. 5 and No. 9), available online at: http://www.mpublic.ro/sites/default/files/PDF/raport_activitate_2017.pdf.

[17] See 2017 Activity Report of Public Ministry, Chapter IV.

due, especially, to the difficulty of knowing the other legal system and, consequently, to a lack of trust or, at the other end of the spectrum, to full trust without exercising the minimum supervision imposed by the EU instruments.

E. Defence rights

Defence rights are explicitly provided as a constitutional right. According to Article 24 of the Romanian Constitution (entitled 'Right of the 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 but also for any other private party (the victim, the civil party and the civilly liable party). It can be exercised during the pre-trial investigation, preliminary chamber and trial. In Romania, the status of the person under investigation goes from being a suspect to a prosecuted person. Because of the specificities of the Romanian procedure, some terminological clarifications have to be presented.

A person under investigation is called either a 'suspect' (suspect) or a 'prosecuted person' (*inculpat*). A person brought to trial is also called 'prosecuted person' (*inculpat*). The 'suspect' is the person against whom a reasonable suspicion of having committed the offence under investigation exists (CCP, Article 305 paragraph 3). The investigated person becomes a suspect when the prosecutor takes the decision to open an investigation into him/her (*in personam*). The decision is taken after the prosecutors or the judicial police, under their own jurisdiction, have opened an investigation into a specific criminal offence (*in rem*).

Just like the prosecuted person, the suspect is entitled to the entire spectrum of defence rights. The only difference is that the suspect's right to access the case file can be postponed without an upper time limit. A suspect becomes a prosecuted person (*inculpat*), when the criminal action is initiated by the prosecutor. In other words, the prosecutor has taken the decision to prosecute. The decision to prosecute is taken by the prosecutor when there is evidence leading to a reasonable assumption that the person committed the offence.[18] The degree of suspicion must be higher than the one regarding the status of the suspect.

When the prosecutor delivers the decision to prosecute, the person under investigation moves from being a suspect to the status of prosecuted person. Pending criminal investigations, the decision to prosecute is delivered only when the prosecutor submits an application for a warrant for detention. This is due to the fact that, in Romanian law, only a prosecuted person (and not the suspect) can be subject to a warrant for detention. In that case, after the prosecutor delivers the decision to prosecute and the warrant for detention is delivered by the judge of rights and liberties, the pre-trial investigations continue.[19] When the prosecutor does not submit

[18] CCP, Art. 15 and Art. 309, para 1.

[19] This is a legacy form the Communist time. In fact, the decision to prosecute does not mean a formal accusation, but merely a condition for a warrant for detention. That is why the decision to prosecute is taken during the criminal investigation.

such an application, the suspect becomes a prosecuted person only at the end of the investigations, right before the case is brought to trial.

As a general concept, following the ECtHR, 'accused' or 'accused person' will be used as referring to the suspect, the prosecuted person and the defendant.

The accused persons have the right to be assisted by a counsel under all circumstances. To that effect, they must be informed about this right at the beginning of the first questioning. There is no particular criminal offence which can justify restrictions being introduced to the right to a counsel. Moreover, there are no circumstances which can justify postponing the exercise of such a right.

The law provides that only the right to access the case file can be postponed for a period with no upper time limit (as for the suspect) and up to ten days (as for the prosecuted person).[20] In the latter situation, the right to access the case file cannot be restricted when the prosecutor submits a motion for a warrant for detention.

The violation of the right to counsel is a ground of nullity. The express nullity is involved only in one situation, namely when both the legal assistance and the presence of the counsel are mandatory (e.g. the interrogation of an accused person held in custody or the interrogation of an accused person who is under age or has no legal capacity). In all other cases, the nullity is a relative one. As a result, it is for the courts to balance the need to apply this ground of nullity. The accused can have the assistance of a counsel (or more than one) at any stage of the proceedings (CCP, Article 89). Conversely, one counsel must not represent more than one client in the same proceeding if conflict of interests may arise. The accused persons have the right to choose any counsel they want. This right is limited only by the incompatibilities provided by the law for the counsels (CCP, Article 88 paragraph 2). Thus, the following persons may not be a counsel of a party in a criminal proceeding: (1) the spouse or a relative up to the fourth degree of the prosecutor or the judge; (2) witnesses summoned in the case; (3) those who participated in the same case as judge or prosecutor; (4) other private parties or subjects of the criminal proceedings.

Legal assistance may be either optional or mandatory. The legal assistance is mandatory in the following cases (CCP, Article 90): 1) when the accused is under age; 2) when the accused is held in custody (arrest or detention); 3) when the accused is deprived of liberty in an educational centre; 4) when the accused is held under compulsory medical admission; 5) whenever the judicial authorities believe that the accused persons could not prepare the defence on their own; 6) the accused is tried for the commission of an offence carrying a potential penalty of more than five years (in this case, the legal assistance is mandatory only during the preliminary hearing and trial).

Where legal assistance is mandatory, the accused persons have the right to choose a counsel of their own. When this is not done, the judicial authorities make an official request to the Bar in order to appoint a counsel, regardless of the accused persons' financial means. In such a case, the accused persons do not have the right to choose a particular counsel from the Bar's list. The counsel will be assigned by the Bar.

[20] CCP, Art. 94.

However, it is a common practice, especially for judges, to ask defendants if they agree to be assisted by that particular counsel.

In Romania, mandatory legal assistance is provided by the Bar from a list of counsels who meet specific criteria and who agree to exercise this defence function. These counsels are paid a flat fee, set mainly according to the stage of the proceedings and the number of co-defendants. The fees are incurred by the State (CCP, Article 274 paragraph 1), through the Ministry of Justice.

As a summary, the law stipulates that suspects, prosecuted persons or defendants have the following procedural rights: a) not to give statements during the criminal proceedings. The judicial authorities are compelled to draw their attention to the fact that their refusal to give statements shall not trigger any unfavourable consequences and that the statements they give may be used as evidence against them; a[1]) to be informed about the facts that they are being investigated for and the charges brought against them; b) to have access to the case file; c) to have a counsel of their own choice or, in cases of mandatory legal assistance, the right to be assisted by an appointed one; d) to present evidence and to argue in court; e) to submit any request relating to the adjudication of both criminal and civil action; f) to have the assistance of an interpreter, free of charge, when they cannot understand or they cannot properly express themselves in Romanian; g) the right to use a mediator in cases permitted by law (when the offender and the victim have the right to come to terms, with the consequence of ending the criminal proceedings); g[1]) the right to be informed about their rights (CCP, Article 83).

Defence rights are also recognised when the accused is a legal entity. Given that such an entity cannot appear in person at the proceedings, it has to designate a representative (CCP, Article 491 paragraph 1). A legal entity has the right to have a counsel in addition to its right to have a representative.

The counsel can exercise all the rights recognised by law for the accused person. In addition, the counsel has the right to attend any investigative action conducted by the police or by the prosecutor (CCP, Article 92). The counsels of the other private parties also have the right to attend the investigative acts. It is to be noted that the accused person and the other private parties do not have this right. It is a right granted only to counsels.

The rationale of the counsel's right to attend was to ensure an oversight mechanism meant to protect the examined person from unlawful actions from the investigators. It was not designed as a means to ensure an adversarial form of questioning during the pre-trial stage. In practice, however, investigative authorities sometimes invite counsels to address questions.

By way of exception, the law stipulates that the counsel has no right to attend: 1) the technical surveillance measures and 2) the search for persons and the search for vehicles. The first exception is justified by its secret character. For instance, the wiretapping of any type of remote communications cannot be carried out by the investigators with the suspect's counsel nearby. The second exception is justified by the fact that, in many cases, the search for persons and the search for vehicles are ordered on the spot when there is a reasonable level of suspicion that the search will result in the collection of evidence.

Investigators have the duty to inform the counsel about the date and time when and the place where an investigative action shall be performed. The notification does not contain the type of the investigative act to be performed or the names of the persons to be questioned. As a rule, this notification is usually carried out one day before the date of the investigative act in order to allow the counsel to include this activity in his agenda. As an exception, where a search of premises is conducted, the notification can be done only after the investigators appear at the premises subject to a search (CCP, Article 92 paragraph 5). Where the counsel is not present, the investigative action can continue as long as the notification was properly done.

The counsels' right to attend the interrogation of witnesses and co-accused persons during pre-trial investigations is a specific feature of Romania's criminal procedure. In everyday practice, the prosecutors avoid the application of this rule by postponing the moment when a person becomes a suspect (i.e. the decision to open an investigation *in personam*).[21] Due to the legacies of the past, the counsel is still regarded as an obstacle for the search of truth principle.

F. Victims' rights

Under Romanian law, the victims have extensive procedural rights: 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, about 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; g[1]) to have the assistance of an interpreter, free of charge, when they cannot understand or cannot properly express themselves in Romanian; h) to be assisted by counsel; i) to use a mediator (CCP, Article 81).

Using these rights, especially the right to present evidence and to argue in court, the victim can be a strong upholder of the prosecutor's case. In practice, commonly, the victims do not undertake this role. The victim also has the right to challenge the prosecutor's decision to dismiss a case. When the preliminary chamber judge grants such an appeal and orders the beginning of the trial, the victim will be a private prosecutor in court. However, in practice, such cases are extremely rare.

Due to the French influence, the Romanian criminal process also contains a civil dimension aiming to compensate for losses. The compensation claim is usually submitted by the victim. Thus, 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 for 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).

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[21] See, for example, Cluj Tribunal, Criminal division, judgment No. 358 from 10 February 2015, final by Cluj Court of Appeal, Criminal division, judgment No. 112 from 12 August 2015. As well, see Harghita Tribunal, Criminal division, judgement No. 56 from 22 November 2016, final by Tg. Mureş Court of Appeal, Criminal division, judgment No. 11 from 23 February 2017.

Where victims do not want to actively participate in the proceedings, they can be examined as witnesses.

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 the right to submit an appeal to the High Court of Cassation and Justice concerning the civil compensation and the verdict, but only when the verdict has influenced the decision on the compensation claim. Where the victims are under age or have no legal capacity (e.g. a mentally ill person), their legal assistance is mandatory (CCP, Article 93 paragraph 4). In addition, taking into account the personal circumstances of victims and their ability to defend themselves personally, judicial authorities may appoint a counsel to assist them. The victim's counsel has the right to attend investigative actions in the same conditions as the accused person's counsel (CCP, Article 93 paragraph 1).

III. Transposition and implementation of procedural rights' Directives for defendants – minimum standards, gaps and delays

A. Preliminary remarks

Drafted under the influence of the EU and the ECHR and its case law, the 2014 Code of Criminal Procedure itself represents an up-to-date transposition of all major European instruments, both regarding procedural rights and cooperation in criminal matters.

Access to the case file is a good example. Considering the case *Forum Maritime* v *Romania*, judgment of 4 October 2007[22], 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 (Code of Criminal Procedure, Article 94 paragraph 1). Unfortunately, the drafting process and the period between the adoption of the new Code by the Parliament (2010) and its entry into force (1 February 2014) meant that a considerable amount of time had passed; when it entered into force, the Code was no longer as up to date as the drafters initially wanted. For example, the special commission that worked on the draft project referred to all existing Framework Decisions (as well as future Directives), trying to embed all into the content of the new Code by mid-2010. But, as the EU legislator was active as well in the period from 2010 to 2014, the Code was, from the outset, a little bit outdated.

Therefore, as a general assessment, the 2014 Code of Criminal Procedure tried to incorporate some principles derived from EU legal instruments, raising the standards of protection for both the rights of accused persons and the protection of victims. However, in everyday practice, there is a tendency to limit the content of procedural rights or their exercise. As previously mentioned, a good example is the postponement of the moment when a person becomes a suspect in order to avoid the counsel's right to attend the pre-trial examination of witnesses. Another example is the postponement of the decision to prosecute in order to avoid the exercise of the right to access the case file as is provided for the prosecuted person.

[22] See ECtHR, *Forum Maritime v Romania*, applications No. 63610/00 and 38692/05, 4 October 2007, available at: http://hudoc.echr.coe.int/eng?i=001-123075.

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 the existing system is to refer directly to legal provisions enshrined in domestic legislation. Still, this is applicable for the operative part of the judgment (the French *dispositif*), which contains only the verdict or the decision. In the largest part of the judgment, containing the reasoning, the courts are already used to making extensive reference to ECtHR case law, especially regarding Article 6 (when dealing with the merits) and Article 5 (in cases of preventive measures). More recently, references have been made to the CJEU's 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 have yet not been fully transposed).

B. State of transposition

In order to ensure better compliance with ECtHR case law, special training sessions for both judges and public prosecutors are being organised both at a centralised 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).

Regarding EU procedural Directives, transposition gaps do exist, as the Romanian legislator is currently not entirely respecting its obligation regarding several EU instruments. There are at least three reasons for these gaps. Firstly, the 2014 Code of Criminal Procedure covers sufficient areas of the Directives and so it was fair enough for the Romanian legislator to communicate to the Commission that at least partial transposition had been achieved (examples will follow). Secondly, it was no easy task for the Ministry of Justice to identify exactly which provision from which Directive had not been implemented by the new set of legislation in force since 2014. Last but not least, due to the political agenda, the government was being periodically changed and so there was a constant wave of changes within the Ministry of Justice, leading to an agenda that was not so clear 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 27 October 2013 as a deadline for its transposition. 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, the amended provisions did not fully implement all the provisions of the Directive.[23] For instance, Article 329 paragraph 3 of the Code of Criminal Procedure provided that only the indictment (*rechizitoriul*) will be translated, not 'all documents which are essential', as Article (1) of the Directive requested. In addition, other provisions of the Directive, such as the necessity for interpretation

[23] See especially A. R. Trandafir (Ilie), D. Pârgaru, *Directiva privind dreptul la interpretare şi traducere în cadrul procedurilor penale, netranspusă în legislaţia 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.

and the availability of interpretation when lodging an appeal had, at that time, no corresponding provisions in Romanian law.

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 had 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 proceedings was no longer mentioned. This was due to Law no 76 of 2016[24], which amended the Law no 178 of 1997 regarding interpreters 25, thus transposing Article 5 from the Directive. However, it was transposed with a three year delay.

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 2014 Code of Criminal Procedure, amended by Law no 255 of 2013. Eventually, Government Emergency Ordinance no 18 of 2016[26] carried out the full transposition, but only by the end of May 2016.

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[27] amending Law no 302 of 2004 regarding international judicial cooperation in criminal matters[28].

According to the Explanatory Memorandum, Law no 236 of 2017 transposed the provisions of Article 10 paragraphs 4-6 from the Directive and thus the Romanian legislator fulfilled its obligations. This conclusion was recently criticised 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.[29] 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. Having in mind both the general principles found in the preamble of the Directive and the actual provisions regarding access to a lawyer, in our opinion, Romanian legislation transposed, eventually, the EU instrument. The way in which the authorities are applying the law is another issue, which can be challenged in court.

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[24] Published in the *Official Gazette*, No. 334 from 29 April 2016.

[25] Published in the *Official Gazette*, No. 305 from 10 November 1997.

[26] Published in the *Official Gazette*, No. 389 from 23 May 2016.

[27] Published in the *Official Gazett*e, No. 993 from 14 December 2017.

[28] Republished in the *Official Gazett*e, No. 377 from 31 May 2011.

[29] 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.

The transposition process of 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 is still ongoing in Romania, the transposition deadline being 1 April 2018. The draft law amending the Code of Criminal Procedure and Law no 304 of 2004 on judicial organisation (published in the *Official Gazette*, No. 827 from 13 September 2005) contains provisions which will transpose, *inter alia*, the Directive. As previously mentioned, the draft law was adopted in June 2018 by the Parliament but the law was not promulgated by the President, as it was challenged in the Constitutional Court regarding certain aspects of unconstitutionality regarding other provisions from the law than the ones transposing the Directive.

When transposed, the Directive will certainly enhance the right to a fair trial in Romania's criminal justice system as nowadays the presumption of innocence tends to be more like an abstract idea. Even if the presumption of innocence is a constitutional right (Constitution, Article 23 paragraph 11) and a procedural right stipulated in the Code (CCP, Article 4 paragraph 1), due to the legacies of the Communist past, it is still difficult to integrate the presumption of innocence into the professional culture of the Romanian justice system. In the socialist model, traditionally, a presumption of guilt dominates the criminal investigation from the start.

As a result, the presumption of innocence is sometimes breached by the authorities when they are making public statements regarding the guilt of a person prior to a verdict of conviction. This is an argument which led to several decisions in ECtHR case law. These judgments identified a breach of the applicant's right to the presumption of innocence under Article 6 § 2 of the ECHR as a result of statements made by Romanian public officials during the course of the trial.[30] Nowadays, even if public statements tend to be more in line with the presumption of innocence, there are still cases where the fact that the presumption of innocence is not fully respected could be identified (e.g. the press communications of the National Anticorruption Department). For example, the latest 'press communications' of the National Anticorruption Department are currently information provided about the case of a major business man[31] sent to trial for buying influence, a chief surgeon sent to trial for taking bribe[32] and two lawyers from the Bucharest Bar sent to trial for peddling influence[33]. In all these cases, the full name and position of the person, as well as a short summary of the offences she / he allegedly committed, are presented. Following

[30] E.g. *G.C.P. v. Romania*, application No. 20899/03, judgment of 20th December 2011, available at: http://hudoc.echr.coe.int/eng?i=001-108237. See also *Păvălache v. Romania*, application No. 38746/03, judgment of 18th October 2011, available at: http://hudoc.echr.coe.int/eng?i=001-123797; *Vitan v Romania*, application No. 42.084/02, judgment of 25th March 2008 (published in the *Official Gazette*, No. 114 from 9 February 2010), available at http://hudoc.echr.coe.int/eng?i=001-122592.

[31] See Press Communicate from 14 November 2018, available at: http://www.pna.ro/comunicat.xhtml?id=9139.

[32] See Press Communicate from 12 November 2018, available at: http://www.pna.ro/comunicat.xhtml?id=9137

[33] See Press Communicate from 7 November 2018, available at: http://www.pna.ro/comunicat.xhtml?id=9136.

the requirement of the above-mentioned decisions, all the press communications end with the same stereotype, namely: "We point out that this stage of the criminal proceeding is – according to the Criminal Procedure Code – finalising the criminal investigation and sending the indictment to the court for trial, and it does not represent a breach of the principle of the presumption of innocence".

Other examples of violations of the right to the presumption of innocence can be found in ECtHR case law. The ECtHR ruled that, according to Romanian law, the use of handcuffs should be limited to exceptional circumstances and not exceed what is absolutely necessary (*Căşuneanu v. Romania*, judgment of 16th April 2013 and *Costiniu v Romania*, judgment of 19th February 2013). The court denied the applicants' claim for non-exhaustion of domestic remedies. However, the court ruled that, because the Romanian law strictly regulates the use of handcuffs, the problems have therefore arisen as a consequence of the implementation norms and regulations adopted by the executive and the police. Contrary to the law, these regulations made the use of handcuffs a default practice. This is a good example of cultural conservatism.

The presumption of innocence can be breached in cases where the accused was handcuffed and presented to the public in this way. For example, in the high profile cases of a former minister or of a former chief prosecutor of the Department for Investigating Organised Crime and Terrorism, both defendants were, when escorted from the courtroom to places of preventive detention, shown handcuffed in the media in pictures and videos[34].

As regards Directive 2016/800/EU on procedural safeguards for children who are suspects or accused persons in criminal proceedings of 11 May 2016 and 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, there are no official records regarding the transposition process and so most probably the transposition process has not yet begun. Regarding the former, the 2014 Code of Criminal Procedure already provides a distinct status for children who are suspects or prosecuted persons in criminal proceedings (e.g. the special rules stipulated in Articles 504-520), so most parts of the Directive are already covered by domestic legislation. As for the Legal Aid Directive, most provisions were already incorporated in the 2014 Code of Criminal Procedure, which considers that access to a lawyer (either a selected one if the accused person has sufficient resources or an *ex officio* one[35]) is a fundamental principle. However, the provisions of Article 1 (c) are not currently *per se* covered by domestic legislation.

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[34] See M. Bornea, *Spectacolul cătuşelor este nelegal*, available online at https://www.juridice.ro/361856/spectacolul-catuselor-este-nelegal.html. For a pending case at the ECtHR, regarding the breach of Article 8 paragraph 1 due to the fact that the person was shown by the media handcuffed with her hands behind her back and accompanied by masked policemen while she was escorted to the courtroom see application No. 10626/11, *Florentina-Daniela Cîrstea v. Romania* (more info is available online at: http://hudoc.echr.coe.int/eng?i=001-181510).

[35] In which case, there are no incumbent fees on the accused person, as the lawyer is nominated by the local Bar, on the request of the prosecutor or the court (the Ministry of Justice has a special fund for these *ex officio* activities, part of an agreement with the Romanian Bar).

As a conclusion, in practical terms, 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 a certain impact in terms of changes to Romanian law.[36] If correctly transposed, it is expected to make Romanian law clearer and more coherent. In addition, it is expected that this Directive will underscore the essence of the presumption of innocence, namely that the defendant is presumed innocent and the burden of proof lies with the prosecution.

However, in order to overcome the legacies from the past, the drafting of a new statutory law is not sufficient. Improving legislation must be followed by a real understanding of the presumption of innocence and by a more balanced approach from all the judicial actors in charge of applying the law (judges, prosecutors, lawyers). The right to be presumed innocent is at odds with the Communist-rooted principle of prosecutorial bias, which might complicate the task of judicial actors to apply the main tenets of the right to the presumption of innocence. However, the presumption of innocence is likely to have a major impact on the special relationship between judges and prosecutors and it brings a new perspective to the relationship between judges, prosecutors and defendants.

Interestingly, some provisions of EU Directives on procedural rights have already been taken into consideration by Romanian courts when interpreting national procedural law. For example, when the 1969 Code of Criminal Procedure was still in force, some courts made reference to 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 that the solution provided by the (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 defence rights. Directive 2012/13/EU was relied on before the full transposition of the aforementioned Directive, thus mirroring the principle of direct applicability of EU law reiterated in the *Milev* judgment,[37] but after the transposition deadline expired. When they presented motions regarding the legality of the indictment, defence counsels invoked the direct applicability of Article 1 paragraph 1 letter c) from the Directive, stating that the accusation had not been properly described.

IV. Romanian system of evidence law. The rule of law versus the finding of the truth, a continuous challenge

As previously mentioned, the Romanian criminal process (both pre-trial investigations and trial) is a continuous inquiry aiming to find the truth. Therefore, evidence collected during the investigative phase can be used during the main trial in order to deliver the verdict. There are no exceptions to this rule.

The principles at the heart of this practice are the search for truth and the free assessment of all evidence. The High Court of Cassation and Justice clearly ruled on this issue: "Wrongly, the appellate court has stated that evidence gathered during the

[36] The requirements laid down under the other two directives, on safeguards for children and legal aid respectively, already exist under the Code of Criminal Procedure and adjacent law, and only small corrections and amendments are expected in this respect.

[37] Case C-439/16 PPU, *Milev,* 27 October 2016, ECLI:EU:C:2016:818.

investigation cannot serve as a basis for conviction and only as a basis for committing the case for trial. The taking of evidence is made by the investigative authorities and the courts. The evidence has no predetermined value and its assessment is made by the judicial authorities after the examination of all evidence in order to uncover the truth."[38]

However, according to the statutory law, the objective of the criminal investigation is to gather evidence about the criminal offence and the offender in order to decide whether there should be a committal for trial (CCP, Article 285). Therefore, it seems that the verdict has to be justified only by using evidence presented to the court for the first time during the trial. This idea was promoted at the beginning of the drafting process of the 2014 Code of Criminal Procedure and its purpose was to minimise the prosecutorial bias at the trial. The main argument of the drafters was that the courts' prior knowledge of the pre-trial investigation file constitutes an important foundation of this bias.

The rule was also stipulated in the 1969 Code of Criminal Procedure. However, it was never an obstacle to the transfer of the investigation file to the courts in order to use evidence obtained at that stage. Commonly, when reaching the verdict, both under the 1969 and the 2014 Code of Criminal Procedure, the courts rely on evidence collected during the investigation. For instance, the examination of a witness during the pre-trial investigation has the same probative value as the examination of the same witness during the trial.

A. Evidence-gathering rules. Hindering the functioning of EU instruments?

1. Criminal law actors

In Romania, the investigative authorities are the prosecutors, the judicial police and the special investigative bodies. The prosecutors have the duty to investigate only serious criminal offences, such as murder, murder upon request of the victim, corruption offences and organised crime. They can request that police officers conduct some activities in their place, such as the questioning of witnesses. However, the responsibility of the entire investigation lies with the prosecutors.

In Romania, the role of the investigative judge does not exist. A similar position existed before the Communist era but, as previously mentioned, it was repealed in 1952. Since then, pre-trial investigations have been exclusively conducted by prosecutors, police officers and some special investigative bodies.

When the prosecutor or the special investigative bodies do not have jurisdiction over a specific offence, the investigation falls under the responsibility of the judicial police (CCP, Article 57). In such cases, the prosecutors have the duty to supervise and direct the investigation. The police officers perform their powers only under the prosecutor's direction.[39]

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[38] See High Court of Cassation and Justice, Criminal Division, judgement No. 1634 of 1999.

[39] Their chiefs within the Ministry of Internal Affairs have no right to interfere with the criminal investigation.

In Romania the only prosecuting authority is the prosecutor. The police or the special investigative bodies do not have the right to prosecute a person (i.e. to bring a criminal action against somebody, to bring charges) and to represent prosecution at trial.

Under the socialist model of criminal procedure, the decision-making power to order pre-trial detention and investigative measures that would amount to a breach of an individual's right to privacy fell within the competence of prosecutors. In 2003, however, under the impetus of the ECtHR in *Pantea v Romania*, [40] the competence to order these measures was transferred to a judge, later referred to as 'judge for rights and liberties' under the 2014 Code of Criminal Procedure. During the investigation stage, the judge for rights and liberties is called upon to rule on motions submitted by the prosecutor with respect to preventive measures (e.g. pre-trial detention, house arrest) or investigative actions (e.g. search of premises, wiretapping), including the examination of witnesses in advance of the trial. Therefore, as a rule, technical surveillance measures require a warrant issued by the judge of rights and liberties.[41] By way of exception, in cases of emergency, the prosecutor has the power to order a technical surveillance measure for a period of up to 48 hours. This can be done only when obtaining a warrant from the judge of rights and liberties, which would lead to a substantial delay to the investigations, to the loss of evidence or would jeopardise the safety of the victim, of witnesses or of their family members.[42]

2. Intelligence and other administrative agencies as special investigative bodies

In Romania, the intelligence services are not investigative authorities in the criminal justice system. According to Law no 51 of 1991 on national security[43], they have a specific role in gathering information when there is a threat to the security of the country. Oversight of the intelligence agencies is entrusted to the Romanian Parliament, which exercises it through a specialised commission.

Threats against national security are defined by Article 3 of Law no 51 of 1991 on national security. Recently, the Constitutional Court ruled that a part of this article

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[40] Judgment of 3 June 2003, application No. 33343/96, available at: http://hudoc.echr.coe.int/eng?i=001-61121.

[41] This warrant must not exceed 30 days since the date of its issuance. It can be extended for a period of up to 30 days at a time and up to a total period of six months. Surveillance in private premises cannot exceed 120 days. A technical surveillance measure can be ordered only when the following conditions are met (CCP, Art. 139): (1) there is a reasonable suspicion in relation to the preparation or commission of an offence expressly listed by the CPP (e.g. crimes against national security, drug trafficking, weapons trafficking, money laundering, blackmail, rape, deprivation of freedom, tax evasion, corruption offences, etc.) or in case of other crimes in respect to which the law sets out a penalty of imprisonment of five years or more; (2) such a measure is proportional to the restriction of fundamental rights, given all the circumstances of the case, the importance of evidence to be obtained or the seriousness of the offence; (3) evidence could not be obtained in other ways or obtaining it implies certain difficulties that would harm the investigation, or there is a threat to the safety of persons or to valuable goods.

[42] Within 24 hours of the expiry of the emergency authorisation, the prosecutor has to obtain the confirmation of the judge of rights and liberties.

[43] Republished in the *Official Gazette*, No. 190 from 18 March 2014.

runs counter to the Constitution due to a lack of clarity and, consequently, leads to a risk of abuse of power. [44] According to Article 3, 'a threat to national security' consists of, *inter alia*, any activity which bring serious violation to the fundamental rights of Romanian citizens. The Constitutional Court ruled that this provision greatly extends the applicability of intelligence activities, far beyond their original prerogatives.

Like any other specialised agency, when intelligence services find out a criminal offence was committed, they have the duty to report that criminal offence to the police or to the prosecutor, according to their jurisdiction (CCP, Article 61 paragraph 1 letter c). After reporting, these agencies no longer have the right to conduct investigations [Article 13 of the Law no 14 of 1992 regarding the organisation and functioning of the National Intelligence Agency[45]].

The statutory law does not provide a mandatory ban for the use of information obtained during activities performed by intelligence services as evidence in a criminal trial. Commonly, the courts ruled that intelligence is admissible evidence at trial, even when charges do not relate to a national security offence or a terrorism offence. Recently, the High Court of Cassation of Justice ruled that information obtained as a result of intelligence activities is admissible evidence at trial and it is for the trial court to apply the principle of free assessment of evidence and to determine its relevance.[46] However, on the same day, the Constitutional Court assessed the constitutionality of Article 3 of Law no 51 of 1991. In its decision, the Constitutional Court ruled that information obtained on the basis of a special law regarding the intelligence activities does not represent evidence in criminal matters since evidence is obtained on the basis of the Code of Criminal Procedure[47]. This ruling may lead to a change of case law on this topic.

The officers of the intelligence agencies can have a role in criminal investigations only when the subject of this investigation is an offence against national security or a terrorist offence. In these particular cases their role is strictly limited by law. Firstly, the officers of the intelligence agencies are the ones who are carrying out the technical surveillance. Taking into account this activity, the law uses the term 'special investigative bodies' (CCP, Article 57 paragraph 2, as amended by the Government Emergency Ordinance no 6 of 2016[48]). This is the only case when the law uses such a qualification. Secondly, officers from intelligence services can act as undercover agents (CCP, Article 148 paragraph 4). In all the other cases (concerning offences which are not offences against national security or terrorist offences), the officers of the intelligence agencies have no right to carry out the technical surveillance, to act as undercover agents or to perform any other kind of investigative activities.

The rules regarding intelligence agencies' right to carry out the technical surveillance only in national security cases are the result of an important decision

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[44] Decision No. 91 of 28 February 2018, published in the *Official Gazette*, No. 348 from 20 April 2018.

[45] Published in the *Official Gazett*e, No. 33 from 3 March 1992.

[46] Decision of the preliminary chamber judge from the High Court of Cassation and Justice, 28 February 2018.

[47] Decision No. 91 of 28 February 2018.

[48] Published in the *Official Gazett*e, No. 190 from 14 March 2016.

delivered by the Constitutional Court in February 2016 and transposed into the Code of Criminal Procedure by the Government Emergency Ordinance no 6 of 2016. Until then, in Romania, technical surveillance in both national security cases and 'ordinary' cases was being carried out by the intelligence services. Until the 2014 Code of Criminal Procedure, this was an informal practice essentially due to the fact that technical devices were almost entirely in the possession of the National Intelligence Agency. Paradoxically, at that time, the statutory law stipulated that only the prosecutors and the police could carry out technical surveillance. However, the prosecutors' offices did not have the necessary technical infrastructure. The 2014 Code of Criminal Procedure had turned this informal practice into statutory law. According to Article 142 paragraph 1, technical surveillance had to be carried out by the prosecutor, the police or other specialised authorities. In everyday practice, the specialised authorities were the intelligence agencies.

Following the decision of the ECtHR in *Iordachi v Moldova*[49], on 16 February 2016, the Constitutional Court ruled that Article 142 paragraph 1 of the 2014 Code of Criminal Procedure lacked clarity and, consequently, did not provide adequate protection against abuses of power in the field of technical surveillance[50]. Therefore, the Government Emergency Ordinance no 6 of 2016 distinguished more sharply between the investigation of an offence against national security or a terrorist offence and an 'ordinary' investigation. As previously noted, according to this Ordinance, intelligence officers can carry out technical surveillance measures only in cases where an offence against national security or a terrorist offence is main tenets of the right to the presumption of innocence being investigated.

However, as for the rest of the cases (concerning 'ordinary' offences), the prosecutors do not have a fully-fledged structure at their disposal to carry out technical surveillance. As a result, during such an investigation, they have to resort to the National Wiretapping Centre within the National Intelligence Agency. This centre possesses the technical devices needed in order to carry out the technical surveillance in national security cases (both as an intelligence activity and as a criminal investigation).

According to the new rules provided by the Government Emergency Ordinance no 6 of 2016, the prosecutors are entitled to access the technical facilities of the National Wiretapping Centre in order to investigate 'ordinary' offences (Article 8 paragraph 2 Law no 14 of 1992 regarding the organisation and functioning of the National Intelligence Agency, as amended by the Ordinance no 6 of 2016). Concrete rules of cooperation between intelligence agencies and the investigative authorities are stipulated in secondary legislation, under the name of 'protocols' of cooperation (Article 8 paragraph 3 Law no 14 of 1992 regarding the organisation and functioning of the National Intelligence Agency, as amended by Ordinance no 6 of 2016).

In the cases where an 'ordinary' offence is investigated, the High Court of Cassation of Justice ruled that the involvement of the intelligence officers in the execution of a technical surveillance warrant constitutes an express nullity on the

[49] Judgement of 10 February 2009, application No. 25198/02, available online at: http://hudoc.echr.coe.int/eng?i=001-91245.

[50] Decision No. 51 of 2016.

grounds that the prosecutor's competence has been breached. Thus, evidence had to be excluded.[51] Following the case law of the Constitutional Court, this decision of the High Court of Cassation of Justice represents a clear statement which puts an end to the involvement of the intelligence officers in the execution of a technical surveillance warrant in 'ordinary' cases. Although the new rules regarding the involvement of intelligence officers have been adopted, the National Wiretapping Centre within the National Intelligence Agency and the protocols of cooperation still maintain the rapprochement between criminal law actors and intelligence agencies.

Alongside the intelligence services, there are other administrative bodies.[52] These are government agencies in charge of supervising the implementation of particular laws[53] and applying sanctions when they find out that an administrative offence has been committed. Even if these agencies are specialised units under Romanian law, they are not recognised as special investigative bodies or, at least, authorities whose crime reports are mandatory for the beginning of a criminal investigation. Consequently, the prosecutors and the police remain the only authorities empowered by the law to investigate criminal offences even where these offences are committed in specialised areas like capital markets.

Nevertheless, although these agencies are part of the executive and do not have the right to perform criminal investigations, prosecutors can give them mandatory orders regarding the criminal investigations (CCP, Article 303). This can lead to the use of special powers conferred by the law to these agencies, such as the right to interview individuals under a penalty in case of refusal, whilst the powers conferred to the prosecutors by the criminal procedure law are limited by the procedural rights.

3. Special investigative measures

Under the general notion of special investigative measures (or special surveillance measures), the Romanian Code of Criminal Procedure regulates technical surveillance measures, obtaining data regarding the financial transactions, seizure of postal communications, deployment of undercover agents, authorised participation in specific activities and controlled deliveries. Technical measures of surveillance, as provided by Article 138 paragraph 1 of the Code of Criminal Procedure, are the following: a) wiretapping of any type of remote communications – accessing, monitoring, collecting or recording communications undertaken via telephone, computer networks or any other forms of communication devices; b) accessing a computer system – involves the access to a computer system or to another data storage device either directly or remotely, with the aid of specialised programmes or through a network; c) video, audio or photo surveillance in private premises – permits taking pictures of persons, to survey and to record conversations, gestures or other activities; d) tracking

[51] See decision of the preliminary chamber judge of 28 February 2018; decision of the preliminary chamber judge of 27 September 2018.

[52] In Romania there are only few special investigative bodies. Many of them belong to the military realm, comprising notably officers designated by the military units' commanders or by the garrisons' commanders and officers designated to act when delegated by the military prosecutors.

[53] Regarding tax, customs, capital market, business competition, etc.

with the use of technical devices – permits the usage of devices able to establish the location of the person or of the object to which such devices are attached to.

Postal deliveries

Withholding, handling and search of postal deliveries may be ordered by the judge of rights and liberties, upon request by the prosecutor, for periods of time similar to the ones applicable for technical surveillance measures. These measures can be ordered regardless of the gravity of the offence committed or prepared. In cases of emergency, the prosecutor may order this measure in the same conditions as the temporary electronic surveillance.

Undercover agents

Undercover agents are police officers working within the judicial police. If the investigation refers to offences against national security or to terrorism crimes, intelligence agencies' employees can also be used as undercover investigators. Undercover investigators may be examined as if they are witnesses who are under threat.

The use of undercover agents may be ordered by the prosecutor for a period of up to 60 days and only when serious offences are under investigation.[54] No judge's confirmation is required by the law. The duration of such a measure may be extended for 60 days at a time, up to a total period of one year, in the same case and in respect to the same person, except for offences against life, national security, drug trafficking, weapons trafficking, and trafficking in human beings, acts of terrorism, money laundering, as well as for offences against the European Union's financial interests. In such cases, no maximum term is provided by the law.

If the prosecutors deem it to be necessary for the undercover agents to use technical devices enabling them to obtain pictures or audio and audio-video recordings, they have to request a warrant from the judge of rights and liberties. To the same effect, if the undercover agent is authorised to perform an activity which actually represents the commission of a criminal offence, the prosecutor has to issue a distinct order.

The undercover agents make written records of each action taken during their mission. The written report is sent to the prosecutor and, according to the courts' practice, it can be used as evidence at trial, even if it is signed by the police officers using their false identity. However, after the ECtHR ruled in *Ali and Boulfinski*[55] that the lack of the examination of the undercover agent as a witness represents a violation of Article 6 of ECHR, the courts began to order such an examination.

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[54] E.g. crimes against national security, drug trafficking, trafficking in human beings, acts of terrorism, money laundering, blackmail, deprivation of freedom, tax evasion, corruption offences and other offences in respect of which the law sets out a penalty of imprisonment of seven years or more

[55] ECtHR, *Ali v Romania*, 9 November 2010, application No. 20307/02, available online at: http://hudoc.echr.coe.int/eng?i=001-101657; *Bulfinsky v. Romania*, judgment of 1 June 2010, application No. 28823/04, available online at: http://hudoc.echr.coe.int/eng?i=001-98968.

The authorised participation in specific activities designates the performance of transactions, operations or any other kind of arrangements regarding an asset or a person who is missing, a victim of trafficking in human beings or of kidnapping, the performance of operations involving drugs, corruption or other services, based on an authorisation given by the prosecutor, for the purpose of obtaining evidence (e.g. a simulation of a corruption offence when an undercover agent acts as someone who offers a bribe).

This measure may be ordered and, eventually, extended, by the prosecutors in conditions similar to the ones required for the authorisation of undercover agents (CCP, Article 150). The total duration of such a measure may not exceed one year. Such activities may be performed by police officers, by undercover agents or by collaborators and they are not regarded as criminal or administrative offences.

At this point, it is important to remember that Article 101 of the Code of Criminal Procedure sets out the prohibition of provocation. Therefore, when ordering such a measure, the prosecutor has to carefully determine whether the conditions provided by the law are met, especially the one regarding the reasonable suspicion related to the preparation or commission of a crime.

Controlled delivery

Controlled delivery designates the technique allowing the entry, transit or exit from the Romanian territory of goods in respect to which there is a suspicion related to the illicit nature of their possession or procurement.

A controlled delivery may be authorised by the prosecutors only in the following situations (CCP, Article 151): 1) the persons involved in illegal transportation of drugs, weapons or of any other proceeds resulting from illegal activities or of items used for the purpose of perpetrating offences could not be discovered or arrested in other ways or this would imply extreme difficulties and would harm the investigation or would be a threat to the safety of persons or to high value goods; 2) the investigation of offences committed in relation to the delivery of illegal or suspicious transport is impossible or extremely difficult in another way.

4. The case of transnational investigations

At least at a declarative level, the Romanian legislator has been quite willing to transpose the provisions of new European instruments. During the EIO and the EPPO negotiations, the Romanian authorities were always supportive of the idea of a European Investigation Order or a European Prosecutor.

It is true that there was a delay in the transposition of the Directive regarding the EIO. However, according to the Explanatory Memorandum to the Law no 236 of 2017, the law which introduced the EIO into Romania's criminal procedure, this was due to the need to find a proper balance between the requirements of the Directive and the provisions of the 2014 Code of Criminal Procedure. 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.

As for the EPPO, the Romanian authorities are currently exploring ways to transpose the Regulation into national law by identifying which domestic normative laws need to be amended in order to have a smooth functioning of the EPPO.[56]

Regarding evidence collection, the disparities in domestic criminal procedure legislation and the lack of understanding of foreign rules of evidence and/or of the functioning of EU instruments can hinder cross-border traditional cooperation and mutual recognition. For example, Romanian authorities sometimes feel that they do not have precise information about the foreign evidence law (i.e. statutory rules and case law regarding the desired evidence). Although 'help' is provided (e.g. information and explanations are given by the special direction from the Ministry of Justice; advice is also given by the magistrates from the European Judicial Network, Eurojust, etc.), the lack of knowledge or doubt with regard to understanding the foreign rules concerning evidence leads to hesitation or even renouncement, especially when there is no pressure from the parties (e.g. the evidential motion is not made by the defendant).

B. Admissibility of evidence. The Romanian exclusionary rules

1. Romania's admissibility of evidence law

During the criminal investigation phase, the prosecutor analyses the legality of the evidence gathered by the police. When the prosecutor is the investigative authority, a formal complaint concerning the legality of evidence can be made to his superior (i.e. the chief prosecutor of the prosecutors' office), according to the procedure provided by Article 336 from the 2014 Code of Criminal Procedure. The chief prosecutor has the right to decide that some investigative acts are affected by nullity and, as a consequence, the evidence obtained as a result of such an act cannot be used. At this stage, as regards evidence gathering, there is no interlocutory appeal to a judge.

After the indictment has been issued and the case is brought to trial, a preliminary hearing must be scheduled. At this hearing, the preliminary chamber judge has the competence to review the legality of evidence (CCP, Article 342 – 346). After the preliminary hearing is completed, the preliminary chamber judge will try the merits of the case. There is no incompatibility between being a preliminary chamber judge and the judge on the merits. In fact, the general rule is that the same judge will examine the case, firstly, as a preliminary chamber judge, and secondly, as a court.

During the preliminary hearing, the exclusion of unlawfully obtained evidence can be requested by the defendant. Following Decision no 641 of 2014 of the Constitutional Court[57], an exclusion request can be filed by the other private parties (by that time only the defendant had the right to submit written motions at the preliminary hearing) or *ex officio* by the judge.

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[56] Daniel Nițu is part of the special commission set up with this task, representing the academic level, together with Andra-Roxana Trandafir from Bucharest University. The commission's other members are part of the Romanian Ministry of Justice, the National Anticorruption Department, the Romanian Anti-Fraud Department and the Romanian Council of Magistrates.

[57] Published in the *Official Gazett*e, No. 887 from 5 December 2014.

Usually, the motions asking for the exclusion of unlawfully obtained evidence are justified using the pre-trial case file (e.g. when intelligence officers were involved in the execution of a technical surveillance warrant in a case concerning a corruption offence, it is enough to present the documents contained in the case file which indicate this involvement). However, since illegalities are not always indicated in the case file, there are cases when it is necessary to present new evidence (e.g. when entrapment is indicated as a reason of nullity, there may be cases in which a witness has to be examined during the preliminary hearing). As a result of Decision no 802 of 2017 of the Constitutional Court, the defendant or the other private parties have the right to present new evidence in order to support a motion asking for the exclusion of unlawfully obtained evidence. The new evidence must be relevant to the legality motion, not to the merits of the case.

When the preliminary chamber judge rules that a piece of evidence was unlawfully obtained, the latter cannot be used during the trial. Recently, the Constitutional Court ruled that the exclusion of unlawfully obtained evidence implies the physical exclusion of the evidence from the case file.[58]

Decisions delivered by the preliminary chamber judge may be challenged by way of an interlocutory appeal to the preliminary chamber judge from the higher hierarchical court within three days of its notice. The prosecutor, the defendant and the other private parties have the right to appeal. When no motions were submitted or these motions were rejected, the preliminary chamber judge confirms the lawfulness of the indictment and the lawfulness of evidence and orders the beginning of the trial on the merits.

The 1969 Code of Criminal Procedure was amended in 2010 in order to stipulate the defendants' right to agree with the facts alleged in the indictment (1969 Code of Criminal Procedure as amended by Law no 202/2010, Article 320[1]). In practice, the shortened trial had considerablesuccess, which helped ease the courts' workload. Consequently, the 2014 Code of Criminal Procedure regulates this proceeding almost with the same rules as initially provided by Law no 202/2010.

When the defendant agrees with the facts alleged in the indictment, the evidence is no longer presented and the trial becomes a shortened one (an abbreviated trial). As a benefit for the defendants, the penalty ranges provided by the law are reduced by one third (as to the term of imprisonment) and a quarter (as to the limits of the fine). The concrete penalty is determined by the courts within the reduced ranges. To benefit from this advantage, the defendants have only until the presentation of evidence begins to admit the facts and to request a shortened trial. In Romania, if the defendants submit this motion after the evidential stage has begun, the benefit can no longer be applied by the courts. Thus, the penalty ranges are not reduced with a different percentage according to the stage at which the defendants present their 'admission of facts'.

When defendants choose not to make an admission of the alleged facts, an ordinary trial will be conducted. In that scenario, the evidence has to be presented in

[58] Decision No. 22 of 2018, published in the *Official Gazett*e, No. 177 from 26 February 2018.

court (an evidential stage). This stage begins with the trial court asking the prosecutor and the private parties if they wish to present evidence (CCP, Article 374 paragraph 5). If so, the prosecutor and the parties must demonstrate the relevance of the proposed evidence. This implies explaining which facts need to be proven, the means by which evidence may be taken, the place where evidence is located and, should witnesses and experts be involved, disclosing their identities and addresses.

A specific feature of the Romanian evidential stage of the trial is that, commonly, the courts rule *ex officio* that pre-trial evidence gathered by the investigative authorities is admissible evidence at trial. As a result, the prosecutors no longer have a duty to prove its relevance. This duty remains applicable only when new evidence is brought up by the prosecutor or the private parties. This informal practice is the consequence of the submission of the investigation file to the trial court. Since both pre-trial investigations and the trial as such are bound by the same purpose, namely the finding of the truth, it seems natural that evidence collected by the prosecutor or by the police becomes admissible evidence at trial, without prior control on relevance.

The 2014 Code of Criminal Procedure preserves this approach. Moreover, it underlines the importance of evidence produced during the investigation stage. To this extent, the 2014 Code provides that, in an ordinary trial,[59] the only evidence which is presented at trial is evidence that has been challenged by the defendant. Under this new rule (CCP Article 374 paragraph 7), evidence which has not been challenged by the defendant is no longer presented by the prosecutor during the trial. It is considered as admissible evidence without any proper discussion about its relevance and without any adversarial proceedings taking place in court.

The Constitutional Court has ruled that this new provision is constitutional (Decision no 342 of 2015).[60] In the court's view, the legality of evidence has to be challenged at the preliminary hearing. During the trial, the defendant may only challenge its reliability, namely the trustworthiness dimension of evidence. The main reason advanced for this ruling is the search for truth. Thus, following Decision no 342 of 2015, in order to question a witness during the trial, the defendant has to challenge the pre-trial statement and has to prove that its reliability can be doubted. The trial court has to determine whether to admit the submitted motion or not. As long as the reliability of the witness statement is not doubted, the right of the defendant to question the witnesses in a court hearing is not a sufficient argument.

Over the past two years, the courts have been determined to enforce this rule. As a result, evidence collected during the investigative stage and declared legally obtained by the preliminary chamber judge, is presented in the adversarial hearing only if the defence clearly argues the issue of reliability. The main argument for this courts' determination is the fact that they are overburdened with work and the desire to shorten the proceedings.

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[59] In contrast to a shortened trial conducted when there is a plea agreement or when the defendant accepts the alleged facts presented by the prosecutor within the indictment.

[60] Published in the *Official Gazett*e, No. 386 from 3 June 2015.

2. Exclusionary rules

Article 102, as introduced by the 2014 Code, provides: "(1) Evidence obtained through torture, as well as evidence deriving from such, may not be used in criminal proceedings. (2) Evidence obtained unlawfully may not be used in criminal proceedings. (3) The nullity of the order by which the production of evidence was decided or authorized or the act through which the evidence was produced entails the exclusion of that evidence. (4) The derivative evidence is excluded only if that evidence was obtained directly from the unlawfully gathered evidence and it could not have been obtained otherwise."

In Romania, the exclusion of unlawfully obtained evidence generally results from the nullity sanction. Only by way of exception, the law lays down some mandatory exclusionary rules. These exceptions are the following: 1) evidence obtained as a result of torture, as well as the derivative evidence resulting from it; 2) evidence obtained in breach of the counsel-client privilege; 3) where validation of the judge of rights and liberties is required for an investigative measure executed without a prior warrant and such a measure is not validated by the judge. Under these rules, illegally obtained evidence is automatically inadmissible and no nullity is involved. There are no supplementary conditions (i.e. a doubt over the reliability, the probative value). For instance, a coerced statement is automatically excluded if it is the result of torture.

As for the rule, the exclusion of evidence can be triggered by a case of absolute nullity or by a case of relative nullity. The main difference between these two categories of nullities is that harm does not need to be proven in the case of an absolute nullity. The harm is presumed by law. That is why the law specifically provides the cases in which an absolute nullity is triggered. On the contrary, a relative nullity is declared by the court only if the person who had requested the nullification proves the existence of harm to his/her rights. Moreover, this person has to prove that the harm can only be removed through the nullification of the act illegally accomplished. If another form of compensation can be ordered, the nullification can be avoided.

Regarding evidence, an absolute nullity is triggered by only two violations of the law (CCP, Article 281). Firstly, the participation of the accused when this is mandatory (e.g. the questioning, the re-enactment of the criminal offence). The latter has little relevance in everyday practice since accused persons usually attend their interrogation. Secondly, 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 in custody). However, this violation only occurs on a parsimonious basis; if an accused held in detention is questioned by the police without his/her 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 proven and no balancing test has to be used.

A recent decision of the Constitutional Court (Decision no 302 of 2017)[61] added a third case of absolute nullity, namely the lack of jurisdiction of the prosecutor. Until this decision, only the violation of the courts' jurisdiction triggered an absolute nullity. As a result, if evidence was collected by a prosecutor who has no jurisdiction over the

[61] Published in the *Official Gazett*e, No. 566 from 17 July 2017.

case, the evidence is excluded. Theoretically, in cross-border cooperation, this case of absolute nullity can have a practical role.

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 a rationale for the relative nullity. Recently, the Constitutional Court ruled that the solution that relative nullity cannot be invoked *ex officio* is unconstitutional.[62] Therefore, at least theoretically, the preliminary chamber judge can invoke such a motion. Still the harm to a private party's rights needs to be proven.

3. Evidence gathered by foreign authorities

Evidence gathered by foreign authorities in another Member State is admissible in Romanian criminal proceedings on condition that the collection of the evidence was based on a mutual assistance instrument.[63]

Requests issued by Romanian authorities will comply with both the 2014 Code of Criminal Procedure and Law no 302 of 2004 regarding international judicial cooperation in criminal matters.[64] Foreign authorities dealing with Romanian requests will generally comply with the formalities and procedures expressly indicated by the Romanian authorities.[65] As a result, evidence gathering will – most probably – be done according to Romanian law.

At the investigative stage, the prosecutor carries out a review of the legality of evidence gathered in the other EU Member State. After the indictment, the preliminary chamber judge will analyse the legality and admissibility of the evidence thus collected during the preliminary hearing. There are no specific rules regarding this kind of evidence, so the general provision from the Code of Criminal Procedure will apply.[66] Still, there is a problem regarding the judicial oversight as to the legality of

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[62] Decision No. 554 of 2017, published in the *Official Gazette*, No. 1013 from 21 December 2017.

[63] For example, such as the European Union Convention on Mutual Assistance in Criminal Matters between the Member States of the EU.

[64] Title VII deals only with mutual assistance requests at the international level. *Inter alia*, the Title contains the domestic legislation which transposed the joint investigation teams, the EIO etc.

[65] As the Romanian legislation represents an accurate transposition of the EU instruments in the field of mutual assistance in criminal matters, this will be the case when operating with the EIO or the 2000 Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union. In other cases, such as joint investigation teams, the formalities and procedures will be in accordance with the law of the Member State in which the team operates.

[66] For example, in a recent case, the Prosecutor Office attached to the Cluj Tribunal was involved in a joint investigation team with the German and Austrian authorities. A series of home searches have been conducted on Romanian territory and on Germany territory. If the case will be sent to trial in front of the Romanian courts (probably this will not be the case here, as the major interest lies with the German authorities), the admissibility of evidence gathered during the seizures will be analysed differently. The legality of seizures conducted on Romanian soil will be analysed according to the Romanian provisions and the seizures

that evidence. As previously mentioned, in Romania, the judges exercise a low level of oversight with regard to legality both during the preliminary hearing and the trial on the merits. Due to the prosecutorial bias, they tend to trust the prosecutors' case (both evidence and merits) and, consequently, usually distrust the motions presented by the defence. When evidence was gathered according to a foreign law, the difficulty to understand foreign law provisions sometimes result in misinterpretations and bias by the prosecutor. As a result, at least in the field of cross-border cooperation, there is a tendency to avoid the application of exclusionary rules.[67] Since the transposition of the EIO is relatively recent, we have no information regarding the way in which mutual trust in this area is interpreted by the Romanian courts.

V. Detention law in Romania. The difficult choice between a preventive measure and an anticipated penalty

A. Pre-trial detention and alternatives to detention

In Romania, preventive measures concerning the accused person's freedom are the following: arrest, judicial supervision, judicial supervision under bail, house arrest and preventive detention (CCP, Article 202). All these measures cannot be ordered unless there is evidence leading to a reasonable suspicion that a person committed an offence and if such measures are necessary to ensure the proper conduct of criminal proceedings, prevent the suspect or the defendant from fleeing the investigation or the trial and committing other offences. Any preventive measure must be proportional to the seriousness of the charges brought against the accused and must be taken only if it is necessary for the attainment of its scope.

1. The arrest

The only measure that can be ordered against the suspect, namely a person against whom the decision to open an investigation *in personam* was issued, is the arrest for up to 24 hours. All the other preventive measures limiting the accused person's freedom can be imposed only upon a prosecuted person, that is, only after the prosecutor has taken the decision to prosecute.

The arrest (*reținerea*) of the suspect can be ordered by police officers or prosecutors for a period of up to 24 hours, which cannot be extended. The grounds upon which a person may be arrested are provided under the aforementioned Article 202.

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conducted in Germany will be reviewed bearing in mind the German law procedural provisions which were referred to by these authorities when ordering the seizures.

[67] For instance, in a recent file, now in the appeal phase (therefore more information cannot be made public at this time), where Daniel Niţu is the lead attorney of the defendant, a witness was examined during the criminal investigation by the Polish authorities (international rogatory commission during the investigation phase, Romania – requesting state, Poland – requested state). Although, the Polish Code of Criminal Procedure seemed not to be fully respected, the Romanian judge of preliminary chamber denied the defendant's motion and ruled that the evidence was admissible. The fact that the witness will be examined again during the main trial, either by video conference or by a new rogatory commission, this time with the competent Poland court, was appreciated as a compensatory mechanism for the aforesaid violation of rules.

2. Preventive detention

When the suspect is under arrest and the prosecutor decides to submit an application for a warrant for detention, the suspect has to acquire the 'prosecuted person' status. Thus, the prosecutor has to deliver the decision to prosecute. The application is filed with the competent judge of rights and liberties, namely the judge either from the first instance court or the court with equivalent rank from the place where the suspect is held in police custody. The prosecuted person will be brought before the judge of rights and liberties and an adversary hearing will be conducted.[68] Legal assistance of the accused is mandatory. Prior to the hearing, the accused person's counsel has the right to access the case file submitted by the prosecutor to the judge of rights and liberties.

Preventive detention may be ordered against a prosecuted person only when the judge of rights and liberties finds that the following requirements have been met: i) there is a reasonable suspicion that the prosecuted person committed a criminal offence, regardless of its gravity or the penalty set out by the law (imprisonment or fine); ii) one of the following grounds exists: (a) the accused fled to avoid the criminal investigation or the trial, or has made preparations in this respect; (b) the accused tried to influence another co-accused, a witnesses or an expert, or tried to destroy real evidence; (c) the accused pressured the victim or tried to reach a fraudulent agreement with the victim; (d) after the decision to prosecute was taken, the accused committed a new deliberate offence or is preparing to commit a new criminal offence. When the accused committed a serious offence expressly provided by law[69] or any another offence for which the law sets out a penalty of at least five years of imprisonment, the threat to the public order[70] represents a separate ground for preventive detention (CCP, Article 223 paragraph 2).

In everyday practice, detention is ordered on public order grounds. The main criterion used to interpret and apply this ground is the gravity of criminal charges and the need to restore individuals' confidence in the criminal justice system. This pattern has been very well explained by a judge as follows:

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[68] The hearing is not open to the public.

[69] E.g. a deliberate offence against life, an offence having caused bodily harm or the death of a person, an offence against national security, an offence of drug trafficking, weapons trafficking, trafficking in human beings, acts of terrorism, money laundering, counterfeiting of currency or other securities, blackmail, rape, deprivation of freedom, tax evasion, assault of an official, judicial assault, corruption, an offence committed through electronic communication means.

[70] The evaluation of the threat to the public order is based on an assessment of the seriousness of the facts, the circumstances under which they were committed, or the entourage and the environment the accused persons come from, of their criminal record and other personal characteristics.

> "Even if we state that preventive detention is a temporary measure whereby we protect society from dangerous individuals, in fact, preventive detention is also intended to immediately satisfy the sense of justice among the population, which cannot be provided through the penalty (because between the time of the offence and the moment of the final judgment usually passes a long period of time), and to intimidate other citizens prone to committing crimes. Only when we will abandon the hypocrite approach that we think one thing and we reason another thing because the law and the ECtHR case-law require us this, although their real intention does not converge with those stated, we will have a credible and pertinent reasoning regarding preventive detention." [72]

Preventive detention may be ordered for 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 stage is 180 days since the enforcement of the warrant[73].

After the indictment was submitted to the trial court, the preliminary chamber judge must review the necessity of detention at intervals of up to 30 days. During the trial on the merits, this review is done at intervals of up to 60 days. The prosecutor is not obliged to file an application for continued detention during trial. This review is performed *ex officio* by the trial court.

If a detained person was brought to trial, he/she may be held in custody pending trial for a maximum period of up to the half of the upper range provided by the law for the charges (e.g. if the accused is tried for a criminal offence for which the law provides the penalty of imprisonment from three to nine years, detention pending trial can last for up to four years and six months). However, regarding the first instance trial, the law provides for a maximum duration of five years (CCP, Article 239). During appeal, the warrant must be lifted when the detention duration equates to the penalty imposed by the trial court through a conviction verdict.

Preventive detention is traditionally ordered during the criminal investigation. However, the law provides that a warrant for detention can also be ordered, for the first time, during the preliminary hearing and trial. In such a case, preventive detention can be ordered against the defendant for a maximum period of 30 days. Afterwards, the preliminary chamber judge must review the necessity of detention at intervals of up to 30 days and the court at intervals of up to 60 days.

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[72] C. Rotaru, 'Jurisprudența CEDO și arestarea preventivă', 2010, 9, *Curierul Judiciar*, 524.

[73] During the investigation, detained persons are held within police detention facilities. These are located in each county. During the trial, detained persons are placed in penitentiaries where, usually, they are kept separate from the convicted persons.

The same time limits apply in case of house arrest. Even more, following the intervention of the Constitutional Court,[74] the duration of house arrest is taken into consideration when checking time limits for preventive detention.[75]

As regards conditions to lift or suspend a detention order, the law provides that a warrant must be lifted as soon as the requirements for issuing it ceased to exist or the prosecutor decided to discontinue the investigation. The warrant must also be lifted when the period for which it was ordered expired. During the detention period, the accused may request the judge of rights and liberties, the preliminary chamber judge or the trial court to order an alternative measure, such as house arrest or judicial supervision.

Statistics suggest that, in recent years, the number of defendants brought to trial and held in detention have been decreasing. In 2017, 10.2% of the defendants were indicted while being held in detention; in 2016, 10.7%; in 2015, 12.8%; in 2014, 14%; in 2013, 15.9% and in 2012 16.7%[76]. As for the number of prosecutors' applications granted by judges, the Superior Council of Magistracy informed that[77]: in 2014, 8,769 accused persons have been brought before the judge at a detention hearing and, of these, 7,040 have been subjected to a detention warrant (80.28%); in 2013, the percentage was 86.8% (10,431 granted requests out of 12,008 submitted requests) and in 2010, the percentage was 86.27% (8,659 granted requests out of 10,036 submitted requests).[78]

3. Alternatives to preventive detention

In Romania, there are three alternatives to preventive detention: judicial supervision, judicial supervision under bail and house arrest.

House arrest was introduced for the very first time by the 2014 Code of Criminal Procedure. Being a preventive measure that implies deprivation of more than a restriction of liberty, house arrest can be ordered by the judge of rights and liberties during the investigation stage, the preliminary chamber judge during the preliminary hearing and by the trial court during the trial. House arrest was meant to be the primary solution for prison overcrowding. During house arrest, accused persons are confined to their residence and have to obey the following obligations: a) to appear before the judicial authorities whenever they are summoned; b) not to communicate with the victim, other co-defendants, witnesses or experts. Failure to comply with these duties may result in the replacement of house arrest with preventive detention.

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[74] See Art. 222, para. 10 CCP, introduced by Law No. 116 of 2016 (published in the *Official Gazette*, No. 418 from 3 June 2016), following Constitutional Court decision No. 740 of 2015 (published in the *Official Gazet*te, No. 927 from 15 December 2015).

[75] For example, if a person was in preventive detention for three years and one year in house arrest, if preventive detention is once again needed, its duration cannot exceed one year.

[76] The information is available in the 2017 Activity Report of Public Ministry.

[77] The information was transmitted following a request submitted on the basis of Law No. 554 of 2001 on the access to information of general interest Published in the *Official Gazette*, No. 663 from 23 October 2001.

[78] We do not have more recent information on this issue.

Then, the accused could be subject to an electronic surveillance system. Due to financial reasons, the electronic monitoring bracelet has not been implemented so far in Romania. Police monitor house arrest via random visits to the residence where the accused person is confined. The police have the right to enter premises without the prior consent of the resident (CCP, Article 221 paragraph 10).

Preventive detention and house arrest can be ordered on the same grounds. Whether or not these requirements are met, the choice between detention and house arrest is assessed by considering the threat level posed by the offence, the purpose of such a measure, health condition, age, family status and other circumstances related to the person against whom the measure is taken.

Judicial supervision is the least restrictive preventive measure. It compels accused persons to obey the following obligations: a) to appear before judicial authorities every time they are summoned; b) to inform judicial bodies having ordered the measure or which the case is pending before about any change of residence; c) to appear before the police officer appointed to supervise them, according to the supervision schedule, or whenever they are called. The judicial authority ordering judicial supervision may also impose the following restrictions: a) not to exceed a given territorial boundary without prior approval; b) not to travel to certain places or to travel only to allowed places; c) to permanently wear an electronic surveillance system; 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; e) not to practise the profession, job or activity in the exercise of which the investigated facts were committed; f) to periodically provide information about their means of living; g) to subject themselves to medical examination, care or treatment, in particular for the purpose of detoxification; h) not to attend any sports or cultural events or other public meetings; i) not to drive specific vehicles; j) not to possess, use or carry weapons; k) not to issue cheques . Failure to comply with any of these duties may result in the replacement of judicial supervision with house arrest or preventive detention.

At the investigation stage, the prosecutor has the power to order judicial supervision for a period of up to 60 days. The prosecutor's decision may be appealed to the judge of rights and liberties within 48 hours and the judge's decision is final. Equally, the judge of rights and liberties can order judicial supervision when he/she denies the prosecutor's request to remand the accused in detention or house arrest. In this case, the decision of the judge of rights and liberties may be appealed to the judge of rights and liberties from the superior court.

At the pre-trial stage, the duration of judicial supervision may be extended by the prosecutor every 60 days, for a total period of one year, if the penalty provided by the law is a fine or imprisonment up to five years, or two years if the penalty provided by the law is life imprisonment or imprisonment exceeding five years. If the accused is indicted under judicial supervision, the preliminary chamber judge and, later, the court, have to review the necessity for judicial supervision at intervals of up to 60 days. During trial, judicial supervision can be extended for a maximum period of five years since the date of the committal for trial. Lately, a slight preference

for judicial oversight could be identified. [79] In everyday practice, judicial oversight is ordered by prosecutors quite easily, the grounds for ordering and extending the judicial oversight essentially commonly relating to the gravity of the offence and the risk of fleeing the investigation.

Ultimately, judicial supervision on bail is similar to judicial supervision, but, in addition, the accused is compelled to pledge a certain amount of money as a guarantee for compliance with the imposed duties. The value of the bail starts at 1,000 Lei (about 225 euro) and it is determined on the basis of the seriousness of charges, the accused person's wealth and the imposed duties (CCP, Article 217). If the accused complies with the duties imposed, the bail is to be refunded at the end of the criminal proceedings, whereas the accused person's failure to comply with such duties may result in the replacement of judicial supervision with house arrest or preventive detention and the confiscation of bail. [80]

Release on bail is also provided by law as an alternative to detention, but prosecutors and judges tend to order bail rarely, usually preferring judicial supervision, with which they are more accustomed. [81]

As a general conclusion, it is fair to say that detention remains the prevailing preventive measure in Romania's criminal justice system. This is due mainly to the cultural conservatism of the country. That being said, an increase in the number of cases in which judicial oversight has been ordered by prosecutors has been observed, which is also reflected in the fall in the number of cases in which detention has been ordered by judges.

B. Detention in cross-border cooperation cases

The European Arrest Warrant (EAW) has been widely used by Romanian courts since its transposition into national law, both as issuing and executing authorities. As a matter of fact, the EAW is in line with the Romanian tradition that prefers detention and this explains its success in the everyday practice of the courts.

Other EU instruments favouring alternatives to detention are underused. A case in point is Council Framework Decision 2009/829/JHA of 23 October 2009 on the application, between Member States of the EU, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention. A similar case can be made on Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgements in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the EU.

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[79] As previously mentioned, this tendency is also proven by the decrease in the number of the cases in which the defendants are brought to trial in detention.

[80] See N. Volonciu, A.S. Uzlău (eds.), *Noul Cod de procedură penală*, Bucureşti, Hamangiu, 2014, 477.

[81] For example, since 2014 bail was used in no more than five high profile cases involving corruption or tax evasion.

A quick glance at recent case law of the Romanian Supreme Court on the EAW shows that Romanian courts usually execute requests by focusing mainly on its formal aspects and thus exercising superficial control.[82]

The emphasis on mutual trust, alongside the preference of authorities for preventive detention drove Romanian courts to execute requests even in cases where they did not fully respect the requirements laid down in the case law of the Court of Justice of the European Union. In some cases, especially when the Hungarian authorities were the issuing ones, the request made no mention of the national arrest warrant.[83] In such a case – involving an EAW issued by the Hungarian authorities with no prior national warrant – the Cluj Court of Appeal stayed the proceedings and referred to the Court of Justice of the EU on the interpretation of Article 8 (1) (c) of FD EAW and the surrender procedures between Member States.[84] Following this preliminary reference, the CJEU decided on 1 June 2016 in the case C-241/15, nowadays known as the *Bob-Dogi* case 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 EAW. Thus, the EAW was no longer valid as no initial national warrant had been issued.[85] We stress that, prior to the *Bob-Dogi* case, the Romanian Supreme Court considered that, due to the fact that, in Hungarian legislation, the EAW is simultaneously to be considered as a national arrest warrant, no implicit ground for non-execution could be invoked by the Romanian Courts.[86] This interpretation was at odds with that of some of the Romanian Courts of Appeal.[87]

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[82] See High Court of Cassation and Justice, Criminal Division, decision No. 1/2017. For a similar formal approach, see High Court of Cassation and Justice, Criminal Division, decision No. 1344/2011.

[83] See High Court of Cassation and Justice, Criminal Division, decision No. 581/2008 in (2008) *Pandectele Române* 132-137; High Court of Cassation and Justice, Criminal Division, decision No. 968/2014, decision No. 1332/2014 and decision No. 657/2016, available online at: http://www.scj.ro.

[84] Cluj Appeal Court, criminal division, court resolution of 15 April 2015.

[85] 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 *Bob Dogi* solution – see, Cluj Court of Appeal, Criminal Division, sentence No. 89/2016.

[86] See the decisions of the High Court of Cassation and Justice, Criminal Division quoted in footnote 662 above.

[87] In particular that of Cluj. See, Oradea Court of Appeal, Criminal Division, sentence No. 6/2010, *in* I.C. Morar (ed.), *Buletinul Rețelei Judiciare Române în materie penală*, București, Hamangiu, 2012, 247-249; Oradea Court of Appeal, Criminal Division, sentence No. 73/2010, *in* (2011) 1 *Buletinul Curților de Apel* 45-46; Oradea Court of Appeal, Criminal Division, sentence No. 22/2012 and sentence No. 197/2012, *in* M. Radu (ed.), *Buletinul Rețelei Judiciare Române în materie penală*, București, Hamangiu, 2014, 65-66 and 85-86. See also, Cluj Court of Appeal, Criminal Division, sentence No. 77/2014, sentence No. 78/2014 and sentence No. 79/2014 (available online at: http:/www.curteadeapelcluj.ro).

C. Interpretation and application of the Aranyosi and Căldăraru *judgment*

Romania features as one of the 'targeted' Member States in the *Aranyosi and Căldăraru* judgment. However, the two-steps test and the ground for postponement introduced by the Court of Justice of the EU failed to have a tangible impact on the day-to-day practice of Romanian courts.

Romanian authorities give relevance to the *Aranyosi and Căldăraru* judgment only when they act as issuing authorities. Unofficially, information is provided to the executing authorities that, if the warrant is executed, the person will be transferred and detained in one of the modern facilities from the State penitentiaries.[88] From our information, when acting as executing authorities, the Romanian courts refrain from using the test or ground of postponement found in the Court of Justice of the EU, even in the cases involving Hungary.[89]

The execution of several EAWs issued by the Romanian courts has been denied as the execution would imply a breach of Article 3 from the ECHR and Article 4 of the Charter.[90] In spite of this, the Romanian courts have not refrained from issuing EAWs, most likely due to the fact that it remains the most common and the most known instrument of cooperation. That being said, the *Aranyosi and Căldăraru* judgment drove the Romanian legislator to incite Romanian courts to rely on instruments other than the EAW. In fact, one of the objectives behind Law no 300 of 2013[91], which amended Law no 302 of 2004 on international cooperation in criminal matters, transposing, *inter alia*, the Transfer of Prisoners FD, was to pursue the Romanian courts to apply the principle of mutual recognition to judgments in criminal matters imposing custodial sentences more often, instead of the classical EAW.[92]

D. Compensation for unjustified detention

Under Romanian law, compensation is available only in three circumstances; when persons have been unlawfully held in arrest, preventive detention or subject to house arrest (CCP, Article 9 paragraph 5, Article 539 paragraph 1). The unlawfulness of the deprivation of liberty has to be declared by the prosecutor's decision to stop the arrest or by the decision of the judge of rights and liberties, the preliminary chamber judge's decision or the trial court's decision to lift the detention warrant due to the violation

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[88] Information is provided by professor, Ph.D., Fabian Gyula, prosecutor at the Public Prosecutors' Office attached to Cluj Court of Appeal.

[89] This is probably due to the prison overcrowding problems facing the Romanian penitentiary system.

[90] Information is provided by professor, Ph.D., Fabian Gyula, prosecutor at the Public Prosecutors' Office attached to Cluj Court of Appeal.

[91] Published in the *Official Gazette*, No. 772 from 11 December 2013.

