

STUDY

Requested by the LIBE committee



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



Policy Department for Citizens' Rights and Constitutional Affairs
Directorate General for Internal Policies of the Union
PE 604.977 - August 2018

EN

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

CIVIL LIBERTIES, JUSTICE AND HOME AFFAIRS

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

STUDY

Abstract

This study, commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the LIBE Committee, examines to what extent differences between national procedural criminal laws hinder the negotiations and the operation of cross-border cooperation instruments. It is based on a comparative analysis of a representative sample of nine Member States. It identifies several forms of "hindrances" to cross-border cooperation, ranging from mere delays to the suspension and the non-execution of assistance requests, alongside the striking underuse of some of the existing instruments. There is no simple or single answer to these challenges. Therefore, several non-legislative and legislative recommendations are put forward for the short- and long-term horizon.

ABOUT THE PUBLICATION

This research paper was requested by the European Parliament's Committee on Civil Liberties, Justice and Home Affairs and commissioned, overseen and published by the Policy Department for Citizens' Rights and Constitutional Affairs.

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

To contact the Policy Department for Citizens' Rights and Constitutional Affairs or to subscribe to its newsletter please write to: poldep-citizens@europarl.europa.eu

Research Administrator Responsible

Roberta Panizza

Policy Department for Citizens' Rights and Constitutional Affairs

European Parliament

B-1047 Brussels

E-mail: poldep-citizens@europarl.europa.eu

AUTHORS

Elodie SELLIER, Université Libre de Bruxelles

Anne WEYEMBERGH, Université Libre de Bruxelles

The authors would like to express their sincere gratitude to national experts that provided invaluable insights on the selection of Member States by preparing reports on jurisprudence and criminal justice systems (Samuli Miettinen and Petri Freundlich for Finland, Perrine Simon for France, Thomas Wahl and Alexander Oppers for Germany, Petra Bard for Hungary, Gerard Conway for Ireland, Silvia Allegranza for Italy, Tony Marguery, Joske Graat, Aart de Vries for the Netherlands, Daniel Nitu for Romania, Marta Muñoz de Morales Romero for Spain). The authors would also like to thank the experts and practitioners whose interviews considerably enriched this research paper (see list annexed to the research paper), as well as Ines Armada (sections 1, 2 and 3 on evidence), Irene Wieczorek (sections 4, 5 and 6 on detention), Pedro Caeiro and Valsamis Mitsilegas, for their valuable comments and observations on the draft version of this report.

LINGUISTIC VERSION

Original: EN

Manuscript completed in August 2018

© European Union, 2018

This document is available on the internet at:

<http://www.europarl.europa.eu/supporting-analyses>

DISCLAIMER

The opinions expressed in this document are the sole responsibility of the author and do not necessarily represent the official position of the European Parliament.

Reproduction and translation for non-commercial purposes are authorised, provided the source is acknowledged and the publisher is given prior notice and sent a copy.

CONTENTS

LIST OF ABBREVIATIONS	7
EXECUTIVE SUMMARY	9
INTRODUCTION	12
A. Background and objectives of the study	12
B. Literature review	15
C. Methodology	17
(i) Selection of Member States	17
(ii) Data collection	18
D. Structure	19
1. INVESTIGATIVE MEASURES	21
1.1. Nature of differences	21
1.1.1. Blurred picture between administrative and criminal law actors and the variable importance of intelligence services	22
1.1.2. Differences among criminal law authorities involved in investigations	23
1.1.3. Special investigative measures and conditions for their use	24
1.2. Impact of these differences on negotiations and the operation of cross-border cooperation	25
1.2.1. Accommodating and circumventing differences: dual flexibility in EU instruments	25
1.2.2. Obstacles in practice: the difficult interoperability of investigation systems	33
1.2.3. The position of individuals and the protection of human rights	37
1.3. Recommendations	41
2. ADMISSIBILITY OF EVIDENCE	46
2.1. Nature of differences	46
2.1.1. Admissibility of evidence in domestic systems	48
2.1.2. Admissibility of evidence gathered in another Member State	52
2.2. Impact on cross-border cooperation	53
2.2.1. Difficulties encountered under the locus regit actum rule and insertion of the forum regit actum rule	54
2.2.2. Compliance and compatibility issues under the forum regit actum rule: the cases of the 2000 MLA Convention and of the EIO	55
2.2.3. Compliance and compatibility issues under the locus regit actum rule: the JITs and EPPO cases	56
2.2.4. A pragmatic approach: the rule of non-inquiry, and impact on mutual trust	57
2.2.5. Fundamental rights concerns arising from current approaches	59
2.3. Recommendations	62

3. TRANSNATIONAL PROCEDURES AND EQUALITY OF ARMS: A LOOK AT CROSS-BORDER INVESTIGATIONS	66
3.1. Key aspects of the principle of equality of arms	66
3.2. Different national understandings of the principle of equality of arms	67
3.3. Accommodating and circumventing differences through an overreliance on national law	70
3.4. Weak position of the defence in EU cross-border cooperation framework	75
3.5. Recommendations	81
4. PRE-TRIAL DETENTION REGIMES AND ALTERNATIVES TO DETENTION	87
4.1. Nature of differences relating to PTD	87
4.1.1. Length, time-limits and decision-making	87
4.1.2. Alternatives to detention	92
4.2. Impact on mutual trust and mutual recognition	93
4.2.1. Different understandings between pre-trial regimes and overuse of pre-trial detention: obstacles to mutual recognition and mutual trust	94
4.2.2. Underuse of FD ESO	99
4.2.3. Lack of communication among the Member States: adverse effect on FD ESO and FD EAW	101
4.3. Recommendations	102
5. PROCEDURES TO ASSESS DETENTION CONDITIONS AND SURRENDER FOLLOWING ARANYOSI AND CALDARARU	106
5.1. Different interpretations of the Aranyosi and Caldaru judgment	107
5.1.1. Key aspects of the Aranyosi and Caldaru judgment	107
5.1.2. Types of information sources, content of information requests and introduction of a system of “guarantees”	108
5.1.3. Scope of the postponement/refusal ground	110
5.2. Impact on mutual recognition	111
5.2.1. Delays and non-execution of the EAW	111
5.2.2. Risks of polarization and “prison shopping”?	112
5.2.3. The unsustainable system of assurances	114
5.2.4. Impact on mutual trust, including beyond the EAW	115
5.3. Recommendations	118
6. COMPENSATION SCHEMES FOR UNJUSTIFIED DETENTION	123
6.1. Nature of differences	123
6.1.1. Grounds for claiming compensation, amounts awarded, eligibility conditions and time-limits	123
6.1.2. Applicability of national schemes to cross-border proceedings	125
6.2. Impact on mutual recognition and cross-border cooperation	126
6.2.1. Ineffective compensation schemes in cross-border situations ...	126
6.2.2. ... Exacerbated by the absence of rules on liability	126

6.2.3. Fundamental rights concerns and misuse of mutual trust	127
6.3. Recommendations	128
7. THE RIGHT TO BE PRESENT AT A TRIAL AND CONDITIONS OF EAW SURRENDERS	131
7.1. Nature of differences	131
7.1.1. Various understandings of the right to be present at the trial	132
7.1.2. Implementation beyond the letter of FD in absentia	133
7.2. Impact on mutual recognition	134
7.2.1. Dissatisfaction with the minimum standards approach and re-installment of a degree of national control	135
7.2.2. Obstacles to the practical operation of EAWs	137
7.3. Recommendations	142
8. COMPENSATION SCHEMES FOR VICTIMS	144
8.1. Nature of differences	144
8.1.1. State compensation systems	145
8.1.2. Compensation from the offender	149
8.2. Impact on cross-border cooperation	151
8.2.1. Risks of unequal treatment in cross-border situations and limited scope of the Compensation Directive	152
8.2.2. Restitution as a compensation mechanism and the Regulation on Confiscation and Freezing Orders: back to national law	154
8.3. Recommendations	155
9. PROTECTION MEASURES FOR VICTIMS	159
9.1. Nature of differences	159
9.1.1. Legal nature of protection orders	160
9.1.2. Procedures, scope of protections orders and definitions of offences	161
9.2. Impact on mutual recognition and cross-border cooperation	162
9.2.1. Flexibility in MR instruments	163
9.2.2. Confusion arising from the existence of a dual framework and risks of incompatibilities in practice	164
9.2.3. Implementation issues, lack of knowledge and legality concerns	165
9.3. The Victims' Rights Directive: raising awareness?	167
9.4. Recommendations	169
Assessment and summary of the recommendations	173
1. General assessment	173
2. Summary of the recommendations	182
ANNEXES	191
Annex 1 – Country reports	191

