ERA
european.law

UP GRADE
YOUR LEGAL EXPERTISE

Criminal Law

Applying Procedural Rights under the Case Law of the CJEU

Online seminar, 1-2 February 2021

1 February 2021 - 13:00-16:45 CET
2 February 2021 - 09:00-12:30 CET

Professional Training (CPD) www.era.int

Speakers and chairs

Katalin Balogh, Coordinator, Legal Interpreting and Translation Training Programme, Faculty of Arts, KU Leuven

Ingrid-Gertrude Breit, Team Leader, Procedural Criminal Law, DG Justice and Consumers, European Commission, Brussels

Christoph Burchard, Professor of Law, Goethe University Frankfurt

Jean-Marie Gardette, Expert Advisor, Research and Documentation Directorate, Court of Justice of the EU, Luxembourg

Salvador Guerrero Palomares, Professor of Law, Defence Lawyer, Member of the Criminal Law Committee of the CCBE, Marbella

Gwen Jansen, Defence Lawyer, Amsterdam

Angelo Marletta, Postdoctoral Researcher, Université Libre de Bruxelles

Anna Mosna, Postdoctoral Research Associate, KU Leuven

Matylda Pogorzelska, Project Manager, Research & Data Unit, European Union Agency for Fundamental Rights (FRA), Vienna

Heidi Salaets, Professor; Legal Interpreting and Translation Training Programme, Faculty of Arts, KU Leuven

Key topics

- Update on the state of play regarding the EU directives on procedural rights
- The rights to interpretation and translation, information, presumption of innocence, legal aid and access to a lawyer in the case law of the CJEU
- Key judgments of the ECtHR
- The position of children in criminal proceedings
- The competence of the CJEU in criminal matters
- The need for further procedural rights in the EU

Language
English

Event number
321DT38e

Organisers
ERA (Cornelia Riehle) in cooperation with the ECBA, EJTN and EULITA

With the support of the Justice Programme 2014-2020 of the European Union

Applying Procedural Rights under the Case Law of the CJEU

Monday, 1 February 2021

13:00 Connecting to the videoconference platform

13:15 **Opening of the seminar**
Cornelia Riehle (ERA)

I. Setting the scene

13:20 **The competence of the CJEU in the area of police and judicial cooperation in criminal matters**
Jean-Marie Gardette

13:50 **Effective remedies in EU law: Implications of Articles 47 and 51 for procedural rights**
Christoph Burchard

14:15 **The development of the EAW in the case law of the CJEU**
Christoph Burchard

14:45 Break

II. Rights applied

15:00 **The rights to interpretation and translation, information and access to a lawyer: status quo**

- **Outcomes of the TRAINAC study by the CCBE**
  Salvador Guerrero Palomares
- **Outcomes of the FRA report 'Rights in practice: access to a lawyer and procedural rights in criminal and European Arrest Warrant proceedings'**
  Matylda Pogorzelska

16:00 **The rights to interpretation and translation, information and access to a lawyer in the case law of the CJEU and key judgments of the ECtHR**
Anna Mosna

16:30 Discussion

16:45 End of day one

Tuesday, 2 February 2021

III. Rights ahead

09:00 Connecting to the videoconference platform

09:15 **State of play regarding the transposition of Directives (EU) 2016/343, 2016/800 and 2016/1919 on the presumption of innocence, children's rights and legal aid in criminal proceedings and their impact in the Member States**
Ingrid-Gertrude Breit

09:45 **Presumption of innocence, children's rights and legal aid in criminal proceedings in the case law of the CJEU and ECtHR**
Angelo Marletta

10:15 **The right to interpretation and information for detainees: theory and practice**
Katalin Balogh and Heidi Salaets

10:45 Break

Objective

This seminar will present the significant case law developed by the Court of Justice of the European Union (CJEU) on the six "Procedural Rights Directives", enabling the consistent and uniform application of EU law.

About the project

The project consists of four seminars taking place in 2020 and 2021.
Each event has a specific focus.
For more information, see:
procedural-rights.legal-training.eu

Who should attend?

This seminar is targeted at judges, prosecutors, defence lawyers, court interpreters as well as prison and probation staff from all over the EU. (Denmark does not participate in the Justice Programme 2014-2020).

Interactive online seminar

The online seminar will be hosted on ERA's own online platform. You will be able to interact immediately and directly with our top-level speakers and other participants. We will make the most of the technical tools available to deliver an intensive, interactive experience. As the platform is hosted on our own server, the highest security settings will be applied to ensure that you can participate safely in this high-quality online conference.

CPD

ERA's programmes meet the standard requirements for recognition as Continuing Professional Development (CPD). This event corresponds to **8 CPD hours**.

Your contact persons

Cornelia Riehle
Deputy Head of Section
E-Mail: criehle@era.int

Liz Greenwood
Assistant
Tel.: +49(0)651 9 37 37 322
E-Mail: Egreenwood@era.int

IV.	Next steps: The need for further procedural safeguards in the EU
11:00	**Challenges ahead – the position of the European Commission** *Ingrid-Gertrude Breit*
11:30	**A new roadmap on minimum standards for certain procedural safeguards: possible future procedural rights in the context of the EAW, pre-trial detention, detention and evidence-gathering** *Gwen Jansen*
12:00	Discussion
12:30	End of online seminar

For programme updates: **www.era.int**
Programme may be subject to amendment.

Apply online for this seminar:

"Applying Procedural Rights under the Case Law of the CJEU":

www.era.int/?129489&en

e-Presentations

Cyber Risks in Financial Institutions: Lessons Learned in Responding to Them
Liviu Chirita

Approaches to Prepare Proactively for Cybercrime Incidents
Dave O'Reilly

Cyber Menaces and Different Types of Cybercrime Offences
Cormac Callanan

Specialised e-Courses

Fighting Child Pornography Online: 10 Key Questions
Alisdair Gillespie

www.era.int/elearning

Save the date

Annual Conference on Countering Terrorism in the EU 2020
Online Conference, 10-11 December 2020

Post-Brexit Cooperation in Criminal Justice and Law Enforcement Cooperation
Online, 28-29 January 2021

Annual Conference on White-Collar Crime in the EU 2021
Online, 17-18 March 2021

Issues faced with the Application of the Law Enforcement Directive
Online/Trier, 20-21 May 2021

This programme has been produced with the financial support of the Justice Programme 2014-2020 of the European Union.

The content of this programme reflects only ERA's view and the Commission is not responsible for any use that may be made of the information it contains.

Co-funded by the Justice Programme of the European Union 2014-2020

Applying Procedural Rights under the Case Law of the CJEU – ERA Online Seminar

The competence of the CJEU in the area of police and judicial cooperation in criminal matters

February 1st 2021

Dr. Jean-Marie Gardette

COUR DE JUSTICE DE L'UNION EUROPÉENNE

The following presentation only reflects the personal views of the speaker

1

Overview

- **Setting out the scene**: Role and competences of the CJEU
  - Role and competences
  - Decentralized and centralized enforcement of EU Law
    - ✓ Remedies available
    - ✓ Importance of the preliminary ruling procedure
  - Looking ahead: judicial review of decisions taken by the EPPO
- **Relevance of the Case Law of the CJEU** in criminal matters
  - Notion of "criminal matters"
  - Looking beyond issues of judicial cooperation
  - Scope of EU Law

2

2

Setting out the scene: Role of the CJEU

- **Art. 19 para. 1 TEU sets out the role assigned to the CJEU as follows:**

"[the CJEU] shall ensure that in the interpretation and application of the Treaties the law is observed".

The Role of the CJEU could thus be described as upholding the Rule of Law within the ambit of EU Law.

3

3

Setting out the scene: competences of the CJEU

- **The distinction between decentralized and centralized enforcement of EU Law** – key to understanding the competences of the CJEU

The distinction is made clear i.a. at Art. 19 para. 2 TEU, requiring the MS to "provide remedies sufficient to ensure effective legal protection in the fields covered by Union law".

- Remedies ensuring the centralized enforcement of EU Law
- Decentralized enforcement of EU Law – the importance of the preliminary ruling procedure

4

4

Setting out the scene: competences of the CJEU

- **The distinction between decentralized and centralized enforcement of EU Law** – key to understanding the competences of the CJUE

- Remedies ensuring the centralized enforcement of EU Law
  - ✓ direct actions: infringement procedures against MS, actions for annulment (to be brought, in principle, before the GC), more rarely other types of direct actions (failure to act, action for damage…
  - ✓ Appeals against GC decisions

- Decentralized enforcement of EU Law – the importance of the preliminary ruling procedure
  2020: 556 new cases out of 735 – 95 references in the field of JHA

5

5

Setting out the scene: competences of the CJEU

- **Decentralized enforcement of EU Law** – The Preliminary Ruling Procedure (Art. 267 TFEU)

"The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:
(a) the interpretation of the Treaties;
(b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union;

Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.

Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court.

If such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice of the European Union shall act with the minimum of delay. "

6

6

Setting out the scene: competences of the CJEU

➢ The Preliminary Ruling Procedure (Art. 267 TFEU)
Admissibility of a the request and scope of the competence given to the CJEU under Art. 267 TFEU

❖ When assessing whether the referring body is a court or tribunal within the meaning of article 267 TFUE, the CJEU will apply following criteria (set out in its decisions in cases C-54/96, Dorsch Consult and C-178/99, Doris Salzmann)
- whether the body is established by law
- whether it is permanent
- whether its jurisdiction is compulsory
- whether its procedure is inter partes
- whether it applies rules of law
- whether it is independent

For a concrete example in the field of criminal law, see order in case C-235/02 [2004] § 23 "The judge investigating a criminal matter or the investigating magistrate constitute a court or tribunal within the meaning of Article 234 EC, appointed to give a ruling, independently and in accordance with law, in cases coming within the jurisdiction conferred on them by law in proceedings intended to culminate in decisions of a judicial nature."
This is not the case of a public prosecutor – see joined cases C-74/95 et C-129/95 [1996].

7

7

Setting out the scene: competences of the CJEU

➢ The Preliminary Ruling Procedure (Art. 267 TFEU)
Admissibility of a the request and scope of the competence given to the CJEU under Art. 267 TFEU

❖ A request from a national court or tribunal may be dismissed by the CJEU if:

- it is clear that the question is not relevant in the sense that the answer to that question cannot affect the outcome of the case;
- the request bears no relationship to the actual facts;
- the issue is hypothetical;
- or the Court has not been provided with the factual or legal material necessary to give a useful answer to the questions submitted

8

8

Setting out the scene: competences of the CJEU

- **Looking ahead: judicial review of decisions of the EPPO – the respective roles assigned to national Courts and the CJEU as regards procedural acts**
  - Principle set out in Art. 42 para. 1 (EU) Reg. 2017/1939
  - Scope of references for preliminary rulings – Art. 42 para. 2

9

9

Relevance of the Case Law of the CJEU when applying procedural rights

- **Notion of "criminal matters"**
  - **No common understanding of the scope of "criminal law" in the EU**
    For the purpose of the Treaty provisions concerning police and judicial cooperation in criminal matters, these are to be determined by referring to the legal bases of EU measures set out by these provisions.
  - **Practical consequence:** **cooperation between MS on specific driving offences now under Directive 2015/413 pertains to the common transportation policy and not to police and judicial cooperation in criminal matters (CJUE [2014] C-43/12 annulling the previous Directive 2011/82/EU due to the choice of an inappropriate legal base)**

10

10

Relevance of the Case Law of the CJEU when applying procedural rights

➢ **Judicial cooperation in criminal matters … and beyond**

- ❖ **EU Law may be applicable in the field of criminal law (CL) even when MS are acting in a field where they retained a sole competence.**
  For instance,
  - restrictions of fundamental freedoms due to national CL provisions
  - national CL provisions impacting rights conferred by EU law
- ❖ **In order to guarantee the application and effectiveness of EU Law, MS may be required to provide for appropriate sanctions under conditions equivalent to those applicable to infringements of national law and complying with the requirements of effectiveness, proportionality and dissuasive effect.**
  - **Greek Maize Case - CJEU [1989] C-68/88**
  - **EU criminal competence through policies: Environment Crime (CJEU [2005] C-176/03) and Ship Source Pollution (CJEU [2007] C-440/05) cases**

11

11

Relevance of the Case Law of the CJEU when applying procedural rights

➢ **Judicial cooperation in criminal matters … and beyond**

- ❖ **Practical consequences when applying procedural rights**

The scope of procedural rights to be guaranteed when sanctioning infringements of EU Law on the basis of national provisions is determined by EU Law (in particular Art. 41 and 47 of the Charter) when the national provisions considered guarantee the application and effectiveness of EU Law.

In such cases a balance has to be struck between the effectiveness requirement and the protection of procedural rights.

12

12

Relevance of the Case Law of the CJEU when applying procedural rights

➢ **Scope of EU Law**

❖ **When establishing its competence under Art. 267 TFEU, the CJEU ascertains i.a. whether the preliminary question falls under the scope of EU Law.**

❖ **This is generally the case when**

- **The question concerns the interpretation (or the validity) of an applicable instrument of EU Law (depending on its personal, substantial and temporal scope of application).**
- **A preliminary question of interpretation may concern the scope of application of any instrument of EU Law.**
  C-790/19 (pending case) (AG Opinion 14th Jan. 2021) – question whether the person who commits an act constituting money laundering, as defined by Directive 2005/60, may be the perpetrator of the offence from which the laundered money derives.

13

13

Relevance of the Case Law of the CJEU when applying procedural rights

➢ **Scope of EU Law**

❖ **A preliminary question may also fall under the scope of EU Law in the following situations:**

- **The question concerns the procedural rights to be guaranteed when sanctioning infringements of EU Law on the basis of national provisions.**
- **The question concerns the interpretation of Art. 41 or 47 of the Charter … provided the national provisions at stake are to be considered as implementing EU Law (!)**
  See the relevant case-law on the interpretation of Art. 51 of the Charter.

14

14

Relevance of the Case Law of the CJEU when applying procedural rights

- **Scope of EU Law for the purposes of Art. 51 of the Charter**

- **Article 51(1) of the Charter provides that the provisions of the Charter are addressed to the Member States only when they are implementing EU law.**
  The fundamental rights guaranteed in the legal order of the European Union are applicable in all situations governed by EU law, but not outside such situations
- **Thus, where a legal situation does not come within the scope of EU law, the Court does not have jurisdiction to rule on it and any provisions of the Charter relied upon cannot, of themselves, form the basis for such jurisdiction (e.g. judgment in cases C-80/18 to C-83/18, UNESA a.o. [2019], para. 37-39)**

15

15

Relevance of the Case Law of the CJEU when applying procedural rights

- **Scope of EU Law for the purposes of Art. 51 of the Charter**

- **Example of criminal penalties adopted by a MS intended to protect the financial interests of the EU (in the field of VAT)**
  judgment in case C-524/15 [2018] Menci, para. 18-22
  (referring to case C-617/10 [2013] Åkerberg Fransson)
  Limit:
  Cases C-469/18 et C-470/18 [2019] Belgische Staat
  Concerning the use of evidence for the purpose of adjusting personal income tax returns in the light of Art. 47 of the Charter
  - **Such use does not have any link to EU law which goes beyond the close relationship that may exist, in one Member State, between the rules on the levying of VAT and those on the levying of personal income tax or the indirect effects of one of those matters on the other**

16

16

Thank you for your attention !

You are welcome to contact me at the following address:
Jean-Marie.Gardette@curia.europa.eu

As soon as circumstances allow visitors' programmes to resume, I would recommend considering a visit – not only to see European justice at work but also to share your own experience with members of the CJUE and ist staff.