[92] 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 (two years and one 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 to opt for the new mechanism of the 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.

of legal rules or by the final verdict of the trial court (CCP, Article 539 paragraph 2). By contrast, the 1969 Code of Criminal Procedure stated that, when a final verdict of acquittal had been reached, the defendant who had been held in detention pending criminal proceedings was entitled to compensation. This rule is missing from the 2014 Code for Criminal Procedure, thus raising the case of whether such unlawful deprivation of liberty could give rise to a compensation right. In 2017, in an appeal on the interpretation of the law, the High Court of Cassation and Justice decided that a verdict of acquittal does not constitute a ground for compensation *per se*.[93]

In order to obtain compensation, accused persons have to initiate an action against the State to the tribunal (civil division) having jurisdiction over their place of residence. Amounts awarded are relatively low. For instance, in 2014, the Cluj Tribunal decided that, following an acquittal, compensation for 166 days of detention would amount to 30,000 Lei (about 6,500 euro) (judgement no 516 of 2014). The decision was upheld by the Court of Appeal. In another case, the compensation for 18 days of unlawful detention amounted to 7,200 Lei (about 1,600 euro).[94]

In practice, there are only a few cases in which compensation was awarded for unlawful detention. Moreover, their number is expected to decrease under the provisions of the 2014 Code of Criminal Procedure.

No particular compensation regime exists regarding the execution of an EAW. The general provision mentioned above from the Code of Criminal Procedure will be incidental if the conditions provided there are fulfilled.[95]

VI. Victim's law. Extensive powers under statutory law, low level of use of these powers in practice

A. Transposition and application of Directive 2012/29/EU

Pre-existing legislation partially corresponded to the requirements set out by the Directive.[96] The full transposition process was finalised recently, as both Law no 211 of 2004 on certain measures to ensure the protection of victims of crime and Law no 192 of 2006 on mediation and organisation of the profession of mediator[97] were amended by Law no 97 of 2018 regarding certain protection measures for the victims of crime.[98] According to the latest amendments, the victim's right to be accompanied by a person of their choice in the first contact with a competent authority was explicitly provided. In addition, new elements were added regarding the right to receive information from

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[93] Decision No. 15 of 2017, published in the *Official Gazette*, No. 946 from 29 November 2017.

[94] Oradea Court of Appeal, judgement No. 1368 of 2013.

[95] For a commentary, see N. Volonciu, A.S. Uzlău (eds.), *Noul Cod de procedură penală* 1287-1296; V. Constantinescu, '*Procedura reparării pagubei materiale sau a daunei morale în caz de eroare judiciară sau în caz de privare nelegală de libertate ori în alte cazuri*', *in* M. Udroiu (ed.), *Codul de procedură penală. Comentariu pe articole*, Bucureşti, CH Beck, 2017, 2116-2130.

[96] Law No. 211 of 2004 on certain measures to ensure the protection of victims of crime, published in the *Official Gazette*, No. 505 from 4 June 2004

[97] Published in the *Official Gazette*, No. 441 from 22 May 2006.

[98] Published in the *Official Gazette*, No. 376 from 2 May 2018.

the first contact with a competent authority, the right to make a complaint and the right to safeguards in the context of restorative justice systems. Eventually, new court premises with separate waiting areas for victims were provided, both for newly built premises (starting with 1 June 2018) and old ones (in which case, the deadline for setting up the special areas is 1 January 2019).

B. Compensation for victims

Under the French influence, the Romanian criminal process developed a civil side aiming to compensate losses. The compensation claim is usually submitted by the victim. Thus, the victim can 'bring' its civil action in the criminal trial; the victim receives the status of civil party and can sustain a private claim against offenders in order to obtain compensation for the damages arising from the offence.

1. Domestic level

Compensation is also provided under 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 EU, 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 EU, legally present on the territory of Romania at the time the offence was committed. In the event victims do not belong to the categories of persons mentioned, Article 21 paragraph 3 from Law no 211 stipulates that financial compensation shall be granted on the basis of the international conventions to which Romania is a party.[99]

The compensation mechanism is triggered by a request from the victim or the spouse, children and dependents of deceased persons in cases of certain offences[100]: murder and qualified murder [2014 CC, Articles 188 and 189], bodily injury (CC, Article 194), a deliberate offence which resulted in the victim's bodily injury, rape, sexual intercourse with a minor and sexual assault (CC, Article 218 – 220), trafficking in human beings and trafficking in minors (CC, Articles 210 and 211), a terrorist offence, as well as any other intentional offence committed with violence.

Financial compensation is granted to the victim only if she or he has notified criminal investigation bodies within 60 days of the date the offence was committed – detailed provisions regulate how to calculate the term, as well as the exception from this condition in cases of victims who were under 18 or who have been forbidden from notifying authorities. Financial compensation shall not be granted: if it is established that the deed does not exist or is not provided for by criminal law or that is was committed in self-defence; if the victim is finally convicted of participating in an

[99] Romania has ratified the 1983 European Convention on the Compensation of Victims of Violent Crimes (by Law No. 304 of 2005, published in the *Official Gazette*, No. 960 from 28 November 2005). The Convention provides compensation for nationals of the States party to the Convention, compensation which shall be paid by the State on whose territory the crime was committed.

[100] Art. 21 from Law No. 211 of 2004.

organised crime group for one of the offences mentioned in Article 21 from Law no 211 of 2004; 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 provocation. In addition, Law no 211 of 2004 (Article 28 – 34) 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 maximum amount available (ten gross minimum salaries – 1,900 Lei, around 400 euro) in cases involving prejudice relating only to material goods.

Romania's criminal legislation considers confiscation as a safety measure and cannot be perceived as a form of compensation. Illegally obtained assets will be confiscated only if these assets are not returned to the victim and to the extent that they are not used to indemnify the victim [CC, Article 112 paragraph 1 letter e)]. Returning goods and property to the victim or when he / she is indemnified is not a confiscation procedure but a civil remedy, which is regulated by the Civil Code.

2. Cross-border cases

As regards the transnational dimension of cooperation, we have no centralised information on the application of Directive 2004/80/EC on cross-border compensation.[101] Although the Directive was transposed into domestic legislation in 2007[102], introducing Title V[1] (Request for financial compensation to crime victims in cross-border cases) in Law no 211 of 2004, it appears that this instrument is not very well known or, in any case, rarely relied on in everyday practice.[103]

C. Protection measures for victims

1. Domestic level

At the domestic level, the applicable law in this particular domain consists of the 2014 Criminal Code and a body of special laws.[104]

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[101] Information was requested from judges operating within the Cluj Court of Appeal, Criminal Division, but no answer was received regarding cases involving Directive 2004/80/EC. In addition, information was requested from prosecutors working in different offices within the Office of the Prosecutor attached to the Cluj Court of Appeal, as well as in the Directorate for Investigating Organized Crime and Terrorism – Cluj Territorial Services. None of the respondents were involved in such proceedings.

[102] Government Emergency Ordinance No. 117 of 2007, published in the *Official Gazette*, No. 729 from 26 October 2007.

[103] Searching the databases of Romanian courts, we found few decisions of civil courts (as the competence belongs to civil courts), mainly denying compensation requests on the grounds of admissibility. For example, in one situation the case involved no violent intentional crime, as the offence in that particular case was destruction of property (Bucharest Court of Appeal, 4th Civil Division, decision No. 1611/2002).

[104] Law No. 211 of 2004 on the protection of victims; Law No. 151 of 2016 transposing the European Protection Order (published in the *Official Gazette*, No. 545 from 2016); Law No. 217 of 2003 on preventing and combating domestic violence, republished in the *Official Gazette*, No. 205 from 2014, last amended by Law No. 35 of 2017 (published in the *Official Gazette*, No. 214 from 2017) and by Constitutional Court decision No. 264 of 2017 (published in the *Official Gazette*, No. 946 from 29 November 2017).

As a general rule, protection measures are ordered by criminal courts either during trial (as 'restrictions' within the content of certain preventive measures) or at the end of the trial, when a final judgment is pronounced. The civil court is competent to issue a restraining order in cases of domestic violence.

The judicial authority in charge of ordering judicial supervision – prosecutor, judge of rights and liberties, preliminary chamber judge, court of first instance, appeal court – may also impose numerous restrictions on the offender.[105] Among these, some pertain to the realm of protection measures for victims, namely: 1) the duty not to travel to certain places or to travel only to allowed places; 2) the duty 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. Whenever subject to 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".[106]

In Romania, both the criminal court and the civil court are competent to impose protection measures. Starting with the competence of the criminal court, this court may first order the 'postponement of penalty enforcement' for a two year supervision term (CC, Article 83) following a guilty verdict. Among the obligations which can be imposed during the supervision term of two years, the offender must respect the following: "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" (CC, Article 85 paragraph 2).

At the end of the trial, the court may also impose ancillary penalties, such as a ban on the exercise of a number of rights for one to five years. Therefore, if the court considers that the victim must be protected, the following rights can be scrapped: "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 out social activities, in the conditions established by the court" (CC, Article 66 paragraph 1).

In cases where a custodial sentence was imposed, the same rights will be scrapped during the execution of the imprisonment, as an accessory penalty with the same content as the ancillary penalty (CC, Article 65 2014). The ancillary penalty will be executed for the established period of one to five years after the imprisonment penalty if fully executed or in cases when a suspension of this penalty is ordered by the court (CC, Article 68 paragraph 1).

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[105] Art. 215, para. 2 CCP.

[106] See M. Udroiu, *Procedură penală. Partea generală,* Bucureşti, CH Beck, 2018, 697.

In cases where conditional release has been ordered from the execution of imprisonment or life imprisonment, the 2014 CC 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" (CC, Article 101 paragraph 2).

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).

Lastly, in cases where the offender was a minor at the time when the crime was committed, the 2014 CC provides that only educational measures can be applied (Article 114). In cases of non-custodial educational measures, Article 121 paragraph 1 stipulates that the court can impose the following restrictions during the period of execution of the educational measure: "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".

The civil court has competence in only a particular case, namely the issuance of a protection order in cases of domestic violence. According to the law, this can be ordered if the person is endangered by an act of violence by a family member. The order can refer to the temporary removal of the aggressor from the family home and/or to limit the contact between the aggressor and other family members (e.g. not use parts of the common dwelling, oblige them to keep a minimum distance, prohibition from being in or moving to certain place or localities, etc.).[107]

A motion for a protection order can be submitted by the victim, the prosecutor or any other authority (e.g. the child protection agency) and the court has to decide within a maximum of 72 hours. An appeal can be submitted within three days from the moment of pronouncement or communication, depending on whether the parties were present at the pronouncement.

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[107] See Art. 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 duration of the order cannot exceed six 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.

2. Transnational cooperation

Transnational cooperation for the protection of victims is regulated under the EPO Directive and the European Protection Measures Regulation 606/2013. No information exists on the cross-border recognition and implementation of a protection order[108]. It may be due to the fact that the EPO Directive was only recently transposed into domestic legislation. Besides, the transposition law (Law no 151 of 2016) was criticised by the doctrine as it is considered rather vague and a mere translation of the text from the Directive instead of a proper implementation into domestic law of European provisions. [109]

The shortfalls of the EPO Directive are both substantial and procedural. From a substantial perspective, protection measures depend on the domestic legislation of both the issuing State and the executing one. Therefore, the effectiveness of the EPO will be undermined given the significant differences and inconsistencies among the laws of the States involved.[110] In order for the EPO to function more effectively, the harmonisation of domestic laws on criminal sanctions (for the offender) and protective measures (for the victim) should be encouraged. From a procedural perspective, it is worth mentioning that some of the key requirements of the EPO Directive, such as immediacy and urgency, can barely be met in practice. Indeed, the Directive itself does not contain time limits for issuing the EPO, an omission that, in all likelihood, has been replicated in national laws, the Romanian transposition law being a case in point.

VII. Horizontal issues of implementation, coordination and cooperation

Most EU instruments are designed to work on a horizontal level, meaning direct cooperation between authorities from various Member States, without 'central' level coordination. Since domestic legislation regarding jurisdiction is pretty much similar in most Member States, difficulties may arise due to overlapping jurisdictions[111] and, most probably, a breach of the *ne bis in idem* principle can arise.

Without a doubt, an EU instrument laying down criteria for determining the competent forum in case of conflict of jurisdiction is needed. Framework Decision 2009/948/JHA indeed contains only recommendations for Member States, thus being considered soft law. Besides, these recommendations refer merely to contact and consultation and fail to

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[108] In addition, no information was provided by the Office of the Prosecutor attached to the Cluj Court of Appeal or the Directorate for Investigating Organized Crime and Terrorism – Cluj Territorial Services.

[109] See, for more details, D. Lupou 'Ordinul european de protecție', 2017, 1, *Caiete de Drept Penal*, 80.

[110] Such as the different legal nature of the measures, their durations, the possibility of extending, modifying, revoking or withdrawing them.

[111] See A. Klip, *European Criminal Law*, Cambridge – Antwerp – Portland, Intersentia, 2012, 199.

provide any criteria to be relied on in order to solve the conflict of jurisdiction. Against this background, it is fair to say that a brand new EU instrument which sets clear and mandatory criteria to be used for solving conflicts of jurisdiction is needed. In this regard, inspiration could be drawn from the Freiburg Proposal on Concurrent Jurisdictions and the Prohibition of Multiple Prosecutions in the European Union.[112]

Furthermore, in the absence of binding criteria in an EU instrument, multiple prosecutions can be triggered, leading to a breach of the *ne bis in idem* principle. The absence of mandatory rules establishing a hierarchy of jurisdictions can lead to a lack of confidence in authorities from other States and even to some kind of competition[113]. Conversely, national authorities, although having jurisdiction to deal with the case, may refrain from doing so, in order not to violate the *ne bis in idem* principle[114] and not to waste their own limited resources.

Although the general tendency at both domestic and European level in recent years has been to avoid *in absentia* proceedings, a trial held in the absence of defendants could easily take place in the context of multiple concurrent jurisdictions. In Romania, a trial can take place *in absentia* and, consequently, it constitutes a ground for retrial only when: (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 were absent upon well-grounded reasons and were unable to inform the court thereupon (CCP, Article 466 paragraph 2). 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.

Defendants convicted *in absentia* may request a retrial no later than one month since the day they were informed, by an official notification, that a final judgment has been delivered. Should defendants be brought into the country on the basis of extradition or an EAW, the term starts from their arrival in Romania. All these rules apply also when the court decided, *in absentia*, the waiver of a 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 on which court has tried the case

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[112] 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., 2003, available online at: https://www.mpicc.de/files/pdf2/fa-ne-bis-in-idem.pdf. We are still wondering why this proposal was not taken into consideration by the European legislator.

[113] For example, the Romanian Criminal Code (Art. 8) regulates the *flag principle*, namely if an offence is committed on board of a Romanian vessel or aircraft, Romanian law is applicable on the basis of territorial jurisdiction. Art. 8 provides no exception, so the solution is the same even if the vessel or aircraft was, for example, in a foreign harbour or airport and, thus, entailing territorial jurisdiction for that state. See, F. Streteanu, D. Niţu, *Drept penal. Partea general*, Bucureşti, Universul Juridic, 2014, vol. I, 170-171.

[114] As an example, see the main proceedings in case Case C-469/03, *Filomeno Mario Miraglia*, 10 March 2005, ECLI:EU:C:2005:156. Apparently, the criminal proceedings against Mr Miraglia were closed by the Dutch public prosecutor without any penalty or other sanctions being imposed and that decision was taken only on the ground that a prosecution in respect of the same facts had been brought in Italy.

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 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).

VIII. Conclusions. Policy recommendations

More harmonisation is needed among domestic laws in order to facilitate cross-border cooperation.[115] 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 as provided that laws governing execution are more alike (e.g. the discrepancies between the Italian law, after the 2013 ECtHR judgment in Torregianni, and the Romanian law).[116] In addition, the European Investigative Order will work smoothly provided that evidence collection is governed by the same rules, conditions and principles at the domestic legislation level.

From a Romanian perspective, the major challenge remains for judicial authorities to understand statutory rules (and their spirit) alongside fostering the desire to put them into practice. To that effect, special training is needed.

From an EU perspective, perhaps Directives should be more precise and define and impose not only minimum standards, but, at least in some situations, precise and concrete standards. Still, we have to be objective and have to admit that such a view is hard to reconcile with the wording of Article 82 paragraph 2 TFEU (the legal basis in this particular field), which provides for the adoption of 'minimum standards'.

The EPPO Regulation and the upcoming Regulation on the mutual recognition of freezing and confiscation orders raises the question as to whether Directives will remain the preferred instruments for the regulation of criminal matters at the EU level in the future. Ultimately, the fact that the EPPO is established by means of a Regulation, while its substantive (material) competence is regulated by a Directive,[117]

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[115] For a similar conclusion, see R. E. Kostoris, 'European Law and Criminal Justice', *in* R.E. Kostoris (eds.), *Handbook of European Criminal Procedure*, Springer International Publishing 2018, 11. Kostoris points out that "Cooperation based on a principle like that of mutual recognition of judicial decisions, which presupposes 'trust' in the respective legal systems of the Member States, cannot properly develop without harmonization of national laws".

[116] We must mention that Law No. 254 of 2014 on execution of custodial sentences (published in the *Official Gazette*, No. 514 from 14 August 2013) was amended by Law No. 169 of 2017 (published in the *Official Gazette*, No. 571 from 18 July 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.

[117] Directive (EU) 2017/1371 on the fight against fraud to the Union's financial interests by means of criminal law, *OJ*, No. L 198, 28 July 2017.

could become problematic in the future.[118] One may wonder whether legislative measures dealing with 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 effective if adopted as Regulations.[119] Although, from the European perspective, such an approach will be more than desirable, once again the already mentioned treaty provisions – Articles 82 paragraph 2 and Article 83 paragraph 1 TFEU– show the general preference for Directives[120], at least for the time being.

Bearing in mind all these in-built treaty limitations, accentuated by the reluctance of Member States to give up their sovereignty, the solution may well come from the CJEU and its constantly evolving case law through the preliminary rulings' procedure. For example, we make reference to the well-known *Aranyosi and Căldăraru* judgment or to the more recent *LM*[121]. In both cases, the court actually 'invented' new grounds for refusal to execute the EAW, going beyond the provisions of FD 2002/584/JHA, as, in practice, the optimism of the European legislator, as derived from the preamble of the Framework Decision, was overshadowed by the new realities found in the domestic order of each Member State (a real risk of inhuman or degrading treatment in Romania and Hungary, doubts on the right to a fair trial in Poland, etc.). In a nutshell, these two cases represent accurate examples of how the preliminary ruling jurisdiction has developed into a "rather special and original tool through which the court has, over time, shaped and built, with innovative judgments of historic importance, the very foundations of Community law".[122] It is for the court – and at the same time, due to the provisions of the Treaties – only for the Court to fill in the gaps left by the Treaties and lead the way to a less fragmented area of European Criminal Law in the future.

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[118] See on that A. Weyembergh, C. Brière, *Towards a European Public Prosecutor's Office (EPPO)* 23, available online at: http://www.europarl.europa.eu/supporting-analyses. The authors stress out that '(…) the lack of a uniform definition of the EPPO's material scope of competence raises concerns as to its compatibility with basic EU principles, particularly the legality principle and the principle of legal certainty as provided for in the EU Charter'.

[119] To quote one of Professor's Martin Böse (Bonn University) interventions at a recent conference in Utrecht on confiscation in the EU (more information is available at: http://www.improvingconfiscation.eu/en/evento/convegno-alluniversita-di-utrecht/), 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 42. For the importance of Regulations for criminal law, see A. Klip, *European Criminal Law*, 52.

[120] Kostoris considers that "directives represent more ductile and less intrusive tools than regulations", thus being from the start preferred by Member States, as it leaves a "margin of appreciation to national systems in implementing them" – R.E. Kostoris, 'European Law and Criminal Justice' (n115) 25-26. Still, the author begins his study by questioning "through which instruments, in what forms, with what limits (…)" are the normative sources "destined to influence our subject" – European Criminal Law, we add (R.E. Kostoris, 'European Law and Criminal Justice' (n115), 8).

[121] Case C-216/18 PPU, *LM*, 25 July 2018, ECLI:EU:C:2018:586.

[122] R.E. Kostoris, 'European Law and Criminal Justice' (n115), 33.

PART II

Comparative study

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CHAPTER I

Investigative measures

I. Comparative analysis of investigation regimes

Few endeavours towards approximation have been undertaken by the EU in respect of investigative measures. Nonetheless, the question of their approximation deserves to be asked, against the background of the rather recent entry into force of the EIO and the EPPO, which are designed to foster transnational investigations. The EIO replaces the corresponding provisions of the 2000 EU Convention for Mutual Legal Assistance in Criminal Matters (hereafter referred to as the 2000 EU MLA Convention) and the Framework Decision on Freezing Orders among the participating Member States.[1] It is thus worth noting that the 2000 EU MLA Convention remains of interest for this study, as Ireland has an opt-out with regard to the EIO Directive and Denmark does not take part in it.[2] However, the legal framework of the Joint Investigation Teams remains unchanged.[3] Three main sets of differences were identified as posing significant obstacles to transnational investigative activities: differences among the types of authorities competent to deal with investigative measures as well as divergences in the competences allocated to them. Although both administrative and criminal law actors play a role in criminal

[1] Respectively under Art. 34(1) and (2) Directive 2014/41/EU.

[2] Speaking in Dáil Éireann on Wednesday 4th 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). The UK later opted in to the EIO by adopting secondary legislation in the form of the Criminal Justice (European Investigation Order) Regulations 2017. National report No. 1 on Ireland, Introduction (point 1).

[3] Pursuant to Art. 3, Directive 2014/41/EU.

investigations, the degree of involvement of administrative bodies differs from one Member State to another, as regards the role of intelligence services in particular. A second category focuses more specifically on differences in the role devoted to criminal law actors as such and a third category examines the types of special investigative measures available in the Member States, alongside the conditions underpinning their deployment.

A. Blurred picture between administrative and criminal law actors and the variable importance of intelligence services

The fight against crime has driven some Member States to resort to the administrative channel in the conduct of investigations, instead of criminal law.[4] Administrative investigations may be preferred to criminal investigations for a variety of reasons. These may include the minor character of the offence[5] or the financial burden and delays associated with the criminal law system.[6] Sometimes it is rather the hybrid nature of offences which triggers a dual track of investigations, such as the protection of financial interests of the EU budget.[7] As a result, it has become increasingly difficult to demarcate the division of labour between national administrative and criminal authorities vested with investigative powers. Differences between Member States are evident here as well. Indeed, the importance of administrative authorities in investigations varies from one Member State to another. The same is true for the division of competences between the administrative channel and criminal law actors as well as for the interactions and synergies between both. The growing importance of intelligence activities in some countries is a case in point. From an organisational point of view, the national law of most countries examined distinguishes law enforcement and intelligence services. Noticeable exceptions include Finland and Ireland, where intelligence activities are carried out by a structure that is officially part of law enforcement authorities.[8] Besides, the procedures applicable to investigative measures deployed to fight serious crimes are often changing, as shown by the adoption of new counterterrorism laws in several

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[4] J. Vervaele, 'Special procedural measures and the protection of human rights: General report', 2009, 5, *Utrecht Law Review*.

[5] Most countries have 'depenalised' minor offences, which are now dealt with through the administrative channel. See O. Jansen, *Administrative Sanctions in the European Union*, Antwerpen, Intersentia, 2013.

[6] K. Sugman Stubbs, M. Jager, 'The organisation of administrative and criminal law in national legal systems: exclusion, organized, or non-organized co-existence', *in* A. Weyembergh, F. Galli (eds.), *Do labels still matter? Blurring boundaries between the administrative and criminal law: the role of the EU*, Bruxelles, Éditions de l'Université de Bruxelles, 2014, 158.

[7] An example of this is provided from an institutional perspective through the establishment of OLAF and the EPPO, which are competent to investigate, respectively, administrative and criminal offences.

[8] 'Surveillance by intelligence services: fundamental rights safeguards and remedies in the EU. Volume II: field perspectives and legal update', Fundamental Rights Agency, Report, 2017. It is illustrative of the leading role of the police in investigations.

countries, which sometimes involves a shift of competences and power from criminal justice actors to administrative authorities (e.g. France, Germany, Netherlands).[9] Following the wave of terrorist attacks on European soil, emphasis was placed on the complementarities between the various channels/actors at the investigation stage. In France, information gathered during fact-finding activities carried out by intelligence services can be 'judicialised' if this information shows evidence that a terrorist offence has been committed or is being prepared.[10] Besides, intelligence services carry out investigations at the request of judicial authorities on a regular basis.[11] Information flows are increasingly a two-way street. Although the principle of secrecy of criminal investigation prevails, the Code of Criminal Procedure (CCP) was amended several times to facilitate horizontal information-sharing from the judiciary to the intelligence services.[12] Since 2017, the prosecutor may pass on elements of criminal files relating to terrorist offences to intelligence services, where necessary, to fulfil the objective of preventing terrorism.[13] Reliance on information gathered by intelligence services in criminal proceedings is more common in other countries with a long history of fighting terrorist threats. In Spain for example, intelligence information was frequently used in criminal proceedings due to the longstanding fight of the national authorities against ETA-led terrorist activities.[14]

B. Differences among criminal law authorities involved in investigations

The nature and competence of criminal law authorities involved in transnational investigations vary from one Member State to another. The following identifies three broad categories of Member States, ranging from national systems devolving

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[9] R. Renard, R. Coolsaet (eds.), 'Returnees: who are they, why are they (not) coming back and how should we deal with them? Assessing Policies on Returning Foreign Terrorist Fighters in Belgium, Germany and the Netherlands', Egmont Institute for International Relations, Egmont paper 101, February 2018.

[10] For this purpose, the information transmitted must be declassified so as to not reveal the investigative techniques deployed during the collection process. Rapport de la Délégation parlementaire française au Renseignement, Rapport d'activité, 2016, 61.

[11] *Ibid.*

[12] Besides the example provided below, the CCP was amended in 2016 to allow the administration to be informed of certain elements pertaining to an ongoing investigation relating to a member of the personnel.

[13] Art. 14, Loi No. 2017-258 du 28 février 2017 relative à la sécurité publique, *JORF*, No. 0051, 1 March 2017. The first paragraph reads: 'Le procureur de la République de Paris, pour les procédures d'enquête ouvertes sur le fondement d'une ou de plusieurs infractions entrant dans le champ d'application de l'article 706-16 dont il s'est saisi, *peut communiquer aux services spécialisés de renseignement* mentionnés à l'article L. 811-2 du code de la sécurité intérieure, de sa propre initiative ou à la demande de ces services, copie des éléments de toute nature figurant dans ces procédures et nécessaires à l'exercice des missions de ces services en matière de prévention du terrorisme.'

[14] M. Jimeno-Bulnes, 'The use of intelligence information in criminal procedure: A challenge to defence rights in the European and the Spanish panorama', 2017, 8, *New Journal of European Criminal Law*, 171, 191.

a minor role to the judge to those countries where most of the investigations are placed within the hands of the judge. A first group of Member States attributes a dominant role to the police force in the conduct of investigations (e.g. Ireland, Finland). The Irish system provides that the only competent body to conduct a criminal investigation is the *Garda Siochana*. Judges therefore have no role in the investigation of offences other than issuing warrants. In Finland, the investigation is led by a senior police, customs or border guard official.[15] A prosecutor leads investigations only in cases where a police officer is suspected of a crime.[16] The role of the judge is extremely limited, aside from authorising the use of certain coercive investigative measures.[17]

Among the sample examined, a second group of Member States (e.g. the Netherlands, Italy, France, Germany, Romania, Hungary) grants significant investigating powers to the prosecutor. The latter supervises and, to some extent, conducts the criminal investigation, with a less important role devoted to the police and the investigating judge. However, the exact balance of investigative powers between the prosecutor and the investigating judge differs from one legal system to another. The supervisory function carried out by the judiciary is less relevant in some systems (e.g. Germany, the Netherlands, Hungary). In Germany for example, the investigatory or pre-trial procedure is formally in the hands of the State prosecution and the prosecutor has been referred to as the 'master of the investigative phase'[18]; judicial authorisation must generally be sought for the deployment of coercive investigative measures, but the judge has no power over the decision to prosecute.[19] In others, judges have more extensive control (e.g. France and Italy). In France, the organisational structure of the pre-trial phase is determined by the nature of the offence. This means that different types of investigations may be carried out, resulting in different investigative powers allocated to the prosecutor and the investigating judge.[20] Authorisation from a third party, i.e. the *juge des libertés et de la détention* (judge of freedoms and detention), must be sought by the prosecutor to carry out measures that may affect personal liberty, such as search and seizures,

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[15] Criminal Investigation Act [Esitutkintalaki] 22.7.2011/805, 2:2. See National report No. 2 on Finland, Section on Evidence gathering and admissibility (point 16).

[16] *Ibid.*, 2:4.

[17] Such as the search of a reporter or a lawyer's office. See national report No. 2 on Finland, Section on Other areas of concern (point 31).

[18] In practice, however, it is the police that undertakes investigations, for the most part. acting on their own authority.

[19] National report No. 2 on Germany, Section on evidence (point A(2)) (see also Part I, Chapter II of this edited volume).

[20] Generally speaking, the prosecutor is responsible for the investigation of minor offences and the investigating judge retains power for the investigation of crimes. The prosecutor may also be involved in criminal investigation. However upon expiration of a certain time-limit, the case must be passed on to the investigating judge. See A. Ryan, *Towards a System of European Criminal Justice, The problem of admissibility of evidence*, New York/London, Routledge, 2014, 137-138.

interceptions of telecommunications and surveillance.[21] In Italy, the prosecutor is, in theory, in charge of the investigation. Similar to France, its margin for manoeuvre is, however, limited by the presence of two judges. The *giudice delle indagini preliminari* (judge for preliminary investigations) is in charge of overseeing the preliminary investigation and making decisions on any measures that restrict the liberty of the accused.[22] The *giudice dell'udienza preliminare* (preliminary hearing judge) takes a decision to send the case to trial.[23]

The third approach devolves larger investigative competences to judges. In Spain, the investigation relies on a strongly decentralised and 'sophisticated' jurisdictional structure that provides a very strong role to the judiciary.[24] It involves the *juzgado de instrucción* (investigating judge) at the local level, and the *juzgado central de instrucción* (national investigating judge) and the *Audiencia Nacional* (high court) at the national level.[25] Exceptionally, the prosecutor may open a limited and preliminary investigation. In the event that coercive measures are needed, the prosecutor must nonetheless transfer the case to the investigating judge.[26]

It derives from the foregoing that the degree of involvement of the judge is by no means even across the sample of Member States analysed. Nonetheless, it should be pointed out that the aforementioned three-fold categorisation is of a merely indicative nature. Indeed, the fight against certain types of serious crime, such as terrorism, organised crime, and human trafficking, alongside the parallel development and refining of special investigation techniques,[27] may act as a driver leading to a redefinition, or a restructuring of the interplay between investigating authorities. Offences relating to these forms of crime often trigger the application of specific procedural rules for the investigation, with reduced judicial oversight.[28] In France, for example, more intrusive measures are used to investigate organised crime offences and the CCP provides for a less protective procedure.[29] In Italy, a specific investigation body made up of prosecutors, i.e. the Anti-Mafia District Directorate, was established

[21] *Ibid.*, 137.

[22] *Ibid.*, 190.

[23] *Ibid.*

[24] 'Report on Spain', Evaluation report on the sixth round of mutual evaluations: The practical implementation and operation of the Council Decision 2002/187/JHA of 28 February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime and of the Council Decision 2008/976/JHA on the European Judicial Network in criminal matters, Eurojust Report, Council Document 11004/2/14, 23 September 2014, 11.

[25] *Ibid.*, 13.

[26] *Ibid.*

[27] See typology developed by M. Wade, 'Developing a Criminal Justice Area in the European Union', European Parliament Study (LIBE Committee), PE 493.043, 2014, 16.

[28] F. Galli, 'Terrorism', *in* V. Mitsilegas, M. Bergström, T. Konstadinides (eds.), *Research Handbook on EU Criminal Law*, Cheltenham, Edgar Publishing, 2016, 418.

[29] M. Kusak, *Mutual admissibility of evidence in criminal matters in the EU, A study of telephone tapping and house search*, Antwerp, Maklu, 2016, 211.

in order to probe 'Mafia cases'[30] as early as 1991. The latter structure is also in charge of conducting terrorist-related criminal investigations.[31]

C. Special investigative measures and conditions for their use

The challenge of diversity in the types of authorities that are competent to deal with investigative measures is heightened by differences in the nature of investigative measures available at the national level, alongside the requirements conditioning their use.[32] Given their complexity and increasing relevance in cross-border frameworks of cooperation, particular attention should be paid to special investigative measures. It is clear from this comparative research that the availability of special investigative techniques is not uniform across the EU. For recent forms of serious crime, such as cybercrime, the legislation of Member States does not always provide for adequate investigations. An illustration of this suggests that, in relation to access and search for information in email accounts, some participants at a Eurojust meeting noted that they would proceed as if it were a regular search whereas others would perceive it as an interception of communications.[33] There is, additionally, no common definition of the existing special investigative measures. In the field of covert operations, for example, no agreement exists as to what an undercover agent is, nor is there an exhaustive list of undercover operations.[34] Third, Member States have established their own 'seriousness' thresholds with respect to the use of a given special investigative tool, resulting in variations in the minimum punishable offences for which recourse to these special techniques is allowed. In Germany, interception of communications and, more particularly, the use of surveillance techniques in domestic premises, is limited to the investigation of an exhaustive list of serious offences.[35] In other countries, it is the sentence length of the offence for which surveillance techniques are deployed that is taken into consideration (e.g. Ireland, the Netherlands).[36] Fourth, as a result

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[30] P. Maggio, 'The EIO Proposal for a Directive and Mafia Trials: Striving for Balance Between Efficiency and Procedural Guarantees', *in* S. Ruggeri (ed.), *Transnational Evidence and Multicultural Inquiries in Europe*, Cham, Springer International Publishing, 2014.

[31] M. Gutheil, Q. Liger, C. Möller, J. Eager, M. Henley, Y. Oviosu, 'EU and member States' policies and laws on persons suspected of terrorism-related crimes', European Parliament Study (LIBE Committee), PE 596.832, December 2017.

[32] As demonstrated by comparative analyses carried out in the framework of the so-called 'EU model rules of criminal investigation and prosecution for the EPPO', a project coordinated by Katalin Ligeti of the University of Luxembourg (Indroduction n36).

[33] 'Report of the Strategic Meeting on Cybercrime', Eurojust Report, 19-20 November 2014, 7.

[34] 'Study on paving the way for future policy initiatives in the field of fight against organised crime: the effectiveness of specific criminal law measures targeting organised crime', Rand Europe, Comparative Report, 2015. Retrieved at: www.ec.europa.eu/home-affairs/sites/homeaffairs/files/e-library/docs/20150312_1_amoc_report_020315_0_220_part_2_en.pdf

[35] National report No. 1 on Germany, Section on evidence (point IV) (see also Part I, Chapter II of this edited volume).

[36] 'Study on paving the way for future policy initiatives in the field of the fight against organised crime: the effectiveness of specific criminal law measures targeting organised crime' (above n34), 255.

of the intrusive nature of some investigative techniques and the possible breaches of fundamental rights that they entail, resorting to these measures often requires special authorisation, which is granted for different periods of time. In the case of interception of communications for example, a request must be filed either to the judge or the prosecutor (e.g. Germany),[37] the investigating officer (e.g. Finland) or the investigating judge (e.g. Hungary, France, Italy, the Netherlands, Romania, Spain).[38] The length of authorisation varies significantly: from 15 days (e.g. France), 30 days (e.g. the Netherlands), 40 days (e.g. Italy), to 90 days (e.g. Germany, Hungary) and 120 days (e.g. Romania).[39]

II. Impact of these differences on cross-border cooperation

The existence of differences in the realm of investigative measures affects cross-border and mutual recognition instruments in several respects. In order to accommodate existing differences, the EU legislator adopted a two-pronged approach: it widened the types of authorities involved (judicial or non-judicial) and deferred crucial aspects of cooperation to national law. These solutions have nonetheless proved insufficient to enable the effective operation of some instruments and delays in the operation of cooperation requests have occurred as a result of incompatibilities or lack of mutual knowledge between investigation systems. Besides, the solutions put forward by the EU and, in particular, the blurred distinction between administrative and criminal law encouraged by the EU in its cooperation instruments, raise a number of concerns from a fundamental rights-based perspective.

A. Accommodating and circumventing differences: dual flexibility in EU instruments

The variety of authorities involved in investigations at the national level, ranging from judicial bodies to administrative and law enforcement actors, was a driver in the EU legislator's decision to retain significant flexibility regarding the nature of authorities involved in the issuing and execution of investigation requests.

'Judicial' cooperation in investigation matters is not limited to cooperation among 'judicial authorities',[40] and includes a range of other national actors.[41]

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[37] In Germany actually, a judge must authorise most of the investigative measures. A prosecutor may authorise interceptions of communications only in urgent cases. See National report No. 2 on Germany, Section on evidence gathering and admissibility (point C(2)) (see also Part I, Chapter II of this edited volume).

[38] 'Study on paving the way for future policy initiatives in the field of fight against organised crime: the effectiveness of specific criminal law measures targeting organised crime' (above n34).

[39] *Ibid.*, 256.

[40] The fight against criminality now includes administrative, law enforcement, and judicial authorities, for example. G. Vermeulen *et al.*, *Rethinking International Cooperation in Criminal Matters* (above Introduction n32), 94.

[41] *Ibid.* See typology of mutual recognition instruments developed at p. 67, as well as the detailed breakdown of the nature of competent authorities appointed to deal with each MR instrument, on p. 70-71.

The nature of actors involved in transnational investigations has been broadened over time. Although the original 1959 MLA Convention referred to 'judicial authorities' as the competent actors of cooperation,[42] cooperation under the EU framework significantly enlarged the number and types of competent authorities. The Convention Implementing the Schengen Agreement (CISA) and the 2000 EU MLA Convention included administrative authorities among the competent actors in cross-border cooperation on condition that the decisions taken by administrative authorities could give rise to proceedings before a court having jurisdiction in criminal matters.[43] The shift to mutual recognition further refined the nature of authorities involved. The Freezing Orders FD and the EIO Directive distinguish between the nature of authorities competent to *issue* assistance requests and those in charge of *executing* orders. As regards the issuing stage, non-judicial authorities are competent to issue freezing orders[44] or investigation orders,[45] upon validation by a judicial authority. The EIO Directive even introduced the possibility for the defence to request the issuing of an EIO if it is provided under national law.[46] As regards the executing stage, FD Freezing Orders simply refers to 'executing State' for the execution of freezing orders.[47] By contrast, the EIO Directive makes a first-ever attempt at defining the nature of an executing authority. Thus, an executing authority within the meaning of Article 2(d) is "an authority having competence to recognise an EIO and ensure its execution in accordance with this Directive and the procedures applicable in a similar domestic case. Such procedures may require a court authorisation in the executing State where provided by its national law". Thus, flexibility was retained as regards the nature of the executing authority. However, its margin of discretion is restricted by a certain degree of judicial control. Ultimately, it is worth mentioning that the notion of 'judicial authorities' is an ambiguous concept, as both prosecutors, courts and judges fall under this category and can be involved in investigations.

[42] Art. 1(1) Council of Europe Convention on Mutual Assistance in Criminal Matters, Strasbourg, 20 April 1959.

[43] Art. 49 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*, No. L 239, 22 September 2000 and Art. 3(1) 2000 EU MLA Convention respectively.

[44] Art. 2(a) FD 2003/577/JHA.

[45] Art. 2(c)(ii) Directive 2014/41/EU.

[46] Art. 1(3) Directive 2014/41/EU.

[47] Art. 2(b) FD 2003/577/JHA.

Evolution of the types of authorities involved

	1959 Convention	1990 CISA	2000 EU MLA Convention	2003 FD Freezing Orders	2014 EIO Directive	2018 E-Evidence Proposal
Requesting / issuing	Judicial authorities	Judicial authorities + Administrative authorities where the decision can give rise to criminal proceedings	Judicial authorities + Administrative authorities where the decision can give rise to criminal proceedings	Judicial authorities + Non-judicial authorities competent upon validation by judicial authorities	Judicial authorities + Non-judicial authorities competent upon validation by judicial authorities + The defence may request an EIO if national law permits this	A court or a judge (production order) A court, a judge or a prosecutor (preservation order)
Requested / executing	-	-	-	-	Competent authority in the executing State. Execution procedures *may* require a court authorisation.	'Addressees', i.e. service providers

It is worth noting that a similarly flexible approach was applied to other EU instruments outside the area of investigation. These include the mutual recognition of financial penalties,[48] probation orders and alternatives to detention[49] and supervision

[48] Art. 1(a) Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties, *OJ*, No. L 76, 22 March 2005. The remainder of the text only refers to 'authorities' without specifying further. For example, authorities other than judicial ones can communicate extracts and information relating to judicial records. See Art. 13(1) 1959 CoE Convention.

[49] Art. 3(2) 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, *OJ*, No. L 337, 16 December 2008.

orders.[50] Other cross-border cooperation instruments retained similar flexibility, such as in the realm of criminal records[51] and conflicts of jurisdiction.[52]

Other instruments do not retain such flexibility, as demonstrated by the Framework Decision on the European Arrest Warrant, which limits the relevant cooperation mechanisms to 'judicial authorities' only. Under Article 1(1) FD EAW, the European Arrest Warrant constitutes a 'judicial decision'[53] that only 'judicial authorities'[54] are competent to issue. The specificities of surrender procedures account for this particular status. Surrender involves the "deprivation, temporary or otherwise, of liberty" as well as "the analysis of proportionality before the EAW is granted".[55] Thus, the execution of an EAW must be subject to sufficient controls at various stages of the surrender procedure[56] and the authorities competent to issue EAWs cannot be other than judicial.[57] The shift

[50] The rule is that judicial authorities are competent to issue and execute ESOs. However, Member States, as an exception, may also designate non-judicial authorities as competent to take decisions. If a decision is taken by a judicial authority which is not a court on either the modification of obligations contained in the probation measure, or the suspension/revocation of the measure, such a decision may be reviewed by a court or by another independent court-like body. See Art. 6 FD ESO.

[51] Art. 3(1) 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, *OJ*, No. L 93, 7 April 2009.

[52] Recital 6, Art. 4(1) FD Conflicts of Jurisdiction read that Member States should have the discretion to designate 'competent authorities.'

[53] Art. 1(1) FD EAW.

[54] Art. 6(1) FD EAW. See also C-452/16, *Poltorak*, 10 November 2016, ECLI:EU:C:2016:784, para. 28 and the so-called OG-PI case of the CJEU. In joined cases of OG-PI, the Court stated that the German Prosecutor cannot be considered as an issuing judicial authority within the meaning of Art. (6(1) of FD EAW because it is exposed to the risk of being subjected directly or indirectly, to individual orders or instructions from the executive, such as a Minister of Justice in the context of a decision on the issuance of EAW (C-508/18 and C-82/19, PPU, OG-PI, 27 May 2019, ECLI:EU:C:2019:456). In a series of other judgements, it considered that the conditions of the FD were met by the Lithuanian public prosecutors (C-509/18, *PF*, 27 May 2019, ECLI:EU:C:2019:457), Austrian (C-489/19PPU, *NJ*, 9 October 2019, ECLI:EU:C:2019:849), French (C-566/19 and C-626/19, *C JR and YC*, 12 December 2019, ECLI:EU:C:2019:1077), Swedish (C-625/19) *XD*, 12 December 2019, ECLI:EU:C:2019:1078) and Belgian public prosecutors (C-627/1990 PPU, *ZB*, 12 December 2019, ECLI:EU:c:2019:1079).

[55] Opinion of Advocate General Campos Sánchez-Bordona delivered on 19 October 2016 on C-452/16, *Poltorak*, para. 38.

[56] Recital 8 FD EAW.

[57] See *Poltorak*, paras. 40 and 44: 'Action by a judicial authority is required at other stages of the surrender procedure, such as hearing the requested person, deciding to keep him in detention, or deciding on his temporary transfer… Therefore, the principle of mutual recognition, enshrined in Article 1(2) of the Framework Decision, pursuant to which the executing judicial authority is required to execute the arrest warrant issued by the issuing judicial authority, is founded on the premise that a judicial authority has intervened prior to the execution of the European arrest warrant, for the purposes of exercising its review.' Whereas the *Poltorak* ruling does not explicitly put into comparative perspective the fields of surrender and cross-border investigation, the explanation put forward by the Court and its Advocate General can be seen as an indirect justification for the different levels of flexibility retained in MR instruments.

of *modus operandi* from 'inter-ministerial' cooperation in the early days of extradition treaties from judge-to-judge cooperation under FD EAW was more far-reaching compared with the realm of transnational investigations, where cooperation between judicial authorities already occurred, notably through the essential role of the judge in authorising the use of coercive investigative measures. Three other FDs limit the scope of cooperation to a decision issued by a court. They comprise those dealing with the mutual recognition of confiscation orders,[58] convictions[59] and transfers of prisoners.[60]

It is interesting to note that the inclusion of administrative components into criminal investigations is not a one-way street. The reverse trend can also be observed. The scope of Mutual Administrative Assistance (MAA) conventions[61] relating, for example, to cooperation on tax and customs matters, has been broadened to include the early stages of criminal investigations and references to the purposes of preventing, investigating and even prosecuting fraud in the EU can be discerned in administrative instruments dealing with the protection of EU financial interests.[62]

The broadening of the number and types of actors involved in transnational investigations does not mean that the actions of administrative authorities are not subject to a certain degree of control. The widening of cooperation in recent instruments was accompanied by stronger emphasis placed on the degree of scrutiny exercised by the judiciary on non-judicial authorities. A case in point is the definition of an executing authority provided under the EIO Directive, compared with the silence of previous MR tools, which heralds a positive shift towards the introduction of a greater degree of judicial scrutiny.[63]

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[58] Art. 2(a) Council Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders, *OJ*, No. L 328, 24 November 2006; now Art. 2(2) of Regulation (EU) 2018/1805 of 14 November 2018 on the mutual recognition of freezing orders and confiscation orders, *OJ*, No. L 303, 28 November 2018.

[59] Art. 2 Council 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, *OJ*, No. L 220, 15 August 2008.

[60] Art. 2 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, *OJ*, No. L 327, 5 December 2008.

[61] See for example Regulation 904/2010 of 7 October 2010 on administrative cooperation and combating fraud in the field of value added tax, 12 October 2010, p. 1. See M. Luchtman, 'Inter-state cooperation at the interface between administrative and criminal law', *in* A. Weyembergh, F. Galli (above n6), 198.

[62] M. Luchtman, 'Inter-state cooperation at the interface between administrative and criminal law', *in* A. Weyembergh, F. Galli (n6), p. 199. Mutual assistance in administrative matters has evolved in parallel to its criminal law counterpart, i.e. the MLA system. For an analysis of the evolution of MLA, see K. Ligeti, M. Simonato, Multidisciplinary investigations into offences, *in* Galli & Weyembergh (n6), 189. For an example of such a 'reverse trend', see Art. 1 of the Convention drawn up on the basis of Art. K.3 of the Treaty on European Union, on mutual assistance and cooperation between customs administrations, *OJ*, No. C 024, 23 January 1998.

[63] Interestingly, a reverse phenomenon can be observed in FD EAW. The latter limits cross-border cooperation between judicial authorities, however it does not contain any provision on judicial control. By contrast, the number of actors involved in cross-border investigations is

Interestingly, the Commission's E-Evidence Regulation Proposal also goes in the direction of enhanced judicial control with regard to issuing authorities. The latter provides that a judicial authority must always be involved in the decision-making process underpinning assistance requests, either as an issuing or a validating authority.[64] Moreover, the proposed regulation re-establishes the distinction between the level of control guaranteed by a court or a judge and the level of control guaranteed by a prosecutor. For example, the issuing of a Production Order for the transfer of 'transactional and content data', which generally requires higher standards,[65] cannot be consented to by a judicial authority other than a judge or a court. As regards less sensitive data, such as subscriber or access data, production orders can be issued by a prosecutor.[66] The reason for this distinction is that the level of judicial control exerted by a prosecutor is certainly not the same as the one exerted by a court or a judge. The latter are considered as a judicial authority in the strict sense of the term[67] and offer the best guarantees of independence, impartiality and proper procedure.[68] These questions lay at the heart of the *Assange* case on extradition/surrender, where the execution of the EAW issued by Sweden was contested on the grounds that it had been issued by a prosecuting authority. According to Assange's lawyers, a 'prosecutor' did not fall under the 'judicial authority' category within the meaning of Article 3 FD EAW.[69] In spite of this, the British High Court embraced in its final judgment the broad meaning conferred to the notion of 'judicial authority' by FD EAW.[70] The Irish High Court addressed similar issues with regard to an EAW issued by the Dutch prosecuting authority and upheld the approach

much wider, but requirements on judicial control have been included. This is despite the fact that many debates were held on judicial control in the run-up to the adoption of FD EAW. A. WEYEMBERGH, 'Transverse report on judicial control in cooperation in criminal matters: The evolution from traditional judicial cooperation to mutual recognition', *in* LIGETI (see Introduction n36), 968.

[64] Art. 4, European Commission, Proposal for a Regulation on European Production and Preservation Orders for electronic evidence in criminal matters, COM (2018) 225 final, 17 April 2018.

[65] Art. 4(2) E-Evidence Regulation Proposal. Such as proving probable cause, i.e. the connection between the criminal activity and the account, and data minimisation procedures, i.e. the review of what is relevant to the offence and can be forwarded to the requesting country). European Commission, Impact Assessment accompanying the Proposal for a Regulation on European Production and Preservation Orders for electronic evidence in criminal matters and Proposal for a Directive laying down harmonised rules on the appointment of legal representatives for the purpose of gathering evidence in criminal proceedings, SWD (2018) 118 final, 17 April 2018, 26.

[66] Art. 4(1) E-Evidence Regulation Proposal.

[67] G. VERMEULEN *et al*. (above Introduction n33).

[68] ECtHR, *Klass a.o.*, Application No. 5029/71, Judgement of 6 September 1978, paras. 55-56.

[69] They further noted that 'in the context of 'a judicial authority' the more appropriate meanings are: 'having the function of judgment; invested with authority to judge causes'; a public prosecutor would not happily fall within this meaning.' *Assange v The Swedish Prosecution Authority* [2012] UKSC 22, para. 17.

[70] *Ibid.*, para. 79. It noted that, in most EU states, a court is involved in the process leading to the issuing of an EAW. Thus, a narrow interpretation of the terms 'issuing judicial authority'

taken by its British counterpart.[71] Supranational instruments deliberately sought to play down the importance of this question, by equating judges and public prosecutors.[72] This approach was endorsed by the Court of Justice of the EU in a line of case law on surrender procedures. In *Poltorak*,[73] the CJEU affirmed that the term 'judicial authority' is not limited to judges or courts but may extend to the authorities required to participate in administering justice in the legal system concerned,[74] such as the national public prosecutor.[75] This approach was maintained and further refined in subsequent case law.[76]

Nonetheless, emphasis on judicial control is made in an inconsistent way. The EIO establishes a certain degree of judicial control over the execution of assistance requests if national law so requires. By contrast, the E-Evidence Proposal, which acts as a complementary tool to the EIO Directive, seems to go a step backwards. The proposed regulation reads that the responsibility to ensure that assistance requests do not encroach upon fundamental rights is deferred to service providers, i.e. 'the addressee.'[77] Addressees are responsible for determining whether one of the several grounds for refusal to the execution of Production and Preservation Orders applies. On the one hand, the weakening of the degree of judicial control at the executing stage is dictated by practical and effectiveness considerations.[78] On the other hand, concerns were expressed that the proposal would be "putting companies at the same level as a court or a state", whereas companies do not have legal obligations similar to those of States to respect and defend people's fundamental rights.[79] It seems that

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would result in 'a large proportion of EAWs being held ineffective (in the UK), notwithstanding their foundation on an antecedent judicial process.'

[71] *Minister for Justice Equality and Law Reform v. McArdle & Brunell*, [2015], IESC, 56, 25th June 2015. It was noted that variations exist in the structure and composition of judicial systems in the Member states, and in many countries the public prosecutor is an integral part. of the judicial structure or judicial corps. Moreover, the 1957 CoE Convention on extradition indicated that a public prosecutor could fall within the concept of judicial authority. National report No. 1 on Ireland, Section on Presumption of Confidence in the Authorities of other Member States (point 5.2.)

[72] F. Gascon Inchausti, 'Report on Spain', *in* Ruggeri (above Introduction n29), 493.

[73] *Poltorak* (n54) para. 32.

[74] *Ibid.*, para. 33.

[75] C-486/14, *Kossowski*, 29 June 2016 ECLI:EU:C:2016:483, para. 39.

[76] The Court however excluded ministries of justice and other government organs and police authorities from the definition of judicial authorities. It ruled that administrative and police authorities pertained to the province of the executive and, pursuant to the principle of the separation of powers that characterises the operation of the rule of law, they cannot be covered by the term judiciary. See C-477/16 PPU, *Kovalkovas*, 10 November 2016 ECLI:EU:C:2016:861, and *Poltorak* (n54), para. 35. It limited their role to providing practical and administrative assistance to the competent judicial authorities, under para. 42. See also C-453/16 PPU, *Özçelik,* 10 November 2016, ECLI:EU:C:2016:860. See also the so called OG-Pi case law (n54).

[77] Art. 14(4) E-Evidence Proposal.

[78] In many cases, the defence will have little access to the service provider, for example if the investigation is carried out without his/her knowledge, or the service provider is located outside the EU.

[79] 'EU e-evidence proposals turn service providers into judicial authorities', *European Digital Rights*, 16 April 2018. Retrieved at: www.edri.org/eu-e-evidence-proposals-turn-

the aforementioned strengthening of judicial control at the issuing stage was meant to compensate for the absence of control at the executing stage. However, the current proposal only provides a possibility for the suspect or accused person to challenge the decision to issue a Production or a Preservation Order in the issuing State.[80] This means that the recognition and execution of the request by the service provider cannot be challenged by the person whose data is at stake.

These concerns are heightened by the absence of clear-cut criteria which service providers should rely on to perform their assessment. As regards fundamental rights in particular, a service provider may oppose an order if it 'manifestly violates' the provisions of the Charter of Fundamental Rights or if it is 'manifestly abusive'.[81] It is not entirely clear what a 'manifest' violation of the Charter of Fundamental Rights or a 'manifest' abuse entail.[82] This approach seems to contradict the obligation of clarity and precision in EU legislation required by the CJEU's jurisprudence,[83] an obligation which is, however, essential in allowing the individuals concerned to enjoy sufficient guarantees that their data will be effectively protected against risks of abuse and unlawful access and use.[84]

Considerations of a more practical nature raise further concerns about the due process of requests and legal foreseeability.[85] The extent to which possible 'manifest' fundamental rights concerns will be taken into account in the processing of Production and Preservation Orders may vary from one service provider to another; the broad scope of the proposal, covering *any* criminal offence, carries the risk of swamping service providers with requests despite the fact that many of them do not have their own legal departments to conduct these assessments.[86] Processing requests from

service-providers-into-judicial-authorities/.

[80] Art. 17(1) E-Evidence Proposal.

[81] Art. 14(4)(f) E-Evidence Proposal.

[82] A similar criticism has been formulated as regards the broad wording of the fundamental rights ground for refusal in the EIO Directive. According to the Fundamental Rights Agency, the introduction of a fundamental rights-based ground of refusal 'should ideally be complemented by explicit parameters. Such parameters could limit the refusal ground to circumstances where an EU Member State has a well-founded fear that the execution of an EIO would lead to a violation of fundamental rights of the individual concerned. In this way a fundamental rights-based refusal ground could serve as a safety-valve, facilitating EU Member State's compliance with fundamental rights obligations owing from EU primary law without Member States having to deviate from EU secondary law'. Fundamental Rights Agency, Opinion on the draft Directive regarding the European Investigation Order, 14 February 2011, 11.

[83] *In Digital Rights Ireland Ltd*, 8 April 2014 and *Tele2*, the Court said that EU legislation on data retention must be subject to 'clear and precise rules'. Joined Cases C-293/12 and C-594/12, *Digital Rights Ireland Ltd*, 8 April 2014, ECLI:EU:C:2014:238; Joined Cases C-203/15 and C-698/15, *Tele2 Sverige AB*, 21 December 2016, ECLI:EU:C:2016:970.

[84] C-362/14, *Schrems*, 6 October 2015, ECLI:EU:C:2015:650 para. 91.

[85] EuroISPA, E-Evidence Proposal: EuroISPA Criticises the Privatisation of Law Enforcement, Press release, Brussels, 17 April 2018. Retrieved at: www.euroispa.org/e-evidence-proposal-euroispa-criticises-privatisation-law-enforcement/

[86] See analysis by E. Kyriakides, 'Digital Free for All, Part Deux: European Commission Proposal on E-Evidence', 17 May 2018. Retrieved at: www.justsecurity.org/56408/digital-free-part-deux-european-commission-proposal-e-evidence/.

law enforcement authorities will, moreover, entail significant costs, especially for small- and medium-sized enterprises. However, the provisions on financial help failed to properly address these legitimate concerns.[87] Besides, the six-hour deadline envisaged for processing emergency requests from law enforcement authorities casts further doubt on the ability of service providers to conduct a review that ensures adequate protection of individuals' rights.[88]

Another two words of caution should be raised. Emphasis placed by the E-Evidence Regulation Proposal on judicial control at the issuing phase, alongside the boundary drawn between prosecutors on the one hand, and judicial authorities *stricto sensu* (i.e. judges and courts) on the other hand, are both welcome developments. Nonetheless, the criterion used to justify this distinction, i.e. between 'sensitive' transactional and content data and 'less sensitive' subscriber and access data, is not without raising concerns. The CJEU made clear that metadata was just as sensitive as communications content because it may allow "very precise conclusions to be drawn concerning the private lives of the persons".[89] The relevance of the Commission's distinction is all the more questionable since, in many Member States, a court order is required to gather metadata.[90] Furthermore, resorting to authorities other than judicial in MR instruments dealing with cross-border investigations sometimes create legality issues due to compatibility concerns with the focus on judicial cooperation of the legal basis of Article 82(1) TFEU. The same criticism has been addressed to the European Commission in the inception impact assessment preceding the E-Evidence Proposal. Doubts were expressed as regards the adequacy of the legal basis chosen, i.e. Article 82(1) TFEU, while the proposal envisages cooperation with service providers to whom the Production and Preservation Orders are addressed.[91] Although the issues at stake differ to some extent and the reasoning of the CJEU in one cannot be fully transposed to the other, some have drawn a parallel with the compatibility issues that arose in Case 1/15 on the EU-Canada Passenger Name Record (PNR) agreement.[92] There, the CJEU ruled that the involvement of non-judicial authorities questioned the legality of Art 82(1) as the appropriate legal basis for concluding such an agreement and the envisaged text did not really seem to contribute to facilitating cooperation between judicial authorities.[93]

B. (Over)reliance on national law: the case of the EIO and the EPPO

Alongside the broad margin of manoeuvre left to the Member States in the choice of competent authorities, the EU legislator made another attempt at circumventing

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[87] Reimbursement of costs may be claimed before the competent authorities of the issuing State, provided that such possibility is foreseen under national law. See Art. 12 E-Evidence Proposal.

[88] Art. 9(2) E-Evidence Proposal. See also E. KYRIAKIDES (above n86).

[89] *Digital Rights Ireland Ltd*, paras. 26-27; *Tele2 Sverige AB*, paras. 98-99 (above n83).

[90] 'Strategic Meeting on Cybercrime', Eurojust Report, 19-20 November 2014, 6.

[91] 'Data protection and privacy aspects of cross-border access to electronic evidence', Statement of the Article 29 Working Party, 19 November 2017, 1.

[92] *Ibid.*

[93] Opinion 1/15 of the Court on the EU-Canada PNR agreement, delivered on 26 July 2017, ECLI:EU:C:2017:592.

national diversity by, this time, referring explicitly to national law in some of the most crucial provisions of EU cooperation instruments. In the EIO Directive and the EPPO Regulation in particular, a switch back to national law could be discerned following the four-year long negotiations,[94] thus markedly contrasting with originally ambitious proposals geared towards fostering harmonisation.

Firstly, national differences on the role devoted to judicial authorities in investigations could not be reconciled during the EPPO negotiations. Somehow, this accounts for the clear preference of some Member States for a collegial structure, which does not require any changes in the organisation of powers between judicial authorities at the national level. The clear preference of France and Germany for the 'collegiate model' is well known and the Franco-German position was made public even before the release of the Commission's proposal.[95] But the creation of a single prosecution office was eyed critically in other countries as well. For example, the leading role of the prosecutor in the conduct of investigations was seen as highly contentious during the negotiations by Finland, where the police takes centre stage in investigative activities.[96] The Finnish Legal Affairs Committee insisted that the regulation should be compatible with its national system without requiring Finland to change its legislation.[97] Even more relevant is the clear opposition of Hungary to the European Commission proposal of 2013. Together with other members of the Visegrad Group, it issued the Sopot Declaration of Prosecutors General on 15 May 2015, thus promoting the so-called 'Network Model', which relied more heavily on national institutions and legal systems.[98] Hungary has still not opted into the EPPO Regulation.[99]

Absence of consensus dealt a blow to the original ambitions of a 'single investigation office' put forward in the 2013 proposal.[100] Instead, a highly decentralised system with a collegiate structure and 'double hatted' European delegated prosecutors endowed with both national and European functions was created.[101] The competence

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[94] From 2010 to 2014 with regard to the EIO (and twelve trilogues), and from 2013 to 2017 for the EPPO.

[95] Joint letter of the Ministers of Justice of France and Germany on the European Public Prosecutor Office to Commissioner Reding, 20 March 2013 (see also Part I, Chapter III of this edited volume).

[96] National report No. 2 on Finland, Section Other areas of concern (point 31).

[97] *Ibid.*

[98] National report No. 2 on Hungary, Section on Other areas of concern (point 31).

[99] *Ibid.*

[100] K. Ligeti, A. Marletta, 'The European Public Prosecutor's Office: what role for OLAF in the future?', *in* Z. Durdevic, E. Ivicevic Karas, *European Criminal Procedure Law in Service of Protection of European Union Financial Interests: State of play and Challenges,* Zagreb, Croatian Association of European Criminal Law, 2016, 61.

[101] Under Art. 13(3) Regulation 2017/1939, European delegated prosecutors 'may also exercise functions as national prosecutors, to the extent that this does not prevent them from fulfilling their obligations under this Regulation'. The implementation of the 'double-hat' system is nonetheless seen as problematic in Member States. The juxtaposition of a supranational prosecutorial function carries a risk of encroachment with the principle of independence, thus creating difficulties for prosecutors, when performing their national functions, to meet their

of the EPPO to investigate Protection of the EU's Financial Interests (PIF) offences is, moreover, shared with the Member States and the EPPO will have to rely on national law in the conduct of the investigation. It was believed that shifting from a centralised to a decentralised office would accommodate the different legal systems which "still vary to a considerable degree, and it is clear that only a prosecutor with his or her background in a given legal system will be able to know exactly what actions are most appropriate and efficient in that given state".[102]

Secondly, another set of difficulties arose during the EPPO and EIO negotiations when it came to reaching a consensus on a common set of measures that should be available in all Member States during cross-border investigations. As regards the EIO Directive, Article 10(2) stipulates that a list of five investigative measures must be available in the Member States. This relatively modest set of measures markedly contrasts with the list of ten measures proposed in the Council's original approach of 2011.[103] Given the limited list of investigative techniques that must be available at the national level, cooperation could easily be hampered if a Member State wishes to rely on a technique other than those provided under the EIO Directive. The non-availability of a requested investigative measure in a similar domestic case in the executing State could indeed trigger recourse to a different investigative measure[104] or even ground a refusal.[105] The case occurred in France, where the execution of an EIO issued to Belgium requesting geo-tracking more than a year after the facts was refused because Belgian procedural criminal law does not provide for such a possibility.[106] In a similar fashion, the list of 21 investigative measures put forward by the Commission in its 2013 proposal on the EPPO Regulation was shortened to six. Whereas some Member States were in favour of the inclusion of a list of investigation measures in the Regulation, others disagreed and preferred that national law applied in this regard. A third group advocated for the inclusion of several lists covering more or less intrusive measures.[107] As a result, the list of evidence-gathering acts available in the European Commission proposal was significantly altered and only the six most intrusive measures, to be ordered to investigate criminal offences punishable by a four-year imprisonment term at a minimum,[108] were kept in the final version. Alongside drastic

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obligations vis-à-vis their respective hierarchy. Some Member States have therefore considered the possibility of creating a special status for prosecutors endowed with supranational investigating powers.

[102] Intervention of Ivan Korčok, President-in-Office of the Council during the debate of the European Parliament of 4 October 2016. Retrieved at: www.europarl.europa.eu/sides/getDoc.do?type=CRE&reference= 20161004&secondRef=TOC&language=en.

[103] Art. 10(2) Directive 2014/41/EU. See Council of the EU, text agreed as general approach to the initiative for a Directive of the European Parliament and of the Council regarding the European Investigation Order, 2010/0817, 21 December 2011.

[104] Art. 10(1)(b) Directive 2014/41/EU.

[105] Art. 11(1)(h) Directive 2014/41/EU.

[106] National report No. 2 on France, Section on evidence-gathering and admissibility (point C) (see also Part I, Chapter I of this edited volume).

[107] 'Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office', Discussion paper, Council Document No. 10859/14, 11 June 2014.

[108] The European Commission decided to drop the measures that were least intrusive and available in most of the Member States. See Art. 30(1) Regulation 2017/1939. European

cuts in this common ground of investigative techniques, the use of some measures may be subject to additional restrictions, which were inserted during the negotiations so as to accommodate the specificities in some national codes of criminal procedure. By way of example, both the use of interceptions of electronic communications and track and trace may be limited to 'specific serious offences'.[109] A reference to national law was included in order to conform to the provisions of German law, according to which, as seen above, the use of the aforementioned investigative measures is restricted to an exhaustive catalogue of offences. Similar concerns were formulated by the Finnish authorities during the negotiations, for whom the original EPPO proposal would have required broadening the scope of certain coercive measures.[110]

Thirdly, differences in the legal conditions governing investigative measures led the EU legislator to leave the possibility to Member States to make their deployment conditional upon a number of requirements, whenever these exist under national law. In the absence of a 'Community judge of freedoms',[111] the use of a particular investigative measure is made conditional upon obtaining judicial authorisation from national courts. In the EPPO, authorisation will be compulsory in two types of circumstances: if it is a requirement under the law of the State where the investigation is being carried out or if the law of the European delegated prosecutor in charge of initiating the investigation so requires.[112] A similar result has been achieved in the EIO, where the execution of an investigation order is subject to the procedures applicable in a similar domestic case, which may require court authorisation as provided under national law.[113] Whereas judicial control is certainly necessary for the preservation of individuals' rights, the requirement of national judicial authorisation can nonetheless be problematic from the perspective of effectiveness, in particular within the framework of EPPO investigations. Bearing in mind the wide variations between delays in obtaining judicial authorisation at the national level, alongside differences in the authority in charge of granting authorisations, as well as the absence of time limits imposed on the national authorities to give their consent, the start of investigations may be seriously deferred. A related concern is the absence of mutual recognition of *ex ante* authorisations, for example in the form of a requirement on national judicial authorities to *mutually* recognise the authorisation already obtained in another Member

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delegated prosecutors are nonetheless entitled to request or order any other measures in their Member State that are available to prosecutors under national law in similar cases.

[109] Art. 30(3) Regulation 2017/1939.

[110] National report No. 2 on Finland, Section on Other areas of concern (point 31).

[111] As noted by the Commission in 2001, this solution would effectively generate an obligation to enact a full body of common European legislation governing investigations, applying to searches, seizures, interceptions of communications, subpoenas, arrest, judicial review, preventive custody and so on. See Commission, 'Green Paper on criminal-law protection of the financial interests of the Community and the establishment of a European Prosecutor', COM (2001) 715 final, 60.

[112] Art. 31(2) and (3) Regulation 2017/1939. See also L. Kuhl, 'Cooperation between Administrative Authorities in Transnational Multi-Agency Investigations in the EU: Still a Long Road Ahead to Mutual Recognition', *in* K. Ligeti and V. Franssen (eds.), *Challenges in the Field of Economic and Financial Crime in Europe and the US*, 2017, 139.

[113] Art. 2(d) Directive 2014/41/EU.

State.[114] This means that authorisations from every single national authority where the EPPO wants to trigger coercive measures will be needed,[115] a procedure which is reminiscent of the mutual legal assistance system.[116] It is consequently doubtful that it will allow the EPPO to meet the efficiency and speediness requirements associated with an ongoing criminal investigation.[117]

C. Obstacles in practice: the difficult interoperability of investigation systems

Despite the two-level flexibility retained in EU instruments, the challenge of reconciling multiple authorities proved difficult to overcome at the practical level of cooperation. The coexistence of administrative and criminal law actors in criminal investigations has raised compatibility concerns. In particular, issues have occurred when an investigation dealt with under the administrative channel in one Member State is conducted by criminal law authorities in another Member State. Examples of this could be identified regarding cross-border investigations of minor offences between Spain and Germany. The German legal order introduced the category of *Ordnungswidrigkeiten* to designate violations of a minor nature which do not qualify as criminal and are punishable with a financial penalty (*Bußе*) imposed by an administrative authority. Despite the administrative nature of the proceedings, the accused person nonetheless has a right of appeal to the ordinary courts.[118] The German solution is illustrative of the 'depenalisation process' of minor offences undertaken in many other EU countries because those violations are not relevant enough to be addressed by criminal law.[119] This classification is not yet mirrored in Spain and MLA requests have to be executed by the judicial authorities of the Spanish investigation system, thus resulting in the allocation of substantial resources to what are nonetheless trivial offences.[120]

Other, more specific concerns arise from the involvement of intelligence services, alongside law enforcement bodies, in criminal investigations. As noted earlier, the scope of involvement of intelligence authorities in criminal investigations among the Member States examined is by no means uniform and depends on the degree of inclusiveness conferred by national codes of criminal procedure. The high level of differentiation in this area generates tensions when both intelligence actors and law enforcement bodies are involved alongside one another in multidisciplinary,

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[114] It is somehow logical in the absence of harmonisation of evidentiary rules.

[115] M. Luchtman, J. Vervaele, European Agencies for Criminal Justice and Shared Enforcement (Eurojust and the European Public Prosecutor's Office), 2014, 10, *Utrecht Law Review*, 140.

[116] L. Kuhl (n112), 139.

[117] A. Venegoni, 'The New Frontier of PFI Investigations, the EPPO and Its Relationship with OLAF', 2017, *Eucrim*, 193-196.

[118] See definition provided by the European Committee on Crime Problems (CDPC). CDPC, Legal assistance in criminal, administrative and civil proceedings related to the liability of legal persons and non-conviction based confiscation, PC-OC Mod (2014) 08, Strasbourg, 7 October 2014, 3.

[119] In Italy and the Netherlands for example. See O. Jansen, *Administrative sanctions in the European Union* (above n5).

[120] National report No. 2 on Spain, Section on evidence gathering and admissibility (point 16).

cross-border investigations. Frictions are exacerbated by the fact that, unlike law enforcement, where the competence of the Member States is shared with that of the EU, intelligence services are regulated solely at the national level. Pursuant to Article 4(2) Treaty on European Union (TEU), national security remains a competence of the Member States. This means that national laws governing information-sharing with other countries, or the use of intelligence evidence in criminal proceedings, continue to apply, even when investigative activities are carried out within EU cooperation frameworks. As a result, incompatibilities between national regimes exist at various levels of cooperation and have permeated the functioning of several EU assistance mechanisms.