Annex 2 – List of interviews	192
REFERENCES	193

LIST OF ABBREVIATIONS

AFSJ	Areas of Freedom, Security and Justice
CCP	Code of Criminal Procedure
CISA	Convention Implementing the Schengen Agreement
CoE	Council of Europe
FRA	Fundamental Rights Agency
EAW	European Arrest Warrant
EC	European Commission
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EIGE	European Institute for Gender Equality
EIO	European Investigation Order
EJTN	European Judicial Training Network
EP	European Parliament
EPM	European Protection Measures
EPO	European Protection Order
EPPO	European Public Prosecutor's Office
ESO	European Supervision Order
EU	European Union
FD	Framework Decision
INTCEN	European Union Intelligence Centre
JIT	Joint Investigation Teams
MAA	Mutual Administrative Assistance
MLA	Mutual Legal Assistance
MR	Mutual Recognition
MS	Member State(s)

- OJ** Official Journal
- OLAF** Office européen de lutte antifraude
- PIF** Protection des intérêts financiers
- PO** Protection Order
- PTD** Pre-trial detention
- TEU** Treaty on the European Union
- TFEU** Treaty on the Functioning of the European Union

EXECUTIVE SUMMARY

Background and aim

For the past decade, cross-border cooperation in criminal matters in the European Union has been premised on the principle of mutual recognition. Its operation presupposes the acceptance of mutual trust between the – yet diverse – legal systems of the Member States. That trust is grounded on their shared commitment to the principles of freedom, democracy and respect for human rights, fundamental freedoms and the rule of law. Multiple calls for EU action in the field of the rights of suspects and accused persons arose after the adoption in 2002 of the European Arrest Warrant, in light of the adverse impact on the rights of individuals arising from the establishment of accelerated and simplified procedures for the recognition of judicial decisions. By conferring an express competence to the EU under Art 82(2) TFEU for the adoption of minimum standards in the field of domestic procedural criminal law, along with the application of the ordinary legislative procedure as the standard decision-making method, the entry into force of the Lisbon Treaty heralded a move towards a values-based approach: the EU legislator, since then, has adopted six directives on the procedural rights of defendants, together with one directive on victims' rights.

Against the background of intense legislative activity in criminal matters, illustrated by the adoption of the EPPO Regulation and the release of the E-Evidence Proposal, recent debates questioned whether further approximation efforts should be undertaken in the field of procedural criminal law. In this context, this study examines whether national criminal procedures underwent sufficient degrees of approximation to support the operation of mutual recognition instruments and allow effective cross-border cooperation in criminal matters. Approximation gaps and loopholes have been identified by putting into comparative perspective the criminal procedural laws of a representative selection of nine Member States: Finland, France, Italy, Hungary, Germany, Romania, The Netherlands, Ireland, and Spain.

Findings

Reconciling differences between national criminal procedures is not always an easy task.

The study identified 9 domains where existing differences among national legislations affect the negotiations and/or cross-border cooperation. These include investigative measures, admissibility of evidence, the principle of equality of arms in transnational investigations, pre-trial detention regimes and alternatives to detention, national procedures to assess detention conditions and surrender following the *Aranyosi and Căldăraru* judgment, compensation regimes for unjustified detention in transnational cases, the right to be present at a trial and conditions for surrender, compensation of victims of crime, as well as protection measures for victims.

As a result from differences in criminal procedural laws, several impacts could be identified.

Adopting new instruments of cooperation proved a challenge. The negotiations of the EIO and the EPPO were complex and lasted several years. Widely divergent criminal procedures, alongside asymmetrical levels of ambition and lack of political willingness to move forward with new instruments, translated into lengthy negotiations and the watering down of initially relatively high ambitions. In practice, differences in criminal procedures impaired the functioning of cooperation instruments. The release of the *Aranyosi and Căldăraru* judgment and its impact on the European Arrest Warrant – leading to a near paralysis of surrender procedures in some countries – focused a great deal of attention. Other instruments deserve close consideration as well. Worthy cooperation mechanisms, such as those adopted in the realm of protection measures for victims, have barely been relied on by the Member States, despite their significant potential to increase the standing of victims across the Union. Meanwhile, delays and ill-execution of requests occurred as a result of incompatibilities between legal and procedural rules, absence of mutual knowledge, as well as the lack of effective and speedy communication and information-exchanges between competent authorities.

Faced with these challenges, solutions were devised by EU lawmakers. Alongside approximation endeavours, of which the adoption of a body of directives on defendants' and victims' rights is a prime illustration, a complementary strategy was formulated. Rather than tackling differences head on, the EU undertook to circumvent them. In some circumstances, the *contours* of judicial cooperation were stretched to their paroxysm so as to include an array of actors alongside judicial bodies, ranging from administrative and civil authorities, to service providers. Flexibility manifested particularly in the terrain of transnational investigations, where both administrative and criminal law actors, alongside public and private actors, play a decisive role. Regarding the protection of victims, the nature – civil, administrative and criminal – of both authorities and protection orders seems to be of little relevance. Where flexibility was deemed unsuitable, deference to national law was preferred.

However, these approaches have proved unsatisfying.

The flexibility retained by the EU legislator creates confusion among the MSs, sometimes resulting in delays in cross-border cooperation, or limited knowledge of existing mechanisms. Reliance on national law has not proven entirely satisfying. The obligation to cope with a variety of national laws, procedures and requirements causes delays and incompatibilities. The current regime moreover generates tensions with fundamental rights. Individuals are faced with widely divergent protection regimes, depending on which MSs participate in transnational cooperation. Variable geometry undermines the principle of legal certainty, a yet crucial requirement in transnational proceedings, where several MSs are involved, and determining the jurisdiction competent to address a claim may prove challenging. In this respect, the framework developed in the directives on defendants' and victims' rights is incomplete: administrative and civil proceedings fall outside their scope of application, the wording of some provisions is sufficiently broad to leave a wide margin of discretion to the national legislator, Ireland and the UK have opted-out from several measures, and only surrender procedures have been explicitly dealt with by the EU directives. This leaves any observer with the feeling that the EU's criminal justice area operates on a system of fundamental rights protection *à géométrie variable*.

Whereas on paper, there is a general consensus that, in an area of criminal justice where a variety of systems co-exist, mutual understanding and recognition of differences is the rule, in practice MSs pursued dissimilar approaches. Some pushed the boundaries of mutual trust to the extreme, to what could be termed "blind trust", and differences were accommodated to the widest extent possible, a posture driven by the assumption that all Member States comply with similarly high levels of fundamental rights protection, as well as the imperative of more efficient judicial cooperation. Others accommodated differences between national systems, provided that these are not such as to encroach upon the core content of a fundamental right enshrined under national law. But reality bites back, and clashes occurred between Member States with high levels of protection, and those perceived as located at a lower end of the spectrum. Although these "clashes" occurred on a relatively parsimonious basis, they suggest that mutual trust is not based on the mere presumption that Member States share the same level of commitment to a common set of values. Trust, in the EU's area of criminal justice, must indeed be "earned" through effective compliance with fundamental rights standards.

Recommendations

This research paper offers various solutions to the array of issues identified throughout this study, spanning both legislative and non-legislative measures. The challenge of striking a balance between approximation and the preservation of legal diversity suggests that practical measures may sometimes be preferred to binding legislative action. Because ancillary measures also support learning and adaptation, they may provide useful complementary tool to support the implementation and operation of cooperation measures.

Practical measures

Instruments that enjoy little visibility, such as FD European Supervision Order, the European Protection Order Directive and the European Protection Measures Regulation, should be

promoted. Training activities and other awareness-raising activities are recommended in this respect. The number of beneficiaries of trainings should be broadened, so as to include not only judicial authorities, but also defence lawyers, victim lawyers, and service providers. Guidelines and handbooks could be developed to facilitate the implementation and use of both cooperation and approximation instruments, and further clarify the interplay between the procedural rights directives and mutual recognition. Meanwhile, the two-tier test developed by the Court of Justice in *Aranyosi and Caldaru*, alongside the ground for postponement/refusal, need further refinement. Information requests should be streamlined, possibly by developing a uniform template available in several languages.

The question of dialogue emerged with particular strength in recent case law, dealing with detention conditions and *in absentia* trials. Enhanced transjudicial dialogue will facilitate cooperation and enhance the cohesion of the EU's area of criminal justice. Drawing on the impetus for dialogue given by the Court of Justice in recent case law, horizontal forms of dialogue, from judges to judges, should be complemented by vertical ones, from national courts to the European Court of Justice.

Last but not least, building the basic capacity of EU States that sometimes lack sufficient resources to implement EU legislation properly is a precondition to enhance compliance with EU law and enable effective cooperation in several areas. EU financial support will be necessary in the crucial domains of detention conditions, compensation for unjustified detention in cross-border cases, and compensation of victims of crime.

Legislative action

A pre-requisite to any legislative action is to consolidate the current *acquis* and shore up the procedural guarantees for defendants, along with the set of rights developed for victims in criminal proceedings. This implies close monitoring, so as to identify and tackle implementation gaps, possibly through infringement proceedings.