Further information is available online:
https://curia.europa.eu/jcms/jcms/Jo2_7019/en/

17

Co-funded by the Justice Programme of the European Union 2014-2020

Applying Procedural Rights under the Case Law of the CJEU

Christoph Burchard
Professor of Law
Goethe University Frankfurt am Main, Germany

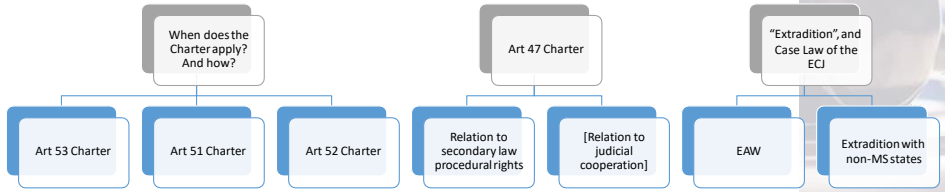
1

Overview

- When does the Charter apply? And how?
- Art 47 Charter
- "Extradition", and Case Law of the ECJ

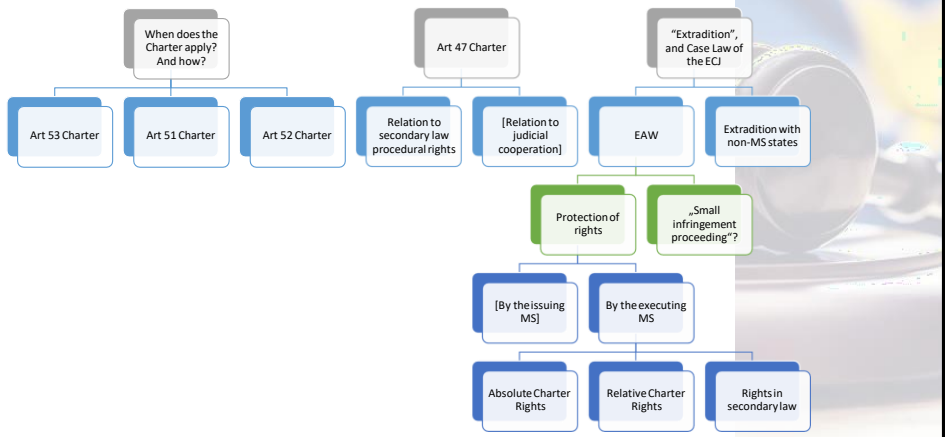
2

Overview



3

Overview



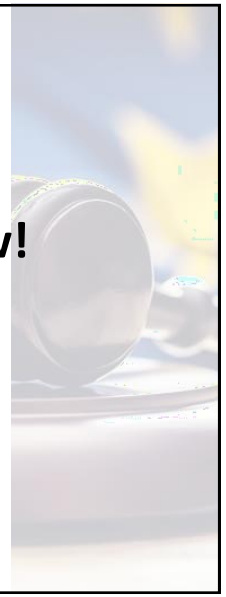
4

Part 1:
Article 51 (+53 + 52) Charter

5

Even if the Charter applies …

Uneasy relation with national law!



6

Even if the Charter applies …

Poll 1:
Even if Union law applies (Article 51!), but there is greater procedural protection by national law, including by national constitutional law (esp. national constitutional fundamental rights): What prevails?

Union law or national law?

The Melloni (C-399/11, 26 Feb 2013) scenario

7

Article 53 Charter

Level of protection

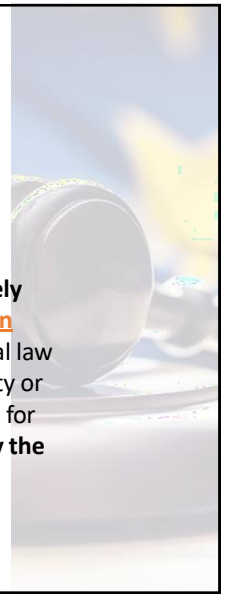
Nothing in this Charter shall be interpreted **as restricting or adversely affecting human rights and fundamental freedoms as recognised**, in their respective fields of application, by Union law and international law and by international agreements to which the Union, the Community or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and **by the Member States' constitutions**.

8

Article 53 Charter

Level of protection

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**.

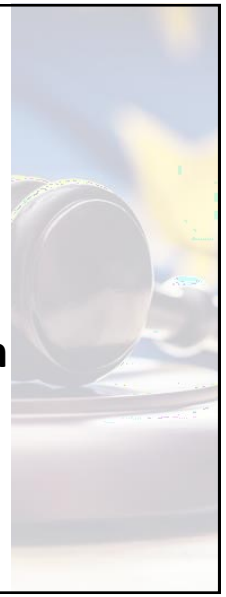


9

When does the Charter apply?

This is all but clear many times.

There are conflicts looming between national and Union law.



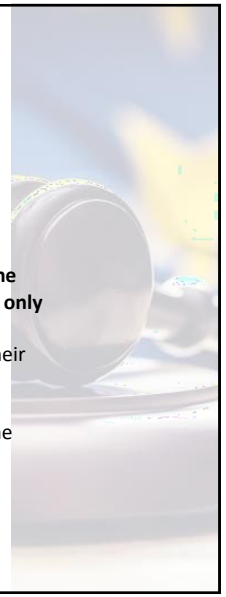
10

Article 51 Charter

Scope

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

2. This Charter does not establish any new power or task for the Community or the Union, or modify powers and tasks defined by the Treaties.



11

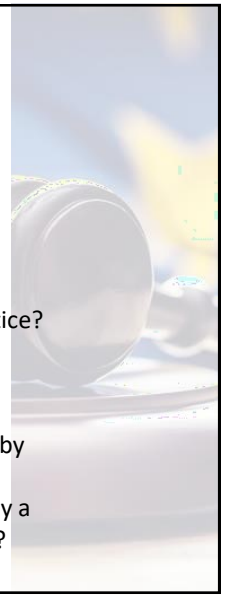
When does the Charter apply?

To EU institutions

Question:
Where does this become relevant in the area of criminal justice?

➔ The EPPO.

The EPPO builds on the investigations on the decentral level by Delegated European Prosecutors. But what if they request authorization etc. by domestic actors, like a search warrant by a national court applying national law. Does the Charter apply?



12

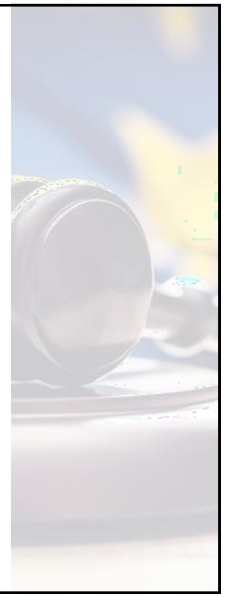
When does the Charter apply?

To EU institutions

To EU Member States

Question:
When do they "implement" Union law?

Question:
Is *Åkerberg Fransson* (C-617/10, 26 Feb 2013) still good law?



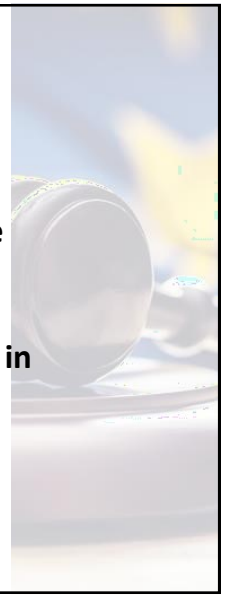
13

"How" does the Charter apply?

There is an uneasy relation with the ECHR and the jurisprudence of the ECtHR.

In certain areas, the Charter has to be interpreted in light of the ECHR.

The ECJ might develop into a fundamental rights court.



14

Art 52 Charter

Scope of guaranteed rights

1. Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the **essence of those rights and freedoms**. Subject to the principle of **proportionality**, limitations may be made only if they are necessary and genuinely meet objectives of **general interest recognised by the Union or the need to protect the rights and freedoms of others**.

3. In so far as this Charter contains rights which correspond to rights guaranteed by the **Convention for the Protection of Human Rights and Fundamental Freedoms**, the meaning and scope of those rights **shall be the same** as those laid down by the said Convention. This provision shall not prevent **Union law providing more extensive protection**.

15

Part 2: Article 47 Charter

16

Art 47 Charter

We arrive at a „normal“ hierarchy of norms in the EU!

Primary Law = EU Constitutional Law

Secondary Law has to compley with EU Constitutional Law

17

Article 47 Charter

Right to an effective remedy and to a fair trial

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

2.Everyone is entitled to a **fair** and public hearing within a **reasonable time** by an **independent and impartial tribunal previously established by law**. Everyone shall have the possibility of being advised, defended and represented.

3.Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.

18

The “ordinary” hierarchy of EU law

Question:
Art 47 in “normal” (merely domestic) criminal proceedings:
How does Art 47 Charter relate to secondary law instruments?

Overview (December 2019):
https://www.consilium.europa.eu/media/41918/eu-instruments-in-the-field-of-criminal-law-and-related-texts_december-2019.pdf

19

IV. APPROXIMATION OF PROCEDURAL LAW

Victims:

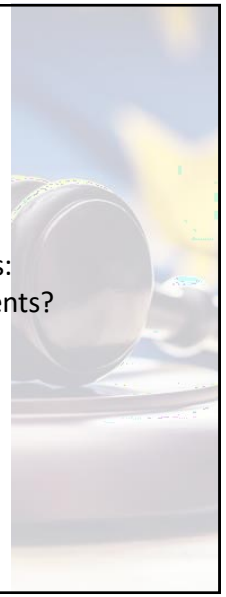
Table of Contents

Suspects and accused persons:

20

The “ordinary” hierarchy of EU law

Question:
Art 47 in “normal” (merely domestic) criminal proceedings:
How does Art 47 Charter relate to secondary law instruments?



21

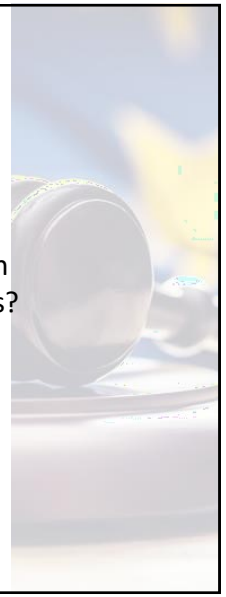
VW C-659/18, 12 March 2020

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, and in particular Article 3(2) thereof, **read in the light of Article 47 of the Charter of Fundamental Rights of the European Union**, *must be interpreted as …*

22

The “ordinary” hierarchy of EU law

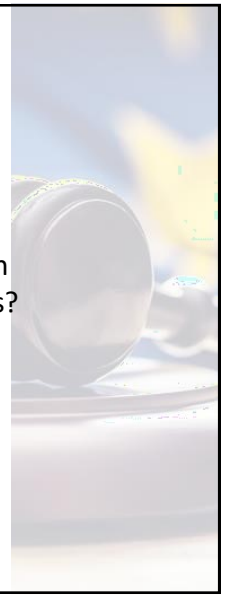
Question for later:
Relation between Art 47 Charter, especially as embodied in secondary law, and judicial cooperation in criminal matters?



23

The “ordinary” hierarchy of EU law

Question for later:
Relation between Art 47 Charter, especially as embodied in secondary law, and judicial cooperation in criminal matters?



24

IR C-649/19, 28 Jan 2021

As a preliminary point, it should be borne in mind that the substantive legality of an EU act cannot be examined in the light of another EU act of the same status in the hierarchy of legal rules, unless the former has been adopted pursuant to the latter or unless it is expressly provided, in one of those two acts, that one take precedence over the other.

By contrast, it is appropriate to examine the validity of that framework decision in the light of Articles 6 and 47 of the Charter.

25

Part 3: EAW (and Extradition) in the case law of the CJEU

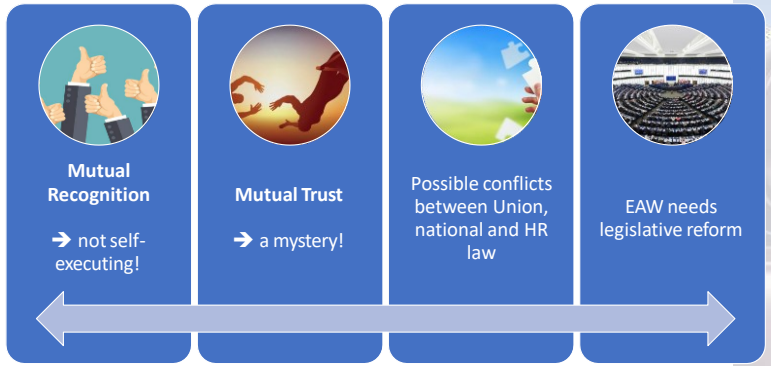
26

Part 3
Subpart A

The EAW

27

Foundational considerations



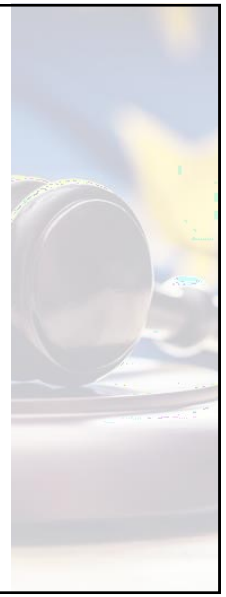
28

My Focus Areas

"Small Infringement Proceeding?"
AY C-267/17, 25 July 2018

Fundamental Rights Protection

- **As protected by the executing authority**
  Aranyosi und Căldăraru
  … and beyond
- ~~**As guaranteed by the issuing (judicial) authority**~~
  ~~*OG and PI …* and beyond~~



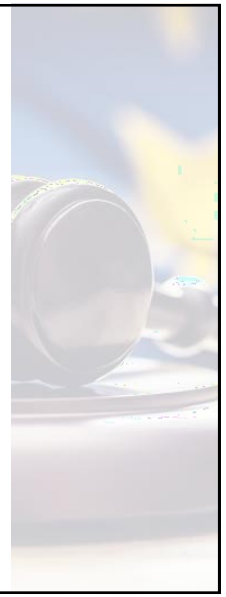
29

My Focus Areas

"Small Infringement Proceeding?"
AY C-267/17, 25 July 2018

Fundamental Rights Protection

- **As protected by the executing authority**
  Aranyosi und Căldăraru
  … and beyond
- ~~**As guaranteed by the issuing (judicial) authority**~~
  ~~*OG and PI …* and beyond~~



30

- Duty to protect by the executing state

What, if any, “duties to protect” exist on the side of the *executing authority* when executing an incoming EAW?

31

- Duty to protect by the executing state

Protection of (fundamental etc.) rights during the actual execution in the executing MS?

32

Duty to protect by the executing state

Is the executing authority responsible for violations of procedural rights in the issuing MS? Does the executing authority have a *transnational "duty to protect"*?

Question: What scenarios come to mind?

33

Duty to protect by the executing state

Question: What scenarios come to mind?

Inhumane prison conditions
Partial courts
Execution of prison term of an in absentia trial
…

34

Duty to protect by the executing state

What about national (constitutional etc.) rights that go beyond Union law?

➔ See above: Melloni, Art 53 Charter

35

Duty to protect by the executing state

So we focus on Union law now.

We assume that there is a definitive regulation in Union law, and that there exists the possibility of a violation of Union law (rights) in the issuing MS.

36

Duty to protect by the executing state

Poll 2:
Is Art. 1 (3) FD-EAW a (possible or even mandatory?) ground of refusal of an incoming EAW if there looms a violation of Union rights in the issuing state?
Yes / No

Art. 1(3) FD-EAW
This 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.