Under the MLA system of evidence-gathering, German authorities eyed requests coming from the police forces of other countries critically as they would perceive MLA as a procedure involving exclusively judicial bodies.[121] Requests did not necessarily turn out to be unsuccessful, but German authorities would make further inquiries to the requesting State, for example by requesting the involvement of a prosecution service or another judicial authority in the formal issuing of an MLA request.[122] Even now, the increasingly porous boundary between police and intelligence services[123] in other EU Member States may become an issue under German law if intelligence services were to be involved in criminal proceedings, as is often the case in the UK and Austria.[124] The hybrid nature of the authorities involved, together with the different types of data that may be gathered, also affect the functioning of loosely institutionalised EU frameworks designed to facilitate the conduct of multidisciplinary investigations. The Financial Intelligence Units (FIUs), established at the level of Member States to fight against terrorist financing and money laundering, are cases in point. In order for FIUs to fulfil their objective, the Council Decision on FIUs establishes a requirement of 'multidisciplinarity' of information and resources.[125] The units should have the capacity to have access to the 'financial', 'administrative' and 'law enforcement' information that they require 'to fulfil their tasks properly,'[126] without a third party authorisation. However, due to the cross-disciplinary nature of information, different types of access to data is provided, and formalities and procedures to exchange information differ from one type of data to another. Law enforcement FIUs, for example, will have easier access to police databases, while administrative FIUs will have to file an access

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[121] National report No. 2 on Germany, Section on Other areas of concern (point C(4)(c)) (see also Part I, Chapter II of this edited volume).

[122] *Ibid.*

[123] On this issue, see also the sobering preliminary conclusions of the United Nations Special Rapporteur of the impact of the new French terrorism law on the rapprochement between intelligence and criminal investigations. J.-P. JACQUIN, 'Antiterrorisme: l'ONU s'inquiète de l'accumulation des lois françaises', *Le Monde*, 24 May 2018. See also 'France: UN expert says new terrorism laws may undermine fundamental rights and freedoms', OHCHR, Press Release, 23 May 2018.

Retrieved at: www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23130&LangID=E.

[124] *Ibid.* German law applies a strict separation between police and intelligence services.

[125] Art. 4 Council Framework Decision 2000/642/JHA.

[126] *Ibid.*, see Art. 32.

request.[127] Then, depending on the type of data that may be gathered, including, among others, criminal judicial decisions, criminal investigations or prosecutions and criminal intelligence, FIUs may be bound by a requirement to obtain clearance from a third party to share information with another FIU for intelligence purposes[128] or to have evidence used in legal proceedings in another Member State.[129] These requirements, however, depend not only on the type of data at hand, but also on the applicable national rules.

Proposals to further enhance information-sharing and tie law enforcement and intelligence activities more closely together were similarly made after the flurry of terrorist attacks on European soil in recent years. At the institutional level, the immediate aftermath of the Brussels terrorist attacks of 22 March 2016 triggered intense debates in the Council on the possibility for EU structures in charge of gathering law enforcement and intelligence data, i.e. Europol and the EU Intelligence Centre (INTCEN) respectively, to draw up joint threat assessments so as to boost the visibility of INTCEN's inputs in internal security bodies.[130] Although the proposal was generally welcomed by national delegations, fundamental issues regarding the methodology, the type of data that should be included in these assessments, as well as the existence of an appropriate legal basis were pointed out.[131] It was also highlighted during these meetings that enhanced cooperation between law enforcement and intelligence should take place at both the European and national level, thereby suggesting that synergies between the two fields have not always been sought in an explicit manner by all Member States.[132]

The challenge of coping with this kaleidoscopic landscape of authorities in the realm of cross-border investigations is heightened by the lack of mutual knowledge and mutual understanding between the different legal systems. Difficulties pinpointing the competent executing authorities have arisen at the issuing and execution stages. With regard to the EIO, filling the request form is no easy task for the issuing authority when multiple competent authorities are involved in the executing Member States.[133]This is particularly so, since the EIO introduced 'new' competent authorities, compared with the MLA framework.[134] Conversely, verification procedures to assess whether

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[127] There is, moreover, great variation between the Member States on the conditions and procedures to obtain such access, which may take between one week and about 30-60 days depending on the country. See Mapping Exercise and Gap analysis on FIUs powers and obstacles for obtaining and exchanging information, report by an expert group for the European Commission, 2016.

Retrieved at: www.ec.europa.eu/transparency/regexpert/index.cfm?do=groupDetail.groupDetailDoc&id=33583&no.=2.

[128] Commission Staff Working Document on improving cooperation between EU Financial Intelligence Units, SWD (2017) 275 final.

[129] *Ibid.*

[130] At the Council's Standing Committee for Internal Security in particular (COSI).

[131] 'Summary of discussions at the COSI', Council Document 8588/16, 10 May 2016, 2.

[132] *Ibid.*

[133] Extracts from Conclusions of Plenary meetings of the EJN concerning the practical application of the EIO, Council Document 15210/17, 8 December 2017, 3.

[134] *Ibid.*, 10-12.

the issuing authority is the competent authority also take place in the executing State sometimes.[135] This challenge in fact pre-exists the EIO, in particular for those countries where the investigation system is built in a radically different way to that of the majority of EU Member States. For example, the Finnish authorities, for whom the policy officer is the competent authority to conduct investigations under the national rules, sometimes faced difficulties determining which authority is competent in other Member States, where the involvement of a prosecutor or an investigating judge is generally necessary.[136]

Identification issues arise even more prominently when the investigation system of the Member State is heavily decentralised at the national level. Under the MLA mechanism, the fragmentary Spanish criminal procedural system, alongside the lack of coordination on the national territory across the multilevel spectrum of authorities involved, render transnational cooperation difficult.[137] The difficulty managing MLA requests along the wide spectrum of authorities involved on the Spanish territory often motivates foreign authorities to issue additional requests. As noted by a Spanish prosecutor, the multiplication of requests makes it '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'.[138] In 2014, Eurojust recommended that Spain 'reflect on the respective role, powers and obligations of all mutual legal assistance actors 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 (…).'[139]

Alongside this, lack of mutual knowledge on how investigative techniques are deployed among the Member States, along with the difficulty of understanding the intricacies of national legal and procedural frameworks, may considerably slow down or hamper cross-border investigations. Sometimes there is not enough information on or comprehension of the different investigative measures prior to their execution.[140] This may cause significant delays with regard to the launch of operations, while referring to Eurojust is not systematic in some countries, such as Ireland.[141] These

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[135] *Ibid.*

[136] A. Suominen, 'The Finnish approach to mutual recognition in criminal matters and its implementation', *in* Vernimmen-Van Tiggelen *et al.*, (above, Introduction, n29), 232.

[137] The Spanish desk for Eurojust is responsible for the coordination with the competent authorities of other Member States. See 'Report on Spain', Eurojust evaluation report on the sixth round of mutual evaluations, Council Document 11004/2/14, 23 September 2014, 47.

[138] National report No. 2 on Spain, quoting Ms. Rosana Morán Martínez, Senior Public Prosecutor at the Prosecutor General's Office, Head of the Area of International Cooperation, Section on Other areas of concern (point 32).

[139] Council Document 11004/2/14, 75.

[140] A. Suominen, 'The Finnish approach to mutual recognition in criminal matters and its implementation', *in* Vernimmen-Van Tiggelen *et al.*, (above, Introduction, n29).

[141] Ireland for example, barely relies on the assistance of Eurojust in coordinating cross-border investigations and prosecutions. The use of Eurojust is limited to extradition requests for MLA and EAWs. 'Report on Ireland', Eurojust evaluation report on the sixth round of mutual evaluations, Council Document 6997/14, 10 November 2014, 52. Perhaps for these reasons,

difficulties are compounded by the possibility introduced for Member States, in some aspects of cooperation, to apply the specificities enshrined in their national law. In the EIO Directive for example, the practical arrangements regarding the execution of controlled deliveries will have to be agreed in each case by the authorities concerned through consultation procedures,[142] however detrimental this may be for the imperative of effectiveness – and legal foreseeability and certainty.[143]

Differences between procedural frameworks were also seen as an obstacle to establishing Joint Investigation Teams (JITs). The 'multi-party' composition of JITs makes their use somewhat more complex.[144] In the Joint Investigation Teams, the nature of participating bodies is indeed left to the discretion of Member States.[145] However, difficulties occurred in identifying competent authorities and police authorities are not always accepted as parties to the team.[146] Other issues include the rules for secrecy of proceedings and access to case file documents (disclosure issues) in particular.[147] Authorities seeking information may not be familiar with the procedures and formalities in the other participating country,[148] and information sharing and analysis do not always flow smoothly[149] despite the fact that the *modus operandi* of JITs relies on direct information exchange.[150] Alongside this, annual reports pointed out the length of procedures to obtain an authorisation on the establishment of a JIT since such an agreement must be signed by the competent authorities of each participating State.[151] Sometimes different authorities within one Member State are competent to make an agreement, thus complicating procedures further.[152] Particularly problematic areas include the deployment of undercover agents and the use of interception of

Ireland took part to its first JIT in 2014, only ten years after it transposed the Framework Decision into national law. *Ibid.*, 49.

[142] Art. 28(1)(b)/Recital 24.

[143] The diversity of existing requirements may be difficult to reconcile with the ECHR obligation to develop foreseeable procedures in relation to human rights sensitive investigative measures. See, for example, the case law of Art. 8(2) ECHR, e.g. ECtHR, *Malone v United Kingdom*, App. No. 8691/19, paras. 67-68.

[144] Eurojust Conclusions of the fourth meeting of National Experts on Joint Investigation Teams, Council Document 17512/08, 19 December 2008, 6.

[145] Art. 1(1) FD JITs.

[146] Eurojust Conclusions of the third meeting of National Experts on Joint Investigation Teams, Council Document 5526/08, 22 January 2008, 9.

[147] Eurojust Annual Report 2012, p. 34. Disclosure rules refer to the obligations of the prosecution to disclose all information relevant to the case to the defence prior to the trial.

[148] C. Rijken, 'Joint Investigation Teams: Principles, practice, and problems. Lessons learnt from the first efforts to establish a JIT', 2006, 2, *Utrecht Law Review*, 99, 118.

[149] 'Report on The Netherlands', Eurojust sixth round of mutual evaluations, 8 January 2014, Council Document 13681/2/13, 59.

[150] Thus bypassing Interpol or Europol channels, or rogatory letters under MLA mechanisms. See Framework Decision on simplifying the exchange of information and intelligence between law enforcement authorities of the Member States of the European Union.

[151] This is despite the flexible, informal framework of the JITs.

[152] Council Document 6997/14, 48.

telecommunications.[153] In order to avoid these issues, a Eurojust report underlined that great care must be taken in the drafting of JITs' agreements to ensure that the provisions of the codes of criminal procedure applicable in the various participating States are taken into account.[154] This may also have an impact on the admissibility of the evidence collected for use before the trial court.[155]

D. Values-based considerations: forum-shopping, legal certainty, and fundamental rights concerns

Concerns about 'forum shopping' arising from keeping a degree of diversity among national frameworks was most prominently raised by critics with respect to the place of investigation in the EPPO. It was stressed that cross-border investigations to combat crimes would not necessarily take place in those countries where they are most needed and that the EPPO could be 'tempted to investigate or execute investigative measures in the MS granting more flexibility to the investigator, or to prosecute where the definition of the offence was broadest or punished more severely'.[156] The European Parliament itself underlined, in a 2014 Resolution, that 'the investigative tools and investigation measures available to the EPPO should be uniform, precisely identified and compatible with the legal systems of the Member States where they are implemented… the criteria for the use of investigative measures should be spelled out in more detail in order to ensure that 'forum-shopping' is excluded'.[157] In the meantime, the final text mitigated those concerns and laid down more specific criteria that must be taken into consideration by the EPPO when choosing the place of investigation. Thus, consideration must be given to 'where the focus of the criminal activity is or, if several connected offences within the competences of the EPPO have been committed, the Member State where the bulk of the offences has been committed'.[158] However, even formulated in these terms, those criteria remain broad and difficult to interpret. One may wonder how the 'focus' or 'bulk' should be determined, particularly at the early stages of the investigation.[159] For example, should the number of offences or the legal interests involved, the nature and degree of the offences or the penalties be taken into consideration?[160] Departure from these criteria is defined in very strict terms and must take into consideration the place of the suspect's or accused person's habitual residence; the nationality of the suspect or accused person; and the place where the

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[153] 'Conclusions of the 9th Annual meeting of the National Experts on Joint Investigation Teams', Council Document 7259/14, 27-28 June 2013, 7.

[154] Council Document 6996/14, 77.

[155] *Ibid.* The report also noted linguistic obstacles.

[156] A. Weyembergh, C. Brière, 'Towards a European Public Prosecutor's Office', European Parliament Study (LIBE Committee), PE 571.399, 2016, 29.

[157] European Parliament resolution of 12 March 2014 on the proposal for a Council regulation on the establishment of the European Public Prosecutor's Office, para. 5(v).

[158] Art. 26(4) Regulation 2017/1939.

[159] M. Luchtman, 'Forum Choice and Judicial Review under the EPPO's Legislative Framework', *in* W. Geelhoed, L.H. Erkelens, A.W.H. Meij (eds.), *Shifting Perspectives on the European Public Prosecutor's Office*, The Hague, TMC Asser Press, 2017, 157.

[160] *Ibid.*

main financial damage has occurred.[161] Nonetheless, it remains to be seen whether these mechanisms will prove sufficient to limit the risk of forum shopping.

In practical terms, the risk of forum shopping is, moreover, not limited to the EPPO. The persistence of variations in criminal procedures establishes a *de facto* system of forum shopping in the investigation of cross-border crimes. For example, the recurrence of procedural obstacles to cooperation in a given Member State, such as lengthy judicial authorisation procedures, could drive the authorities of other countries to avoid collaboration with that particular State. Attempts were made at addressing this risk in the EIO, where Article 6(1)b provides that an investigation order may only be issued if the investigative measure(s) indicated in the EIO could have been ordered in a similar domestic case. However, there is a risk of forum shopping occurring in the context of JITs, where those correction mechanisms do not exist. The legal framework of the JITs has indeed remained out of the scope of the EIO Directive and Member States retain considerable flexibility and autonomy with regard to both their establishment and functioning.[162] This is the case despite the fact that the persisting variety of criminal procedures applicable from a MS to another amount to legal certainty issues, not least because individuals may encounter difficulties in knowing which is the applicable procedural framework.

Another point of concern arises regarding the dual recourse to administrative and judicial authorities in cross-border investigation instruments. The latter reflects the increasingly 'blurring picture' between the administrative and criminal fields.[163] However, this porosity of boundaries between the two ambits is not without creating tensions with the protection of individuals' rights. Criminal law has an intrinsically punitive nature. It operates with a view to punishing individuals responsible for causing 'harm to others' and, through the threat or actual imposition of a punishment, it expresses values for indicating the wrongfulness of certain behaviour.[164] Recourse to criminal law instruments is therefore limited by a number of procedural guarantees and regulating principles,[165] for criminal law to be invoked fairly, in order to protect the individuals from abusive action by the State.[166] As noted elsewhere, such considerations

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[161] Art. 26(4)(a), (b) and (c) Regulation 2017/1939.

[162] See Consejo General del Poder Judicial, Informe sobre el anteproyecto de ley por la que se modifica la ley 23/2014, de 20 de Noviembre, de reconocimiento mutuo de resoluciones penales en la Union Europea, para. regular la orden europea de investigacion, 28 September 2017, p. 19.

[163] A. Weyembergh, F. Galli (n6).

[164] E. Herlin-Karnell, 'Is administrative law still relevant? How the battle of sanctions has shaped EU criminal law', *in* M. Bergstrom, V. Mitsilegas, and T. Konstadinides (eds.), *Research Handbook on EU Criminal Law*, Cheltenham, Edward Elgar, 2015, 233.

[165] Such as the principle of ultima ratio, meaning 'to the exceptional case the ultimate means', the principle of legality, and the principle of proportionality, to name only a few. See M. Kaiafa-Gbandi, 'Approximation of substantive criminal law provisions in the EU and fundamental principles of criminal law', *in* F. Galli and A. Weyembergh (eds.), *Approximation of substantive criminal law in the EU, The way forward*, Bruxelles, Éditions de l'Université de Bruxelles, 2013.

[166] E. Herlin-Karnell, 'The Challenges of EU Enforcement and Elements of Criminal Law Theory: On Sanctions and Value in Contemporary 'Freedom, Security and Justice' Law', 2016, *Yearbook of European Law*, 15.

are alien to administrative law, whose function is to protect public interest, and not the rights of the individual.[167] This is why the administrative law framework is perceived as more efficient, and authorities sometimes use it as a 'detour' to bypass some of the 'burdens' associated with procedural guarantees applying in criminal law.[168] The result has been a tendency to overextend the administrative law into the criminal law domain, leading to a hybrid domain dubbed 'criministrative law' by some authors.[169]

At the heart of this picture lies the challenge of respecting the fundamental principle of separation of powers. The downside from the perspective of cross-border cooperation is the asymmetries in the level of protection and the protective procedural safeguards made available to individuals.[170] A suspect subject to an investigative measure adopted through the criminal law channel will benefit from the guarantees stemming from the right to a fair trial and have more opportunities to challenge the measure before a court. The level of protection offered to persons subject to administrative inquiries differs considerably from the procedural safeguards afforded to suspects in criminal proceedings. Investigations into cases of fraud show that 'procedural guarantees are not always specified and administrative authorities enjoy a certain flexibility in preserving them'.[171] Determining the applicable procedural framework appears an even thornier task in the realm of multidisciplinary investigations. Investigations carried out in the fields of terrorist financing,[172] or the protection of financial interests,[173] increasingly require an 'integrated' approach,[174] supported by the involvement of an admixture of administrative and judicial organs that apply divergent standards of protection. In such multi-level constellations,

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[167] G. Vermeulen *et al.* (above, Introduction, n32).

[168] *Ibid.*, 95.

[169] A. Bailleux, 'The fiftieth shade of grey. Competition law, 'criministrative law' and 'fairly fair trials'', *in* A. Weyembergh, F. Galli (n6), 137-155.

[170] *In Engel*, the ECtHR noted that: 'If the Contracting States were able at their discretion to classify an offence as disciplinary instead of criminal, or to prosecute the author of a 'mixed' offence on the disciplinary rather than on the criminal plane, the operation of the fundamental clauses of Arts 6 and 7 would be subordinated to their sovereign will. A latitude extending thus far might lead to results incompatible with the purpose and object of the Convention. The Court therefore has jurisdiction, under Art. 6 and even without reference to Arts 17 and 18, to satisfy itself that the disciplinary does not improperly encroach upon the criminal.' ECHR, *Engel e.a.*, 8 June 1976, para. 81.

[171] K. Ligeti, M. Simonato, 'Multidisciplinary investigations into offences against the financial interests of the EU: a quest for an integrated enforcement concept', *in* A. Weyembergh, F. Galli (n6), 93.

[172] The Financial Intelligence Units are a case in point. A requirement of 'multidisciplinarity' is imposed onto them during investigations carried out in money laundering and terrorist financing, blending financial, administrative and intelligence information.

[173] K. Ligeti, M. Simonato, 'Multidisciplinary investigations into offences against the financial interests of the EU: a quest for an integrated enforcement concept', *in* A. Weyembergh, F. Galli (n6).

[174] See, for example, European Commission, Communication on the protection of the financial interests of the European Union by criminal law and aby administrative investigations: an integrated policy to safeguard taxpayers' money, COM (2011) 293 final.

procedural standards developed at the national level often fail to function adequately in cross-border situations.[175]

Unfortunately, these concerns are unlikely to be alleviated by the adoption of a body of EU directives on procedural guarantees. The EU has been juggling between administrative and criminal fields, adopting a certain degree of flexibility in evidence-gathering instruments, leaving '*carte blanche*' to the Member States with regard to the kind of authorities competent to issue and execute, for example, investigation orders.[176] On the contrary, the Council and the Commission expressly excluded administrative proceedings from the scope of EU procedural rights directives.

During the negotiations on the Presumption of Innocence Directive, the possibility of broadening the scope of application to 'similar proceedings' instead of only criminal proceedings was evoked by the European Parliament in a number of amendments, as a result of an orientation vote.[177] It also made a reference to the *Engel* criteria on punitive administrative sanctions as to the definition of 'criminal charge'.[178] The Commission and the Council objected to this approach on the basis that this would be inconsistent with the remainder of procedural rights directives, where administrative proceedings have been explicitly excluded from their scope. Administrative law was indeed left outside the scope of the remainder of EU directives[179] despite the fact that the harmonisation of safeguards with a view to transnational cooperation is nearly

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[175] As the case of the fight against financial crime shows. See K. Ligeti, V. Franssen (eds.), *Challenges in the Field of Economic and Financial Crime in Europe and the US*, Oxford, Hart. Publishing, 2016.

[176] G. Vermeulen, 'Free Gathering and Movement of Evidence in Criminal Matters in the EU: Thinking Beyond Borders, striving for balance, in search of coherence', Inaugural Lecture Held in accepting the position of Extraordinary Professor of 'Evidence Law', Maastricht University, 2011, 20. Retrieved at: www.cris.maastrichtuniversity.nl/portal/files/1088490/guid-8ef5f903-17f2-4312-8e54-05bcadf2ef3c-ASSET1.0.

[177] S. Cras, A. Erbeznik, 'The Directive on the Presumption of Innocence and the Right to Be Present at Trial', 2016, Issue 1, *Eucrim*, The European Criminal Law Associations' Forum.

[178] See Commission Proposal for a Directive of the European Parliament and of the Council on the strengthening of certain aspects of the presumption of innocence and of the right to be present at trial in criminal proceedings – Examination of revised text, 11112/15, Brussels, 29 July 2015, footnote 2. The Presidency and the Commission opposed this view for reasons of consistency with the remainder of directives on procedural rights.

[179] Take, for example, punitive measures applied to children. Previous research shows that boundaries between criminal and non-criminal proceedings are quite porous with regard to juvenile delinquency. Some countries have indeed taken the approach of *educative* proceedings against juveniles, instead of formally *criminal* proceedings, in order to avoid the stigma relating to the formal criminal label or to ensure that juveniles receive a milder treatment. This does not mean, however, that a substantial punitive nature of the proceedings has been removed. However, Recital 17 of the Safeguards for Children Directive explicitly limits its scope to criminal proceedings only. See D. De Vocht, M. Panzavolta, M. Vanderhallen, M. Van Oosterhout, 'Procedural Safeguards for Juvenile Suspects in Interrogations: A Look at the Commission's Proposal in Light of an EU Comparative Study', 2014, 5, *New Journal of European Criminal Law*, 485.

non-existent in administrative law[180] and that individuals often benefit from much lower protection when they are subject to administrative investigations/sanctions.[181] Besides, the current framework is incoherent with the flexible and more protective approach taken by the ECtHR with regard to the scope of application of guarantees of fair trials.[182]

This being said, one may refer to minor offences as an effort to bring administrative proceedings under the procedural safeguards enshrined in EU legislation.[183] As discussed earlier,[184] under the national law of most EU Member States, administrative offences embrace certain violations that have a criminal connotation but are too trivial to be governed by criminal law and procedure, such as traffic offences.[185] The wording of this exception is similar in all directives. It provides that procedural safeguards can apply to administrative offences such as minor offences on condition that there is a possibility for appeal before courts which are also competent in criminal matters.[186] This notwithstanding, given the nature of offences targeted by EU cross-border cooperation tools such as the EIO, the EPPO and the E-Evidence Proposal, alongside the focus on coercive investigative measures of these instruments, these provisions will have a limited impact on the field of transnational investigations.

The increasing blur between administrative and criminal law, alongside the involvement of both administrative and judicial authorities in transnational investigations, also heightens the risk of parallel investigations initiated for the same case. The co-existence of criminal and administrative authorities with coinciding objectives can result in the same case being dealt with by different authorities, thus producing overlaps in terms of criminal and administrative liability for the same act.[187] Concurrent investigations and/or concurrent sanctions could result in

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[180] See O. Jansen, P. Langbroek, *Defence rights during administrative investigations*, Antwerp, Intersentia, 2007.

[181] *Ibid.*

[182] This is despite the fact that the ECtHR's approach was endorsed by the Court of Justice in its nascent case law on administrative and criminal sanctions. C-617/10, *Åkerberg Fransson*, 26 February 2013, ECLI:EU:C:2013:105, para. 35; C-489/10, *Bonda*, 5 June 2012, ECLI:EU:C:2012:319, para. 37.

[183] The directives generally take the example of traffic offences.

[184] See the examples of Germany and Spain.

[185] G. Vermeulen, W. De Bondt, C. Ryckman, *Rethinking International Cooperation in Criminal Matters in the EU*, Antwerp, Maklu, 2012, 101.

[186] See Recital 16 Directive 2010/64/EU, Art. 2(2) Directive 2012/13/EU, Recital 16 Directive 2013/48/EU, Recital 15 Directive 2016/800/EU, Recital 11 Directive 2016/1919/EU, Art. 7(6) Directive 2016/343/EU. The wording of EU procedural rights directives mirrors that of some cross-border cooperation and mutual recognition instruments (e.g. 2000 EU MLA Convention, 2003 FD Freezing Orders).

[187] See contributions by Ligeti , Simonato, Luchtman, *in* A. Weyembergh, F. Galli (n6) on market abuse more specifically, see also E. Herlin-Karnell, 'The challenges of EU enforcement and elements of criminal lax theory: On sanctions and value in contemporary' 'Freedom, Security and Justice' Law' (above n166).

breaches of the *ne bis in idem* principle enshrined in Article 50 of the Charter,[188] by imposing stricter punishments of infringements. In the *Åkerberg Fransson* case especially,[189] the Court of Justice of the EU ruled that Article 50 of the Charter of Fundamental Rights did not preclude a combination of administrative and criminal penalties, provided that the administrative penalty is not criminal in nature.[190] The examination of the criminal nature of the penalty must be assessed according to the *Engel* criteria developed by the ECtHR to define the notion of 'criminal charge',[191] namely the legal classification of the offence under national law, the very nature of the offence and the nature and degree of severity of the penalty risks that are incurred.[192] Whereas *Åkerberg Fransson* referred to a national situation, questions regarding the transnational application of the *ne bis in idem* principle will sooner or later arise before the Court of Justice of the EU if Member States are unable to coordinate their approach and exchange information.[193]

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[188] Art. 50 of the Charter states that 'No one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been acquitted or convicted within the Union in accordance with the law.' It should however be noted that the ne bis in idem principle does not necessarily apply when administrative investigations/sanctions are taking place. In Italy for example, several administrative investigations may take place for the same fact. See O. Jansen, *Defence Rights during Administrative Investigations*, Antwerp/Oxford, Intersentia, 2007, 129.

[189] *Åkerberg Fransson* (above n182). The proceedings involved the compatibility with the *ne bis in idem* principle of the Swedish national sanctions system, that involved two separate sets of proceedings, i.e. administrative and criminal, to penalise the same wrongdoing. Examples of conflicts between the principle of *ne bis in idem* and a dual regime of sanctions were found in multiple countries, such as Romania, France, and Italy. As regards Romania, see: M. Gorunescu, 'Considerations about overlapping criminal land administrative liability for the same offense', 2011, 1, *Challenges of the Knowledge Society*, 169-175; As regards France, see Decision by the Conseil Constitutionnel No. 2014-453/454 QPC and 2015-462 QPC of 18 March 2015; As regards Italy, see Decision by the Court of Cassation No. 102/8.3.2016.

[190] *Ibid.*, para. 34.

[191] *Ibid.*, para. 35.

[192] Pursuant to this approach, certain administrative offences and professional disciplinary proceedings may indeed fall within the ambit of the criminal head of Art. 6 ECHR. See ECHR, *Engel and others v. the Netherlands*, 8 June 1976: 'If the Contracting States were able at their discretion to classify an offence as disciplinary instead of criminal, or to prosecute the author of a "mixed" offence on the disciplinary rather than on the criminal plane, the operation of the fundamental clauses of Articles 6 and 7 would be subordinated to their sovereign will.'

[193] As noted by Eurojust, information exchanges do not always run smoothly among the Member States on whether parallel investigations or prosecutions are taking place, and sometimes national authorities do not have knowledge of parallel proceedings that are being conducted in another EU country. See Eurojust News, Issue 14, 2017; 'Strategic Seminar on Conflicts of Jurisdiction, Transfers of Proceedings, Ne Bis In Idem: Successes, shortcomings and solutions', Eurojust Report, The Hague, 14 June 2015. See also K. Ligeti, M. Simonato, 'Multidisciplinary investigations into offences against the financial interests of the EU: a quest for an integrated enforcement concept', *in* A. Weyembergh, F. Galli (above n6), 105. These concerns have not come to an end with the flexibility retained in the type of actors involved in investigations carried out under MR, because the determination of authorities remains a matter for national law.

CHAPTER II

Admissibility of illegally and improperly obtained evidence

I. Comparative analysis of inadmissibility regimes

'The law of admissibility regulates whether a particular piece of evidence should be received – or 'admitted' into the trial.'[1] The question of admissibility of evidence has emerged as a crucial one in the last few years. The adoption of a number of cooperation instruments in the realm of evidence-gathering indeed prompts a broader reflexion on admissibility issues, as it makes little sense for evidence to be transferred if it is then excluded from the proceedings and cannot serve the purpose of facilitating the prosecution in the requesting/issuing State. As noted earlier, evidence-gathering and admissibility rules are the two sides of the same coin: establishing certain exclusionary rules offers an alternative way to establish minimum requirements at the collection phase. Besides, the Lisbon Treaty conferred an express competence on the EU to adopt minimum rules in admissibility of evidence under Article 82(2)(a). Thus far, however, the multiplication of instruments regulating cross-border investigations has not been accompanied by the adoption of minimum standards on evidence admissibility, despite the close attention it has received in EU policy documents.[2]

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[1] P. Roberts and A. Zuckerman, *Criminal evidence*, Oxford, Oxford University Press, 2nd ed., 2010, 97.

[2] The Tampere Council of 1999 first introduced the concept of mutual admissibility of evidence in the EU, namely that 'evidence lawfully gathered by one Member State's authorities should be admissible before the courts of other Member States.' Tampere European Council Conclusions, 15 and 16 October 1999, para. 36; see also Commission 'Green Paper on criminal-law protection of the financial interests of the Community and the establishment of a European Prosecutor', COM (2001) 715. The GP took note that 'the diversity of national rules on evidence means that evidence gathered in one Member State cannot be used in courts in another,' and argued that the 'establishment of a common investigation and prosecution area guided by the principle of mutual admissibility of evidence would help to overcome this barrier.' It excluded, however, the adoption of supranational rules governing admissibility of

The ECtHR has only established few, clear exclusionary rules: evidence obtained by means of torture[3] and as a result of police incitement.[4] However, evidence obtained in violation of other ECHR rights may also give rise to an Article 6 ECHR violation, including evidence obtained through incitement, incriminating statements obtained in violation of the privilege against self-incrimination or the right to silence or confessions obtained during police interrogations without the suspect being assisted by a lawyer.[5] However, as regards other circumstances, the ECtHR opted for an extremely cautious approach when a claim is made before it that evidence obtained in violation of the Convention was used by the trial court in reaching a conviction. Arguing that the Convention contains no rules on admissibility of evidence, the ECtHR has examined such claims within the context of the right to a fair trial.[6] It has repeatedly stated that it is not its role to determine whether particular types of evidence may be admissible, its concern being whether the proceedings as a whole, including the way in which the evidence was obtained, were fair. This test significantly limits the chances of the ECtHR declaring a certain type of evidence inadmissible as a matter of principle: the violation committed during the gathering of the evidence needs to be so serious or its negative effect on the right to a fair trial so irrevocable that nothing can be done at a later stage of the proceedings to compensate for it.

As a direct consequence of the absence of real approximation efforts at the European level, Member States have kept their own rules dictating that certain types of evidence must be excluded, meaning that they cannot be taken into consideration in reaching a decision as to the guilt or innocence of the accused. Indeed, exclusionary rules are often rooted in a particular legal tradition[7] and thus differ considerably across jurisdictions.

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evidence, the logical consequence of it would be the 'general codification of criminal law in Europe' and out of proportion to the objective of ensuring effectiveness in proceedings. See p. 58; Commission 'Green Paper on obtaining evidence in criminal matters from one Member State to another and securing its admissibility' COM(2009) 624 final.

[3] The ECtHR interpreted this exclusionary rule narrowly. The whole Art. 3 ECHR does not apply, and only evidence obtained by means of torture is subject to an exclusionary rule. See ECtHR, *Gäfgen v. Germany*, App. No. 22978/05, 1 June 2010.

[4] ECtHR, *Teixeira de Castro v Portugal*, App No. 25829/94, 9 June 1998.

[5] The admission of other types of unlawful evidence has however been tolerated by the ECtHR. For example, Art. 6(3)(d) ECHR grants the accused the right to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him. But the breach of this right does not always amount to a violation of Art. 6 ECHR. See S. Allegrezza, 'Critical Remarks on the Green Paper on Obtaining Evidence in Criminal Matters from one Member State to another and Securing its Admissibility', 2010, *Zeitschrift für Internationale Strafrechtsdogmatik*, 576. Retrieved at: www.zis-online.com/dat/artikel/2010_9_489.pdf.

[6] Art. 6 ECHR.

[7] See K. Ambos, citing Orie: 'the rules of evidence are closely linked to the procedural system in which they function'; K. Ambos, 'The structure of international criminal procedure: 'adversarial', 'inquisitorial' or 'mixed'?', *in* M. Bohlander (ed.), *International criminal justice: A critical analysis of institutions and procedures*, London, Cameron May, 2007, 500.

Exclusionary rules can, however, be broadly classified into two categories:[8] a first group comprises those exclusionary rules designed to improve the accuracy of factfinding, that aim to determine, for example, whether evidence is reliable. These are typical, though not exclusive, of common law.[9] In a second category are those exclusionary rules governed by other considerations: within the latter there are rules such as the English law excluding evidence obtained through interception of communications, which aims at protecting the secrecy of those investigative measures. The most important subcategory is, however, composed of those exclusionary rules that deal with illegally obtained evidence, which aim at ensuring the legitimacy of the criminal justice system, to control the coercive action of criminal justice actors and redress police misconduct, or more generally, to protect the rule of law.

Exclusionary rules dealing with illegally obtained evidence are of particular interest from an EU perspective. The focus of this study on this type of exclusionary rules is justified on two important grounds. Firstly, EU instruments for evidence-gathering abroad determine the law applicable to investigative measures and often result in these being governed by an admixture of the laws of the issuing and executing States. Indeed, a direct consequence of the lack of harmonisation of the rules on investigative measures is that EU instruments for cross-border evidence-gathering have had to determine the law that will govern their deployment. Traditionally, the law of the State where evidence is gathered was applicable (*locus regit actum*). The 2000 MLA Convention operated a major change, generally requiring that investigative measures be taken in accordance with the law of the State that requests it (*forum regit actum*), a rule that was later incorporated into the EIO Directive. Today, the two rules – *locus regit actum* and *forum regit actum* – coexist. As a consequence, the task of determining whether a particular piece of evidence is 'legal' or not becomes rather difficult. Indeed, as has been noted elsewhere, 'by its very nature, the concept of exclusion of illegally obtained evidence is a (criminal) procedural entity'.[10] The finding of illegality is thus linked to the criminal procedure of a particular State; when evidence is gathered abroad on the basis of EU instruments of judicial cooperation, foreign criminal procedural rules apply, ineludibly affecting the examination of the legality of the evidence. Secondly, the EU has an interest in addressing the issue of illegal evidence, in particular when the illegality amounts to a human rights violation, since the EU and its Member States are bound by the Charter of Fundamental Rights and the ECHR.

A. Admissibility of evidence in domestic systems

In the absence of EU-wide rules, admissibility of unlawfully gathered evidence has 'different connotations' in the jurisdictions examined[11] and is governed by differing rules and conditions. Among the Member States examined, a first distinction must be made between those who have adopted the exclusionary principle of evidence

[8] M. Damaska, 'Evidentiary barriers to conviction and two models of criminal procedure: a comparative study', 1973, 121, *University of Pennsylvania Law Review*, 514, 525.

[9] Such as the bad character evidence rule or the best evidence rule.

[10] F. Pinar Ölçer, 'Illegally Obtained Evidence in European Treaty of Human Rights (ETHR)', *Annales de la Faculté de Droit d'Istanbul*, No. 57, 2008, 84.

[11] A. Ryan, *Towards a System of European Criminal Justice*, (above Part II, Chapter I, n20), 2014, 20.

illegally obtained and those who have not.[12] The exclusionary principle is enshrined in the law of most EU States examined (e.g. Ireland, Germany, Italy, Spain, Hungary, France, Finland, Romania). This principle, however, does not feature in the law of the Netherlands. Nevertheless, many exceptions exist in each of the systems pertaining to one or the other category, thus narrowing differences to some extent.[13] A second difference lies in the types of existing criteria resulting in the exclusion of evidence. Third, the consequences of the exclusion of illegally obtained evidence differ from one system to another. Fourth, differences exist regarding the degree of discretion left to the judge in assessing whether evidence should be admitted (or excluded). The margin for manoeuvre left to the judge differs widely, including among the Member States that belong to the first category, i.e. those that have adopted the principle of exclusion of evidence obtained illegally.

Starting with one of the countries with the most stringent exclusionary rules, Ireland had, until recently, one of the most restrictive rules on unlawfully/illegally gathered evidence. Evidence obtained in breach of constitutional rights was automatically excluded in almost all circumstances.[14] In some cases more time was spent arguing on the admissibility of evidence than establishing the guilt of the suspect.[15] However, a recent decision by the Irish Supreme Court softened this approach. The Irish Supreme Court case of *DPP v. JC*[16] now provides for very limited grounds for the exclusion of evidence obtained as a result of a breach of a person's constitutional rights.[17]

In Germany, the most prominent exclusionary rules include evidence obtained using certain methods of interrogation interfering with the autonomy of the person, including physical or psychological maltreatment, deceit by hypnosis and illicit threats

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[12] For further information on this distinction, see L. KENNES, *La recherche d'un système équilibré de sanctions, dans la procédure pénale, des irrégularités – Étude de droit comparé*, PhD thesis, Bruxelles, Université libre de Bruxelles, Faculté de Droit, defended on 22 May 2018.

[13] M. MARTY, *La légalité de la preuve dans l'espace pénal européen*, Bruxelles, Larcier, 2016.

[14] National reports on Ireland. The Supreme Court differentiated between evidence obtained 'improperly or illegally' and evidence obtained in breach of constitutional rights. The former includes, for example, evidence obtained through stealing, and may be admitted before the court. The exclusionary rule nonetheless applies as regards evidence gathered in conscious and deliberate breach of constitutional rights. Exceptions to this rule, dubbed 'extraordinary excusing circumstances', however exist. They include: the need to rescue a victim in peril, the saving of vital evidence from imminent destruction, evidence obtained incidental to and contemporaneous with a lawful arrest, although made without a valid search warrant. People (AG) v O'Brien (1965) IR 142 (IESC) 170. See A. RYAN, 'Report on Ireland', *in* LIGETI (above, Introduction, n36).

[15] M. KUSAK, *Mutual admissibility of evidence in criminal matters in the EU* (above, Part II, Chapter I, n29), 211.

[16] Evidence will now be admissible if obtained unconstitutionally where the breach of constitutional rights was inadvertent.

[17] Already in 2002, a group of experts appointed by the Irish Ministry of Justice suggested to the Court that the exclusionary rule should be softened to some extent. It stated that there was no need for such a stringent rule to fulfil the overarching objective of upholding constitutional rights and freedoms. See L. KENNES, *La recherche d'un système équilibré de sanctions, dans la procédure pénale, des irrégularités* – Étude de droit comparé (above, n12), 339.

and promises;[18] and evidence obtained in violation of the constitutional protection of 'core' privacy, e.g. information protection by the testimonial privilege of a lawyer, physician or member of the clergy.[19]

In Spain, the national law excludes evidence obtained directly or indirectly in breach of one or several fundamental rights.[20]

In Italy, the judge excludes evidence obtained in breach of fundamental rights[21] as well as the possibility of using hearsay evidence.[22] The Italian Constitution, following a constitutional reform enacted in 1999, consecrates the basic evidentiary rule for the defence: the principle of adversary gathering of evidence.[23] In concrete terms, this means that evidence should in principle be produced in the presence of the defence so as to allow cross-examination. Consequently, the judge shall not use evidence other than lawfully obtained evidence during the trial stage and exclude, at least in principle, 'hearsay evidence', namely previous statements collected at the investigation stage. A list of exhaustive exceptions to this exclusionary rule has been included in the Italian CCP;[24] however these exceptions have been subject to strict interpretation.[25]

In Hungary, evidence cannot be admitted before the courts if it was obtained by committing a criminal action[26] or by other illicit methods,[27] or by the substantial restriction of the procedural rights of the participants.[28]

In Finland, the national law precludes the use of evidence obtained through torture, in breach of a person's right not to self-incriminate or in violation of the right to a

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[18] T. Weigend, 'Report on Germany', *in* Ligeti (above, Introductin, n35), 296.

[19] *Ibid.*, see also national report on Germany in this edited volume (Part I, Chapter II) .

[20] Art. 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'. Some other factors however must be taken into consideration, such as the relevance of the fundamental right infringed; whether the information has been obtained alongside other elements, apart. from the unlawful elements, due to which it is reasonable to think that the indirect evidence would have been discovered anyway; if the fundamental right violated requires a specific protective standard, because of its vulnerability; and the attitude of those who caused the infringement of the constitutional rule, for example whether the violation was committed intentionally. See L. Bachmaier Winter, 'Report on Spain', *in* Ligeti (above, Introductin, n35).

[21] Art. 191 Italian CCP. This exclusion may be determined at every stage of the proceedings. See also National report No. 2 on Italy, Section on evidence-gathering and admissibility (point 19).

[22] National report No. 1 on Italy, Section on probable cause and evidence-gathering (point 3).

[23] *Ibid.*, see also Art. 111 Italian Constitution.

[24] 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.

[25] National report No. 1 on Italy, Section on probable cause and evidence-gathering (point 3).

[26] Such as unauthorised gathering of covered information. This is considered a relative exclusion.

[27] Such as the impairment of the person's procedural rights, or as a result of a forced interrogation (e.g. mental or physical exhaustion, prohibition of sleeping, etc.). This is considered an absolute exclusion.

[28] Other exceptions apply. See the full list in national report No. 2 on Hungary, Section on evidence-gathering and admissibility (point 19); see also L. Karsai, Z. Szomora, *Criminal Law in Hungary*, Kluwer Law International, 2010, 172.

fair trial.[29] Some restrictive rules regarding the admissibility of oral testimonies were also developed.[30] It is interesting to note that, prior to 2016, standards of evidence admissibility were not regulated at all by law.[31]

In Romania, an absolute nullity of evidence can be triggered provided that one of two procedural rights are breached:[32] either denying the defendant his/her participation at stages of criminal proceedings where it is mandatory; or denying the defendant his/her right to the presence of a counsel at stages of the criminal proceedings where it is mandatory.[33] Although, in practice, these rights are rarely violated, the breach of all the other legal rules can be sanctioned by a relative nullity, provided that harm was caused to others as a result of the failure to comply with those rules,[34] thereby seemingly promoting the protection of individuals' rights.[35] Another condition for absolute nullity was recently identified by the Romanian Constitutional Court in 2017. According to this new rule, evidence gathered as a result of an investigative order issued by a prosecutor who does not have jurisdiction on a case cannot enter the trial.[36]

The French system is based on a system of 'free proof',[37] according to which the truth may be established by all means of proof, which is evaluated by the court to reach a verdict based on their conviction beyond reasonable doubt.[38] Besides, admissibility of evidence is poorly regulated by the CCP and the bulk of rules governing the collection and admissibility of evidence are provided by national jurisprudence.[39] Evidence collection activities have to meet certain French standards, such as respect for fundamental rights[40] and the principle of loyalty developed by the Court of

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[29] See National report No. 2 on Finland, Section on evidence gathering and admissibility (point 19). See also Chapter 17, Section 25(2) of the Code of Judicial Procedure (*Oikeudenkäymiskaari* 4/1734). Most Scandanivian countries have not implemented admissibility standards.

[30] For example, limitations apply on what is allowed to enter the trial as an oral testimony, e.g. such as records of deliberations between judges, or information stemming from client-lawyer communications, etc. National report No. 2 on Finland, Section on evidence gathering and admissibility (point 19).

[31] Before 2016, the question of admissibility was determined on a case by case basis by the Finnish Supreme Court. The inclusion of the aforementioned prohibitions in the code of judicial procedure resulted from jurisprudential developments. National report No. 2 on Finland, Section on evidence gathering and admissibility (point 19).

[32] In France, the act declared null is then excluded from the file. In Romania, it is not.

[33] National report No. 2 on Romania, Section on evidence-gathering and admissibility (point 19) (see also Part I, Chapter V of this edited volume).

[34] See Art. 281-282 of the Romanian CCP, on the rules of absolute and relative nullity respectively.

[35] National report No. 2 on Romania, Section on evidence-gathering and admissibility (point 19) (see also Part I, Chapter V of this edited volume).

[36] In 2017. *Ibid.*

[37] In French *'liberté de la preuve.'*

[38] Ryan (above Part II, Chapter I, n20), 134.

[39] J. Tricot, 'Report on France', *in* Ligeti (above, Introduction, n35), 254.

[40] Including human dignity, privacy and defence rights. See 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 ?', 2011, 1, *RSC*.

Cassation.[41] However, in practice, the control applied by the French authorities is relatively lax.[42] Similarly, the existence of different types of nullities[43] sometimes result in case-by-case basis assessments and legal uncertainty.[44] In rare instances, an exclusionary approach was taken by the authorities to certain types of evidence, for example where statements of suspects were collected without the presence of a lawyer.[45]

In the Netherlands, illegally obtained evidence is subject to an assessment by the court, which decides on the exclusion of evidence according to a variety of criteria.[46] These include the interest that the breached rule serves, the gravity of the breach and the harm caused by the breach. In general, evidence gathered illegally may be excluded when a rule or a legal principle of criminal procedure has been seriously breached in the illegal collection process.[47] The Dutch system is complex and admissibility seems to be decided on a case-by-case basis, depending on the set of criteria mentioned under the CCP, as well as the investigative measure deployed. As noted by an author, a breach of a rule of criminal procedure means 'failure to observe written and unwritten rules that apply to gathering evidence. No distinction is made between the different types of rules'.[48] According to the case law of the Supreme Court, a direct connection must be established between the breach and the gathering activity, meaning that the breach must exclusively be the result of unlawful actions.[49]

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[41] According to which evidence must be gathered and examined in accordance with the law and in respect of the rights of the individual and the integrity of justice. RYAN (above Part II, Chapter I, n20), 155.

[42] Some defence rights have been, for example, very scarcely referred to by the Court of Cassation. This is notably the case for the right to not self-incriminate oneself, and the right to silence. See 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 ?' (above n40) as well as National report No. 2 on France, Section on evidence-gathering and admissibility (point C) (see also Part I, Chapter I of this edited volume)

[43] Nullities may comprise textual nullities and substantial nullities. Textual nullity means that it is specifically stated in the CCP that a breach of a particular provision gives rise to nullity. However, no definition of a substantial nullity is provided. This means that substantial nullity has to be examined on the basis of an individual assessment. RYAN (above Part II, Chapter I, n20), 158.

[44] LELIEUR (above n40).

[45] RYAN (above, Part II, Chapter I, n20), 241.

[46] Enshrined under Art. 359a CCP.

[47] M. J. BORGERS and L. STEVENS, 'The use of illegally gathered evidence in the Dutch criminal trial', 2010, 14, *Electronic Journal of Comparative Law*, 3.

[48] *Ibid.* They can be rules on respecting fundamental rights, such as the right to remain silent. But they can also be rules that pertain 'only' to the contents of certain documents that have to be shown to the suspect when means of coercion are used. Section 359a CCP is intended to be a provision that applies to all these rules. No distinction is made either between violations of constitutional and non-constitutional rights.

[49] For an overview of the Dutch Supreme Court's case law on admissibility of evidence, see M.J. BORGERS, L. STEVENS, 'The use of illegally gathered evidence in the Dutch criminal trial' (n47). See also National report No. 2 on the Netherlands, Section on evidence (point 3) (see also Part I, Chapter IV of this edited volume). The 'causal link' or 'direct connection' test also exists under the French law. See KENNES (above, n12).

B. Admissibility of evidence gathered in another Member State

Among the group of countries examined, there is no exclusionary rule as regards the admissibility of evidence gathered in another EU Member State. While some Member States apply their national rules of evidence to evidence obtained in a foreign jurisdiction, others have established specific rules for foreign evidence.[50] With the entry into force of the 2000 EU MLA Convention and more recently of the EIO Directive, evidence must be gathered by the requested/executed State according to the formalities and rules indicated by the requesting/issuing State. Italy did not implement the 2000 EU MLA Convention until 2016[51] and instead relied on the 1959 Council of Europe Convention, whereby evidence must be gathered according to the law of the requested/executing State.

Despite significant variations in admissibility criteria at the domestic level, often exclusionary rules are less strictly applied in cross-border proceedings than when national authorities conduct a domestic investigation (e.g. Germany, Italy, the Netherlands).[52] In Germany, breaches of the national *ordre public* and the fair trial principle of Article 6 ECHR are considered as the main limitations for declaring evidence admissible in German criminal proceedings.[53] In Italy, exclusionary rules intervene when evidence gathered has been obtained in breach of public order or public decency and constitutionally protected fundamental rights and 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.[54] In the Netherlands, the judicial review examines whether evidence has been gathered in accordance with the right to a fair trial.[55]

In other countries, inadmissibility rules applied at the domestic level continue to apply in cross-border situations (e.g. France, Romania, Spain, Finland).[56] This means that, in principle, foreign authorities in charge of the investigations will have to comply with some of the specificities of national criminal justice systems[57] and that

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[50] It should in this regard be noted that in respect of illegally obtained evidence, foreign evidence is intrinsically different to national evidence, in that in the examination of the legality of the evidence foreign rules might apply.

[51] L. No. 149/2016 adopted on 21 July 2016.

[52] Or involving the conduct of evidentiary activities by the national authorities in a foreign State.

[53] National report No. 1 on Germany, Section on Transfer of Evidence (point VI) (see also Part I, Chapter II of this edited volume).

[54] National report No. 2 on Italy, Section on evidence-gathering and admissibility respectively (point 19).

[55] *Ibid.*

[56] See National reports No. 2 on France, Romania, Finland, Spain, Sections on evidence-gathering and admissibility.

[57] For example, under 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 Art. 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 (Art. 176, para. 6, from Law No. 302 of 2004). See National report No. 2 on Romania, Section on evidence-gathering and admissibility (point 19) (see also Part I, Chapter V of this edited volume).

evidence may be excluded from the trial according to the rules of the requesting/issuing State. It is interesting to note that, in Hungary, there is no explicit rule governing the admissibility of evidence gathered in another country. The national code of criminal procedure nonetheless states that evidence may be gathered by a foreign country upon Hungarian request according to the rules of the CCP.[58] It can be inferred from this provision that the exclusionary rules mentioned above governing domestic procedures also apply to cross-border evidence collection.[59]

Standards for admissibility sometimes depend on the kind of evidence that is collected and national procedural rules may continue to apply in some countries for specific types of evidence. Evidence provided via testimonies are a case in point in Spain and Italy, for which national procedural rules continue to apply.[60] In Italy, documents and records of unrepeatable activities can always enter the trial and evidence gathered by means of interceptions of communication can usually be used in the proceedings, provided that a rogatory letter was issued.[61] However, the admissibility of records of witness examinations is subject to restrictions and one of the following three conditions must be fulfilled: the presence of a counsel during the testimony, consent of the accused or the fact that it was impossible to cross-examine the witness.[62] These conditions are, however, of a non-cumulative nature.

II. Impact on cross-border cooperation

In the absence of common minimum rules, national standards on admissibility of unlawfully gathered evidence have amounted to a 'patchwork of rules, principles and practice' that 'does not only increase the complexity of transnational justice, but undoubtedly has a negative impact on the protection of fundamental rights and the efficiency of international judicial cooperation'.[63] Obstacles to have evidence gathered in accordance with the law of the requested/executing State admitted in the proceedings of the issuing State *(locus regit actum)* resulted in a shift in *modus operandi*. Thus, it is the law of the requesting/issuing State *(forum regit actum)* that now governs cooperation in most EU instruments. The coexistence of two rules (i.e. *locus regit actum* and *forum regit actum*) gives rise to complex problems that manifest themselves in the terrain of admissibility of evidence: issues of compliance have been pervasive in respect to both the law of the requesting/issuing State and the law of the requested/executing State. Compliance issues may arise with JITs and be heightened in the EPPO within the framework of investigations carried out in multiple countries. Against this background, many countries adopted the 'principle of non-inquiry',

[58] M. Hollan, 'Report on Hungary', *in* Ligeti (above, Introduction, n35), 331.

[59] *Ibid.*, see also National report No. 2 on Hungary, Section on evidence-gathering and admissibility (point 17) (see also Part I, Chapter III of this edited volume).

[60] L. Bachmaier Winter, 'Transnational Criminal Proceedings, Witness Evidence and Confrontation, Lessons from ECtHR's Case Law', 2013, 9, *Utrecht Law Review*; F. Caprioli, 'Report on Italy', *in* Ruggeri (above, Introduction, n28), 442.

[61] F. Caprioli, 'Report on Italy', *in* Ruggeri (above, Introduction, n28), 442.

[62] *Ibid.*

[63] L. Bachmaier Winter, 'Transnational Criminal Proceedings, Witness Evidence and Confrontation, Lessons from ECtHR's Case Law', (above, n60), 128.

whereby requesting/issuing States do not check how evidence was gathered as a rule so as to not paralyse the system of transnational investigations, however detrimental this may be from the perspective of individuals' rights.

A. Difficulties encountered under the locus regit actum *rule and insertion of the* forum regit actum *rule*

Prior to the entry into force of the 2000 EU Convention on MLA in Criminal Matters, Member States relied on the *locus regit actum* rule in transnational investigations, inherited from the 'mother Treaty' of the 1959 Council of Europe Convention on Criminal Matters (hereafter 1959 CoE Convention).[64] In its Article 3(1), the 1959 Convention notes that the requested State must execute an MLA request according to and in compliance with its own rules.[65] This is also known as the *lex loci* principle. The application of this principle led, however, to admissibility problems. Differences among national procedures often resulted in it being impossible to use information gathered in a Member State in the proceedings of another Member State. For example, evidence was collected in the requested State with sometimes little consideration for the guarantees enshrined in the laws of the trial State.[66] Absence of compliance with such procedural requirements and formalities, perceived as crucial in the trial State for evidence to be admitted, led to the exclusion of the evidence obtained, rendering the cooperation granted futile.

Concerned with the situation and in order to facilitate the admissibility of evidence across the EU and attain the goal of free movement of evidence, the EU adopted the aforementioned Convention on Mutual Assistance in 2000[67], which introduced the *forum regit actum* principle that was later included under Article 9(2) of the EIO Directive and the new E-Evidence Proposal.[68] Pursuant to this principle, Member States receiving a request for assistance shall comply with the formalities and procedures indicated by the requesting State unless otherwise provided in the ECHR, on condition that such formalities and procedures are not contrary to the fundamental principles of law of the requested Member State.[69] The idea behind this

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[64] Council of Europe, European Convention on Mutual Assistance in Criminal Matters, ETS No.030, Strasbourg, 20 April 1959.

[65] The full provision reads: 'The requested Party shall execute in the manner provided for by its law any letters rogatory relating to a criminal matter and addressed to it by the judicial authorities of the requesting Party for the purpose of procuring evidence or transmitting articles to be produced in evidence, records or documents.'

[66] I. Armada, 'The European Investigation Order and the lack of European standards for gathering evidence. Is a fundamental rights-based refusal the solution?', 2015, 6, *New Journal of European Criminal Law*.

[67] See S. Peers, *EU Justice and Home Affairs Law* (above, Introduction, n9), 103. The Convention is in force in the majority of EU States.

[68] Art. 5(f) and 6(f) E-Evidence Proposal.

[69] Art. 4(1) of the 2000 EU MLA Convention. Additionally, Art. 4(2) provides that: 'The requested Member State shall execute the request for assistance as soon as possible, taking as full account as possible of the procedural deadlines and other deadlines indicated by the requesting Member State. The requesting Member State shall explain the reasons for the deadline.'

rule is to subject the collection of foreign evidence to the legislation of the trial state, 'nationalising' it with the aim of ensuring its admission – and thus enhancing the efficiency of prosecutions.

Whereas most EU States now rely on the *forum regit actum* rule for cross-border cooperation in evidentiary matters, the *locus regit actum* principle remains applicable in at least three contexts. Already existing evidence will naturally be collected in accordance with the *locus regit actum* rule, and so irrespective of the legal instrument used to transfer it. The *locus regit actum* rule also remains the underpinning rule for investigative activities carried out within the framework of Joint Investigation Teams[70], even if the flexibility of this instrument allows participating States to have their own national procedural requirements taken into consideration. Finally, the *locus regit actum* rule was also retained as the preferred *modus operandi* of EPPO investigations.

B. Compliance and compatibility issues under the forum regit actum *rule: the cases of the 2000 MLA Convention and of the EIO*

Despite efforts towards more effective and smoother circulation of evidence across the EU's area of criminal justice, the introduction of the *forum regit actum* rule in 2000 failed to completely erase admissibility issues arising following transnational investigations. Firstly, it must be stressed that the *forum regit actum* rule is somewhat voluntary; the requesting/issuing State may – but may not – indicate the formalities and procedures it wishes the requested/executing State to follow. Spain, for example, does not always provide indications on the applicable procedure to be followed by the requested/executing State.[71] If nothing is said, the law of the requested/executing State will apply. Moreover, even when the requesting/issuing State does indicate such formalities and procedures, these indications may turn out to be difficult to understand for the requested/executing State in spite of the assistance provided by European Judicial Network (EJN) in criminal matters and Eurojust.[72] This may result in partial compliance on the part of the executing State with the law of the issuing State, in particular when no claim is filed by the defence.[73]

Secondly, the requested Member State is allowed to disregard the formalities and procedures indicated if they are contrary to its fundamental principles of law, without the latter being defined. Neither the MLA Convention nor the EIO Directive offer guidance on how and to what extent the rules of the issuing State should be

[70] Under the EU Convention on Mutual Legal Assistance of 2000, the team 'shall carry out its operations in accordance with the law of the Member State in which it operates.' See Art. 13(3)(b) EU Convention on Mutual Legal Assistance in Criminal Matters between the Member States of the European Union, 29 May 2000.

[71] National report No. 2 on Spain, Section on evidence gathering and admissibility (point 17).

[72] National report No. 2 on Romania, Section on evidence-gathering and admissibility (point 20) (see also Part I, Chapter V of this edited volume).

[73] *Ibid.*

followed.[74] To a certain extent, the requested/executing Member State thus remains free to establish its own rules or practice as to the degree of compliance that should be met with the procedures of the other national systems.[75] This is compounded by the fact that it is difficult for the requesting/issuing State to carry out checks on whether and to what extent the requested/executing State has fulfilled the conditions necessary for the piece of evidence to be admitted. Sometimes, the difficulty in terms of checking how information was gathered resulted in the evidence being excluded by the issuing State. As stated earlier, failure by the requested Member State to prove that it followed the modalities specifically indicated by the requesting State for the collection of the evidence requested via MLA constitutes a ground for excluding the evidence in Italy. In a specific case, the Romanian authorities were supposed to alert the Italian judicial authorities of the place and date of the activity, but the report merely stated that they followed the procedures required by Italy; evidence was excluded on that basis.[76]

From a longer term perspective, it cannot be excluded that admissibility issues arise in the operation of the E-Evidence Proposal which, as noted above, adopted the *forum regit actum* principle as a functioning rule. Writing in 2016, the Commission noted that direct requests from law enforcement authorities to service providers are not expressly foreseen under most national laws of criminal procedure.[77] It also expressed doubts as to the admissibility of evidence gathered through direct cooperation in a later criminal trial.[78] Despite these concerns, the E-Evidence Proposal does not contain any provision on admissibility and, instead, merely acknowledges the widely divergent admissibility rules between the Member States.[79]

C. Compliance and compatibility issues under the locus regit actum *rule: the JITs and EPPO cases*

Under the *locus regit actum* rule, the authorities of the requesting country cannot control the manner in which foreign courts and authorities apply their own laws. Under the 1959 Convention regime, this resulted in situations in which the judicial authorities of the requesting country failed to examine the way in which evidence was gathered by foreign authorities and nonetheless admitted the evidence.[80] Inevitably, this had negative consequences on the position of the defence. The Spanish Supreme Court attempted to circumvent this issue by shifting the burden of proof onto the

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[74] I. Armada, 'The European Investigation Order and the lack of European standards for gathering evidence. Is a fundamental rights-based refusal the solution?' (above n66), 20.

[75] Denmark does not take part in the EIO Directive, and Ireland has not opted-in the EIO.

[76] Cass., Sez. IV, 26.05.10, B *et al.*, Rv. 247822. See also National report No. 1 on Italy, Section on the impact of different criminal procedures on cross-border cooperation (point 1.3.).

[77] Commission, 'Non-paper: Progress Report following the Conclusions of the Council of the European Union on Improving Criminal Justice in Cyberspace', Council Document 15072/1/16, 7 December 2016, 10.

[78] *Ibid.*

[79] See Art. 18 E-Evidence Proposal, as regards the extent to which immunities and privileges that protect the data sought in a Member State must be taken into account by the trial State.

[80] F. Gascon Inchausti, 'Report on Spain', *in* Ruggeri (above, Introduction, n28), 485.

party affected by the evidence and held, in some instances, that evidence could not be excluded since illegality could not be proven.[81]

Recurrent obstacles to the admissibility of evidence exist as a result of disregard for the national procedures of the State of prosecution, as JIT investigations illustrate.[82] In JITs, as stated earlier, it is normally the law of the State where the investigation is carried out that applies, according to the *locus regit actum* principle, irrespective of the number of participants in the team, and evidence is shared among all the participating countries. In some cases, indeed, the lawfulness of the evidence obtained by the team has been challenged due to the existence of special requirements under the law of the trial court, in particular with regard to the use of special investigative techniques.[83] Although the Irish involvement within the JITs has remained (very) parsimonious to date, one of the fears expressed by Irish officials was that evidence obtained through joint investigations may not easily enter the trial due to possible constitutional obstacles with regard to Irish rules on admissibility.[84]

This being said, admissibility issues have been more or less solved by the extensive dialogue that is taking place between national competent authorities prior to the beginning of fact-finding operations. Although the FD JITs follows the *lex loci* principle, the FD remains silent on whether evidence should be admitted in the State of trial if the rules of the State of investigation have been followed. In practice therefore, participating States generally underline the formalities and procedures which must be taken into consideration when investigations are being carried out in order to facilitate the admission of evidence in the proceedings when the trial is taking place. Dialogue and mutual knowledge are consequently crucial to the effective operation of JITs, thus underlining the difficulty in applying the *locus regit actum* principle when investigations are conducted by multiple countries with different standards.[85]

From the perspective of evidence collection, the system established by the EPPO Regulation does not follow the *forum regit actum* rule either. Contrary to the EIO, which involves bilateral cooperation between two Member States, EPPO investigations may indeed take place in a plurality of EU States. In such a context, the *forum regit actum* rule would be difficult to implement, since the State/s of trial remains/remain unknown and the European delegated prosecutor cannot know what applicable rules, formalities and procedures to abide by during the conduct of investigations for the evidence to be admitted.[86] The general rule is that investigations will be carried out in

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[81] *Ibid.*

[82] Council Document 7259/14, 27-28 June 2013; See also Eurojust Annual Report, 2012, 39.

[83] *Ibid.*

[84] Council Document 6997/14, 48.

[85] The aforementioned meeting suggested that enhancing participation of Seconded National Experts in JITs investigations could allow participating States to become more knowledgeable about one another's legal systems. Thus, it would diminish the risk of incompatibilities.

[86] This is compounded by the fact that the Regulation provides that for reasons of workload, investigations and prosecutions may be assigned to a prosecutor other than in his/her Member State of origin. Recital 28 Regulation 2017/1939.

a Member State by one of the national European delegated prosecutors in charge of the case,[87] according to his/her own national law. In theory the delegated prosecutor in charge should originate from the State where the investigation is being conducted.[88] A consequence of this is that there are as many European delegated prosecutors as Member States where investigations are needed. This was precisely to avoid situations where the handling delegated prosecutor encounters difficulties in understanding the language and legal system of the MS concerned.[89] Thus, the applicable law is that of the country where the investigation is being carried out, which happens to be also the law of the European delegated prosecutor in charge of the investigation.

The risk of exclusion of evidence inherent in the application of the *locus regit actum* rule has been addressed in the EPPO Regulation by means of a provision dealing with admissibility of evidence. Article 37(1) thus requires that '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'. This provision aims at enhancing the possibilities of admission of the evidence collected by the EPPO; it is not an exclusionary but an 'inclusionary' rule. The final wording of the provision is quite different to that included in the EPPO proposal presented by the Commission in 2013. Under the former Article 30(1), evidence collected and presented by the EPPO should be admitted before national courts without any validation or similar legal process even if the national law of the Member State where the court is located provides for different rules on the collection or presentation of such evidence, on the condition that its admission would not adversely affect the fairness of the procedure or the rights of the defence enshrined under Articles 47 and 49 of the Charter of Fundamental Rights.[90] Explicit reference to the fairness of the procedure and the rights of the defence were therefore removed from the provision's final wording and can now only be found in Recital 80. The added value of the current rule may be questioned: as it flows from the previous analysis of differences, Member States do not exclude evidence obtained abroad and the current provision is in this respect somewhat redundant. Additionally, the EU legislator opted for the inclusion of a provision that seeks to improve the chances of the evidence being admitted for the sake of the prosecution case but failed to incorporate an exclusionary rule of evidence obtained in violation of the right to a fair trial.

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[87] Or the competent authorities instructed to carry out the investigation. See Art. 28(1) Regulation 2017/1939.

[88] Recital 29, Regulation 2017/1939.

[89] *Ibid.*

[90] Art. 30(1) COM (2013) 534 final. As noted elsewhere, this provision purported to ensure free movement of evidence across the EU and was quite ambitious in scope, given the existence of different national rules on the collection or presentation of evidence; see A. Weyembergh, K. Ligeti, 'The European Public Prosecutor's Office: Certain Constitutional Issues', *in* L. H. Erkelens, A.W. Meij, M. Pawlik (eds.), *The European Public Prosecutor's Office: An Extended Arm or a Two-headed Dragon?*, The Hague, TMC Asser Press Institute, 2014.

D. A pragmatic approach: the rule of non-inquiry and its impact on mutual trust

Issues of compliance with the national law of the trial State arising during cross-border investigations, alongside the difficulty in terms of checking how evidence was collected by the requested/executing State, drove Member States to rely on a more flexible approach to the way evidence was gathered by a foreign authority. This relatively lax position of judicial authorities *vis-à-vis* evidentiary activities carried out by another State has been termed the 'rule' or 'principle of non-inquiry'. In concrete terms, this means that the requesting State applies a less stringent check on the manner in which evidence was obtained in the requested State as they would do in an investigation carried out by the domestic authorities.[91] For example, the judicial review of how evidence was collected by the foreign authorities is sometimes quite poor, as was pointed out in France.[92] A similar attitude could be discerned when cross-border cooperation was regulated by the *locus regit actum* rules developed by 1959 MLA Convention. Thus, the Italian Court of Cassation often resorted to the argument that 'a foreign legal system cannot be expected to adjust to the constitutional principles of another State'.[93]

Some countries even relied on mutual trust to justify their own reluctance to conduct a thorough review on how evidence was gathered by the foreign State. In Spain, the Supreme Court invoked the principles of respect of the sovereignty of EU State and mutual trust to defend its approach. It declared, in a ruling of 2003, that the Spanish courts shall not become supervisors of the legality of acts executed in another EU State and that 'in a common European area of freedom, security and justice, … it is not acceptable to control the judicial acts and measures carried out in the different Member States in execution of letters rogatory issued in conformity with Article 3 of the 1959 Convention'.[94] In practice, unlawfully gathered evidence was sometimes admitted in criminal proceedings.[95] Similarly, the Dutch practice of cross-border evidence-gathering, and MR at large, hinges on a rigid application of the principle of mutual trust as an overarching principle pursuant to which violations of fundamental rights cannot occur since all EU States are party to the ECHR and apply a common, minimum set of fundamental rights.[96]

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[91] L. Bachmaier Winter, 'Transnational Criminal Proceedings, Witness Evidence and Confrontation, Lessons from ECtHR's Case Law', above n60, 139.

[92] As regards, for example, whether the principle of loyalty was upheld during the investigation. See National report No. 2 on France, Section on evidence-gathering and admissibility (see also Part I, Chapter I of this edited volume).

[93] Cass. 28 November 2002, Acri, in CED Cass. 223202. Quoted, *in* F. Caprioli, 'Report on Italy', *in* Ruggeri (above, Introduction, n28), 447.

[94] STS 1521/2002, 25 September 2002, *in* L. Bachmaier Winter, 'Transnational Criminal Proceedings, Witness Evidence and Confrontation, Lessons from ECtHR's Case Law' (above n60), 139. The principle of non-inquiry, however, does not apply to witness evidence.

[95] It did so in particular when an individual in his private capacity had brought evidence to court obtained through theft of business data. The Supreme Court held that 'the rule of exclusion becomes meaningful only as an element of prevention against excesses by the State in the investigation of a crime.' SC 228/2017.

[96] National report No. 2 on the Netherlands, Section on evidence (point 3) (see also Part I, Chapter IV, of this edited volume).

It is interesting to draw a comparison with surrender procedures. Member States have generally tended to shy away from examining how evidence that led to the issuing of an EAW was gathered. Rather, they attempted to accommodate differences in evidentiary law. The cases of Italy and Ireland discussed below provide interesting illustrations. A word of caution should nonetheless be raised. In evidentiary matters, the requested/executing State is actively contributing to the criminal procedure deployed in the requesting/issuing State, thereby suggesting that a stringent test should be applied by the latter, compared with surrender procedures. However insightful the two examples below are, the approach taken by Member States in surrender procedures cannot be fully transposed to cross-border admissibility of evidence.

The Italian law implementing the EAW imposes an obligation, when Italy acts as an executing State, to verify the 'probable cause', understood as 'serious indications of guilt', as a condition to execute an EAW for the purpose of prosecution.[97] The same law also provides that the Italian executing authorities must take into consideration whether the evidentiary principles enshrined in the Italian Constitution, i.e. consecrating the basic rule of adversary gathering of evidence, have been observed during the evidence collection process leading to the issuing of an EAW. This would have probably led to systematic refusals of surrender and a clash with the principle of mutual recognition. However, in a line of case law, the Court of Cassation ruled that by no means did the Italian authorities have the power to review the modalities under which evidence resulting in the issuing of an EAW had been gathered.[98] It is therefore not necessary for the issuing MS to adopt a configuration of procedural safeguards similar to the Italian one.[99]

Interestingly, the Irish standards of admissibility of evidence were also put to the test in a recent EAW case.[100] Non-conformity with national rules of admissibility were recently invoked as a ground of appeal in a surrender procedure, involving Ireland as an executing State, and the UK as an issuing State. The appellant argued 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. The Irish High Court quashed the appeal on the grounds that there was a need for 'significantly more', namely a real and substantive, i.e. 'egregious', defect in the system of justice, where fundamental rights were likely to be placed at risk, or actually denied, to deny surrender in such a case.[101] It further noted that 'rules of evidence 'may differ' between states, and that alone does not at all lead to the necessary

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[97] National report No. 2 on Italy, Section on evidence-gathering and admissibility (point 20).

[98] 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).

[99] C. Cass., Sez. VI, 27.1.2012, n. 4528, Baldi (Rv. 251959).

[100] The *Minister for Justice & Equality v. Buckley*, [2015], IESC 87, 26th November 2015. National report No. 1 on Ireland, Section on Presumption of confidence in the authorities of other Member States (point 5).

[101] *Ibid.*, paras. 24-25.

conclusion that there is a breach of fundamental rights in the requesting state'.[102] This case is of particular relevance because it put to the test the scope of application of the Irish Constitution on evidence rules. The attitude of the Irish authorities cannot, as such, be termed as relying on a principle of non-inquiry. However, by setting a high threshold for the non-execution of an EAW through the 'egregious defect standard', a certain flexibility, or 'presumption of confidence',[103] can nonetheless be observed.