In the short-term, minimum standards should be developed in the realm of detention conditions. Similarly, exclusionary rules of evidence obtained illegally/improperly, construed along the case law of the ECtHR, should be adopted. These rules should be complemented by emphasis on judicial review: exclusionary rules of evidence will be of little help if national authorities are not bound by an obligation to examine how evidence was collected. Thus, the judge must be able to evaluate whether there has been a violation of the defendant's rights during the collection process, otherwise evidence must be excluded. Judicial review is also necessary to address issues of overuse of pre-trial detention: an obligation to review the necessity for remand at early and regular stages of the procedure should be inserted. This could complement the development of a system of maximum time-limits on pre-trial detention. Issues pertaining to compensation should also be addressed in the short term. The revision of the Compensation Directive for victims must be initiated in the near future. The parallel adoption of an instrument on compensation for unjustified detention in cross-border proceedings could be envisaged.

In the medium-term, procedural safeguards for the defence designed specifically for transnational investigations must be adopted. Additional rules should be designed to facilitate the task of the defence to challenge transnational investigations ordered by the prosecution through, *inter alia*, facilitating access to the case file at early stages of the criminal procedure, expanding legal aid mechanisms, and strengthening existing provisions on legal remedies.

In the longer run, approximation of investigative measures, standards of admissibility of evidence (as opposed to exclusionary rules), and protection measures available to victims, would certainly render the functioning of the EU's area of criminal justice more optimal. Legislative action in these fields is, however, very complex and too premature.

INTRODUCTION

A. Background and objectives of the study

For the past decade, the *modus operandi* of cross-border cooperation in the field of EU criminal law has been premised on the principle of mutual recognition (MR). Its operation presupposes the acceptance of mutual trust between the – yet diverse – legal systems of the Member States. The Court of Justice of the EU (CJEU) acknowledged the existence of differences between national orders, however these should not prejudice mutual trust. Pursuant to this principle, each Member State “recognises the criminal law in force in other Member States even when the outcome would be different if its own national law were applied.”¹ In the controversial *Opinion 2/13* the Court of Justice moreover added that mutual trust is a principle “of fundamental importance in EU law ... that allows an area without internal borders to be created and maintained.”²

As noted elsewhere, this resulted in the establishment of “a comprehensive system whereby national judicial decisions in criminal matters are recognised and executed across the EU quasi-automatically, with a minimum of formality and with the aim of speedy execution.”³ This being said, ensuring effective prosecutions was never the sole objective of mutual recognition. MR was designed “not only to strengthen cooperation between Member States but also to enhance the protection of individual rights.”⁴ Its implementation hinges on the mutual trust of MS in each other’s criminal justice systems and that trust “is grounded, in particular, on their shared commitment to the principles of freedom, democracy and respect for human rights, fundamental freedoms and the rule of law.”⁵

This notwithstanding, multiple calls for EU action in the field of the rights of suspects and accused persons arose after the adoption in 2002 of the EU’s flagship mutual recognition measure of EU criminal law, namely the European Arrest Warrant (EAW).⁶ Despite the significant impact on the rights of individuals arising from the multiplication of EAWs,⁷ along with the establishment of accelerated and simplified procedures for the recognition of judicial decisions, fundamental rights never featured as an explicit ground for refusal in the EAW Framework Decision (FD). Whereas some authors criticised the mutual trust principle for being eponymous with “blind faith,”⁸ it is noteworthy that all Member States examined for the purpose of this study incorporated a more or less explicit fundamental rights ground for refusal in the national laws transposing FD EAW.

In 2001, a Framework Decision was adopted to establish minimum rights on the standing of victims.⁹ The Commission went on with a “Green Paper” on procedural safeguards in 2003, this time for suspects and defendants.¹⁰ Eventually the Commission put forward a proposal for a Council Framework Decision on certain procedural rights in criminal proceedings throughout the European Union in 2004.¹¹ The proposed FD sought to establish minimum standards covering suspects and defendants’ rights, and contained provisions on the right to free translation and interpretation, the right to legal advice (including legal aid), the right to

¹ C-187/01, *Gözütok and Brügge*, 11 February 2003, paras 32-33.

² CJEU, *Opinion 2/13* of the Court on Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms, 18 December 2014, para 191.

³ V. Mitsilegas, *EU Criminal Law after Lisbon: Rights, Trust and the Transformation of Justice in Europe*, Oxford/Portland: Hart Publishing, 2016, p. 124

⁴ Programme of measures to implement the principle of mutual recognition of decisions in criminal matters, *OJ C* 12, 15 Jan. 2001, p. 1

⁵ *Ibid.* See also Tampere European Summit, Presidency Conclusions, 15 and 16 Oct. 1999, SN 200/99, para 33: “Enhanced MR of judicial decisions and judgements and the necessary approximation of legislation would facilitate co-operation between authorities and the judicial protection of individual rights”.

⁶ V. Mitsilegas, *EU Criminal Law after Lisbon, Rights, Trust, and the Transformation of Criminal Justice in Europe*, 2016, *op. cit.*

⁷ For an analysis of the multiple infringements to human rights caused by the operation of EAWs, see A. Weyembergh, I. Armada, C. Brière, *Critical Assessment of the Existing European Arrest Warrant Framework Decision*, Research Paper for DG EPRS, 2014.

⁸ Peers 2016, *op. cit.* p. 160

⁹ Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings, 2001/220/JHA

¹⁰ COM (2003) 75 final

¹¹ COM (2004) 328 final, 28 April 2004

communication and/or consular assistance, the right to specific attention for persons who cannot understand the proceedings, and the right to information. Despite the relatively modest scope of its provisions (i.e. only aiming at minimum standards), the proposal gave rise to heated debates among the Member States. Opponents invoked, *inter alia*, the lack of legal basis in the Treaties for such proposal and the potentially far-reaching infiltrations in national criminal justice systems¹², in particular into the legal balance between the pursuit of security and the protection of fundamental rights.¹³ The staunch opposition of Member States, added to the rule of unanimity in decision-making under the Third Pillar, had the effect of delaying negotiations and significantly watering down the FD provisions, to the point it became impossible to reach an agreement.

To address the fundamental rights concerns arising from the increasing use of mutual recognition and cross-border cooperation instruments, the Lisbon Treaty conferred an express competence to the EU under Art 82(2) TFEU for the adoption of minimum standards in the field of domestic procedural criminal law, thus replacing the vague power of Art 31(1)(c) of the old Treaty on “ensuring compatibility in rules applicable in the Member States, as may be necessary to improve such cooperation.”¹⁴ A distinctive feature of Art 82(2) TFEU is that it applied the ordinary legislative procedure as the standard decision-making method in lieu of the prior rule of unanimity in the Council with consultation of the European Parliament. This is a direct consequence of the communautarisation of the Third Pillar by the Lisbon Treaty.

Despite a substantial increase in EU margin for manoeuvre in the ambit of procedural law, two points of caution should be raised. First, an emergency brake rule was inserted under Art 82(3) TFEU, allowing Member States to put an end to discussions when a measure proposed under Art 82(2) TFEU “would affect fundamental aspects of its criminal justice system,” thus reflecting the particularly sensitive dimension of the field. Second, EU competence exists only to the extent “necessary to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension.” In other words, the harmonisation of national procedures is not an end in itself, but rather a means to facilitate or achieve mutual recognition and cooperation in criminal matters at large. It is therefore believed that conferring an EU competence to set minimum requirements in the field of procedural criminal laws will enhance trust among EU states involved, and *in fine* facilitate the operation of mutual recognition instruments.¹⁵ Emphasis on the rights of individuals feeds into the broader momentum of a more values-based approach to EU criminal law, as evidenced by the integration of the Charter into primary law by the Lisbon Treaty. The Charter has proved a useful tool not only to interpret several provisions of EU law,¹⁶ but also to bring EU human rights policies closer to European Convention on Human Rights (ECHR) standards.¹⁷ Hence, the right to a fair trial under Art 6 ECHR also appears in Art 47 of the Charter, along with Art 48 on the rights of the defence. In a similar vein, the Court confirmed in its case law that Art 6 of the Charter incorporates ECHR standards on detention.¹⁸

The adoption of a Roadmap on the procedural rights of suspects and defendants in 2009 under the leadership of the then Swedish Presidency gave a much-needed impetus for the adoption of an unprecedented and growing body of legislation in this area. Despite the many

¹² T. Spronken, *Effective Defence: The Letter of Rights and the Salduz-directive*, in G. Vermeuleun et al (eds), *Defence Rights: International and European Developments*, Antwerp: Maku, 2012, p. 86;

¹³ V. Mitsilegas, *EU Criminal Law after Lisbon, Rights, Trust, and the Transformation of Criminal Justice in Europe*, 2016, op. cit.

¹⁴ Consolidated version of the Treaty on European Union (2002), OJ C 325/5, 24.12.2002

¹⁵ On the articulation between mutual trust, mutual recognition and the competence conferred onto the EU under Article 82(2) TFEU, see P. Asp, *European criminal and national criminal law*, in V. Mitsilegas, M. Bergström and T. Konstadinides, *Research handbook on EU criminal law*, Cheltenham/Northampton, Edward Elgar Publishing, 2016, p. 331.

¹⁶ Directive 2016/343 strengthening certain aspects of the presumption of innocence was interpreted in the Milev case in light of Article 48(1) of the Charter. See CJEU, C-439/16 PPU, *Emil Milev*, 27 October 2016.