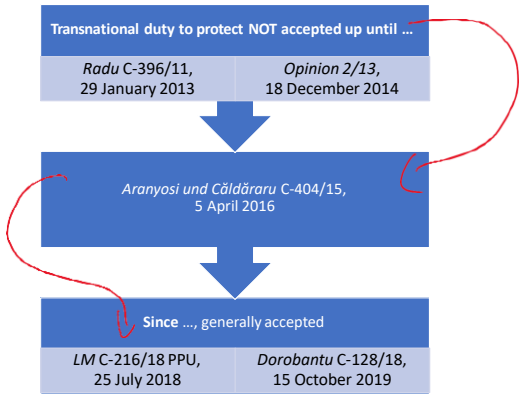
37

Duty to protect by the executing state

This was controversial for a long time, but it is no longer in general!

The answer is today: Yes, there is a transnational duty to protect Union rights under Union law!

38



39

Duty to protect by the executing state

But: What are the substantive criteria and what is the procedure to activate the transnational "duty to protect" on the side of the executing authority?

40

Duty to protect by the executing state

One needs to distinguish, and one needs to pay attention to a highly dynamic jurisprudence!

Absolute Charter Rights (Article 4 Charter)	Relative Charter Rights (Article 47 Charter)	Rights guaranteed by secondary law
• Dorobantu C-128/18, 15 October 2019	• LM C-216/18, 25 July 2018 • L and P C-354/20 PPU and C-412/20 PPU, 17 Dec 2020	• TR C-416/20 PPU, 17 Dec 2020

41

Duty to protect by the executing state

One needs to distinguish, and one needs to pay attention to a highly dynamic jurisprudence!

Absolute Charter Rights (Article 4 Charter)	Relative Charter Rights (Article 47 Charter)	Rights guaranteed by secondary law
• Dorobantu C-128/18, 15 October 2019	• LM C-216/18, 25 July 2018 • L and P C-354/20 PPU and C-412/20 PPU, 17 Dec 2020	• TR C-416/20 PPU, 17 Dec 2020

42

Dorobantu C-128/18, 15 October 2019

A finding, by the executing judicial authority, that there are substantial grounds for believing that, following the surrender of the person concerned to the issuing Member State, that person will run [a risk of the violation of Art 4 Chater], because of the conditions of detention prevailing in the prison in which it is actually intended that he will be detained, **cannot be weighed**, for the purposes of deciding on that surrender, against considerations relating to the efficacy of judicial cooperation in criminal matters and to the principles of mutual trust and recognition.

Art 4 Charter is absolute

43

Dorobantu C-128/18, 15 October 2019

Article 1(3) FD EAW read in conjunction with **Article 4 Charter** must be interpreted as meaning that when the executing judicial authority has objective, reliable, specific and properly updated information showing there to be **systemic or generalised deficiencies** in the conditions of detention in the prisons of the issuing Member State, it must, for the purpose of assessing whether there are substantial grounds for believing that, following the surrender to the issuing Member State of the person subject to a European arrest warrant, that person will run a **real risk** of being subjected to inhuman or degrading treatment within the meaning of Article 4 of the Charter, take account of all the relevant physical aspects of the conditions of detention in the prison in which it is actually intended that that person will be detained, such as the personal space available to each detainee in a cell in that prison, sanitary conditions and the extent of the detainee's freedom of movement within the prison.

System'e (abstract) + individual (concrete)

44

Dorobantu C-128/18, 15 October 2019

That assessment is not limited to the review of obvious inadequacies. For the purposes of that assessment, the executing judicial authority must request from the issuing judicial authority the **information** that it deems necessary and **must rely, in principle, on the assurances** given by the issuing judicial authority, in the absence of any specific indications that the conditions of detention infringe Article 4 of the Charter of Fundamental Rights.

traditional extradition markers

45

Dorobantu C-128/18, 15 October 2019

As regards, in particular, the personal space available to each detainee, the executing judicial authority must, in the absence, currently, of minimum standards in that respect under EU law, take account of the minimum requirements under Article 3 ECHR, as interpreted by the ECtHR.

EU law = ECHR

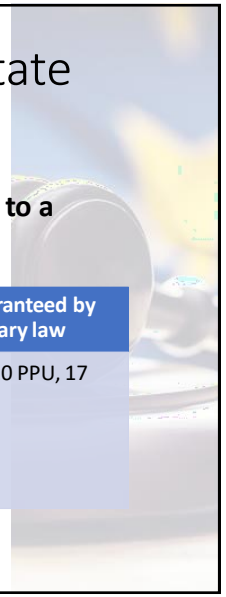
46

Dorobantu C-128/18, 15 October 2019

The executing judicial authority **cannot** rule out the existence of a real risk of inhuman or degrading treatment merely because the person concerned has, in the issuing Member State, a **legal remedy enabling** that person to challenge the conditions of his detention or because there are, in the issuing Member State, legislative or structural measures that are intended to reinforce the monitoring of detention conditions.

47

Duty to protect by the executing state



One needs to distinguish, and one needs to pay attention to a highly dynamic jurisprudence!

Absolute Charter Rights (Article 4 Charter)	Relative Charter Rights (Article 47 Charter)	Rights guaranteed by secondary law
• Dorobantu C-128/18, 15 October 2019	• LM C-216/18, 25 July 2018 • L and P C-354/20 PPU and C-412/20 PPU, 17 Dec 2020	• TR C-416/20 PPU, 17 Dec 2020

48

L and P C-354/20 PPU and C-412/20 PPU, 17 Dec 2020

The FD-EAW must be interpreted as meaning that, where the executing judicial authority, which is called upon to decide whether a person in respect of whom a European arrest warrant has been issued is to be surrendered, has evidence of systemic or generalised deficiencies concerning the independence of the judiciary in the Member State that issues that arrest warrant which existed at the time of issue of that warrant or which arose after that issue, that authority **cannot deny the status of 'issuing judicial authority' to the court which issued that arrest warrant** and cannot presume that there are substantial grounds for believing that that person will, if he or she is surrendered to that Member State, run a real risk of breach of his or her fundamental right to a fair trial, guaranteed by the second paragraph of Article 47 of the Charter of Fundamental Rights of the European Union, **without carrying out a specific and precise verification** which takes account of, inter alia, his or her personal situation, the nature of the offence in question and the factual context in which that warrant was issued, such as statements by public authorities which are liable to interfere with how an individual case is handled.

49

Duty to protect by the executing state

One needs to distinguish, and one needs to pay attention to a highly dynamic jurisprudence!

Absolute Charter Rights (Article 4 Charter)	Relative Charter Rights (Article 47 Charter)	Rights guaranteed by secondary law
• Dorobantu C-128/18, 15 October 2019	• LM C-216/18, 25 July 2018 • L and P C-354/20 PPU and C-412/20 PPU, 17 Dec 2020	• TR C-416/20 PPU, 17 Dec 2020

50

TR C-416/20 PPU, 17 Dec 2020

Relying on the provisions of a directive to prevent the execution of a European arrest warrant would make it possible to circumvent the system established by the FD-EAW, which exhaustively lists the grounds for refusing execution.

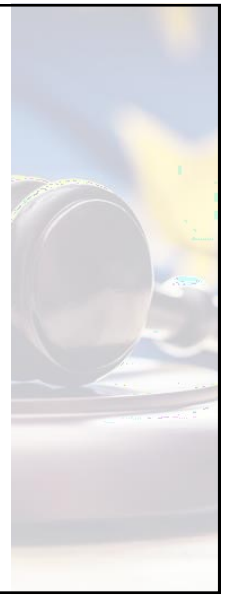
51

My Focus Areas

"Small Infringement Proceeding?"
AY C-267/17, 25 July 2018

Fundamental Rights Protection

- **As protected by the executing authority**
  Aranyosi und Căldăraru
  … and beyond
- ~~**As guaranteed by the issuing (judicial) authority**~~
  ~~*OG and PI* … and beyond~~



52

Part 3
Subpart B

Extradition with non-MS states

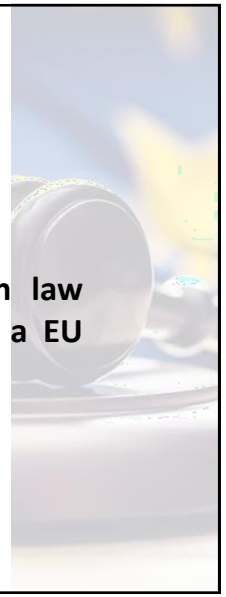
53

Traditional Extradition Law

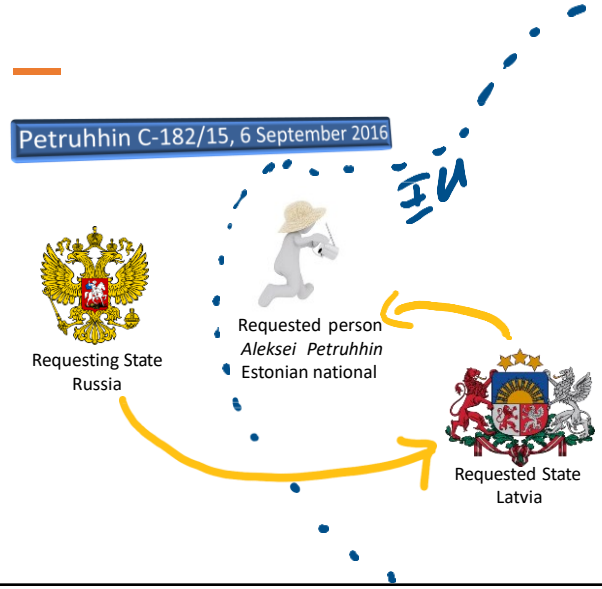
Poll 3:

Does Union Law control traditional extradition law (with a non-EU state; and without there being a EU extradition treaty)?

Yes / No



54



Detention for and extradition to non-EU-Member States

A revolution in traditional extradition law

(1) Neither legislative nor jurisprudential guidance

(2)Practice has to resolve esp. legal uncertainties

55

Poll 3.

Does Union law control traditional extradition to non-MS states (without there being a EU extradition treaty!)?

YES or NO

56

Petruhhin C-182/15, 6 September 2016

1. **Article 18 TFEU and Article 21 TFEU** must be interpreted as meaning that, when a Member State to which a Union citizen, a national of another Member State, has moved receives an extradition request from a third State with which the first Member State has concluded an extradition agreement, it must inform the Member State of which the citizen in question is a national and, should that Member State so request, surrender that citizen to it, in accordance with the [FD EAW], provided that that Member State has jurisdiction, pursuant to its national law, to prosecute that person for offences committed outside its national territory.

2. Where a Member State receives a request from a third State seeking the extradition of a national of another Member State, that first Member State must verify that the extradition will not prejudice the rights referred to in **Article 19 Charter**.

Detention for and extradition to non-EU-Member States

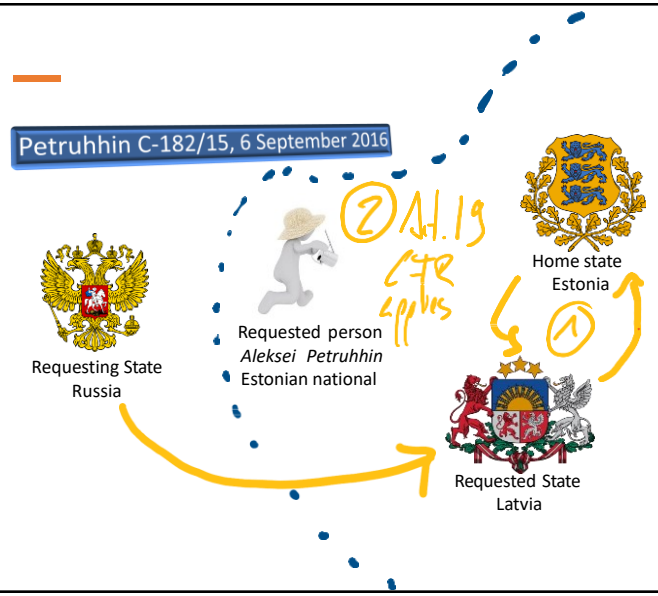
A revolution in traditional extradition law

(1) Neither legislative nor jurisprudential guidance

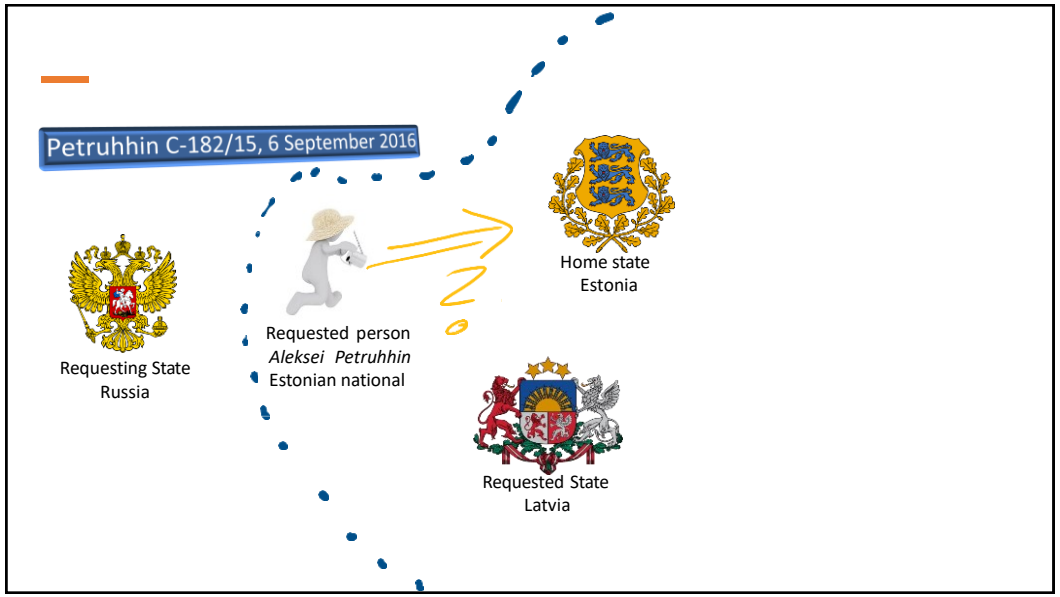
(2)Practice has to resolve esp. legal uncertainties

57

Petruhhin C-182/15, 6 September 2016



58



59

Thank you!

burchard@jur.uni-frankfurt.de

60

UNIVERSIDAD DE MÁLAGA

CO-FUNDED BY THE JUSTICE PROGRAMME OF THE EUROPEAN UNION 2014-2020

CCBE

OUTCOMES OF THE TRAINAC STUDY BY THE CCBE/ELF

ERA SEMINAR "APPLIYNG PROCEDURAL RIGHTS UNDER THE CASE LAW OF THE CJEU (1TH FEBRUARY 2021)

DR. SALVADOR GUERRERO PALOMARES

UNIVERSIDAD DE MÁLAGA

THE COUNCIL OF BARS AND LAW SOCIETIES IN EUROPE (CCBE)

CCBE

- Representing more than 1 million lawyers in europe, through their Law Societies and Bar Associations.
  - 31 full members and 13 observers.
- Recognized as the voice of the legal profession.
- CCBE aims:
  - Regulation of the legal profession.
  - Defence of the rule of law.
  - Defence of human rigthts and democratic values.