E. Fundamental rights concerns: absence of judicial control, legal certainty and impact of procedural rights directives

The pragmatic approach pursued by the national authorities is certainly conducive to the smoother, and more effective, circulation of evidence across the EU. However, following the rule of non-inquiry is not without raising challenges from the perspective of fundamental rights due to the absence of review by a judicial authority. Critics pointed out that the requesting/issuing State has the full responsibility to carry out a check *ex officio* on possible irregularities occurring during the collection of evidence by the executing State.[104] However, if the requesting/issuing State applies the rule of non-inquiry, as is the case in most of the countries examined, then no one takes the responsibility to check the way in which evidence was gathered.[105]

The case of Mr Hilali illustrates this problem well.[106] In 2004, an EAW was issued by Spain to the UK seeking the surrender of Mr Hilali. The British judicial authorities put Mr Hilali in jail before they consented to his surrender. In the meantime, the evidence on which the proceedings were opened in Spain was found inadmissible by the Spanish courts. Surrender could not take place as the basis on which the EAW had been issued was no longer valid. In view of this change of circumstances, Mr Hilali applied for judicial review before the British High Court but his demands were rejected on the grounds that, if the decision of whether the alleged crime constitutes an extradition offence is a matter of the courts of the executing State, the evidence on which the extradition order is based and its admissibility *are entirely matters for the court of the issuing State.* Mr Hilali spent four years in prison in the UK before a new extradition offence of alleged murder was found and he was surrendered to the Spanish authorities to be jailed for another year. The case never came to trial and the charges were dropped in 2012.

In the absence of common standards on evidence-gathering operations and without a review of the way investigations were carried out in the executing country by the issuing

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[102] *Ibid.*

[103] National report No. 1 on Ireland, Section on Presumption of confidence in the authorities of other Member States (point 5).

[104] A. Van Hoek, M. Luchtman, 'Transnational cooperation in criminal matters and the safeguarding of human rights', 2005, 1, *Utrecht Law Review*, 21.

[105] *Ibid.*

[106] Regina (Hilali) *v.* Governor of Whitewall Prison and Another: UKHL 3, 2008. See also analysis by See T. Konstadinides, 'The Europeanisation of extradition: how many light years away to mutual confidence?', *in* C. Eckes, T. Konstadinides (eds.), *Crime within the Area of Freedom, Security and Justice: A European Public Order*, Cambridge, Cambridge University Press, 2011, 192, 224.

State, encroachments may occur on the legal protection of persons subject to investigative acts.[107] Quite straightforwardly, reliance on mutual trust as a justification for refusing to check how evidence was gathered is incompatible with the rights of the defence, along with the imperative of a quality judicial assessment of the facts. Mutual trust is a claim that exists between judicial authorities or State institutions.[108] It does not, however, exist on the side of the defence. Thus, 'the function of the defence is not to trust, but to check compliance with the law and to ensure that the rights of the defendant are safeguarded.[109] By consequence, if mutual trust stands as an obstacle to the right of the defence, then 'the principle of non-inquiry should be rethought'.[110] These issues lay at the heart of the *Stojkovic v. France and Belgium* case.[111] The ECtHR condemned France on the grounds that it had not reviewed that the interview of a witness pursuant to a letter rogatory issued to Belgium had been carried out in conformity with Article 6 ECHR.

The use of the rule of non-inquiry gave rise to controversies in some Member States. That national authorities resort to the rule of non-inquiry as the preferred *modus operandi* has triggered intense debates at the national level.[112] Reports on France, Italy and Germany suggest that tensions occur between the need to preserve the probative value of the evidence gathered in order to prevent impunity on the one hand and the imperative of preserving the rights of individuals on the other hand. In Italy, critics noted that relying on the rule of non-inquiry implied a 'progressive reduction of the content of the adversary principle until it becomes unrecognisable'.[113] Similar criticism was voiced in Germany. A defence lawyer interviewed in the German report pointed out that the approach taken by the Federal Constitutional Court, whereby foreign evidence may be admitted even though it does not comply with the German standards, means that German courts can justify 'all or nothing'.[114] The Federal Constitutional Court set guidelines in this respect in an important judgment of 2012 on the interpretation of the *forum regit actum* rule.[115] The case concerned a German request issued to the Czech authorities to carry out telecommunications interceptions. As regards the admissibility of the evidence then gathered, the German Federal Constitutional Court emphasised that, since evidence had been collected according to the German rules, the use of the evidence obtained abroad in German criminal proceedings was independent of the lawfulness of the measure in the requested EU State.[116] Compliance with the law of

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[107] *Ibid.*

[108] L. Bachmaier Winter (above n60), 140.

[109] *Ibid.*

[110] *Ibid.*

[111] ECtHR, *Stojkovic v. France and Belgium*, App. No. 25303/08, 27 October 2011.

[112] National reports No. 2 on Italy, France, and Germany (see various sections on evidence gathering and admissibility).

[113] F. Caprioli, 'Report on Italy', *in* Ruggeri (above, Introduction, n28), 447.

[114] National report No. 2 on Germany, Section on evidence gathering and admissibility (point C(2)) (see also Part I, Chapter II of this edited volume).

[115] BGH 1 StR 310/12 – Beschluss vom 21. November 2012 (LG Hamburg) = BGHSt 58, 32 = HRRS 2013, Nr. 314.

[116] National report No. 2 on Germany, Section on evidence gathering and admissibility (point C(2)) (see also Part I, Chapter II of this edited volume).

the requested State is, under the *forum regit actum* rule, therefore not a matter for the German Federal Constitutional Court.[117]

A second main concern stems from the challenges the current cooperation frameworks entail from the perspective of legal certainty. The co-existence of a variety of rules and cooperation logics, i.e. *forum regit actum* and *locus regit actum*, may complicate the task of the defence of challenging the way evidence was gathered due to difficulties in knowing the applicable law. Legal certainty challenges are exacerbated by the reluctance of the EU legislator to adopt an exclusionary rule in the EPPO, thereby maintaining the high degree of differentiation between exclusionary rules. This means that the extent to which fundamental rights are being taken into consideration when judicial authorities check whether evidence should be admitted or excluded varies to a great extent.[118] The Regulation extended the free circulation of evidence to the point of 'an (almost) automatic 'presumption of admissibility of evidence''[119] by removing the provisions on fundamental rights from the main text of the regulation and shifting the burden of admissibility tests to national authorities. Against this background, the hands-off approach pursued by the EU legislator does little to give a concrete meaning to the concept of mutual admissibility.[120] By nearly abolishing the fundamental rights guarantees that Member States should have taken into account when scrutinising the admissibility of evidence, EU legislators opened the way to the persistence of differing standards that will continue to co-exist in parallel, including in terms of the fundamental rights guarantees attached to them.[121]

F. The presumption of innocence and the access to a lawyer directives: A missed opportunity?

In spite of the aforementioned shortcomings, the adoption of the Presumption of Innocence and the Access to a Lawyer Directives failed to redress the balance by forcing Member States to review how evidence was gathered. Thus, EU legislators explicitly refrained from establishing exclusionary rules regarding evidence illegally/improperly obtained. The Presumption of Innocence Directive, like previously the ECtHR, connects the presumption of innocence with the right against self-incrimination and the right to remain silent. Article 10(2) reads that 'Member States shall ensure that,

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[117] *Ibid.*

[118] See E. De Busser, 'Procedural issues under the EPPO's legislative framework, Conference on the Establishment of the European Public Prosecutor's Office (EPPO): 'state of play and perspectives', The Hague: TMC Asser Institute, 7-8 July 2016; A. Weyembergh, C. Brière, 'Towards a European Public Prosecutor's Office' (above Part II, Chapter I, n156), 33.

[119] V. Mitsilegas, F. Giuffrida, 'The European Public Prosecutor's Office and Human Rights', *in* W. Geelhoed *et al.* (above, Part II, Chapter I, n159), 77.

[120] *Ibid.* In the 2013 EC proposal, reliance on vaguely defined and all-encompassing concepts such as 'fairness of the procedure' and 'rights of the defence' was considered detrimental to legal certainty, given the large interpretative discretion that was left to the Member States.

[121] In 2014 already, the European Parliament warned against the lack of clarity and uniformity of admissibility rules. European Parliament, interim report on the proposal for a Council regulation on the establishment of the European Public Prosecutor's Office (COM(2013)0534 – 2013/0255(APP)), 24 February 2014, para. vi.

in the assessment of statements made by suspects or accused persons or of evidence obtained in breach of the right to remain silent or the right not to incriminate oneself, the rights of the defence and the fairness of the proceedings are respected'. However, Member States may do so '*without prejudice to national rules and systems on the admissibility of evidence*'. The inclusion of a reference to national law suggests that this provision is not an exclusionary rule and does not amount to a departure from the rule of non-inquiry; it does not clearly impose on Member States the obligation to exclude evidence obtained in violation of the right to remain silent or the right not to incriminate oneself. It was noted during the negotiations that Member States with a system of free assessment of evidence should be able to continue to use it.[122] Back then, the Commission's proposal did include an exclusionary rule, which read that 'any evidence obtained in breach of this Article shall not be admissible, unless the use of such evidence would not prejudice the overall fairness of the proceedings'.[123]

The Access to a Lawyer Directive should also be mentioned in this context. As briefly recalled earlier and acknowledged in the Directive itself[124], the ECtHR's case law has established more or less clearly that incriminating statements made during police interrogations without access to a lawyer must be excluded. Consequently, the Commission's proposal contained an exclusionary rule in this regard[125], which was watered down during the negotiations to result in a provision that is very similar to that in Article 10(2) of the Presumption of Innocence Directive: 'Without prejudice to national rules and systems on the admissibility of evidence, Member States shall ensure that, in criminal proceedings, in the assessment of statements made by suspects or accused persons or of evidence obtained in breach of their right to a lawyer or in cases where a derogation to this right was authorised in accordance with Article 3(6), the rights of the defence and the fairness of the proceedings are respected'[126]. Again, the EU legislator fails to establish an exclusionary rule that would shield the accused from abusive methods of investigation and this is so in spite of the backup of the ECtHR's case law.

At first glance, the Presumption of Innocence Directive seems to provide a higher degree of protection than ECHR case law. Thus, 'the exercise by suspects and accused persons of the right to remain silent or of the right not to incriminate oneself shall not be used against them and shall not be considered to be evidence that they have committed the criminal offence concerned'.[127] This goes further than the ECtHR's controversial *Murray* case, whereby 'adverse inferences' may be drawn from the silence of the

[122] S. Cras, A. Erbeznik (above, Part II, Chapter I, n177), 64.

[123] See Arts 6 (4) and 7 (4) of the proposal.

[124] See Recital 50.

[125] Art. 13 (3) of the proposal reads: 'Member States shall ensure that statements made by the suspect or accused person or evidence obtained in breach of his right to a lawyer or in cases where a derogation to this right was authorised in accordance with Article 8, may not be used at any stage of the procedure as evidence against him, unless the use of such evidence would not prejudice the rights of the defence'.

[126] Art. 12 (2) Directive 2013/48/EU.

[127] Art. 7 (5) Directive 2016/343/EU.

accused in the light of all the circumstances of the case.[128] This notwithstanding, the *effet utile* of the Directive is undermined by two further concerns. A first issue focuses on the lack of clarity as to the scope of the right to a legal remedy afforded to individuals under Article 10. In case of infringement or derogation to the right to be presumed innocent, the assessment of these breaches by the competent authorities should respect the rights of the defence and the fairness of the proceedings. However, this assessment should be 'without prejudice to national rules and systems on the admissibility of evidence.'[129] Another point of concern lies in the existing variable geometry in the EU's criminal justice area as a result of the various opt-outs of the UK, Ireland and Denmark. Thus far, neither of these three countries have opted into the Presumption of Innocence Directive. Asymmetries in standards of protection recently caused some difficulties in the operation of the EAW between the UK and Germany (see box).

Variable geometry and inconsistencies among levels of protection in the right to remain silent as an obstacle to the EAW[130]

An EAW case was recently referred to the Federal Constitutional Court of Germany, whereby the defendant contested his surrender to the UK on the grounds that the British law, in accordance with the *Murray* judgment, allowed the court and the jury to draw inferences from his silence to his guilt. This conflicted with the status of the accused's right to remain silent in the German legal order. The Federal Constitutional Court stated that surrender 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 as infringed, for instance, where an accused is induced by means of coercion to incriminate himself. 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. In the case at hand, the core content of the right was not infringed. The German Federal Constitutional Court ruled that denying surrender in this case would be too far-reaching.

[128] ECtHR, *Murray*, 8 February 1996. It noted in this case that 'whether the drawing of adverse inferences from an accused's silence infringes Article 6 is a matter to be determined in the light of all the circumstances of the case, having regard to the situations where inferences may be drawn, the weight attached to them by the national courts in their assessment of the evidence and the degree of compulsion inherent in the situation' (para. 47). The Strasbourg Court adopted a similar stance in *Condron v. United Kingdom*, 2 May 2000, where it stated that 'it would be incompatible with the right to silence to base a conviction solely or mainly on the accused's silence or on a refusal to answer questions or to give evidence himself. Nevertheless, the Court found that it is obvious that the right cannot and should not prevent that the accused's silence, in situations which clearly call for an explanation from him, be taken into account in assessing the persuasiveness of the evidence adduced by the prosecution' (para. 56). Originally, the Commission had adopted ECHR stance in its Green Paper of 2006, a preliminary position that was heavily criticised and consequently scrapped in its proposal. See Cras, Erbeznik (above, Part II, Chapter I, n177).

[129] Art. 10(2) Directive 2016/343/EU.

[130] BVerfG, Beschl. v. 6.9.2016 – 2 BvR 890/16 = StV 2017, 241. A press release in English is available at: www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2016/bvg16-065.html.

CHAPTER III

Transnational investigations and equality of arms

The principle of equality of arms requires that 'each party must be afforded a reasonable opportunity to present his case – including his evidence – under conditions which do not place him at a substantial disadvantage *vis-à-vis* his opponent.'[1] Logically deriving from this case law, the principle of equality of arms applies to evidence matters. It has not been explicitly laid down in the text of the ECHR, but it should be read as one of the 'fairness requirements' of Article 6(1) ECHR.[2] Nor has it been explicitly stated under EU law. This being said, the CJEU ruled that the principle of equality of arms was a 'corollary' of the right to a fair trial[3] and that it was a component of the principle of effective judicial protection laid down in Article 47 of the Charter.[4]

I. Different understandings of the principle of equality of arms

The interpretation and implementation of the principle of equality of arms differ across the EU. The following addresses these differences through two representative

[1] ECtHR, *Dombo Beheer BV v. Netherlands*, 27 October 1993, para. 33. This is also the approach taken by the CJEU, see C-199/11, *EU v Otis a.o* EU:C:2012:684, para. 71.

[2] M. Van Wijk, *Cross-border evidence gathering: Equality of arms within the EU?*, The Hague, Eleven Publishing, 2017, 24. Meanwhile, the Strasbourg Court substantially fleshed out this principle in its case law. See, inter alia, the aforementioned case of *Dombo Beheer*, but also ECtHR, *Natunen v Finland,* 31 March 2009, para. 42: 'The accused must have the opportunity to organise his defence in an appropriate way and without restriction as to the possibility to put all relevant defence arguments before the trial court and thus to influence the outcome of the proceedings.'

[3] Joined cases C-514/07P, C-528/07P and C-532/07P, *Sweden and others v API and Commission*, 21 September 2010, para. 88

[4] *EU v. Otis a.o.*, para. 48 (above n1). As noted by Advocate-General Cruz-Villalón in this case, the Court's approach to the principle of equality of arms builds on the definition laid down by the ECtHR.

case studies,[5] namely the possibility for the defence to conduct investigations alongside the prosecution, as well as the extent to which the defence is able to cross-examine witnesses. The means and margin of manoeuvre available to the defence to gather evidence against the prosecution differ in several respects across the EU. Comparing the extent to which Member States have implemented the right for the defence to conduct its own investigations and the right to cross-examine witnesses is of particular interest for the purpose of this research, since the respective status of these rights differs in the current procedural framework developed for the defence. Whereas both of these rights are characteristics of the adversarial tradition, only the right to cross-examination has been codified under Article 6(3)(d) ECHR,[6] and imposed as an obligation onto civil law systems. It is not legally binding, under ECtHR law, for the Member States to implement a right for the defence to conduct its own investigations in order to fulfil the requirements of the principle of equality of arms. In some countries, however, this right is linked to equality of arms, as the analysis below shows.

Some countries have indeed conferred a right to the defence to adopt a proactive approach and present a case against the prosecution.[7] This can be done by allowing the defence, i.e. either the defendant or his/her lawyer, to be given the opportunity to conduct investigations. This right, however, is not guaranteed in all EU States. At the higher end of the spectrum, Italy and Ireland are the sole countries that provide an express right to the defence to undertake investigations on its own and present the evidence gathered at the trial, alongside the prosecution. Under the Italian CCP, defence investigations are considered crucial and the investigative powers of the lawyer are relatively broad,[8] as a result of the adversarial shift of the Italian criminal justice system in the 1980s.[9] Thus, it is possible for the defence lawyer to carry out investigative activities on behalf of his/her client if the latter has knowledge that a criminal procedure will be brought against him/her, before the prosecutor has initiated the investigation.[10] Investigative activities may take place at every stage of the procedure and include subpoenaing and obtaining statements of witnesses, requesting documents from public bodies, conducting scientific tests and accessing premises with the purpose of viewing a site or an object.[11] The

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[5] Other aspects of equality of arms could have been included, such as the duty of disclosure by the prosecution of all evidence in its possession before the trial. See National report No. 2 on Ireland, Section on the status of defence rights (point 2).

[6] Art. 6(3)(d) ECHR reads: 'Everyone charged with a criminal offence has the minimum following rights: (…) (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.'

[7] For an extensive analysis of the principle of equality of arms and the active/reactive role the defence may take during the proceedings, see M. Igorevna Fedorova, *The Principle of Equality of Arms in International Criminal Proceedings*, PhD thesis, The Netherlands: University of Utrecht, defended on 7 September 2012.

[8] M. Van Wijk, *Cross-border evidence gathering: Equality of arms in the EU?* (above n2), 189.

[9] National report No. 2 on Italy, Section on general questions on the Italian national criminal procedure system (point 1.2.).

[10] *Ibid.*

[11] *Ibid.* See also Ryan (above, Part II, Chapter I, n20), 198.

defence may also request the prosecutor to carry out special investigation acts. These concern investigative measures that cannot be initiated by authorities other than the public ones, such as search and seizure and wiretapping.[12] In Ireland too, the defence is free to carry out its own investigations.[13] However, this right is limited to the possibility, for the defence lawyer, to carry out interviews of witnesses before a trial.[14]

In other Member States, the defence is not prevented from conducting investigations on its own, although it is not explicitly granted as a right under national law (e.g. Romania). In Romania,[15] the defence can collect evidence by, for example, gathering documents and identifying witnesses. However, the defence must obtain the approval of the prosecutor (at the investigation stage) or the court (at the trial stage) for these documents to be considered as evidence. The defence is allowed to contact witnesses unless a specific preventive measure was ordered to prevent the suspect or accused person from so doing.

In the remainder of countries, the general rule is that the defence cannot conduct investigations on its own. The approach of the defence is then more 'reactive' as it is reliant on the prosecution, or the judge, to whom it must request authorisation to have further investigative acts carried out (e.g. Germany, the Netherlands, Ireland, Hungary, France, Spain). In Germany, the defence has an obligation or, one may say, a duty, to actively participate in the conduct of the investigation.[16] The request can be filed to either the investigative judge or the prosecutor.[17] The margin for discretion enjoyed by the authorities is, however, relatively broad; the competent prosecutor or judge will comply with a request, only to the extent the suggested evidence is deemed relevant to the investigation.[18] In the Netherlands, the defence does not enjoy similar powers to the prosecutor. For example, the prosecutor can demand that the judge undertakes investigative acts, whereas the defence has only the possibility to file a request for this purpose.[19] Then, the prosecutor can request an expert on its own motion, whereas the defence must request the prosecutor for experts.[20] Similarly,

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[12] F. Ruggeri, S. Marcolini, 'Report on Italy', *in* Ligeti (above, Introduction, n35), 402.

[13] A. Ryan, 'Report on Ireland', *in* Ligeti (above, Introduction, n35), 354

[14] If the defence wishes to call on its own expert witnesses at the trial, it must however request permission from the court of trial beforehand. National report No. 2 on Ireland, Section on status of defence rights (point 2).

[15] National report No. 2 on Romania, Section on evidence-gathering and admissibility (point 18) (see also Part I, Chapter V of this edited volume).

[16] National report No. 2 on Germany, Section on general features of the German criminal procedure system (point A(2)) (see also Part I, Chapter II of this edited volume).

[17] T. Weigend, F. Salditt, 'Criminal defence during the pre-trial stage in Germany', *in* E. Cape, J. Hodgson, T. Prakken, T. Spronken (eds.), *Suspects in Europe: Procedural rights at the investigative stage of the criminal processs in the European Union*, Antwerpen, Intersentia, 2008, 91.

[18] *Ibid.*, see also National report No. 2 on Germany, Section on general features of the German criminal procedure system (point A(2)) (see also Part I, Chapter II of this edited volume).

[19] National report No. 2 on the Netherlands, Section on Evidence (point 2) (see also Part I, Chapter IV of this edited volume). Requests filed to the investigating judge by the defence takes place through a procedure called the *mini instructie*, replaced by the 'judicial inquiry' in 2011. Van Wijk (above n2), 110.

[20] National report No. 2 on the Netherlands, Section on Evidence (point 2) (see also Part I, Chapter IV of this edited volume).

the public prosecutor can always attend the questioning of a witness before an investigative judge, but the access of the defence can be restricted in the interest of the investigation.[21] In Hungary, the defence may request the assignment of an expert during the investigation phase, the granting of which being nonetheless entirely subject to the discretion of the prosecutor.[22] In Spain, the lawyer has no investigative powers of its own and must request the judge or any other competent authorities to have further evidentiary activities carried out if necessary.[23] In France, it is for the prosecutor or the investigating judge to investigate the case in an impartial manner.[24] Under the CCP, interrogating a witness at the investigation stage might constitute an offence of subornation of witness for the defence.[25] The lawyer may, however, file an application to the investigating judge in order to carry out and/or have evidentiary activities carried out.[26]

Another, interesting point of comparison between national criminal procedures are the applicable rules to the cross-examination of witnesses. The right for the defence to examine witnesses is inherited from the adversarial tradition; all Member States, even those predominantly belonging to the inquisitorial tradition, are under the obligation to implement a right to cross-examination, pursuant to Article 6(3)(d) ECHR. It requires, as a rule, the presence of witnesses at the trial so as to accord the defence an effective opportunity to challenge the evidence against the accused and to check the reliability of the witness evidence.[27] Although the ECtHR formulated a general rule on witness evidence, the understanding and application of this right differs from one Member State to another.

At the trial stage, cross-examination of witnesses is used to gather evidence in several countries due to the major adversarial features of their criminal justice system (e.g. Ireland, Italy) or the incorporation of adversarial elements in others (Hungary,[28] Germany,[29] Romania[30]). In purely adversarial proceedings, the underpinning rule is

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[21] *Ibid.*

[22] M. Hokklan, 'Report on Hungary', *in* Ligeti (above, Introduction, n35), 307.

[23] Such as having premises searched, or witnesses interrogated. See Chapter 4, Art. 520(6)(b) Ley de Enjuiciamiento Criminal. See also National report No. 2 on Spain, Section on evidence-gathering and admissibility (point 18), as well as 'Criminal proceedings and defence rights in Spain', Fair Trials fact sheet, last updated in 2013. Retrieved at: www.fairtrials.org/wp-content/uploads/Spain-advice-note.pdf

[24] By seeking elements in favour and against the suspect (i.e. *à charge* and *à décharge*), in order to determine whether the charges against the suspect are sufficient to send him forward for trial. See Ryan (above Part II, Chapter I, n20), 151.

[25] J. Tricot, 'Report on France', *in* Ligeti (above, Introduction, n35), 256.

[26] Such as to hear a witness, to have an element of the investigation disclosed, and so on. The powers of the lawyer to request investigations are broader when the investigating judge is the responsible authority to conduct them. He/she must examine the request within a month. See Arts 434 and 156 CCP.

[27] L. Bachmaier Winter, 'Report on Spain', *in* Ligeti (Introduction, n35), 131.

[28] Art. 295 CCP. See Karsai & Szomora (above Part II, Chapter II, n28), 193.

[29] National report No. 2 on Germany, Section on general questions on the German criminal procedure system (point A(2)) (see also Part I, Chapter II of this edited volume).

[30] Art. 381 CCP.

that evidence given orally by the witness at trial is the only evidence that may be relied upon to reach a verdict.[31] Italy and Ireland apply this rule, albeit in a more or less strict manner. In Ireland, witnesses must be tested on their testimonies through cross-examination by the defence.[32] Cross-examination by the defence is a constitutional right. If not granted, witness evidence is considered as hearsay.[33] Some (limited) exceptions have, however, been accepted to the common law rule for hearsay evidence.[34] In Italy,[35] rules are slightly laxer, due to the conservation under the national CCP of elements of the inquisitorial tradition. For example, when it is not possible to gather oral testimony in trial, the previous statements collected during the preliminary stage can be used as evidence.[36] Interestingly, the Romanian procedural framework underwent a noteworthy shift in recent years. Prior to 2017, no adversary hearing nor presentation of evidence were deemed necessary, even if the alleged offences could not be proven otherwise than by presenting evidence at the trial, for example by cross-examination. The Romanian Constitutional Court declared the aforementioned provision unconstitutional in 2017 as regards the principles enshrined under Article 6 ECHR. Amendments were made and a system similar to that of Italy and Germany has been established.[37]

In criminal justice systems predominantly rooted in the inquisitorial tradition, the value of cross-examination of witnesses at the trial stage is less relevant and may be subject to exceptions. For example, in Spain, witnesses must appear before the trial judge and give testimony. However, witnesses may be interrogated at the pre-trial stage on an exceptional basis and the written records of statements may be used in courts.[38] Interestingly, if it is known beforehand that the witness will not be able to

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[31] RYAN (above, Part II, Chapter I, n20), 109.

[32] *Ibid.*

[33] A. RYAN, 'Report on Ireland', *in* LIGETI (above, Introduction, n35).

[34] Such as dying declarations, spontaneous statements considered to be part of the evidence admitted. See RYAN (above Part II, Chapter I, n20), 109.

[35] Interestingly, the Italian system also provides for the *incidente probatorio* procedure, i.e. an anticipatory hearing taking place at the pre-trial stage, in order to gather evidence, for example through the examination of a witness, if there are reasons to believe he or she will not be available for examination at trial because of illness or other serious impediment. See National report No. 2 on Italy, Section on the rights of victims (point 3). See also RYAN (above Part II, Chapter I, n20), 199.

[36] Art. 512 CP. Similarly, documentary evidence and written reports are generally accepted. National report No. 2 on Italy, Section on evidence gathering and admissibility (point 17). This stands in contrast to Ireland, where stricter rules apply. Some exceptions were made to the strict admissibility regime for written documents, such as reports obtained through surveillance activities. See Criminal Justice Act of 2009.

[37] 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 National report No. 2 on Romania, Section on general questions on the Romanian criminal procedure system (point 1) (see also Part I, Chapter V of this edited volume).

[38] Provided that the confrontation rule was respected and the testimony was taken before a judge. L. BACHMAIER WINTER, 'Report on Spain', *in* LIGETI (above, Introduction, n35), 725.

testify at trial, testimonies can be taken through the 'anticipated practice of evidence', which provides the possibility to interrogate a witness at the pre-trial stage in the same conditions as it would take place during the trial, i.e. by granting the defence an opportunity of cross-examination.[39] In the Netherlands, the pre-trial investigation stage remains the most important phase of the proceedings.[40] The Dutch legislator has not opted for a system of 'cross-examination' during the trial itself and the law establishes that, in principle, the presiding judge first asks questions to witnesses, followed by other judges, the public prosecutor and the suspect.[41] This also means that witnesses may not necessarily give oral evidence at the trial if they have already made an oral or written testimony during the criminal investigation; the testimony is laid down in a report that is used at a later stage by the trial judge.[42]

II. Accommodating and circumventing differences by extreme reliance on national law: investigative tools, procedural safeguards and legal remedies

In order to overcome the widely divergent approaches of the Member States to the principle of equality of arms, the EU has, just as in the realm of investigative measures, attempted to circumvent differences by leaving a wide margin of discretion to the Member States and extensively referring to national law. The difficulty of reconciling divergent approaches in relation to the principle of equality of arms is firstly illustrated by the wording of cooperation instruments, such as the EIO Directive and the EPPO Regulation: a certain degree of flexibility was retained in the EIO and the EPPO as regards the participation of the defence in transnational investigations. Whereas both the EIO Directive and the EPPO Regulation acknowledged and took into consideration the right of the defence to conduct investigations in a few countries, in the absence of uniform enforcement across the EU, the scope of this right remains conditional upon its existence in the national law.

The EIO Directive refers to the right of the suspected or accused person, or his lawyer on his behalf, to request the issuing of an EIO to obtain evidence.[43] Whereas this is a welcome addition compared with the original draft, where no such provision existed,[44] this possibility is made conditional upon availability under national law and is only foreseen 'within the framework of applicable defence rights in conformity with national criminal procedure'.[45] During the negotiations, Member States made it clear that this would not entitle defendants to a new right to conduct parallel investigations given that the latter does not exist under the national law of some countries. Similar

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[39] *Ibid.* This practice seems to mirror the Italian *'incidente probatorio'* procedure.

[40] Van Wijk (above, n2), 110.

[41] National report No. 2 on the Netherlands, Section on Evidence (point 2) (see also Part I, Chapter IV of this edited volume).

[42] *Ibid.*

[43] Art. 1(3) Directive 2014/41/EU.

[44] The main problems would concern language and costs. See S. Allegrezza, 'Critical Remarks on the Green Paper on Obtaining Evidence in Criminal Matters from one Member State to another and Securing its Admissibility', 2010, 9, *Zeitschrift für Internationale Strafrechtsdogmatik*, 577.

[45] *Ibid.*

considerations exist in the EPPO Regulation.[46] Article 41(3) imposes an obligation on the Member States to provide suspects and accused with 'the possibility to present evidence, to request the appointment of experts or expert examination and hearing of witnesses, and to request the EPPO to obtain such measures on behalf of the defence'. However, this right is made conditional upon its existence under national law. This means that, similarly to the EIO, the adoption of the EPPO Regulation does not involve the creation of new rights for defendants, who remain bound by the same national constraints as before. This is a clear step backwards compared with the original Commission proposal, where a *right*, and not a mere possibility which is conditional upon its existence under national law, was conferred on suspects and accused persons to present evidence to the consideration of the EPPO and to request the latter to gather any evidence relevant to the investigation, including appointing experts and hearing witnesses.[47]

Secondly, differences were 'circumvented' in a number of (nevertheless crucial) aspects of defence rights in transnational investigations by deferring the questions of procedural safeguards and legal remedies to national law. The EIO Directive emphasises that the procedural safeguards available to the defence are subject to national law. Article 14(7) contains a general clause ascertaining the imperative of respecting the rights of the defence and the fairness of the proceedings in the issuing State when assessing evidence obtained through the EIO '*without prejudice to national procedural rules*'. The insertion of various references to national law in the main provisions of the EIO Directive is an acknowledgment that evidence is gathered *differently* from one MS to another and that differing procedural safeguards apply. A similar line of reasoning was adopted in the EPPO Regulation. Article 41(3) stipulates that suspects or accused persons involved in EPPO proceedings shall have all the procedural rights available to them under the applicable national law. These safeguards, however, vary considerably across the EU.[48] In the absence of efforts on the part of EU legislators to attenuate these differences, the defence is confronted with a multiplicity of procedural frameworks. Variable geometry in the protection afforded to individuals has given rise to heavy criticism in the literature.[49] In a similar fashion, the release of the E-Evidence Proposal has not been accompanied by the adoption of specific safeguards either. The current text simply provides that the procedures of the issuing State apply when transfer of data is requested from a service provider located in another State. There remains, however, a considerable lack of clarity as to the conditions underpinning the issuing of a transfer request.[50] It was indeed noted that there is too much deference in the current proposal to the national law of the

[46] Questions relating to the applicable procedural safeguards for nationals involved in cross-border cases were raised internally by the Dutch Parliament in the course of the EPPO negotiations. National report No. 2 on The Netherlands, Section on evidence-gathering and admissibility (see also Part I, Chapter IV of this edited volume).

[47] Art. 35, Commission Proposal on the EPPO.

[48] Art. 1(3).

[49] For criticisms of the resulting variable geometry, see for instance Weyembergh and Brière (above Part II, Chapter I, n156).

[50] E. Kyriakides (above Part II, Chapter I, n86).

issuing State.[51] The conditions for the issuing of Production and Preservation Orders are few and formulated in broad terms.[52] Both Preservation Orders and Production Orders – albeit to a lesser extent,[53] can be issued for *all* kinds of criminal offence.[54] Alongside this seeming absence of limits, the proposal fails to lay down criteria for the subsequent use of data by the issuing States beyond the mere obligation of observing the proportionality and necessity requirements[55].

The EIO Directive, the EPPO Regulation and the E-Evidence Proposal all provide that EU procedural rights directives apply to transnational investigations carried out under their respective frameworks. The impact of these directives will nonetheless be limited in the realm of investigations. This is particularly so regarding the Access to a Lawyer Directive. Under Article 3(3), suspects and accused persons shall have, as a minimum, the right for their lawyer to attend the following investigative and evidence-gathering acts: identity parades, confrontations and reconstructions of the scene of a crime. This could facilitate the participation of the defence in cross-border investigative acts but its potential must be put in perspective given the minimalist approach pursued by the EU legislator. [56] The list of investigative and evidence-gathering acts is rather limited. It could have included, for example, the examination of witnesses; the question of witnesses is particularly relevant since the EPPO Regulation provides for the possibility for the defence to present evidence, to request especially the hearing of witnesses, and to request the EPPO to obtain such measures on behalf of the defence.[57] Interestingly, the Commission proposal on the right of

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[51] *Ibid.*

[52] Production Orders imply that a transfer request is filed to the service providers, and Preservation Orders are issued to prevent the removal, deletion or alteration of data that is located in another Member State. For Preservation Orders, the data may be transferred to the issuing State at a later stage by means of an EIO, or an MLA request.

[53] On condition that the transfer requests only concern the less sensitive 'subscriber and access data', i.e. less sensitive data. For 'transactional and content data', deemed more sensitive, a transfer request may only be issued for a list of serious crimes. This is despite the fact that the distinction between the two different levels of sensitivity is debatable. See Art. 5(3) and (4) E-Evidence Proposal.

[54] Production Orders relating to 'metadata', as opposed to the more sensitive 'content data', can be issued for all types of offences. As regards the latter, Production Orders can only be issued for a specific list of serious crimes. See Art. 5(3) and 6(2) E-Evidence Proposal.

[55] It is worth drawing a comparison with the CJEU's rulings in *Digital Rights Ireland* and *Tele2*, although the scope and the stakes of surveillance, alongside the breadth of infringements to the right to privacy and data protection differ. In these two judgments, the Court said that data retention must be subject to 'minimum safeguards so that the persons whose data have been retained have sufficient guarantees to effectively protect their personal data against the risk of abuse and against any unlawful access and use of that data.' See *Digital Rights Ireland Ltd* (above Part II, Chapter I, n83), para. 54. These safeguards were also developed in the ECtHR's jurisprudence at great length. Inter alia, these include: 'the procedure to be followed for examining, using and storing the data obtained; the precautions to be taken when communicating the data to other parties; and the circumstances in which recordings may or must be erased or destroyed.' See ECtHR, *Zakharov v. Russia*, App. No. 47143/06, 4 December 2015, para. 215.

[56] Van Wijk (above, n2), 90.

[57] Art. 41(3) Regulation 2017/1939.

access to a lawyer, in its original draft, included a right to legal assistance in any case and any procedural or evidence-gathering act.[58] In 2011, a group of Member States objected to the Commission proposal. The criticism came from both sides of the 'common law – civil law divide';[59] Ireland, the UK, Belgium and France contended that the European Commission proposal would result in 'substantial difficulties for the effective conduct of criminal proceedings by their investigating, prosecuting and judicial authorities'.[60] In particular, they argued that mandating the presence of a lawyer for every investigative measure where the suspect's presence is required or permitted would cause significant delay in the early investigations and alter the balance that must be struck between procedural rights and the effectiveness of the criminal justice system.[61] Somewhat unsurprisingly, the French authorities opted for a *de minima* transposition of Article 3(3).[62] Critics pointed out the nearly literal implementation of the Access to a Lawyer Directive and the clear choice of the national legislator not to extend the rights of the defence beyond European standards.[63]

Other issues arose in the exercise of this right. In Spain for example, the Supreme Court opted for different levels of protection, depending on the investigative measure at hand. In a recent domestic case,[64] the Spanish Supreme Court denied the allegations brought by the defendant that his right to privacy had been violated because the house search he was subject to had not been carried out in the presence of a lawyer. The Supreme Court stated that domestic legislation does not provide for such a right, nor does the Access to a Lawyer Directive. In another judgment, however, the Supreme Court ruled that the presence of a lawyer was required for the collection of DNA samples, arguing that the minimum standards approach taken by the EU legislator allowed Member States to go beyond the provisions of the Directive.[65]

Thirdly, deference to national law could also be discerned in respect to another safeguard which is closely intertwined with the principle of equality of arms: the right of individuals to effective judicial protection. This right is encapsulated under Article 13 ECHR and Article 47 of the Charter of Fundamental Rights. It means that any individual whose fundamental rights are violated must be able to assert this violation

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[58] Art. 3(1)(a)(b) Commission Proposal on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest, COM (2011) 0326 final.

[59] As accurately pointed out by Ryan (above Part II, Chapter I, n20), 43.

[60] Commission, 'Proposal for a Directive of the European Parliament and of the Council on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest – Note by Belgium / France / Ireland / the Netherlands / the United Kingdom', Interinstitutional File 2011/0154 (COD), Council Document14495/11, 2.

[61] *Ibid.*, 3.

[62] See National report No. 2 on France, Section on the state of implementation of directives (point B) (see also Part I, Chapter I of this edited volume).

[63] *Ibid.* See also E. Vergès, 'La procédure pénale à son point d'équilibre', 2016, *RSC*, 551 et seq.

[64] STC 196/2015, see National report No. 2 on Spain, Section on impact of procedural rights directives (point 4.2.).

[65] STC 734/2014, see National report No. 2 on Spain, Section on impact of procedural rights directives (point 4.2.).

before a national authority, generally in the form of a court.[66] It has great significance in evidentiary law because it allows the defence to obtain a review of how evidence was gathered. Despite the relevance of the right to judicial protection in such a human rights-sensitive field as transnational investigations, little guidance is provided in current cross-border cooperation instruments, along with procedural rights directives, on how to exercise this right, beyond a mere obligation imposed on Member States to insert it under national law. This means that the conditions of access to an effective remedy, alongside how individuals may exercise this right, are left to the discretion of the Member States,[67] and much of the effectiveness of these remedies will depend on existing arrangements under national law.[68]

Moreover, inconsistencies arise between instruments dealing with transnational investigations. For example, the EIO Directive[69] and the E-Evidence Proposal[70] state that a remedy against the decision to issue an assistance request should be sought by individuals in the issuing State. By contrast, neither the 2000 MLA Convention nor the JIT Framework Decision contain provisions on legal remedies. This means that remedies are available to individuals only to the extent that they exist in comparable national investigations,[71] thus heightening the risk that a legal remedy available in a purely domestic case cannot be exercised in cross-border circumstances.[72] Moreover,

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[66] B. Schünemann, 'Solution Models and Principles Governing the Transnational Evidence-Gathering in the EU', *in* S. Ruggeri (ed.), *Transnational Evidence and Multicultural Inquiries in Europe*, 64.

[67] This issue is well illustrated in the Information Rights Directive, which provides defendants with the possibility to challenge a possible failure or refusal of authorities to disclose the materials of the case to the defence under Art. 8(2). However, that right 'does not entail the obligation for Member States to provide for a specific appeal procedure, a separate mechanism, or a complaint procedure in which such failure or refusal may be challenged.' In other words, the national remedies available under national law, irrespective of whether they effectively guarantee equality of arms, must remain unchanged.

[68] This being said, a recent study on the EAW FD shows that, even where national systems provide for a legal remedy, the conditions underpinning access to such remedies, as well as their degree of effectiveness, widely differ from a MS to another. For example, the right of appeal tends to be restricted in those countries with a centralised judicial system dealing with extradition requests (e.g. Germany), where the highest jurisdiction is in charge of such appeals (e.g. Germany, France, Italy, Finland), and in Ireland, where the appeal must be claimed before the same High Court judge who consented to the surrender of the person; In Spain and in Hungary, the appeal is brought before lower courts. See CCBE, 'EAW-Rights, analysis of the implementation and operation of the European Arrest Warrant from the point of view of defence practitioners', 2016, Report, 250.

[69] Art. 14(2) Directive 2014/41/EU.

[70] Art. 17(3) E-Evidence Proposal. Besides, national courts in the issuing State have been designated as 'best-placed' to review the legality of European Production Orders issued to request electronic data. See Explanatory Memorandum, E-Evidence Proposal.

[71] A Van Hoek, M Luchtman, 'Transnational cooperation in criminal matters and the safeguarding of human rights', 2005, 1, *Utrecht Law Review*, 32.

[72] Both instruments recall the *Cassis de Dijon* rules on non-discrimination between domestic and transnational cases. Art. 14 EIO Directive provides that legal remedies applicable to investigative measures indicated in the EIO shall be equivalent to those available in a similar

no indication is provided under the current instruments on how to reconcile differences between legal remedies available in the national systems.

Alongside these challenges, the 'effectiveness' of the legal remedy may be called into doubt. The EIO Directive and the question of the suspensive effect of the legal remedy in transnational investigations is a case in point. As a general rule, under the EIO Directive, the legal remedy does not suspend the execution of the measure.[73] It is worth noting that Member States enjoy a margin of flexibility, since the execution of the measure may be suspended if 'it is provided in similar domestic cases'.[74] However, the transfer of evidence by the executing State may be suspended pending the outcome of a legal remedy in the issuing State, unless the immediate transfer is essential for the conduct of the investigation and to preserve fundamental rights.[75] This rule is absolute when the transfer would cause serious and irreversible damage to the person concerned. If a legal remedy turns out to be successful once evidence has already been transferred, then the issuing State 'shall take into account' a successful challenge against the recognition or execution of an EIO[76]. Whereas lack of clarity exists as regards the obligation of 'taking into account' the outcome of the legal remedy, the issuing State must 'ensure that in criminal proceedings in the issuing State the rights of the defence and the fairness of the proceedings are respected when assessing evidence obtained through an EIO'.[77] The latter provision seems to limit to some extent the use of evidence in the proceedings in the trial State, if a successful challenge has been brought against the recognition or execution of an EIO.

From the perspective of the accused, absence of EU-wide rules makes it difficult to identify the jurisdiction competent to address his/her claim. Determining before which jurisdiction investigative measures, or the outcome of these measures, should be challenged, may become a thorny task when measures are ordered by one State, but executed by another State, and then have effects in the ordering State, because evidence may be used in the proceedings.[78] First, pinpointing the breach and identifying the authority responsible depend on a variety of factors, including the applicable law, i.e. *forum regit actum* or *locus regit actum*, the means of evidence collection deployed, and whether the Member States allow for the interested party to become aware of the

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domestic case. Recital 88 Regulation 2017/1939 states that 'the national procedural rules governing actions for the protection of individual rights granted by Union law must be no less favourable than those governing similar domestic actions (principle of equivalence) and must not render practically impossible or excessively difficult the exercise of rights conferred by Union law (principle of effectiveness).' See Case 33/76, *Rewe-Zentralfinanz eG et Rewe-Zentral AG v. Landwirtschaftskammer für das Saarland*, 16 December 1976, ECLI:EU:C:1976:188.

[73] Art. 14(6) Directive 2014/41/EU.

[74] *Ibid.*

[75] The transfer of evidence shall be suspended if it would cause serious and irreversible damage to the person concerned. Art. 13(2) Directive 2014/41/EU.

[76] Art. 14(7) Directive 2014/41/EU.

[77] *Ibid.*

[78] A. Van Hoek, M. Luchtman, 'Transnational cooperation in criminal matters and the safeguarding of human rights', (above Part II, Chapter II, n105); R. Vogler, 'Transnational Inquiries and the Protection of Human Rights in the Case-Law of the European Court of Human Rights', *in* Ruggeri (above, Introduction, n28), 28.

investigation before, during, or after its execution.[79] For example, in the absence of provisions on legal remedies in FD JITs or the 2000 EU MLA Convention, uncertainty remains as to the competent jurisdiction the defendant may bring his/her claim before. Second, allocating the responsibility to handle the claim to the issuing State under the EIO Directive and the E-Evidence Proposal may also lead to unfairness. If defendants are citizens or residents of a country other than the one where the proceedings are taking place, they will have to defend themselves in a foreign country, facing further expenses, and dealing with a procedural system which they may not be familiar with.[80]

The challenge of accessing legal remedies, which is inherent to the weak position of the defence in transnational investigations, is further heightened by broader concerns over the ability of national courts to exert control. The question of whether national courts are best placed to ensure effective judicial control lies at the core of the controversies surrounding the EPPO Regulation. Current rules stipulate that the legality review of procedural acts intended to produce effects *vis-à-vis* third parties is assigned to national courts, along with the choice of the trial State by the EPPO.[81] A major difficulty for national judicial bodies is that the EPPO remains an EU body, entrusted with a number of tasks that cannot be carried out by a single MS,[82] along with

[79] The use of some 'special investigative measures' indeed requires high degrees of secrecy, such as wiretaps or interceptions of telecommunications, which may delay the right of suspects to be informed about the investigation.

[80] A. Arena, 'The Rules on Legal Remedies: Legal Lacunas and Risks for Individuals Rights', *in* Ruggeri (above, Introduction, n28), 113.

[81] See extensive and critical analysis of such control by national courts by M. Luchtman, 'Forum Choice and Judicial Review under the EPPO's Legislative Framework', *in* W. Geelhoed *et al.* (above Part II, Chapter I, n159), 166; Weyembergh and Brière (above Part II, Chapter I, n156), 37-38. The original EC proposal referred to the EPPO as a national authority for the purpose of judicial review (see Recital 37 COM (2013) 0534 final). In this respect, authors especially denounced that such system does not prevent either contradictory rulings on the legality of certain measures to be delivered in the case of investigations carried out in multiple Member States – thus leading to multiple reviews, nor does it lay down which remedies should be made available to suspects who may have an interest in prosecution in a Member State other than the one that the EPPO opted for. In *Foto-Frost*, the Court of Justice precluded national courts from delivering contradictory rulings on Union acts and upheld the principle of coherence in the EU's system of judicial protection. See Case 314/85, *Foto-Frost v Hauptzollamt Lübeck-Ost*, 22 October 1987, paras. 16-17. At para. 17, it ruled the Court had 'exclusive jurisdiction to declare void an act of a Community institution' and 'the coherence of the system requires that where the validity of a Community act is challenged before a national court the power to declare the act invalid must also be reserved to the Court of Justice.' (M. Luchtman, J. Vervaele, 'European agencies for criminal justice and shared enforcement (Eurojust and the European Public Prosecutor's Office)' (above Part II, Chapter I, n115), 144; A. Csuri, 'The Proposed European Public prosecutor's Office – from a Trojan Horse to a White Elephant?', 2016, 18, *Cambridge Yearbook of European Legal Studies*, 141).

[82] Comprising, inter alia, the development of prosecutorial policies, the decision to stArt. investigations, or the decisions to deploy certain investigative measures in a particular state and/or to bring criminal charges in another.

decisions which cannot always be attributed to a single legal order.[83] The Regulation, moreover, remains silent on how to exert such control: the way this control is exerted remains determined by national law.[84]

III. Weak position of the defence in EU cross-border cooperation frameworks

'The transnational nature of criminal proceedings sometimes weakens the implementation of the right to equality of arms.'[85] Infringements to the principle of equality of arms are more difficult to discern because they consist in the accumulation of 'separate, small encroachments'.[86] Unfortunately, these have not yet received the attention they deserve in policy debates and the literature, in a similar way to those occurring in surrender procedures.

The highly differentiated application of the principle of equality of arms is complemented by a *de facto* asymmetry between the defence and the prosecution in cross-border proceedings. Indeed, the guarantees deriving from the principle of equality of arms tend to be more difficult to enforce in cross-border situations. A first set of difficulties is reflected in a number of practical considerations which emerge as a result of the transnational nature of investigations. Conducting investigations abroad indeed entails additional barriers of a financial, technical and linguistic nature, which prevent the defence from adopting a proactive attitude at the investigative phase. The geographical distance between the place of the trial and the place where evidence is collected means that the cost of conducting, participating in and challenging investigations may be particularly high. For example, if the defence wishes to conduct parallel investigations, the lawyer may have to travel to the country where the investigation was carried out to collect further evidence that cannot be obtained in the country of the prosecution, for example witness statements.[87] Witnesses are often reluctant to travel to give evidence. However, this becomes problematic if the defence is not able to travel to collect witness statements in the country where he/she is located, in particular when the trial state puts high value on oral evidence, such as Ireland.[88] Linguistic assistance is also likely to be necessary if the defence wishes to

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[83] M. Luchtman, 'Forum Choice and Judicial Review under the EPPO's Legislative Framework', *in* Geelhoed *et al.* (above Part II, Chapter I, n159), 166.

[84] See analysis by Luchtman and Vervaele (above Part II, Chapter I, n115), 144.

[85] S. Gless, 'Transnational Cooperation in Criminal Matters and the Guarantee of a Fair Trial: Approaches to a General Principle', 2013, 9, *Utrecht Law Review*, 92.

[86] *Ibid.*, 108.

[87] See S. Gless, J. Vervaele, 'Law should govern: Aspiring General principles for Transnational Criminal Justice', 2013, 9, *Utrecht Law Review*. See also ECHR, *PV v. Germany*, App No. 11853/85, 13 July 1987, para. 4c: where the European Commission on Human Rights did not exclude that 'witnesses residing abroad whose presence at the trial cannot be enforced by the trial court are examined on commission by a court at their place of residence.'

[88] Or in the UK for that matter. See J. McEwan, 'The testimony of vulnerable victims and witnesses in criminal proceedings in the European Union', 2009, 10, *ERA Forum*, 369, 386. See also ECtHR, *Al-Khawaja and Tahery v UK*, App 26766/05 and 22228/06, 20 January 2009. The Court held that the fact that the defendant gives evidence on his own behalf at the trial was insufficient as a means of challenging evidence, given that the statement had been made without the presence of the defence and the witness could not be cross-examined.

conduct investigations abroad. Hiring an interpreter or a translator entails additional costs. In some countries, legal aid is not provided for in such circumstances, simply because the possibility to conduct investigations abroad is not necessarily regulated under national law. In the Netherlands, where defence lawyers may carry out informal investigations in foreign countries, the law does not specifically regulate legal aid in relation to evidence acts conducted abroad.[89] Thus, the defence is not entitled to receive a payment in advance that could potentially cover the lawyer's travel expenses.[90]

IV. Limited efforts undertaken by the EU to mitigate existing challenges

In many respects, the EU attempted to address existing asymmetries between the defence and the prosecution in transnational proceedings and redress some of these imbalances. Efforts were first made in the last few years to address technical and linguistic issues inherent to the transnational nature of investigations. The Translation and Interpretation Directive places particular emphasis on providing quality of linguistic assistance at the pre-trial stage, in particular as regards the investigative work conducted by administrative or judicial authorities.[91] It requires Member States to take concrete measures and develop specific services to ensure that the defendants have knowledge of the case against them.[92] However, the minimalist approach of the legislators is illustrated by the merely indicative list of 'essential documents' that Member States are under an obligation to translate, including 'any decision depriving a person of his liberty, any charge or indictment, and any judgment'.[93] The obligation to translate 'essential documentary evidence', included in the Commission proposal to facilitate its transfer from one country to another, was not retained in the final text.[94] Prosecution evidence seemingly does not fall within the scope of the Directive either.[95] In some countries, the right to translation was unknown to lawmakers, and the list of essential documents was transposed literally with no further requirements,

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[89] Van Wijk (above n2), 127.

[90] *Ibid.*

[91] Art. 2(2) Directive 2010/64/EU reads: 'Member States shall ensure that, where necessary for the purpose of safeguarding the fairness of the proceedings, interpretation is available for communication between suspected or accused persons and their legal counsel in direct connection with any questioning or hearing during the proceedings or with the lodging of an appeal or other procedural applications.'

[92] Inter alia, these measures include a duty to establish a register of translators (Art. 5(2)), to provide trainings for judges, prosecutors and judicial staff (Art. 6), an independence and confidentiality requirement on the part. of interpreters and translators (Art. 5(2)), a positive obligation to control the adequacy of the interpretation provided and to test the language skills of defendants (Art. 2(4)), a complaint mechanism for the accused if the interpretation/translation is deemed insufficient, which may result in the interpreter/translator being replaced (Art. 2(5) and Art. 3(5)).

[93] Art. 3(2) Directive 2010/64/EU.

[94] Member States feared that the financial impact of the translation of such a voluminous amount of materials would be too high. See S. Cras, L. de Matteis, 'The Directive on the Right to Interpretation and Translation', 2010, *Eucrim*, 159.

[95] National report No. 2 on Germany, Section on effectiveness and adequacy of EU law on criminal procedure (point (B)(3)) (see also Part I, Chapter II of this edited volume). See also

such as in Spain.[96] In others, gaps still exist. France was reluctant to implement the right to translation and the latter remains narrowly interpreted.[97] In Romania, only the indictment act is subject to compulsory translation.[98] Besides, a certain degree of confusion still exists among defence lawyers as to whether documents containing evidence gathered abroad must be translated given the non-exhaustive nature of the list of essential documents provided in the Directive.[99] Special training for interpreters and translators, lawyers and judicial authorities, in order for them to be aware and able to rely on the provisions of EU legislation, have not been provided in Germany[100] and Italy[101].

In a similar fashion, the right to legal aid provided under Directive 1919/2016 (the 'Legal Aid Directive') supposed to cover the costs of legal assistance, is also limited in some respects. Under Article 2(1)(c), the Legal Aid Directive refers to the same list of investigative and evidence-gathering acts that is enshrined under the Access to a Lawyer Directive, i.e. identity parades, confrontations and reconstructions of the scene of a crime. It acknowledges that this list is non-exhaustive given the minimalist character of the Directive and Member States may choose to provide legal aid beyond this list.[102] Thus, 'Member States should be able to grant legal aid in situations which are not covered by this Directive, for example when investigative or evidence-gathering acts other than those specifically referred to in this Directive are carried out'. Extending the scope of application of the right to legal aid to investigative and evidence-gathering acts is, however, only a mere possibility. In those countries where the right to legal aid is narrowly interpreted, it is unlikely that a comprehensive approach will be retained. For example, the German criminal procedure does not grant legal aid as such to poor defendants but provides financial public support to defendants only if there is a situation of 'mandatory' or 'necessary' defence.[103] Given the broad discretion enjoyed by national authorities in the Directive, the transposition

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J. Brannan, 'Identifying written translation in criminal proceedings as a separate right: scope and supervision under European law', 2017, 27, *The Journal of Specialised Translation*.

[96] National report No. 2 on Spain, Section on the impact of procedural rights directives on the Spanish criminal justice system (point 4.2).

[97] See National report No. 2 on France, Section on the impact of EU legislation on national criminal procedure (point B) (see also Part I, Chapter I of this edited volume). Art. 803-5 CPP transposing that right has been interpreted narrowly by the Court of Cassation. 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.

[98] National report No. 2 on Romania, Section on transposition gaps (point 5) (see also Part I, Chapter V of this edited volume).

[99] National report No. 2 on Germany, Section on effectiveness and adequacy of EU law on criminal procedure (point (B)(3)) (see also Part I, Chapter II of this edited volume).

[100] *Ibid.*, (point (B)(1)(b)).

[101] National report No. 2 on Italy, Section on the impact of procedural rights directives (point 1.4.)

[102] Recital 16 Directive 1919/2016.

[103] National report No. 2 on Germany, Section on impact of procedural rights directives (point B(1)(a)) (see also Part I, Chapter II of this edited volume).

of this new instrument is unlikely to trigger a far-reaching reform of the German legal aid regime.[104]

Secondly, efforts were made so as to alleviate constraints arising from the geographical distance separating the country where the defendant originates from or resides and the place of the trial. Both the 2000 EU MLA Convention and the EIO Directive[105] took advantage of technological innovations so as to enable the conduct of hearings of both defendants and witnesses through video conference in order to facilitate their remote participation in the proceedings.[106]

Notwithstanding these endeavours, the use of the video link entails both positive and negative consequences. Providing the possibility to conduct hearings via video conference may work in favour of the defendant; for example, it offers the advantage to the suspect of being heard without the need to move to the country of investigation and may constitute an appropriate alternative to the issuance of an EAW.[107] However, the participation of the defendant to the main hearing via video link was criticised for putting the suspect or accused person at a disadvantage;[108] relying on these mechanisms does not allow the defendant to have full knowledge of the events occurring in the hearing or effectively perceive the behaviour of the protagonists.[109] However, these conditions are crucial to ensure a full understanding by the defence of the dynamics of the proceedings and for it to be able to deploy the most appropriate defensive strategy.[110]

Efforts were made in both the 2000 MLA Convention and the EIO Directive to address these shortcomings by including a number of safeguards to be met by national authorities. These include a duty imposed on competent authorities to enter into a dialogue regarding the practical arrangements of the hearing; in particular the executing State must 'summon the suspected or accused persons to appear for the hearing … in such a time as to allow them to exercise their rights of defence

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[104] *Ibid.*

[105] See Art. 10 (video-conference) and 11 (telephone conference) 2000 MLA Convention and Art. 24 (video-conference) and 25 (telephone conference) Directive 2014/41/EU.

[106] The use of telephone conference is allowed for witnesses, however it is excluded for defendants.

[107] Recital 26 Directive 2014/41/EU reads: 'With a view to the proportionate use of an EAW, the issuing authority should consider whether an EIO would be an effective and proportionate means of pursuing criminal proceedings. The issuing authority should consider, in particular, whether issuing an EIO for the hearing of a suspected or accused person by videoconference could serve as an effective alternative.'

[108] From the perspective of the judge too, the use of the video links to conduct hearings of defendants is questionable. In adversarial systems in particular, the importance of body language is crucial to assess the credibility of defendants and determine whether suspects or accused persons are lying or not. See A. Mangiaracina, 'A new and controversial scenario in the gathering of evidence at the European level: The proposal for a Directive on the European Investigation Order', 2014, 10, *Utrecht Law Review*, 122.

[109] See A. Grio, 'The Defendant's Rights in the Hearing by Videoconference', *in* Ruggeri (above, Introduction, n28), 121.

[110] *Ibid.*

effectively'.[111] Additionally, defendants have been granted a right not to testify, which can be invoked under the laws of *both* the requesting/issuing State and requested/executing State.[112] Most importantly, the conduct of the hearing is conditional upon the consent of the defendant under both the 2000 MLA Convention and the EIO Directive.[113]

Despite these endeavours, the regime applicable to video conference hearings was criticised for failing to apply other (crucial) safeguards, such as the privilege against self-incrimination, the right not to be questioned, the lack of pressure on moral freedom and expression of thought,[114] and the right of the defendant to consult with his or her lawyer during video conference proceedings.[115] There is, as often in EU instruments, much deference to national law regarding the rules governing the hearing. Both the 2000 MLA Convention[116] and the EIO Directive[117] state that the hearing shall be conducted 'directly by, or under the direction of' the requesting/issuing Member State in accordance with its own laws'.[118] Besides, whereas the 2000 MLA Convention provided for the compulsory presence of the judicial authority during the hearing, the EIO Directive includes a simple reference to national law; the

[111] Art. 24(3)(b) Directive 2014/41/EU reads: 'The issuing authority and the executing authority shall agree the practical arrangements. When agreeing such arrangements, the executing authority shall undertake to: summon the suspected or accused persons to appear for the hearing in accordance with the detailed rules laid down in the law of the executing State and inform such persons about their rights under the law of the issuing State, *in such a time as to allow them to exercise their rights of defence effectively*.'

[112] Art. 10(5)(e) 2000 MLA reads e) the person to be heard may claim the right not to testify which would accrue to him or her under the law of either the requested or the requesting Member State; Art. 24(5)(e) Directive 2014/41/EU reads: suspected or accused persons shall be informed in advance of the hearing of the procedural rights which would accrue to them, including the right not to testify, under the law of the executing State and the issuing State.

[113] Art. 10 2000 MLA Convention and Art. 25(2)(a) Directive 2014/41/EU respectively.

[114] *Ibid.*, p. 122. Similar criticism was formulated by the Fundamental Rights Agency in its opinion on the directive, see Opinion of the FRA on the draft Directive regarding the European Investigation Order,. Retrieved at: http://fra.europa.eu/fraWebsite/research/opinions/op-eio_en.htm, p. 12.

[115] J. Blackstock, Briefing on the European Investigation Order for Council and Parliament, London: Justice, 2010, para. 54.

Retrieved at: www.static1.1.sqspcdn.com/static/f/650429/8149987/1281967185407/Briefing+on+the+European+Investigation+Order+for+council+and+parliament.pdf?token=FRnOkPmffqOqTtTImuuzfUSKLWg%3D.

[116] Art. 10(5)(c) 2000 MLA reads: '(c) the hearing shall be conducted directly by, or under the direction of, the judicial authority of the requesting Member State in accordance with its own laws.'

[117] Art. 24(5)(c) Directive 2014/41/EU reads: 'the hearing shall be conducted directly by, or under the direction of, the competent authority of the issuing State in accordance with its own laws.'

[118] Reliance on the law of the requesting/issuing State is characteristic of the *forum regit actum* rule. The right not to testify, which can be invoked in both the requesting/issuing and requested/executing States is a noticeable exception to this *modus operandi*.

obligation of ensuring the presence of the judicial authority during the hearing of the defendant seems to have been lifted.[119]

As for hearings of witnesses, shortcomings similarly exist regarding specific guarantees, such as the right to the presence of a legal counsel during the hearing. The Commission argued that 'defence lawyers must have the possibility to question witnesses and experts during the hearing by video conference if the information gathered by these means is to be introduced into the criminal trial'.[120] This rule was recognised as necessary to protect the rights of the defence. However, no provision was introduced in this regard.

V. Lack of consideration for the defence in EU cross-border cooperation frameworks

A last point of concern relates to the somewhat restrictive scope of cooperation instruments. Whereas the EU has sought to improve and facilitate cross-border cooperation in the EU's criminal justice area among a variety of public actors, including primarily police and judicial authorities, the position of the defence in EU cooperation frameworks was seemingly subject to less consideration. State cooperation under MLA and MR instruments operate according to a 'top-down' approach. Assistance requests are exchanged between police and judicial authorities, as well as, in more limited cases, non-judicial authorities, thus assigning only a marginal role to the defence. Concretely, the defence cannot, under EU instruments, directly request the competent authorities of another EU State to conduct investigations on its behalf. Put in a different way, the margin for manoeuvre of the defence is more limited whenever it wishes to conduct its own investigations or participate in investigations initiated by other actors when a cross-border dimension is involved. For example, where the possibility to conduct or to request the conduct of investigations is provided under national law, the defence may have to rely on the authorities of its own country in order for them to issue an assistance request to foreign authorities for further fact-finding activities to be carried out. By way of example, in both the Netherlands and Italy, the defence must file an application to the national authorities of the country of prosecution for them to send a letter of request to the foreign authorities asking for further inquiries to be carried out.[121] However, it is sometimes less likely that these applications are successful. In Italy for example, the defence will have to build a much more solid case file than in domestic cases in order to demonstrate the importance of

[119] Art. 10(5)(c) 2000 MLA reads: '(c) the hearing shall be conducted directly by, or under the direction of, the *judicial authority* of the requesting Member State in accordance with its own laws.' This stands in contrast with Art. 24(5)(c) Directive 2014/41/EU, which reads: 'the hearing shall be conducted directly by, or under the direction of, the competent authority of the issuing State in accordance with its own laws.'

[120] A. Mangiaracina, 'A new and controversial scenario in the gathering of evidence at the European level: The proposal for a Directive on the European Investigation Order', (above n108) quoting European Commission, Comments on the Initiative regarding the European Investigation Order in criminal matters, 2010, 29.

[121] Van Wijk (above n2).

the requested investigation, with no guarantees that its demands will be successful.[122] Moreover, in the absence of oversight on the part of the defence on the investigative activities conducted by the executing State, there is a risk that the evidence gathered, though originally requested to exculpate the defendant, turns out to be inculpatory and is shared with the authorities of the issuing State.[123]

Alongside this, information on the deployment, or the outcome, of ongoing investigations may be more difficult to obtain for the defence in cross-border cases. Information exchanges at the EU level generally circulate among national authorities, to the exclusion of third parties. Besides, the defence is not allowed to participate in information exchange networks established at EU level, such as Europol or Eurojust.[124] Defence attorneys have no direct access to these agencies and only a few countries allow the defence to instigate requests to Europol or Eurojust through a motion for the taking of evidence.[125] This heightens the difficulty for the defence to conduct its own investigation through, for example, interrogating witnesses, because the source of information may be more difficult to trace in cross-border cases.[126]

Unfortunately, the 'information gap' faced by the defence is unlikely to be solved by the entry into force of the Information Rights Directive. Article 7 of the Directive attempted to equalise the balance and uphold the principle of equality of arms by expressly granting a right to the defence to access the materials of the case,[127] with a view to challenging either the lawfulness of an arrest or a detention order[128] or the merits of the accusation.[129] Upholding the principle of equality of arms while, at the same time, ensuring the efficient conduct of criminal prosecutions, turned out to be a difficult balance to strike during the negotiations on this provision.[130] Limitations to this right exist: access to the materials of the case should be granted 'at the latest'

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[122] *Ibid.*

[123] *Ibid.*

[124] Gless, 'Transnational Cooperation in Criminal Matters and the Guarantee of a Fair Trial: Approaches to a General Principle' (above n85), 100.

[125] *Ibid.*

[126] A. van Hoek, M. Luchtman, 'Transnational cooperation in criminal matters and the safeguarding of human rights', 2005, 1, *Utrecht Law Review*, 20.

[127] This latter provision is in line with the interpretation made by the ECtHR of the principle of equality of arms, that requires evidence and other materials to be disclosed so as to not put the defence at disadvantage *vis-à-vis* the prosecution. See ECtHR, *Jasper v. United Kingdom*, App No. 27052/95, 16 February 2000.

[128] A right of access to 'documents' is conferred under Art. 7(1), i.e. photographs and audio and video recordings, to facilitate the task of arrested and detained persons of challenging the lawfulness of an arrest or detention order. See also Recital 30.

[129] Then, Art. 7(2) refers to 'material evidence' to which defendants should have access in order to challenge the merits of the accusation. There too, material evidence includes, but not only, photographs and audio and video recordings. Recital 31 Directive 2012/13/EU. The scope of the right of access to material evidence is wider than that of the right of access to documents, because the materials listed under Recital 31 are of a non-exhaustive nature. See S. Cras and L. Matteis, 'The Directive on the Right to Information', 2013, issue 1, *Eucrim*, 30.

[130] *Ibid.*, 24.

upon submission of the merits of the accusation to the judgment of a court.[131] Thus, the Directive only refers to the latest possible moment at which access must be granted. Therefore, it seems to suggest that access to the materials of the case may be denied at the stage preceding the formal accusation by the court.[132] This seriously limits the effectiveness of this right as it leaves little time for the defence to prepare its own counter-strategy, especially if investigations must be carried out abroad. Some countries have indeed opted for a minimalist transposition of the Directive, such as France.[133]

More broadly, it is unclear how access to the materials can be exercised during investigations carried out under the EPPO framework.[134] The European delegated prosecutor dealing with a particular matter is responsible for granting access to the case file to suspects and accused persons after an investigation has been initiated.[135] However, there is little information on how the case file, for example, should be transmitted from the investigation to the trial State, along which timeframe, and under what conditions, in particular in situations where investigations took place in multiple countries. Overall, the applicability of this right to EPPO investigations will depend on how it is implemented under national law,[136] as well as, most importantly, the extent to which the national legislator sought to facilitate the task of the defence.

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[131] Art. 7(3) Directive 2012/13/EU.

[132] ECBA, ECBA Initiative 2017/2018 'Agenda 2020: A new Roadmap on minimum standards of certain procedural safeguards' (available on www.ECBA.org/extdocserv/20180424_ECBA_Agenda2020_New Road Map.pdf), 3.

[133] See National report No. 2 on France, Section on the impact of EU legislation on national criminal procedure (point B) (see also Part I, Chapter I of this edited volume). Under the French CCP, access to some materials during police custody may be prevented. Moreover, the French investigating judge can limit access to the materials of the case during the investigation. The Information Rights Directive was invoked more than 30 times before the Court of Cassation, but French judges refused to make a referral to the CJEU. They considered that 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 giving 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 at the stage of the arrest.

[134] This criticism can be extended to other directives on procedural rights, as a matter of fact. It should be noted though that the Information Rights Directive does not refer either to the right of requested person to have access to the materials of the case in EAW proceedings either – or any other right besides the provision of a letter of rights. It is assumed that the requested person will enjoy the rights conferred in the directive in the issuing State upon surrender by the executing State.

[135] Art. 45(2) Regulation 2017/1939.

[136] Art. 41(2) Regulation 2017/1939 reads that suspects and accused persons shall have, at a minimum 'the procedural rights provided for in Union law, including directives concerning the rights of suspects and accused persons in criminal procedures, *as implemented by national law*'.

CHAPTER IV

Pre-trial detention regimes and alternatives to detention

I. Comparative analysis of pre-trial detention regimes

Pre-trial detention (PTD) regimes differ significantly across the EU. Differences exist as regards maximum length of PTD, the existence of a system of time limits and judicial review, as well as the criteria relied on to trigger a deprivation of liberty. Alongside these widely divergent approaches, alternatives to detention diverge at the national level, as well as the conditions governing their use.

A. Maximum length of pre-trial detention

A few Member States provide for a maximum length of pre-trial detention under national law (e.g. Spain, France, Romania, Italy). Where national law provides for a time limit, differences exist between the maximum length of pre-trial detention, as well as in the approach taken to calculate this maximum. Time limits may therefore vary depending mainly on the gravity of the offence (e.g. the nature of the offence or the length of the punishable sentence). Other elements can be taken into consideration, such as the cross-border nature of the crime. In Spain, imprisonment may not exceed two years but this limit may be extended for another two years if the offence is punishable by a custodial sentence of more than three years[1]. In France,[2] the maximum length of pre-trial detention is two years for an offence punishable by 20 years of imprisonment and three years for an offence punishable by more than 20 years. Pre-trial detention may be extended up to three or four years if the offence was committed outside the national territory. A total of four years of PTD may also be imposed for serious crimes.[3] In Romania[4], PTD length is

[1] National report No. 2 on Spain, Section on detention (point 12).

[2] Art. 145-2 French CCP.

[3] Such as drug trafficking, organised crime, terrorism. Then, the 4-year period may be extended by a 4-month period, which is renewable once.