¹⁷ According to the Explanations relating to the Charter, several provisions have the same meaning and scope as ECHR case law. Article 48(1) of the Charter for example mirrors Article 6(1) of the Convention.

¹⁸ CJEU, C-237/15 PPU, *Lanigan*, 2015

qualms about harmonisation of national law in such a “sensitive and distinctive” field,¹⁹ thus far six directives have been adopted on the rights of suspects and defendants. These include, in chronological order:

- (i) Directive 2010/64/EU on the right to interpretation and translation;
- (ii) Directive 2012/13/EU on the right to information;
- (iii) Directive 2013/48/EU on the right to access to a lawyer and to right to have a third party informed upon deprivation of liberty and to communicate with relatives and consular authorities while deprived of liberty;
- (iv) Directive 2016/343/EU on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings;
- (v) Directive 2016/800/EU on safeguards for children in criminal proceedings; and
- (vi) Directive 2016/1919/EU on the right to legal aid.

All six directives apply to both suspects and accused persons, as well as arrested and detained persons, from the pre-trial stage to the end of the criminal proceedings, and provide specific provisions for European Arrest Warrant proceedings.

Another Roadmap released in 2011 on victims’ rights resulted in the adoption of Directive 2012/29/EU establishing a comprehensive set of minimum standards on the rights, support and protection of victims of crime, thus repealing the aforementioned Framework Decision of 2001.

Despite the adoption of a body of legislation, this research purports to go beyond the realm of procedural rights where approximation has already been launched. Indeed, it aims to identify areas in which differences between national criminal procedural laws affect, in the sense of slowing down or blocking, the adoption and operation of mutual recognition, EU actors (especially the EPPO) and other cross-border cooperation tools.

Negotiations of the most recent directives adopted since the entry into force of the Lisbon Treaty have been difficult. Their approximation impact is limited. Indeed, Art 82(2) TFEU only aims at a common denominator at a rather minimum level, thus leaving the door open to the persistence of divergences between national criminal procedural laws.²⁰ Gaps and loopholes remain. For instance, the specific reference made to EAW proceedings in the six directives dealing with the rights of the defence raises the concerns of their application to other mutual recognition instruments. The absence of applicability of EU directives to administrative proceedings provides another example, despite the significant flexibility that was retained in EU cross-border cooperation instruments as regards the nature (i.e. judicial and non-judicial) of authorities involved.²¹

It nonetheless seems premature to recommend a revision of these seven directives in the near future. The transposition period has expired for the Interpretation and Translation Directive,²² the Information Rights Directive,²³ the Victims’ Rights Directive,²⁴ the Access to a lawyer Directive,²⁵ and the Presumption of Innocence Directive.²⁶ However, the Safeguards for Children and Legal Aid Directives are still in the process of being transposed.²⁷ That the transposition deadline has not expired for all directives renders the task of providing a comprehensive, accurate and thorough assessment of their impact on mutual recognition and cross-border cooperation difficult. Moreover, transposition delays occurred as regards some

¹⁹ Ibid.

²⁰ ECHR minimum standards, for example, were never fully implemented, or complied with by the Member States. However, in the case of ECHR, it is rather the lack of incentives for compliance, together with the absence of a proper enforcement mechanism established by the Strasbourg Court that account for the persistence of disparities among criminal procedural laws.

²¹ For example, the EIO Directive provides that administrative or any other competent authorities may be involved either in the issuing (with some restrictions) or the execution of EIOs. See Section 1.

²² 27 October 2013.

²³ 2 June 2014.

²⁴ 16 November 2015.

²⁵ 27 November 2016.

²⁶ 1 April 2018.

²⁷ 11 June 2019 and 25 May 2019 respectively.

directives, such as the Access to a Lawyer and Victims' Rights Directives, thus postponing the implementation process further.

In light of these challenges, this study focuses on crucial areas of cross-border cooperation, which were insufficiently tackled, or simply left unaddressed. Among these, evidence-gathering and evidence admissibility were never fully subject to approximation endeavours, in spite of the recent legislative developments in this field, as evidenced the adoption of the European Investigation Order,²⁸ the adoption of a Regulation on the European Public Prosecutor's Office in October 2017,²⁹ the release of a Proposal for a Regulation on the mutual recognition of freezing and confiscation orders,³⁰ and of a proposal for a Regulation on cross-border access to electronic evidence.³¹ Other neglected areas include detention conditions or compensation for suspects/defendants subject to unjustified detention carried within the framework of relevant mutual recognition mechanisms.³²

Against the background of intense legislative activity in criminal matters, recent debates have questioned whether further harmonisation efforts should be undertaken in the field of procedural criminal law.³³ In this context, this study aims at identifying approximation gaps and loopholes that affect negotiations of recent cooperation instruments and/or undermine cooperation in criminal matters on the ground. Thus, it examines whether national criminal procedures underwent sufficient degrees of approximation to support the operation of mutual recognition instruments, and allow effective cross-border cooperation in criminal matters. For this purpose, this study is based on a comparison of the national criminal procedural laws of a selection of nine Member States.

B. Literature review

The scope of this study feeds into an ever-expanding literature in the field.

Several contributions addressed the interplay between approximation of national criminal procedures and mutual recognition since the adoption of several MR instruments in the beginning of the 2000s.³⁴ A first category of authors put the emphasis on the difficulty to reconcile effective cooperation in criminal matters and the diversity of legal traditions, either by following a 'theme-by-theme' methodology,³⁵ or by putting national approaches into comparative perspective.³⁶ A second category focused more specifically on the difficulty to

²⁸ Expiration of the transposition deadline was in May 2017 (Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters, OJ L 130, 1.5.2014).

²⁹ Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO') OJ L 283, 31.10.2017.

³⁰ Proposal for a Regulation of the European Parliament and of the Council on the mutual recognition of freezing and confiscation orders, 15104/17, 1.12.2017.

³¹ European Commission, Improving cross-border access to electronic evidence in criminal matters, Inception Impact Assessment, 2017. Proposal for a Regulation of the European Parliament and of the Council on European Production and Preservation Orders for electronic evidence in criminal matters COM/2018/225 final, 17.4.2018. Proposal for a Directive of the European Parliament and of the Council laying down harmonised rules on the appointment of legal representatives for the purpose of gathering evidence in criminal proceedings, COM(2018) 226 final, 17.4.2018.

³² On this matter, See European Parliament resolution of 27 February 2014 with recommendation to the Commission on the review of the European Arrest Warrant (2013/2109(INL)), para 11: "While stressing the primary importance of correct procedures including appeal rights, calls for Member States, as either an issuing or executing Member State, to provide for legal mechanisms to compensate damage arising from miscarriages of justice relating to the operation of mutual recognition instruments, in accordance with the standards laid down in the ECHR and in the well-established case-law of the CJEU".

³³ See the paper presented by ECBA President Holger Matt at the 2017 ECBA spring conference, available at: <http://www.ecba.org/extdocserv/conferences/prague2017/ECBAagenda2020NewRoadmap.pdf>

³⁴ Especially, A. Weyembergh, *L'harmonisation des législations : condition de l'espace pénal européen et révélateur de ses tensions*, Bruxelles: Presses Universitaires de Bruxelles, 2004.

³⁵ On transnational investigations, see the works of S. Ruggeri, i.e. S. Ruggeri (ed), *Transnational Evidence and Multicultural Inquiries in Europe*, Heidelberg: Springer, 2014; S. Ruggeri, *Transnational Inquiries and the Protection of Fundamental Rights in Criminal Proceedings*, Heidelberg: Springer, 2013; on the transfer of prisoners, see T. Marguery, *Mutual Trust under Pressure: the Transferring of Sentenced Persons in the EU*, Oisterwijk: Wolf Publishers, 2018.

³⁶ T. Wahl, "The perception of the principle of mutual recognition of judicial decisions in criminal matters in Germany", in G. Vernimmen-Van Tiggelen, L. Surano, A. Weyembergh (eds), *The future of mutual recognition in criminal matters in the European Union*, Bruxelles: Presses Universitaires de Bruxelles, 2009, pp. 115-147; A. G. Zarza, Mutual recognition in criminal matters in Spain, in G. Vernimmen-Van Tiggelen, L. Surano, A. Weyembergh (eds),

strike a balance between adopting effective MR instruments while, at the same time, ensuring the respect of fundamental rights and enhancing mutual trust.³⁷

Previous studies on procedural rights assessing the feasibility of the numerous instruments and proposals contained in the Roadmap should be mentioned, in particular academic projects coordinated by Taru Spronken and Gert Vermeulen,³⁸ as well as those comparing national criminal procedures.³⁹ Other comparative studies focused on evidence and procedural criminal law carried in the run-up to the establishment of a European Public Prosecutor's Office, those coordinated by the Max Planck Institute⁴⁰ and those coordinated⁴¹ and edited by Katalin Ligeti in particular.⁴² Other works put a more narrow emphasis on either specific procedural safeguards, such as the right to information,⁴³ the right to translation,⁴⁴ and the right to access to a lawyer,⁴⁵ to name but a few, or those areas where the EU has only taken preliminary steps towards harmonisation, such as evidence law⁴⁶ and detention conditions.⁴⁷ Finally, a few authors analysed the challenges of implementing EU directives in national laws from the standpoint of individual Member States, such as France,⁴⁸ Romania,⁴⁹ Italy,⁵⁰ and Portugal.⁵¹

The future of mutual recognition in criminal matters in the European Union, Bruxelles: Presses Universitaires de Bruxelles, 2009, pp. 189-219.