THE TRAINAC PROJECT ORIGINIS. OBJETIVES

- The TRAINAC Project is an investigation project founded by the EU's Justice Programme and carried out by the CCBE and the ELF (European Lawyers Foundation).
- The aim was to provide an assessment by defence practitioners in the the EU of the implementation of the firsts three Directives on procedural safeguards:
  - Directive 2010/64, on the right of interpretation and translation.
  - Directive 2012/13, on the right of information.
  - Directive 2013/48, on the right of access to a lawyer.
- The study was published in 2016.
  - http://europeanlawyersfoundation.eu/wp-content/uploads/2015/04/TRAINAC-study.pdf

THE TRAINAC PROJECT METHODOLOGY

- Meetings with the appointed experts from 26 EU countries (Germany and Romania excluded).
- Widespreading a questionarie amongs defense practitioners of each countries.
- Compiling the information gathered in the questionaries and provided by each country experts in a final document.

OUTCOME
THE DIRECTIVE ON THE RIGHT TO INTERPRETATION AND TRANSLATION

- Inadequate quality requirements (p. 13).
- Lack of systematic approaches to ascertain the necessity of translation/interpretation (p. 13).
- Different approach to essential documents for translation (p. 15).
- Lack of safeguards for the confidentiality of communication between suspected or accused persons and their legal counsel (p. 12).
- Some Member States limit the scope of the right to interpretation for communication with legal counsel (p. 12).

OUTCOME
THE DIRECTIVE ON THE RIGHT OF INFORMATION

UNIVERSIDAD DE MÁLAGA

- Extent, format, communication and temporal scope of the rights are not consistent across the Member States (p. 42/44)
- The information provided is often not clearly understandable (p. 40).
- The Letter of Rights for suspects or accused persons who are arrested or detained are not always provided in a timely way (p. 41).
- Letters of Rights do not always cover all the rights prescribed by the Directive (p. 35/36).
- Some Member States do not have a specific Letter of Rights for EAW, as prescribed by the Directive (p. 38).
- Some Member States have no specific provisions to challenge the lack of information (p. 53).

OUTCOME
THE DIRECTIVE ON THE RIGHT TO BE ASSISTED BY A LAWYER

- Delay between the arrest and notification of the lawyer (p. 60/61).
- Limited role permitted to lawyers during questioning of suspects (p. 62/63).
- Difficulties in meetings in private with the lawyer (p. 63/64).
- The scope of the derogations is overly broad and open to abuse (p. 66).
- Weak remedies (p. 75).

FURTHER DEVELOPMENTS

- Report from the **FRA**: Rights of suspected and accused persons across the EU: translation, interpretation and information (**2016**).
- Report from the **COMMISSION** to the European Parliament and the Council on the implementation of Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings (**2018**).
- Report from the **FRA**: Rights in practice: access to a lawyer and procedural rights in criminal and European arrest warrant proceedings (**2019**).

ERA online seminar,
1 February 2021

Co-funded by the Justice Programme of the European Union 2014-2020

FRA
EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS

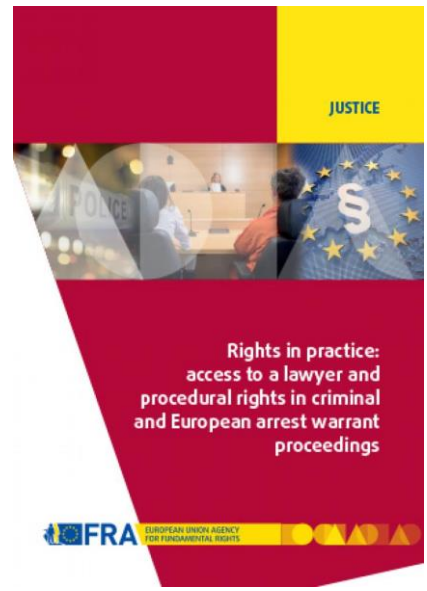
Outcomes of the FRA report

'Rights in practice: access to a lawyer and procedural rights in criminal and European Arrest Warrant proceedings'

Dr. Matylda Pogorzelska
Project manager

FRA
EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS

Report available on the Agency's website



2

FRA
EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS

At the European Commission's request, FRA assessed and presents in its report on how the procedural defence rights enshrined in

- **Directive 2013/48/EU** on the right of access to a lawyer in criminal proceedings and in EAW 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;
- **Directive 2010/64/EU** on the right to interpretation and translation in criminal proceedings
- **Directive 2012/13/EU** on the right to information in criminal proceedings

are being implemented in practice across eight Member States.

3

FRA
EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS

Member States researched:

Austria, Bulgaria, Denmark, France, Greece, the Netherlands, Poland, Romania

- All bound by the EAW FD.
- All – except for Denmark (specific opt-out agreement) – are bound by the Roadmap's measures.
- All EU Member States, however, regardless of any opt-out regime, are bound by the minimum standards of defence rights as developed in the case law of the European Court of Human Rights and embodied in the Roadmap's instruments.

4

FRA
EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS

Objective and focus of the research:

Objective:

- Examine how authorities fulfil, in practice, their obligations regarding the procedural rights of defendants in certain contexts.

Focus:

National proceedings involving persons who are suspected of a crime, are summoned for questioning, but are not deprived of their liberty.

National proceedings involving persons who are suspected of a crime, are summoned for questioning, and deprived of their liberty.

Cross-border proceedings involving persons arrested pursuant to an EAW.

6

FRA
EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS

FRA's report is based on:
(Small) Desk research and Social fieldwork research

252 interviews - conducted in 2018.
These included:

- **169 criminal justice professionals** (judges, prosecutors, police officers, lawyers, staff of monitoring statutory bodies)
- **83 defendants** (48 arrested in the state in which they were charged and 35 arrested in another EU country based on an EAW)

Member State	Defendants in national proceedings	Defendants in EAW proceedings	Lawyers	Police officers	Judges and prosecutors	Members of bodies that monitor detention facilities	Total number of interviewees
AT	5	5	6	4	6	3	29
BG	5	6	6	5	4	3	29
DK	5	4	4	6	6	4	29
FR	10	3	8	8	7	5	41
EL	6	4	6	5	5	3	29
NL	4	2	7	7	4	2	26
PL	7	7	6	7	9	3	39
RO	6	4	4	6	7	3	30
Total	48	35	47	48	48	26	252

7

FRA
EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS

Key findings:

- Defendants are not always effectively informed about their rights
- At the initial stage defendants are sometimes questioned as witnesses
- Access to legal assistance is often delayed
- Defendants do not receive accurate information about the charges and reasons for their arrest

8

FRA
EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS

Defendants are not always effectively informed about their rights

- Most practitioners and defendants agree that defendants **receive this information before the first official questioning**.
- The **information given differs in its scope and content, and in how it is conveyed**.
- Several **factors** determine whether or not defendants receive information about their rights in an effective manner. These include, among others:
  - Assigning defendants a procedural status other than that of a suspect *(e.g. person of interest, witness, person invited for an 'intelligence talk')*
  - Barriers to defendants accessing information due to particular vulnerabilities *(e.g. language barriers, lack of education, disabilities or intoxication)*
  - Accessibility of the format in which the information about rights is provided.
  - Authorities not having practices to verify a defendant's understanding of the information provided, especially when no lawyer is present.

9

At the initial stage defendants are sometimes questioned as witnesses

- FRA's research identifies cases in which law enforcement authorities question a person as a **witness or 'informally'** ask them questions, even when there are plausible reasons for suspecting that person's involvement in a crime.

  (Means: Defendants do not receive information about their rights as a suspect – in particular, the right to remain silent and not to incriminate themselves.)

- FRA's research also highlights instances in which law enforcement authorities establish **informal practices** so that defendants' self-incriminatory statements, made as a witness, can later be used against them legally in the course of the proceedings

  (e.g.: by questioning former witnesses again, this time as defendants, and asking them if they stand by their previous statements)

10

Access to legal assistance is often delayed

- Respondents highlight the **crucial** importance of defendants having **access to legal assistance** – especially **from the very beginning** of criminal proceedings.
- Respondents argue that **defendants deprived of liberty, in particular, face difficulties in accessing lawyers directly and/or in private**.

  (e.g.: police officers or defendants' relatives call lawyers on their behalf. Sometimes, these calls are significantly delayed after the moment of arrest or detention.)

- When such **'indirect' or delayed contact** occurs, **defendants cannot obtain advice** at an early stage, such as to remain silent.

  (→ Lawyers cannot ask questions that may help them to prepare an effective defence.)

- **Defendants deprived of liberty do not always have the possibility of talking to their lawyers in private before the first questioning**.

  (→ Instead, where conversations happen at all, they are often short and/or take place in public corridors in the presence of police officers.)

11

Defendants do not receive accurate information about the charges and reasons for their arrest

- Respondents indicate that very often, when **informing defendants about the accusations (charges)** against them and the reasons for arrest, authorities tend to limit themselves to indicating the relevant provisions of criminal law, using technical language, and not specifying the actual allegations.
- In some cases, both persons deprived and persons not deprived of liberty receive information about the accusation after some delay, and suspects deprived of liberty learn about the grounds for arrest only after being detained for some time.

Results:

- ❖ creates practical challenges for building an effective defence
- ❖ impedes a defendant's ability to challenge deprivation of liberty, especially for defendants who do not benefit from legal assistance.

12

EAW specific results:

- Consent to surrender – defendants are often insufficiently informed about the meaning and the consequences
- Representation in the issuing MS:
  - Authorities in the executing MS very often do not inform about the right to appoint a lawyer in the issuing MS
  - If so, the right remains theoretical due to lack of support
  - Ideally, the issuing MS should provide a list of defence lawyers
- Many shortcomings in the field of translation

13

FRA
EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS

Issues found in EAW procedures:

- Language barriers
  - Right to information
  - Consenting to transfer to another MS
  - Misunderstanding: Persons making decisions contrary to their interests
- Ensuring effective legal representation
  - Access to interpreter
  - Access to a lawyer in issuing MS

14

FRA
EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS

Upcoming
FRA Publication
on
Procedural (Defence) Rights

15

FRA
EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS

2021

Publication of FRA report

"Presumption of innocence and the right to remain silent and to be present at trial – perspective of professionals from selected Member States"

Directive 2016/343/EU

- Presumption of Innocence
- Public References to Guilt
- Presentation of defendants

FRA report will address MS practice regarding:

- Burden of Proof
- Rights to remain silent and not self-incriminate
- Rights to be present at a trial and to a new trial

16

FRA
EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS

Thank you very much for your attention!

[Q&A]

17

Thank you

FRA
EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS

matylda.pogorzelska@fra.europa.eu
Just_digit_secure@fra.Europa.eu

fra.europa.eu

THE RIGHTS TO INTERPRETATION AND TRANSLATION, INFORMATION AND ACCESS TO A LAWYER IN THE CASE LAW OF THE CJEU AND KEY JUDGMENTS OF THE ECTHR

Co-funded by the Justice Programme of the European Union 2014-2020

Dr. Anna Mosna
Post-Doctoral Researcher
KU Leuven

1 FEBRUARY 2021

SYNOPSIS

A. The right to interpretation and translation

B. The right to information

C. The right of access to a lawyer

A. THE RIGHT TO INTERPRETATION AND TRANSLATION

INTERPRETATION ⟷ **TRANSLATION**

Oral linguistic assistance to understand oral statements

Oral linguistic assistance to understand (parts of) documents

Written translation of documents

A. THE RIGHT TO INTERPRETATION AND TRANSLATION

Article 6 § 3 (e) ECHR

right of everyone charged with a criminal offence to have the **free assistance of an interpreter** if he **cannot understand or speak** the language used in court

ECtHR case-law

- Vehicular language acceptable (**Vizgirda v. Slovenia** § 83)
- Must be granted whenever there are reasons to suspect that defendant is not proficient enough (**Vizgirda v. Slovenia** § 81)
- Does not apply to relation client-lawyer (**X. v. Austria**, Commission decision)
- Must be free even in case of conviction (**Luedicke, Belkacem and Koç v. Germany** § § 42, 46)
- Must be adequate (**Knox v. Italy**, §§ 182-186), adequacy must be controlled (**Kamasinki v. Austria** § 74, **Hermi v. Italy** § 80)
- Does not refer to written translation (**Kamasinski v. Austria** § 74)

A. THE RIGHT TO INTERPRETATION AND TRANSLATION

Directive 2010/64/EU

Article 2 on right to interpretation extends it also to certain communications between suspected or accused persons and their **legal counsel**

Article 3 establishes right to **translation** of essential documents (including decisions depriving a person of his liberty, any charge or indictment, and any judgment)

CJEU case-law

- right to translation refers in principle to the translation of court documents towards the language the suspected or accused person understands – and not the other way around, provided document is not considered essential (**Covaci** §§ 44, 47)
- Penalty orders imposing sanctions in relation to minor offences delivered after a simplified procedure are essential documents that must be translated→ because a penalty order represents both an indictment and a judgment (**Sleutjes** §§ 31, 34)

B. THE RIGHT TO INFORMATION

Article 6 § 3 (a) ECHR

Right of everyone charged with a criminal offence to be **informed** promptly, in a language which he understands and in detail, of the **nature and cause** of the accusation against him

ECtHR case-law

- There is no special formal requirement as to the manner in which information is delivered (**Pélissier and Sassi v. France** § 53, **Drassich v. Italy** § 34)
- Duty to inform rests entirely on the prosecution, it is not sufficient to make information passively available without bringing it to the attention of the defence (**Mattoccia v. Italy** § 65)
- Promptly: in good time for the preparation of the defence: (**C. v. Italy**, Commission decision, contra: **Borisova v. Bulgaria** §§ 43-45)
- Information must actually be received by the accused (legal presumption of receipt is not sufficient) (**C v. Italy**, Commission decision).