[4] National report No. 2 on Romania, Section on detention (point 12) (see also Part I, Chapter V of this edited volume).

capped at five years but the CCP foresees that preventive detention cannot exceed half the length of the maximum penalty provided by law for the offence allegedly committed. In Italy, pre-trial detention cannot be ordered for more than two years for crimes that can be punished with sentences of up to six years, four years for crimes that can be punished with sentences of up to twenty years, six years for more serious offences.[5]

In some countries, no maximum length exists on pre-trial detention (e.g. Germany, the Netherlands, Hungary, Finland). In Germany, a maximum length for PTD applies only in specific circumstances; it cannot exceed one year if the arrest is based on the risk that the individual will re-offend. That ground is itself limited to a series of serious offences.[6] For other grounds of arrest, pre-trial detention normally does not exceed six months. After six months, a thorough review takes place and the court may exceptionally decide to prolong the length of pre-trial detention.[7] Pursuant to the German criminal code of procedure, continuation of PTD may only take place if 'the particular difficulty', the 'unusual extent of the investigation' or 'some other important reason' do not justify continuation of remand.[8] There is, by consequence, no absolute limitation on the length of PTD.[9] In the Netherlands, the maximum period of detention length preceding the trial cannot exceed 104 days. This is the only formal maximum length of pre-trial detention. In practice, the pre-trial period can last longer, for example in more complicated investigations, where the trial may be suspended.[10] In Hungary, the Code of Criminal Procedure was amended in 2013 to abolish the four-year time limit on pre-trial detention for convicted persons who committed a crime punishable by at least 15 years of imprisonment.[11] However, time limits exist for each stage of the PTD for less serious criminal offences.[12] In a similar trend, Finnish law does not place limits on the length of pre-trial detention.[13] However, the judge sets a deadline for the charges to be brought against the defence.[14] In Ireland,

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[5] G. Parisi, G. Santoro, A. Scandurra, 'The practice of pre-trial detention in Italy, Research report', 'Fair Trials' research project, 'Pre-trial detention: a measure of last resort?', 2016, 17.

[6] These include, for instance, sexual abuses, child abuse, stalking, aggravated theft, robbery, blackmail, fraud, or arson.

[7] National report No. 2 on Germany, Section on detention (point C(1)(a)cc) (see also Part I, Chapter II of this edited volume).

[8] *Ibid.* The relevant provision can be found under Sec. 121(1) GCCP.

[9] This is also the conclusion reached by C. Morgenstern, H. Kromrey, '1st national report on Germany', DETOUR, Research project, 'Towards Pre-Trial Detention as Ultima Ratio', 2016, 13.

[10] J. Crijns, B. Leeuw, H. Wermink, 'Pre-trial detention in the Netherlands: legal principles versus practical reality', Fair Trials' research project, 'Pre-trial detention: a measure of last resort?', 2016, 24.

[11] Fair Trials, 'Hungary's perpetual pre-trial detention', guest post, 13 March 2015. Retrieved at: www.fairtrials.org/guest-post-hungarys-perpetual-pre-trial-detention/.

[12] National report No. 2 on Hungary, Section on Detention (point 12) (see also Part I, Chapter III of this edited volume).

[13] 'An analysis of minimum standards in pre-trial detention and the grounds for regular review in the Member States of the EU, Report on Finland', ECBA Report, 2007, 9.

Retrieved at: http://www.ecba.org/extdocserv/projects/JusticeForum/Finland180309.pdf.

[14] As noted in Section 14 of the Coercive Measures Act, the time limit may not be longer than what is necessary for the completion of the criminal investigation and the preparation of

pre-trial detention is generally not relied on. Before being charged, suspects shall not be detained for more than 48 hours for ordinary offences, 72 hours in the case of terrorist offences[15] and up to seven days for serious offences.[16] Formally, however, there are no statutory limits on remand in custody imposed after the charges were imposed, pending the resolution of that charge before the courts.[17]

Countries where a maximum length of PTD was defined

	Maximum length	Criteria
ES	4 years	Offence punishable by more than 3 years of imprisonment.
FR	4 years (and 8 months)	Offence punishable by more than 20 years of imprisonment was committed outside the national territory. Serious crimes (e.g. drugs trafficking, terrorism, etc.).
RO	5 years	Half of the maximum sentence prescribed by law for the particular crime for which the defendant is accused of and must not exceed 5 years.
IT	6 years	Serious offences punishable by life sentence or sentence to more than 20 years prison.
Countries where no maximum length of PTD was defined		
DE	After six months, a thorough review takes place but continuation of the PTD can be ordered in exceptional circumstances.	
NL	After 104 days, the pre-trial can last longer, if more complicated investigations take place and the trial is suspended. Regular reviews of detention take place.	
HU	Absence of maximum limit on PTD length for crimes punishable of more than 15 years.	
FI	No limits (but scarce use of PTD).	
IE	No limits (but scarce use of PTD).	

the charges. This time limit may however be expanded if need be; the remanded person and his/her counsel shall be provided with an opportunity to be heard on the request (Section 14(2) Coercive Measures Act, 806/2011).

[15] National report No. 2 on Ireland, Section on detention (point 12).

[16] Such as murder, false imprisonment or possession of firearms with intent to endanger life, drug trafficking. See A. Ryan, 'Report on Ireland', *in* Ligeti (above, Introduction, n35), 343.

[17] J. Mulcahy, 'The practice of pre-trial detention in Ireland, Research report', 2016, Irish Penal Reform Trust, Report, 71.

B. Systems of periodic review

Alongside the adoption of a maximum length, Member States have established a system of periodic review of PTD (e.g. the Netherlands, Italy, Germany, Romania, Hungary, France, Spain, Finland).[18] In both the Netherlands and Italy, a review of detention orders takes place after each stage of the pre-trial detention[19]; the review of the detention order is stricter after each phase and the suspect must be released if time limits have expired. The Italian pre-trial detention system is characterised by an automatic and non-discretionary nature: when the time-limits are exceeded, the judge has no alternative but to release the person in custody, irrespective of whether the original precautionary measures,[20] adopted as part of the proceedings, are still in force.[21] In Germany, PTD exceeding six months can only be maintained exceptionally and continuation must be duly justified.[22] As a result, remand detention periods exceeding one year are rare in practice.[23] In Romania, 'preventive' detention, i.e. taking place either during the investigation or the preliminary hearing and the trial, can be ordered for a maximum of 30 days, and extended for another period of 30 days up to a maximum of 180 days. The court must review the necessity of detention at intervals up to 60 days.[24] In Hungary, the review of PTD takes place after six months by the court of first instance if the latter has not delivered a conclusive decision yet and by the court of appeal if PTD has exceeded one year.[25] In France,[26] PTD must be reviewed after one year. Then, PTD may be renewed for six months,[27] up to the absolute and exceptional limit of four years and eight months.[28]

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[18] National reports No. 2 on the Netherlands, Italy, and Germany, Sections on detention.

[19] Such as custody, remand in custody, detention in custody.

[20] Under Art. 274 CPP, they 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).

[21] National report No. 2 on Italy, p. 16-17.

[22] 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. See National report No. 2 on Germany, Section on Detention (point C) (see also Part I, Chapter II of this edited volume).

[23] *Ibid.*

[24] National report No. 2 on Romania, Section on detention (point 12) (see also Part I, Chapter V of this edited volume).

[25] National report No. 2 on Hungary, Section on detention (point 12) (see also Part I, Chapter III of this edited volume).

[26] National report No. 2 on France, Section on detention (point C) (see also Part I, Chapter I of this edited volume).

[27] Following the opinion of the Public prosecutor, at the request of the Public prosecutor or the concerned person (or his/her lawyer). An order for release may be taken 'at any time' by the investigating judge.

[28] National report No. 2 on France, Section on detention (point C) (see also Part I, Chapter I of this edited volume). See also Art. 145-2 CP. Pre-trial detention may be prolonged after the end of the judicial investigation in criminal matters until the hearing of the Assize Court (Art.179 and 181 CPP).

Another group of countries applies a slightly different system. In Spain, PTD is subject to the principle of proportionality and cannot last longer than the time necessary for achieving the aims that drove authorities to order the detention of the suspect.[29] Time limits, however, vary according to the charges and the grounds that led to remand.[30] The suspect or the accused person may bring an appeal against a decision on PTD.[31]

Reviews of pre-trial detention seemingly take place on a more regular basis in Finland and Ireland. Under the Finnish system, the person remanded in custody has the right to request the detention order to be reviewed by a judge at two-week intervals.[32] In Ireland, upon the first appearance before the court, the detention order may only be for eight days.[33] Then, remand in custody may be ordered for a period up to 15 or 30 days, upon consent of the accused and the prosecution.[34]

C. Grounds for adopting a decision on pre-trial detention

The underpinning reasons governing the use of PTD vary to some extent. A major trend can nonetheless be discerned in the selection of countries analysed; most of the time PTD is ordered with a view to preventing absconding, re-offending and interference with the investigation. The seriousness of the suspected offence is also considered as an important factor.[35]

These criteria are generally based on a certain degree of suspicion,[36] but the 'suspicion' threshold seems to vary from one country to another. For example, in Italy, a 'certain degree of suspicion' implies that reasonable circumstantial evidence is needed for a restriction of freedom.[37] In Germany, the threshold is higher and a *strong* suspicion (as opposed to a certain degree of suspicion) is needed, which means that it

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[29] L. Bachmaier Winter, 'Report on Spain', *in* Ligeti (above, Introduction, n35), 729.

[30] *Ibid.*

[31] *Ibid.*

[32] The request should be handled in court without delay and at the latest in four days. See 'An analysis of minimum standards in pre-trial detention and the grounds for regular review in the Member States of the EU' (above n13), 9.

[33] D. Perry, M. Rogan, '1st National Report on Ireland' for the DETOUR Project: 'Toward Pre-Trial Detention as Ultima Ratio', 2016, Trinity College, 10.

[34] *Ibid.*

[35] For example in France, although the length of pre-trial detention amounts, on average, to 25 months, it can be extended up to four years for crimes punishable of more than 20 years of imprisonment, such as terrorism and organised crime (Art. 145-2 CCP). Fair Trials, Pre-trial detention in France, Communiqué issued after the meeting of the local expert group (France), 13 June 2013. (Retrieved at: www.fairtrials.org/wp-content/uploads/Fair_Trials_International_France_PTD_Communiqué_EN.pdf). See also country reports available in 'A Mesure of Last Resort? The practice of pre-trial detention decision-making in the EU', Fair Trials, Report, 2016; See also W. Hammerschick, C. Morgenstern, S. Bikelis, M. Boone, I. Durnescu, A. Jonckheere, J. Lindeman, E. Maes, M. Rogan, 'Towards Pre-trial Detention as Ultima Ratio: Comparative Report', 2017, DETOUR research project.

[36] Under Art. 5(1)(c) ECHR, a decision on deprivation of liberty must be based on a reasonable degree of suspicion: 1. No one shall be deprived of his liberty save in the following cases... the lawful arrest or detention of a person... on reasonable suspicion of having committed an offence ..."

[37] F. Ruggeri, 'Report on Italy', *in* Ligeti (above, Introduction, n35), 387.

is highly likely that the person will be convicted in the trial phase.[38] The threshold of suspicion required may, moreover, vary from a PTD phase to another within criminal justice systems. Under Dutch law, police custody must be grounded on a *reasonable* suspicion but, in order to order remand in custody and detention in custody, *grave presumptions* against the suspect are needed.[39]

By contrast, investigative detention is not so much relied on in Ireland, where it is associated with a system of preventive justice, a notion that was inherited from the UK. Under Irish constitutional law, a prisoner cannot be detained for a purely preventive purpose;[40] the general requirement is that a suspect must be brought before a judge and charged as soon as is practicable.[41] Ireland introduced the risk of reoffending as a ground for pre-trial detention in 1997 by amending the Irish Constitution with a new article.[42] The introduction of a new amendment in favour of PTD did not result in much change in practice.[43] However, this might change soon with the release of a new bill that is currently going through legislative negotiations. The latter would introduce new grounds for refusing a decision on bail, including preventing evasion and/or interference with justice.[44]

D. Alternatives to detention

Alongside widely divergent pre-trial detention systems, differences arise regarding the list of alternatives to detention available at the national level, as well as the procedure leading national authorities to use them. Firstly, the list of alternatives to PTD available under national law differs considerably from one MS to another. Although it is impossible within the scope of this research to list all the alternatives to detention available under the law of the nine Member States analysed here, it is useful to compare alternatives available in Spain and France. In quantitative terms, in Spain,[45] the CCP provides for six alternatives to PTD only, against 16 in France. In qualitative terms, various alternatives provided under French law, for example a prohibition to drive a vehicle and not to engage in certain professional or social activities, or to undergo medical examination or even hospitalisation, *inter alia* with the aim of detoxification, are not provided under the Spanish criminal code of procedure.[46] Conversely, Spanish law foresees alternatives to detention that do not feature under the French CCP, such as the expulsion of aliens and the possibility to serve preventive

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[38] T. Weigend, 'Report on Germany', *in ibid.*, 274.

[39] National report No. 2 on the Netherlands, Section on detention (point 3) (see also Part I, Chapter IV of this edited volume).

[40] *Minister for Justice, Equality and Law Reform v. Murphy* [2010] 3 IR 77.

[41] G. Conway, 'Irish Practice on Mutual Recognition in European Criminal Law', *in* Vernimmen-Van Tiggelen *et al.* (above, Introduction, n29), 283.

[42] Thus overturning a ruling by the Irish Court of 1966, that closely associated PTD to preventive justice. See People (Attorney General) v O'Callaghan (1966). I.R. 501. Quoted in W. Hammerschick et al, 'Towards Pre-trial Detention as Ultima Ratio: Comparative Report' (above n35), 15.

[43] *Ibid.* The ground of re-offending is nonetheless being applied in practice, in combination to other grounds.

[44] Alongside the power to hear complainant evidence in bail applications, and the proof of foreign convictions. See Part 5 of General Scheme of Bail Bill, July 2015.

[45] National report No. 2 on Spain, Section on detention conditions (point 12).

[46] Art. 147 French CCP.

detention in a detoxification centre.[47] Commonalities can nonetheless be observed between the Member States. For example, judicial control is supported by electronic monitoring in several countries (e.g. France, the Netherlands, Romania, Germany).[48] However, electronic monitoring and house arrest, although provided under national legislation at the pre-trial stage, are barely used by Member States in practice. A look at a survey by the Council of Europe's Annual Penal Statistics reveals that, among the countries examined, substantial data on the number of persons benefiting from alternatives to detention at the pre-trial stage was only available with regard to France and the Netherlands.[49] In the remainder of countries, the number of persons placed under supervision measures are too scant to be included in the results of the survey. In France, only 2.1 persons out of 100,000 detainees are subject to supervision measures at the pre-trial stage, against 8.3 persons in the Netherlands.

Secondly, as regards the decision-making procedure underpinning the use of alternatives to pre-trial detention, the factors lying behind the reluctance of Member States to resort to these measures are sometimes difficult to identify and differences between approaches hard to pinpoint. In some countries, the question may be raised as to the existence of a degree of arbitrariness underpinning the decision-making process as to whether the person should be put in pre-trial detention or subject to an alternative measure.[50] In Spain, for example, preventive detention may be ordered without any previous risk assessment by a judge on risks of flight and/or re-offending,[51] and PTD is often used as a form of coercion to force the accused's cooperation.[52] Sometimes, the national law is framed in a way that is not conducive to the use of alternatives to detention. In the Netherlands, the judge must assess whether pre-trial detention is required or not.[53] The existing system is, however, not conducive to the use of supervision measures; it is only after the decision to order PTD that the judge assesses whether it is prudent to suspend it, on his/her own motion, on demand of the prosecutor, or at the request of the suspect.[54] Nonetheless, it is difficult for a judge to convincingly argue that the detention should be suspended as the suspension procedure takes place after he/she has already

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[47] National report No. 2 on Spain, Section on detention (point 12).

[48] See country reports commissioned by the Fundamental Rights Agency for the following research project: 'Rehabilitation and mutual recognition – practice concerning EU law on transfer of persons sentenced or awaiting trial' (2015).

Retrieved at: www.fra.europa.eu/en/country-data/2016/country-studies-project-rehabilitation-and-mutual-recognition-practice-concerning.

[49] Council of Europe Annual Penal Statistics, SPACE II, Persons Serving Non-Custodial Sanctions and Measures in 2016, Survey, PC-CP (2017) 11, 25.

[50] As noted by participants at an expert roundtable on pre-trial detention organised by Fair Trials at the European Parliament on 25 April 2018.

[51] A. Nieto Martin, C. Rodriguez Yagüe, M. Muñoz de Morales Romero, 'Chapter on Spain', *in* A. Bernardi (ed.), *Prison Overcrowding and alternatives to detention, European sources and national legal systems*, Naples, Jovene Editore, 2016, 418.

[52] *Ibid.*

[53] National report No. 2 on the Netherlands, Section on detention (point 3) (see also Part I, Chapter IV of this edited volume).

[54] *Ibid.*

concluded that a person should be in pre-trial detention.[55] It is interesting to contrast these findings with the approach taken by Ireland and Finland, where a very low number of pre-trial detainees exist.[56] In Ireland, there is indeed a strong presumption in favour of bail, often perceived as *the* alternative to pre-trial detention in Ireland.[57] In Finland, however, bail is not relied on at all.[58] Instead, the person may be subject to a travel ban or an enhanced travel ban,[59] provided that the most severe penalty provided for the offence is imprisonment of at least one year,[60] or confinement.[61]

II. Impact on mutual trust and mutual recognition

Differences among pre-trial detention regimes, alongside overuse of remand in some countries seriously affect cross-border cooperation. Practice shows that obstacles to the functioning of cooperation instruments such as the FD EAW directly emerged as a result of these seeming incompatibilities. Alongside these issues, lengthy periods of imprisonment carry the risk of jeopardising individuals' rights, a practice which may not be tolerated in other EU States. Meanwhile, little can be expected from the procedural rights directives, where references to pre-trial detention issues are scant and certainly too elusive to yield a concrete impact on cooperation. Ultimately, differences among regimes governing alternatives to detention are definitely too wide to allow the effective operation of the FD ESO, which cannot fulfil its role as a 'flanking measure' of the EAW.

A. Obstacles to the operation of the EAW as a result of different approaches to pre-trial detention

No consensual approach exists as to the use of pre-trial detention. Excessive pre-trial detention length in some countries, alongside the absence of time limits on PTD in some countries, could easily result in tensions between those countries where PTD is subject to strict conditions and others where greater leeway is enjoyed by the national authorities in charge of making the detention order. As acknowledged by DG Justice Commissioner Vera Jourova, 'the lack of minimum procedural safeguards for pre-trial detention can hinder judicial cooperation'.[62] 'Hindrances' already occurred in the past and directly impaired the operation of the EAW. In Italy, the law implementing the EAW includes an express ground for refusal when the legislation of the issuing State

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[55] *Ibid.*

[56] See the latest CoE statistics, Council of Europe Annual Penal Statistics, SPACE I – Prison populations, PC-CP (2017) 10, 54.

[57] J. Mulcahy, 'The practice of pre-trial detention in Ireland' (above n17), 151.

[58] 'An analysis of minimum standards in pre-trial detention' (above n13).

[59] An enhanced travel ban complements the original travel ban with supervision measures and may also include an obligation to stay home. National report No. 2 on Finland, Section on detention (point 12).

[60] Other conditions apply, such as the likelihood that a suspect will abscond or avoid criminal investigations, trial or enforcement of punishment, or continue his criminal activity. See Section 1(1)(2) Coercive Measures Act.

[61] National report No. 2 on Finland, Section on detention (point 12).

[62] Speech by Commissioner Jourova at the European Criminal Law Academic Network, 2016 Annual Conference, 10th anniversary. Retrieved at: www.europa.eu/rapid/press-release_SPEECH-16-1582_en.htm.

does not provide maximum time limits for preventive detention.[63] The provision was described as a 'legislative bug' and accused of paralysing the execution of EAWs, which it did in practice.[64] A solution was found in the *Ramoci* case of 2007,[65] where the Court of Cassation ruled 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. Somewhat paradoxically, despite a strict system of time limits, in Italy suspects and accused persons usually spend lengthy periods in remand.[66]

A more recent set of obstacles impairing the operation of the EAW originate from difficulties to reconcile common law and civil law approaches to investigative detention. Common law countries have tended to object to EAWs issued for the purpose of investigations, that could result in lengthy pre-trial detention periods for the requested person. Thus, EAW requests should only be issued for the purposes of a trial on the charge specified in the warrant as opposed to the continuation of a fact-finding investigation of the offence.[67] A first, concrete manifestation of these opposite approaches to pre-trial detention can be found under Irish law. Ireland sought to limit the scope of FD EAW by prohibiting the execution of arrest warrants issued for investigative purposes.[68] It did so by issuing a declaration at the time of the adoption of the FD EAW. It is useful to provide the relevant passage of the declaration in full:

> 'Ireland shall in the implementation in domestic legislation of this Framework Decision provide that the European Arrest Warrant shall only be executed for the purposes of bringing that person to trial or for the purpose of executing a custodial sentence or detention order.'[69]

The Irish exception was inserted under section 11 of the national law implementing the EAW.[70] Pursuant to this provision, Ireland will only surrender where a decision

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[63] Art. 18(1)(e) of the law implementing the EAW (1. 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. See national report No. 2 on Italy, section on Detention (12.1.).

[64] *Ibid.*

[65] C. Cass. Sez. Un, 30.1.2007, n. 4616, Ramoci (Rv. 235531).

[66] Trials take extremely long amounts of time, thus adversely impacting the length of pre-trial detention. 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. See National report No. 2 on Italy, Section on diversity of legal traditions and its impact on cross-border cooperation in criminal matters (point 1.3.).

[67] Weyembergh, Brière and Armada (above, Introduction, n8), 38.

[68] Conway, 'Irish Practice on Mutual Recognition in European Criminal Law', *in* Vernimmen-Van Tiggelen *et al.* (above, Introduction, n29), 290.

[69] Statement by the Minister of Justice, Equality and Law Reform on 5 December 2003. Quoted in Conway (above n41), 290.

[70] Under Section 11 of the European Arrest Warrant Act of 2003.

has already been taken to charge the person.[71] Put in another way, Ireland will not surrender for the purpose of investigative detention, so as to uphold the requirements laid down under the Irish Constitution. The blanket exclusion enshrined under Irish law has not caused major issues to date.[72] In practical terms, the Irish judicial authorities have adopted a flexible approach. For example, they did not exclude the conduct of fact-finding activities subsequent to surrender.[73] Much of the approach pursued by the Irish courts is an incremental one, which consisted of examining on a case-by-case basis whether either surrender, or the Irish Constitution, should be given the priority, without drawing a precise dividing line between cases of surrender and non-surrender.[74]

Second, the approach taken by other common law systems, such as the UK, have had a direct impact on the operation of the EAW. In Germany,[75] it has been observed that the British authorities are reluctant to surrender persons if they are likely to face a long period of pre-trial detention in the issuing Member State. As a result, German orders to arrest the person subject to surrender are not always followed by the British authorities and less intrusive measures are preferred, such as release upon bail.[76] In some cases, the suspect escaped.[77] This notwithstanding, the restrictive stance taken by Ireland and the UK may be rendered void due to the sometimes long periods of time elapsing between charging and the time that the court is ready to try the individual in the issuing State.[78]

B. Overuse of pre-trial detention and adverse impact on mutual trust

Alongside hindrances to effective cooperation, excessive pre-trial detention length may amount to encroachments upon fundamental rights, which could give rise to feelings of distrust between judicial authorities.

Mutual trust hinges on the presumption that Member States comply with a high level of protection of individuals' rights. Pre-trial detention, as a measure of deprivation of liberty, may infringe Article 5 ECHR in case of abuse.[79] It is particularly sensitive

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[71] National report No. 2 on Ireland, Section on detention (point 12.1.).

[72] *Ibid.* See also Conway (above n41), 292.

[73] National report No. 1 on Ireland, Section on Irish case law (point 5).

[74] *Balmer v. Minister for Justice and Equality,* [2016], IESC 25, 12th May 2016. National report No. 1 on Ireland, Section on Irish case law (point 5).

[75] National report No. 2 on Germany, Section on Differences between criminal procedures and their impact on cooperation (A)(4) (see also Part I, Chapter II of this edited volume).

[76] *Ibid.*

[77] *Ibid.*

[78] Conway (above n41), 291; Weyembergh, Brière, Armada (above, Introduction, n8), 38. The exception contained under Irish law would then be rendered void.

[79] Detention in enforcement EAWs is less problematic because a final judgement will in those cases have declared the requested person guilty of a criminal offence. Therefore, PTD is governed by stricter rules – under Art. 5(1)(c) ECHR, than detention as such – governed by Art. 5(1)(f) ECHR. The former reads 'the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence of fleeing after having done so'. The latter reads: 'Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in

because no trial has yet taken place and the person still enjoys the presumption of innocence. Thus, it is linked to proportionality issues, and trial readiness, *as per* the requirements of Article 5(1)(c) ECHR. Logically therefore, it should only be imposed in exceptional circumstances, in other words when 'less stringent measures have been considered and found to be insufficient to safeguard the individual or the public interest'.[80] In 2017, the European Parliament stressed that the systematic use of remand at the pre-trial stage, combined with poor prison conditions, entailed a violation of the fundamental rights of prisoners.[81]

The inherent connection between pre-trial detention and the right to be presumed innocent has also been recognised by the Council of Europe in the 2006 European Prison Rules in particular,[82] as well as in some countries, such as Italy[83] and France.[84] In a similar fashion, the recently adopted Presumption of Innocence Directive acknowledged that the codification of this right may have a bearing on pre-trial detention. Unfortunately, this reference to pre-trial detention is only made in a recital: the right to be presumed innocent should be "*without prejudice* to preliminary decisions of a procedural nature, which are taken by judicial or other competent authorities and are based on suspicion or on elements of incriminating evidence, *such as decisions on pre-trial detention*, provided that such decisions do not refer to the suspect or accused person as being guilty".[85] The position of the EU legislator therefore suggests that the decision on pre-trial decision must be grounded on a number of criteria so as to conform to the right to be presumed innocent. These are spelled out in further details in the remainder of the provision: competent authorities "might first have to verify that there are sufficient elements of incriminating evidence against the suspect or accused person to justify the decision concerned, and the decision could contain reference to those elements". This notwithstanding, the location of these provisions, i.e. under a non-binding recital, alongside the use of 'might' and 'could', suggest that

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accordance with a procedure prescribed by law: (...) f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition'.

[80] ECtHR, *Ambruszkiewicz v Poland*, 4 May 2006, para. 31.

[81] European Parliament, Motion for a resolution on prison systems and conditions (2015/2062(INI)), 6 July 2017, point 13.

[82] The 2006 EPRs notably state that remand in 'custody is always exceptional and is always justified.' There is a need to ensure that persons remanded in custody are 'able to prepare their defence and to maintain their family relationships' and are not 'held in conditions incompatible with their legal status, which is based on the presumption of innocence.' Recommendation Rec(2006)13 of the Committee of Ministers to Member States on the use of remand in custody, the conditions in which it takes place and the provision of safeguards against abuse.

Retrieved at: www.wcd.coe.int/ViewDoc.jsp?id=1041281&Site=CM.

[83] From the Italian viewpoint, preventive detention must be theoretically kept separate from punishment and should not (systematically) last until the conclusion of the proceedings.

[84] Art. 137 of the French CCP provides 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 supervision. If this does not serve its purpose, he may, *in exceptional cases*, be remanded in custody'.

[85] See Recital 16 Directive 2016/343/EU.

there is no obligation for the Member States to conform to these requirements, and clearly make their potential to address issues of PTD overuse less likely. The CJEU confirmed this assessment in two judgments, where it stated that:

> "Directive 2016/343 cannot be interpreted, in the light of the minimal degree of harmonisation pursued therein, as being a complete and exhaustive instrument intended to lay down all the conditions for the adoption of decisions on pre-trial detention, whether as regards the rules governing examination of various forms of evidence or the extent of the statement of reasons for such a decision."[86]

Another, and arguably more relevant, hindrance to mutual trust is the nearly systematic recourse to pre-trial detention in cases of surrender. The risk of flight in cross-border proceedings generally persuades authorities to resort to PTD,[87] even though alternatives are available at the national level.[88] One of the reasons put forward is that the person may be more willing to leave the country. In Germany, the risk of flight constitutes one of the two grounds for issuing an extradition arrest order prior to the execution of an EAW.[89] In France, out of 180 EAWs executed in 2017, in 124 cases individuals whose surrender was sought were placed in detention, which represents approximately 70 per cent of cases.[90] This means that persons requested for surrender, who often are neither a resident nor a national of the country in charge of executing the request, will be more easily sent to pre-trial detention, in comparison to a purely domestic situation. This could have a discriminatory effect if risk assessments rely on nationality as a determining factor.[91] It is also detrimental to mutual trust,[92] as a principle founded on a common set of values shared by all EU States, of which 'equality' and 'non-discrimination' are constitutive examples.

C. Challenging a detention order: procedural rights directives as a safeguard against lengthy pre-trial detention?

Because they provide the defence with better tools to challenge an arrest or a detention order, EU procedural rights directives constitute a welcome development

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[86] See *Milev* 2018, (above, Introduction, n17) para. 47 and, more recently in the context of Art. 16 Directive 2016/343: C-8/19 PPU, *RH*, Order of the Court, 12 February 2019, ECLI:EU:C:2019:110, para. 59.

[87] Interestingly, in the seminal *Aranyosi and Căldăraru* case of the Court of Justice, the Public Prosecutor of Bremen, after having arrested temporarily Mr Aranyosi, had ordered his release, on the ground that 'there was at that time no risk that the accused would abscond, given his social ties.' See Joined cases C-404/15 and C-659/15 PPU, *Aranyosi and Căldăraru*, 5 April 2016, ECLI:EU:C:2016:198, para. 65.

[88] 'EAW-rights, Analysis of the implementation and operation of the European Arrest Warrant from the point of view of defence practitioners' (above Part II, Chapter III, n68).

[89] Alongside the strong suspicion that the accused would obstruct the finding of truth in the foreign proceedings or extradition proceedings. National report No. 2 on Germany, Section on detention (point C(1)(c)) (see also Part I, Chapter II of this edited volume).

[90] National report No. 2 on France, Section on detention (C) (see also Part I, Chapter I of this edited volume).

[91] 'Criminal detention and alternatives: fundamental rights aspects in EU cross-border transfers' 2016, Fundamental Rights Agency, Report, 34.

[92] See Art. 2 TEU.

from the perspective of pre-trial detainees. Therefore, there is less of a prospect that a suspect or accused person will go through long period of pre-trial detention, including in cross-border proceedings. Examples of relevant provisions can be found in the Interpretation and Translation Directive, as evidenced by the obligation for authorities to provide defendants with a translation of 'essential documents', namely 'any decision depriving a person of liberty, any charge or indictment'.[93] This could certainly help non-nationals of a country to challenge an arrest or a detention order or an arrest warrant. In Italy for example, the right to interpretation between suspects and accused persons and a legal counsel was not provided prior to the transposition of the Directive.[94] Other examples are to be found in the Information Rights Directive, which especially provides that a Letter of Rights 'drafted in simple and accessible language' must be handed to arrested or detained persons[95], including persons arrested for the purpose of executing a European Arrest Warrant.[96] The aforementioned right of access to the case file should also be mentioned. Arrested persons and detainees, alongside suspects and accused persons, also have access to case materials in possession of the competent authorities, 'which are *essential* to challenging effectively, in accordance with national law, the lawfulness of the arrest or detention'.[97] Of particular relevance too is the Access to a Lawyer Directive, pursuant to which legal assistance should be granted 'without undue delay after deprivation of liberty'.[98] Pre-trial detention issues occurring in EAW proceedings were also taken into consideration under Article 10, where the right to request 'dual representation' in both the executing and the issuing State is explicitly recognised. Ensuring legal representation may speed up court proceedings and reduce the length of pre-trial detention. In some countries, the scope of the right to legal assistance was not provided in such a comprehensive way as in the Directive. For example, the right for the lawyer to be present and actively participate in examinations of the accused by the police was not provided in the Netherlands[99] and in Germany[100] prior to the adoption of the Directive. In a similar fashion, detainees fall within the scope of the Legal Aid Directive,[101] including upon arrest pursuant to an

[93] Art. 3(2) Directive 2010/64/EU.

[94] National report No. 2 on Italy, Section on impact of EU legislation on the national criminal procedure (point 4.2.)

[95] Art. 4(4).

[96] Art. 5 Directive 2012/13/EU.

[97] Art. 7(1) Directive 2012/13/EU.

[98] Art. 3(2) (c) Directive 2013/48/EU.

[99] Only minors and vulnerable suspects – i.e. feeble-minded individuals – could have a lawyer present during the interrogations. National report No. 2 on the Netherlands, Section on Impact of EU legislation on national criminal procedure (point 2) (see also Part I, Chapter IV of this edited volume).

[100] 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 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. Therefore, changes in practice may be limited. National report No. 2 on Germany, Section on the impact of procedural rights directives (Section B(1)(a)) (see also Part I, Chapter II of this edited volume).

[101] Art. 2(1)(a) Directive 2016/1919/EU.

EAW.[102] These provisions should ensure that the right of access to a lawyer in pre-trial detention hearings is meaningful, for example by mitigating the risk of bureaucratic hurdles to obtain legal aid.[103]

In spite of these positive and very welcome developments, a few words of caution should be expressed. The broad language of directives, firstly, leaves a wide margin for manoeuvre to national authorities. One such example is provided under the Information Rights Directive, as regards the right of access to the materials of the case that are 'essential' to challenge a decision on arrest or detention. Under this provision, the question of what is meant by 'essential' was left to the discretion of the Member States. This provision was subject to narrow interpretation in some Member States,[104] whereas in others, the national legislator went beyond the minimum standards conferred by the directive, as illustrated below. Nonetheless, a best practice comes from Spain, where the legislator adopted a more protective approach to this right in the transposition process. The corresponding provision does not provide access to essential case materials, as per the wording of the directive, but to 'the *elements* of the proceedings that are *essential* to challenge the legality of detention or deprivation of liberty'.[105] Recital 30 provides examples of such 'essential' elements, namely 'photographs, audio and video recordings'. This provision was interpreted broadly by the Constitutional Court. Examples were given in a recent judgment where Article 7 Information Rights Directive was relied on to quash a detention order,[106] that go well beyond the examples provided under Recital 30. *Inter alia*, these include incriminating testimonies, the content of the scientific expert reports that establish a connection link between the facts under investigation and the detainee and documents containing the result of a search and seizure of real property. The protective Spanish approach contrasts with the Italian[107] and French transpositions,[108] which have seemingly limited the scope of this right. Secondly, the effectiveness of procedural rights directives is hampered by the variable geometry arising from existing opt-outs on the Access to a Lawyer Directive, such as that of Ireland. The Irish opt-out is all the more striking as the right for the lawyer to attend police interviews is not provided under Irish law.[109]

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[102] Until they are surrendered, or until the decision not to surrender becomes final (Art. 5(1) Directive 1919/2016).

[103] Fair Trials, 'A Measure of Last Resort?' (above, Introduction, n56).

[104] Such as France.

[105] National report No. 2 on Spain, Section on the State of transposition of directives (point 4.2.).

[106] *Ibid.*

[107] It seems that the transposition of this right has been omitted by the Italian legislator. This right was already provided under national law prior to the entry into force of the directive, yet it is not fully guaranteed: full disclosure of the case file is only provided at the very end of the preliminary investigations. National report No. 2 on Italy, Section on impact of EU legislation on the national criminal procedure (point 4.2.).

[108] During police custody, access to the case file is still limited in France.

[109] 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 a lawyer present during police interviews. *Director of Public Prosecutions v. Doyle,* [2017], IESC 1, 18th January 2017.

Third and last, discrepancies exist between the 'law in the books' and 'law in action'. This means that, in practice, little change is to be expected from the entry into force of procedural rights directives. In Germany for example, despite the insertion of an obligation to translate judgments, oral interpretations by an interpreter are held to be sufficient.[110] In a similar fashion, Italy limited the *effet utile* of the rights enshrined under the Interpretation and Translation Directive; the Supreme Court excluded the right for the defendant who does not understand Italian to have a written translation in a known language of the final decision, the decision allowing the surrender in case of extradition, and the order validating the arrest that was delivered during the hearing in which the interpreter assisted the suspect.[111]

D. Underuse of Framework Decision on a European Supervision Order

Framework Decision 2009/829/JHA on supervision measures as an alternative to provisional detention (hereafter FD ESO) establishes a system whereby a sentenced person can have the measure imposed on him or her at the pre-trial stage in a State where that person has closer social ties, such as family, or work and study connections, than the trial State. The rationale for the adoption of FD ESO was based on the observation that discriminatory treatments between those who are resident in the trial State and those who are not; thus 'a non-resident risks being remanded in custody pending trial even where, in similar circumstances, a resident would not'.[112] A similar idea underpinned the adoption of Framework Decision 2008/947/JHA on probation measures and alternatives to detention, which focuses on the post-trial stage.[113] The basic principle of FD ESO is that a Member State recognises a decision on a supervision measure rendered in another Member State and monitors whether the alleged offender complies with it.[114] In case of a breach of these measures, the

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See National report No. 2 on Ireland, Section on the impact of EU legislation on national criminal procedure (point 5.2.).

[110] National report No. 2 on Germany, Section on the impact of procedural rights directives (Section B(1)(a)) (see also Part I, Chapter II of this edited volume).

[111] National report No. 2 on Italy, Section on impact of the procedural rights directives on Italian criminal procedure (point 4.2.). See, respectively: Cass., sez. I, 8 March 2014, n. 449, Cass., sez. IV, 19 March 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.

[112] Recital 5 FD ESO.

[113] Indeed, under the CoE Convention that FD Probation Measures aimed to replace (i.e. CoE Convention on the Supervision of Conditionally Sentenced or Conditionally Released Offenders), often judicial authorities would not consider alternatives to detention because foreigners did not have a permanent residence in the country of prosecution. As a result, offenders who would normally have qualified for suspended sentence or probation were sentenced to an imprisonment term or kept in prison until their sentence expires. Judges and prosecutors sometimes opted to release the person, in order to have that person expelled, thus increasing the likelihood that this person would re-offend in the country of deportation. See S. NEVEU, 'Probation measures and alternative sanctions in Europe: from the 1964 convention to the 2008 Framework Decision', 2013, 4, *New Journal of European Criminal Law*, 136.

[114] Art. 1 FD ESO.

suspect may be surrendered to the State of prosecution.[115] The FD provides for six different supervision measures that must be available in the Member States, which impose on the individual concerned the duty: (i) to inform authorities about any change of residence; (ii) not to enter certain places; (iii) to remain at a specific place; (iv) to observe certain limitations on leaving the State territory; (v) to report to authorities; and (vi) to avoid contact with specific persons.[116] Facilitating the circulation of supervision measures is of particular relevance to the aforementioned obstacles arising from both the operation of the EAW and mutual trust. The FD ESO was dubbed 'a crucial flanking measure for the EAW',[117] as persons benefiting from supervision measures run less risk of having their fundamental rights violated because they are not deprived of their liberty.[118]

However, many commentators and interviewees emphasised that the FD ESO is clearly under-used by the Member States.[119] Various factors account for the reluctance of Member States to rely on this instrument. First, FD ESO has been inconsistently transposed, as all Member States have transposed this instrument, with the noticeable exception of Ireland.[120] Second, relying on the FD ESO carries the risk that a measure existing under one Member State is unavailable in another Member State. Some Member States went well beyond the list of supervision measures provided under Article 8, as evidenced by the aforementioned cases of Spain and France. Nonetheless, differences in supervision measures among national legal frameworks led the EU legislator to devise solutions in order to accommodate divergences and lessen risks of incompatibilities. FD ESO inserted an adaptation requirement under Article 13, in case the nature of the supervision measure issued is incompatible with the law of the executing State. Thus, the adapted measure should 'correspond as far as possible to that imposed in the issuing State'.[121] The adaptation clause is, however, hardly workable in practice. The executing State remains faced with the difficulty of finding equivalences under its own law to the measure originally issued. The example below provides one such example of obstacle between Spanish and French measures.

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[115] *Ibid.*

[116] See Art. 8(1) FD ESO.

[117] D. Sayers, 'The EU's common rules on detention: how serious are Member States about protecting fundamental rights?' (2014) EU Law Analysis, Blog post, 17 February. Retrieved at: www.eulawanalysis.blogspot.be/2014/02/the-eus-common-rules-on-detention-how.html. See also Weyembergh, Armada, Brière (above, Introduction, n8).

[118] 'Criminal detention and alternatives: fundamental rights aspects in EU cross-border transfers' (n91), 37.

[119] 'EAW-rights, Analysis of the implementation and operation of the European Arrest Warrant from the point of view of defence practitioners' (above Part II, Chapter III, n68), 149.

[120] European Judicial Network, Implementation table of FD 2009/829/JHA, as of 23 May 2018. Retrieved at www.ejn-crimjust.europa.eu/ejn/EJN_Library_StatusOfImpByCat.aspx?CategoryId=39.

[121] Art. 13(1) FD ESO.

A Spanish national had been convicted of a gender-based crime for a period of seven months of prison.[122] The Spanish authorities ordered the suspension of the detention period on condition that he undertakes a behavioural education course on gender equality.[123] The convicted person then moved to France. However, no such course was foreseen under French law. Similarly, this course was not provided under any of EU instruments. Article 8 FD ESO was considered by the Spanish authorities, since it provides for an obligation to undergo therapy or treatment for addiction under Article 8(d). However, neither France nor Spain have implemented this measure under national law. It was, moreover, perceived as difficult to see how the measure could be adapted under French law and, if it could be done, how to gauge whether the replacement measure would be appropriate in that particular case. In the absence of an equivalent measure under French law, and in light of the irreproachable behaviour of the defendant since he had moved to France, the Spanish court decided to lift the obligation for the defendant to undertake such a course.

Interestingly, compatibility issues do not always occur at the pre-trial phase of the proceedings, but also at the post-trial stage, once the person has already been convicted and sentenced. Just as in the case of remand, the imprisonment term may be replaced by a probation measure or an alternative to detention. However, that same person may seek to serve his or her sentence in another country to which he or she has closer ties,[124] a possibility that is offered by the Framework Decision on Probation Measures and Alternatives to Detention.[125] The FD enables a Member State which has prosecuted and convicted an offender and imposed a probation measure or an alternative to detention on him or her, to request another Member State to take care of the execution of a sentence on its territory. The challenge of adapting the measure was faced with a similar intensity as under the FD ESO. The measure may be simply unknown in the executing State,[126] and lack of flexibility as to the alternatives available under the national laws renders the implementation of equivalent measures from a Member State to another difficult. Besides, Member States have different interpretations of the same measure and its transfer to another Member State without

[122] Santander Provincial Court Ruling n. 507/2015 of 26 November 2005 (National report No. 1 on Spain).

[123] '*Curso de reeducación conductual*'. The Spanish court wondered if the measure provided under Art. 8(2)(d), i.e. 'an obligation to undergo therapeutic treatment or treatment for addiction', could apply.

[124] S. Neveu, 'Probation measures and alternative sanctions in Europe: from the 1964 convention to the 2008 Framework Decision' (above n113), 144.

[125] 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.

[126] Dutch view at the 'Minutes of the Meeting with EU Member States' experts on the implementation of the Framework Decisions 2008/909/JHA (Transfer of Prisoners), 2008/947/JHA (Probation and Alternative Sanctions and 2009/829/JHA (European Supervision Order)', 1.

altering its content has been perceived as a challenge.[127] It is to be noted that in its conclusions of December 2019, the EU Council has called on the Member States and the Commission to enhance the implementation of the FD ESO.[128]

E. Exacerbating differences: lack of communication among the Member States

Alongside these issues, the difficulty to cope with widely divergent procedural frameworks is exacerbated by a striking lack of communication between national authorities. Even in situations where a Member State issues a supervision order, lack of communication between the issuing and executing authorities prevents the FD ESO from being fully effective. The FD ESO imposes a duty on the competent authorities of the Member States to communicate and consult and to exchange information on, *inter alia*, the particular situation of the suspect, compliance with the measures taken and possible adaptation of the measure, criminal records and any other changes in circumstances.[129] However, such exchanges barely occur in practice,[130] thus impairing effective monitoring and follow-up of the measures imposed.[131] Communication is all the more relevant in the absence of a common regime on pre-trial detention and alternatives to pre-trial detention. There is no certainty that a person under supervision as a result of a decision taken by a judge in a Member State will receive equivalent treatment in another Member State. Lack of trust on how conditions for the use of supervision measures will be monitored in another EU State sometimes account for the reluctance of national judges to rely on the FD ESO.[132] These instruments work best in those countries that have implemented centralised procedures, such as the Netherlands, where a network of contact points in other Member States facilitates exchanges of information. Last but not least, absence of mutual knowledge on national practices is exacerbated by little awareness, among judicial authorities, of the existence of the FD ESO.[133]

Failure to provide information also impairs the operation of the EAW. The FD EAW provides, under Article 26(1), that all periods of detention served in the executing State shall be deducted from the total period of detention to be served in the issuing State. This means that, whenever the person to be transferred has already served a period of pre-trial detention in the executing State, it can be deducted from the overall custodial sentence. However, issuing States do not always easily obtain information on the exact duration of the detention period already served in the executing State, as per Article 26(2) FD EAW. Executing authorities encounter difficulties in determining the exact amount of time that a person had been held in

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[127] *Ibid.*, 6.

[128] See Council conclusions on alternative measures to detention: the use of non-custodial sanctions and measures in the field of criminal Justice, *OJ*, No. C 422, 16 December 2019.

[129] Art. 20 and 22 FD ESO.

[130] 'Criminal detention and alternatives: fundamental rights aspects in EU cross-border transfers' (n91).

[131] *Ibid.*, 32.

[132] National report No. 2 on Romania, Section on detention (point 15). (see also Part I, Chapter V of this edited volume).

[133] *Ibid.*

custody,[134] in respect to domestic proceedings on the one hand and with regard to EAW proceedings on the other hand.[135] Similarly, executing authorities do not always understand why this information is needed and Eurojust sometimes acts as an intermediary body that ensures the communication of such information to the issuing State.[136] This may become a serious issue if a person is surrendered after a long period of pre-surrender detention in the executing state, not least because the surrendered person will be subject to more pre-trial detention in the issuing State pending trial. The wording of Article 26(1) FD EAW is confusing in this respect.[137] Whereas most Member States have established a system of maximum periods of pre-trial detention, it is not clear from the FD if the surrendered person should be granted release if the combined periods exceed this maximum.[138]

[134] Some Member States have encountered difficulties to gauge the amounts of pre-trial detainees incarcerated in national prisons. Spain is a case in point. National data is sometimes inaccurate, as official statistics and studies carried out by local institutions sometimes differ, and a recent report suggests that SPACE reports should be regarded with caution. See A. Nieto Martin, C. Rodriguez Yagüe, M. Muñoz de Morales Romero, Chapter on Spain, *in* A. Bernardi (ed.), *Prison Overcrowding and alternatives to detention, European sources and national legal systems*, Naples, Jovene Editore, 2016, 408.

[135] 'EAW case work 2014-2016', Eurojust Report, 11 May 2017, 13.

[136] *Ibid.*

[137] Weyembergh, Brière, Armada (above, Introduction, n8).

[138] Similarly, it is not clear if the reference to a 'detention order' includes an order for pre-trial detention. The English version 'as a result of a custodial sentence or detention order being passed' and the French version 'par suite de la condamnation à une peine ou mesure de sûreté privatives de liberté'.

CHAPTER V

Mutual recognition post-*Aranyosi and Căldăraru*: Diversity of approaches and resulting challenges

The Court of Justice of the EU's judgment of *Aranyosi and Căldăraru* [1] rendered in April 2016 was a watershed moment in the history of mutual recognition, and more specifically, in the history of surrender procedures. It is useful to recall the key contents and stakes of this ruling before delving into the differing interpretations it raised among the Member States. In the *Aranyosi and Căldăraru* judgment, the German Court of Bremen was reluctant to surrender Mr Căldăraru and Mr Aranyosi under the EAW mechanism to Romania and Hungary respectively, given the poor detention conditions they risked facing. The Court of Justice of the EU was called upon by the German Court of Bremen to interpret Article 1(3) FD EAW. Under this article, the FD EAW 'shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 (TEU)'. It first recalled that Member States are bound by Article 4 of the Charter of Fundamental Rights when implementing EU law, under Article 51(1) of the same instrument. Then, it established a two-pronged test that the executing authority must follow whenever the requested person may suffer degrading and inhuman treatment upon surrender to the issuing State.

– First, the executing judicial authority must assess whether systemic or generalised deficiencies exist as to the detention conditions of the issuing Member State;[2]
– Then, it must decide, on the basis of a 'specific and precise' assessment, whether there are 'substantial grounds' to believe that the individual concerned will be exposed to risks such as to infringe Article 4 of the Charter of Fundamental Rights if detained in the executing country.[3] For this purpose, information exchanges between

[1] Joined cases C-404/15 and C-659/15 PPU, *Pál Aranyosi and Robert Căldăraru*, 5 April 2016, EU:C:2016:198.

[2] *Ibid.*, para. 89.

[3] *Ibid.*, para. 92.

the issuing and executing States are essential. In the face of such circumstances, the CJEU did not opt to give the right to the executing judicial authority to abandon the EAW. It ruled that the EAW must be postponed[4] until the issuing judicial authority provides information discounting the risk of infringement to Article 4 of the Charter of Fundamental Rights.[5] If the existence of that risk cannot be discounted within a reasonable time, the executing judicial authority must decide whether the surrender procedure should be brought to an end.[6]

The *Aranyosi and Căldăraru* judgment was a clear attempt to reconcile the principles of mutual trust and recognition with the protection of the fundamental rights of the requested individual. It feeds into the line followed by the CJEU in its case law to put limits on the principle of mutual trust, as illustrated by the application of Article 4 of the Charter to the two asylum cases of *N.S.* and *C.K.*[7]. *Aranyosi and Căldăraru* is the first concrete application to a criminal case of the exception contained in the definition of the principle of mutual trust in *Opinion 2/13*, according to which "each Member State, *save in exceptional circumstances*, (must) consider all the other Member States to be complying with EU law and particularly with the fundamental rights recognised by EU law".[8] Limitations on a 'blind' application of mutual trust in criminal matters had been long-awaited and this judgment was generally welcome. It seems that, from now on, trust must be 'earned' by the Member State of origin through effective compliance with EU fundamental rights standards.[9]

Key aspects of the *Aranyosi and Căldăraru* judgment, however, have remained woefully unclear. The ruling did not lift the veil of uncertainty surrounding the precise contours of the 'exceptional circumstances' notion formulated in *Opinion 2/13*. There is still a considerable lack of clarity as regards the scope of the ground for postponement/refusal formulated by the CJEU. Several countries have relied on the two-step approach provided under the *Aranyosi and Căldăraru* judgment in determining whether they should consent to surrender in EAW cases (e.g. Finland,

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[4] *Ibid.*, para. 98.

[5] *Ibid.*, para. 103.

[6] *Ibid.*, para. 104.

[7] C-578/16 PPU, *C. K. a.o.*, 16 February 2017, ECLI:EU:C:2017:127. There is, yet, a major difference between the field of asylum and criminal law. In N.S., if the return of the asylum seeker is impossible, the MS in which the asylum seeker finds itself will be able to process the asylum application because asylum law is almost fully harmonised across the EU. This is not the case in the realm of criminal law, where refusals to surrender may result in crimes going unpunished and aument the risks of impunity, not least because time-limits apply on the period of PTD that the requested person is normally subject to prior to his/her transfer.

[8] *Opinion 2/13* (above Introduction, n3), para. 191. See also the conclusions of the Luxembourg Court in the cases of *N.S.* (C-411/10, *N. S. v Secretary of State for the Home Department* and C-493/10, *M. E. and Others v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform*, 21 December 2011, ECLI:EU:C:2011:865 and C-399/11, *Melloni*, 26 February 2013, ECLI:EU:C:2013:107.

[9] K. Lenaerts, 'La vie après l'avis: Exploring the principle of mutual (yet not blind) trust', 2017, 54, *Common Market Law Review*, 837-840.

Germany, the Netherlands, Italy, France).[10] Judicial authorities found themselves in a position where they must assess detention conditions in another country before consenting to surrender a person requested by an EAW. In practice, national courts had to find out by themselves the answers to the many questions left unaddressed by the *Aranyosi and Căldăraru* judgment. Subsequent decisions by the CJEU brought some clarifications but the latter have remained rather limited.

I. Comparative analysis of approaches to surrender post- *Aranyosi and Căldăraru*

A. Types of information sources, content of information requests and introduction of a system of 'guarantees'

The first part of the judgment provides that the executing judicial authority must assess whether systemic or generalised deficiencies exist as to the detention conditions of the issuing Member State. Little information has been provided so far on the type of information that should be relied on for the executing State to examine whether a real risk of inhuman and degrading treatment exists. The CJEU allowed the Member States to rely on a broad range of evidence in order to substantiate their assessment provided that the information used is 'objective, reliable, specific and properly updated'.[11] The CJEU gave a *non-exhaustive* list of examples of documents which can be taken into consideration by the Member States. These range from judgments of international courts, judgments of the ECtHR and judgments rendered by the national courts of the issuing Member State, to decisions, reports and other documents produced by bodies of the Council of Europe or under the aegis of the UN.[12] The non-exhaustive nature of that list suggests that evidence from all types of sources may be relied on by Member States.

Given the broad margin for manoeuvre left to the Member States, the type of information that may be used by executing authorities in the conduct of their assessment differs from one country to another. In Germany,[13] the Netherlands,[14] Ireland,[15] and Italy,[16] judicial authorities often refer to reports from the Council of Europe's Committee on the Prevention of Torture to support their assessment. Reports

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[10] The impact of the *Aranyosi and Căldăraru* judgment in Spain has yet to be determined. As noted by a recent Fair Trials report, the authorities refused to supply any data on post-surrender cases due to the Spanish Personal Data Protection Act. 'Beyond Surrender', Fair Trials Report, 2018, 30.

[11] *Pál Aranyosi and Robert Căldăraru*, para. 89.

[12] *Ibid.*

[13] It should be noted that in federal countries such as Germany, differences even exist among the Higher Regional Courts of the country on how they should apply the approach taken by the CJEU in *Aranyosi and Căldăraru* in surrender cases. This is of particular relevance since it is the Higher Regional Court that holds the EAW procedure in its hand in Germany.

[14] J. Graat, B. Oude Breuil, D. Van Uhm, E. Van Gelder, T. Hendrikse, Part IV Dutch Report, 'Transfer of Prisoners in Europe', 2018, Utrecht University, 29. See also National report No. 1 on Germany, Part V (see also Part I, Chapter II of this edited volume).

[15] See National report on Ireland, Section on detention (point 12.2) as well as the case of Minister for Justice and *Equality v. Kinsella*, [2017], IEHC 519, 26th July 2017.

[16] National report No. 2 on Italy, Section on detention (point 12.2.).

from non-governmental organisations may be taken into consideration as well, as recent Italian[17] and Dutch[18] jurisprudential developments show.

The second part of the test formulated by the CJEU gave rise to more striking divergences in interpretation at the national level. The CJEU ruled that the executing State should make a decision on surrender on the basis of a specific and precise assessment, which may be supported by additional information on the current state of detention conditions, which can be requested from the issuing State. However, the CJEU gave few clarifications about the content, nature and scope of information requests. The latter merely stated that the executing authority must file a request for all necessary supplementary information 'as a matter of urgency'.[19] This request may 'relate to the existence, in the issuing Member State, of any national or international procedures and mechanisms for monitoring detention conditions, linked, for example, to visits to prisons, which make it possible to assess the current state of detention conditions in those prisons'.[20] Most Member States have combined the CJEU test with other ECHR criteria spelled out in its case law on Article 3 ECHR in order to conduct their analysis (e.g. Germany, the Netherlands, Italy, Finland, Ireland), as regards the space of cells in particular.[21] This comes as little surprise, as the original reference for a preliminary ruling in the *Aranyosi and Căldăraru* judgment was supported by several judgments rendered by the ECtHR on the conformity with Article 3 ECHR of Hungarian and Romanian prison conditions.[22]

Based on the *Aranyosi and Căldăraru* judgment, several countries, when acting as executing authorities, have already filed information requests on the state of detention conditions in the issuing State, in order to substantiate their assessment (e.g. Germany, the Netherlands, Italy, Ireland, Finland). In the absence of guidance provided in the *Aranyosi and Căldăraru* judgment, national judicial authorities have established their own criteria to base their assessments on. As a result, the content of national requests differs.[23] For example, in Finland, the Supreme Court consented to surrender to Bulgaria

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[17] 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 *Căldăraru 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).

[18] Such as reports released by the European Prison Observatory. See J. Graat *et al.*, Part IV Dutch Report, 'Transfer of Prisoners in Europe', 2018, 29.

[19] *Pál Aranyosi and Robert Căldăraru*, para. 95.

[20] *Ibid.*, para. 96.

[21] The ECtHR ruled that the space of cells should not go below 3 sqm. See in particular with *Muršić v. Croatia*, App. No. 7334/13.

[22] Besides, Art. 3 ECHR was codified under Art. 4 of the Charter.

[23] These questions were raised in a recent Eurojust meeting, regarding the extent to which criteria other than prison cells, used as a benchmark by the ECtHR to determine whether a detainee may face a risk of degrading and inhuman treatment, should be taken into consideration by executing authorities. These include the extent to which not only the size of prison cells, but also conditions of imprisonment, such as access to daylight possibility of natural ventilation, individual toilet and outdoor activities, should be taken into consideration in reaching a decision on the extradition of the person. The EAW and Prison Conditions, Outcome Report of the College, Thematic Discussion, Council Document 9197/17, 16 May 2017, 2.

on the grounds that i) work had been undertaken by the authorities to renovate detention facilities, ii) outdoor activities were organised and prison leaves were granted, and iii) efforts were made to address issues of violence between inmates.[24] Different and more detailed criteria were established by the German and Italian judicial authorities in recent cases. In Italy, recent information requests have included specific demands about the length of the penalty, the concrete treatment of it, the space allowed to the convicted person, the heating conditions and the system of lunch/dinner, to name but a few.[25] However, the content of Italian requests varies depending on whether the person will be subject to 'continuous (i.e. closed) detention' or 'semi-detention'.[26]

In some cases, the national authorities of the executing state went beyond mere information requests and asked for 'assurances' on the part of the issuing States, in the sense of material guarantees on detention conditions (e.g. the Netherlands, Germany).[27] Those guarantees may, for example, consist of providing an individual cell to an inmate requested for surrender or the assurance that the surrendered person will not be detained in a specific prison. In a case involving France and the Netherlands as issuing and executing countries respectively, the Dutch authorities required assurances that the surrendered person would not be detained in specific French prisons, such as Villepintes or Fleury-Merogis.[28] In another case involving Germany as the executing State, the regional court made surrender to Hungary conditional upon the assurance that the space and further arrangement of the detention conditions in the correctional facility during pre-trial and post-trial detention would meet the minimum standards of Article 3 ECHR. It also requested that, should the defendant be placed in another prison, the latter must meet European minimum standards as well.[29]

B. Scope of the postponement/refusal ground

The release of the *Aranyosi and Căldăraru* judgment by the CJEU gave rise to a 'new' ground for postponement/non-execution. The scope of this ground, however, remains unclear. On the one hand, the CJEU stated that, even though the supplementary information is not sufficient to discount a real risk of inhuman and degrading treatment, the execution of the warrant must be postponed in the first place,

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[24] National report No. 2 on Finland, Section on detention (12.2.).

[25] D. Cavallini, R. Amato, National Report on Italy, 'Transfer of Prisoners in Europe' (n18), 40.

[26] In case of 'continuous detention', it shall be ensured to the detainee a cell space of at least 3 m^2; in case of 'semi-detention', a smaller cell space may be accepted, provided that that other conditions are fulfilled (e.g. short duration of the detention, sufficient freedom of movement outside the cell and overall adequate detention conditions). See C. Cass., Sez. VI, 9.11.2017, n. 53031, P. (Rv. 271577). Quoted in National report No. 2 on Italy, Section on detention conditions and the influence of *Aranyosi and Căldăraru* on mutual recognition (point 12.2.).

[27] National reports No. 12 on Germany and on the Netherlands, Sections on detention conditions and the influence of *Aranyosi and Căldăraru* on mutual recognition. (see also Part I, Chapter II of this edited volume).

[28] National report No. 2 on France, Section on detention (see also Part I, Chapter I of this edited volume).

[29] National report No. 1 on Germany, Part V(3); National report No. 2 on the Netherlands, Section on the influence of *Aranyosi and Căldăraru* for the Netherlands (point 3).

but it cannot be abandoned.[30] On the other hand, the last paragraph of the judgment reads that 'if the existence of that risk cannot be discounted within a reasonable time, the executing judicial authority must decide whether the surrender procedure should be brought to an end'. The convoluted language used by the CJEU suggests that it is not at ease with the formulation of a new ground for refusal. It seems that, by using the 'brought to an end' formulation instead of 'refusing the execution of the EAW', the CJEU left national authorities free to decide whether they wish to discontinue the proceedings or not.[31] Put in a different way, the burden of interpreting the *Aranyosi and Căldăraru* judgment as introducing a new ground for refusal was passed onto national courts, thus reinforcing the assumption according to which the CJEU is somewhat uncomfortable with the formulation of this ground. In spite of this confusing wording, this judgment was generally interpreted as inserting a new ground for non-execution, following a certain period of time during which the issuing State must address information requests sent by the executing State (e.g. the Netherlands, Italy, Germany). This interpretation was later on confirmed by the CJEU itself.

An additional layer of confusion was provided by the lack of clarity as to what is meant by the 'reasonable time' requirement, after which proceedings are supposed to be brought to an end. In all likelihood, these deficiencies will not be remedied overnight.[32] In the Netherlands, the period of postponement was understood as a lapse of time during which authorities are given room to provide additional information to exclude a risk of violation of Article 4 of the Charter of Fundamental Rights. In recent case law, the Court of Amsterdam referred to a period of nine months. Should this limit be exceeded and the information received cannot exclude a real risk of inhuman and degrading treatment, the EAW request will be declared 'inadmissible' and the public prosecutor will not consider the EAW.[33] A similar approach was taken in Italy, where the Italian judicial authority is bound to refuse the execution *rebus sic stantibus*.[34] This means that, in case the risk conditions change for the better in the issuing State, the previous refusal will not exclude a second decision consenting to the execution of the surrender.[35] Germany, where decisions on surrender are placed within the hand of Higher Regional Courts, adopted a broadly similar approach, pursuant to which surrender is simply 'not permissible at the moment'.[36] Inconsistencies nonetheless arose between regional courts themselves in the interpretation given to the ground for

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[30] *Pál Aranyosi and Robert Căldăraru*, para. 98.

[31] Opinion of Advocate General Campos Sánchez-Bordona in Case C-220/18 PPU, *ML v Higher Regional Court of Bremen*, delivered on 4 July 2018, ECLI:EU:C:2018:547, para. 84.

[32] A. Willems, 'Improving Detention Conditions in the EU – Aranyosi's Contribution', Paper prepared for the EUSA Biennal Conference, Miami, May 2017, 8.

[33] National report No. 2 on the Netherlands, Section on detention conditions (point 2) (see also Part I, Chapter IV of this edited volume).

[34] Or '*allo stato degli atti*'. See National report No. 2 on Italy, Section on detention conditions (point 12.2.)

[35] *Ibid.* It remains unclear, however, whether the executing procedure should restart from the beginning and which issues should be considered as covered by *res judicata*/preclusion.

[36] National report No. 1 on Germany, Section on other case law on detention conditions (point IV) (see also Part I, Chapter II of this edited volume).

postponement.[37] Therefore, surrender towards some countries was permitted by some regional courts, while others took the reverse decision.[38]

A last word should be said about the concrete impact of the postponement of a decision on surrender on the requested person. In both Germany and Italy, the non-execution of surrender requests amounted to the unconditional release of the person detained in pre-trial detention, as per the requirements of the principle of proportionality.[39] To some extent, the CJEU endorsed this approach and stated in the *Aranyosi and Căldăraru* judgment that the individual concerned cannot remain in custody without any limit in time.[40] However, it referred to the solution put forward in *Lanigan*, where supervision measures can be attached to the provisional release of the person, in order to prevent him or her from absconding so long as no final decision on the execution of the EAW has been taken.[41] This solution was perceived as difficult to put into practice in case of a formal refusal of surrender.[42] In its conclusions of December 2018, the EU Council reminded the EUNS that any case for non-execution based on an infringement of fundamental rights should be applied restrictively.[43]

II. Impact on mutual recognition

The significant margin for manœuvre left to the Member States to assess whether surrender should be consented to has impaired the functioning of the EAW in several respects. Practical and direct consequences can be observed, as evidenced by the numerous delays and suspensions of executions. Other, perhaps subtler, issues are likely to arise in the coming years, if no clarification is brought to the ground for postponement/refusal formulated by the CJEU. These include, notably, risks of polarisation and forum shopping. Meanwhile, the system of guarantees, whereby cross-border inmates are better treated compared with national detainees, is difficult to justify and maintain in the long run. Ultimately, the broadening of the *Aranyosi and Căldăraru* test for other purposes than detention conditions questions the very foundations of mutual trust, as will especially be seen with the Celmer or LM case.

A. Delays and non-execution of the EAW

The possibility to make surrender conditional to the receipt of information and assurances on detention conditions on the part of issuing States dealt a heavy blow to the operation of the EAW by significantly delaying, or blocking, the execution of

[37] In Germany, the surrender system is highly decentralised, and Higher Regional Courts hold the decision-making power in respect to the execution of EAWs.

[38] National report No. 1 on Germany, Section on other case law on detention conditions (point IV) (see also Part I, Chapter II of this edited volume).

[39] National report No. 2 on Germany, Section on detention conditions (point C(1)(d)) (see also Part I, Chapter II of this edited volume). National report No. 2 on Italy, Section on detention conditions (point 12.2.).

[40] *Pál Aranyosi and Robert Căldăraru*, paras. 98 and 101.

[41] *Lanigan* (above Introduction, n19), para. 61.

[42] National report No. 2 on Italy, Section on detention conditions (point 12.2.).

[43] Conclusions on mutual recognition in criminal matters 'Promoting mutual recognition by enhancing mutual trust', *OJ*, No. C 449, 13 December 2018.

requests. In many cases, requests for information deferred the surrender of the person and the deadlines of Article 17 FD EAW could not be met. [44] In the Netherlands, the Court of Amsterdam ruled that the obligation to delay the surrender decision could be considered as an exceptional circumstance within the meaning of Article 17(7) FD EAW, which justified the inability of the Dutch judicial authority to take a decision within 90 days.[45] As noted by the CJEU in the *ML* case, the extreme level of detail of information requests sent to the issuing State renders the task of providing the executing State with the necessary guarantees within the time limits imposed by Article 17 FD EAW nearly impossible to fulfil. The CJEU, along the lines of the opinion released by its Advocate General, moreover added that:[46]

> "(T)hose questions — because of their number, their scope (every prison in which the person concerned might be held) and their content (aspects of detention that are of no obvious relevance for the purposes of that assessment, such as, for example, opportunities for religious worship, whether it is possible to smoke, the arrangements for the washing of clothing and whether there are bars or slatted shutters on cell windows) — make it, in practice, impossible for the authorities of the issuing Member State to provide a useful answer, given, in particular, the short time limits laid down in Article 17 of the Framework Decision for the execution of a European arrest warrant."

Often, the information requested is not readily available to the issuing authorities and subsequent amounts of research are needed; data from publicly available sources, such as European Parliament reports, or press releases, have sometimes been included in the information file sent to the executing authorities. As a result, executing authorities often receive inadequate replies to information requests, as is the case in Germany.[47]

Meanwhile, the number of non-executions of EAWs has soared. As a matter of example, more than forty cases have been referred to the German Supreme Court relating to detention conditions since 2016, compared with only one in 2014.[48] Interestingly, attempts to invoke bad detention conditions as a fundamental right ground for the non-execution of surrender had proven difficult and barely successful in the past.[49] In Italy, the CJEU's ruling marked a 'U-turn' in the application of the fundamental rights ground for refusal inserted in the Italian law transposing the EAW.[50] Prior to *Aranyosi and Căldăraru*, this ground had been poorly relied on and cases were generally dismissed by the Italian Court of Cassation.[51] In the Netherlands, the execution of several EAWs was suspended on the ground that surrender would infringe the fundamental rights of the requested person. Breaches of individuals

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[44] Council document 9197/17, 3.

[45] J. Graat *et al*., Part IV Dutch Report, 'Transfer of Prisoners in Europe' (n18), 30.

[46] C-220/18 PPU, *ML v Higher Regional Court of Bremen*, 25 July 2018, ECLI:EU:C:2018:589, para. 103.

[47] See National report No. 2 on Germany, Section on detention conditions (point C(1)(d)). (see also Part I, Chapter II of this edited volume).

[48] National report No. 1 on Germany, Section on Other case law on detention (point IV).

[49] Weyembergh, Armada and Brière, (above Introduction, n8), 54-55.

[50] D. Cavallini, R. Amato, National Report on Italy, 'Transfer of Prisoners in Europe' (n18), 5.

[51] *Ibid.*

rights, which was implemented as a ground for refusal under Article 11 of the Dutch Surrender Act, had only been used twice prior to the release of the *Aranyosi and Căldăraru* judgment.[52]

Countries most affected by surrender refusals include eastern European countries, such as Romania, Poland, Bulgaria and Hungary.[53] Alongside these, Italy, Belgium and France have recently faced similar reluctance to the execution of EAWs issued by their judicial authorities.[54] As one of the targets of the *Aranyosi and Căldăraru* ruling, Romania has faced several refusals of execution.[55] The multiplication of refusals did not, however, prevent the Romanian authorities from issuing EAWs.[56] Interestingly, efforts have nonetheless been undertaken by the Romanian legislator to limit the use of the EAW instruments and reduce Romania's overcrowding problems. Thus, under Romanian law, EAWs cannot be issued for the purpose of executing a custodial sentence if a penalty of less than two years of imprisonment has been imposed. Another example can be found in the law implementing the FD Transfers of Prisoners, where the explanatory memorandum encourages the competent Romanian authorities to refrain from using the EAW and rely instead on the FD Transfers of Prisoners.[57]

B. Risks of polarisation and 'prison shopping'?

The trend for polarisation in the EU, between Member States with bad prisons on the one hand and those with good prisons on the other hand, existed long before the CJEU delivered the *Aranyosi and Căldăraru* judgment. National authorities were aware that imprisonment conditions were particularly dramatic in some EU States, such as Hungary, Romania and Italy. These issues had been largely documented by the Council of Europe's instruments and the ECtHR, notably through the special technique of 'pilot judgment procedures'.[58] Whether inadequate detention conditions could constitute a ground for refusing the execution of the EAW was already a matter that was the subject of lively discussion among the judicial authorities of the Member States. Some national courts had already refused EAW requests on the grounds that prison conditions were unacceptable in the issuing countries. Cases of non-execution

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[52] National report No. 2 on the Netherlands, Section on other areas of concerns (point 4) (see also Part I, Chapter IV of this edited volume).

[53] As it follows from the national reports. See also some of the case law on defence rights available on the website of Fair Trials at: www.fairtrials.org/campaigns/eu-defence-rights/defence-rights-in-europe-case-law/.

[54] National report No. 2 on France, Section on detention conditions (see also Part I, Chapter I of this edited volume).

[55] *Ibid.*

[56] National report No. 2 on Romania, Section on detention (point 12) (see also Part I, Chapter V of this edited volume).

[57] *Ibid.*

[58] The ECtHR moreover developed this technique to identify structural and systemic issues in Member States and offer a possibility of speedier redress to the individuals concerned. See ECHR factsheet on Pilot judgments, November 2017.

occurred in the UK with regard to EAWs issued by Italy[59] and Ireland in respect to Poland,[60] where the courts based their respective judgments on a violation of Article 3 ECHR and relied on Council of Europe reports and (pilot) judgments delivered by the ECtHR. A reverse approach was taken by Italy, where the Italian Court of Cassation ruled that the fundamental rights ground for refusal enshrined in the Italian law transposing FD EAW[61] excluded that the mere existence of a situation of prison overcrowding in the issuing Member State did not, in the absence of other concrete and specific elements, entail a 'serious risk' of degrading and inhuman treatment for the requested person that was such as to refuse the surrender.[62]

European Union policymakers had also acknowledged the existence of deficiencies in Member States' prisons. The European Commission recognised, in 2011, that the FD EAW 'does not mandate surrender where an executing judicial authority is satisfied, taking into account all the circumstances of the case, that such surrender would result in a breach of a requested person's fundamental rights arising from unacceptable detention conditions'.[63] The position of the European Commission stood in contrast to an earlier rigid stance towards refusal based on human rights grounds and gave hints that a change of strategy in favour of a more expansive interpretation of grounds for refusal was in the making.[64] Put differently, concerns about polarisation pre-existed the *Aranyosi and Căldăraru* judgment. What the Court of Justice of the EU seemingly did, *in fine*, was only to give the green light to judicial authorities to refuse surrenders on the grounds of a breach of Article 4 of the Charter of Fundamental Rights. In all

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[59] See *Hayle Abdi Badre v Court of Florence* (2014) EWHC 614. The British High Court noted at paras 87-88 that 'the structural and systemic nature of prison overcrowding in Italy is clearly evident from the statistical data (of CoE reports) … the breach of the applicants' right to benefit from adequate conditions of detention is not the result of isolated incidents but arises from a systemic problem, which results in turn from a chronic malfunction particular to the Italian penitentiary system, which has affected, and is likely to affect again in the future, many people … the situation found in the present case therefore constitutes a practice incompatible with the Convention.'