³⁷ A. Erbežnik, Mutual Recognition in EU Criminal Law and Fundamental Rights-The Necessity for a Sensitive Approach, in C. Brière, A. Weyembergh (eds.), *The Needed Balances in EU Criminal Law, Past, Present and Future*, Oxford/Portland, Hart Publishing, 2018.

³⁸ See in particular two major studies conducted during the pre-Lisbon era on the potential for harmonisation of procedural criminal laws across the Union on the basis of the 2004 Proposal for a Framework Decision on certain procedural rights in criminal proceedings throughout the European Union. See T. Spronken, G. Vermeulen, D. de Vocht, L. van Puyenbroeck, *EU Procedural Rights in Criminal Proceedings*, Report funded by the European Commission, 2009; E. Cape, Z. Namoradz, R. Smith and T. Spronken, *Effective Criminal Defence in Europe*, Antwerpen-Oxford: Intersentia, 2010.

³⁹ G. Vermeulen, W. De Bondt, C. Ryckman, *Rethinking International Cooperation in Criminal Matters in the EU, Moving beyond actors, bringing logic back, footed in reality*, Antwerp: Maklu, 2012.

⁴⁰ *Rethinking European Criminal Justice*, coordinated by the Max Planck Institute and funded by OLAF for 2006-2007, Freiburg.

⁴¹ Study coordinated by the University of Luxembourg and funded by OLAF on EU model rules of evidence and procedural safeguards for the procedure of the proposed European Public Prosecutor's Office, 2012 and EU model rules of criminal investigations and prosecution for the procedure of the proposed European Public Prosecutor's office, 2011-2012.

⁴² See K. Ligeti (ed.) *The Future of Prosecution in Europe*, vol. 2, Oxford: Hart Publishing, forthcoming, 2018; K. Ligeti (ed.), *The Future of Prosecution in Europe*, vol. 1, Oxford: Hart Publishing, 2013, pp. 945 - 985.

⁴³ S. Allegrezza, V. Covolo, *The Directive 2012/13/EU on the Right to Information in Criminal Proceedings: Status Quo or Step Forward?*, *Croatian Association of European Criminal law*, 2016, pp. 41-51; I-M. Rusu, *The right to information within the criminal proceedings in the European Union. Comparative examination. Critical opinions. Judicial Tribune*, Vol 6, special issue, 2016, pp. 139-150.

⁴⁴ E-J. Van Der Vliet, *The right to interpretation and translation*, *The Journal of Specialised Translation*, Issue 14, 2010, pp. 26-40; E. Hertog, *Directive 2010/64/EU of the European Parliament and of the Council on the Right to Interpretation and Translation in Criminal Proceedings: Transposition Strategies with regard to Interpretation and Translation*, *MonTI*, Vol 7, 2015, pp. 73-100; S. Quattrocchio, *The Right to Information in EU Legislation*, in S. Ruggeri (ed), *Human Rights in Criminal Law: New Developments in European Legislation and Case Law after the Lisbon Treaty*, New York: Springer International Publishing, 2015; R. Vogler, *Lost in Translation: Language Rights for Defendants in European Criminal Proceedings*, in S. Ruggeri 2015, op. cit., pp. 96-108.

⁴⁵ V. Mols, *Bringing directives on procedural rights of the EU to police stations: Practical training for criminal defence lawyers*, *New Journal of European Criminal Law*, Vol 8, No 3, 2017, pp. 300-308; A. Soo, *How are the member states progressing on transposition of Directive 2013/48/EU on the right of access to a lawyer? An inquiry conducted among the member states with the special focus on how Article 12 is transposed*, *New Journal of European Criminal Law*, Vol 8, No 1, 2017, pp. 64-76.

⁴⁶ M. Kusak, *Common EU Minimum Standards for Enhancing Mutual Admissibility of Evidence Gathered in Criminal Matters*, *European Journal of Criminal Policy Research*, Vol 23, 2017, pp. 337-352

⁴⁷ A. Bernardi, A. Martufi (eds), *Prison overcrowding and alternatives to detention. European sources and national legal systems*, Naples: Jovene Editore, 2016.

⁴⁸ See E. Vergès, *Emergence européenne d'un régime juridique du suspect, une nouvelle rationalité juridique*, *Revue de Science Criminelle*, 2012, p. 635.

⁴⁹ See I-M. Rusu, *The right to information within the criminal proceedings in the European Union. Comparative examination. Critical opinions. Judicial Tribune*, Vol 6, special issue, 2016, pp. 139-150.

⁵⁰ G. Laura Candito, *The Influence of the Directive 2012/13/EU on the Italian System of Protection of the Right to Information in Criminal Procedures*, in Ruggeri 2015 op. cit., pp. 229-261.

⁵¹ P. Caiero (ed), *The European Union Agenda on Procedural Safeguards for Suspects and Accused Persons: the 'second wave' and its predictable impact on Portuguese law*, Law Institute, University of Coimbra, 2015.

Whereas this brief overview of academic works provides valuable insights on the state of procedural criminal laws at EU and national levels, the study at hand does not dwell on any of these. Rather, it constitutes an attempt at providing an assessment of the interplay between national criminal procedures and cross-border cooperation. Nine years after the entry into force of the Lisbon Treaty, and the granting of an explicit competence to the EU in the approximation of criminal procedures, time is ripe to assess in a comprehensive manner the impact of EU legislative efforts in harmonising procedural safeguards, analyse recent evolutions in the case law,⁵² as well as to measure the complexity of the challenges that lie ahead for cross-border cooperation in criminal matters,⁵³ and outline potential next steps to address them most effectively.

C. Methodology

(i) Selection of Member States

For the purpose of this study, a representative sample of nine Member States has been identified, in order to assess where differences can lead to problems in the application of mutual recognition tools and instruments. The following countries have been selected: Finland, France, Germany, Hungary, Italy, Ireland, the Netherlands, Romania and Spain.

Several factors were taken into account in the selection process. Besides the need to strike a fair geographical balance between Western, Mediterranean, Central, Eastern and Nordic Member States, particular attention was paid to the diversity of national legal systems, namely those adhering to inquisitorial, accusatorial, and mixed systems. Previous comparative research on the commonalities and differences in applying procedural rights in criminal proceedings across the Union indeed opted for a selection of Member States based on the three different paradigms of legal traditions in the EU, namely inquisitorial, adversarial, and post-socialist legal systems.⁵⁴ As noted elsewhere, the development of an Area of Freedom, Security and Justice (AFSJ) as well as a single European area where freedom of movement is secured, has not been accompanied by the creation of a single area of law.⁵⁵ The relevance of legal pluralism as a selection criterion should therefore not be overlooked, and the above classification has been construed so as to be in line with the cautious approach pursued by the drafters of the Treaty under Art 82(2) TFEU, that is to “take into account the differences between the legal traditions and systems of the Member States” in the harmonisation process of procedural criminal law. It should be noted, however, that Member States adhere neither to purely inquisitorial (i.e. France, Spain, Finland) nor purely adversarial (i.e. Ireland)⁵⁶ traditions, as a result of subsequent reforms of the criminal justice systems over the past decades. Others define themselves as belonging to truly mixed (i.e. The Netherlands, Italy, Germany) systems, and a last group of states represent post-socialist legal systems (i.e. Romania, Hungary).

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

⁵² e.g. The *Aranyosi and Caldaru* judgment on detention conditions.

⁵³ e.g. The revision of the Framework Decision on the European Arrest Warrant.

⁵⁴ E. Cape, Z. Namoradze, R. Smith and T. Spronken, *Effective Criminal Defence in Europe*, Antwerpen-Oxford: Intersentia, 2010.

⁵⁵ The law remains territorial. See V. Mitsilegas, *EU Criminal Law after Lisbon, Rights, Trust, and the Transformation of Criminal Justice in Europe*, 2016, op. cit.

⁵⁶ There are few inquisitorial elements in Irish criminal procedure. For example, a judge generally acts as a referee at trial. Moreover, Ireland has a Constitution, meaning that there has been a degree of codification of the case law. See National report No 2 on Ireland, Section on general questions (point 1).

(ii) Data collection

The research was conducted through a combination of desk research and empirical research methods.

Desk research involved trawling through the aforementioned existing literature as well as a variety of official and policy documents, such as the 2009 and 2011 roadmaps, relevant EU legislation (e.g. directives on procedural rights for defendants and on victims' rights), and new instruments relevant to the topic at hand (e.g. Regulation on the European Public Prosecutor's Office, proposal for a Regulation on Freezing and Confiscation Orders). Particular attention was also paid to *ex post* assessments by the European Commission and other reports carried out by the European Parliament, in respect to, *inter alia*, the Victims' Rights Directive,⁵⁷ the European Protection Order Directive,⁵⁸ and the implementation of procedural rights directives and detention conditions.⁵⁹ The work of EU agencies was also taken into consideration, such as the studies written by the Fundamental Rights Agency,⁶⁰ and Eurojust reports and case law analyses.⁶¹

Another strand of the research includes a mapping of the extensive body of the case law of the European Court of Human Rights, alongside recent judgments delivered by the Court of Justice of the European Union, relating not only to procedural rights directives, but also to mutual recognition instruments at large.