H O W

B. THE RIGHT TO INFORMATION

WHAT

- Information must contain factual and legal basis of the charge (**Pélissier and Sassi v. France** § 51 and **Kamasinski v. Austria** § 79, **Mattoccia v. Italy** § 59)
- Information must be detailed enough to allow the defendant to fully understand the charges against him in order to prepare and adequate defence (**Mattoccia v. Italy** § 60) → for example: offences must be listed, place and date of the offence, relevant articles of the criminal code and the name of the victim (**Brozicek v. Italy** § 42)

B. THE RIGHT TO INFORMATION

CHANGES

- Change in legal characterisation must be contained in the bill of indictment or at least given during the trial (**I.H. and others v. Austria**, § 34)
- Requalification of the facts → must allow practical and effective exercise of defence rights (**Pélissier and Sassi v. France** § 62)
- Defect in notification of the reformulated charge could be cured in appeal proceedings if the defendant can contest his conviction in front of the higher court with respect to all relevant legal and factual aspects (**Dallos v. Hungary** §§ 49-52; **Sipavicius v. Lithuania** §§ 30-33)

B. THE RIGHT TO INFORMATION

WHAT NOT

- No need to mention evidence on which the charge is based (**X v. Belgium**, Commission decision; **Collozza and Rubinat v. Italy**, Commission decision)

→ consider: in case of arrest, Article 5 § 2 ECHR applies → prompt information on the reasons for arrest and any charge against, see **Fox, Campbell and Hartley v. UK** § 40

B. THE RIGHT TO INFORMATION

EFFECTIVE

- If a person has mental difficulties, authorities are required to take additional steps to enable the person to be informed (**Vaudelle v. France** § 65)
- If a person does not speak the language of the court, a translation must be provided (**Brozicek v. Italy** § 41)
  - translation of an indictment should be given in written form so as to avoid a practical disadvantage for the defendant (**Hermi v. Italy** § 68, **Kamasinski v. Austria** § 79)
  - but, depending on the case, also oral translation could suffice if the defendant is still able to prepare his defence (**Husain v. Italy**, dec)
- Linguistic assistance is free (**Luedicke, Belkacem and Koç v. Germany** § 45)

B. THE RIGHT TO INFORMATION

DIRECTIVE 2012/13/EU

- right to receive instruction about his procedural rights
- right to be informed about the charge
- right to access the case file

B. THE RIGHT TO INFORMATION

CJEU case-law

- Suspects must be informed as soon as possible from the moment they are subject to suspicions that justify, on therapeutic and safety grounds the restriction of their liberty; at the latest before they are first officially questioned by the police (EP §§ 45-46, 53-54)

INFO ABOUT RIGHTS

B. THE RIGHT TO INFORMATION

INFO ABOUT CHARGE

ACCESS TO CASE FILE

CJEU case-law

- Can be after the lodging of an indictment that initiates the trial stage, but no later than the actual commencement of the hearing of argument on the merits of the charges (**Kolev and Others** §§ 92, 99)

B. THE RIGHT TO INFORMATION

INFO ABOUT CHARGE

CJEU case-law

- Amendments to the charges must be notified at a point in time when the defence still have the opportunity to respond effectively (**Kolev and Others** §§ 95, 99; **Moro** § 55)
  - where only legal characterisation is amended: right to information does not imply the right to request a negotiated penalty after the beginning of the trial (**Moro** § 63)
- Actual awareness is required: where penalty order is served to authorised person → accused person must have the benefit of the whole prescribed period for lodging an objection or have his position restored to the status quo ante (**Covaci** §§ 66-68; **Tranca and Others** §§ 50-51; **UY** § 60)
  - Accused person cannot be held criminally liable for infringing a penalty order that has become *res iudicata* if the person did not have knowledge of that order (**UY** § 65)

C. THE RIGHT OF ACCESS TO A LAWYER

Article 6 § 3 (C) ECHR

right of everyone charged with a criminal offence to **defend himself in person or through legal assistance of his own choosing** (…)

ECtHR: Salduz v. Turkey

- right to be effectively defended by a lawyer is fundamental feature of fair trial
- access to a lawyer should be provided as from the first interrogation of a suspect by the police
- Unless: compelling reasons to restrict this right → such restriction must not unduly prejudice the rights under Article 6

(Salduz v. Turkey §§ 51, 55)

C. THE RIGHT OF ACCESS TO A LAWYER

- Even before the start of the trial if trial fairness could be seriously prejudiced by initial failure to comply with Article 6 ECHR (**Öcalan v. Turkey** § 131, **Ibrahim and Others v. UK** § 253, **Magee v. UK** § 41)
- As soon as a there is a criminal charge (**Simeonovi v. Bulgaria** § 110) → no need for a formal charge: plausible reasons for suspecting the person of a crime suffice (**Truten v. Ukraine** § 66)
- Two minimum requirements: a) right to contact and consultation with a lawyer prior to interview, including confidential instructions to the lawyer; b) presence of the lawyer at police interview and any further questioning in the pre-trial proceedings (**Beuze v. Belgium** §§ 133-134)
- Application of this right in the pre-trial phase depends on special features of national proceedings (**Ibrahim and Others v. UK** § 253, **Brennan v. UK** § 45, **Berliński v. Poland** § 75).
- Also application of this right in appellate and cassation proceedings depends on special features of the proceedings involved (**Meftah and Others v. France** § 41)

S C O P E

C. THE RIGHT OF ACCESS TO A LAWYER

- R. to access: only for compelling reasons: exceptional circumstances, temporary in nature and based on the assessment of the particular circumstances of the case→ general risk of leaks is not a compelling reason (**Ibrahim and Others v. UK** §§ 258-259)
- R. to choose: if there are relevant and sufficient reasons for holding that this is necessary in the interest of justice (**Meftah and Others v. France** §§ 45, 47)
- R. of confidential communications between the accused and his lawyer → only in exceptional circumstances (**Sakhnovskiy v. Russia** § 102): e.g. to prevent a risk of collusion or in case of issues concerning the lawyer's professional ethics or unlawful conduct (**S. v. Switzerland** § 49, **Rybacki v. Poland** § 59)

RESTRICTIONS

C. THE RIGHT OF ACCESS TO A LAWYER

- must satisfy the "knowing and intelligent waiver standard" (**Ibrahim and Others v. UK** § 272)
- it is a trial court's duty to verify that waiver was voluntary – failure to do so would deprive the defendant the possibility to remedy the situation (**Türk v. Turkey** § 53-54)

WAIVER

C. THE RIGHT OF ACCESS TO A LAWYER

- Effectiveness of legal assistance → must be "practical and effective" (**Artico v. Italy** § 33)
- States' responsibility is limited as the conduct of the defence is a matter between the accused and his lawyer (**Imborscia v. Switzerland** § 41)
- privately hired lawyers → only if manifest failure to provide effective representation, considering the circumstances of the case: e.g. accused's young age, seriousness of charge, contradictory allegations against him, failure of the lawyer to attend multiple hearings, accused's many absences from the hearings (**Güveç v. Turkey** § 131)

E F F E C T I V E

C. THE RIGHT OF ACCESS TO A LAWYER

Article 47 § 2 Charter

Directive 2013/48/EU

CJEU case-law

- Directive 2013/48/EU applies also to judicial proceedings triggered by the commission of an offence and which authorise, on therapeutic and safety grounds, the committal to a psychiatric hospital of persons who, in a state of insanity, have committed acts representing a danger to society (**EP** §§ 54, 63)
- Grounds for restrictions of the right of access to a lawyer are exhaustively listed under Article 3 §§ 5 and 6 Directive 2013/48/EU – no delays are allowed for suspects or accused who have failed to appear (**VW** §§ 42-43, 48)
- The right to be assisted by a lawyer of his own choosing may be restricted where that lawyer is instructed also by another accused person and there is a conflict of interest between the two defendants (**Kolev and Others** §§ 106, 111)

THANK YOU FOR YOUR ATTENTION!

annamosna@yahoo.de

State of play regarding the transposition of Directives (EU) 2016/343, 2016/800 and 2016/1919 on the presumption of innocence, children's rights and legal aid in criminal proceedings and their impact in the Member States

Applying Procedural Rights under the Case Law of the CJEU/ERA

01/02 February 2021

Co-funded by the Justice Programme of the EU

Justice

Directive (EU) 2016/343 on certain aspects of the Presumption of Innocence

- Reference in the **2009 Stockholm Programme** (section 2.4)
- **Fourth Directive** adopted to strengthen the procedural rights of suspects and accused persons in criminal proceedings
- Adopted on **9 March 2016** - Transposition period ended on **1 April 2018**

Justice

Main elements of the Directive (1)

- Scope of the Directive
- Content of the Directive
  - ✓No public references to guilt before proved guilty (public statements made by public authorities and judicial decisions)
  - ✓Presentation of suspects and accused persons: measures of physical restraint

Main elements of the Directive (2)

- Content of the Directive
  - ✓Burden of proof and *in dubio pro reo*
  - ✓Right to remain silent and right not to incriminate oneself
  - ✓Right to be present at the trial and right to a new trial
  - ✓Remedies

State of play regarding transposition

- **Notifications** to the Commission: complete transposition notified by all Member States.
- **Infringement proceedings** for non-communication: 11 Member States in 2018, 4 still open for partial communication.
- **Completeness and conformity check** together with external contractor.

Preliminary conclusions

The Directive is **not yet fully implemented** in all Member States.

The Directive is not only about the principle of presumption of innocence but about the rights deriving from the principle.

Issues arise with regard to the scope of the rights; public references to guilt; presentation of suspects and accused; right not to incriminate oneself; right to be present at the trial (*in absentia* judgments).

Directive (EU) 2016/800 on procedural safeguards for children

- **Part of "Procedural rights package"**
- Adopted on **11 May 2016** - Transposition period ended on **11 June 2019**
- Based on **international standards** (UN CRC and the Guidelines of the Council of Europe on child-friendly justice)
- **Binding EU-wide (minimum) rules** on procedural rights for children

Main elements of the Directive (1)

- **Scope** of the Directive
- **Effective participation of a child:**
  - ✓ Right to information: information of child and parent(s) or appropriate adult
  - ✓ Access to a lawyer/Assistance by a lawyer: mandatory assistance for children in detention or when a decision on detention is taken and in serious and complex cases
  - ✓ Legal Aid: to ensure the effective exercise of the assistance by a lawyer
  - ✓ Individual Assessment: specific needs of children to be taken into account

Main elements of the Directive (2)

- **Safeguards related to deprivation of liberty:**
  - ✓Deprivation of liberty as a measure of last resort
  - ✓Alternative measures to detention where possible
  - ✓Specific safeguards in case of deprivation of liberty
  - ✓Right to medical examination

Main elements of the Directive (3)

- **Other Safeguards**
  - ✓Audio-visual recording of questioning by police
  - ✓Protection of privacy
  - ✓Presence at court hearings
  - ✓Training of professionals

State of play regarding transposition

- **Notifications** by Member States to the Commission: not all Member States have yet notified complete transposition
- **Infringement proceedings** for non-communication: 7 Member States in 2019, 2 Reasoned opinions in 2020
- **Completeness and conformity check** together with external contractor

Preliminary conclusions

The Directive is **not yet fully implemented** in all Member States.

Several Member States have undertaken important changes to their juvenile justice systems as part of transposition efforts. Some Member States are still working on incorporating the directive into national law.

Compliance check ongoing but issues arise with regard to the scope, prompt and adequate information, assistance by a lawyer, deprivation of liberty, ….

Directive (EU) 2016/1919 on legal aid

- **6th Directive adopted in the context of "Procedural rights package"**
- Closely linked to **Directive 2013/48/EU on the right of access to a lawyer**
- Adopted on **26 October 2016** - Transposition period ended on **5 May 2019**

Main elements

- Scope
- Legal aid in criminal proceedings
- Legal aid in European arrest warrant proceedings
- Decisions regarding the granting of legal aid, competent authority
- Quality and training

State of play regarding transposition

- **Notifications** by Member States to the Commission: Complete transposition: 23 Member States
  Partial transposition: 2 Member States
- **Infringement proceedings** for non-communication opened against 4 Member States
- **Completeness and conformity check** with external contractor ongoing

15

Justice

Preliminary conclusions

The Directive is **not yet fully implemented** in all Member States.

Added value: legal aid to be granted without undue delay, legal aid in the executing and issuing Member State (EAW for purpose of conducting criminal prosecution) – means test only, provisions on decision making and quality.

Compliance check ongoing but issues arise with regard to the timing of the decision on legal aid, legal aid in the context of EAW proceedings, lack of independence of authorities taking a decision on legal aid, …

16

Justice

Thank you!

Dr. Ingrid Breit
Team-leader

DG Justice and Consumers
Unit B2
Criminal Procedural Law

Challenges ahead

Applying Procedural Rights under the Case Law of the CJEU/ERA

01/02 February 2021

Co-funded by the Justice Programme of the EU

Justice

Introduction

- **1999 Tampere Conclusions**
- **2009 Stockholm Programme and Roadmap**
- **Six Directives** adopted between 2010 and 2016 to strengthen the **procedural rights** of suspects and accused persons in criminal proceedings: right to interpretation and translation, right to information, right of access to a lawyer, presumption of innocence, legal aid and procedural safeguards for children

Justice

Implementation of PR Directives

Considerable EU acquis – Strong focus on Implementation - key priority of the Commission!

- Correct implementation into national law
- Coherent application in practice
- Development of best practices

Infringement proceedings where necessary.

Procedural rights - areas of activities

- Protection of vulnerable adults
- Pre-trial detention
- EAW
- Admissibility of evidence

AI/Digitalisation

Artificial Intelligence (AI):

- COM White Paper (February 2020)
- Public consultation
- Impact Assessment
- Regulatory Proposal: Q1 2021

Digitalisation:

- 2 Studies: digital criminal justice, use of innovative technologies in the justice field
- COM Communication on Digitalisation of justice (Dec.2021) + Follow up

Importance of judicial training

- European Judicial training Strategy 2021-2024

- Publication of the Annual Report 2020 on European Judicial Training

- Launch of a new European Training Platform

Since 2011, 1,2 million justice professionals were training on EU law

Thank you!

Dr. Ingrid Breit
Team-leader

DG Justice and Consumers
Unit B2
Criminal Procedural Law

Presumption of innocence, children's rights and legal aid in the case law of the ECtHR and CJEU

Dr Angelo Marletta

FNRS Belgique – Université Libre de Bruxelles

Co-funded by the Justice Programme of the European Union 2014-2020

1

Outline

Part I: Presumption of innocence

Part III: Legal Aid

Part III: Children's Rights in criminal proceedings

2

PART I:

Presumption of Innocence

3

Normative references

ECHR

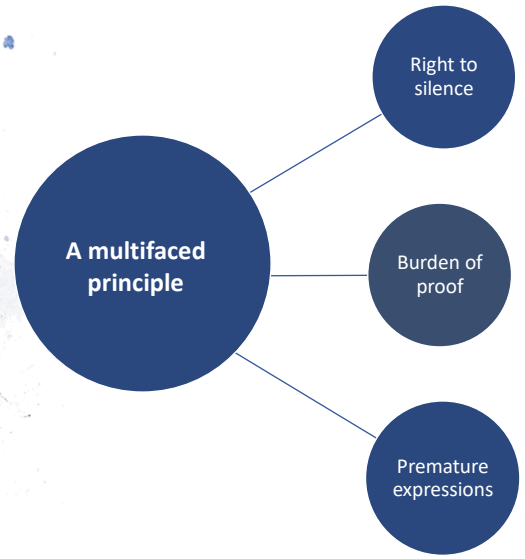
- Art 6 para 2

EU Law

- Art 48 para 1 EU CFR
- Directive 2016/343

4

"Everyone charged with a criminal offence shall be presumed innocent until proven guilty according to the law"
ECHR, Art 6 para 2



5

PoI and the Right to Silence

- The right to silence is **not specifically mentioned** under Art 6 ECHR and under Art 48 EU CFR
- Is part of the notion of a fair procedure and in **close connection** with the PoI
- Landmark case ECtHR, ***Funke v France*** § 44, 1993
- Its **effective exercise** is closely connected with the **right of access to a lawyer** (*Salduz v Turkey*, § 54)

6

PoI and the Right to Silence: adverse inferences

- Respect of the PoI implies that a conviction **cannot be based solely** or mainly on the defendant's silence
- However, the RTS is a **relative right**
- **Adverse inferences** from the silence "in situations that clearly call for an explanation" (*John Murray v UK* § 47, *Ibrahim and Others v UK* § 269)

7

PoI and the burden of proof, *in dubio pro reo*

- The PoI requires **the prosecution to bear the burden of proof** with regard to the charges against the accused (*Barberà, Messegué and Jabardo v Spain*, § 77)
- It follows that, in principle, the PoI is **violated if the burden of proof is shifted** from the prosecution to the defence (*John Murray v UK*, § 54) and also that **any doubt should benefit the accused**
- **However…**

8

PoI and the burden of proof: presumptions of fact or law

- **Presumptions of fact or law** can be allowed "**within reasonable limits**" (*Salabiaku v France*, § 28; *Radio France and others v France*, § 24)
- In particular, **striking a balance** between the importance of the **protected interests** and the **rights of the defence**
- Such presumptions must be **rebuttable**

9

PoI, premature expressions and public references to guilt

- The PoI requires also judicial authorities to refrain from **premature expressions** of guilt before the accused has been formally declared guilty according to the law (*Kangers v Latvia*, § 60)
- **Separation of cases** presenting "strong factual ties" **must be carefully assessed** (*Navalnyy and Ofitserov v Russia*, § 104)
- **Parallel proceedings against co-suspects**: references to **the co-suspects tried separately** must be made **only if indispensable** and **worded** in such a way to avoid potential pre-judgment about their guilt (*Karaman v Germany,* § 64)

10

CJEU case law and the PoI

Case law on PoI and RTS **as general principles**:

- *Orkem v Commission* (C-374/87)
- *Spector Photo* (C-45/08)

Case law on the **2016 Directive** on the PoI:

- *Milev* (C-310/18 PPU)
- *RH* (C-8/19 PPU)
- *AH and Others* (C-377/18)
- *DK* (C-653/19 PPU)

11

The 2016 Directive on PoI and decisions on pre-trial detention

(CJEU, *Milev, RH and DK*)

To date 3 cases on the applicability of the 2016 Directive in regard to

- ***Milev:*** extension of pretrial detention ("reasonable grounds")

  ***RH*:** extension of pretrial detention, evaluation of evidentiary elements

  DK: re-examination of pretrial detention and burden of proof

- In all of the three occasions, the CJEU insisted on the **minimal degree of harmonization** of the Directive and that it **does not govern the requirements and conditions** for the adoption of decisions on pre-trial detention
- Such decisions, however, **should not refer** to the person in custody **as being guilty**

12

Art 4 para 1 of the 2016 Directive on the PoI: public references to guilt

*"Member States shall take the necessary measures to ensure that, for as long as a suspect or an accused person has not been proved guilty according to law, public statements made by public authorities, and **judicial decisions**, other than those on guilt, do not refer to that person as being guilty. This shall be **without prejudice to acts of the prosecution which aim to prove the guil**t of the suspect or accused person, **and to preliminary decisions of a procedural nature**, which are taken by judicial or other competent authorities **and which are based on suspicion or incriminating evidence**."*

13

The 2016 Directive on the PoI, public references to guilt and separation of proceedings

(CJEU, *AH and Others*)

A **separate agreement** concluded with the prosecution by **only one (MH) of five co-defendants** tried for **participation in a criminal organization**

The agreement contained an admission of guilt by MH and **reference to the other co-defendants** as members of the criminal organization

Is this **compatible with art 4 para 1** of the 2016 Directive?