[60] *MJELR v Rettinger*, [2010], IESC 45, 23 July 2010. Interestingly, the Irish court referred to the *Soering v UK* judgment and the concept of 'real risk of suffering degrading and inhuman treatment' developed therein, as well as the principles stated in *Saadi v Italy*. See the reasoning developed at paras. 24-27 of the judgment.

[61] Art. 18 (1) (h) of l. 69/2005 provides an express a mandatory ground for refusal in case the surrender should entail 'a serious risk for the requested person to be subject to the death penalty, torture or other inhuman or degrading treatment or punishment'. National report No. 2 on Italy, Section on Detention (point 12).

[62] C. Cass., Sez. VI, 15.10.2014, n. 43537, Florin (Rv. 260448).

[63] Commission report on the implementation since 2007 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, COM(2011) 175 final ('third evaluation report'), Brussels, 2011, 7.

[64] V. Mitsilegas, 'The Limits of Mutual Trust in Europe's Area of Freedom, Security and Justice: From Automatic Inter-State Cooperation to the Slow Emergence of the Individual' 2012 31 *Yearbook of European Law*, 326; see also A. Willems, 'Improving Detention Conditions in the EU – Aranyosi's Contribution' Paper prepared for the EUSA Biennal Conference, Miami, May 2017, 4.

likelihood, this polarisation phenomenon will be reinforced in the aftermath of the *Aranyosi and Căldăraru* case-law.[65]

Fears were expressed that a trend for 'prison shopping' could emerge. Cases have already arisen where requested persons are unwilling to challenge an EAW in those executing States with poor detention conditions, in order to leave the country as soon as possible.[66] On the contrary, in Ireland, persons held in PTD sometimes do not apply for bail and seek adjournments to their case so that the greatest time possible is spent in Irish prisons, which are considered of higher quality than elsewhere in Europe. This way, credit will be given for the entire time spent in prison upon surrender, once they begin to serve a custodial sentence in the issuing State.[67]

C. The unsustainable system of assurances

The development of a system of 'guarantees' or 'assurances' in some Member States whenever they act as executing authorities raise a variety of legal and practical concerns. The broad discretion left to executing authorities as regards the type of assurances to be requested indeed results in treating detainees involved in a cross-border case differently from a detainee involved in a national case. From a legal perspective, differences in treatment can amount to discriminatory treatment between national and non-national inmates. One may nonetheless argue that non-nationals should not have to suffer from poor detention conditions similar to nationals for the sake of non-discrimination and equal treatment. According to this line of reasoning, this would amount to a race to the bottom in standards of detention which could, *in fine*, have an adverse impact on mutual trust.

Another line of criticism relates to the lack of reliability of the system of guarantees itself. From a strictly practical standpoint, the system of guarantees and reassurances is unworkable on a large scale and from a long-term perspective. Individual cells, for example, are unlikely to be available for all the detainees awaiting surrender to the issuing State, especially in those countries where significant investments are necessary to improve detention conditions. In this case too, the surrender regime can be blocked because of the inability of the issuing State to meet the demands of the executing State. Then, experience shows that in some cases issuing authorities do not comply with the guarantees or assurances given to the executing authorities. Once the requested person has been surrendered, the executing State has indeed little control over the detention conditions faced by the prisoner and cannot verify whether the guarantees provided accurately reflect reality.[68] With regard to the monitoring of the application of Article 3 ECHR, the ECtHR stated that 'assurances are not in themselves sufficient to ensure

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[65] This concern was also voiced at a Eurojust meeting in 2017. Council Document 9197/17, 1.

[66] For example, in Lithuania, see 'EAW-rights, Analysis of the implementation and operation of the European Arrest Warrant from the point of view of defence practitioners' (above Part II, Chapter III, n68), 39.

[67] *Ibid.*, 147. Interestingly, the same study reports that Ireland is also one of the countries where surrender requests take the longest to be processed (on average 12 months). See paragraph on 'prison-shopping' developed in the section on national procedures and conditions for surrender after *Aranyosi and Căldăraru*.

[68] J. Graat *et al.*, Part IV Dutch Report, 'Transfer of Prisoners in Europe' (n18), 30-31.

adequate protection against the risk of ill-treatment. There is an obligation to examine whether assurances provide, in their practical application, a sufficient guarantee that the applicant will be protected against the risk of ill-treatment'.[69] Thus, it may very well be that the guarantees given by the issuing authorities are no longer respected once the person has been transferred, as illustrated by the *Rusu* case, involving surrender from the UK to Romania.[70] Meanwhile, a person may face degrading and inhuman treatment at a later stage, for example if the prisoner is transferred to another prison after he or she was surrendered.[71] Carrying out an assessment of the entirety of the issuing State's detention facilities seems, nonetheless, to be impractical. For this reason, in *ML* the CJEU struck a balance between pragmatism and realism on the one hand and the necessity to address the Article 4 Charter of Fundamental Rights issues raised by prison transfers effectively on the other hand. Instead of requiring a comprehensive assessment of all Hungarian prisons, it ruled that executing authorities are 'solely required to assess the conditions of detention in the prisons in which, *according to the information available to them*, it is actually intended that the person concerned will be detained, including on a temporary or transitional basis'.[72] A similar view was taken by the CJEU in *Dorobantu*.[73]

Whereas these two judgments can be seen as mitigating the risk of a subsequent violation of Article 4 Charter of Fundamental Rights by extending control over several detention facilities and establishing minimum criteria for the review of detention conditions, the executing authority continues to base its assessment on information provided by the issuing authority. This is despite the fact that, as the *Rusu* case demonstrated, such information or guarantees are not always respected by the issuing State.

Ultimately, attention should be paid to the risk of politicising judicial proceedings. Where assurances cannot be satisfied by the issuing State, dialogue between authorities may help overcome a deadlock situation. This is also the view that was taken by the ECtHR, where a State may, when confronted with a situation where it has to assess the

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[69] ECtHR, *Othman v. UK*, App. No. 8139/09, 17 January 2012, para. 87.

[70] 'Beyond Surrender', Fair Trials Report, 2018, 31. The report also explains that Romania regularly violates the assurances it gives to other countries in EAW proceedings.

[71] *Ibid.* Those reservations also lied at the core of referred questions to the Court by the German Court of Bremen, dubbed 'Aranyosi II' by some authors. However relevant, those questions had been dismissed by the CJEU. The EAWs issued for the surrender of Mr Aranyosi had been annulled by Hungary, and there was no longer a need, for the Court, to adjudicate. The relevance of these questions is illustrated by the *ML* case and the filing of a reference for a preliminary ruling to the Court, this time dealing with detention conditions in Romania (C-128/18). National report No. 2 on Germany Section on Detention (point C(1)(d)) (see also Part I, Chapter II of this edited volume). See C-496/16, *Pál Aranyosi*, Order of the Court, 15 November 2017, ECLI:EU:C:2017:866. In essence, the Court of Bremen asked whether the executing authorities, were under the obligation not only to file requests to the issuing State for guarantees with respect to the place where the requested person is to be detained, but also to take into consideration detention conditions in other prisons in their decision to surrender or not.

[72] *ML* (n45), para. 87 (emphasis added).

[73] C-128/18, *Dumitru Tudor Dorobantu*, 15 October 2019, ECLI:EU:C:2019:857.

assurances given by another State with respect to the application of Article 3 ECHR, check "whether compliance with the assurances can be objectively verified through diplomatic or other monitoring mechanisms".[74] The case occurred in France, where the French authorities were unable to meet the Dutch demands that the surrendered person would not be detained in Villepintes or Fleury-Merogis.[75] The impasse was ultimately solved through extensive dialogue between chancelleries.[76] Dialogue may certainly prove helpful for the executing authority to assess whether a risk of violation of Article 4 of the Charter of Fundamental Rights exists and ultimately take a decision on surrender.[77] However, reliance on diplomatic channels between national authorities suggests that the surrender of a person is somehow made conditional upon the well-being of relations between EU States. This carries the risk of '(re)politicising' the proceedings, which is certainly at odds with the spirit of the EAW[78] and seems to herald a shift backwards to the old extradition system. The downside of involving politics in the determination of proceedings is that human rights guarantees may not be taken into consideration to the extent that they deserve.[79] Moreover, it is difficult to reconcile with CJEU case law where the CJEU excluded ministries of justice and other government organs[80] from the definition of judicial authorities.[81]

D. Mutual trust beyond surrender proceedings

Beyond practical consequences for the operation of the EAW, detention conditions may affect mutual trust between the Member States in a more general manner. This link is by no means new. Under 'Measure F' of the 2009 roadmap, the European Commission released a Green Paper on detention conditions in 2011, where it acknowledged that poor treatment of detainees may undermine the principle of mutual trust that underpins judicial cooperation within the EU.[82] The current practice of the *Aranyosi and Căldăraru* case law suggests that the principle of mutual trust relies on rather fragile foundations. As noted by Advocate General Bobek in a EAW case,

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[74] *Othman v UK*, para. 189(viii).

[75] National report No. 2 on France, Section on detention (point C) (see also Part I, Chapter I of this edited volume).

[76] *Ibid.*

[77] See H. Sorensen, 'Mutual Trust – blind trust or general trust with exceptions? The CJEU hears key cases on the European Arrest Warrant', *EU Law Analysis*, 18 February 2016.

[78] *Ibid.*

[79] S. Gless, J. Vervaele, 'Law should govern: Aspiring general principles for transnational criminal justice', 2013, 9(4), *Utrecht Law Review*.

[80] C-477/16 PPU, *Kovalkovas*, 10 November 2016, ECLI:EU:C:2016:861.

[81] It ruled that administrative and police authorities pertained to the province of the executive and, pursuant to the principle of the separation of powers that characterises the operation of the rule of law, they cannot be covered by the term judiciary. C-452/16, *Poltorak*, 10 November 2016, para. 35. It limited their role to providing practical and administrative assistance to the competent judicial authorities, under para. 42. See also C-453/16 PPU, *Özçelik*, 10 November 2016, ECLI:EU:C:2016:860.

[82] Strengthening mutual trust in the European judicial area – A Green Paper on the application of EU criminal justice legislation in the field of detention, Commission Communication, COM (2011) 327 final, 4.

mutual trust no longer implies 'an irrefutable presumption'.[83] The broad interpretation of the *Aranyosi and Căldăraru* test by the national courts resulted in a 'switch from the classic paradigm of EU law of 'judges asking judges' to a system that relies on 'judges monitoring judges''.[84] Instead of fostering confidence across the EU, mutual assessments risk fuelling a feeling of mutual distrust, which jeopardises the primacy, unity and effectiveness of EU law.[85]

The current impact of the *Aranyosi and Căldăraru* case law on mutual trust is threefold. Firstly, it highlights that a fundamental gap exists in EU law as regards the protection of individuals against inhuman and degrading treatment that may occur as a result of bad detention conditions. This gap is well illustrated in a German judgment on surrender.[86] In assessing whether German judicial authorities should consent to surrender or not, the Federal Constitutional Court based its reasoning primarily on the requirements of detention conditions as defined in the national jurisprudence on Article 1 of the Constitution, which guarantees the protection of human dignity. It reaffirmed, in this case, that the Federal Constitutional Court would protect the inviolable rights stemming from the German Constitution, such as the right to human dignity, even if conflicting with EU law. This is not to say that the German decision differs from the position taken by the CJEU in the *Aranyosi and Căldăraru* judgment. The Federal Constitutional Court simply emphasised that the case law of the CJEU was incomplete because it could not be discerned which specific minimum standards derived from Article 4 Charter of Fundamental Rights on detention conditions and what determined the applicable review of detention conditions under European Union law.[87] The persistence of this gap, along with the re-instalment of a degree of control by the national judge to fill this identified vacuum, are detrimental to mutual trust because differing national standards may apply and co-exist with one another, thereby jeopardising the primacy of EU law.

Another point of concern, related to the above, arises. Whereas it is traditionally the executing State that trusts the issuing State for the purpose of the execution of an EAW, the issuing State should also trust the executing State in order for the system to work properly. Bad prison conditions can hamper the execution of EAWs, but theoretically speaking these could also impair the issuance of EAWs, whenever authorities issue a request for surrender, whereas they are aware that the person will

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[83] Opinion of Advocate General Bobek delivered on 20 December 2017, Case C-571/17 PPU, *Openbaar Ministerie v Samet Ardic*, ECLI:EU:C:2017:1013, para. 80.

[84] T. Koncewicz, 'The Consensus Fights Back: European First Principles Against the Rule of Law Crisis', *Verfassungsblog*, 5 April 2018.

[85] That is, the famous triptych of *Melloni* (above n8). See P. Bard, W. Van Ballengooij, 'Judicial Independence as a Precondition for Mutual Trust', *Verfassungsblog*, 10 April 2018.

[86] BVerfG, Beschl. v. 18.8.2017 – 2 BvR 424/17 = HRRS 2017 Nr. 832. The order is available in the Internet (in German) at: www.bverfg.de/SharedDocs/Entscheidungen/DE/2017/08/rk20170818_2bvr042417.html. See National report No. 1 on Germany, Section on Follow up to the identity control order (point IV).

[87] National report No. 1 on Germany, Section on Follow up to the identity control order (point IV). See also National report No. 2 on Germany, Section on Detention conditions (point C(1)(d)(2)) (see also Part I, Chapter II of this edited volume).

have to undergo poor prison conditions, pending surrender in the executing State. This issue constitutes the more subtle and difficult to discern 'other side of the coin' of the *Aranyosi and Căldăraru* case law and could well become a major point of friction in the foreseeable future. Nonetheless, it has yet to receive the attention that it clearly merits. Unfortunately, the impact of the procedural rights directives is unlikely to enhance mutual trust in this regard. The right provided to the lawyer, under Article 4 of the original proposal on the Access to a Lawyer Directive, to access the place of detention to check detention conditions,[88] did not make it into the final version of the Directive.

Second, it cannot be excluded that existing gaps in EU law on detention conditions could have knock-on effects on other areas of cooperation beyond the operation of the European Arrest Warrant. A case in point is provided by the Council Framework Decision 2008/909/JHA on the recognition of custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union (hereafter FD Transfer of Prisoners).[89] Back in 2011, ten Member States had already emphasised in their replies to the European Commission Green Paper on detention conditions that inadequate detention conditions may affect the proper application of the FD Transfer of Prisoners. National authorities expressly stated that they were reluctant to transfer a person where his or her basic human rights would be infringed,[90] in particular since the FD Transfer of Prisoners limits the situations in which the consent of the prisoner is needed.[91] A comparative study of 2018[92] revealed that none of the countries examined exclude the possibility of refusing a transfer that would result in a violation of Article 3 ECHR.[93] Besides, France, Germany and Hungary have mentioned detention conditions in the State of execution as a relevant criterion to assess the prospects of social rehabilitation, the latter being one of the main objectives served by the FD.[94]

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[88] Art. 4, European Commission, Proposal for a directive on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest, COM (2011) 326 final, Brussels, 8 June 2011.

[89] Both the FD EAW and FD Transfer of Prisoners establish a transfer mechanism.

[90] Commission, Analysis of the replies to the Green Paper on the application of EU criminal justice legislation in the field of detention, 7.

[91] Under Art. 6 FD Transfer of Prisoners, the consent of the sentenced person shall not be required when the person is transferred (a) to the Member State of nationality he/she lives; (b) to the Member State to which the sentenced person will be deported once he or she is released from the enforcement of the sentence on the basis of an expulsion or deportation order included in the judgment or in a judicial or administrative decision or any other measure consequential to the judgment; (c) to the Member State to which the sentenced person has fled or otherwise returned in view of the criminal proceedings pending against him or her in the issuing State or following the conviction in that issuing State.

[92] T. Marguery (above, Introduction, n28), 427.

[93] *Ibid.* But said study does not mention a single case yet.

[94] 'Criminal detention and alternatives: fundamental rights aspects in EU cross-border transfers' (above, Part II, Chapter IV, n91), 45.

Thirdly, the need to strengthen the link between mutual recognition and human rights and to toughen up the conditions for cross-border cooperation is increasingly being felt at the national level. The question can be raised as to whether the *Aranyosi and Căldăraru* judgment can be relied on beyond the sole realm of detention conditions and the absolute prohibition of torture and degrading and inhuman treatment. In the Netherlands, the Court of Amsterdam applied the two-tiered test that it developed in its interpretation of *Aranyosi and Căldăraru*, to an EAW case where the requested person could be subject to inhuman and degrading treatment in Poland because she had made incriminating statements on a particularly violent gang. The defence feared that surrender to Poland would entail a breach of Articles 2 and 3 ECHR and Article 4 of the Charter of Fundamental Rights, and she could face retaliation.[95]

The question referred to the CJEU by the Irish court with respect to the execution of an EAW issued by Poland is another, and even more controversial, case in point. Thus far, at the EU level, obstacles to the operation of the EAW as a result of the *Aranyosi and Căldăraru* judgment had been confined to the question of detention conditions. In the *Minister for Justice and Equality v. LM* case,[96] also known as the *Celmer* case, the CJEU has been asked to broaden its fundamental rights test towards a wide rule of law test based on the flagrant denial of a fair trial in the issuing country. The Irish court asked whether the *Aranyosi and Căldăraru* two-step test developed by the CJEU could be applied if the executing authority had found that the common value of the rule of law set out in Article 2 TEU had been breached in Poland. More specifically, the Irish court enquired as to whether the surrender of Mr Celmer to Poland should be subject to a further assessment of the risk of unfair trial, given the alleged lack of independence of the Polish judiciary.[97] Then, if the requested person was at real risk of a flagrant denial of justice, the Irish court asked whether it had to revert to the issuing authority for further information about the trial and, if so, what type of guarantees of fair trial would be required.[98]

The CJEU confirmed the applicability of the *Aranyosi* test to the rule of law. It began by intertwining the right of a fair trial to the protection of the rule of law by affirming that the former is indeed 'of cardinal importance as a guarantee that all the rights which individuals derive from EU law will be protected and that the values common to the Member States set out in Article 2 TEU, in particular the value of the rule of law, will be safeguarded'.[99] Along the lines of *Aranyosi*, the CJEU stated that, in order to assess whether there is a real risk of breach of the right to a fair trial, the executing authority must first identify, on the basis of objective, reliable and updated information, whether systemic deficiencies in the judicial system of the issuing State exist, with particular regard to a lack of independence of the courts.[100] If the first part of the test is satisfied, it must still assess whether the requested person in the particular

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[95] National report No. 2 on the Netherlands, Section on conclusion and recommendations (point 5) (see also Part I, Chapter IV of this edited volume).

[96] See C-216/18 PPU, *LM*, 25 July 2018, ECLI:EU:C:2018:586.

[97] *Ibid.*, para. 25.

[98] *Ibid.*

[99] *Ibid.*, para. 48.

[100] *Ibid.*, para. 61.

case at hand would run a real risk of having his/her right to a fair trial violated if he/she were to be surrendered,[101] and may request further information from the issuing State for this purpose.[102] When addressing the question of judicial independence, the Court relied on the *Associação Sindical dos Juízes Portugueses* case[103] and tied the right to a fair trial to the requirement of an independent and impartial judiciary as a guarantor of effective remedies.[104]

In some respects, the *LM* case clarified some matters that had remained obscure after *Aranyosi*. The CJEU indeed provided an embryonic answer to the crucial question of the applicability of the *Aranyosi and Căldăraru* judgment to other cases, where violations of non-absolute rights may be at stake. As regards defence rights enshrined under Articles 6, 47 and 48 of the Charter of Fundamental Rights, Advocate General Sharpston stated that 'the infringement in question must be such as fundamentally to destroy the fairness of the process'.[105] None of these rights are of an absolute nature, in contrast to Article 4 of the Charter. In *LM*, the CJEU took for granted that any breach of fundamental rights could trigger the *Aranyosi* test and stated that a right that one can derogate from, such as the right to a fair trial enshrined under Article 47 of the Charter of Fundamental Rights may still result in the EAW being postponed, provided that certain conditions are fulfilled, thus broadly following its Advocate General's opinion.[106] Nonetheless, the CJEU did not provide the Member States with a general rule enabling them to refuse the execution of any EAWs on the grounds that the right to a fair trial would not be upheld in the issuing State. Indeed, the *Aranyosi* test cannot be applied but on a case-by-case basis. It cannot be substituted to the procedure triggered under Article 7 TEU, thereby reserving the European Council with the exclusive competence to suspend mutual trust. If such a procedure were to succeed,

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[101] *Ibid.*, para. 68.

[102] *Ibid.*, para. 76.

[103] Which required Member States to maintain independent judiciaries. See C-64/16, *Associação Sindical dos Juìzes Portugueses*, 27 February 2018, ECLI:EU:C:2018:117.

[104] *LM*, paras. 63-66.

[105] Opinion of AG Sharpston delivered in C-396/11, *Radu* on 18 October 2012 ECLI:EU:C:2012:648 para. 97.

[106] Opinion of AG Tanchev delivered in C-216/18 PPU, *Minister for Justice and Equality v LM* on 28 June 2018, ECLI:EU:C:2018:517, paras. 57-58. The Court nonetheless avoids the flaws of the AG's opinion and notably rejects the high threshold set by his flagrant denial of justice test. In order to substantiate his assessment, AG Tanchev relied on rather extreme cases involving complicity with torture where the ECtHR has found a flagrant denial of justice due to the lack of independence and impartiality of the judiciary. This suggested that the threshold for establishing a violation of the right to a fair trial was so high that 'there would be virtually no situations where a flagrant breach could be determined.' The opinion seems moreover at odds with Sharpston's view in *Radu* that the 'flagrant denial of justice' test developed by the ECtHR was deemed 'unduly stringent', because 'it would require that every aspect of the trial process to be unfair', thus ignoring the fact that 'a trial that is only partly fair cannot be guaranteed to ensure that justice is done. See commentary of AG Tanchev's opinion on the Celmer case by P. Bard, W. Van Ballegooij, 'The AG Opinion in the Celmer Case: Why Lack of Judicial Independence Should Have Been Framed as a Rule of Law Issue', *VerfBlog*, 2 July 2018, as well as the Opinion of AG Sharpston delivered in *Radu*, para. 83.

which is woefully unlikely to happen given the high requirements of a consensus and the possibility for any EU country to veto the procedure, Member States should automatically refuse the execution of any EAW, that is 'without having to carry out any specific assessment of whether the individual concerned runs a real risk that the essence of his fundamental right to a fair trial will be affected'.[107] Instead of adopting what could be termed a 'reverse automaticity rule' implying, this time, automatic refusals instead of surrenders, the CJEU therefore maintained the approach taken in Opinion 2/13, in other words that mutual trust cannot be rebutted save in exceptional circumstances. Nevertheless, it is easy to foresee that, had the CJEU opted for a more stringent test and chosen not to defer to the European Council, it could have resulted in nearly paralysing EAW proceedings, possibly leading to the collapse of the system. The CJEU found itself in a particularly uneasy position; as noted elsewhere, it had to strike a delicate balance between 'the Scylla of being toothless and the Charybdis of "throwing the baby out with the bathwater"'.[108]

Whether *Aranyosi and Căldăraru* has become 'the cornerstone' of 'a Union that respects the fundamental rights'[109] is debatable in some respects. The difficult question of 'where to draw the line' emerged even more crucially after the *Celmer* case. Indeed, it is easy to foresee that an EAW could be suspended on other grounds, provided that the defence provides solid evidence substantiating the alleged fundamental rights violations.[110] However, the *Celmer* judgment suggests that there are doubts as to the applicability of the *Aranyosi* test to questions pertaining to the rule of law and independence and impartiality of the judge precisely. More, it is doubtful that the individual assessment approach developed by the CJEU in *Aranyosi and Căldăraru* can be transposed to the lack of independence and impartiality of the whole judiciary of the issuing State. Should judges no longer fulfil these two requirements, the guarantees provided to the executing State that the requested person will have his/her rights respected may also be flawed, thus compromising the assessment of the executing State.[111] Meanwhile, the question of the necessary threshold to suspend or refuse the execution of an EAW will emerge again as a crucial one. These issues suggest that the CJEU may have to develop a series of new tests, which are tailor-made to the problem at hand. In the meantime, clarifications will need to be brought to the scope of the 'exceptional circumstances' pursuant to which mutual trust can be rebutted, a question that the CJEU has yet to be confronted with.[112]

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[107] *LM* (n105), para. 72.

[108] D. Kosar, 'The CJEU Has Spoken Out, But the Show Must Go On', *VerfBlog*, 2 August 2018.

[109] Opinion of Advocate General Bobek delivered on 20 December 2017, Case C-571/17 PPU, *Openbaar Ministerie v. Samet Ardic*, ECLI:EU:C:2017:1026, para. 80.

[110] An interviewee notably mentioned the issue of corruption.

[111] See critical analysis by K.L. Scheppele, 'Rule of Law Retail and Rule of Law Wholesale: The ECJ's (Alarming) "Celmer" Decision', *VerfBlog*, 28 July 2018.

[112] L. Bay Larsen, 'Quelques remarques sur la place et les limites de la confiance mutuelle dans le cadre du mandat d'arrêt européen' 2018, 112, *L'Observateur de Bruxelles, Dossier Spécial (L'espace judiciaire européen : évolutions récentes et perspectives)*, 14.

CHAPTER VI

Compensation schemes for unjustified detention: Missing from the picture?

I. Comparative analysis of compensation schemes

Unjustified detentions may occur as a result of a mixture of different circumstances. These include, among other reasons, clear mistakes by the issuing or executing States (or both), or judicial errors on the person, following, for instance, the theft or selling of identity cards.[1] Whereas these issues have gained more visibility over the years, the EU has yet to adopt a dedicated instrument regulating unjustified detention for the purpose of the execution of an EAW. The FD EAW does not contain provisions on compensation for unjustified detention either. The silence of the EU legislator on these issues contrasts with the realm of cross-border victims, where a Directive designed to facilitate the interoperability of national compensation schemes for victims of intentional and violent crimes was adopted in 2004. In the absence of EU rules governing compensation for unjustified detention, differences arise between compensation systems available in domestic proceedings in terms of grounds for application, amounts awarded, time limits for application and eligibility criteria, as well as the extent to which national compensation schemes have been or can be transposed to transnational situations.

A. Grounds for claiming compensation, amounts awarded, eligibility conditions and time limits

All the Member States from the sample examined have established a compensation system for unjustified detention occurring within the framework of domestic proceedings. The content of existing schemes and procedures to claim compensation for unjustified detention still vary from one Member State to another. The most striking differences occur in terms of grounds for application, amounts awarded, time limits for application and

[1] Weyembergh, Armada and Brière (above, Introduction, n8), 41.

eligibility criteria.[2] Starting with the grounds for granting compensation, the concept of 'erroneous assessment by the judicial authority' seems to be the most widespread ground for granting compensation (e.g. Spain, Germany, Romania[3], Italy, Finland, Ireland[4]). In other countries, compensation claims must fulfil strict conditions (e.g. France, Spain, the Netherlands). In France, admissibility of requests for compensation for damages is provided on condition that the trial ended with a discharge, a decision of acquittal or a decision to drop the charges. Under Article 149 of the Criminal Procedure Code, the claim must be filed with the court within six months of notification of the final decision stating the innocence of the accused.[5] These conditions were criticised for being too strict, in the recent *Camara* scandal, where compensation for unjustified detention was denied in the first place because the person had not been subject to a final decision establishing their innocence. Instead, Mr Camara was simply released from prison (see box).

Unjustified detention for mistaken identity: a French example[6]

In 2001, Mohamed Camara was arrested by the Belgian authorities on the basis of an EAW issued by France. Mohamed Camara was accused of the rape of two minors aged 15. He was subsequently imprisoned for a three-month term in Belgium before he was extradited to France to spend another two months in prison. However, it turned out, after a DNA analysis, that the French authorities had mistaken the identity of Mr. Camara with the homonymous rapist. Mr. Camara sought compensation from the French authorities some years afterwards. He struggled somehow to receive compensation from the State because he had been granted neither an acquittal nor a discharge nor a decision to drop the charges. Mr. Camara *in fine* obtained compensation amounting to EUR 45,000.

In Spain too, strict conditions relating to compensation for pre-trial imprisonment apply. Under the Judiciary Act, the scope of compensation is limited to those cases where

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[2] It is worth noting that those differences had been underlined by the Council of Europe in the context of extradition. CoE, European Committee on Crime Problems (CDPC), Committee of experts on the operation of European Conventions on co-operation in criminal matters (PC-OC), Replies concerning compensation issues related to the European Convention on Extradition, PC-OC (2008) 03 Rev 3, 2 November.

[3] In Romania, compensation may be claimed as regards pre-trial detention when criminal detention was deemed unlawful by the competent judicial authorities. See National report No. 2 on Romania, section on compensation for unjustified detention (point 14) (see also Part I, Chapter V of this edited volume).

[4] In Ireland, the sole ground on which unjustified detainees may rely on is that of miscarriages of justice. See especially 'EAW-rights, Analysis of the implementation and operation of the European Arrest Warrant from the point of view of defence practitioners' (above, Part II, Chapter III n68), 71. See also Irish Penal Reform Trust, 'The practice of pre-trial detention in Ireland', 2016, 32.

[5] 'Compensation after detention based on an EAW' Roundtable organised by the European Judicial Network, Paris, 22 September 2017.

[6] More information on M. Leplongeon, '45 000 euros pour avoir été emprisonné par erreur. Trop peu ?', *Le Point*, 6 January 2014. Quoted in National report No. 2 on France, Section on compensation for unjustified detention (point C).

there has been an error in a judicial activity or it cannot be proven that the appellant has committed a crime, whenever there is not enough evidence proving the participation of the appellant to such a crime.[7] Other, more parsimonious, grounds for compensation claims include irregular functioning of the judicial administration (e.g. Spain) and losses of business due to extradition for unjustified detention (e.g. Germany).[8] Another area of procedural divergence relates to the time limits to lodge a compensation claim. These range from three months (the Netherlands[9]; Spain) and six months (France[10]; Finland[11]) to one year (Germany, Hungary[12]) and two years (e.g. Italy[13]), after the end of the proceedings.

Once the compensation claim has been processed by the competent authorities, a financial sum is allocated to the claimant. However, national compensation rates per day differ significantly, from EUR 25 (e.g. Germany),[14] to EUR 80-105 (e.g. the Netherlands),[15] EUR 100-120 (e.g. Finland)[16] and more than EUR 230 (e.g. Italy).[17] Factors to be taken into consideration when determining the amounts of compensation also vary. For example, they include whether the person has been detained in a police station or in a prison (e.g. the Netherlands) or the person's age (e.g. France).[18] In Spain, the amount of compensation is calculated according to the time spent in detention and the damages incurred to the person and his/her family.[19]

B. Applicability of national schemes to cross-border proceedings

The existence of a national compensation scheme notwithstanding, the majority of countries analysed do not foresee compensation for individuals involved in cross-border cooperation frameworks, for example in the event a request for surrender

[7] The possible limitations on the number of individuals benefiting from compensation induced by the restricted scope of the Spanish legislation were somewhat mitigated by ECHR case law. The Spanish Constitutional Court ruled that this provision should not be such as to limit the right to the presumption of innocence.

[8] National report No. 2 on Germany, Section on Compensation (A(2)(a)) (see also Part I, Chapter II of this edited volume).

[9] Complainants must apply within three months after the surrender procedure ended, i.e. surrender was either denied by the Dutch judicial authorities (either the Court or the Prosecutor), or the EAW was withdrawn.

[10] 'Compensation after detention based on an EAW' (n5). See also Art. 149 CCP.

[11] The indicated amount applies to short-term detention. For longer detentions compensation rates may be raised to thousands of euros. National report No. 2 on Finland, Section on detention (point 14).

[12] National report No. 2 on Hungary, Section on Detention (point 14) (see also Part I, Chapter III of this edited volume).

[13] 'Compensation after detention based on an EAW' (n5).

[14] This reimbursement mainly concerns the costs for a Germany-based lawyer.

[15] 105 euros per day at the police station, 80 euros per day in a pre-trial detention facility. See 'EAW-rights, Analysis of the implementation and operation of the European Arrest Warrant from the point of view of defence practitioners' (above, Part II, Chapter III, n68), 71.

[16] National report No. 2 on Finland, Section on detention (point 14). 'EAW-rights' (above, Part II, Chapter III, n68), 71.

[17] 'EAW-rights' (above, Part II, Chapter III, n68), 71, 279.

[18] 'Compensation after detention based on an EAW' (n5), 3.

[19] National report No. 2 on Spain, Section on detention conditions (point 14).

was withdrawn after the requested person served a period of pre-trial detention in the executing State.[20] As regards the existence of a national system providing for compensation in transnational cases, only two Member States in the sample analysed, i.e. the Netherlands and Germany, have established a compensation system that clearly provides the possibility for 'surrender victims' to obtain compensation for unjustified EAW detention. The two compensation systems are, however, radically opposed in terms of *modus operandi*. The German scheme applies only when Germany acts as an issuing authority, unless the authorities are responsible for the unjustified persecution. Compensation under the Dutch rules can be claimed only when the Netherlands is the executing authority: the claim may be admissible only if surrender was refused by the Dutch court – in any other circumstances, for example if the EAW was withdrawn, the executing authorities cannot be held responsible.[21] In other countries (e.g. Finland, Italy, France), although the national authorities have not dedicated a specific compensation mechanism for *transnational* cases, the supreme courts ruled that the national compensation scheme also applied to EAW 'victims'.[22]

As a result of uncertainties regarding the applicability of compensation schemes to transnational situations in some countries, it is still unclear which authority should incur the costs of compensation. A study pointed out that there is a general agreement on designating the issuing State as responsible for dealing with the compensation claim if the judicial error was made in the latter country even if the wrongful detention took place in the executing State,[23] as is the case in France. In Finland and Italy, however, the case law of the courts suggests that compensation may be granted although they acted as executing States. In Finland more specifically, the State usually pays compensation without many formalities to be fulfilled; the State Treasury developed dedicated forms for compensation claims and the final decision is made within a month.[24] If payments are issued later than originally expected, interest payments are made to the claimant.[25]

II. Impact on mutual recognition and cross-border cooperation

The existence of significant variations in compensation regimes comes as little surprise. There are no EU rules establishing the duty to ensure fair compensation in EAW cases nor are there provisions organising the allocation of liability between the issuing and the executing States. As a result, compensation schemes are rather ineffective in cross-border situations and the absence of rules on liability often makes it difficult to pinpoint the Member State responsible for addressing the compensation claim. Logically therefore, fundamental rights concerns arise.

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[20] WEYEMBERGH, ARMADA and BRIÈRE (above, Introduction, n8), 43.

[21] A.M. VAN KALMTHOUT, 'An Analysis of Minimum Standards in Pre-trial Detention and the Grounds for Regular Review in the Member States of the EU', *in* A.M. VAN KALMTHOUT, M.M. KNAPEN, C. MORGENSTERN (eds.), *Pre-Trial Detention in the European Union*, Tilburg, Wolf Legal Publishers, 2009.

[22] See national reports No. 2 on Finland, Italy and France, Section on detention (point 14).

[23] 'EAW-rights' (above, Part II, Chapter III, n68), 71.

[24] *Ibid.*, p. 72.

[25] *Ibid.*

A. Ineffective compensation schemes in cross-border situations …

Despite the existence of a compensation scheme in most EU States examined, the risk of being deprived of compensation exists. The granting of compensation in cross-border cases may be thwarted by procedural costs, procedural risks, language issues and difficulties associated with the lack of understanding of the legal regime in a different EU State. An example of this relates to the case of a Slovak citizen arrested on the basis of an EAW issued by the Netherlands.[26] The only evidence held against him was a DNA sample found at the crime scene. Despite the fact that the person could prove that he was not in the Netherlands at the time that the offence was committed, the Slovak court consented to his surrender, considering that the EAW was formally valid and that his claims should be dealt with in the issuing State. After the person's surrender, the Dutch court realised that the evidence was insufficient and released him, leaving him with no money or assistance and without even notifying his release to the Slovak embassy. Despite the endured sufferings (bad reputation, economic loss and psychological damage), he renounced the option to lodge proceedings in the Netherlands and did not receive any compensation.

B. … exacerbated by the absence of rules on liability

The risk of being deprived of compensation is exacerbated by the absence of provisions organising the allocation of liability between the executing and the issuing States, which logically derives from the absence of EU rules on compensation in EAW cases. In Germany, cases occurred where compensation for damage was denied by the courts when the person had to be released because prosecution was time-barred and extradition could no longer take place or because the German courts found that the extradition request was inadmissible.[27] A case dating from 2005 clearly illustrates the way in which the burden of responsibility may shift between the issuing and executing States. In the situation at hand, a person was provisionally arrested upon arrival in Germany on the basis of a Schengen Information System (SIS) alert introduced by the Austrian authorities. Once informed of the arrest, the issuing authorities notified Germany that the SIS alert had been revoked. When the arrested person claimed compensation in Germany, he was denied such a right, on the ground that, at the time of the arrest, it was not apparent that the alert had been revoked.[28]

In the absence of rules governing liability, it cannot be excluded from the example above that the requested person is denied compensation on the grounds that the executing and the issuing States were unable to come to an agreement on responsibility.[29] It is interesting to note that other instruments, such as the Framework

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[26] Case quoted in WEYEMBERGH, ARMADA and BRIÈRE, (above, Introduction, n8), 42.

[27] National report No. 2 on Germany, Section on Compensation (A(2)(a)) (see also Part I, Chapter II of this edited volume).

[28] Case quoted in in WEYEMBERGH, ARMADA and BRIÈRE, (above, Introduction, n8), 42.

[29] *Ibid.*

Decision on Freezing Orders, [30] or the SIS II Regulation,[31] do contain provisions allocating liability. In particular, Article 48 of the SIS II Regulation reads that:

> 'Each Member State shall be liable in accordance with its national law for any damage caused to a person through the use of N.SIS II. This shall also apply to damage caused by the Member State which issued the alert, where the latter entered factually inaccurate data or stored data unlawfully. If the Member State against which an action is brought is not the Member State issuing the alert, the latter shall be required to reimburse, on request, the sums paid out as compensation unless the use of the data by the Member State requesting reimbursement infringes this Regulation.'

The latter instrument is of particular interest because it creates a precedent, under which both the issuing and executing States may be held liable for damages caused to a person, for technical or legal errors committed when they used the SIS system. It is particularly relevant to unjustified detention occurring within the framework of EAWs, because Article 9(2) FD EAW allows the transmission of EAWs via an alert in SIS II. Unfortunately, the absence of review of SIS alerts often results in the maintaining of sleeping or outdated alerts in the system,[32] that sometimes result in unjustified arrests.[33] Although the mechanisms governing liability and the procedures for claiming compensation should be further spelled out, the provisions of the SIS II Regulation lay the basis from which inspiration may be drawn for the adoption of a future instrument. Care should nonetheless be paid not to widen existing inconsistencies in EU instruments governing the responsibility for compensation. Whereas in the FD Freezing Orders, it is the issuing State that can be held liable, in the SIS II Regulation, both the issuing and the executing States have a responsibility for damage. Finally, the EPPO Regulation introduces a new rule on liability, this time conferring jurisdiction over compensation for damages on the CJEU.[34]

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[30] Although it does so in a limited way. See Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence, *OJ*, No. L 196, 2 August 2003. Art. 12 reads: '1. Without prejudice to Article 11(2), where the executing State under its law is responsible for injury caused to one of the parties mentioned in Article 11 by the execution of a freezing order transmitted to it pursuant to Article 4, the issuing State shall reimburse to the executing State any sums paid in damages by virtue of that responsibility to the said party except if, and to the extent that, the injury or any part. of it is exclusively due to the conduct of the executing State. 2. Paragraph 1 is without prejudice to the national law of the Member States on claims by natural or legal persons for compensation of damage.'

[31] Regulation No. 1987/2006 of the European Parliament and of the Council of 20 December 2006 on the establishment, operation and use of the second generation Schengen Information System (SIS II).

[32] See Weyembergh, Armada and Brière (above, Introduction, n8), 16.

[33] See the *Prazcijk* case below.

[34] Art. 113 Regulation 2017/1939.

C. Fundamental rights concerns and misuse of mutual trust

Interestingly, mutual trust is sometimes invoked as a justification for refusing a claim for compensation. The *Praczijk* case[35] provides an excellent illustration of inappropriate implementation of the principle of mutual trust. In the proceedings at hand, an Italian judicial authority issued an EAW against a Belgian national called Praczijk. On that basis, Praczijk was arrested by the Belgian authorities and placed in detention. In spite of doubts concerning his identity, no additional information was requested from Italy. The person was then surrendered, whereupon the competent authorities soon realised that he had been mistakenly confused with the suspect and released him. When questioned by a member of the Belgian Parliament on the compensation to be paid to Mr Praczijk, the Belgian Minister of Justice at the time, L. Onkelynx, declared that the Belgian authorities did not have to pay any compensation since they had not made any mistake but merely satisfied their duty of mutual trust.

Promoting mutual recognition and mutual trust is conditional upon the protection of individuals' rights.[36] Compensation of persons who suffered from unjustified detention in transnational situations is intrinsically linked to fundamental rights which, by the same token, may have a positive – or adverse – impact on mutual trust. As early as in 2008, the Council of Europe emphasised that 'compensation of persons is a very important question, in particular as it affects human rights, which would deserve further consideration by the PC-OC at a later stage'.[37] As noted elsewhere, the EU has a responsibility to ensure that the individual who suffers from unjustified detention receives fair compensation, as provided under Article 6 of the Charter of Fundamental Rights read in conjunction with Article 52(2).[38] It is, moreover, in line with Article 5(5) ECHR. This provision provides a general entitlement of victims or detention to a direct and enforceable right to compensation before national courts.[39] Absence of provisions on unjustified detention may have an impact on other MR instruments dealing with the movement of prisoners, such as the FD Transfer of Prisoners. Further research is, however, needed to identify whether compensation issues arose in the application of this instrument.

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[35] See Weyembergh and Santamaria, 'La reconnaissance mutuelle en matière pénale en Belgique', *in* Vernimmen-Van Tiggelen *et al.*, (above, Introduction, n29), 67.

[36] Between 2012 and 2017, approximately 104 EAW compensation cases have been filed to France. 54 cases occurred in the Netherlands for the 2012-2016 period. 'Compensation after detention based on an EAW' (n5).

[37] PC-OC, 'List of decisions taken at the 6th meeting of the restricted Group of experts on international co-operation (PC-OC Mod) enlarged to all PC-OC members', 30 September-2 October 2008, 1.

[38] See Weyembergh, Armada and Brière (above, Introduction, n8), 43.

[39] Art. 5(5) ECHR provides that 'Everyone who has been the victim of arrest or detention in contravention of the provisions of this Art. shall have an enforceable right to compensation', and several judgments have already dealt with this issue. See the fact sheet of the ECtHR. Retrieved at: www.echr.coe.int/Documents/Guide_Art_5_ENG.pdf.

CHAPTER VII

The right to be present at a trial and conditions of EAW surrenders

The right to be present at the trial is regulated by Framework Decision 2009/299/JHA (hereafter the FD *in absentia*). It lays down 'the circumstances in which the person concerned must be deemed to have waived, voluntarily and unambiguously, his right to be present at his trial'.[1] In other words, a decision rendered *in absentia* may not constitute a ground for refusing the execution of an EAW, provided that one of the four conditions listed under Article 2 is met.[2] Just as the ECtHR did in its case law,[3] the Court of Justice of the EU took the view in its seminal *Melloni* judgment that, although the right of the accused person to appear in person at his/her trial is 'an essential component of the right to a fair trial', 'that right is not absolute'.[4] Mr Melloni was subject to a European Arrest Warrant issued by Italy after he had been sentenced to ten years of imprisonment. The conviction took place *in absentia* since Mr Melloni had fled to Spain to escape Italian justice. In order to challenge the EAW request,

[1] C-399/11, *Stefano Melloni v. Ministerio Fiscal*, 26 February 2013, ECLI:EU:C:2013:107, para. 52.

[2] (i) The person was summoned in due time in person and informed of the scheduled date and place of the trial and informed in due time that a decision may be handed down if or she does not appear at the trial; (ii) The person was made aware in due time of the scheduled trial and gave a mandate to a legal counsellor to defend him or her at the trial; (iii) after being served with the decision and being expressly informed about her right to a retrial, or an appeal, the person expressly stated that he or she does not contest the decision or did not request a retrial or appeal within the applicable time frame; and (iv) the person was not personally served with the decision but will be personally served with it without delay after the surrender and will be expressly informed of his or her right to a retrial, or an appeal, will be informed of the time frame within which he or she has to request such a retrial or appeal, as mentioned in the relevant European arrest warrant.

[3] See, for example, judgment of the ECtHR of 1 March 2006 in *Sejdovic v. Italy*, paras. 82, 86 to 88 and 99.

[4] *Melloni* (above n1), para. 49.

Mr Melloni invoked the strict constitutional regime governing surrender for the purpose of the execution of a sentence rendered in *in absentia* trials in Spain and providing for a higher degree of protection of individuals compared with the FD. In its preliminary reference to the CJEU, the Spanish court raised the question of the possibility to interpret Article 53 of the Charter of Fundamental Rights[5] as opening the possibility for Member States to grant more extensive fundamental rights to the accused than the ones afforded by EU law. The CJEU answered in the negative, arguing that such an interpretation, in an area where the fundamental rights had been harmonised in an exhaustive way, would undermine the effectiveness and the primacy of EU law.

I. Comparative analysis of national regimes governing *in absentia* trials

As hinted at in the *Melloni* case, the right to be present at the trial encapsulates a greater significance in some countries compared to others. Regarding specific aspects of *in absentia* trials, the national legislator has sometimes gone beyond the letter of the Framework Decision.

A. Various understandings of the right to be present at the trial

A first category of Member States considers that the right to be present during the trial is fundamental to due process and *in absentia* trials are usually not permitted in domestic proceedings (e.g. Ireland, Germany, Spain, Finland). Sometimes, the exclusion of *in absentia* trials is the result of the legal tradition that these countries belong to. In Ireland, the adversarial nature of trials prohibits judgments *in absentia* in domestic cases.[6] In common law cultures, it is generally assumed that *in absentia* trials simply do not take place and the exercise of jurisdiction requires having the person in custody of the court.[7] Until recently, Irish law would make surrender for the purpose of executing a custodial sentence rendered *in absentia* subject to the requirement that the requested person had 'fled' the issuing State.[8] The unusual (and strict) condition

[5] Art. 53 of the Charter reads: 'Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union, the Community or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions.'

[6] European Committee on Crime Problems, Committee of Experts on the Operation of European Conventions on Co-operation in Criminal Matters (PC-OC), Questionnaire concerning judgments in absentia and the possibility of a retrial – Summary and Compilation of Replies, PC-OC (2013) 01 Rev.3 Bil., 29.

[7] IBA International Criminal Court and International Criminal Law Programme, Report on the Experts' Roundtable on trials in absentia in international criminal justice, September 2016. In the UK for example, in absentia trials were prohibited until 2001. Since then, they have taken place on a parsimonious basis, and under strict conditions. See EU strengthens trials in absentia – Framework Decision could lead to miscarriages of justice, Briefing note, London: Open Europe. Retrieved at: www.archive.openeurope.org.uk/Content/documents/Pdfs/tia.pdf.

[8] See the *Tobin I* case, National report No. 1 on Hungary (case 1) (see also Part I, Chapter III of this edited volume).

provided under Irish law led to tensions between Ireland and Hungary.[9] In Germany and Spain, the right to be present at a trial is a constitutional right. In Spain, the right for the defendant to be present at his own trial constitutes an absolute right which is intrinsically linked to the principle of human dignity. The Constitutional Court established in 2000 that the right to be physically present at the hearing in criminal proceedings relating to serious offences constituted one of the essential components of the absolute content of the right to a fair trial enshrined in Article 24(2) of the Constitution.[10] Prior to the *Melloni* judgment, the Spanish courts even went a step further and held that an EAW could be refused on account of an *indirect* violation of an absolute right, such as the right to be present at the trial.[11] The 'indirect violation of the absolute content of a fundamental right' approach led Spain to make surrender conditional upon the guarantee of a retrial whenever the person was sentenced *in absentia* for a serious offence,[12] thus leading Spanish courts to refuse the execution of several EAWs.[13] In a similar fashion, in Germany, the right of the accused person to be present at his/her trial is viewed as an essential requirement of the right to a hearing in accordance with the law and is intrinsically linked to the principle of human dignity.[14] *In absentia* trials are not permitted under the domestic code of criminal procedure when the accused is charged with serious crimes.[15] The right to be present at one's trial is not a constitutional right in Finland. However, trials held *in absentia* are usually not permitted either in domestic proceedings, although narrowly defined exceptions exist.[16]

A second category of countries applies less stringent standards as regards what is meant by the 'presence' of the appellant at the trial, meaning that *in absentia* trials

[9] *Ibid.* In 2002, Mr Tobin had been sentenced *in absentia* to a three-year imprisonment term by the Hungarian court for the crime of murder, while he was residing in Ireland. Mr Tobin did not return to Hungary to service his sentence. The surrender request issued by Hungary was refused by the Irish court, on the grounds that Mr Tobin had not fled Hungary, a yet important requirement under Irish law. The Irish law was subsequently amended after this case.

[10] M. Garcia, 'STC 26/2014: The Spanish constitutional court modifies its case law in response to the CJEU's *Melloni* judgment', *European Law blog*, 17 March 2014.

[11] Sentencia 91/2000, 30 March.

[12] If a person has been convicted in his absence, a surrender for the execution of that conviction must be made conditional on the right to challenge the conviction in order to safeguard that person's rights of defence, even if he had given power of attorney to a lawyer who effectively represented him at the trial. See *Melloni* (above n1), paras. 20 and 22.

[13] Sentencias n. 177/2006 of 5 June; 199/2009 of 28 September.

[14] PC-OC (2013) 01 Rev.3 Bil., 17.

[15] German Code of Criminal Procedure, §§ 230(1), 232. The constitutional identity control was applied for the very first time in EAW proceedings, but it cannot be excluded that it may be transposed to other mutual recognition instruments that carry the risk of infringing the constitutional guarantees formulated in the German Basic Law.

[16] The defendant i) has been invited and informed that the trial may go on without him/her; ii) consented to the trial being held in absentia and his/her presence is not necessary; the person is evading the proceedings. See National report No. 2 on Finland, Section on in absentia (point 35).

are allowed under national law (e.g. the Netherlands, France[17], Romania, Italy). For example, both France and the Netherlands apply the 'default of appearance' procedure, meaning that the court will try the case as usual if the person fails to appear.[18] As a consequence of differing degrees of acceptance of *in absentia* trials, the conditions of a retrial once the person has been tried *in absentia* are different as well, in the sense that they depend on more or less narrowly defined conditions. For instance, retrial procedures do not always allow full reconsideration of all material evidence.[19]

B. Implementation beyond the letter of the FD in absentia

Alongside the restrictive approach taken by a few countries to *in absentia* trials, some even went beyond the provisions contained under the FD *in absentia* in their national laws implementing the EAW. Firstly, in some cases, Member States transposed the *optional* ground for refusal of Article 4a as a *mandatory* one (e.g. Germany, Spain, Ireland, Italy, the Netherlands). As such, the choice of a mandatory transposition seems to revert to the logic of the Framework Decision, as it transforms a 'possibility of non-execution (…) into a requirement of non-execution'.[20]

In other cases, a few countries even extended the scope of Article 4a FD EAW. By way of example, the Dutch implementing law has included appeal proceedings within its ambit; the Dutch authorities referred a question to the Court of Justice of the EU on the scope of the concept of 'trial resulting in the decision' of the FD EAW in the *Tupikas* case.[21] The CJEU endorsed the Dutch approach, which is more protective: it applies the guarantees formulated under Article 4a to both the first decision and the decision taken on appeal. The CJEU's reasoning relied on the broad scope of Article 6 ECHR, which applied not only to the finding of guilt, but also to the determination of the sentence. The CJEU asserted that, because the appeal proceedings are decisive in determining the sentence of the person, the defendant must be able to exercise his/her rights of defence to influence the final decision that is taken in this respect. The

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[17] The French CCP was amended in 2004 to abolish the *jugement par contumace,* whereby the accused person could be sentenced without receiving legal assistance, nor having the right to an appeal (see ex Arts 627-632 CCP). See ECtHR, *Krombach v France*, App. No. 29731/96, 13 February 2001. The Court ruled that contumace sentences were in breach of Art. 6(3) ECHR (see also Part I, Chapter IV of this edited volume).

[18] National report No. 2 on the Netherlands, Section on in absentia (point 4) (see also Part I, Chapter IV of this edited volume). The French CCP provides for three different types of 'judgment by default': i) by default; ii) by repeated default; or iii) by adversarial hearing subject to notification. The conditions of in absentia trials differ from a category to another. See PC-OC (2013) 01 Rev.3 Bil., 16.

[19] B. de Sousa Santos (ed.), 'The European arrest warrant in law and in practice: a comparative study for the consolidation of the European law-enforcement area', 2010, Permanent Observatory of Justice, University of Coimbra.

[20] Opinion of Advocate General Bobek in Case C-270/17 PPU, *Openbaar Ministerie v Tadas Tupikas*, 26 July 2017 ECLI:EU:C:2017:609/, para. 75.

[21] C-270/17 PPU, *Openbaar Ministerie v. Tadas Tupikas*, 10 August 2017, ECLI:EU:C:2017:628. In the proceedings at hand, it could not be ascertained whether *Tupikas*, during appeal proceedings taking place in Lithuania, had been informed of the time and place of the hearing, or had authorised his lawyer to represent him.

CJEU reiterated its judgment in the subsequent *Zdziaszek* case, whereby the Dutch authorities asked whether proceedings resulting in a cumulative sentence constituted a trial resulting in a decision within the meaning of the FD EAW.[22] In Ireland, the transposition law refers to non-appearance 'at the proceedings', whereas the FD *in absentia* only refers to non-appearance 'at the trial'. This minor difference in transposition was brought to light in 2017 in a case concerning an *in absentia* judgment on sentencing. The Polish authorities had imposed a sentence on the appellant. Once part-served, the sentence was suspended and then re-instated without notification to the appellant, who was sought for surrender in Ireland. The question boiled down to whether the case actually fell under the provisions preventing surrender. The Irish court concluded on the absence of clarity on the applicability of Article 4a FD and held it necessary to make a reference to the Court of Justice of the European Union on the scope of 'trial' within Article 4a of the Framework Decision on European Arrest Warrant.[23] On the basis of the judgments delivered in the *Tupikas* and *Zdziaszek* cases, the Irish court withdrew its reference[24].

II. Impact on mutual recognition

The coexistence of different approaches to *in absentia* trials lies at the core of the longstanding debate on the conundrum faced by EU law since *Melloni* on the adoption of common *minimum* standards. Whereas minimum rules are beneficial for some Member States, other national orders are prevented from going beyond EU guarantees. In some cases, in order to ensure the effectiveness of the EAW mechanism, those Member States may be forced to lower their national standard of protection, as has happened in Spain after the CJEU delivered the *Melloni* judgment. *Melloni* was heavily criticised in the literature and the reasoning of the CJEU was condemned for '(endorsing) the Union's objective speedy surrender, renouncing the highest level of protection of fundamental rights provided by the law of the executing State'.[25]

Dissatisfaction with the low protection afforded to individuals confronted with *in absentia* trials in some countries drove some Member states to re-instal a degree of control over the application of EU law, thus threatening the primacy of EU law. The coexistence of different approaches to *in absentia* trials has also had several implications for the practical operation of the EAW. Surrender procedures have been delayed or blocked because EU States do not always conform to FD *in absentia* provisions.

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[22] See C-271/17 PPU, *Zdziaszek,* 10 August 2017, ECLI:EU:C:2017:629.

[23] *Minister for Justice v. Lipinski*, [2017] IESC 26.

[24] C-376/17, *Lipinski*, Order of 23 February 2018, ECLI:EU:C:2018: 175.

[25] M. Daniele, 'Evidence gathering in the realm of the European Investigation Order, From National Rules to Global Principles', 2015, 6, *New Journal of European Criminal Law*, 188. At the same time, if the CJEU attempted to prevent Member States from invoking their national standards in the operation of FD EAW. Granting such margin for manoeuvre to Member States would have been detrimental to the effectiveness of the principle of mutual recognition, mutual trust and would have called into question the primacy of EU law.

A. Dissatisfaction with the minimum standards approach: Towards the re-instalment of a degree of national control?

The existence of widely divergent standards across the EU means that some countries consider that the level of protection that they confer on EU citizens is higher than in other EU States. Actual or perceived asymmetries drove some Member States to re-instal a certain degree of national control over surrender procedures. Countries with a high standard of protection may find themselves dissatisfied with the standards applicable in other legal orders. Fears that executing countries may have to lower their fundamental rights standards in transnational cooperation situations could give rise to 'episodes of mistrust' towards certain legislative systems deemed unable to provide 'adequate guarantees'.[26] Although Spain revised its Constitution in order to conform to the CJEU ruling in *Melloni*, the Spanish Constitutional Court, in its judgment implementing the CJEU's ruling in *Melloni*, issued a reserve as regards the primacy of EU law.[27] It emphasised that the sovereignty of the Spanish people should be preserved and affirmed the supremacy of the Spanish Constitution. Moreover, it warned that the Constitutional Court remained competent if EU law were to become irreconcilable with the Spanish Constitution.[28] The German Federal Constitutional Court expressed an even clearer warning to the EU. By order of 15 December 2015, the Federal Constitutional Court applied the 'identity review' to an *in absentia* case.[29] The concept of identity review directly stems from the *Solange* jurisprudence[30] and implies that all the elements constitutive of Germany's constitutional identity may act as a limit to the application of EU (or international) laws that entail a breach of this identity.[31] In the case at hand, it was questionable whether the complainant would

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[26] B. Galgani, 'Extradition, Political Offence and the Discrimination Clause', *in* Ruggeri (above, Introduction, n28), 173.

[27] Sentencia 26/2014, 13 February 2014.

[28] *Ibid.*, para. 3.

[29] Federal Constitutional Court of Germany, Protection of fundamental rights in individual cases is ensured as part of identity review, Press Release 4/2016 of 26 January 2016. Retrieved at:

www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2016/bvg16-004.html;jsessionid=A1235A9967C58FC4EC86960E0E430AD2.2_cid392.

[30] In the Solange I order of 1974, the Federal Constitutional Court established an identity review mechanism according to which EU law would not be applied in Germany if it conflicted with those rights that lie at the core of the constitutional identity of Germany. This ruling was reviewed by the Solange II order, after the EU framework for fundamental rights underwent several improvements. The order of 2015 has been dubbed 'Solange III' by some commentators. See M. Hong, 'Human Dignity and Constitutional Identity: The Solange-III-Decision of the German Constitutional Court', *Verfassungsblog*, blogpost, 18 February 2016. Retrieved at: www.verfassungsblog.de/human-dignity-and-constitutional-identity-the-solange-iii-decision-of-the-german-constitutional-court. As regards Solange I and Solange II, see: Internationale Handelsgesellschaft von Einfuhr-und Vorratsstelle für Getreide und Futtermittel, [1974], Decision of 29 May 1974, BVerfGE 37, 271 CMLR 540 (Solange I); Order of the Second Senate of the German Constitutional Court of 22 October 1986 – 2 BvR 197/83 (Solange II).

[31] On the identity review and the internal struggle within the German legal academy to accept the primacy of EU law, see B. Davies, 'Resistance to European Law and Constitutional

have the opportunity of a new evidentiary hearing against the judgment *in absentia* at the appeal stage in Italy. The Federal Constitutional Court quashed the decision taken by a lower court to execute an EAW request issued by Italian judicial authorities as it violated the right to a fair trial as a constitutive element of the right to human dignity enshrined under Article 1 of the German Constitution. It emphasised that:

> "The fact that the principle of mutual trust does not apply without limits even according to Union law also signifies that the national judicial authorities, upon relevant indications, are authorised, and under an obligation, to review whether the requirements under the rule of law have been complied with, even if the European arrest warrant formally meets the requirements of the Framework Decision. Also under a Union law perspective, an effective judicial review presupposes that the court that decides about the extradition is able to conduct the relevant investigations as long as the extradition system established by the Framework Decision remains effective in practice. As a consequence, the requirements under Union law with regard to the execution of a European arrest warrant are not beneath those that are required by (the Basic Law) as minimum guarantees of the rights of the accused."

The identity review triggered in the aforementioned German order, dubbed the 'Solange III decision',[32] has occurred twice since then, as regards the right to remain silent and detention conditions.

The propensity of some Member States to challenge the primacy of EU law should not be neglected. Fears that this trend finds echoes in other countries should not be overlooked. The right to be present at the trial is a fundamental right which is sometimes guaranteed by national constitutions. Even though the national laws do not always provide that executions of EAWs should be systematically turned down if the conditions for the right to be present are not met, all MSs examined have introduced – in a more or less explicit manner, a fundamental rights ground for refusal in their national laws transposing the EAW. Even where Member States have not transposed the FD *in absentia* as a mandatory ground for refusal, it cannot be excluded that the execution of an EAW could be refused on the ground that the fundamental rights of the defendant will not be safeguarded in the issuing country. According to the findings of a recent study, *in absentia* trials is where the fundamental rights ground for refusal enshrined under national laws implementing the EAW is most likely to be triggered.[33]

B. Minimum standards: a more flexible approach after the Taricco *saga?*

Recent case law shows that the debate on whether national protection standards should prevail over EU law is far from over and is not confined to *in absentia* trials. The question of national differences was analysed further in the so-called *Taricco* saga, where the CJEU, in its final judgment, accommodated a certain degree of differentiation so as to protect the fundamental principles enshrined at the national level.

Identity in Germany: Herbert Kraus and Solange in its Intellectual Context', 2015, 21, *European Law Journal*, 434, 459.

[32] M. Hong, 'Human Dignity and Constitutional Identity' (n30).

[33] T. Marguery (above, Introduction, n28), 421.

The issue at hand was the compatibility of time limitations introduced in the Italian criminal code in tax fraud with the Member States' general obligation to fight against PIF offences under Article 325 TFEU.[34] In *Taricco I*, the Court of Justice of the EU overturned the time limitation system enshrined in Italian law to give full effect to Article 325 TFEU.[35] Those findings were contested by the Italian Court of Cassation in the *Taricco II* case[36] on several grounds. *Inter alia*,[37] it was argued that the Italian time limitation is covered by the legality principle as enshrined in the Constitution[38] and the Italian Constitution guarantees a higher level of protection of fundamental rights than that recognised in EU law. References were made to Article 53 of the Charter of Fundamental Rights[39] and to Article 4(2) TEU to support the argument that national courts cannot conform to *Taricco I* without calling into question the Italian constitutional identity.[40] The CJEU, in its judgment, somehow shelved the issue of confronting the case at hand to the principles of *Melloni*,[41] which, however, had been discussed extensively in its Advocate General's opinion.[42] Instead, it reaffirmed the crucial aspects of *Taricco I*, such as the direct effect of Article 325 TFEU and the obligation to comply with that provision, but allowed the Italian courts to disapply the findings of *Taricco I* whenever the requirements of certainty, precision and foreseeability inherent to the principle of legality would be violated.[43] Put in a different way, the CJEU allowed the Italian criminal courts to apply their own national standards of protection. It is difficult to say whether the *Taricco II* case constitutes 'a risk or an opportunity'[44] for *in absentia* trials and cross-border cooperation at large. Some have argued that *Taricco II* is the recognition that the specificities of domestic

[34] C-105/14, *Taricco I and other*s, ('Taricco I'), 8 September 2015, ECLI:EU:C:2015:555.

[35] *Ibid.*, para. 58. See also para. 51: 'The provisions of EU primary law impose on Member States a precise obligation as to the result to be achieved that is not subject to any condition regarding the application of the rule … which they lay down.'

[36] C-42/17, *M.A.S. and M.B.,* ('Taricco II'), 5 December 2017, ECLI:EU:C:2017:936.

[37] The Court of Cassation also argued that the criteria laid down in *Taricco I* for the disapplication of the provisions of Italian law, were vague and generic, and raised issues from the perspective of legal certainty.

[38] See the Order of the Court delivered on 28 February 2017 in C-42/17, available in French and Italian only. (ECLI:EU:C:2017:168)

[39] Opinion of Advocate General Bot delivered on 18 July 2017 in C-42/17, para. 8. (ECLI:EU:C:2017:564).

[40] *Ibid.*, paras. 120-121.

[41] It reiterated the principles of *Melloni*, namely that national courts are free to apply national standards provided that the primacy, unity and effectiveness of EU law are not compromised, however it did so by quoting *Akerberg Fransson*, and not *Melloni*. See 'Taricco II', para. 47.

[42] AG Bot in his opinion showed no signs of compromise. Instead, it upheld the principles formulated in *Melloni* and, for the same reasons as in this latter judgment, overturned the interpretation made by the Italian Court of Cassation of Art. 53 of the Charter by virtue of the principle of primacy of EU law. (Opinion (above n41) paras. 155-156).

[43] Taricco II, paras. 60-62.

[44] S. Manacorda, 'The Taricco saga: A risk or an opportunity for European Criminal Law', 2018, 9, *New Journal of European Criminal Law*, 4, 11.

criminal law enshrined in the national constitution deserve to be taken into account and considered in balance with the effectiveness of EU law.[45] The implications of the *Taricco II* judgment are as yet difficult to discern and raise questions of interpretation. One of them is the extent to which the CJEU will maintain its flexible approach in future rulings or stick to the strict application of the principle of effectiveness formulated in *Melloni*, thus 'accepting the risk of new rebellions'.[46]

The attitude of the CJEU in *Melloni* and the *Taricco* saga is illustrative of the longstanding difficulty in terms of striking a balance between safeguarding the human rights of the person, on the one hand, and ensuring the effective application of cross-border instruments, on the other. The standards developed by the Framework Decision on *in absentia* trials were criticised in some respects for taking a pro-recognition approach. Since it is only a mutual recognition instrument, it only deals with how to ascertain whether a retrial will take place after a person is tried *in absentia*, and not what this retrial entails.[47] The need to ensure that a fair trial is taking place, by granting the opportunity to examine witnesses for example, must be taken into consideration at the retrial stage in order to satisfy Article 6 ECHR.[48] Against this background, it is perhaps no surprise that some Member States opted to transform these originally optional grounds for refusal into mandatory ones. For example, it was underlined that the optional nature of the grounds for non-execution means that the FD does not define a minimum standard but rather a *maximum* standard on the conditions for surrender.[49] Put in another way, the FD allows the executing State to apply a lower threshold on *in absentia* trials.[50] The frustration which may result from this race to the bottom will certainly not amount to creating more 'trust' across the EU, as demonstrated by the 'conditional acceptance of EU law primacy'[51] by national constitutional courts in *Taricco II*.

C. Obstacles affecting the practical operation of EAWs

At a more practical level of cooperation, the presence of variations in the standards applicable to *in absentia* trials has impaired the operation of the EAW in several respects. Indeed, the description of differences revealed that some Member States have gone further than the EAW FD and have transformed the optional ground for refusal into a mandatory one, thus amounting to less flexibility in the execution of EAWs. As regards Article 4(6) FD EAW, the CJEU's *Popławski* judgement suggests that

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[45] *Ibid.* It is also the view taken by F. Viganò, 'Melloni overruled? Considerations on the 'Taricco II' judgment of the Court of Justice', 2018, 9, *New Journal of European Criminal Law*, 18, 23.

[46] *Ibid.*, 22. On the implications of *Taricco II* on the three pending judgments of *Scialdone*, *Kolev* and *Menci*, see G. Giuffrida, 'Taricco principles beyond Taricco, some thoughts on three pending cases, Scialdone, Kolev and Menci', 2018, 9, *New Journal of European Criminal Law*, 31, 37.

[47] J. Blackstock, 'European Arrest Warrants, Ensuring an effective defence', Justice Report, 2012, 23.

[48] *Ibid.*

[49] *Ibid.*

[50] *Ibid.* Emphasis added.

[51] M. Krajewski, 'Conditional' primacy of EU law and its deliberative value: an imperfect illustration from Taricco II', *European Law Blog*, 18 December 2017.

transforming an optional refusal into a mandatory one is likely to generate tensions.[52] In this judgment, the executing State had transformed Article 4(6) FD EAW into a mandatory ground for non-execution and refused the surrender of a person requested for the purpose of serving a custodial sentence, without yet undertaking that sentence itself. The CJEU held that:

> 'Legislation of a Member State which implements Art 4(6) of Framework Decision 2002/584 by providing that its judicial authorities are, in any event, obliged to refuse to execute an EAW in the event that the requested person resides in that Member State, without those authorities having any margin of discretion, and without that Member State actually undertaking to execute the custodial sentence pronounced against that requested person, thereby creating a risk of impunity of that requested person, *cannot be regarded as compatible* with that framework decision.'

The CJEU was confronted, in this case, with a clear risk of impunity. In *Popławski II*, the CJEU widened the scope of its interpretation by making the option of refusing the execution of a surrender request subject to the guarantee that the custodial sentence which Mr Popławski received will be enforced in the Netherlands.[53] These two judgments suggest that it is not at ease with the transposition by the Member States of an optional ground for refusal into a mandatory one. As noted by Advocate General Bot in *Popławski I*, 'the option which, according to the Court, the Member States have as to whether or not to transpose the grounds for optional non-execution into their national law does not mean for that matter that … they are at liberty to interpret the words 'may refuse' as establishing an obligation incumbent on their judicial authorities to refuse to execute a European arrest warrant'.[54] The choice of some Member States to opt for mandatory refusals instead of optional refusals in the field of *in absentia* trials clearly illustrates the underlying tension between the risk of impunity deriving from an all too strict approach to *in absentia* trials and the due process imperative of giving the defence the opportunity to present its case.

Setting higher standards may nonetheless pose significant obstacles to the fluidity of mutual recognition of national decisions. It does not necessarily imply that EAWs are systematically refused by the executing State. However, the mere fact that the person to be surrendered appeals to the judicial authorities of the executing State suffices to cause significant delays to the execution of the EAW.

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[52] In the case at hand, the Netherlands had implemented the optional ground for refusal of Art. 4(6) FD EAW as a mandatory one. See C-579/15, 29 June 2017, *Popławski,* ECLI:EU:C:2017:503, para. 23: 'legislation of a Member State which implements Article 4(6) of Framework Decision 2002/584 by providing that its judicial authorities are, in any event, obliged to refuse to execute an EAW in the event that the requested person resides in that Member State, without those authorities having any margin of discretion, and without that Member State actually undertaking to execute the custodial sentence pronounced against that requested person, thereby creating a risk of impunity of that requested person, *cannot be regarded as compatible* with that framework decision.'

[53] C-573/17, *Popławski v. Openbaar Ministerie*, 24 June 2019, ECLI:EU:C:2019:530, para. 100.

[54] Opinion of Advocate General Bot delivered on 15 February 2017 in Case C-579/15, *Popławski,* ECLI:EU:C:2018:65, para. 28.

In the *Tupikas* case, Advocate General Bobek held that the Dutch transposition of Article 4a was considered 'too rigid' and amounted to difficulties in the execution of the EAW.[55] Bearing in mind the rigidity of some national legal frameworks, a 'clash' sometimes occurred between countries where the right to be present at a trial is of constitutional importance and others. In some cases, this 'clash' translated into the non-execution of EAW requests. For example, in an EAW case involving the German surrender to Romania of a detained person tried *in absentia*, the Romanian authorities considered that connecting the defendant via videoconferencing link to the main hearing was sufficient to ensure that the right to be present at the trial had been enforced.[56] However, this was deemed unacceptable by the German authorities.