Turning to the gathering of empirical evidence, the research team identified national experts in the nine Member States selected. Each of those experts was responsible to conduct:

- an overview of national case law where differences between the national criminal laws were perceived as an obstacle to the operation of mutual recognition instruments and cross-border cooperation in criminal matters at large;
- a report on the specificities of national procedural laws in areas covered by inter-state cooperation, such as the protection of victims, investigation measures and admissibility of evidence, to name but a few on the basis of a questionnaire prepared by the research team.

In order to complement the findings of national reports, and to get a clear picture of the state of play at EU level, the research process was complemented by the conduct of several semi-structured interviews. Interviews involved a triangulation of sources comprising EU and national officials working in the field of criminal law. Interviews targeted primarily officials working in the EU institutions and agencies. More than ten interviews were conducted with experts working at the European Commission, the Council of the EU and the European Parliament, as well as relevant EU agencies and networks, such as Eurojust and the European Judicial Network. Interviews also took place at the Belgian Federal Ministry for Justice in order to gain concrete insights on the extent to which national diversity and perspectives hindered the negotiations of approximation and cooperation instruments.⁶²

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

⁵⁷ European Parliament, The Victims' Rights Directive 2012/29/EU, European Implementation Assessment, EPRS, Ex-Post Evaluation Unit, Study, 2017.

⁵⁸ European Parliament, European Protection Order Directive 2011/99/EU, European Implementation Assessment, EPRS, Ex-Post Evaluation Unit, Study, 2017.

⁵⁹ European Parliament, Procedural rights and detention conditions, Cost of non-Europe report, W. van Ballegooij, EPRS, European Added Value Unit, 2017.

⁶⁰ See, *inter alia*, country reports commissioned by the Fundamental Rights Agency for the following project: Rehabilitation and mutual recognition – practice concerning EU law on transfer of persons sentenced or awaiting trial, May 2015; Fundamental Rights Agency, Rights of suspected and accused persons across the EU: translation, interpretation and information, Vienna: FRA, 2016.

⁶¹ See, *inter alia*, Eurojust, EAW case work 2014-2016, 11 May 2017; Conclusions of the Thirteenth Annual Meeting of National Experts on Joint Investigation Teams (JITs) 17 and 18 May 2017, Eurojust, The Hague.

⁶² See Annex 1 for the full list of interviews already conducted and those to come.

D. Structure

This study identifies a set of 9 domains where differences between national criminal procedures affect, to a more or less greater extent, the negotiation and operation of cross-border cooperation instruments in criminal matters, including the EPPO.

These include:

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

These nine areas of analysis are structured in a similar way. Each of them was divided into three sub-categories:

A first category identifies and describes the main points of divergence among the procedural laws of the Member States. The comparative study relies on the inputs provided by the national rapporteurs and was sometimes complemented by the findings of other reports, in particular those carried out by the Fundamental Rights Agency,⁶³ Fair Trials,⁶⁴ the European Parliament Research Service,⁶⁵ as well as various research projects commissioned by the EU institutions, on the European Protection Order in particular.⁶⁶

A second category analyses how these differences hinder mutual recognition, cross-border cooperation and/or mutual trust. The term “hindrance” has been understood broadly so as to capture the various nuances and degrees this very notion encapsulates. Therefore, the study examined not only impairments to the effective operation of cooperation mechanisms, but also infringements – actual or potential – to fundamental rights and mutual trust. The first reports on the national case law prepared by the nine rapporteurs were particularly helpful in this respect. The research attempts to determine, where applicable, the prospective impact of EU directives on the rights of victims and defendants on narrowing divergences between criminal procedures, and mitigating the adverse impact of these differences on cross-border cooperation and mutual trust. Although this analysis is merely prospective, it was deemed necessary to assess whether, and where it might be advisable to move forward with new legislative proposals.

The third and last sub-section offers a number of recommendations and is intended to outline legislative and non-legislative measures. The research nonetheless sought to be realistic, and to weigh the benefits of further harmonisation with the imperative of preserving the diversity of legal traditions. For this reason, practical tools and soft law instruments were sometimes preferred to legislative action or proposed to complement legislative action.

⁶³ Fundamental Rights Agency, “Victims of crime in the EU: the extent and nature of support for victims”, Report, Vienna: FRA, 2015; Fundamental Rights Agency, “Rights of suspected and accused persons across the EU: translation, interpretation and information”, Vienna: FRA, 2016.

⁶⁴ Fair Trials, *A Measure of Last Resort? The practice of pre-trial detention decision-making in the EU*, 2016. Retrieved: <https://www.fairtrials.org/wp-content/uploads/A-Measure-of-Last-Resort-Full-Version.pdf>

⁶⁵ European Parliament, *Procedural rights and detention conditions, Cost of non-Europe report*, W. Van Ballegooij, EPRS, European Added Value Unit, 2017.

⁶⁶ European Parliament, *European Protection Order Directive 2011/99/EU, European Implementation Assessment*, EPRS, Ex-Post Evaluation Unit, Study, 2017.

Ultimately, it should be noted that the list of differences and the obstacles to cross-border cooperation and mutual recognition that derive from them is of a non-exhaustive nature. Drawing up a comprehensive overview of differences among national procedural criminal laws is nearing impossible within the timeframe imposed, at least in sound methodological terms.

1. INVESTIGATIVE MEASURES

KEY FINDINGS

- Investigative measures have not been subject to real approximation efforts at EU level. Differences between countries in the role devoted to the judicial authorities in the investigation, the degree of involvement of administrative bodies in criminal investigations, alongside widely divergent regimes and conditions governing the deployment of special investigative techniques, account for this “approximation gap”.
- The EU intended to circumvent these differences through a two-pronged strategy: significant flexibility was retained in the nature of authorities involved in transnational investigations, allowing both judicial and non-judicial authorities to participate in cross-border evidentiary activities. Where divergent procedural rules proved impossible to reconcile, reliance on national law was preferred. Eschewing differences, however, has not proved an entirely successful strategy: delays and incompatibilities in cross-border cooperation have arisen, alongside risks of forum-shopping, as well as legal certainty and fundamental rights concerns.
- The procedural rights directives will be of little help to address these shortcomings, in particular since administrative proceedings have been nearly excluded from their scope.
- The porous boundaries between administrative and criminal law, alongside the salient role devoted to private parties in the E-Evidence Proposal, must be complemented by the strengthening of judicial control. In the absence of real approximation of investigative measures, dialogue must be encouraged between competent actors of cooperation to foster mutual knowledge and avoid incompatibilities and delays, and training must be encouraged, in particular for defence lawyers and service providers.

1.1. Nature of differences

Investigative measures were barely subject to approximation efforts at EU level. However, the question of their approximation deserves to be asked, against the background of the recent entry into force of the EIO and the EPPO, designed to foster transnational investigations. The EIO replaces the corresponding provisions of the 2000 EU Convention for Mutual Legal Assistance in Criminal Matters (hereinafter ‘the 2000 EU MLA Convention’) and the Framework Decision on Freezing Orders among the participating Member States.⁶⁷ It is thus worth noting that the 2000 EU Convention remains of interest for this study, as Ireland has an opt-out on the EIO Directive, and Denmark does not take part in it.⁶⁸ The legal framework of the Joint Investigation Teams however remains unchanged.⁶⁹

Three main sets of differences were identified as posing significant obstacles to transnational investigative activities: differences among the types of authorities that are competent to deal with investigative measures, as well as divergences in the competences allocated to them.

⁶⁷ Under Arts 34(1) and (2) EIO Directive respectively.

⁶⁸ The absence of a dual criminality ground with regard to certain coercive measures constituted among the reasons put forward by Ireland for its decision. Dáil Éireann Debate, *Vol. 843 No. 1*. Speaking in in Dáil Éireann on Wednesday 4th June 2014, the then Irish Minister for Justice & Equality Frances Fitzgerald T.D. stated: “The Framework Decision on the European Evidence Warrant 2008/978/JHA is being repealed by the European Investigation Order Directive. Although Ireland has not yet made a final decision on whether or not to opt in to that Directive, we will not be preparing legislation to implement the now defunct Framework Decision. Requests for evidence between Ireland and other states will continue to be done in accordance with the provisions of the Criminal Justice (Mutual Assistance) Act 2008. Such matters are not affected by the fact that the European Evidence Warrant Framework Decision is not being implemented. (Dáil Éireann Debate, *Vol. 843 No. 1*, para. 156). The UK later opted in to the EIO by adopting secondary legislation in the form of the Criminal Justice (European Investigation Order) Regulations 2017. National report No 1 on Ireland, Introduction (point 1).