The CJEU **recalled the ECtHR case law** in *Karaman v Germany* ad *Navalnyy and Ofitrov v Russia* and concluded that the reference to co-defendants tried separately is possible **only:**

- **If necessary** for the **categorisation of the legal liability** of the person entering the agreement
- **Using a wording** that **clearly** indicates that the guilt of the other co-defendants has not been legally established

14

PART II:

Legal Aid

15

Normative references

ECHR

Art 6 para 3 c

EU Law

- Art 47 para 3 EU CFR
- Art 48 para 2 EU CFR
- Directive 2016/1919

16

Right to free legal assistance if he has not sufficient means to pay for it and "when the interests of justice so require"

(ECHR Art 6 para 3 c)

Two **cumulative** conditions:

- **Means test:** "some indications" are sufficient (*Tsonyo Tsonev v Bulgaria n.2* § 39)
- **"Interests of justice" test:**
  - **Seriousness** of the offence
  - **Severity** of the penalty
  - **Deprivation of liberty** at stake (*Quaranta v Switzerland* § *33, Benham v UK* § 61*, Zdravko Stanev v Bulgaria* § 38)
  - **Complexity of the case:** f.i. unfamiliarity with the language or the legal system (*Quaranta v Switzerland* § 35, *Twalib v Greece* § 53)

17

Right to legal aid in criminal matters under EU Law

- Art 47 para 3 and 48 para 2 are corresponding to art 6 para 3 ECHR (need for consistent interpretation)
- To date, no CJEU cases on the **Directive 2016/1919**
- **Innovative** right to legal aid also in the **issuing MS** in EAW proceedings (art 5), however:
  - Exclusion of **"executive" EAWs**
  - Need to interpret the "**merits test**" strictly: EAWs involve **normally involve deprivation of liberty**

18

PART III:

Children's Rights

19

Normative references

International Conventions:

- Art 14 para 4 of International Covenant on Civil and Political Rights
- UN Convention on the rights of the Child
- Beijing Rules on Juvenile Justice

ECHR/CoE:

- Art 6 para 1 ECHR (in particular)
- Guidelines of CoE Committee of Ministers of on child friendly justice (soft law)

EU Law:

- Art 24 par 2 EU CFR
- Directive 2016/800

20

ECtHR on juvenile criminal justice

- Need to **fully take into account age, level of maturity and intellectual and emotional capacities**, and to promote his ability to **understand and participate** in the proceedings (*T v UK*, § 84).
- Need to take into account vulnerability and to ensure the **effective participation and understanding** of his/her rights **since the early stage of the proceedings** and **waivers** of rights should be admissible only if expressed **unequivocally and in full awareness** (*Panovits v Cyprus*, § 67-68, *Salduz v Turkey*, § 59-60)
- **Detention** of minors shall be the measure of **last resort**, shall last as **short** as possible and they shall be kept **separate from adults** (*Nart v Turkey*, § 31)

21

Right to an individual assessment

(Art 7, 2016 Directive on minors)

"1. Member States shall ensure that the **specific needs** of children concerning **protection, education, training and social integration** are taken into account

2. For that purpose children who are suspects or accused persons in criminal proceedings **shall** be individually assessed. The individual assessment shall, in particular, take into account the **child's personality** and **maturity**, the child's **economic, social and family background**, and any **specific vulnerabilities** that the child may have.

(…)

4. The individual assessment shall serve to establish and to note, in accordance with the recording procedure in the Member State concerned, such information about the individual characteristics and circumstances of the child as might be of use to the competent authorities when:

(a) determining whether **any specific measure to the benefit of the child** is to be taken;

(b) assessing the appropriateness and effectiveness of any **precautionary measures** in respect of the child;

(c) taking **any decision** or course of action in the criminal proceedings, including when **sentencing**.

(…)

9. Member States **may derogate from** the obligation to carry out an individual assessment where such a derogation is warranted in the circumstances of the case, **provided that it is compatible with the child's best interests**."

Art 7 does not apply in EAW proceedings: see Art 17 of the 2016 Directive on minors

22

Minors and the EAW

(CJEU, *Piotrowski*)

- Art 3 para 3 of the EAW FD provides a **mandatory ground for refusal** in regard to persons who may not, owing to their age, be criminally tried according to the law of the executing MS
- The case related a 17 years old residing in BE and subject to an EAW from PL. According to **Belgian Law**, minors between 16 and 18 years old can be subject to criminal proceedings **only following an individual assessment**
- The CJEU established that the executing authority must **simply verify whether the person concerned has reached the minimum age** required to be regarded as criminally responsible in the executing Member State **without having to consider any additional conditions**, or individual assessment
- **Strict interpretation,** functional to mutual recognition and j**ustified also on the basis of the 2016 Directive on minors:** its art 7 on individual assessment is not recalled among the guarantees provided for EAW proceedings (art 17)

23

Thank for your attention!

Dr Angelo Marletta
angelo.marletta@ulb.be

24

ECtHR case law in order of reference (with hyperlinks)

- *Funke v France*, 1993, App n 10828/84
- *Salduz v Turkey*, 2008, App n 36391/02
- *John Murray v UK* , 1996, App n 18731/91
- *Ibrahim and Others v UK*, 2016, App n 50541/08
- *Barberà, Messegué and Jabardo v Spain*, 1988, App n 10590/83
- *Salabiaku v France*, 1988, App n 10519/83
- *Radio France and Others v France*, 2004, App n 53984/00
- *Kangers v Latvia*, 2019, App n 35726/10
- *Navalnyy and Ofitserov v Russia*, 2016, App n 46632/13
- *Karaman v Germany*, 2014, App n 17103/10
- *Tsonyo Tsonev v Bulgaria n 2*, 2010, App n 2376/03
- *Quaranta v Switzerland*, 1991, App n 12744/87
- *Benham v UK*, 1996, App n 19380/92
- *Zdravko Stanev v Bulgaria*, 2012, App n 32238/04
- *Twalib v Greece*, 1998, App n 24294/94
- *T v UK*, 1999, App n 24724/94
- *Panovits v Cyprus*, 2009, App n 4268/04
- *Nart v Turkey*, 2008, App n 20817/04

25

CJEU case law in order of reference (with hyperlinks)

- *Orkem v Commission*, 1989, C-374/87
- *Spector Photo and Van Raemdonck*, 2009, C-45/08
- *Milev*, 2018, C-310/18 PPU
- *RH*, 2019, C-8/19 PPU
- *AH and Others, 2019*, C-377/18
- *DK (also known as Spetsializirana prokuratura)*, 2019, C-653/19 PPU
- *Dawid Piotrowski*, 2018, C-376/16

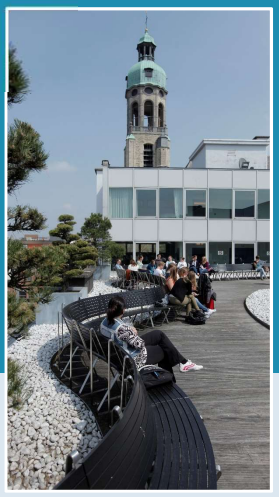
26

KU LEUVEN

ERA

Co-funded by the Justice Programme of the European Union 2014-2020

Applying Procedural Rights under the Case Law of the CJEU



Dr. Katalin Balogh
Prof. Dr. Heidi Salaets

KU LEUVEN

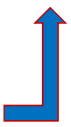
The right to interpretation and information for detainees: theory and practice

Outline

- **Theory**
- The TransLaw project
- Practice – Semi-structured interviews with detainees
- Conclusion

Legal basis > EU right to interpretation and translation in criminal proceedings

- European Convention on Human Rights
- Directive 2013/48/EU: the right of acess to a lawyer…
- Directive (EU)2016/1919: on legal aid for suspects and accused persons in criminal proceedings …
- Directive (EU) 2016/343: on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings
- …
- Directive 2010/64/EU: the right to interpretation and translation in criminal proceedings



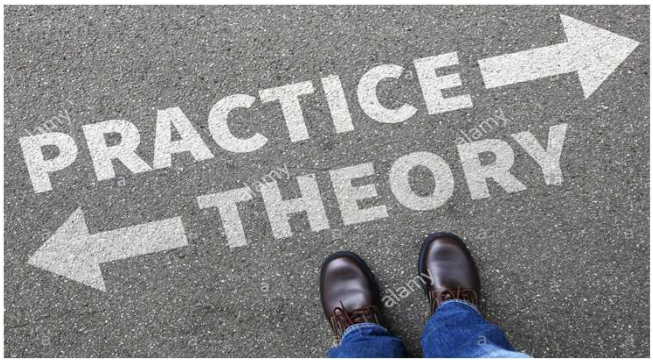
PS: the exact way in which Member States transpose this directive is up to each country ...

Legal basis for the right to interpretation and translation in criminal proceedings - Belgium

Belgian Language Act of 1935: language and interpreting rights of persons suspected or accused of crime

= a concretisation of Article 30 of the Belgian Constitution: "The use of languages spoken in Belgium is free; only the law can rule on this matter, and only for acts of the public authorities and for judicial affairs."

Theory and practice



Outline

- Theory
- **The TransLaw project**
- Practice – Semi-structured interviews with detainees
- Conclusion

The **TransLaw** project - funded by DG Justice nr 760157 (2017-2019)

Project partners:
University of Vienna (coordinator)
University of Trieste (IT)
KU Leuven (BE)
University of Maribor (SI)

JUST-AG-2016/JUST-AG-2016-06

http://translaw.univie.ac.at

TRANSLAW

This project is co-funded by the Justice Programme of the European Union

Workpackages and activities

1. Deskresearch, which explored the complex service paths of persons suspected or accused of crime (PACs) who need an interpreter.
2. *Interviews with **ALL** stakeholders during a service path: LP (Legal professionals), LI (Legal interpreters) and PACs*
3. Joint training and workshops for interpreters and legal professionals
4. Transcultural law clinics for law students and interpreting students who will work together to support PACs who do not have sufficient command of the language of the jurisdiction.

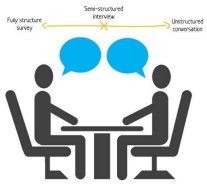
Interviews with ALL stakeholders

Semi-structured interviews with all stakeholders (LP=4, LI=3, PAC=9) about:

- ✓ general description of the quality of the service path of PACs
- ✓**Presence of LI** in service path
- ✓Formal **quality** of interpreting and degree of experience
- ✓Configuration of the language assistance

i.e. **spatial interactions** in the physical setting

- ✓**Effectiveness** and impact of the LI



Semi-structured interviews (methodology)

- All interviews were:
  - ✓ recorded (audio)
  - ✓ transcribed
  - ✓ manually and individually coded by three researchers
  - ✓according to SMEC rules of KU Leuven (Social and Societal Ethics Committee) and ethical clearance (informed consent)

Situation Penitentiary Institutions in Belgium – a small 'excursion'

- The population of the Penitentiary Institutions*:
  - Belgian: 56%
  - Foreigners: 44% (from more than 130 countries)
- Belgium: 9th place out of 56 entries in Europe regarding foreign populations in prisons**.

* source:Belgian Directorate General of Penitentiary Institutions (2017)

** source: World Prison Brief

Outline

- Theory
- The TransLaw project
- **Practice – Semi-structured interviews with detainees**
- Conclusion