The existence of different understandings and applications of the right to be present at one's trial drove Member States to request further information on the conditions surrounding *in absentia* trials in the issuing State prior to the execution of the EAW. However, obtaining information on whether the trial has taken place *in absentia* in accordance with the conditions set in both the FD and CJEU jurisprudence is sometimes a difficult process.[57] Although information contained in the warrant should be sufficient to enable the executing authority to arrive at a decision on the application for surrender, additional requests are sometimes necessary. In a 2008 case,[58] the Irish court explained that, even with a carefully designed and properly filled in form for a warrant, in particular cases ambiguities might arise, or some *lacunae* on points of detail in the information may exist, particularly when the standard form of arrest warrant is to be issued by a judicial authority in one legal system and executed by a judicial authority in another legal system, for example due to the use of different languages. However, the difficulty in obtaining guarantees from the issuing State is an issue which has been raised in several reports.[59] For example, French judges reported that the information given by issuing authorities on whether and how the person was notified of the date and place of the trial lacks precision and is not welltranslated.[60] Answers to requests for additional information are sometimes limited to the mere reaffirmation that the notification was duly made.[61] In the absence of satisfying

[55] Opinion of Advocate General Bobek in Case C-270/17 PPU, *Openbaar Ministerie v. Tadas Tupikas*, delivered on 26 July 2017, ECLI:EU:C:2017:609 paras. 79-80.

[56] See OLG Karlsruhe, Beschl. v. 27.4.2017, Ausl 301 AR 35/17. The German authorities refused the execution of the EAW.

[57] A. Suominen, 'The Finnish approach to mutual recognition in criminal matters and its implementation', *in* Vernimmen-Van Tiggelen *et al*. (above, Introduction, n29).

[58] *Minister for Justice, Equality and Law Reform v Sliczynski*, [2008], IESC 73, 19th December 2008. See National report No. 1 on Ireland, Section on the s. 21A of the 2003 EAW Implementing Act (point 5.3.).

[59] J. Blackstock, 'European Arrest Warrants, Ensuring an effective defence' (n49); National reports on France, Ireland and Germany (see also Part I, Chapter I and II of this edited volume).

[60] National report No. 2 on France (see also Part I, Chapter I of this edited volume).

[61] *Ibid.*

guarantees, EAW requests have often been turned down in France,[62] while Ireland[63] and Germany[64] faced similar issues. Countries where EAWs are most often subject to information requests and refusals include Romania and Poland.[65]

Second, contradictory trends could be discerned as regards the guarantees needed from the issuing State in order to make a decision on surrender. In some cases, the executing State may be satisfied with a mere diplomatic assurance from the issuing State. Consents to surrender are sometimes grounded on the presumption that ECHR standards are met, pursuant to the principle of mutual trust.[66] In others, higher guarantees must be received from the issuing State. It is interesting to contrast the approaches taken by Germany and the UK in the following cases. In Germany, by order of 5 February 2015,[67] a regional court 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 are not considered in line with the requirements of the German law implementing the EAW. It added that a diplomatic assurance from the Romanian authorities that the retrial will be guaranteed and that the rights of the person concerned will be maintained, cannot replace the legislation in place. This approach taken by Germany stands in sharp contrast to the position adopted by the UK in the *Da An Chen* case.[68] Da An Chen was tried *in absentia* in Romania without his knowledge. He was arrested in the UK upon request of the Romanian authorities and sentenced to twenty years of prison for allegedly committing murder. One year later, the British authorities ordered his extradition for the purpose of executing the twenty-year prison sentence on the basis of the decision taken by the Romanian authorities. Interestingly, the British authorities assumed that Mr Chen would be granted a retrial upon his arrival, based on Romania's membership of the ECHR, as well as reports and assurances given by the Romanian authorities.[69] A hearing was organised in order to determine whether a new trial should take place. However, Mr Chen's sentence was upheld and no retrial was granted.

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[62] The non-fulfilling of *in absentia* conditions laid down in the FD by issuing States is the most frequently used ground for refusal in France. National report No. 2 on France, Section on adequacy in light of the case law and practice on judicial cooperation (see also Part I, Chapter I of this edited volume).

[63] National report No. 1 on Ireland, Section on the s. 21A of the 2003 EAW Implementing Act (point 5.3.).

[64] National report No. 1 on Germany, Section on other case law on in absentia (II) (see also Part I, Chapter II of this edited volume).

[65] As noted in the German, Dutch, Irish and French reports.

[66] See case law on *in absentia* of National report No. 1 on the Netherlands (see also Part I, Chapter IV of this edited volume). The case law that references to mutual trust and compliance with the Charter and the ECHR's rules form the main justification of the court in determining whether the EAW should be executed. The Dutch law implementing the EAW also stipulates that the conditions surrounding *in absentia* trials are governed by the procedural rules of the issuing State. In other words, the obligation to refuse surrender depends on the degree of compliance of the *in absentia* trial procedure at hand with the rules of the issuing State, rather than those of the Dutch law.

[67] OLG Stuttgart, Beschluss vom 05. Februar 2015 – 1 Ausl 6/15.

[68] 'The Da An Chen case', Fair Trials. Retrieved at: www.fairtrials.org/da-an-chen/.

[69] House of Lords, Joint Committee on Human Rights, *The Human Rights Implications of UK Extradition Policy, Fifteenth Report of Session 2010-12* (HL Paper 156), 22 June 2011, 21.

D. The Dworzecki *judgment: an attempt to clarify the conditions of* in absentia *trials?*

The CJEU made a step forward in addressing those concerns in the *Dworzecki* judgment.[70] It clarified the content of information that must be exchanged between the issuing and executing authorities in order to facilitate the task of the executing State in establishing whether the guarantees of a fair trial are upheld. It held that issuing authorities must include, in the EAW, evidence on the basis of which it found that the person concerned received official information on the place and date of the trial.[71] Moreover, that authority must, at the request of the executing authority, provide additional information.[72] Meanwhile, executing authorities must examine whether there was a possible lack of diligence in the conduct of the concerned person, e.g. if he or she tried to escape the summons directed to him/her; and specific provisions of national law of the issuing State, such as the right to request a new trial under certain conditions.[73] If none of the conditions prove satisfying enough to surrender the person, the authorities may '(request) supplementary information, as a matter of urgency, if (the issuing authority) finds that the information communicated by the issuing Member State is insufficient to allow it to decide on surrender'.[74]

Ultimately, the CJEU clarified the meaning of 'summoned in person … or by other means' and 'informed in such a manner that it was unequivocally established that (the person in question) was aware of the scheduled trial' under Article 4a(1) FD *in absentia*. The CJEU ruled that 'other means' should be understood as 'a method of service' that 'ensures that the person concerned has himself received the summons and … has been informed of the date and place of his trial'[75] and '(achieves) the same high level of protection of the person summoned'.[76] It did not rule out that handling information on the date and place of the trial to a third party was *per se* contradictory to Article 4a. However, it must be 'unequivocally established' that the information was passed on to the person concerned and such information should be included in the EAW by the issuing State.[77] The specific guarantees contained under this provision are summarised in Advocate General Bobek's opinion; they relate to 'the methods whereby the information is received (the information must be official and not merely circumstantial or informal), its terms (it must include the date and place of the trial) and its result (the person concerned must be *actually* informed, in such a manner that the

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[70] C-108/16 PPU, *Dworzecki*, 24 May 2016, ECLI:EU:C:2016:346.

[71] *Ibid.*, para. 49.

[72] *Ibid.*, para. 53. Requests for additional information were already filed before the Court of Justice rendered its decision in *Dworzecki*. See for example the following case from the French Cassation Court: Cour de cassation, Chambre criminelle, 25 mars 2014, n° 14-81.430, inédit.

[73] *Ibid.*, paras. 51-52.

[74] *Ibid.*, para. 53.

[75] *Dworzecki*, para. 45.

[76] *Ibid.*, para. 46.

[77] *Ibid.*, paras. 48-49.

fact that he was made *aware* of the scheduled trial was established *unequivocally*)'.[78] These conditions are, moreover, cumulative.[79]

Whereas the *Dworzecki* judgment entails positive developments as it clarifies a number of provisions contained in the FD, it fails to address the problem comprehensively. On the one hand, the clarifications brought by the CJEU in recent case law are welcome and could facilitate the implementation of the conditions contained under Article 4a FD EAW.[80] Issuing Member States now find themselves bound by an obligation to provide information upon requests to the executing State. Thus, the CJEU transformed what used to be an *ad hoc* practice implemented by executing authorities into a formal procedure. Furthermore, the summoning conditions have been clarified, thus providing indications to the executing State as regards the type and content of information that they may request from the issuing country in future EAW procedures. The *Dworzecki* judgment is also eponymous with a more values-based approach taken by the CJEU through the imposition of a duty onto the executing State to conduct a thorough assessment of the conditions in which the *in absentia* trial took/would take place in the issuing State. On the other hand, the procedures for *in absentia* surrender remain constrained by the same time limits enshrined under the FD EAW as before. This means that the executing State will have to check whether the defence rights of the person are respected within 60 days of the EAW being transmitted by the issuing country. It remains to be seen whether the indications provided by the Court of Justice of the EU in *Dworzecki* will prove sufficient to allow executing States to receive all the guarantees *at a sufficiently early stage of the procedure* to enable them to assess whether the right to a fair trial will be upheld. The challenge of ensuring the timely and smooth transfer of accurate and reliable information between issuing and executing authorities is reminiscent of the difficulties encountered in the realm of detention conditions after the *Aranyosi and Căldăraru* judgment, where the CJEU placed significant emphasis on dialogue between the judicial authorities.

E. The Presumption of Innocence Directive: A (non-)solution?

The release of the Presumption of Innocence Directive deserves close attention as it devotes a number of provisions to the conditions supposed to govern trials held *in absentia*. The Directive builds on the provisions enshrined in FD *in absentia*. Unfortunately, the Directive seems to be limited to a mere codification of the existing *acquis*, thus limiting its added value to raise the level of protection afforded to individuals. Furthermore, some of the provisions that it contains even *simplified* the conditions laid down under the FD *in absentia*.[81] Thus, pursuant to Article 8 of the Presumption of Innocence Directive, a decision taken *in absentia* can be enforced,

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[78] Opinion of Advocate-General Bobek delivered on 11 May 2016 in C-108/16 PPU, ECLI:EU:C:2016:333, para. 62.

[79] *Ibid.*, para. 63.

[80] This is also the view of our Spanish expert. See National report No. 2 on Spain, Section on effectiveness of EU law on national criminal procedure (point 11).

[81] Thus, Art. 8 provides that decisions on the guilt or innocence can only be taken *in absentia* if (i) the suspect/accused person has been informed 'in due time' of the trial and the consequences of non-appearance; or (ii) has mandated a lawyer to represent him/her. If these

provided that the person, upon apprehension, is informed of the possibility to challenge the decision and of the right to a new trial or to *another legal remedy*.[82] The use of 'another legal remedy' under the latter provision is problematic as it seems to open the door to an indefinite number of alternatives to the right to a retrial in comparison to the provisions of the FD. The qualitative requirements introduced under Article 9, that both the retrial and the remedy must ensure a fresh reassessment of the merits of the case, including a fresh examination of evidence, may not be sufficient; take for example a situation where the sole 'other legal remedy' available is an appeal before an appeal court, if the person loses this appeal, then no other alternatives will be available to that person.[83] A certain degree of unequal treatment may arise between those entitled to a new trial in some Member States, while in other jurisdictions the defendants will solely benefit from a possibility to appeal. Could, for example, the execution of an EAW for the purpose of serving a sentence rendered *in absentia* be refused by the executing authorities on the grounds that the defendant will not be provided a new trial in the issuing country but a mere possibility of appeal? This may very well occur in those countries where the constitutional courts have taken a strict stance with regard to *in absentia* trials. Risks of paralysing the operation of EAWs, therefore, cannot be fully prevented by the entry into force of the Presumption of Innocence Directive.

conditions are not met, the decision can be challenged by the suspect/accused person and a new trial may take place. See Art. 8(2)a and 9 Directive 2016/343/EU.

[82] *Ibid.*

[83] See S. Cras, A. Erbeznik, 'The Directive on the Presumption of Innocence and the Right to Be Present at Trial, Genesis and description of the new EU-Measure', 2016, 1, *Eucrim*; S. Ruggeri, '*Inaudito reo* Proceedings, Defence Rights, and Harmonisation Goals in the EU', 2016, 1, *Eucrim*.

CHAPTER VIII

Compensation schemes for victims

Compensation for victims is essential in the EU's Area of Freedom Security and Justice (AFSJ). It bolsters 'civic trust' from society, in the capacity of public policies and public authorities to protect citizens.[1] Before delving into the comparative study of compensation schemes, it is useful to note that variations are intrinsically linked to the status of the victim in the criminal law of EU States, along with the nature and degree of their participation in criminal procedures.

A trend common to all EU States is the increasing recognition of victims' rights over the past decade, the latter being either constitutionally protected or granted the status of fundamental rights.[2] An exception to this rule can be found in Ireland, where victims' rights are not directly protected under Irish constitutional law but are inherent in other rights, such as the (un-enumerated) right to bodily integrity and to property.[3] In some countries, the enhanced protection granted to victims resulted from the incremental development of national case law (e.g. France, Spain)[4] and the pressure of EU legislation (e.g. the Netherlands, Ireland, Italy).[5]

The status of victims in criminal proceedings is subject to important variations. In some countries, the victim is not always seen as a party to the proceedings but rather as a witness (e.g. Ireland)[6] and the focus is therefore on protecting victims rather than

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[1] D. Maiers, 'Offender and state compensation for victims of crime, Two decades of development and change', 2014, 20, *International Review of Victimology*, 156.

[2] National reports No. 2, Section on the status of the rights of victims under national law.

[3] National report No. 2 on Ireland, Section on the status of the rights of victims under national law (point 3).

[4] National report No. 2 on France, Section on the status of the rights of victims (point A) (see also Part I, Chapter I of this edited volume); National report No. 2 on Spain, Section on the status of the rights of victims (point 3).

[5] National report No. 2 on the Netherlands, Section on the rights of the defence and the victims (point 1) (see also Part I, Chapter IV of this edited volume); National report No. 2 on Ireland, Section on the status of the rights of victims under national law (point 3); National report No. 2 on Italy, Section on Victims (point 23).

[6] National report No. 2 on Ireland, Section on victims (point 23).

enabling them to take part in proceedings.[7] In the Netherlands, the victim is not considered as a party to the proceedings either, but rather as a participant.[8] The situation is more nuanced in Italy, where victims harmed by a crime have the right to take a proactive role at the pre-trial stage even though his/her powers are significantly limited at the trial stage.[9] The Italian system applies a particular regime for victims economically damaged by a crime, a category that embraces both the person who suffered an economic loss and moral damage as a direct consequence of a crime; only this last category is entitled to intervene in the trial as a civil party.[10] In other countries, the victim is considered as a civil party to the criminal proceedings (e.g. France, Romania, Spain).[11] Blending the civil and criminal channels avoids separate proceedings and sometimes provides a cheaper and simpler manner to obtain compensation.[12] The German CCP recognises victims as an independent party to the proceedings and provides for their active participation during the criminal procedure by granting them, *inter alia*, a right to legal assistance, access to the file and to be present during the trial.[13] This is despite the fact that the term 'victim' is not legally defined under German law.[14]

I. Comparative analysis of compensation schemes

Noticeable differences could be discerned in respect to compensation schemes from the State as well as rules on compensation from the offender, which the following analysis purports to analyse.

A. Diversity of State compensation systems

Compensation is regulated at EU level by Directive 2004/80/EC (hereafter referred to as the Compensation Directive) of April 2004. A degree of harmonisation had already been established by the 1983 Council of Europe Convention on compensation

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[7] Under the common law, a victim of a crime also has the right to act as a private prosecutor, but this rarely happens in practice. National report No. 2 on Ireland, Section on Victims (point 23). See also Fundamental Rights Agency, 'Victims of crime in the EU: the extent and nature of support for victims', 2015, 29.

[8] National report No. 2 on the Netherlands, Section on the rights of the defence and the victims (point 1) (see also Part I, Chapter IV of this edited volume).

[9] For example, the victim has a right to search privately for evidence during investigations, to ask the prosecutor to collect evidence through the *incidente probatorio* procedure (i.e. to collect evidence that is at risk of vanishing), to ask for a judicial review of the decision taken by the prosecutor to dismiss the case, etc. At the trial stage however, the witness status of the victim significantly hamper their margin for manoeuvre. National report No. 2 on Italy, Section on Victims (point 3).

[10] National report No. 2 on Italy, Section on victims (point 3).

[11] National report No. 2 on France, Section on the status of the rights of victims (point A) (see also Part I, Chapter I of this edited volume); National report No. 2 on Romania, Section on victims (point 3) (see also Part I, Chapter V of this edited volume). National report No. 2 on Spain (point 24).

[12] Fundamental Rights Agency, 'Victims of crime in the EU: the extent and nature of support for victims', Report, Vienna: FRA, 2015.

[13] National reports on Germany, Section on Victims (points B and C) (see also Part I, Chapter II of this edited volume).

[14] *Ibid.*

of victims of violent crimes, which has been ratified by most countries.[15] The Compensation Directive applies to 'victims of intentional violent crime'. However, it does not aim at harmonising compensation systems due to a lack of Commission competence to do so.[16] Instead, it establishes a mechanism whereby victims of intentional violent crimes in one Member State may claim compensation in another Member State. The rationale for the adoption of the Compensation Directive was to set up a system of cooperation that facilitates access to 'fair and appropriate' compensation to victims of violent intentional crimes in cross-border situations.[17] It builds on the principle of equal access to rights and protection formulated in the *Cowan* judgment of 1989, where the CJEU ruled that the protection of natural persons should be guaranteed whenever they exercise their right of free movement. [18] Thus, the State, 'in enacting legislation for the compensation of victims of crime, … takes a position analogous to that of a guarantor with regard to compensation for harm which could not otherwise be redressed, harm arising from the infringement of rights which it was the State's duty to protect but which it was not able to guarantee'.[19] Since then, all Member States examined have set up a national system providing compensation from the State for violent intentional crimes, alongside existing schemes allowing compensation from the offender. However, State compensation has not been subject to approximation measures despite the adoption of the Compensation Directive in 2004. The Directive requires the national compensation scheme of Member States to cover *any* violent intentional crime committed on their territory,[20] however the organisation and functioning of national

[15] With the exception of Hungary, Ireland and Italy, among the Member States examined. (European Convention of 24 November 1983 on the Compensation of Victims of Violent Crimes, ETS No 116 (see Council of Europe, treaty office)).

[16] Peers (above, Introduction, n9), 159. It should be noted that instruments combating terrorism and human trafficking similarly refrained from imposing specific conditions on Member States regarding compensation schemes, which remain governed by national rules. See Recital 28 Directive 2017/541 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA; Art. 17 Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims and replacing Council Framework Decision 2002/629/JHA.

[17] Recital 6 and Art. 12(2) Directive 2004/80/EC.

[18] It draws on the approach taken by the Court in its seminal judgment *Cowan* of 1989, where it ruled that the award of a compensation for a crime committed on the territory of a Member State conditional upon the existence of an agreement between that Member State and the victim's Member State of origin impinged on the freedom of movement. See Case 186/87, *Cowan v. Trésor public*, 2 February 1987, ECLI:EU:C:1989:47, para. 20. Reference to *Cowan* is made under Recital 2 Directive 2004/80/EC.

[19] Opinion of Advocate General Carl Otto Lenz in *Cowan v. Trésor public*.

[20] C-601/14, *Commission v Italy*, 11 October 2016, EU:C:2016:759, para. 49. See also para. 46: 'the determination of the intentional and violent nature of a crime, as the Advocate General has stated in points 69 and 83 of his Opinion, although the Member States have, in principle, the competence to define the scope of that concept in their domestic law, that competence does not, however, permit them to limit the scope of the compensation scheme for victims to only certain violent intentional crimes, lest it render redundant Article 12(2) Directive 2004/80/EC.'

compensation schemes remains entirely governed by national authorities. The latter enjoy a wide margin of manoeuvre in terms of, *inter alia*, definitions of victims and crimes, alongside 'specific eligibility, conditions and financial ceilings'.[21] The following puts the scope, procedures, time limits and amounts awarded of compensation schemes into comparative perspective.

In terms of material scope, the Compensation Directive does not provide a definition of 'violent intentional crime' and significant variations exist at the national level as regards the crimes covered by compensation schemes. As noted by the CJEU, Member States remain 'competent to define the scope of (the violent intentional crime) concept in their domestic law'.[22] As a result, what is meant by 'intentional violent crimes' differs from one Member State to another. For example, the crimes of murder, human trafficking and sexual abuse explicitly feature as grounds for compensation in some countries (e.g. France, Italy, Romania, the Netherlands).[23] Sometimes the compensation scheme also covers less serious attacks, such as theft, fraud or blackmail or victims for whom a serious material or psychological condition has arisen (e.g. France).[24] The Spanish compensation system applies to 'violent crimes' and more specific references to crimes against sexual freedom and terrorism exist.[25] In Ireland and Germany, the material scope of application of compensation systems is laid down in even broader terms. In Ireland in particular, the Scheme of Compensation for Personal Injuries Criminally Inflicted provides for compensation in case of 'crime of violence' but little in terms of details comes within its scope, besides arson, poisoning, and 'injury', including death.[26] The German Compensation Act too covers the administration of poison alongside the 'at least negligent creation of a danger to the life and limb of another person by commission of a crime by means causing a common danger'.[27]

The procedures to claim compensation also differ to some extent. In some EU States, a claim can be passed on to the authority of the victim's State of origin even though the crime was committed abroad (e.g. Italy, France, Hungary, Germany),[28] whereas this possibility is not provided in other countries (e.g. the Netherlands, Ireland, Finland, Romania, Spain).[29] In the majority of countries (e.g. Hungary, France, Italy, Spain, Ireland, Romania), a compensation claim cannot be submitted if the criminal investigation bodies have not been notified.

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[21] As acknowledged by Commissioner Vera Jourova (see Answer given by Ms Jourova on behalf of the Commission to an MEP Question on 20 February 2018).

[22] *European Commission v. Italy* (above n20), para. 42.

[23] See national reports and various links to national compensation schemes quoted throughout the text.

[24] Ministry of Justice, Fact sheet on compensation in France.

[25] National report No. 2 on Spain, Section on victims (point 24).

[26] Scheme of Compensation for Personal Injuries Criminally Inflicted.

[27] Section 1(2)(2) Crime Victims Compensation Act, amended on 20 July 2017.

[28] Since 2009 and an amendment to the Crime Victims' Compensation Act it is possible for victims to apply for compensation and assistance if the violent act was committed abroad. See website of the German Ministry of Labour and Social Affairs.

[29] See national reports.

In terms of time limits within which to submit an application, some national systems regulate from the time of the conviction of the offender (e.g. Romania, Hungary, the Netherlands[30]) and others from the time that the crime was committed (e.g. Ireland, Spain, Germany). Finland and France apply both criteria with different time frames. As regards the first group, the period for application varies from one year (e.g. France, Romania) to three years (e.g. Finland) after the final judgment was rendered. As regards the second group, differences between time periods are much wider: from three months (e.g. Hungary, Ireland) to one year (e.g. Spain, Romania[31]), three years (e.g. France) and ten years (e.g. the Netherlands) if the case has not been tried in court (e.g. Finland)[32]. In Germany, there is no time limit within which to file an application.[33]

Finally, differences also exist as regards the type and amount of compensation. Generally speaking, compensation is calculated on a case-by-case basis, in accordance with the damage suffered by the victim. For example, maximum compensation amounts vary significantly,[34] spanning EUR 8,200 (e.g. Italy)[35], EUR 15,000 (e.g. France)[36], EUR 28,500 (e.g. Germany)[37], EUR 35,000 (e.g. the Netherlands)[38], EUR 61,000 (e.g. Finland),[39] EUR 500,000 (e.g. Spain).[40] In Romania, the maximum compensation amounts cannot exceed the equivalent of ten national minimum basic gross salaries calculated on a yearly basis.[41] In Spain, where the system of

[30] Or once the police investigations have been completed. See website of the Criminal Injuries Compensation Fund (*Schadefonds Geweldsmisdrijven*).

[31] Or three years if the perpetrator is unknown. Art. 25 Law on certain measures to ensure the protection of victims of crime *OJ*, No. 505, 4 June 2004 (official translation).

[32] Finnish State Treasury, Fact Sheet on compensation claims.

[33] According to the website of the German Ministry of Labour and Social Affairs.

[34] Compensation amounts are not always publicly available.

[35] According to the website of the Italian Ministry of Justice, the amount set for the crime of homicide is EUR 7,200; in case of homicide committed by the spouse, also separated or divorced, or by a person who is or was involved in an emotional relationship with the injured person, the amount is EUR 8,200 exclusively in favor of the victim's children; for the offence of sexual violence, except for the case where the mitigating circumstance of minor gravity occurs, the amount is EUR 4,800; for offences other than those of homicide and sexual violence, the maximum amount for the reimbursement of medical and care costs is EUR 3,000. See also Question raised by MEP Stefano Maullu to the Commission on 10 November 2017.

[36] See European Parliament, EPRS implementation assessment of Directive 2012/29/EU, 2017, 58.

[37] It only applies in the case of loss of several limbs. For any other damage, the maximum compensation amount is set at EUR 16, 500. Section 3a(2) Crime Victims Compensation Act, last amended on 20 July 2017.

[38] See website of the Dutch Criminal Injuries Compensation Fund.

[39] Finnish State Treasury, Fact Sheet on compensation claims.

[40] National report No. 2 on Spain, Section on victims (point 24). The amounts of compensation yet vary depending on the crime. For example, compensation for death amounts to EUR 250,000, compensation for injuries that left the victim disable for life ranges between EUR 75,000 and EUR 500,000.

[41] Art. 27(2) Law on certain measures to ensure the protection of victims of crime, *OJ*, No. 505, 4 June 2004 (official translation).

compensation is fragmented across different laws, the maximum thresholds vary according to both the type of crime committed and the damage incurred. For example, if a victim died following a terrorist attack, a financial compensation of maximum EUR 500,000 can be awarded to the spouse or the family.[42] In Hungary, there is no maximum threshold.[43]

It is noteworthy that all Member States have created a dedicated webpage spelling out information on their national compensation scheme in English. However, the content of the information varies from one country to another. The Hungarian factsheet, for example, provides details about the crimes covered and the procedure to be followed to claim compensation, as well as a list of contact points in different countries.[44] Germany went a step further and translated the law implementing the Compensation Directive.[45] By contrast, the dedicated webpage of the Italian Ministry of Justice merely provides information on the amount of compensation per crime covered and reads that victims should refer to the assisting authority of his/her Member State of origin for further information on the Italian scheme.[46] Differences of approach do not pertain, as such, to the realm of criminal procedure, but they may complicate the task of individuals to access compensation in another EU State.

B. National arrangements for compensation from the offender

Compensation from the offender is not regulated at the EU level. It is understood in the sense of any financial payment by an offender in respect of a victim's loss or injury or the offender's direct or indirect restoration of stolen or damaged property.[47] This means that compensation is resourced privately, in contrast to State schemes, for which compensation is extracted from public funds. Compensation from the offender may take various forms. In some cases, the property stolen by the offender may have been confiscated by the State and this can be used as a form of compensation from the offender. This form of compensation is of particular relevance given the inclusion of references to this right in the new Regulation of 14 November 2018 on the mutual recognition of freezing orders and confiscation orders.[48]

All countries examined have arrangements in their criminal justice systems that guarantee a right to compensation from the offender. Victims may bring a civil claim for compensation during the criminal proceedings, with the noticeable exception

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[42] Art. 20(4) and 17 Act 29/2011, of 22 September, on the recognition and comprehensive protection of the victims of terrorism [Ley 29/2011, de 22 de septiembre, de reconocimiento y protección integral a las víctimas del terrorismo]. Retrieved at: www.boe.es/buscar/pdf/2011/BOE-A-2011-15039-consolidado.pdf.

[43] Section 7 Act CXXXV of 2005 on Crime Victim Support and State Compensation.

[44] Act CXXXV of 2005 on Crime Victim Support and State Compensation (official translation).

[45] See German Scheme of Compensation for Personal Injuries Criminally Inflicted.

[46] See official website of the Italian Ministry of Justice: www.giustizia.it/giustizia/it/mg_2_10_6.page.

[47] See definition provided by D. Maiers, 'Offender and state compensation for victims of crime, Two decades of development and change' (above n1), 146.

[48] Regulation (EU) 2018/1805, *OJ*, No L303, 28 November 2018, especially Art. 30.

of Ireland, where discretion is left to the national court to make a compensation order.[49] Restitution of the confiscated property as a form of compensation of the victim is, however, not provided under the national law of all EU States. In Germany, restitution of the confiscated property is seen as a form of compensation of the victim.[50] A slightly different system exists in Italy, where restitution of confiscated property can be seen as an indirect means of compensation. Victims of crime can access compensation funds, the funding of which comes in part from the confiscation of properties of the convicted acquired in the course of the unlawful activity.[51] In other countries however, confiscated assets go to the State and are generally not used to compensate victims. This being said, the property may be returned to the victim through a civil procedure (e.g. Spain,[52] the Netherlands,[53] Romania[54], Ireland[55], France[56]).

In some national systems, a right is granted to the victim to ask national authorities to undertake action for the seizure of confiscated assets (e.g. Germany,[57] Finland and France). In France and Finland in particular, the national authorities have competence for, or must take action for the purpose of restitution or compensation of victims.[58] This may include the duty to freeze and confiscate property on behalf of the victim or granting the victim priority on the confiscated property.[59]

The possibility to claim compensation and/or restitution during criminal proceedings, however, is accompanied by significant differences in legal aid regimes. Most countries examined provide for free legal assistance and legal representation during criminal proceedings. However, eligibility conditions differ. For example,

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[49] See National reports No. 2, Section on victims compensation. See also FRA, Country studies for the project 'Victim Support Services in the EU: An overview and assessment of victims' rights in practice', 2016. Retrieved at: www.fra.europa.eu/en/country-data/2016/country-studies-project-victim-support-services-eu-overview-and-assessment-victims.

[50] National report No. 2 on Germany, Section on compensation rights (point C(III)(6)) (see also Part I, Chapter II of this edited volume).

[51] M. Barbera, A. Baracchi, V. Protopapa, F. Rizzi, 'Victim Support Service in the EU: An overview and assessment of victims' rights in practice, National report on Italy', 2014, research project, 41.

[52] National report No. 2 on Spain, Section on Victims (point 24).

[53] M. Wijers, 'Compensation of victims of trafficking under international and Dutch law', *La Strada International*, 28 April 2014, 6.

[54] National report No. 2 on Romania, Section on Victims (point 24) (see also Part I, Chapter V of this edited volume).

[55] The proceeds are passed to the exchequer after costs have been met. National report No. 2 on Ireland, Section on Victims (point 24).

[56] In France, the restitution of confiscated property is traditionally not considered as a form of compensation under national law, however the victim can request for damages to be paid on the assets confiscated to the perpetrator. National report No. 2 on France, Section on Victims (point C) (see also Part I, Chapter I of this edited volume).

[57] National report No. 2 on Germany, Section on compensation rights (point C(III)(6)) (see also Part I, Chapter II of this edited volume).

[58] Commission Staff Working Document (2016) 468 final, 23.

[59] See also FRA, Country studies for the project 'Victim Support Services in the EU: An overview and assessment of victims' rights in practice' (above n48).

eligibility for free legal aid and representation is not always systematic and may depend on the resources of the victim and status, but such conditions are generally waived for the most serious crimes (e.g. France, Italy, Spain).[60] In some countries, a means-test applies (e.g. Finland, Germany).[61] Others grant free legal aid and free legal representation for victims of serious crimes without means-testing (e.g. Romania, Ireland).[62] In the Netherlands, all victims are entitled to free legal advice and all victims of a serious crime are entitled to free legal representation (a means test applies for victims of other crimes).[63] In Hungary, victims with low financial means only receive partial assistance from the State.[64]

It should also be noted that not all EU countries provide the possibility for victims to benefit from advance payments from the State in case the offender does not have the means to pay for compensation. Advance payments are provided in some countries (e.g. Finland),[65] for some particular forms of serious crimes (e.g. the Netherlands,[66] Italy)[67] and under specific conditions (e.g. Romania, France).[68] In Germany and Spain, 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 corresponding national scheme.[69] In Spain, the offender must have been declared insolvent.[70]

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[60] *Ibid.*

[61] *Ibid.* In Finland, the lawyer's fees are covered by the government, irrespective of the victim's financial situation. See National report No. 2 on Finland, Section on victims (point 24).

[62] *Ibid.*

[63] J. Nieuwboer, G. Walz, 'Victim Support Services in the EU: An overview and assessment of victims' rights in practice, Report on the Netherlands', 2014, FRANET.

[64] National report No. 2 on Hungary, Section on Victims (point 23) (see also Part I, Chapter III of this edited volume).

[65] M. Aaltonen, A. Sams, A.-M. Sorjanen, 'Victim Support Services in the EU: An overview and assessment of victims' rights in practice, Report on Finland', 2014, FRANET.

[66] In the Netherlands, the full amount of compensation can be paid by the State in advance if the person making the claim is a victim of a violent crime or a sex crime, including trafficking in human beings. The offender must have been convicted and ordered to pay damages to the victim as part. of the criminal proceedings and failed to pay damages within the eight months after the sentence has become final. In other cases, the victim can receive an advance payment of maximum EUR 5,000. See M. Wijers, 'Compensation of victims of trafficking under international and Dutch law'(above n52). See also Ministry of Security and Justice, Fact Sheet on the Rights of victims of criminal offences.

[67] In Italy, the State compensation mechanism applies when a claim to obtain compensation from the offender was brought unsuccessfully. See official website of the Italian Ministry of Justice.

[68] For example advance payments are provided in Romania if the victim has applied for compensation within a year from the date the offender's liability was established, the victim has participated in the proceedings as a civil party; the offender cannot pay or has disappeared; the victim has not received compensation from an insurance company. See G. Georgiana Fusu-Plăiașu, 'Victim Support Services in the EU: An overview and assessment of victims' rights in practice, Report on Romania', 2014 FRANET, 29.

[69] National report No. 2 on Germany, Section on compensation of victims (point C) (see also Part I, Chapter II of this edited volume); National report No. 2 on Spain, Section on compensation of victims (point 24).

[70] National report No. 2 on Spain, Section on compensation of victims (point 24).

II. Impact on cross-border cooperation[71]

The persistence of significant variations in compensation schemes risks affecting cross-border cooperation in two respects. Incompatibilities between State compensation schemes may arise and give rise to situations whereby the victim suffers from uneven treatment from one Member State to another. Besides, in the absence of consensus on the rules governing compensation from the offender, the functioning of the Confiscation and Freezing Orders Regulation, which includes crucial provisions on compensation from the offender, may be seriously impaired.

A. Risks of unequal treatment in cross-border situations and limited scope of the Compensation Directive

The very nature of the Directive as an instrument of legislation leaves Member States free to determine the means deployed to achieve the objective pursued by the Directive. This means that Member States may choose to go beyond the list of measures that it contains. As seen above, extending the material scope of the Directive beyond the mere category of 'intentional violent' crimes provides one example of this. However, those areas where the national legislator has gone beyond the provisions of EU law may constitute obstacles from the perspective of cross-border cooperation, not least because a measure foreseen in one country does not find equivalence in another country.[72] The high degree of differentiation between State compensation schemes indeed suggests that a victim may not always receive quality compensation in all Member States. Concerns of different treatment in cross-border situations therefore arise, meaning that, when exercising their right to free movement, victims may face more restrictive rules or less advantageous compensation schemes in the country where they moved to than in the country of origin. For example, a victim of theft may be entitled to compensation in France but that same victim cannot claim compensation in Romania. This is compounded by the fact that some countries do not allow their own nationals to claim compensation if the crime was committed abroad. In other words, if gaps and flaws exist in the compensation system of the country where the crime was committed,[73] the victim cannot rely on the compensation scheme of his/her country of origin to obtain full compensation. Thus, victims may enjoy less protection in cross-border situations than they would in purely domestic proceedings.

Approaching the problem the other way around, another consequence of the narrow scope of the Directive can be foreseen. Given that the Directive only applies to cross-border situations, namely 'only where a violent intentional crime has been committed in a Member State other than that in which the victim is habitually

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[71] See also J. MILQUET, 'Strenghthening victim's rights: from compensation to reparation', Report to the President of the European Commission, J.-C. Juncker, March 2019.

[72] It is obvious that this issue is a recurrent one and applies to all directives adopted by the EU in the field of cross-border cooperation. However, it is worth mentioning this shortcoming as regards the Compensation Directive in particular; the absence of precision on the scope, content and eligibility conditions of compensation schemes indeed exacerbates the equivalence issue.

[73] As was the case in Italy until recently, where the compensation system only applied to certain types of crime.

resident',[74] its provisions cannot be relied on by individuals in situations other than transnational proceedings, for example at the domestic level. This means that the amounts of compensation received may be more generous and advantageous in transnational situations compared with purely domestic proceedings, thus giving rise to what has been termed 'reverse discrimination'.[75] The case below provides an example of such a kind.

Limited scope of application of the Compensation Directive: the *Paola C.* case[76]

Ms C claimed compensation for a sexual assault committed in Italy by an Italian national. The national court ordered the offender to pay for compensation. However, the defendant did not have the financial means to do so. As a result, Ms C sought to receive compensation from the Italian State and relied, for that purpose, on the Compensation Directive. However, the national compensation scheme only covered terrorism and organised crime. The Tribunal of Florence referred a question to the Court of Justice of the EU, asking whether the Compensation Directive imposed an obligation on Member States to adopt a compensation scheme for victims of all violent or intentional crime. The Court of Justice of the EU declared itself not to be competent to answer the question as it referred to a purely domestic situation.[77]

Following this judgment, the European Commission introduced an action for failure against Italy. In 2016, the CJEU gave a broader interpretation of the provisions of the Directive and overturned the decision that it took in 2014. The CJEU ruled that it 'does not permit them to limit the scope of the compensation scheme for victims to only certain violent intentional crimes',[78] including in purely domestic proceedings. Conscious of the limited margin of manoeuvre conferred by the Directive as regards national compensation schemes, the CJEU instead relied on the principle of non-discrimination on the grounds of nationality lying at the heart of the right of free movement of persons and services to sanction the Italian Republic.[79] Advocate General Bot further added that, to enable EU citizens to circulate freely across the EU, a 'game of mirrors', i.e. equivalent compensation schemes from one Member State to another, must be in place.[80]

The clarifications brought by the CJEU on the scope of the broad notion of 'intentional violent crime' should be welcome as the judgment heralds a step further in the protection of victims and diminishes the risk of falling into a 'reverse discrimination' scheme. The current picture nonetheless remains a mixed one. The

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[74] C-467/05, *Dell'Orto*, 28 June 2007, ECLI:EU:C:2007:395, para. 59; C-79/11*, Giovanardi and Others*, 12 July 2012, ECLI:EU:C:2012:448, para. 37.

[75] S. Peers, 'Reverse discrimination against rape victims: a disappointing ruling of the CJEU' EU Law Analysis, blog post, 24 March 2014. This is also the view of our Spanish expert. See National report No. 2 on Spain, Section on victims (point 30).

[76] C-122/13, *Paola C.*, Order of 30 January 2014, ECLI:EU:C:2014:59.

[77] *Ibid.*, para. 12.

[78] *European Commission v. Italy* (above n20), para. 46.

[79] *Ibid.*, para. 50

[80] Opinion of Advocate-General Bot delivered on 12 April 2016, C-601/14, ECLI:EU:C:2016:249, para. 79.

CJEU excluded the possibility of Member States imposing *quantitative* limitations on the list of intentional violent crimes covered but it left the *qualitative* aspects of this notion to be defined by national authorities[81]. In practical terms, double standards will continue to exist, alongside uneven treatment from one Member State to another.

Besides, the applicability of the Directive to 'violent intentional crimes' only was seen as too restrictive. This means that not all victims fall within the scope of application of national compensation schemes.[82] This raises the broader question as to whether the State should, in fact, give precedence to the crime victim's injuries above those of other victims, such as accident at work or of a congenital nature or a contracted disease or illness.[83] As seen in the comparison of differences, the focus of national compensation schemes has remained, in most parts, on serious violence.

Another interesting issue raised in Germany is that, even when victims are entitled to claim compensation,[84] they tend not to do so. No concrete explanation accounting for the underuse of this instrument could be found; *'action civile'* tools, such as mediation mechanisms offering out-of-court settlements, exist in parallel and seem to be preferred[85]. In practice, cross-border compensation was rarely sought. At the national level, an empirical study on the use of compensation funds in the Netherlands revealed that awareness of the existence of a State compensation scheme among victims is low.[86] Besides, sometimes less than full compensation is paid by the Dutch fund.[87] In Finland, recourse was made to the national compensation scheme only seven times since the implementation of the directive.[88]

Little can be expected from the Victims' Rights Directive in terms of compensation. Firstly, there seems to be a disconnection between the Victims' Rights Directive and the Compensation Directive. The Victims' Rights Directive provides a right to compensation from the offender whereas the Compensation Directive provides an entitlement to compensation from the State. From this observation, it seems that the two instruments, adopted at different times and following different logics, co-exist without building on the strengths of one another. The criminal focus of the scope of the Victims' Rights Directive, secondly, gave rise to criticism despite the civil nature of many of the claims brought by victims. The victim's right to legal aid is a case in point. The Directive provides for this right only when the victim has the status of civil party to criminal proceedings. Whereas many cases are not dealt with via the criminal justice channel, the right to legal aid is excluded in situations where a separate civil claim is introduced. However, these restrictions 'may be particularly onerous for

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[81] *European Commission v. Italy* (above n20), para. 46.

[82] As observed in Germany. National report No. 2 on German, Section on victims (point II(H)) (see also Part I, Chapter II of this edited volume).

[83] Wijers (above n52), 155.

[84] *Ibid.*

[85] *Ibid.*

[86] M.R. Hebly, J.D.M. Van Dongen, S.D Lindenbergh, 'Crime Victims' Experiences with Seeking Compensation: A Qualitative Exploration', 2014, 10, *Utrecht Law Review*.

[87] *Ibid.*

[88] National report No. 2 on Finland, Section on victims (point 19).

victims of gender-based violence who do not make complaints and whose cases will never be dealt with as part of the criminal justice system'.[89].

B. Restitution as a compensation mechanism and the Regulation on Confiscation and Freezing Orders: back to national law

Bolstered by the imperative of addressing security threats stemming from terrorist financing and organised crime, the European Commission released, in 2016, a proposal for a regulation on confiscation and freezing orders. The Commission noted in the explanatory memorandum of the proposal that 'the confiscation of assets aims at preventing and combating crime, including organised crime*, compensating victims*, and provides additional funds to invest back into law enforcement activities or other crime prevention initiatives and *to compensate victims*'.[90] The proposal therefore sought to facilitate access to restitution and compensation, noting that often, 'the victim's only possibility to get back the losses suffered is to obtain restitution or compensation directly from the confiscated property'.[91] The subsequent provisions provided that, whenever a property is confiscated by the executing State, the corresponding sum should be restituted to the victim if the issuing State has taken a decision to do so, "for the purposes of compensation or restitution".[92] The European Parliament insisted during the negotiations on *limiting* the transfer of the confiscated property to the issuing State for the *sole* purpose of compensation or restitution of the victim[93], which is a rather positive addition from the perspective of victims' rights. One may indeed welcome the efforts made to include the protection of victims in mutual recognition. Few attempts have been made, thus far, to address the needs of victims in cross-border cooperation instruments. The Commission rightly pointed out in its impact assessment accompanying the proposed regulation on confiscation and freezing orders that the current cross-border cooperation framework in these two domains does not at all refer to victims.[94]

However, as the initial proposal, the regulation of 14 November 2018 does not establish any common rule on the restitution of confiscated property as a means of compensation of victims. It shies away from '(introducing) any new right for victims where such right does not exist under national law'.[95] The existence of a high degree of differentiation suggests that the cross-border compensation mechanism of

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[89] European Parliament 'Draft Report on the implementation of Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime', LIBE Committee, 26 February 2018, 8.

[90] Commission Explanatory Memorandum on a Proposal on the mutual recognition of freezing and confiscation orders, COM (2016) 819 final, 1.

[91] Commission Impact assessment on the Proposal for a regulation of the European Parliament and of the Council on the mutual recognition of freezing and confiscation orders, SWD(2016), 22.

[92] Recital 32, Art. 31 Confiscation and Freezing Orders Proposal.

[93] Amendment No. 126, European Parliament Report on the proposal for a regulation of the European Parliament and of the Council on the mutual recognition of freezing and confiscation orders (COM(2016)0819 – C8-0002/2017 – 2016/0412(COD)).

[94] FD 2003/577/JHA on Freezing Orders and FD 2006/783/JHA on Confiscation Orders. See Commission Staff Working Document (2016) 468 final, 22.

[95] *Ibid.*, 16.

property returns may only be relied on where the possibility for victims to obtain compensation through the restitution of confiscated property has been provided at the national level.[96] Additionally, the complementarity of compensation from the State and compensation from the offender is not in place in all countries. This may result in situations where the right of the victim to obtain compensation becomes void due to lack of financial means on the part of the offender to restitute the financial damage to the victim. Further reflection should be conducted on the subsidiary role of the State if the offender is not in a position to provide compensation.[97]

The latter shortcomings have been left unaddressed by the Victims' Rights Directive. The Directive does grant victims a right to compensation from the offender and to restitution of confiscated property. This being said, the obligations weighing on the Member States with regard to compensation are particularly weak: Member States must ensure that victims are entitled to *obtain a decision* on compensation by the offender within a reasonable time.[98] This means that, whenever a victim files a claim for compensation to the court in the course of the criminal proceedings, the relevant national authorities must ensure that the victim is made aware of the decision of the court on its claim. Thus, the Directive confers a right to information to victims on the outcome of their compensation claim rather than a right to compensation *per se*. This is further illustrated by the absence of precision on the type of compensation to be granted, and under which conditions,[99] besides a mere requirement of '(promoting) measures to encourage offenders to provide adequate compensation to victims'.[100] A similar assessment can be made on the restitution of the confiscated property; the organisation of the practicalities are, again, to be 'determined by national law'. [101]

Another factor to bear in mind is that, in all countries, compensation from the offender can be obtained by filing a claim directly in the criminal proceedings.[102] However, preparing and sustaining a compensation claim may entail significant costs. Unfortunately, the 'conditions or procedural rules under which victims have access to legal aid shall be determined by national law'[103] as well as their reimbursement for participating in criminal proceedings.[104] In the impact assessment conducted prior to the adoption of the Victims' Rights Directive, the Commission discarded the policy options of regulating legal aid and compensation. It acknowledged that 'further

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[96] On the existence of such schemes and national legislations on confiscation, see Transparency International, 'Legislation meets practice: National and European perspectives in confiscation and forfeiture of assets' 2015 Comparative report.

[97] Commission Guidance document on the transposition and implementation of Directive 2012/29/EU, 37.

[98] Art. 16(1) Directive 2012/29/EU.

[99] The option of regulating compensation was discarded in the Impact Assessment of 2011, for the lack of information of national compensation systems. See European Commission, Impact Assessment accompanying the Proposal for a Directive on the Rights of Victims, SEC(2011) 580 final, p. 23.

[100] Art. 12(2) Directive 2012/29/EU.

[101] Art. 15 Directive 2012/29/EU.

[102] Or by introducing a separate civil claim, i.e. civil court action.

[103] Art. 13 Directive 2012/29/EU.

[104] Art. 14 Directive 2012/29/EU.

research is still needed to precisely identify problems and possible solutions. Such research is even more important since action in these areas could have very high cost implications for the Member States. As such, legal aid and compensation are not included in the options below but will be the subject of further studies to determine appropriate EU action'.[105]

Against this background, it seems that the Victims' Rights Directive shies away from laying down rules governing compensation systems and legal aid. It is fair to say that the same, non-constraining approach as the Compensation Directive, was followed. Unfortunately, the *effet utile* of these rights risks being undermined by the persistence of inconsistencies and high variations between national schemes.

[105] European Commission, Impact Assessment accompanying the Proposal for a Directive on the Rights of Victim, SEC(2011) 580 final, p. 23.

CHAPTER IX

Protection measures for victims

I. Comparative analysis of protection measures

Victims should be protected against future assaults through intimidation on the part of the offender or retaliation.[1] Protection measures have been designed to protect the person from repeat offences, against 'a criminal act that may endanger his or her life, physical or psychological integrity, dignity, personal liberty or sexual integrity'.[2] These measures are most widespread in the context of domestic violence, harassment and sexual assault[3] and most of the time involve the avoidance of contact between the offender and the victim through provisional or final measures.[4] Differences could be identified as regards the legal nature of protection orders, as well as the procedures leading to the issuing of a protection order, alongside the scope of these measures and definitions of offences resulting in the application of a protection measure.

A. Legal nature of protection orders

The sample of Member States examined can be divided into three groups. A first category brings together the Member States whose national laws provide for both civil and criminal protection measures, depending on the nature of these protection measures, on the type of proceedings and on the moment when they are adopted (e.g. Hungary, Ireland, Italy, the Netherlands).[5] The procedure to claim such protection

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[1] S. van der Aa, J. Ouwerkerk, 'The European Protection Order: No Time to Waste or a Waste of Time?', 2011, 18, *European Journal of Crime, Criminal Law and Criminal Justice*, 267-287.

[2] Cerrato *et al.* (above, Introduction, n50), 7.

[3] Council of Europe, 'Emergency barring orders in situations of domestic violence: Article 52 of the Istanbul Convention: A collection of papers on the Council of Europe Convention on preventing and combating violence against women and domestic violence', 2017.

[4] S. van der Aa, J. Niemi, L Sosa, A. Ferreira and A. Baldry, *Mapping the legislation and assessing the impact of Protection Orders in the European Member States*, Oisterwijk, Wolf Legal Publishers, 2015.

[5] Cerrato *et al.* (above, Introduction, n50), 31.

depends on the nature of the measure. In the Netherlands, for example, civil protection measures can only be obtained via preliminary relief proceedings. By contrast, no less than fourteen different procedures exist in criminal law to apply for a protection measure. A second group of countries applies exclusively one or the other type of protection measure. In some countries, protection orders can only be issued by a civil authority (e.g. Germany) while, in other countries, protection orders mainly, or exclusively pertain to the criminal field (e.g. Spain, Romania).[6] In Romania, the civil court is only competent to issue restraining orders in domestic violence cases.[7] In Spain, protection measures are exclusively adopted by judicial organs in criminal matters.[8] A third group is made up of those countries where some of the national protection measures do not fall squarely into one or the other category. The authorities of Finland, for example, issue 'quasi-criminal protection orders',[9] which are not necessarily connected to a criminal prosecution but the violation of which constitutes a criminal offence.[10] Moreover, not only the victim, but also the police and the prosecutor can apply for an order.[11] As a result, the protection orders are neither of a purely civil nor a purely criminal nature.[12]

B. Procedures, scope and definitions

Alongside differences in terms of legal nature, the procedure to apply for protection also differs from one Member State to another. The margin for manœuvre enjoyed by the victim when requesting the issuing of a protection measure is a case in point. In a first group of countries, the victim itself, along with its family, the prosecutor, the police and any relevant authority can request a protection order (e.g. Spain, Romania, Hungary[13], Finland).[14] In others, only the prosecutor has the competence to do so (e.g. Italy)[15] or the Family Court, *('juge aux affaires familiales')* (e.g. France),[16] or the court and/or the prosecutor (e.g. the Netherlands).[17]

Secondly, protection orders may serve various purposes depending on the Member States in question. Civil measures are generally of a precautionary nature and take the form of a restraining order (e.g. France, Romania, Ireland, the Netherlands, Germany,

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[6] S. VAN DER AA *et al.*, *Mapping the legislation and assessing the impact of Protection Orders in the European Member States* (n4).

[7] National report on Romania, Section on Victims (point 27) (see also Part I, Chapter V of this edited volume).

[8] National report No. 2 on Spain, Section on Victims (point 30).

[9] 'The Act on Restraining Orders.' See S. VAN DER AA *et al* (n4), 221.

[10] *Ibid.*

[11] *Ibid.* For a typology of existing protection orders, see S. VAN DER AA, 'Protection Orders in the European Member States: Where Do We Stand and Where Do We Go from Here?', 2012, 18, *European Journal of Criminal Policy Research*, 190.

[12] *Ibid.*

[13] J. WIRTH, 'National report on Hungary', 2015, POEMS project.

[14] S. VAN DER AA, 'Protection Orders in the European Member States: Where Do We Stand and Where Do We Go from Here?' (n4), 190; National report No. 2 on Romania, Section on Victims (point 23) (see also Part I, Chapter V of this edited volume).

[15] A. BALDRY, L. DE GEUS, 'National Report on Italy', 2015, POEMS project.

[16] National report No. 2 on France, Section on the protection of victims (point C) (see also Part I, Chapter I of this edited volume).

[17] National report No. 2 on the Netherlands, Section on the protection of victims (point 2) (see also Part I, Chapter IV of this edited volume).

Finland). They may also be used to stop a wrongful act (e.g. Italy, France, the Netherlands, Spain), such as domestic violence. As part of the criminal proceedings, a protection order can be issued as a complementary tool or a condition for the suspension of the prison sentence. At the pre-trial stage, a protection order can be imposed so as to prevent any contact between the offender and the victim as an alternative to pre-trial detention (e.g. France, the Netherlands, Italy, Spain, Romania).[18] For example, under Dutch law the judge can order the suspension of PTD under the condition that the suspect does not contact the victim.[19] As part of the sentence, the competent judicial authorities can impose a measure restricting the person's freedom (e.g. Ireland, the Netherlands, Romania, France). At the post-trial stage, a protection order may be imposed as a pre-condition to order conditional release (e.g. France, the Netherlands, Romania, Hungary, Spain). This means that the latter may be associated with specific requirements, for example that the convicted person does not contact or communicate with the victim, their relatives or any other persons as determined by the judge.[20]

The existence of emergency protection measures is also uneven across the selection of Member States examined. Emergency Barring Orders (EBOs) are crucial in that they guarantee victims protection in case of immediate danger, in case of domestic violence against women in particular.[21] Only five Member States have included, in their legal systems, short-term protection measures applying from the moment a risk has been identified (e.g. the Netherlands, Italy, Hungary, Germany, Finland). However, in other countries EBOs do not exist.[22] In Ireland, The Domestic Violence Act of 2018 provides the courts with the possibility to issue EBOs.[23] Article 52 of the Council of Europe's Istanbul Convention[24] provides that Member States must adopt EBOs to prevent perpetrators of domestic violence from entering the residence or contacting the victim.[25] Most Member States have ratified the Istanbul Convention (e.g. Finland, France, Germany, Italy, Ireland the

[18] National report No. 2, Section on Victims (point 23). As regards Italy, complementary information could be found, *in* BALDRY and DE GEUS, 'National Report on Italy' (above n15).

[19] National report No. 2 on the Netherlands, Section on victims (point 2) (see also Part I, Chapter IV of this edited volume).

[20] National report No. 2 on Spain, Section on victims (point 28).

[21] WAVE Network, SNaP: 'Special Needs and Protection Orders', 2016, International report.

[22] CERRATO *et al.* (above, Introduction, n50).

[23] Act announced in National report No. 2 on Ireland, Section on victims (point 23). Previously, only Interim Barring Orders (IBOs) could be issued. (WAVE Network (n21)).

[24] Council of Europe Convention of 11 May 2011 on preventing and combating violence against women and domestic violence, (Istanbul, convention), CETS No 210.

[25] The full provision reads: 'Parties shall take the necessary legislative or other measures to ensure that the competent authorities are granted the power to order, in situations of immediate danger, a perpetrator of domestic violence to vacate the residence of the victim or person at risk for a sufficient period of time and to prohibit the perpetrator from entering the residence of or contacting the victim or person at risk. Measures taken pursuant to this article shall give priority to the safety of victims or persons at risk.'

Netherlands, Romania, Spain) but not all of them[26], this in spite of the fact that it was signed by the EU in June 2017.[27]

Variations in protection regimes also depend on the way in which offences have been defined and addressed at the national level. Gender-based violence deserves closer attention. This example is particularly relevant as the EPO Directive essentially arose from the willingness of some countries to address the lack of protection of gender-based victims across the EU. The national legal definitions of gender-based violence in general, and specific forms of violence, such as rape, sexual assault, stalking and intimate partner violence, to name only a few examples, differ significantly from one Member State to another.[28] For example, the German CCP defines sexual assault as: 'Whosoever coerces another person, by force, by threat of imminent danger to life or limb, or by exploiting a situation in which the victim is unprotected and at the mercy of the offender, to suffer sexual acts by the offender or a third person on their own person or to engage actively in sexual activity with the offender or a third person.' By contrast, the definition provided by the Irish CCP is much more succinct and evasive: 'Sexual assault means an indecent assault on a male or a female.' Logically, national answers to gender-based offences are different too, as a comparative study shows.[29]

II. Impact on mutual recognition and cross-border cooperation*

Under the Spanish presidency of the EU in 2010, twelve Member States launched an initiative for a Directive on the European Protection Order. The rationale for the EPO was to increase the protection for victims in a cross-border situation to ensure that protection orders applied over the whole EU territory. Perpetrators and victims must be able to exercise their freedom of movement and protection should not be limited to the State where the protection measure was originally adopted.[30] Put in a different way, it was believed that the protection should 'follow' victims to the Member State that they chose to go to. In order for cross-border protection to be achieved, the mutual recognition route was chosen. On the basis of Measure C of the 2011 roadmap on victims' rights, the EU developed the European Protection Order Directive (hereafter referred to as the EPO Directive) and Regulation 606/2013 on the mutual recognition of protection measures in civil matters (hereafter referred to as the EPM Regulation).

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* See also the report by J. MILQUET (see above, Part II, Chapter VIII, n70).

[26] Among the 9 member states studied, only Hungary did not (see Council of Europe, Treaty office).

[27] European Parliament 'Interim Report on the proposal for a Council decision on the conclusion, by the European Union, of the Council of Europe Convention on preventing and combating violence against women and domestic violence' LIBE Committee (COM(2016)0109 – 2016/0062(NLE)), 19 July 2017.

[28] See, on this matter, the comparative index of national definitions drawn up by the European Institute for Gender Equality on its website.

[29] T. FREIXES, L. ROMÁN (eds.), 'Protection of the Gender-Based Violence Victims in the European Union, Preliminary study of the Directive 2011/99/EU on the European protection order', 2014, EPOgender project.

[30] VAN DER AA and OUWERKERK, 'The European Protection Order: No Time to Waste or a Waste of Time?' (above, n4), 268.

These two instruments allow national authorities to issue protection orders to protect victims of one Member State when they are located in another Member State.

There are major obstacles to the operation of these instruments. The widely divergent national approaches to protection measures resulted in significant flexibility being retained by EU legislators, both during the negotiations and regarding the content of mutual recognition instruments. Flexibility, along with the existence of a dual framework, generated some confusion among the Member States as to which instrument should be relied on. The overriding impression is that incompatibilities between national protection measures exist in practice. This is exacerbated by the poor implementation of these instruments as well as a striking lack of knowledge of their existence.

A. Flexibility in mutual recognition instruments

The complex and kaleidoscopic landscape of national protection measures rendered the negotiations on a cross-border protection instrument difficult. Attempts at accommodating the diversity of legal traditions are threefold. First, the co-existence of civil and criminal protection measures at the national level forced EU lawmakers to consider the adoption of two separate instruments governing the ambits of both civil and criminal law. A compromise was reached between the Commission on the one hand, and the Council and the Parliament on the other hand. At times during the negotiation of the EPO, the Commission wanted to restrict the scope of the Directive to criminal matters. Bearing in mind the diversity of protection measures issued by civil jurisdictions at the national level, this raised concerns within the legislative bodies, and it was agreed to prepare a separate instrument for civil matters.[31] Then, the existence of different kinds of authorities in the Member States calls for a 'high degree of flexibility in the cooperation mechanism'.[32] Flexibility was introduced as regards the nature of authorities competent to adopt and enforce protection measures.[33] The EPO Directive provides that not only 'judicial' but also 'equivalent authority or authorities' are competent under national law to issue an EPO and to recognise such an order.[34] Flexibility is further illustrated in the preamble of the Directive, where Recital 10 explicitly states that the civil, administrative or judicial nature of the authority adopting a protection measure is irrelevant. The 'civil counterpart' of the EPO Directive, namely the EPM Regulation, retained similar flexibility as regards the nature of authorities. Thus, the civil, administrative or criminal nature of the authority ordering a protection measure is not determinative;[35] decisions can be taken by either judicial or administrative authorities. Police authorities, on the other hand, do not have the competence to issue civil protection orders.[36] Third, flexibility

[31] Cerrato *et al.* (above, Introduction, n49), 12. See also Commission Statement by Vice-President Viviane Reding, former DG Justice Commissioner, on the European Protection Order, Strasbourg, MEMO/11/906, 13 December.

[32] Recital 8 Directive 2011/99/EU.

[33] Recital 20 Directive 2011/99/EU. Also reiterated under Art. 1, whereby rules allow a judicial or *equivalent* authority to adopt a protection order.

[34] Art. 3(1) Directive 2011/99/EU.

[35] Recital 10 Regulation 606/2013.

[36] Art. 3(4) and Recital 11 Regulation 606/2013.

was introduced regarding the nature (criminal or civil) of protection measures to be implemented. In the EPO Directive, the competent executing authorities remain free to determine the kind of measures of protection that should follow the issuing of a protection measure. Recital 20 states that the 'competent authority in the executing State is not required in all cases to take the same protection measure as those which were adopted in the issuing state, and has a degree of discretion to adopt any measure which it deems adequate and appropriate under its national law' to provide continued protection to the person. It is interesting to note that a stricter approach was taken in the EPM Regulation. Cross-border cooperation under this instrument is strictly confined to the realm of civil cooperation. Thus, the type and the civil nature of the protection measure cannot be affected.[37]

Regarding the number and types of protection measures governed by the EPO Directive and the EPM Regulation, no endeavours at approximating the protection regimes were made beyond a mere list of three measures that must be available in all Member States: a geographical prohibition on certain places; a prohibition or regulation of contact; and a prohibition or regulation on approaching a person beyond a limited distance.[38] The all-encompassing wording and broad scope of these three protection measures suggest that these instruments sought to circumvent the absence of uniform protection measures for victims at the national level and to favour effective cross-border cooperation. The EPO Directive goes a step further by acknowledging that the approximation of the national legislation of the Member States is not required;[39] on the contrary, the Directive specifically states that it 'does not create obligations to modify national systems for adopting protection measures nor does it create obligations to introduce or amend a criminal law system for executing a European protection order'. This accommodation of differences is mirrored in the EPM Regulation, which states that the Regulation 'takes account of the different legal traditions of the Member States and does not interfere with the national systems for ordering protection measures'.[40] As a result, Member States are not obliged to 'modify their national systems so as to enable protection measures to be ordered in civil matters, or to introduce protection measures in civil matters for the application of this Regulation'.

B. Confusion arising from the existence of a dual framework and risks of incompatibilities in practice

The co-existence of the EPO Directive and the EPM Regulation in the field of protection orders complicates their use[41] and creates confusion as to which instrument should be given the priority, depending on the circumstances of a case.[42] This raises an interesting paradox: whereas national differences forced EU lawmakers to

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[37] Recital 20 Regulation 606/2013.

[38] Art. 5 Directive 2011/99/EU.

[39] Recitals 8 and 9 Directive 2011/99/EU.

[40] Recital 12 Regulation 606/2013.

[41] National report No. 2 on Germany, Section on Victims (point E(I)) (see also Part I, Chapter II of this edited volume); National report No. 2 on France, Section on Victims (point C) (see also Part I, Chapter I of this edited volume).

[42] D. Porcheron, 'Le principe de reconnaissance mutuelle au service des victimes de violences', 2016, *Rev. crit. DIP*, 232.

accommodate the variety of civil and criminal protection measures by adopting two separate instruments, it is precisely this endeavour at accommodation which is being criticised for raising confusion at the implementation stage.

Nonetheless, the choice of one or the other instrument has important implications for the victim since the degree of effectiveness and efficacy is not the same in the Directive and the Regulation. These differing levels of effectiveness echo existing differences in mutual recognition in criminal matters and mutual recognition in civil matters and are somehow logical. For example, in the EPM Regulation, the standard transmission form applicable in mutual recognition instruments was replaced by a certificate containing more detailed information about the issuing authority, the protected person, the person causing the risk and the type of protection measure applied and its duration.[43] Meanwhile, in the EPM Regulation, the grounds for refusal were shortened to two instead of nine in the EPO Directive.[44] Then, the dual criminality requirement of the EPO Directive[45] is not mirrored in the EPM Regulation, where direct and automatic circulation of the protection measure is encouraged.[46]

Other differences between the two instruments are less obvious to discern and more difficult to understand. The involvement of administrative authorities is a case in point. Whereas flexibility regarding the nature of authorities was retained in both instruments, only the EPM Regulation makes the competence of administrative authorities conditional upon the existence of 'guarantees with regard, in particular to their impartiality and the right of the parties to judicial review'.[47] In practical terms, frictions may arise from the co-existence of proceedings partly governed by criminal law and partly governed by civil law. There seems to be a widespread feeling among national authorities that these instruments, if relied on, would be unworkable in practice. Indeed, compatibility issues could arise when the executing State has to recognise an EPO imposing protection measures that originally were adopted by non-criminal authorities or even non-judicial agents or bodies of the issuing State.[48] Germany, for example, will never be able to issue protection orders under the EPO, whereas Spain will never make use of the civil certificates provided under the EPM Regulation. Obstacles at the enforcement stage may also arise as a result of the existence of a dual regime of protection measures. The question of compliance can be raised in particular when a Member State only has civil instruments at its disposal to enforce a criminal protection order issued by another jurisdiction.[49] In the Netherlands for example, the supervision of compliance with civil protection orders is less regulated than it is for criminal protection orders.[50]

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[43] Art. 7 Regulation 606/2013.

[44] Art. 13 Regulation 606/2013.

[45] Art. 10(c) Directive 2011/99/EU.

[46] National report No. 2 on France, Section on Victims (point C) (see also Part I, Chapter I of this edited volume).

[47] Art. 3(4) and Recital 20 Regulation 606/2013.

[48] See national reports on Germany (point E(I)) and Spain (point 30).

[49] *Ibid.*

[50] The claimant is solely responsible for the supervision, and electronic means of monitoring compliance cannot be imposed. Former studies pointed out the lack of enforcement measures and sanctions in case of breaches of POs in Germany (see WAVE Network (n21), 22).

From a more technical perspective, it may simply be that some of the instruments deployed by the issuing State to monitor whether the protection order is being complied with are not available in the executing State. The extent to which Member States have established specialised services and other protection measures for victims varies to some extent. Thus, the 'preliminary layers' of protection, a pre-requisite for cooperation at the inter-State level, are not always available. Put in another way, it may very well be that the victim does not enjoy an equivalent protection in the State where he or she moves to compared with the State of origin. Fears of such a kind were expressed by Spain, whose national law provides for a variety of monitoring techniques, including electronic bracelets and geolocation devices connected to police servers.[51]

Somewhat ironically, interviewees and national reports suggested that it is easier to make use of domestic procedures instead of relying on cross-border channels of protection. For example, in Germany, the formalities to initiate a protection measure are few and thus constitute an easier and faster way than going through the inter-European procedure, where authorities must first enter into contact with one another.[52] Moreover, the domestic system of protection against violence, which pre-existed the EPO Directive and the EPM Regulation, is also open to EU citizens of other Member States who reside in Germany.[53] This is compounded by the clear deficit in coordination and communication that was recently identified between competent national authorities.[54]

C. Implementation issues, lack of mutual knowledge and legality concerns

The two instruments were described in the national reports as difficult to transpose by the respondents and barely workable in practice. Significant transposition delays occurred with regard to the EPO Directive. The transposition deadline for the latter instrument was set on 11 January 2015, but the transposition process was only completed last year, with the last Member State being Belgium in May 2017.[55] Only seven EPOs had been issued since the entry into force of the EPO Directive until 2018[56] despite thousands of protection orders issued at the domestic level. For example, in Finland, 1,500 restraining orders were issued in 2017.[57] No information could be found in the national records of the Member States examined on the issuing of civil protection orders under the EPM Regulation.

The way in which those instruments were implemented is not conducive to their smooth operation. For example, the requirement of dual criminality was implemented

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[51] National report No. 2 on Spain, Section on Victims (point 30). It is interesting to note that similar issues arose as regards the use of probation measures and alternatives to detention. Above, s IV.

[52] National report No. 2 on Germany, Section on victims (point E(I)) (see also Part I, Chapter II of this edited volume).

[53] *Ibid.* (point C(II)).

[54] CERRATO *et al.* (above, Introduction, n50), 53.

[55] Loi du 9 avril 2017 relative à la décision de protection européenne, *Moniteur Belge*, 18 mai 2017, 57542-57557.

[56] Four EPOs were issued by Spain, two in the UK and one in Italy.

[57] National report No. 2 on Finland, Section on Victims (point 28).

in some countries as a mandatory ground for refusal (e.g. France and Spain). This could also constitute one of the reasons preventing the use of the EPO, due to existing divergences between the definitions and concepts of offences, such as gender-based violence.[58] One may also mention that the EPO Directive does not provide time limits for Member States to issue protection orders. As a result, most legislation did not include specific provisions in their transposing laws.[59] Other issues include the way in which the EPO Directive was converted into national law, sometimes resulting in a mere translation of the Directive, without further adaptation to the particularities of national systems.[60] The Irish opt-outs of both the EPO Directive and the EPM Regulation add another impediment to high ambitions of free circulation of protection.

Besides, there seems to be a general lack of knowledge about these two instruments on the part of both victims and professionals in charge of protecting them. A recent European Parliament study reveals that victims still lack awareness of their rights and information on how they could exercise them is scarcely available.[61] Despite the fact that the EPO Directive provides for the conduct of courses and training for judicial authorities on EPO procedures,[62] in Germany, many judges and lawyers are simply not aware that the EPO exists.[63] Most lawyers in Germany dealing with criminal law are primarily criminal defence lawyers and it can be hard to find specialised victim lawyers.[64] Another issue identified in Germany is the lack of willingness of lawyers themselves to undergo training since the EPO mechanism has never been relied on in Germany.[65] A similar criticism applies to France, where judges dealing with protection measures applied to victims are few, and human and financial resources devoted to the enforcement of these measures are scant.[66] An obstacle to the training of judges identified in Germany lies in the requirement of independence of judges, who cannot be forced to participate in training.[67]

A last concern relates to the compatibility of the flexibility retained under the EPO Directive with the legal basis of Article 82(1) TFEU on judicial cooperation

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[58] See above. See also National report No. 2 on Spain, Section on Victims (point 30). For example, gender-based violence may encapsulate a different meaning depending on the degree of acceptance of same-sex couples or relationships in the national law of a given MS.

[59] See National report No. 2 on Romania, Section on Victims (point 27) (see also Part I, Chapter V of this edited volume).

[60] *Ibid*.

[61] SCHERRER *et al.* (above, Introduction, n49).

[62] Recital 31 Directive 2011/99/EU reads that: 'Member States should consider requesting those responsible for the training of judges, prosecutors, police and judicial staff involved in the procedures aimed at issuing and recognising a European protection order to provide appropriate training with respect to the objectives of this Directive.'

[63] National report No. 2 on Germany, Section on victims (point E(I)) (see also Part I, Chapter II of this edited volume).

[64] This is despite the fact that victim protection is taken into account in the education of judges and prosecutors (see National report No. 2 on victims (point II)).

[65] *Ibid.*

[66] C. BLAYA, 'Mapping the legislation and assessing the impact of protection orders in the European Member States (POEMS), National report on France', 2015.