⁶⁹ Pursuant to Art 3 EIO Directive.

Both administrative and criminal law actors are involved in investigations, as illustrated by the growing relevance of intelligence services in some countries (1.1.1). Additionally, the types of criminal law actors and their competences also widely differ (1.1.2.). Then, a third category includes differences that exist among the investigative measures themselves and the conditions of their deployment (1.1.3).

1.1.1. Blurred picture between administrative and criminal law actors and the variable importance of intelligence services

The fight against crime propelled some MSs to resort to the administrative channel in the conduct of investigations, instead of criminal law.⁷⁰ Administrative investigations may be preferred to criminal investigations for a variety of reasons. These may include the minor character of the offence,⁷¹ or the financial burden and delays associated to the criminal law system.⁷² Sometimes it is rather the hybrid nature of offences that triggers a dual track of investigations, such as the protection of financial interests of the EU budget.⁷³

At the national level, it has become increasingly difficult to demarcate the labour division between administrative and criminal authorities vested with investigative powers. Differences between MSs is evident here as well. Indeed, the importance of administrative authorities in investigations varies from a MSs to another. The same is true for the division of competences between the administrative channel and criminal law actors, as well as for the interactions and synergies between both.

The growing importance of intelligence activities in some countries is a case in point.

From an organisational point of view, the national law of most countries examined distinguishes law enforcement and intelligence services. Noticeable exceptions include Finland and Ireland, where intelligence activities are carried out by a structure that is officially part of law enforcement authorities.⁷⁴

Besides, the procedures applicable to investigative measures deployed to fight serious crimes are often changing, as evidenced by the adoption of new counterterrorism laws in several countries, which sometimes involves a shift of competences and power from criminal justice actors to administrative authorities (e.g. France, Germany, Netherlands).⁷⁵ Following the wave of terrorist attacks on the European soil, emphasis was placed on the complementarities between the various channels/actors at the investigation stage. In France, information gathered during fact-finding activities carried out by intelligence services can be "judicialized", if this information shows evidence that a terrorist offence has been committed or is being prepared.⁷⁶ Besides, intelligence services carry out investigations at the request of judicial authorities on a regular basis.⁷⁷ Information-flows are increasingly a two-way street. Though the principle of secrecy of criminal investigation prevails, the CCP was amended several times to facilitate horizontal information-sharing from the judiciary to the intelligence services.⁷⁸ Since 2017, the prosecutor may pass on elements of criminal files

⁷⁰ J. Vervaele, "Special procedural measures and the protection of human rights: General report", *Utrecht Law Review*, Vol 5, Issue 2, 2009

⁷¹ Most countries have "depenalised" minor offences, which are now dealt with through the administrative channel. See O. Jansen, *Administrative Sanctions in the European Union*, Antwerpen: Intersentia, 2013

⁷² K. Sugman Stubbs and M. Jager, "The organisation of administrative and criminal law in national legal systems: exclusion, organized, or non-organized co-existence", in A. Weyembergh, F. Galli (eds), *op. cit.*, 2014, p. 158.

⁷³ An example of this is provided from an institutional perspective through the establishment of OLAF and the EPPO, that are competent to investigate administrative and criminal offences respectively.

⁷⁴ Fundamental Rights Agency, *Surveillance by intelligence services: fundamental rights safeguards and remedies in the EU Volume II: field perspectives and legal update*, 2017, p. 28. It is illustrative of the leading role of the police in investigations, as seen in Section 1.1.1.

⁷⁵ R. Renard, R. Coolsaet (eds), "Returnees: who are they, why are they (not) coming back and how should we deal with them? Assessing Policies on Returning Foreign Terrorist Fighters in Belgium, Germany and the Netherlands", Egmont paper 101, Brussels: Egmont Institute for International Relations, February 2018

⁷⁶ For this purpose, the information transmitted must be declassified so as to not reveal the investigative techniques deployed during the collection process. Rapport de la Délégation parlementaire française au Renseignement, Rapport d'activité, 2016, p. 61

⁷⁷ *Ibid.*

⁷⁸ Besides the example provided below, the CCP was amended in 2016 to allow the administration to be informed of certain elements pertaining to an on-going investigation relating to a member of the personnel.

relating to terrorist offences to intelligence services, where necessary to fulfil the objective of preventing terrorism.⁷⁹

Reliance on information gathered by intelligence services in criminal proceedings is more common in other countries, with a long history of fighting terrorist threats, such as Spain. Intelligence information was frequently used in criminal proceedings due to the longstanding fight of the national authorities against ETA-led terrorist activities.⁸⁰

1.1.2. Differences among criminal law authorities involved in investigations

The nature and competence of criminal law authorities involved in transnational investigations vary from a MS to another. The following identifies three broad categories of MSs, ranging from national systems devolving a minor role to the judge to those countries where most of the investigations are placed within the hands of the judge.

A first group of MSs attributes a dominant role to the police force in the conduct of investigations (e.g. Ireland, Finland). The Irish system provides that the only competent body to conduct a criminal investigation is the *Garda Síochána*. Judges have therefore no function in the investigation of offences other than issuing warrants. In Finland, the investigation is led by a senior police, customs or border guard official.⁸¹ A prosecutor leads investigations only in cases where a police officer is suspected of a crime.⁸² The role of the judge is extremely limited, aside from authorising the use of certain coercive investigative measures.⁸³

Among the sample examined, a second group of Member States (e.g. The Netherlands, Italy, France, Germany, Romania, Hungary) grant significant investigating powers to the prosecutor. The latter supervises and conducts to a certain extent the criminal investigation, with a less important role devoted to the police and the investigating judges. The exact balance of investigative powers between the prosecutor and the investigating judge however varies from a country to another. The control function by the judiciary is less relevant in some systems (e.g. Germany, the Netherlands, Hungary). In Germany for example, the investigatory or pre-trial procedure is formally in the hands of the state prosecution and the prosecutor has been referred to as the “master of the investigative phase”⁸⁴; judicial authorisation must generally be sought for the deployment of coercive investigative measures, but the judge has no power over the decision to prosecute.⁸⁵

In others, judges have a more extensive control (e.g. France and Italy). In France, the organisational structure of the pre-trial phase is determined by the nature of the offence. This means that different types of investigations may be carried out, resulting in different investigative powers allocated to the prosecutor and the investigating judge.⁸⁶ Authorisation from a third party, i.e. the *juge des libertés et de la détention* (judge of freedoms and detention), must be sought by the prosecutor to carry out measures that may affect personal

⁷⁹ Art 14 Loi n° 2017-258 du 28 février 2017 relative à la sécurité publique, JORF n°0051, 1 March 2017. The first paragraph reads: “Le procureur de la République de Paris, pour les procédures d'enquête ouvertes sur le fondement d'une ou de plusieurs infractions entrant dans le champ d'application de l'article 706-16 dont il s'est saisi, *peut communiquer aux services spécialisés de renseignement* mentionnés à l'article L. 811-2 du code de la sécurité intérieure, de sa propre initiative ou à la demande de ces services, copie des éléments de toute nature figurant dans ces procédures et nécessaires à l'exercice des missions de ces services en matière de prévention du terrorisme.”

⁸⁰ M. Jimeno-Bulnes, “The use of intelligence information in criminal procedure: A challenge to defence rights in the European and the Spanish panorama”, *New Journal of European Criminal Law*, Vol 8, Issue 2, 2017, pp. 171-191

⁸¹ Criminal Investigation Act [Esitutkintalaki] 22.7.2011/805, 2:2. See National report No 2 on Finland, Section on Evidence gathering and admissibility (point 16).

⁸² *Ibid*, 2:4.

⁸³ Such as the search of a reporter or a lawyer's office. See national report No 2 on Finland, Section on Other areas of concern (point 31).

⁸⁴ In practice, however, it is the police that undertakes investigations, for the most part acting on their own authority.