Population journalière moyenne par nationalité - Gemiddelde dagelijkse bevolking per nationaliteit				
Pays dont le détenu possède la nationalité	2017	2018	2019	Land waarvan de gedetineerde de nationaliteit bezit
Afghanistan	32,8	35,5	46,0	Afghanistan
Afrique du Sud	1,2	0,9		Zuid-Afrika
Albanie	214	204,6	247,6	Albanië
Algérie	505,4	503,8	465,2	Algerije
Allemagne	16,4	24,2	21,2	Duitsland
Angola	18,6	16,1	20,4	Angola
Antilles néerlandaises	0,5	0,8	1,0	Nederlandse Antillen
Arabie Saoudite			0,3	Saudi-Arabië
Argentine	0,1	0,1	1,4	Argentinië
Arménie	14,8	16,0	11,7	Armenië
Australie		0,1	1,0	Australië
Autriche	1	0,6		Oostenrijk
Azerbaïdjan	3,5	3,9	4,8	Azerbeidzjan
Bangladesh	2,5	2,3	2,0	Bangladesh
Bélarus	2,2	6,4	1,9	Wit-Rusland
Belgique	5843,5	5705,8	5850,0	België
Belize		0,0		Belize
Bénin	0,7	1,1	0,2	Benin
Bhoutan	0,3			Bhutan
Bolivie		0,1		Bolivia
Bophutatswana			0,0	Bophutatswana
Bosnie-Herzégovine	23,2	22,7	25,7	Bosnië-Herzegovina
Brésil	11	9,2	13,9	Brazilië
Brunei			0,4	Brunei
Bulgarie	79,9	64,2	71,2	Bulgarije
Burkina Faso	2	2,3	1,8	Burkina Faso
Burundi	3,4	2,2	4,7	Burundi
Cambodge	1	1,0	1,0	Cambodja
Cameroun	17,6	21,3	21,0	Kameroen
Canada	0,7	0,0	0,0	Canada
Cap-Vert (République)	0,3	0,6	1,0	Kaapverdië
Centrafricaine (République)	0,2	0,6		Centraal-Afrikaanse Republiek
Chili	15,8	9,6	9,3	Chili
Chine	5,4	3,9	7,9	China
Chypre		0,4	0,5	Cyprus
Colombie	16,7	15,4	14,2	Colombia
Congo (République démocratique)	99,4	83,8	85,3	Congo (Democratische Republiek)
Congo (République populaire)		2,0	2,3	Congo (Volksrepubliek)
Côte-d'Ivoire	4,8	7,1	11,5	Ivoorkust
Croatie	16,9	22,5	32,9	Kroatië
Cuba	3,2	6,8	9,9	Cuba
Danemark	0	0,1	0,6	Denemarken
Djibouti (République)			0,1	Djibouti (Republiek)
Dominique	1,4	0,6	0,2	Dominica
Égypte	24,3	27,6	24,4	Egypte
Équateur	5,1	5,8	5,0	Ecuador
Érythrée	0,6	7,6	18,1	Eritrea
Espagne	45,4	43,6	41,7	Spanje
Estonie	2,7	2,6	2,6	Estland
États-Unis d'Amérique	3	2,2	1,1	Verenigde Staten van Amerika
Éthiopie	1,6	1,4	5,3	Ethiopië
Finlande	2,8	2,1	1,1	Finland
France	214,4	207,7	210,4	Frankrijk
Gabon			0,3	Gabon
Gambie	6,1	4,3	6,4	Gambia
Géorgie	36,9	56,9	70,0	Georgië
Ghana	6	6,4	9,1	Ghana
Gibraltar	0			Gibraltar
Grèce	11	10,1	8,8	Griekenland
Guatemala		0,3	0,6	Guatemala
Guinée	42,6	44,3	46,8	Guinee
Guinée équatoriale		0,3	0,4	Equatoriaal-Guinea
Guinée-Bissau	0,7	1,3	0,5	Guinee-Bissau
Guyana		1,6	1,6	Guyana
Guyane française	3	0,6	0,2	Frans-Guyana
Haïti	0,9	1,2	1,0	Haïti
Honduras	0	0,0		Honduras
Hong Kong			0,0	Hongkong
Hongrie	13,6	8,2	8,7	Hongarije
Inde	26,5	18,6	15,2	India
Indonésie	0,3	0,2		Indonesië
Irak	66,7	77,5	83,1	Irak
Iran	21,7	19,5	22,7	Iran
Irlande	5,4	2,0	3,6	Ierland
Israël	4,1	1,7	4,9	Israël
Italie	144,7	153,9	145,5	Italië
Jamaïque	1,5	0,3	4,6	Jamaica
Jordanie	0,7	0,3	0,2	Jordanië
Kazakhstan	3,1	2,6	3,5	Kazachstan
Kenya	1,1	1,1	2,0	Kenia
Kirghizstan	2,4	0,9	0,5	Kirgizstan
Kosovo	23,2	23,9	22,2	Kosovo
Koweït			0,2	Koeweit
Lettonie	7	7,0	7,2	Letland
Liban	13,3	11,5	12,1	Libanon
Libéria	3	3,4	4,1	Liberië
Libye	20,1	30,4	46,6	Libië
Lituanie	45,6	23,8	18,9	Litouwen
Luxembourg	4,3	5,1	3,6	Luxemburg
Macédoine	23,2	27,9	25,7	Macedonië
Madagascar	1,1	2,2	3,0	Madagaskar
Malaisie	0,1			Maleisië
Mali	3	3,0	4,4	Mali
Malte	1	1,0	0,1	Malta
Maroc	1005,3	938,7	913,1	Marokko
Martinique	0,2			Martinique
Maurice	1,6	1,4	1,1	Mauritius
Mauritanie	8,8	7,3	9,2	Mauritanië
Mexique	3,4	4,1	7,0	Mexico
Moldavie	8,9	10,9	7,8	Moldavië
Mongolie	2,8	1,2	0,3	Mongolië
Monténégro	4,6	7,5	9,1	Montenegro
Namibie			0,3	Namibië
Népal	1,5	0,4	0,2	Nepal
Nigéria	33	38,5	43,7	Nigerie
Norvège	0	0,3	2,3	Noorwegen
Océan Indien Britannique	0	0,0		Brits-Indische Oceaan
Oman	1	1,0	1,0	Oman
Ouganda	1	0,9	0,7	Oeganda
Ouzbékistan	3,9	3,8	2,8	Oezbekistan
Pakistan	16,9	10,3	14,2	Pakistan
Palestine	45	37,1	35,1	Palestina
Panama		0,7	1,5	Panama
Pays-Bas	281,2	293,2	327,4	Nederland
Pérou	2,7	0,5	2,5	Peru
Philippines	1,5	1,0	1,3	Filipijnen
Pitcairn		0,0	0,0	Pitcairn
Pologne	91	100,3	106,0	Polen
Porto Rico	0,4			Puerto Rico
Portugal	31,9	27,6	33,1	Portugal
République Dominicaine	5,6	8,3	7,4	Dominicaanse republiek
Roumanie	339,6	369,1	382,6	Roemenië
Royaume-Uni	21,4	18,7	15,9	Verenigd Koninkrijk
Russie	49,9	48,0	49,0	Rusland
Rwanda	15,7	8,6	6,4	Rwanda
Sahara occidental	0		0,5	Westelijke Sahara
Sénégal	8,5	8,4	9,3	Senegal
Serbie	60,3	67,1	61,3	Servië
Sierra Leone	7,5	10,3	10,0	Sierra Leone
Slovaquie	30,4	28,5	32,3	Slovakije
Slovénie	1,1	1,0	0,7	Slovenië
Somalie	15,7	12,6	18,8	Somalië
Soudan	5,5	6,3	11,4	Soedan
Sri Lanka	0,8	0,1	1,5	Sri Lanka
Suède	1,8	2,1	1,7	Zweden
Suisse	0,7			Zwitserland
Suriname	20,5	18,7	18,5	Suriname
Syrie	54,7	80,5	56,2	Syrië
Tadjikistan	1		0,3	Tadzjikistan
Taïwan	0,2	0,3		Taiwan
Tanzanie	5,4	2,8	3,4	Tanzania
Tchad	0,1	0,1	0,4	Tsjaad
Tchèque	13,2	12,1	12,1	Tsjechië
Thaïlande	2,2	2,9	2,1	Thailand
Togo	2,9	2,0	1,9	Togo
Trinidad et Tobago		0,1		Trinidad en Tobago
Tunisie	118,4	113,2	124,4	Tunesië
Turquie	114,1	108,3	104,8	Turkije
Ukraine	22,6	17,4	15,7	Oekraïne
Uruguay		0,5		Uruguay
Venezuela	1,6	5,4	3,9	Venezuela
Vietnam	4,9	4,6	2,1	Vietnam
Zimbabwe	1	0,7		Zimbabwe
OTAN	0,2			NAVO
Réfugié	28,5	28,8	33,3	Vluchteling
Réfugié ONU	3,3	4,3	2,7	VN-vluchteling
Indéterminé	152,1	137,3	157,2	Onbepaald
Total	**10471,4**	**10240,6**	**10559,3**	**Totaal**

Semi-structured interviews with PACs

PAC#	Mother tongue or preferred language	Languages spoken during the procedure/used by the interpreter	Prison location
1	Arabic	French/Spanish >< Dutch	Beveren-Waas
2	Berber	Dutch only	
3	Arabic Standard & French	Moroccan Arabic/Palestinian-Syrian varieties of Arabic >< Dutch	
4	Berber	Arabic Standard >< Dutch	
5	Moroccan Arabic	Egyptian Arabic >< Dutch	
6	Russian	Russian >< Dutch	
7	Bulgarian	Bulgarian >< Dutch	
8	Arabic & French	French >< Dutch	Mechelen
9	Italian	Albanian >< Dutch	

First contact and communication issues

- 8/9 PACs: **no interpreter** => no communication during the specific situation of their arrest (in another country like Bulgaria, Luxemburg, in the car) or during first contacts.
- Later in the service path: **wrong interpreter** (see table)

"The police back in 2006 said that living in Belgium means I had to learn Dutch. I could speak Moroccan Arabic but no Berber. They gave me an Egyptian interpreter, when I told the judge, he said he was the only one available." (#5)

Communication issues in the next phase (1)

- Was there somebody present who spoke another language?
  - 6/9: Wrong interpreter
  - #6: Good Russian – poor Dutch ☹
  - #7: bad interpreter ☹
  - #8: used his second language (French) ☺

Communication issues in the next phase (2)

PAC#	Mother tongue or preferred language	Languages spoken during the procedure/used by the interpreter	Prison location
1	Arabic	French/Spanish >< Dutch	Beveren-Waas
2	Berber	Dutch only	
3	Arabic Standard & French	Moroccan Arabic/Palestinian-Syrian varieties of Arabic >< Dutch	
4	Berber	Arabic Standard >< Dutch	
5	Moroccan Arabic	Egyptian Arabic >< Dutch	
6	Russian	Russian >< ~~Dutch~~	
7	Bulgarian	~~Bulgarian >< Dutch~~	
8	Arabic & **French** ☺	**French** >< Dutch	Mechelen
9	Italian	Albanian >< Dutch	

Communication issues in the next phase (3)

- Was the interpreter introduced?
  - #2: didn't remember
  - #1&3: "a woman" who introduced herself
  - #4: yes
  - #6: deduction from the fact, she spoke Russian
  - #8: introduction only to to the police
- The choice out of necessity for French or Dutch?
  - Only #8: French *"key to making the process work"*

"I didn't understand anything in my file. There was no impact at all of anything. Only that they made it more difficult. They ruined my life." (starts crying). #2

Complexity of the Service Path – one or multiple interpreters

- Different interpreters: between 2-6

The reason of preference of different interpreters :

"to avoid bad quality" (#7)

"I don't care [about having different interpreters]: the only thing I hope is that every individual gets a professional interpreter who does his job in giving the person the possibility to speak his own language. There is a big difference in quality, their way of working and dealing with things. Sometimes they act like a police officer". (#5)

Position: Seating arrangements

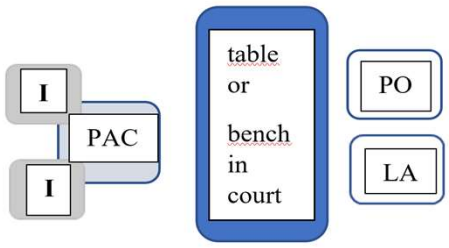


Figure 1: I = interpreter/ PO = Police officer/ LA = Legal Actor

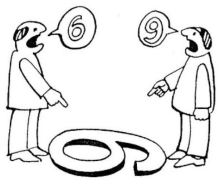
Position: Neutrality (1)

- #3,5,8: Interpreter works with the police
- #1: sympathy from the interpreter (*"standing next to me"*)
- #2: person who comforted the detainee: (*"punishment was too severe"*)
- #7: Trust in the interpreter: "[the interpreter told]*'I don't have to worry'. She told me Belgians were just like that. That everything would be ok, that there was no evidence."*
- #4&5: clear views on what the interpreter is supposed to do:

"We are 2019, not 2012: human rights become clearer, it is not like before anymore. They introduced a new system in Belgium, and I think it is very good. If you go to the police, then an interpreter and lawyer is present. Everything that has been said, is also recorded". #4

Position: Neutrality (2)

"Once they hired an Egyptian interpreter who thought I did not speak a word of Dutch. He made an addition towards the police, saying: "What he says, is not correct' Then I have protested and told him: this is a conversation between myself and the police. If I don't tell the truth, it is up to the policeman to discover, it is not your task!" (#5)



Performance of the legal interpreter (1)

- #2,5,6,7,8,9: quality is **insufficient** - **non-existent**
- #2,3: it is not the interpreter's responsability if **the judge speaks too fast** or in a complicated way:
- "*I don't see any difference with or without an interpreter in the communication with the authorities. Even if he translates, in what way can I check it? If he leaves things out? Everything goes very fast, so…?*" (#3)
- "*During the criminal proceeding, I almost wanted to stop the court hearing because I didn't understand anything!*" (#2)

Performance of the legal interpreter (2)

- The perception of the intepreter is rather negative. The following elements were highlighted:
  - **Weak linguistic** competence (one of the languages)
  - **Lack of accuracy** *"She summarizes what I was saying in Russian. It was much shorter. So, information was lost. I didn't dare to say something back then, now I would"* (#6)
  - **Choice of language based on nationality**:

"I didn't understand. The interpreter didn't listen to my questions and needs. I needed an interpreter in Italian, not Albanian. So, I didn't have the right interpreter(s). Their intervention was completely useless […] I had 6 interpreters for Albanian, none in Italian […] I asked the police officer, lawyer, magistrates for an Italian interpreter. Didn't receive it. Only incomprehension. (#9).

Performance of the legal interpreter (3)

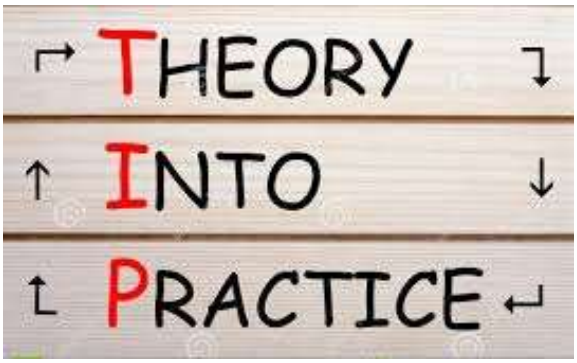
- Interpreters of the **wrong language and/or regional variant** (Standard Arabic><Berber, Dutch><French, Albanian><Italian or third languages like Spanish or French)
- **Lack of respect for gender and/or cultural and/or religious aspects**: *"For me [male] it was a young woman, and it didn't feel good because of her age, sex and as experienced by my religion. I had to tell her things and had to hear some things from her that felt as a humiliation to me. Since I was feeling uncomfortable, it didn't feel like an assistance. They don't take that into account."* (#6).
- ☺ Only two detainees are positive: *"key to making the process work"* (#8) *"to know somebody was standing next to me"* (#1).
- ☹ Others: '*not ok*' #5; *indifferent* #3,6,9; *"no comprehension of the case" #2; "You may have rights, but you don't get them. Also, in prison you have rights, but they are not respected". #4*

Interest in Transcultural Law Clinic

- All are positive
- *"I am very positive. If it had existed before, a lot of people wouldn't have the problems I have. This would lead to a better linguistic situation. I would certainly make use of it. The interpreter can do whatever he wants, there is no control!" #2*

Outline

- Theory
- The TransLaw project
- Practice – Semi-structured interviews with detainees
- **Conclusion**



Conclusion and recommendations

We cannot generalize but apparently there exists

- a more structural, deep-rooted denial of (the right to) the interpreter because every other right seems to come first: the right to a lawyer, the right to information etc. ***these rights are non-existent if you cannot understand them due to linguistic barriers***.

"linguistic isolation of foreign prisoners further accentuates their vulnerability and leads to inequality. It also risks jeopardizing their chances of release and social integration." (Gallez 2018:752).

Recommendations

- **Be aware of possible linguistic barriers** (LBs) from the **arrest** up to the **court** and eventually in **prison**
- If there is a LB: try to work as much as possible with **professional interpreters** in all stages of the criminal procedure meaning

→set-up a reliable National Register!

- It you (need to) work with ad-hoc interpreters (personnel, passers-by, or even: inmates) **be aware of all the risks:** no linguistic knowledge, no interpreting skills, no ethical code (neutrality, impartiality, professional secrecy etc.)

Recommendations (2)

- Don't automatically think: nationality = (1) language
- **THINK about all possible consequences in the legal procedure if the right to a fair trail has been denied!**
- Organize interprofessional trainings
  - Also in an early stage, already at university!