[67] National report No. 2 on Germany, Section on victims (point E(II)) (see also Part I, Chapter II of this edited volume).

chosen by the legislators.[68] Whereas a joint legal basis of Article 82 and Article 81 TFEU would have perhaps reflected more accurately the content and the cooperation mechanism laid down in the Directive,[69] the Commission rejected this possibility during the negotiations.[70]

D. The Victims' Rights Directive: raising awareness?

The comprehensive scope of the Victims' Rights Directive carries the potential to raise awareness on the imperative of protecting victims throughout the EU. Under Chapter 4, the Victims' Rights Directive includes a general right to protection for victims. 'Protection' is declined in several aspects. Under Article 18, the victim has a right to be protected from 'secondary and repeat victimisation, from intimidation and from retaliation, including against the risk of emotional or psychological harm, and to protect the dignity of victims during questioning and when testifying. When necessary, such measures shall also include procedures established under national law for the physical protection of victims and their family members'.[71] The scope of this provision is much broader than that of protection orders. Whereas the EPO Directive and the EPM Regulation regulate interactions between the offender and the victim, the Victims' Rights Directive covers the interplay between the victim and both the offender and professionals dealing with the offence, such as investigative and judicial authorities. Thus, it provides complementary protection to the protection orders instruments. The inclusion of a list of dangerous situations that the victim may face, i.e. secondary and repeat victimisation, intimidation and retaliation, including against the risk of emotional or psychological harm, can be used as guidance by the national authorities as to the circumstances in which a protection order should be issued. However, the procedures and instruments to enable such protection remain a matter for the national law and Article 18 does not seek to expand the list of protection measures provided under the EPO Directive and the EPM Regulation further.[72] The Court of Justice of the EU was called on by the Italian judicial authorities (Tribunale di Bari) to further clarify the exact scope of this provision through the preliminary ruling

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[68] Similar concerns were formulated as regards the E-Evidence Directive. It seems that the widening of cross-border cooperation actors is not always compatible with the rather strict boundaries – between administrative, criminal and civil actors – operated in the Treaties.

[69] Mitsilegas (above, Introduction, n4), 196.

[70] The reason for this was that Art. 82 TFEU provides Member States with an 'emergency brake' under its third paragraph, whereas the provisions of Art. 81 TFEU are more ambitious when it comes to the approximation as they leave less discretion to national authorities. Arguably, bringing civil and criminal provisions under the same instrument would have conferred more margin for manoeuvre to the member states to backtrack on the approximation of civil law, than they would have under a single Art. 81 TFEU procedure. An agreement was found with the European Commission to move the civil provisions into a separate instrument.

[71] Art. 18 Directive 2012/29/EU.

[72] As stated in the Commission's guidance paper on the implementation of Directive 2012/29/EU, 40.

procedure.[73] Alongside this, Article 19 provides that, where necessary, contact should be avoided between the offender and the victims and its family members, for example by providing separate court rooms during the proceedings. The latter provision is reminiscent of the prohibition/regulation of contact and distance enshrined under the EPO Directive and the EPM Regulation and ensures a degree of consistency between the three instruments.

Two observations can be made. First, the inclusion of a chapter on the protection of victims may contribute to raising awareness about the need to protect victims further. Indirectly, it could also incite Member States to resort to the EPO Directive and the EPM Regulation more often. Then, the difficulty to regulate in favour of minimum standards on protection measures is illustrated by the absence of approximation efforts in the Directive. Rather, the guidance document on the implementation of the Victims' Rights Directive explicitly states that Article 18 *does not* harmonise the types of national protection orders. Besides, the Victims' Rights Directive applies to criminal matters only and does not regulate civil measures.[74] Therefore, those provisions will be of little help to address the crux of the problem: incompatibilities between civil, criminal and quasi-criminal protection orders. Despite these apparent limitations, the introduction of a general standard of protection for victims under national law was assessed positively in some countries, especially where it was not foreseen under national law prior to the entry into force of the Directive (e.g. Italy, Germany).[75]

Furthermore, the strong focus on victims of gender-based violence of the Victims' Rights Directive could, over time, give greater visibility to the EPO Directive and the EPM Regulation, bearing in mind the underlying objective of the latter instruments to ensure that victims of gender-based violence are adequately protected throughout the EU. The guidance document issued by the Commission on the implementation of the Directive indeed mentions that the provisions it contains are particularly relevant to the protection of victims of gender-based violence. It includes a non-exhaustive list of situations which qualify as gender-based violence, comprising physical violence, sexual exploitation and abuse, female genital mutilation, forced marriages and so-called 'honour crimes'.[76] Perhaps streamlining the national definitions of gender-based offences could lead, over time, to more consensus on the protection afforded

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[73] C-38/18, *Massimo Gambino and Shpetim Hyka*, 29 July 2019, ECLI:EU:C:2019:628. In this case, the Court of Justice examines the compatibility of Italian law with the Directive. It concludes that the CCP, that allows defendants to ask witnesses (who can be victims as was the case in the file) to be heard again if the composition of the court has changed, does not jeopardise victims' rights enshrined in Art. 16 and 18 of the Directive 2012/29EU.

[74] Similar restriction applied to Framework Decision 2001/220/JHA (see *Dell'Orto*, (above Part II, Chapter VIII, n72) as well as the opinion of Advocate General Kokott delivered on 8 March 2007.

[75] National reports No. 2 on Germany and Italy, Section on Victims (points C(I)(1) and 23 respectively). In Italy, this led to a strengthening of the rights of victims with specific protection needs (Art. 90-quarter CCP).

[76] Commission Guidance Document related to the transposition and implementation of Directive 2012/29/EU, Art. (2013) 3763804, 19.12.2013, 8.

to victims of such offences. This is compounded by the inclusion of a few provisions on the kind of protection and support that must be available for vulnerable persons. Thus, the Directive recognises that 'women victims of gender-based violence and their children often require special support and protection because of the high risk of secondary and repeat victimisation, of intimidation and of retaliation connected with such violence'.[77] Victims of gender-based violence have a right to targeted and integrated support[78] and an individual assessment,[79] and training of authorities in direct contact with victims should be gender-sensitive.[80]

A word of caution should nonetheless be raised. The exclusion of administrative and civil proceedings from the scope of the Victims' Rights Directive means that some offences may not fall within its scope. It is the case, for example, of victims of sexual offences within public administration in Spain,[81] where these offences are dealt with under the administrative channel, where the victim is not entitled to the status of party to the proceedings. The Spanish Constitutional Court addressed this gap to some extent, ruling that some of the rights enjoyed by the victims in criminal proceedings shall be guaranteed in disciplinary proceedings.[82]

E. The relative disconnection between approximation and mutual recognition

In spite of the strong awareness-raising potential of the Victims' Rights Directive, the relations between the latter's provisions and mutual recognition are difficult to appreciate. The preamble of the Directive includes a simple and brief reference to mutual recognition and to the EPO Directive[83] without elaborating further on how it is supposed to contribute to its functioning. Besides, none of the provisions of the Victims' Rights Directive refer to the EPO Directive. The justification for adopting the Victims' Rights Directive, along with references to mutual trust and mutual recognition, that featured in the explanatory memorandum of the original proposal of the Commission, were scrapped in the final version of the text.[84] The original text read:

> 'Mutual recognition can only operate in a spirit of confidence, whereby not only judicial authorities but all those involved in the criminal justice process and others who have a legitimate interest in it can trust in the adequacy of the rules of each Member State and trust that those rules are correctly applied. Where victims of crime are not subject to the same minimum standards throughout the EU, such trust can be reduced due to concerns over the treatment of victims or due to differences in

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[77] Recital 17 Directive 2012/29/EU.

[78] Art. 9(3)(b) Directive 2012/29/EU.

[79] Art. 22(3) Directive 2012/29/EU.

[80] Recital 61 Directive 2012/29/EU. For example, victims of gender-based violence to have interviews carried out by a person of the same sex as the victim (Art. 23(2)(d) Directive 2012/29/EU).

[81] National report No. 2 on Spain, Section on Victims (point 29).

[82] *Ibid.*

[83] Recital 7.

[84] Commission Proposal for a directive establishing minimum standards on the rights, support and protection of victims of crime (COM/2011/0275) final – (COD) 2011/0129, 2, 3.

> procedural rules. Common minimum rules should thus lead to increased confidence in the criminal justice system of all Member States, which in turn should lead to more efficient judicial cooperation in a climate of mutual trust as well as to the promotion of a fundamental rights culture in the European Union. They should also contribute to reducing obstacles to the free movement of citizens since such common minimum rules should apply to all victims of crime.'

The seeming disconnection between approximation and mutual recognition in the field of victims stands in contrast to EU legislation on the rights of defendants, which was perceived as a pre-requisite for mutual recognition to operate effectively because of the potentially detrimental effect of some instruments on the exercise of human rights, the FD EAW in particular.[85]

Chronological considerations provide a partial account for this relative disconnection between approximation and mutual recognition instruments in the realm of victims' rights. Whereas considerable amounts of time have elapsed between the adoption of FD EAW and the adoption of the procedural rights directives on defendants, mutual recognition instruments in the realm of the protection of victims were adopted almost simultaneously with the Victims' Rights Directive. However, this raises the question of the adequacy of the legal basis, since measures adopted on the basis of Article 82(2) TFEU must demonstrate that they will facilitate mutual recognition. One may wonder whether the Victims' Rights Directive, in its current form, facilitates 'mutual recognition of judgments and judicial decision and police and judicial cooperation in criminal matters having a cross-border dimension'. These concerns reinforce the aforementioned criticism aimed at the Compensation Directive, from which the Victims' Rights Directive seems also completely disconnected.

[85] See analysis by Mitsilegas (above, Introduction, n4), 198.

PART III

Conclusion and recommendations

Élodie Sellier and Anne Weyembergh

CHAPTER I

General assessment

Nine areas of friction could be identified throughout this comparative research, as a result of differences among national procedural criminal laws. Nonetheless, the sort of 'negative catalogue'[1] of obstacles to cross-border cooperation set out above is by no means exhaustive and could be developed and deepened further.[2] Several limitations and challenges indeed paved the way for the preparation of this study. For example, some of the mutual recognition and cross-border cooperation instruments addressed have been implemented recently (e.g. the EIO Directive) or are still in the process of being implemented (e.g. the EPPO Regulation), not to mention those still being negotiated or not adopted yet (e.g. the E-Evidence Proposal). Thus, it was impossible to take the distance needed to appreciate and assess in a comprehensive and accurate manner the obstacles impairing the functioning of these mechanisms. Besides, it should not be overlooked that this research draws on a limited sample of nine Member States. Other issues may be encountered elsewhere but these were impossible to address within the scope of this study.

Alongside methodological challenges, reports and research papers by academics, EU and national officials and civil society representatives highlighted that other areas deserve close examination as well. *Inter alia*, these comprise the absence of an EU instrument organising transfers of proceedings,[3] obstacles stemming from conflicts of jurisdiction as well as differences in understandings and approaches to the principle of *ne bis in idem*. Although the latter may seriously impair cross-border cooperation,[4] obstacles encountered in these areas were deliberately left out

[1] National report No. 2 on Germany, Section on conclusion and recommendations (point D) (see also Part I, Chapter II of this edited volume).

[2] As noted in the Introduction.

[3] National report No. 2 on Spain, Section on Conflicts of jurisdiction (point 22).

[4] See the project led by the European Law Institute on Prevention and Settlement of Conflicts of Exercise of Jurisdiction in Criminal Law, University of Luxembourg, 2014-2017.

See the Draft Legislative Proposals for the prevention and resolution of conflicts of jurisdiction in criminal matters in the European Union retrieved at:

of the scope of this research since the link between these and differences in criminal procedures is more tenuous.[5]

Another area of inquiry will deserve closer attention in the coming years. It relates to the crumbling dichotomies underpinning the EU's area of criminal justice. The demarcation line between administrative and criminal law has become extremely porous, helped by the significant flexibility retained in EU instruments, in order to accommodate the different degrees of 'blur' between the two ambits at the national level. The question of where to draw the line between the administrative and criminal fields permeates many fields of cooperation, including the realm of victims, where the EU had to cope with the variety of administrative and criminal protection measures existing at the national level. Then, another boundary has begun to wane with the strengthening and expansion of cross-border cooperation in criminal matters: the one underpinning the respective roles of public and private actors. Inherent in this change are the important responsibilities conferred on private actors in the E-Evidence Proposal. Private parties are not only expected to actively cooperate with judicial authorities and their role is no longer confined to that of 'gatekeepers' and 'long-arm collectors of enforcement information'.[6] They also take an active part in the assessment of the investigative measure, in particular when examining whether the assistance request conforms to fundamental rights. Faced with these 'tectonic shifts' in the division of labour and competences in the EU's area of criminal justice, the legal landscape of actors has become extremely complex, interweaving not only EU and national actors and laws, but also embracing administrative and penal rules and procedures, alongside public and private actors. If the trend of multiplying and complexifying the number and kinds of actors involved in cross-border cooperation is to persist, care must be taken that the requirement of effectiveness of cooperation whilst expanding the options for transnational cooperation does not raise legality concerns. With the adoption of the EPO Directive and the release of the E-Evidence Proposal, it seems that the legal basis for judicial cooperation of Article 82(2) TFEU was stretched well beyond its scope so as to accommodate the development of new forms of cooperation. Pushing the boundaries of Treaty provisions further and broadening options for transnational cooperation by involving new types of actors should not result in lowering the standards and rights of individuals.

Other areas were identified during the research and drafting process of this research. These include, *inter alia*, the application of some of the general principles of EU law to cross-border cooperation mechanisms, such as the principle of proportionality,[7] the procedural rights of vulnerable persons and, in particular, those of witnesses,[8] the position of legal persons in criminal justice systems.

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www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/Conflict_of_Jurisdiction_in_Criminal_Law_FINAL.pdf.

[5] With the noticeable exceptions of *ne bis in idem* issues.

[6] J. Vervaele, 'Special procedural measures and respect of human rights', 2009, 80, *Revue internationale de droit pénal*, 88.

[7] National report No. 2 on Germany, Section on conclusion and recommendations (point D) (see also Part I, Chapter II of this edited volume).

[8] See J. McEwan, 'The testimony of vulnerable victims and witnesses in criminal proceedings in the European Union' (above Part II, Chapter III, n88). Looking into witnesses'

I. Practical impact of differences in criminal procedures on mutual recognition and cross-border cooperation

This research identified several types of 'hindrances' to cross-border cooperation in criminal matters. The very notion of *hindrance* to mutual recognition and/or cross-border cooperation was given a broad interpretation, ranging from lengthy and complex negotiations,[9] mere delays[10] and poor execution of measures[11] to the non-execution of requests,[12] alongside the near absence of use of cooperation instruments by the Member States.[13]

The complex and lengthy negotiations leading to the adoption of new instruments of cooperation serve as a first illustration of the difficulties encountered in reconciling differences among criminal procedures. This challenge, combined with the sometimes asymmetrical levels of ambition and lack of political willingness to move forward with new instruments, translated into lengthy negotiations and the watering down of initially relatively high ambitions. The strategies relied on by the national representatives sitting in Council formations often had a knock-on effect on the provisions of the final texts, of which the rocky road that led to the adoption of the EIO Directive and the EPPO Regulation is an illustrative example. The drastic cuts in the list of investigative measures to be made available in all Member States during transnational investigations, along with the shift from the idea of an EU central office to prosecute PIF offences to a highly decentralised structure in the EPPO, offer prime examples of this. Meanwhile, crucial provisions, such as the exclusionary rules on admissibility of evidence in the original drafts of the EPPO Regulation, the Access to a Lawyer Directive and the Presumption of Innocence Directive, were either removed from the main text and inserted in the preamble of these instruments or simply deleted.

The functioning of existing measures has been impaired to a varying extent, depending on a range of factors. The most visible obstacles to cooperation are those relating specifically to the European Arrest Warrant. Indeed, the *Aranyosi and Căldăraru* case-law seriously affected the functioning of the EAW despite its widespread and longstanding use across the EU since its adoption, more than a decade ago. Whereas the FD EAW has received most public attention over the past

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duties in criminal proceedings from a MS to another was also suggested as a possible area of research and improvement by the second national report on Germany (Section on Conclusion and policy recommendations (point D) (see also Part I, Chapter II of this edited volume).

[9] Negotiations on the EIO Directive and the EPPO Regulation are cases in point.

[10] EAW issued for the purpose of executing a custodial sentence, authorisation procedures for setting up a JIT, judicial authorisation for the use of coercive investigative measures, identification of the competent authorities under the EIO.

[11] EAW issued for the purpose of conducting a prosecution, if the person is to serve a long period of pre-trial detention, investigation requests for minor offences that would normally be dealt with under the administrative channel in the requesting/issuing State but are dealt with under the judicial channel of the requested/executing State.

[12] EAW issued for the purpose of executing a custodial sentence, EAW issued for the purpose of conducting a prosecution *in absentia.*

[13] Cross-border compensation for unjustified detention, cross-border compensation for victims of serious and intentional crimes, protection measures for victims.

two years, other instruments deserve close consideration as well. Worthy cooperation mechanisms, such as the EPO Directive and the EPM Regulation, have been barely relied on by the Member States despite their significant potential to increase the standing of victims across the EU. Meanwhile, delays and poor execution of requests occurred as a result of incompatibilities between legal and procedural rules, absence of mutual knowledge, as well as the lack of effective and speedy communication and information exchanges between competent authorities.

II. How to cope with differences? Typology of existing trends among Member States …

Against this background, solutions were found in order to accommodate and overcome those differences. Among the Member States analysed, two types of approaches could be observed: a 'blind trust' approach and a 'half-hearted' or more 'reluctant' approach.

Member States following the 'blind trust' paradigm sought to accommodate differences to the maximum extent possible. National courts, when assessing whether a request for assistance, a warrant, or an order should be executed, base their analysis on the trust that governs the relations between the Member States. According to this line of reasoning, it is generally taken for granted that fundamental rights violations cannot occur in those countries which are parties to the ECHR and have implemented the acquis of the Charter of Fundamental Rights. One may wonder whether this approach truly hinges on the honest assumption that the values enshrined under Article 2 TEU are being upheld across the EU. Pursuant to this approach, cooperation would still rely on the principle of mutual trust even though it implies falling into a naïve reality of mutual ignorance. But form often trumps substance. In many circumstances, mutual trust was invoked as a justification to hide the underlying preference of national authorities for more efficient judicial cooperation, irrespective of the varying degrees of compliance with fundamental rights across the EU and the adverse impact it may have on individuals. Why, for example, have the fundamental rights grounds for refusal rarely been invoked in surrender procedures prior to the release of the *Aranyosi and Căldăraru* judgment, whereas executing authorities knew that the requested person would risk undergoing degrading and inhuman treatment, as a result of the deficiencies of the carceral system of the issuing State? Whereas resorting to the mutual trust argument has become less and less of a tenable position since *Aranyosi and Căldăraru*, the 'blind trust' paradigm continues to prevail in other fields of cooperation. This approach is prevalent in the field of admissibility of evidence, where some national authorities explicitly refrain from reviewing how evidence was gathered by the authorities of a foreign Member State.

The 'half-hearted' attitude differs from the above. Member States endorsing this approach have accepted differences between criminal procedures, on condition that these differences are not such as to encroach upon the core content of a fundamental right enshrined under national law. There, the general idea is that the mere existence of differences in criminal procedures is not enough to justify the non-execution of a request for assistance. This is the stance taken by the German Federal Constitutional Court when it implemented its identity review. The extent of the review is limited to

the protection of the 'core rights' enshrined in the Constitution, such as the principle of human dignity. The Federal Constitutional Court invoked the 'identity review' three times, as regards *in absentia* trials,[14] the right to remain silent[15] and detention conditions.[16] This position mirrors the jurisprudential developments in Ireland, where the Irish courts laid down the 'egregious defect standard', when confronted with differences in criminal procedures in surrender proceedings.[17] The threshold set by the Irish courts is that differences must be critical so as to justify a refusal to surrender. Thus, 'egregious circumstances' may take the form of 'a clearly established and fundamental defect in the system of justice of a requesting state'[18] that is such as to be incompatible with the national Constitution.

Variations and nuances could nonetheless be identified in the degree of 'half-heartedness' developed by the Member States. Clashes sometimes occur between countries with high levels of protection and those perceived as located at a lower end of the spectrum. Mismatches in the use of investigative detention, alongside the suspensions of many EAWs issued by, among other countries, Romania, serve as illustrations of this trend. This approach suggests that mutual trust is not based on the mere presumption that Member States share the same level of commitment to a common set of values but shows that trust must be 'earned' by the Member States through effective compliance with fundamental rights standards.

Although it is possible to discern recurring trends in the attitudes of Member states, it is interesting to note that none of the countries examined fall squarely into one or the other category. In practice, the position adopted by national authorities varies from a field of cooperation to another, depending on the classification of the right infringed under national law. For example, Germany has adopted a flexible approach to standards of admissibility of evidence, but the German position is much stricter on *in absentia* trials because the right to be present at a trial is intrinsically linked to the constitutional right to human dignity. Then, the coexistence of a variety of approaches is problematic from the perspective of fundamental rights. That Member States interpret the concept of mutual trust differently is one thing and it already complicates the task of defendants to challenge a cooperation measure effectively because national regimes differ to a more or less greater extent. The issue of variable geometry becomes a thornier one when interpretations of mutual trust differ *within the national regime itself*, depending on both the cooperation measure at hand and the individual's right that is being infringed.

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[14] See above (Part II, Chapter VII).

[15] See above (Part II, Chapter II). This relatively flexible approach is illustrated by a 2016 ruling, when Germany was confronted to the different implementation of the right to remain silent in the UK, where inferences may be drawn from the suspect's silence. In its judgment, the Federal Constitutional Court emphasised that the defendant's right to remain silent would only be infringed if its *core content* would be affected.

[16] See above (Part II, Chapter V).

[17] See above (Part II, Chapter II). National report No. 1 on Ireland, Section on the scope of the grounds for non-execution of the EAW (point 5.2.)

[18] *Minister for Justice, Equality & Law Reform v. Brennen*, [2007], IESC 21, 4th May 2007.

III. … Alongside the 'flexibility approach' developed by the EU

Coping with widely divergent legal regimes was not only a difficult undertaking for the Member States. As far as the EU is concerned, the question of how to strike a balance between the diversity of legal traditions and the imperative of approximation, the latter being a prerequisite to the effective operation of cross-border cooperation since the entry into force of the Lisbon Treaty, emerged as a crucial one. In order to mitigate the impact on cooperation and fundamental rights of the lack of harmonised rules and the seeming incompleteness of the approximation framework, the EU developed three different strategies.

A first attempt at reducing the impact of differences in criminal procedures on cross-border cooperation lies in the adoption of a body of directives on the basis of the 2009 and 2011 roadmaps, on defendants' and victims' rights respectively. The bulk of directives codifies and clarifies the case law of the ECtHR, as well as the principles developed therein, and expands the current procedural framework to some extent by implementing a number of new provisions.[19] Moreover, the adoption of EU legislation carries the potential of increasing compliance with the jurisprudential *acquis* developed by the ECtHR through the advent of a 'centralised system of enforcement of EU criminal law':[20] the Commission has the competence to monitor the implementation process of these directives and may launch infringement procedures before the Court of Justice of the EU if it considers that the directives have not been implemented adequately. Besides, the choice of the Directive as an instrument means that some of the rights they confer have ascending vertical direct effect. Individuals may therefore invoke these rights directly before the courts of Member States if national law failed to implement them, thus complementing the Commission's powers with a 'decentralised enforcement avenue'.[21] Put in another way, irrespective of whether these rights add much to the ECHR and the national systems already in place, 'their adoption by the European legislature will obviously increase their strength and enforceability, due to the particular nature of European law'.[22]

Alongside approximation endeavours, a complementary strategy was devised by the EU. This time, the approach taken was not geared to tackling differences head on but rather to circumventing them. As a result, significant flexibility was retained in cross-border cooperation mechanisms in order to strike a balance between ensuring the effectiveness of instruments and respecting national legal diversity. First, the scope of actors involved in cross-border cooperation was significantly widened so as to include both judicial and non-judicial actors, such as administrative authorities. This flexibility has manifested itself particularly in the terrains of transnational

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[19] Through the introduction of a Letter of Rights to be handed to the arrested person (Directive 2012/13/EU).

[20] Mitsilegas (above Introduction, n4), 175.

[21] *Ibid.*

[22] P. Caeiro, 'Introduction (or: Every Criminal Procedure Starts with a Bill of Rights)', *in* P. Caeiro (ed.), *The EU Agenda on Procedural Safeguards for Suspects and Accused Persons: The 'Second Wave' and Its Predictable Impact on Portuguese Law*, Coimbra, Universidade de Coimbra, 2015, 16.

investigations and the protection of victims. Another degree of flexibility was instilled as regards the nature of cooperation measures themselves. Concerning the protection of victims, the existence of a variety of criminal, administrative and civil measures drove the EU legislator to achieve flexibility with regard to the measures of protection which follow the recognition of a European Protection Order.

Ultimately, where differences proved too wide and sensitive to be accommodated by the 'flexibility approach' promoted by the EU, deference to national law was preferred. Several examples of this were encountered in the course of this research. In institutional terms, the implementation of the decentralised EPPO, where ambitions of a single prosecution office faced stiff resistance from the Member States which, *in fine*, preferred a more collegiate framework, will be a real credibility test. In procedural terms, the requirements of judicial authorisation by the national judicial authority for the use of investigative measures is another telling example. Examples abound in the field of procedural safeguards and legal remedies. Most of the time, the scope, access and eligibility conditions, as well as the overall effectiveness of these provisions, are a matter for national law. In the realm of defendants, these include the degree of applicability of the procedural rights directives to cross-border cooperation instruments, which often depends on the scope of directives under national law. As for the right to a legal remedy, whenever dedicated provisions have been included in EU instruments, the content of these provisions is often limited to a blanket obligation to implement a right to an effective remedy. Few rules governing the access to such remedies, alongside their scope of application were incorporated. Within the realm of victims, the rights to compensation from the State and compensation from the offender, alongside the right to the restitution of the confiscated property and to legal aid, suffer from similar shortcomings.

The current solutions brought by the EU have not always been conducive to effective cross-border cooperation. Somewhat paradoxically, whereas flexibility and deference to national law were retained to facilitate and pave the way for smooth cross-border cooperation, maintaining the co-existence of the administrative and criminal channels has not always yielded more effectiveness. Incompatibilities between measures invoked as part of the administrative or criminal ambits occur and generate considerable confusion among practitioners. This is particularly so in the realm of victims, where difficulties in coping with the variety of administrative, criminal and civil measures were pointed out as one of the major reasons for the under-use of the EPO Directive and the EPM Regulation. Delays may occur as a result of the obligation to cope with a variety of existing laws, procedures and requirements. An example of this can be found in the realm of transnational investigations where, in the absence of an EU judge of freedoms, a requirement of judicial authorisation at the national level will be necessary to initiate special investigative measures.

From the point of view of individuals' rights, the solutions retained by the EU have not proven satisfying either. Firstly, whereas national law has not always been designed to cope with transnational aspects of justice,[23] fair trials guarantees and the conditions to access to justice continue to be left, to a large extent, to the discretion

[23] *Ibid.*

of the Member States. By consequence, maintaining a strong degree of deference to national law means that individuals are confronted with varying rules and protection regimes, depending on the Member States participating in cooperation frameworks. Variable geometry undermines the principle of legal certainty, which is, however, a crucial requirement in transnational proceedings where several Member States are involved, and determining which jurisdiction is competent to address a claim is not always an easy task. Then, the question can be raised of the extent to which blending the administrative and criminal channels, where different procedural safeguards, as well as differing types of access to justice are provided to individuals, may encroach upon fundamental rights. These concerns emerge most prominently when multidisciplinary investigations are conducted or a dual track of administrative and criminal sanctions is imposed for the same offence because uncertainty remains as to which guarantees should be applied. Difficulties for individuals to cope with differing regimes of legal protection depending on the nature – administrative or criminal – of cooperation at hand are compounded by another layer of complexity stemming from the strong deference to national law observed in EU instruments.

These concerns are compounded by the minimalist approach pursued by EU legislators in the procedural rights directives, thus undermining their added value, along with their mitigating impact on possible infringements to individuals' rights. Low levels of ambition are illustrated by a variety of factors. In terms of scope, administrative and civil proceedings, along with legal persons, and the post-trial stage of proceedings, are altogether excluded from the scope of EU legislation. As regards the transnational component of EU procedural rights directives, reference is only made to surrender procedures; the link to other mutual recognition and cross-border cooperation instruments is extremely tenuous and uncertain.[24] Crucial safeguards have often been included under recitals, which contrasts with the sometimes low levels of ambition of the main text, such as the tension between the presumption of innocence and pre-trial detention.[25] As such therefore, the current framework for the protection of individuals is not entirely satisfying and may give rise to significant tensions between national constitutional courts and the principle of primacy of EU law.[26] It is not entirely conducive to properly '(ensuring) full implementation and respect of Convention standards, and, where appropriate, to ensure consistent application of the applicable standards and to raise existing standards'.[27]

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[24] Such as FD Transfers of Prisoners and FD Probation Measures, that exclusively deal with post-trial situations. Lack of clarity moreover exists as to the extent of their application to the EIO and the EPPO, as well as the Regulation on Confiscation and Freezing Orders and the E-Evidence Directive. Though these instruments explicitly state that the procedural rights contained in the defendants' directives continue to apply, it remains unclear how these may be relied on in order to challenge transnational evidence.

[25] See above (Part II, Chapter IV). See also Intervention by V. Costa Ramos, Committee for the Prevention of Torture (CPT), Expert Roundtable on Pre-trial Detention, organised by Fair Trials on 25 April 2018 at the European Parliament, Brussels.

[26] See above (Part II, Chapter VII).

[27] Council of the EU, Resolution on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings, 2009/C 295/01, recital 2.

IV. Imbalances and inconsistencies between actors and instruments

The tension between the operation of cross-border cooperation instruments and fundamental rights has been widely documented in the literature. It boils down to the longstanding debate on how to reconcile effectiveness of EU cooperation without encroaching upon the protection of individuals. This research identified a number of imbalances and inconsistencies, which somehow illustrate the red lines of this debate and to some extent suggest that the crucial questions it raises have not found a satisfactory answer yet.

A. Prosecution and defence

Despite the adoption of EU legislation on procedural safeguards in order to limit the negative effects on individuals' rights, imbalances between the prosecution and the defence have pervaded. Much emphasis has been placed over the past years on the adoption of new cooperation instruments, as demonstrated by the multiplication of transnational investigation tools recently negotiated. Recurrent references in the study to situations where defendants face discriminatory treatment in cross-border situations suggest that more should be done to redress this imbalance.

The original promise that 'the treatment of suspects and the rights of the defence would not only not suffer from the implementation of the mutual recognition principle, but that the safeguards would even be improved through the process',[28] was only partially fulfilled. Efforts were made in surrender procedures to 'reduce the existing distance of protection between criminal proceedings on the one hand, and the EAW on the other'.[29] Hence, dedicated provisions were inserted under each of the procedural rights directives. The picture remains nevertheless mixed, and the breadth of issues left unaddressed is impressive. Detention conditions have become an outstanding obstacle to surrenders, compensation mechanisms for unjustified detention are few, and cannot be replicated automatically to transnational proceedings and sentenced persons lack safeguards to challenge their condition, post-trial situations being excluded from the scope of EU legislation of procedural rights.

Worrying concerns have emerged over the effective application of the principle of equality of arms in transnational investigations. Responsibility for safeguarding the rights of the defence was passed to national courts on the basis of not entirely clear-cut standards.[30] Assuming that the rights of suspects or accused persons are adequately protected due to EU membership of the ECHR is not sufficient and misleading.[31] Although recently adopted instruments (e.g. EPPO, EIO) refer to EU legislation on procedural rights, it is not entirely clear how the protection conferred by the EU directives can be transposed from surrender procedures to transnational investigations.

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[28] European Commission, Communication on the programme of measures to implement the principle of MR of decisions in criminal matters, *OJ*, No. C 12, 15 January 2001, 16.

[29] L. Mancano, 'The Right to Liberty in European Union Law and Mutual Recognition in Criminal Matters', 2016, 18, *Cambridge Yearbook of Legal Studies*, 235.

[30] Gless, 104.

[31] As evidenced by the Court's recognition that the presumption of mutual trust is rebuttable. See above (Part II, Chapter V).

B. Defence and victims

Asymmetries continue to exist between the legal protection afforded to the defence and the one developed in favour of victims. This observation keeps holding true, even though the crime victim is no longer 'a forgotten figure of the criminal justice system',[32] and more consideration was given to victims under the legislation adopted on the basis of Article 82(2)(c) TFEU. Although it is acknowledged that defendants and victims are subject to 'variable vulnerabilities',[33] it seems that, thus far, less attention has been paid to the vulnerabilities of the latter.

A first, striking asymmetry between defendants and victims is of a quantitative nature. The six directives adopted in respect to defence rights were adopted in a relatively short span of time, in contrast to the two measures adopted in the realm of victims. Meanwhile, the revision process of the Compensation Directive, although it has been on the agenda since 2011, has been postponed to 2019.

A second issue focuses on the content of the rights conferred. The provisions contained under the six directives on the defence imply a significant degree of approximation of standards if taken all together, despite the minimalist approach pursued by the legislators. Of the two directives dealing with victims, only the Victims' Rights Directive implies a significant approximation effort on the part of national authorities. This notwithstanding, the content and scope of the rights granted by the Victims' Rights Directive markedly contrast with the rights conferred by the procedural rights directives for defendants. By way of example, the rights to legal assistance and legal aid, which gave rise to the adoption of dedicated instruments for the defence, were reduced to a mere obligation imposed on the Member States to implement these rights, leaving national authorities free to determine their content, scope and eligibility conditions.

Thirdly, the status of victims in cross-border cooperation instruments has, thus far, received little attention. The link between the approximation of victims' rights and mutual recognition is extremely tenuous compared with the procedural rights directives adopted for defendants. On the one hand, it may be argued that the question of defendants has only emerged in recent years and a huge gulf of nearly a decade separates the adoption of the first mutual recognition measure of the European Arrest Warrant in 2002 and the first Directive on interpretation and translation in 2010. Similarly, the systematic inclusion of references to the procedural safeguards of defendants in cooperation instruments is a rather new development. By contrast, the first mutual recognition measure adopted in the realm of victims dates back to 2011, thereby explaining, to some extent, why ambitious efforts have not yet been undertaken to flesh out the link between cooperation measures and victims' rights. On the other hand, the question of the standing of victims in the EU's criminal justice area goes back to 2001, with the adoption of the first Framework Decision in this

[32] N. Katsoris, 'The European Convention on the Compensation of Victims of Violent Crimes', 1990, 14, *Fordham International Law Journal*, 188.

[33] S. Van Der Aa, 'Variable Vulnerabilities? Comparing the Rights of Adult Vulnerable Suspects and Vulnerable Victims under EU Law', 2016, 7, *New Journal of European Criminal Law*, 39-59.

regard. Cooperation instruments adopted in the past decade failed to explore synergies and complementarities with the Framework Decision, a disconnection that pervaded the relationship between the Victims' Rights Directive and protection measures. By referring to the possibility for victims to obtain compensation or restitution from the property confiscated in cross-border cases, the Confiscation and Freezing Orders Regulation heralds a positive step towards a more inclusive approach, which hopefully will be replicated in other instruments.

C. Approximation and cross-border cooperation

A last asymmetry can be discerned regarding the sometimes questionable link between approximation and cross-border cooperation. The overarching rule in the construction of the EU's area of criminal justice is that the adoption of cross-border cooperation instruments pre-empts approximation of legislation. The general approach followed by the EU is reminiscent of the proverbial *'reculer pour mieux sauter'*. Although the debate on procedural rights dates back to 2004, it took no less than nine years after the entry into force of FD EAW before the first piece of legislation designed to facilitate its use by laying down minimum standards on defence rights was adopted.[34] Minimum rules on the rights of defendants can be justified on specific human rights grounds and EU standards can be linked directly with the operation of the EAW.[35] This degree of complementarity, however, was not achieved in respect to other instruments. Despite references to the procedural rights directives in both the EPPO and the EIO, there remains a certain degree of unclarity as to applicability of these provisions to cross-border investigations. Similarly, it is regrettable that the provisions of the Victims' Rights Directive, despite their broad scope, are almost totally disconnected from the EPO Directive and the EPM Regulation. Reference has not been made either to the Compensation Directive, which provides for the establishment of compensation from the State for cross-border victims of intentional and violent crimes, despite the fact that the Victims' Rights Directive contains provisions on compensation from the offender.

The 'reactive' approach pursued by the EU, as opposed to an 'active' or 'anticipative' *modus operandi*, affects cooperation. In the absence of approximation endeavours, it is not only that mechanisms are being neglected by Member States because they seem unworkable in practice, as demonstrated by the EPO Directive and the EPM Regulation. Individuals also suffer from the lack of availability of adequate safeguards to invoke whenever the practice of cross-border cooperation entails violations of their fundamental rights. The shortcomings and insufficiencies inherent to this 'wait and see' attitude were painfully exposed in the *Aranyosi and Căldăraru* case law, where the point was made that cross-border cooperation cannot function properly in the absence of minimum levels of harmonisation in the field of detention conditions. Against this background, it is somehow unsurprising that some national courts threatened to restore a degree of control over certain aspects of cross-border cooperation.

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[34] See Introduction.

[35] Mitsilegas (above, Introduction, n4), 198.

Ultimately, the various opt-outs of the UK and Ireland make the link between approximation and mutual recognition even less obvious to discern. The current framework of *'justice à la carte'* and a 'pick and choose' approach pursued by the two countries undermines the complementarity resulting from the combination of instruments.[36] As the Treaty is currently worded, the effective operation of mutual recognition and the adoption of defence rights are woven together and constitute two sides of the same coin.[37] Participating in enforcement measures while remaining outside instruments safeguarding defence rights in order to facilitate judicial cooperation clearly challenges the coherence of the EU's area of criminal justice.[38] It also leaves any observer with the feeling that, irrespective of the close intertwining between approximation and mutual recognition suggested by the Treaties, in many circumstances the latter seems to operate on its own, as if it were the preferred – and less controversial – *modus operandi* of cooperation in criminal matters.

[36] As noted in the study, Ireland does not participate in the EPPO Regulation and the EPO Directive and is bound by only two procedural rights directives out of six, namely the Translation and Interpretation Directive and the Information Rights Directive.

[37] MITSILEGAS (Introduction, n4), 182.

[38] *Ibid.*

CHAPTER II

Recommendations

This study identified various solutions to the nine issues that were discussed above. More detailed recommendations can be found in the independent chapters. Two types of recommendations are provided: practical solutions, including soft law mechanisms (I) and legislative action (II).

I. Practical recommendations and soft law tools

Practical mechanisms may be sometimes preferred to binding legislative action.[1] Ancillary measures, because they support learning and adaptation, may also act as a useful complementary tool that support the implementation and operation of legislative instruments.

A. Developing training and other awareness-raising activities

The need to foster and promote training was raised in many of the national reports received.[2] Training has a dual advantage, not only increasing knowledge about EU measures, but also fostering mutual understanding between the Member States themselves. The research found that lack of knowledge is an overarching issue that had several impacts. Little or complete absence of awareness of some cooperation instruments among national authorities, practitioners and civil society clearly thwart their use or their 'correct' use, as often incompatibilities occur. Alongside this, the striking lack of mutual knowledge about each other's national legal systems cultivates feelings of distrust, which do little to incite Member States to cooperate with one another.

Several aspects of training structures and activities deserve to be expanded and further refined. In terms of scope, the type and number of beneficiaries of training should be broadened to include not only relevant criminal justice authorities, including judges, prosecutors and law enforcement authorities, but also legal professionals, such as defence lawyers. Private entities, service providers in particular, will also

[1] See T. Marguery (Above, Introduction, n28), 439.
[2] Germany, Spain, France.

deserve close attention, in light of their growing relevance in the current cooperation framework and the release of the E-Evidence Proposal. Furthermore, the content of training should be focused on a more limited selection of instruments. Alongside other cooperation mechanisms, such as the EAW, training should target specifically these tools that have not enjoyed much publicity thus far (e.g. the European Supervision Order) and those that recently entered into force but still prove complex to use in cross-border situations (e.g. procedural rights directives). Training sessions were also suggested in the realm of victims' rights, an area where few practitioners have developed their expertise. Linguistic training should also be encouraged and target primarily lawyers involved in cross-border procedures. Linguistic divergences have constituted, for all too long a period, a barrier to effective cooperation, which lessen the likelihood that the defence is granted a fair trial. In spite of this, in Germany, special training 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.[3] The entry into force of the EPPO Regulation, meanwhile, suggests that different languages may be involved when investigations are carried out in multiple countries. Adequate translation and interpretation services at the national level will be paramount to ensuring the protection of the fundamental rights of individuals involved in EPPO cases.[4]

Current initiatives to develop EU-wide registers of lawyers, disclosing their areas of expertise as well as the languages, should be further strengthened and better tailor-made to the transnational nature of proceedings. Registers have indeed been established, as demonstrated by the 'Find a lawyer' database available on the e-Justice Portal, where the contact details of lawyers are easily accessible by EU country, along with the spoken languages and their areas of expertise.[5] Somehow ironically, the transnational component seems to have been omitted from this database. The register is organised according to the domains of expertise at the domestic level, but information on how to find a lawyer competent in, say, surrender procedures, is missing. A similar criticism applies to the register developed by the European Criminal Bar Association (ECBA) as regards fraud and compliance lawyers in Council of Europe countries.[6] These latter initiatives need to be further developed and improved so as to facilitate legal assistance in cross-border cases. A comprehensive register would, for instance, ensure a more effective operation of the right to dual representation enshrined in the Access to a Lawyer Directive, allowing defence lawyers in the executing state to identify and coordinate with experienced lawyers in the issuing state.[7]

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[3] National report No. 2 on Germany, Section on Directives for which the transposition deadline has already passed (B)(2)(c) (see also Part I, Chapter II of this edited volume).

[4] National report No. 2 on Spain, Section on conclusion and recommendations (point 33).

[5] See e-justice portal: www.e-justice.europa.eu/content_find_a_lawyer-334-en.do.

[6] ECBA, Find a lawyer, available at: www.ecba.org/contactslist/contacts-search-country.php.

[7] J. Goldsmith, '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', Report, CCBE, 2015.

B. Boosting exchanges of information and dialogue

In some particular fields, 'transjudicial dialogue'[8] and communication were deemed crucial in order to facilitate cross-border cooperation. The need to strengthen dialogue between judicial authorities is consistent with the insistence of both the EU legislator and the CJEU on the need to reinforce two-way information exchanges between the Member States, either in EU instruments (e.g. EIO) or jurisprudence (e.g. *Aranyosi and Căldăraru* and *Dworzecki*). Diversity should indeed be used as a strength, rather than a weakness, precisely because the variety of legal traditions implies that plenty of solutions can be found in each national system. The analysis above on detention conditions, *in absentia* trials, pre-trial detention and supervision measures, investigative measures and admissibility of evidence, and protection measures, all constitute areas where EU-wide judicial conferences, networks, publications and institutional contacts may play a role in building consensus.[9] Best practice exchanges and experience- and information-sharing sessions, in this regard, become even more relevant. By way of example, many EU countries could draw inspiration from the solutions developed by the UK and Ireland on how to ensure that alternatives to detention work effectively, through best practice exchanges focusing on issues of monitoring and compliance.[10] Community-building events should be organised on a more regular basis among national authorities and legal practitioners in order to enable emulation between participants and practical solutions to common implementation problems. A best practice comes from the Netherlands where, in October 2017, an international conference was held bringing practitioners from, *inter alia*, Belgium, Germany, France, Norway and Switzerland. The conference was meant to gather insights from national criminal procedures, from which the Netherlands could draw from with a view to a future modernisation of the Dutch CCP.[11] Another good practice comes from Romania, where the commission of experts in charge of drafting the new CCP of 2014 comprised German and Italian advisers.[12]

More systematic use of EU judicial actors, such as Eurojust and EJN, should, moreover, be made in order to facilitate communication, including the tools developed by the latter, such as the European Judicial Atlas. Other recommendations in this field include making better use of existing networks, such as defence lawyers' organisations (e.g. the Council of Bars and Law Societies of Europe (CCBE), ECBA), and establishing new ones, gathering lawyers competent in cross-border situations and lawyers specialised in victims' cases.

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[8] A.M. Slaughter, 'A Global Community of Courts', 2003, 44, *Harvard International Law Journal*, 219.

[9] Difficulties to access information have been exacerbated by the *Aranyosi and Căldăraru* judgment, that prompted a variety of information requests to issuing States on detention conditions in surrender procedures. Lack of availability of information at the national level resulted in significant delays in the execution of EAW requests, and for them to be suspended, whenever information was either not delivered, or deemed unsatisfactory by the executing authority.

[10] Hammerschick *et al.*, (above Part II, Chapter IV, n35), 68.

[11] National report No. 2 on the Netherlands, Section on the Dutch criminal procedural law (point 1) (see also Part I, Chapter IV of this edited volume).

[12] National report No. 2 on Romania, Section on General features of the Romanian criminal justice system (point 1) (see also Part I, Chapter V of this edited volume).

C. Soft law instruments

The multiplication of mutual recognition (MR) and approximation mechanisms should be accompanied by complementary support tools facilitating their implementation. Inconsistencies between the various MR instruments on the one hand, and between approximation measures and MR on the other hand, must be addressed. Guidance and support tools for practitioners on the relationship between the variety of cooperation instruments available could be developed, for instance laying down further details on why the European Arrest Warrant should only be used as the *ultima ratio*[13] and in which circumstances resorting to the FD ESO may be preferred to the issuing of an EAW. Similar guidance tools could be developed to clarify the concept of trials *in absentia*, as laid down in the corresponding Framework Decision and interpreted by the Court of Justice of the EU, so as to promote the coherent interpretation and implementation of this concept.[14] Given the remaining lack of clarity concerning the impact of procedural rights directives on the operation of MR instruments, guidance on this matter would be equally welcome. Inspiration could be taken from the guidelines developed by several Member States to facilitate the implementation of EU procedural rights legislation.[15] The guidelines developed by the Commission to assist the transposition of the Victims' Rights Directive could serve as another suitable point of departure for this purpose.

Clarification is also needed as regards the scope of the ground for refusal formulated by the Court of Justice of the EU in *Aranyosi and Căldăraru*. Whereas it is essentially the role of the Court of Justice of the EU to narrow down the test that it developed in the latter judgment, consideration could be given to the creation of a template available in several languages, which would lay down in precise terms the content and scope of information that should be requested from the issuing State. This would contribute to streamlining information requests so as to avoid situations where issuing authorities are swamped with several demands at the same time and find themselves in a situation where they cannot provide accurate and reliable information within the time limits imposed by the FD EAW. It is hoped that the CJEU will have the opportunity to shed more light on the scope of the new ground for refusal formulated in its *Aranyosi and Căldăraru* case law. In this respect, vertical dialogue between the CJEU and national courts is needed, alongside its horizontal, 'national-to-national', dimension. In some situations indeed, 'judge-to-judge dialogue', although substantial, does not always prove sufficient to address all the legal complexities of a case. The EAW proceedings involving the surrender of Mr Puigdemont to Spain are a case in point. Despite extensive dialogue between national courts, in the absence of questions

[13] National report on Germany (Part I, Chapter II of this edited volume).

[14] Thus far, these efforts have remained at embryonic stage. The updated handbook released by the European Commission in 2017 only included a very brief paragraph of the findings of the Court in *Dworzecki*.

[15] 'Rights of suspected and accused persons across the EU: translation, interpretation and information', FRA Report, 2016, 33.

referred to the CJEU, the decisions taken by the Belgian[16] and German[17] executing authorities left many legal questions unaddressed and received a mixed reception.[18]

D. Financial support from the EU

Financial support from the EU is highly desirable. Building the basic capacity of EU States that sometimes lack sufficient material and human resources to implement EU legislation properly is a precondition to enhance compliance with EU law and enable effective cooperation. With the noticeable exception of Ireland and Finland, national reports all pointed out the financial difficulties that may be associated with the implementation of new instruments of legislation. The need for an EU funding mechanism was identified in the following sections: investigative measures, detention conditions and compensation schemes in favour of both defendants and victims. As regards detention conditions in particular, 12 Member States sent a letter to the European Commission in 2015 asking whether the EU could fund the renovation of existing prisons. As a response, the Commission mapped out possibilities for funding through the use of structural funds and raised this possibility *vis-a-vis* national ministries.[19] There is a need, however, to raise awareness of this instrument further.[20] Besides, relying on structural funds exclusively only provides a partial answer to detention conditions issues.[21] In its conclusion of December 2018 the EU Council invited the Commission to promote making optimal use of the funds under EU financial programmes, including in order to modernise detention facilities and support the MS to address the problem of deficient detention conditions.[22]

Alongside enhanced compliance and more effective implementation, funding is also necessary to facilitate the negotiations and the ensuing adoption of new

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[16] See for instance Nederlandstalige rechtbank van eerste aanleg Brussel, *De procureur des Konings te BRUSSEL Openbaar Ministerie v. Antoni Comin Oliveres*, BR16.EU.51/18, 16 May 2018 (in Dutch – not available to public).

[17] See for instance Schleswig-Holsteinisches Oberlandesgericht, Antrag des Generalstaatsanwalts auf Erlass eines Auslieferungshaftbefehls gegen Carles Puigdemont eingegangen, Press Release, 3 April 2018 (in German). Retrieved at: www.schleswig-holstein.de/DE/Justiz/OLG/Presse/PI/201802Puigdemontdeutsch.html.

[18] None of the authorities involved (Belgian and German executing authorities and Spanish authorities) referred questions to the Court, and many legal concerns remain. These include, for example, the scope of the obligatory ground for refusal inserted in the Belgian law transposing the EAW, if there are valid grounds for believing that its execution would infringe the fundamental rights of the person concerned enshrined under Art. 6(2) TEU. A question could have be raised asking whether the presumption of compliance with EU fundamental rights in Spain could be rebutted in the case at hand. See C. Rizcallah, 'The EU and the Spanish Constitutional Crisis', *EU law analysis*, 6 November 2017. Retrieved at: www.eulawanalysis.blogspot.com/2017/11/the-eu-brought-on-stage-in-spanish.html.

[19] A few countries made quite some use of this instrument, such as Hungary.

[20] J. Beneder, Intervention at the conference 'Beyond Surrender: Launch Event of Fair Trials' Regional Report on the European Arrest Warrant', European Parliament, 28 June 2018.

[21] For example, ventilation and sanitary equipments can be improved by the use of structural funds dedicated to energy efficiency.

[22] See Council conclusions on mutual recognition in criminal matters (see above Part II, Chapter V, n43).

legislative instruments.[23] Given that support from the Member States cannot be taken for granted, financial help can be seen as a means to increase buy-in for a series of legislative instruments in the four areas mentioned above. History indeed proves that negotiations may be significantly hampered when the implementation of new instruments implies that a significant financial burden must be borne by the Member States.[24] Put in another way, financial help could act as a lever for political will.

II. Legislative action

A. Consolidating the current acquis and identifying and addressing implementation gaps

Many of the national and EU officials interviewed, alongside some of the rapporteurs involved in the preparation of this study,[25] expressed a degree of caution as regards the adoption of new legislation in the coming years. Instead, consolidating the *acquis* as well as reflecting on how to make existing mechanisms more effective were seen as more desirable and realistic.[26]

Several arguments came in support of the consolidation approach, particularly with regard to procedural guarantees for defendants adopted on the basis of the 2009 roadmap. Firstly, the impact of the procedural legislation on transnational cooperation remains to be determined. Some directives have not been fully transposed. It is therefore too early to gauge in an accurate and comprehensive manner the impact of EU legislation on both domestic and cross-border proceedings.[27] The CJEU, secondly, will have the opportunity to clarify and possibly extend the scope of these minimum guarantees through giving broad interpretations of their provisions.[28] From this point of view, an in-depth study of the case law of the CJEU relating to these directives and its impact would be particularly useful.[29] Thirdly, many officials pointed to the same

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[23] See the example of the negotiations on Legal Aid under Chapter 5.

[24] The Legal Aid Directive is a case in point. Instead of being formally integrated within the Access to a Lawyer Directive, as originally foreseen in the 2009 Roadmap, it was decided to negotiate a separate instrument at a later stage, in view of the disagreements the financial costs the Legal Aid Directive implied generated among the Member States. As noted elsewhere, "anything in the European Union that costs money, including the right to legal aid, is always very sensitive." S. Cras, 'Directive on the Right of Access to a Lawyer in Criminal Proceedings and in European Arrest Warrant Proceedings', 2014, 1, *Eucrim*, 33.

[25] The German and Dutch reports (see also Part I, Chapters I and IV of this edited volume).

[26] Spain, Germany, the Netherlands.

[27] Thus far, directives seem to have raised the applicable standards in criminal procedures at the domestic level (e.g. in Germany, Romania, Spain, Italy, The Netherlands) and some of the directives' provisions have been relied on in a few national proceedings (e.g. Spain, Romania). These only constitute, however, preliminary findings.

[28] According to AG Bot, the concept of minimum rules creates 'misunderstandings', and the 'objective of more effective judicial cooperation in criminal matters … calls for a broad interpretation of Directive 2010/64 guaranteeing the best protection of the rights of defence of the persons concerned.' See Opinion of AG Bot, C-216/14, *Criminal proceedings against Gavril Covaci*, delivered on 7 May 2015, ECLI:EU:C:2015:305, para. 74.

[29] See, inter alia, C-216/14, *Criminal proceedings against Gavril Covaci,* 15 October 2015, ECLI:EU:C:2015:686.; C-25/15, *Balogh,* 9 June 2016, ECLI:EU:C:2016:423; C-278/16, *Sleutjes,*

conclusion that re-opening the negotiations on key instruments such as the Access to a Lawyer Directive and the Presumption of Innocence Directive could backfire and risks weakening the current *acquis*. The head-on opposition and deep reluctance of some Member States has made the path leading to the adoption of these directives much more difficult. In all likelihood, re-opening the negotiations would give them a window of opportunity to weaken some of the guarantees that they contain. Fourthly, a general preference for a 'wait and see' approach could be discerned among interviewees. The practice of recently adopted and transposed instruments, such as the EIO and the EPPO, will shed more light on the concrete obstacles hampering or hindering cooperation and allow EU lawmakers to pinpoint more accurately where legislative gaps need to be filled. Approximation in this field is likely to be a rather delicate process and any initiative on the part of the Commission should be supported by accurate monitoring and strong evidence that a legal vacuum needs to be addressed. Lastly, the implementation process of the current set of directives generated significant technical and financial costs in the realms of both defendants and victims.[30] The view was taken that Member States should not submerged by a constant flow of new EU legislation that they simply cannot cope with.[31]

As part of the consolidation approach, implementation gaps should be identified and addressed. Flaws indeed remain in the implementation process of the procedural rights directives.[32] Other striking implementation failures exist with respect to the FD *in absentia*, the FD ESO and the FD Probation Measures. A more uniform implementation of these tools is highly desirable in order to maximise their effectiveness. Resorting to infringement proceedings against 'reluctant' Member States should be considered on a more regular basis. Several procedures have been initiated against several Member States for the poor implementation of the Compensation Directive, but reliance on this mechanism has been inconsistent to date.[33] The acquisition of full enforcement powers in December 2014 was, moreover, invoked as an argument by the European Commission, as 'guardian of the Treaties', to dismiss calls for the re-opening of the negotiations on the EAW and justify its inclination for a 'wait and see' posture.[34] At first glance, however, it seems that the Commission has made little use of the scrutiny and compliance powers it has taken on since the Lisbon Treaty.

A word of caution should be raised. As noted in the Dutch report, the implementation process of EU legislative instruments may be slowed down for

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12 October 2017, ECLI:EU:C:2017:757; C-612/15, *Criminal proceedings against Nikolay Kolev*, *Stefan Kostadinov*, 5 June 2018, ECLI:EU:C:2017:257.

[30] *Ibid.*

[31] National report No. 2 on the Netherlands, Section on conclusion and recommendations (point 5).

[32] Such as Art. 14 of the Information Rights Directive in the Netherlands, the scope application of Art. 3(6) of the Interpretation and Translation Directive in Spain, which is limited to the 'judgment' in Spain and does not apply to 'any resolution of appeal'.

[33] *Supra*, Part II, Chapters IV and VII.

[34] European Commission, Follow-up to the European Parliament resolution with recommendations to the Commission on the review of the European arrest warrant adopted by the Commission on 28 May 2014, 2.

pecuniary reasons because financial and technical difficulties exist at the national level.[35] A few Member States[36] have, for example, encountered financial difficulties in the implementation process of directives on the right to translation and interpretation, legal aid and victims' rights. Against this background, infringement proceedings will be of little help and support to bring national law into line with the necessary level of transposition required by the EU. In this respect, the European Commission would be well advised to conduct sound and comprehensive monitoring.

B. Boosting the legitimacy of new EU legislative action: improving monitoring and data collection

In spite of a clear inclination for the consolidation approach in the coming years, this research recommends the adoption of several legislative actions. In this respect, the key to success is to back innovative solutions by comprehensive monitoring and comparative data on the difficulties encountered at the national level. One of the biggest challenges faced during the preparation of this research was indeed the lack of reliable information. In some particular areas, implementation/evaluation assessments and comparative studies are particularly few and far between. Whereas alternatives to detention, pre-trial detention regimes and protection measures for victims have become the topic of several studies in recent years, research on other, essential domains of cooperation is nearly absent. These range from investigative measures, admissibility of evidence and procedural safeguards available in cross-border situations, to the fields of compensation, focusing either on victims, or defendants in case of unjustified detention.

Whereas crucial aspects of cross-border cooperation were recently addressed by recent studies, dealing with, *inter alia*, transfers of prisoners and probationers,[37] conflicts of jurisdiction[38] and legal remedies,[39] comprehensive monitoring and extensive mapping of existing legal, procedural and legislative frameworks in the Member States is needed in the nine areas of cooperation identified in this study. Particular attention will have to be devoted in the coming years to the implementation and functioning of recently adopted instruments, such as the EIO and the EPPO. Risks of forum shopping, alongside the occurrence of delays in the conduct of investigations, incompatibilities between investigative measures as well as possible admissibility

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[35] National report No. 2 on the Netherlands, Section on conclusion and recommendations (point 5) (see Part I, Chapter IV of this edited volume).

[36] Such as Spain, Romania, the Netherlands.

[37] T. MARGUERY (above, Introduction, n29).

[38] See the project led by the European Law Institute on Prevention and Settlement of Conflicts of Exercise of Jurisdiction in Criminal Law, University of Luxembourg, 2014-2017.

See the Draft Legislative Proposals for the prevention and resolution of conflicts of jurisdiction in criminal matters in the European Union. Retrieved at: www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/Conflict_of_Jurisdiction_in_Criminal_Law_FINAL.pdf.

[39] See the project led by S. ALLEGREZZA on Effective defence rights in criminal proceedings: a European and comparative study on judicial remedies (JRECRIPRO), University of Luxembourg, 2015-2017.

issues, will deserve close scrutiny. Awareness of these issues will perhaps help policymakers develop innovative proposals and come up with creative solutions.

C. Short-term legislative solutions

Legislative action should be taken in order to address current obstacles to cross-border cooperation. The following recommendations are designed to tackle both issues which significantly limit the effectiveness of cooperation and those which generate tensions with individuals' rights. Key in this respect is to adopt, in the near future, minimum rules in the crucial areas of detention conditions and admissibility of evidence. Drawing on the momentum generated by the *Aranyosi and Căldăraru* case law, EU leaders should seize the opportunity to go beyond the modest agenda set out so far. Poor detention conditions have become the thorn in the side of mutual recognition, delaying and blocking surrender procedures, and putting at risk the principle of mutual trust in the EU. These standards already exist in a way, through the monitoring work of the Council of Europe and ECHR case law. However, the main problem of these instruments is that they lack enforcement powers, thus leaving Member States with a certain margin for discretion in implementing the recommendations issued by Strasbourg bodies.[40] Agreeing on minimum standards on detention conditions would lay the groundwork for increased compliance with the principles enacted by ECHR text and case law, through the combined enforcement powers of the European Commission and the Court of Justice of the EU. It is high time for an enhanced monitoring and scrutiny of fundamental rights in the EU's area of criminal justice and for the CJEU to "behave as a human rights court would behave".[41] The triadic connection between detention conditions, the effectiveness of mutual recognition and the preservation of individuals' rights is almost self-evident. Logically therefore, Article 82(2)(b) TFEU could be envisaged as a legal basis to achieve minimum standards on detention conditions. Tying minimum standards to mutual recognition will work as a key lever to eventually force Member States to adapt their incarceration systems and introduce the necessary changes to the same magnitude as if legislation at the domestic level were adopted. Should this legal basis be excluded, an alternative lies in Article 352 TFEU. However, relying on the latter legal basis raises a significant challenge given the unanimity requirement that it entails.

This study identified another priority area where minimum rules are needed. With the multiplication and diversification of instruments on evidence gathering, exclusionary rules on illegally/improperly obtained evidence have become an essential feature of the EU's instrumentarium. EU lawmakers should take advantage

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[40] Intervention by J. Friestedt, Head of Transversal Support Division, Committee for the Prevention of Torture Secretariat, at the Expert roundtable on pre-trial detention, organised by Fair Trials at the European Parliament in Brussels, 25 April 2018.

[41] Advocate-General Y. Bot, in joined cases C-404/15 and C-659/15 PPU, *Aranyosi and Căldăraru*, delivered on 3 March 2016, ECLI:EU:C:2016:140, para. 175. The full paragraph of the opinion reads: 'I am aware that the position which I suggest the Court should adopt amounts, in part, to asking it to behave as a human rights court would behave. In the sphere of criminal law, I think that that approach will need to be addressed at some point.'

of the express competence conferred on the EU by the Lisbon Treaty under Article 82(2)(a) TFEU. Inadmissibility rules construed along the baseline of ECHR case law must be reflected upon and evidence obtained in breach of, for example, torture, police incitement, the infringement of the privilege of self-incrimination, the right to silence or the right to legal assistance, must be excluded. Although this solution 'only' consists of a codification of ECHR principles, the added-value of adopting minimum rules at EU level lies not only in enhancing the visibility of a complex body of ECtHR case law, but in that these standards could be broadly interpreted by the EU legislator, thus mirroring the strengthening of the *Salduz* jurisprudence in the Access to a Lawyer Directive. The adoption of a Directive would, moreover, confer the possibility on individuals to rely on their direct effect and give the right to the Commission to initiate infringement proceedings against poor or non-implementation by the Member States.

This notwithstanding, adopting these standards will yield little impact on the current system of evidence circulation if Member States continue to rely on the rule of non-inquiry. This research paper advocates in favour of the development of an EU rule excluding evidence where it is impossible to know how it was gathered. It promotes the imposition of a binding obligation on national judicial authorities to examine how evidence was collected and, if the non-disclosure or partial disclosure of evidence at the pre-trial stage is such that the judge cannot evaluate whether there has been a violation of the defendant's right, then evidence must be excluded. This is in line with the approach taken by the ECtHR to illegal evidence; when examining claims that illegal evidence was relied on to reach a verdict, the ECtHR's test[42] begins with an assessment of the substantive right allegedly violated at the pre-trial phase. Only once it has been established that a fundamental right has been breached at the collection phase does the ECtHR examine whether the defence was presented with an adequate opportunity to invoke defence rights in challenging both the collection and the use of evidence; or as the ECtHR has put it, to "challenge the authenticity of evidence and opposing its use".[43]

A comprehensive and effective answer will be necessary to address the issues at hand. This study offers to complement the adoption of minimum rules with provisions strengthening and further enhancing the existing framework for judicial review. As discussed above, exploring complementarities between minimum rules and judicial review was deemed necessary in the sovereignty-sensitive field of admissibility of evidence. In a similar fashion, the legislative agenda on detention conditions cannot be fully disconnected from current issues of overuse of pre-trial detention and the extreme length of remand in some countries. Drawing on the Finnish or Irish experiences, where low rates of pre-trial detainees exist and

[42] The so-called two-tiered approach is dissected, *in* F.P. Ölçer, 'The European Court of Human Rights: The fair trial analysis under Article 6 of the European Convention of Human Rights', *in* S.C. Thaman (ed.), *Exclusionary rules in comparative law*, Heidelberg, Springer, 2013, 371-399.

[43] See for example ECtHR, *PG and JH v. United Kingdom*, App. No. 44787/98, 25 September 2001, paras. 77 and 79; ECtHR, *Allan v UK*, App. No. 48539/99, 5 November 2002, para. 43.

judicial review of PTD takes place at regular and short intervals, this study suggests reflecting on the insertion of an obligation to review the necessity for remand at early and regular stages of the procedure. This could be implemented alongside other measures, for example a binding system of maximum time limits on pre-trial detention.

Another two issues can be addressed through legislative means. These relate to compensation schemes for victims of crime, on the one hand, and suspects and accused persons that suffered from unjustified detention in cross-border situations, on the other hand. Starting with the former, the revision of the Compensation Directive should lay down minimum rules on the scope and content of compensation schemes. Too many variations exist among national Member States for this instrument to be relied on in cross-border situations. A broader reflection should be conducted on the inclusion of rules for compensation from the offender, as well as the way the two systems can complement one another and build synergies. The articulation between both compensation mechanisms needs refining and could be spelled out in further detail so as to enable complementarities and synergies. In particular, indications should be provided to victims on circumstances where it is more advisable to rely on one or the other mechanism. This has two advantages. First, compensation is a sensitive field of negotiations due to the financial burdens associated with the adoption of a binding financial mechanism. Achieving synergies between the two instruments could alleviate financial costs. Lessons could be drawn from these Member States which combine both systems. In the Nordic States for example, half of the funds for compensation come from the offenders, or a certain percentage of inmates' salaries. Another best practice comes from France, where national authorities recently imposed a levy on property insurance policies to bolster the compensation fund dedicated to victims of terrorism.[44] The second advantage of this solution is to make the compensation mechanism foreseen in the Regulation on Confiscation and Freezing Orders workable. Reflecting on how the State could advance payment in case of default by the offender would avoid situations where the compensation claim of the victim in cross-border cooperation is left unaddressed. Last but not least, linking the revised Compensation Directive to the Confiscation and Freezing Orders Regulation would contribute to tying more closely the approximation of victims' rights and instruments of mutual recognition.

In the margins of these debates, the revision of the Compensation Directive could be seized on as an opportunity to reflect on how to tackle the absence of EU compensation rules for unjustified detention for defendants. The revision process could go hand in hand with the adoption of an instrument providing compensation for unjustified detention in transnational proceedings. The latter would impose an obligation on Member States to implement a compensation system in cross-border

[44] 'France ups insurance levy to boost attack victims compensation fund', Reuters, 19 October 2016.

Retrieved at: www.businessinsurance.com/article/20161019/NEWS06/912310065/France-boosts-insurance-levy-terrorism-attack-victims-compensation-fund-Paris-cr.

cases and develop rules governing liability between the issuing and executing States. However, difficulties in garnering support from Member States can be easily foreseen, bearing in mind significant costs that will result from the establishment of compensation schemes. This could, moreover, prejudice the forthcoming negotiations on the revision of the Compensation Directive because financial burdens could be invoked as an argument to block the adoption of an ambitious instrument. Against this background, it is fair to say that financial support cannot be separated from the legislative agenda on compensation.

D. Medium- and long-term perspectives: reflecting on the adoption of new instruments

The foregoing indicates where legislative action is needed from a short-term perspective. These areas do not, however, constitute the end of the road. In the medium term, the development of procedural standards for the defence in transnational investigations and the adoption of an instrument guaranteeing the right to an effective remedy in cross-border investigations must be reflected upon. The further strengthening of an EU framework for judicial cooperation in criminal matters needs to be pursued. The work on procedural guarantees, though welcome, must be nurtured and intensified, and the transnational application of the concept of fair trial needs further refining.[45] We lack sound and effective due process principles for, in particular, cross-border investigations, as well as subsequent prosecutions and trials.[46] Additional rules should be designed to facilitate the task of the defence to challenge transnational investigations ordered by the prosecution by, *inter alia*, facilitating access to the case file at early stages of the criminal procedure, developing legal aid mechanisms and strengthening existing provisions on legal remedies. The jurisprudential context begs for this debate to take place. The elevation of the right to effective judicial protection of individuals' rights as a 'general principle of EU law' in the *Associação Sindical dos Juìzes Portugese*s case,[47] will perhaps drive Member States to ask the CJEU to clarify the extent of the application of Article 47 of the Charter of Fundamental Rights to transnational investigations, through the preliminary ruling procedures.[48]

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[45] As advocated by Gless (above, Part II, Chapter III, n85).

[46] As noted by Gless and Vervaele (above, Part II, Chapter III, n87).

[47] C-64/16, *Associação Sindical dos Juízes Portugueses,* 27 February 2018, ECLI:EU:C:2018:117, para. 35.

[48] References in the EIO Directive and the EPPO Regulation to Art. 47 of the Charter are plentiful. As regards the EIO Directive, see Art. 11(f), and Recitals 18, 19 and 39. As regards the EPPO Regulation, see Arts 5(1) and 41 and Recital 30, 83 and 94. The Court, in its judgment, moreover associated the effective implementation of the right to a judicial remedy to the implementation of the principle of mutual trust. It stated that 'mutual trust between the Member States and, in particular, their courts and tribunals is based on the fundamental premise that Member States share a set of common values on which the European Union is founded… Article 19 TEU, which gives concrete expression to the value of the rule of law stated in Article 2 TEU, entrusts the responsibility for ensuring judicial review in the EU legal order not only to the Court of Justice but also to national courts and tribunals.' See paras. 30-32.

These initiatives would feed into the reflection on the adoption of the roadmap 2020 for the rights of the defence advocated by ECBA.[49]

In a similar vein, attention should also be paid to the increasing difficulty in distinguishing the demarcation line between judicial and non-judicial actors, which has arisen in recent EU instruments, including the E-Evidence Proposal. Judicial oversight must be ensured and the scope of the 'manifest' breach of fundamental rights ground for refusal should be complemented by more explicit criteria outlining the kind and level of oversight to be carried out. Alongside the modalities of oversight, effective means to challenge cross-border assistance requests, along with their recognition and execution, should be easily accessible by individuals so as to meet the requirement of legal certainty and maintain a fair balance between effective prosecution and defence rights.

Legislative action in several domains was deemed premature and/or too complex in the current state of affairs. From a longer-term perspective, attention should nonetheless be dedicated to these areas, ranging from the harmonisation of a minimum set of investigative measures to the adoption of minimum standards of admissibility for evidence gathered through special investigative measures, alongside the approximation of protection measures available to victims at the national level. At least in strictly theoretical terms, adopting these instruments would herald a move towards a smoother and more effective system of cooperation.

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Food for thought sessions, building specifically on the nine areas of friction identified in this research paper, should be encouraged and conducted in parallel to the monitoring of the newly established cooperation frameworks.

It is up to EU leaders to reflect further on the many obstacles to cross-border cooperation identified in this research and to take on these challenges.

[49] The ECBA launched an initiative aiming at reflecting further on the adoption of a 'Roadmap 2020'. Areas covered by this roadmap include (Pre-Trial) Detention and European Arrest Warrant; Certain Procedural Rights in Trials; Witnesses' Rights and Confiscatory Bans; Admissibility and Exclusion of Evidence and other Evidentiary Issues; Conflicts of Jurisdiction and *ne bis in idem*; Remedies and Appeal; and Compensation.

Biographies

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Aart de Vries is a PhD researcher at the Utrecht Centre for Regulation and Enforcement in Europe (RENFORCE) and the Willem Pompe Institute for Criminal Sciences of Utrecht University, in the Netherlands. In his dissertation, he studies the asymmetries in the context of transnational enforcement that result from the indirect enforcement model of European Union law, identifies the connected problems and gaps, and provides recommendations to solve those issues. To this avail, he assesses the architecture of punitive enforcement of European Union law in the fields of fiscal customs legislation, financial regulation and environmental law in the Netherlands, Germany and France, and analyses how these systems interact in a cross-border enforcement context.

Joske Graat is a PhD candidate at Utrecht University and is affiliated to the Utrecht Centre for Regulation and Enforcement in Europe (RENFORCE). Her PhD research focuses on the protection of citizens against arbitrary interferences with their legal position in the Area of Freedom, Security and Justice. Alongside her PhD, she participated in research projects on whistleblower protection for the Albanian Ministry of Justice and on the transfer of prisoners and the investigatory powers of OLAF for the European Commission.

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