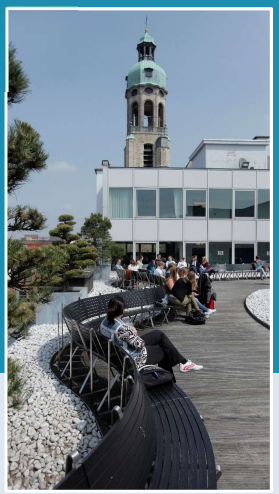
Transcultural Law Clinics

KU LEUVEN

ERA

Co-funded by the Justice Programme of the European Union 2014-2020

https://www.arts.kuleuven.be/english/rg_interpreting_studies/research-projects/translaw



Dr. Katalin Balogh

Katalin.balogh@kuleuven.be

Prof. Dr. Heidi Salaets

Heidi.salaets@kuleuven.be

New horizons for defence rights after 2020: which "steps" of the Roadmap still need to be taken?

2 February 2021

Gwen Jansen
gwen@jansenadvocatuur.nl

Co funded by the Justice Programme 2014-2020 of the European Union

Agenda 2020 ECBA – a New Roadmap on Procedural Rights

- Amsterdam Treaty /Tampere Council 1999 → principle of mutual recognition → Lisbon Treaty Art. 67, 82 TFEU.
- Mutual recognition requires mutual trust.
- 2009 Roadmap on procedural safeguards.
- Mission to achieve mutual trust has not been completed; partial distrust still exists (e.g. Measure F 2009 Roadmap – Detention Green Paper – no follow up)
- Need to monitor implementation of Procedural Rights' Directives and Directive (EU) 2016/343.
- Action should continue to be taken at the EU level in order to strengthen the rights of suspected or accused persons in criminal proceedings and thus the principle of mutual recognition and its underlying mutual trust.
- ECBA Proposal - "Agenda 2020: A new Roadmap on minimum standards of certain procedural safeguards"

Matt, Holger, 2017 - https://eucrim.eu/articles/guest-editorial-eucrim-12017/

Agenda 2020 ECBA – a New Roadmap on Procedural Rights (2)

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

ECBA Agenda 2020 available at: http://www.ecba.org/content/index.php/124-featured/751-ecba-roadmap-2020; https://journals.sagepub.com/doi/pdf/10.1177/2032284418788760

Measure A of the ECBA Roadmap Agenda 2020 - (Pre-Trial) Detention and European Arrest Warrant

- European Arrest Warrant (see ECBA Handbook defending an EAW: http://handbook.ecba-eaw.org):
  - Improve / modernize / "lisbonise" the existing mutual recognition instrument FD 2002/584/JHA (FD EAW)
  - Proportionality
  - Fundamental rights' refusals (detention conditions, etc.)
  - Pre-trial detention
  - Consultation procedures
  - Consequence of refusal
  - Improving dual defence / legal aid
- Detention Conditions:
  - Certain minimum rights of prisoners
  - Differences of standards in prison conditions infringe partly the principle of human dignity and have become obstacles to EAW proceedings (cf. EC Handbook on issuing and executing EAW, 28/09/2017;

Measure A of the ECBA Roadmap Agenda 2020 - (Pre-Trial) Detention and European Arrest Warrant (2)

- Pre-Trial Detention - need for minimum standards
  - Legal and factual requirements for both a national arrest warrant and an EAW; Art. 33 of the EPPO Regulation 2017/1939 refers to national law (only) → fundamental problems, for instance in cases which clearly lack proportionality (no provision on proportionality, contrary to the EIO, cf Art 6 Directive 2014/14/EU);
  - Time-limits for pre-trial detention (including taking into account detention in other MS)
  - Specific remedies and/or regular judicial control by the responsible authorities
  - Use of less intrusive measures: European Supervision Order is actually not used in practice and FD 2009/829/JHA is still not (or not properly) implemented in many Member States (cf FRA report 2016 p. 30 ff).

    An arrest warrant should always be a measure of last resort in Europe → need for clear rules on proportionality.
  - Practical issues arise repeatedly regarding access to the file and intentional non-disclosure of (exculpatory) information by the state authorities throughout Europe including where pre-trial detention is imposed. Regulation 2017/1939 on EPPO refers in Art 45 par 2 to national law (only) and to Directive 2012/13/EU in Article 41(2)(c) – see Art. 7(1) Directive 2012/13

EAW Reform Proposals?

- **EC**
  - **No proposals for reform currently** (but.... The new Commissioner said the following to the Parliament back in November "Concerning the European Arrest Warrant, I will continue to monitor its application and work closely with you and with the Member States to continue to improve it ... We will consider whether infringement proceedings are necessary in light of the compliance assessment. I will also seriously consider whether to bring forward a proposal to revise the European Arrest Warrant.")

EAW Reform Proposals?

- **EP**
  - European Parliament resolution of 27 February 2014 with recommendations to the Commission on the review of the European Arrest Warrant (2013/2109(INL))
  - European Arrest Warrant – European Implementation Assessment a Study of the EPRS, author Wouter van Ballegooij, June 2020
  - European Arrest Warrant and surrender procedures between Member States - European Parliament resolution of 20 January 2021 on the implementation of the European Arrest Warrant and the surrender procedures between Member States (2019/2207(INI))
  -
- **ECBA / CCBE / Fair Trials and many others are pushing for reform since many years:**
  - **E.g. Fair Trials:**
    - A Measure of Last Resort? The practice of pre-trial detention decision-making in the EU
    - Briefing Paper on the Communication on digitalization of Justice in the European Union, January 2021
  - **E.g. CCBE**
    - EAW-Rights - Analysis of the implementation of the European Arrest Warrant from the point of view of defence practitioners
  - **E.g. ECBA:**
    - ECBA response on a Green Paper on detention
    - European Criminal Bar Association Statement of Principles on the use of Video-Conferencing in Criminal Cases in a Post-Covid-19 World.

[...]

Proposals in academic studies / others

ECBA (2011)- reply to Green Paper on Detention:

- Legislation to set minimum standards for the use and review of PTD detention in the EU;
- More effective information-gathering to monitor how PTD is used throughout the EU, to include the immediate addition of questions in this area to the annual review of EAW cases;
- Ensuring facilities are available to enable a suspect to defend themselves at trial, with the absence of such facilities to be a reason not to allow surrender under an EAW;
- A presumption of release pending trial;
- A maximum period of pre-trial detention should be introduced;
- Legal aid to be provided in the issuing and executing states to enable legal advisers to make submissions for alternatives to immediate surrender, appropriate use of the European Supervision Order (ESO), alternatives to detention on conviction and transfer of prisoners between member states post conviction

http://www.ecba.org/content/index.php/publications/statements-and-press-releases/587-ecba-response-on-a-green-paper-on-detention

European Parliament resolution of 27 February 2014 with recommendations to the Commission on the review of the European Arrest Warrant (2013/2109(INL))

- Procedure for validation on a needsbasis of MR measure in the issuing MS by a judge, court, investigating magistrate or public prosecutor, in order to overcome the differing interpretations of the term "judicial authority".
- Proportionality check when issuing MR decisions, based on all the relevant factors and circumstances (e.g. as the seriousness of the offence, trial-readiness, impact on the rights of the requested person, including the protection of private and family life, cost implications, availability of an appropriate less intrusive alternative measure)
- Standardised consultation procedure for exchange of information regarding the execution of judicial decisions (e.g. assessment of proportionality, trial-readiness)
- Mandatory refusal ground where there are substantial grounds to believe that the execution of the measure would be incompatible with the executing MS obligation in accordance with Article 6 of the TEU and the Charter, notably Article 52(1) thereof with its reference to the principle of proportionality
- Effective legal remedies - Article 47(1) of the Charter and Article 13 of the ECHR (e.g. right to appeal in the executing MS against the requested execution of a mutual recognition instrument; right for the requested person to challenge before a tribunal any failure by the issuing MS to comply with assurances given to the executing MS)
- Improve definition of the crimes where the EAW should apply in order to facilitate the application of the proportionality test
- EAW Judicial Network and a network of defence lawyers working on EU criminal justice and extradition matters
- Legal mechanisms to compensate damage arising from miscarriage of justice relating to the operation of mutual recognition instruments
- Improve standards of detention conditions, including conditions of pre-trial detention.

European Parliament resolution of 20 January 2021 on the implementation of the European Arrest Warrant and the surrender procedures between Member States (2019/2207(INI))

1. "Points out that the EAW is a major achievement and an effective, useful and indispensable instrument; recognises that the EAW has substantially improved cooperation on surrenders"

2. "Notes the existence of particular problems; finds that these do not call the system into question"

3. "Notes that such problems relate to detention and prison conditions, proportionality, implementation in EAW proceedings of the procedural safeguards enshrined in EU law, in particular dual legal representation, training, specific rule of law issues, the execution of custodial sentences, time limits and in absentia decisions; acknowledges that certain cases raised the issue of double criminality; perceives, in other cases, an inconsistency in the application of grounds for refusing to execute EAWs; highlights further the absence of a comprehensive data system enabling the establishment of reliable qualitative and quantitative statistics on the issue, execution or refusal of EAWs "

4. "Notes that attempts are being made to solve some issues by a combination of soft law (EAW handbook), mutual assessments, the assistance of Eurojust, CJEU case law and supplementing legislation (Framework Decision 2009/299/JHA and Directive 2013/48/EU)"

7. "Underlines that the EAW should not be misused for minor offences; recalls that use of the EAW should be limited to serious offences where it is strictly necessary and proportionate; urges the use of less intrusive legal instruments, such as the EIO; points out that issuing authorities should carry out proportionality checks"

8. "Highlights that according to the CJEU, the refusal to execute an EAW is an exception to mutual recognition and must be interpreted strictly"

European Parliament resolution of 20 January 2021 on the implementation of the European Arrest Warrant and the surrender procedures between Member States (2019/2207(INI)) (2)

- **Recommendation to improve the functioning of the EAW (10-30)**
- **Recommendations on Fundamental rights (31-43)**
- **For a Coherent EAW legal framework** (44-48)
- **(Brexit)**

European Parliament resolution of 20 January 2021 on the implementation of the European Arrest Warrant and the surrender procedures between Member States (2019/2207(INI)) (3)

Recommendations (selected):

- Recalls the importance of implementing the procedural rights directives with a view to guaranteeing the right to a fair trial;
- Stresses that instruments such as Framework Decision 2008/909/JHA on the transfer of prisoners, Framework Decision 2008/947/JHA on probation and alternative sanctions, the EIO, the European Supervision Order, the European Convention on the Transfer of Proceedings in Criminal Matters, both complement the EAW and provide useful and less intrusive alternatives to it; stresses that the EAW should only be used if all other alternative options have been exhausted and that states should not have recourse to the EAW in situations where a less intrusive measure would lead to the same results, for example hearings by videoconference or related tools;
- Calls on the Member States to ensure that judicial authorities are able to order available alternatives to detention and coercive measures in EAW proceedings, particularly where a person consents to their surrender, unless a refusal is necessary and justified;
- Calls on the Commission and the Member States to provide appropriate funding for legal aid to persons concerned by EAW proceedings, including for legal assistance in both the issuing and executing Member States before surrender is ordered, funding for suitably qualified interpreters and translators, specific training on the EAW for practitioners

European Parliament resolution of 20 January 2021 on the implementation of the European Arrest Warrant and the surrender procedures between Member States (2019/2207(INI)) (4)

Recommendations (selected):

- Calls on the Commission to study the feasibility of supplementing instruments on procedural rights, such as those on admissibility of evidence and prison conditions in pre-trial detention; believes that the absence of minimum standards on prison conditions and pre-trial detention at EU level, of the limitation of the use of pre-trial detention to being a measure of last resort and of the consideration of alternatives, coupled with the lack of a proper assessment of whether the cases are trial-ready, can lead to unjustified and excessive periods being spent by suspects and accused persons in pre-trial detention; calls on the Commission to achieve EU minimum standards, particularly on criminal procedural safeguards and on prison and detention conditions, as well as to strengthen the information tools for national executing authorities on the conditions of pre-trial detention and imprisonment in each Member State;
- Underlines that there is no mechanism in place to ensure a proper follow-up to the assurances provided by the issuing judicial authorities after surrender;

Measure D of the ECBA Roadmap Agenda 2020 - Procedural rights in the context of evidence-gathering

- This area has not been regulated, without prejudice to some sparse provisions in the various instruments.
- For example:
  - the right of the lawyer to be present at questionings and some evidence gathering acts (Directive 2013/48);
  - the right to request an EIO (Directive 2014/41);
  - European Public Prosecutor's Office - art. 41, no. 3;
  - Exclusion of evidence / valuation - art. 14, no. 7, Directive 2014/41 and 37 European Public Prosecutor's Office Regulation;
  - Legal remedies / judicial review (art. 42 and 14 of Directive 2014/41)
- However, these are very limited and refer in most cases to national law.

Measure D of the ECBA Roadmap Agenda 2020 - (Pre-Trial) Admissibility of Evidence

Problems:

a) highly divergent interpretation of the various rights at domestic level, which creates relevant differences, for example in the role of legal assistance and access to the file at the pre-trial stage, which creates a very disparate situation between MS, calling into question the uniform guarantee of established rights.

b) particularly serious situation in the area of cross-border evidence gathering, whether horizontal or in European Public Prosecutor's Office proceedings, as the accused will not have a sufficiently consistent and high minimum level of procedural rights at the investigation (or trial) stage. Even domestic protection and compensation mechanisms lose their effectiveness because of the cross-border combination of legal systems.

c) legal fragmentation which makes it very difficult to determine the applicable law and makes the rules of several countries incompatible in the field of measures of gathering evidence, something particularly relevant in the field of special investigative measures, or intrusive measures.

d) lack of appropriate remedies, either procedural or substantive.

Measure D of the ECBA Roadmap Agenda 2020 - (Pre-Trial) Admissibility of Evidence

What proposals are under discussion?

a) monitoring, and assessing the need for additional legislative measures, defining the role of the lawyer, the rules of access to the file in relation to the different procedures for gathering evidence and exercising means of protection

b) the establishment of specific cross-border rights, including assistance by a lawyer and special provisions guaranteeing the defendant's right to participate actively in the taking of evidence and the possibility of taking evidence.

c) harmonisation of procedural "guarantees" regarding the gathering of evidence, in particular intrusive measures.

d) the establishment of European law remedies, access to the CJEU, and sanctions for violations in relation to the taking of evidence.

ECBA (2020) - European Criminal Bar Association Statement of Principles on the use of Video-Conferencing in Criminal Cases in a Post-Covid-19 World.

CONTENTS

Proposals in academic studies / others (2)

ECBA (2020) - European Criminal Bar Association Statement of Principles on the use of Video-Conferencing in Criminal Cases in a Post-Covid-19 World.

- Proportionality – the use of video-link and other alternatives to EAW §§ 12-43.
- ECBA urges the European Union institutions and Member States' institutions and judicial authorities, as well as the Council of Europe and its Member States, to take practical and, if needed, legislative steps to enhance the use of video-conferencing in cross-border cases, namely:
  - Consolidating the existing data from previous studies and organizing a comprehensive assessment of the reasons for the under-use of remote video-technology;
  - Establishing explicitly the right of the accused to participate by video-link, at least in the cases in which this is the most proportionate solution, as referred to above;
  - Developing appropriate and compatible legal standards for remote participation where that is permitted and appropriate (*see Chapter B.4*);
  - Promoting the development of appropriate and compatible technical infrastructures and solutions (which allow for true-to-life remote participation, and exercising of the procedural rights in this context - *see Chapter D*).
  - Considering the issues relating to the transparency and privacy in the use of remote technology in criminal trials (*see Chapter* E)

http://ecba.org/content/index.php/124-featured/783-ecba-statement-on-video-conferencing-in-criminal-cases

Thank you !
Dank je wel!

Check out www.ecba.org

and http://handbook.ecba-eaw.org/ update coming soon)