⁸⁵ National report No 2 on Germany, Section on evidence (point A(2))

⁸⁶ Generally speaking, the prosecutor is responsible for the investigation of minor offences, and the investigating judge retains power on the investigation of crimes. The prosecutor may also be involved in criminal investigation, however upon expiration of a certain time-limit, the case must be passed on to the investigating judge. See A. Ryan, *Towards a System of European Criminal Justice, The problem of admissibility of evidence*, New York/London: Routledge, 2014, pp. 137-138

liberty, such as search and seizures, interceptions of telecommunications and surveillance.⁸⁷ In Italy, the prosecutor is, in theory, in charge of the investigation. Similar to France, its margin for manoeuvre is however limited by the presence of two judges. The *giudice delle indagini preliminari* (judge for preliminary investigations) is in charge of overseeing the preliminary investigation and making decisions on any measures that restrict the liberty of the accused.⁸⁸ The *giudice dell'udienza preliminare* (preliminary hearing judge) takes a decision to send the case to trial.⁸⁹

The third approach devolves larger investigative competences to judges. In Spain, the investigation relies on a strongly decentralised and “sophisticated” jurisdictional structure that provides for a very strong role to the judiciary.⁹⁰ It involves the *juzgado de instrucción* (investigating judge) at the local level, and the *juzgado central de instrucción* (national investigating judge) and the *Audiencia Nacional* (high court) at the national level.⁹¹ Exceptionally, the prosecutor may open a limited and preliminary investigation. In the event coercive measures are needed, the prosecutor must nonetheless transfer the case to the investigating judge.⁹²

The above suggests that the degree of involvement of the judge is by no means even across the sample of MSs analysed. These three overarching groups are yet merely indicative. The fight against certain types of serious crime, such as terrorism, organised crime, and human trafficking, alongside the parallel development and refining of special investigation techniques,⁹³ may redefine the interplay between investigating authorities. Offences relating to these forms of crime often trigger the application of specific procedural rules for the investigation, with reduced judicial oversight.⁹⁴ In France, for example, more intrusive measures are used to investigate organised crime offences, and the CCP provides a less protective procedure.⁹⁵ In Italy, a specific investigation body made up of prosecutors, i.e. the Anti-Mafia District Directorate, was established in order to probe “Mafia cases”⁹⁶ as early as 1991. This latter structure is also in charge of conducting terrorist-related criminal investigations.⁹⁷

1.1.3. Special investigative measures and conditions for their use

The challenge of diversity among competent authorities to deal with investigative measures is heightened by differences among the types of investigative measures available at the national level, alongside the requirements conditioning their use. This has for instance been demonstrated by the comparative analyses carried out in the framework of the so-called “EU model rules of criminal investigation and prosecution for the EPPO”, a project coordinated by Katalin Ligeti of the University of Luxembourg.⁹⁸

Special investigative measures deserve particular attention.

⁸⁷ Ibid, p. 137

⁸⁸ Ibid, p. 190

⁸⁹ Ibid.

⁹⁰ Eurojust, Evaluation report on the sixth round of mutual evaluations: The practical implementation and operation of the Council Decision 2002/187/JHA of 28 February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime and of the Council Decision 2008/976/JHA on the European Judicial Network in criminal matters: Report on Spain, 23 September 2014, 11004/2/14, p. 11

⁹¹ Ibid, p. 13

⁹² Ibid.

⁹³ See typology developed by M. Wade, “Developing a Criminal Justice Area in the European Union”, study for the European Parliament, LIBE Committee, PE 493/043, 2014, p. 16

⁹⁴ F. Galli, “Terrorism”, in V. Mitsilegas, M. Bergström, T. Konstadinides, *Research Handbook on EU Criminal Law*, Cheltenham: Edgar Publishing, 2016, p. 418

⁹⁵ M. Kusak, *Mutual admissibility of evidence in criminal matters in the EU, A study of telephone tapping and house search*, Antwerp: Maklu, 2016, p. 211

⁹⁶ P. Maggio, “The EIO Proposal for a Directive and Mafia Trials: Striving for Balance Between Efficiency and Procedural Guarantees”, in S. Ruggieri (ed.), *Transnational Evidence and Multicultural Inquiries in Europe*, Cham: Springer International Publishing, 2014

⁹⁷ M. Gutheil, O. Liger, C. Möller, J. Eager, M. Henley, Y. Oviosu, “EU and member States’ policies and laws on persons suspected of terrorism-related crimes”, Study for the LIBE Committee of the European Parliament (PE 596.832), 2017

⁹⁸ K. Ligeti (ed.), *The Future of Prosecution in Europe*, Vol. 1, Oxford: Hart Publishing, 2013; K. Ligeti (ed.), *The Future of Prosecution in Europe*, Vol. 2, Oxford: Hart Publishing (forthcoming)

First, the availability of special investigative techniques is not the same across the Union. For recent forms of serious crime, such as cybercrime, the legislation of MSs does not always provide for adequate investigations. An illustration of this suggests that access and search for information in email accounts, some participants at a Eurojust meeting noted that they would proceed as if it were a regular search, whereas others would perceive it as an interception of communications.⁹⁹

Second, there is no common definition of the existing special investigative measures. In the field of covert operations, for example, no agreement exists as to what an undercover agent is, nor is there an exhaustive list of undercover operations.¹⁰⁰

Third, Member States have established their own “seriousness” thresholds with respect to the use of a given special investigative tool. The minimum punishable offence for which recourse to these special techniques is allowed differs. In Germany, interception of communications and, more particularly, the use of surveillance techniques in domestic premises is limited to the investigation of an exhaustive list of serious offences.¹⁰¹ In other countries, it is the sentence length of the offence for which surveillance techniques are deployed that is taken into consideration (e.g. Ireland, the Netherlands).¹⁰²

Fourth, as a result of the intrusive character of some investigative techniques and the possible breaches of fundamental rights they entail, resorting to these measures often requires a special authorisation, which is subject to varying lengths. In the case of interception of communications for example, a request must be filed either to judge or the prosecutor (e.g. Germany),¹⁰³ the investigating officer (e.g. Finland) or the investigating judge (e.g. Hungary, France, Italy, The Netherlands, Romania, Spain).¹⁰⁴ The length of authorisation varies significantly: from 15 days (e.g. France), 30 days (e.g. The Netherlands), 40 days (e.g. Italy), to 90 days (e.g. Germany, Hungary) and 120 days (e.g. Romania).¹⁰⁵

1.2. Impact of these differences on negotiations and the operation of cross-border cooperation

The existence of differences in the realm of investigative measures affects cross-border and mutual recognition instruments in several respects. First, in order to accommodate existing differences, a two-level flexibility was retained by the EU legislator (1.2.1.): by widening the types of authorities involved (judicial or non-judicial) (A) and by referring to national rules in crucial provisions (B). These solutions have nonetheless proved insufficient to enable the effective operation of some instruments, and delays, alongside incompatibilities, occurred (1.2.2.). The solutions put forward moreover raise fundamental rights concerns (1.2.3.).

1.2.1. Accommodating and circumventing differences: dual flexibility in EU instruments

A. Widening the types of competent authorities and judicial control: together but apart?

i) Widening the types of authorities involved ...

⁹⁹ Eurojust, Report of the Strategic Meeting on Cybercrime, 19-20 November 2014, p. 7

¹⁰⁰ Rand Europe, “Study on paving the way for future policy initiatives in the field of fight against organised crime: the effectiveness of specific criminal law measures targeting organised crime”, 2015, op. cit.

¹⁰¹ National report No 1 on Germany, Section on evidence (point IV)

¹⁰² Rand Europe, Study on paving the way for future policy initiatives in the field of fight against organised crime: the effectiveness of specific criminal law measures targeting organised crime, op. cit., 2015, p. 255.

Retrieved at: https://ec.europa.eu/home-affairs/sites/homeaffairs/files/e-library/docs/20150312_1_amoc_report_020315_0_220_part_2_en.pdf

¹⁰³ In Germany actually, a judge must authorise most of the investigative measures.

A prosecutor may authorise interceptions of communications only in urgent cases. See National report No 2 on Germany, Section on evidence gathering and admissibility (point C(2))

¹⁰⁴ Rand Europe, Study on paving the way for future policy initiatives in the field of fight against organised crime: the effectiveness of specific criminal law measures targeting organised crime

¹⁰⁵ Ibid, p. 256.

The variety of authorities involved in investigations at the national level, ranging from judicial bodies to administrative and law enforcement actors, raise the question of the compatibility of these different actors in cross-border proceedings. Besides, judicial authorities is not a univocal concept either, and both prosecutors and judges can be involved in investigations.

In EU instruments dealing with investigations, significant flexibility was retained regarding the authorities involved in the issuing and execution of investigation requests, in order to accommodate national differences among Member States. 'Judicial' cooperation in investigation matters is not limited to cooperation among "judicial authorities",¹⁰⁶ and includes a range of other national actors.¹⁰⁷

The nature of actors involved in transnational investigations was broadened overtime. The original 1959 MLA Convention referred to "judicial authorities" as the competent actors of cooperation.¹⁰⁸ Cooperation under the EU framework significantly enlarged the number and types of competent authorities. The Convention Implementing the Schengen Agreement (CISA) and the 2000 EU MLA Convention included administrative authorities among the competent actors in cross-border cooperation, on condition that the decisions taken by administrative authorities could give rise to proceedings before a court having jurisdiction in criminal matters.¹⁰⁹ The shift to mutual recognition further refined the nature of authorities involved. The Freezing Orders FD and the EIO Directive distinguish between the nature of authorities competent to *issue* assistance requests, and those in charge of *executing* orders. The EIO Directive moreover introduced the possibility for the defence to request the issuing of an EIO if it is provided under national law.¹¹⁰ As regards the issuing stage, non-judicial authorities are competent to issue freezing orders¹¹¹ or investigation orders,¹¹² upon validation by a judicial authority. As regards the executing stage, FD Freezing Orders simply refers to "executing State" for the execution of freezing orders.¹¹³ The EIO Directive makes a first-ever attempt at defining the nature of an executing authority. Thus, an executing authority within the meaning of Art 2(d) is "an authority having competence to recognise an EIO and ensure its execution in accordance with this Directive and the procedures applicable in a similar domestic case. Such procedures may require a court authorisation in the executing State where provided by its national law." Thus, flexibility was retained as regards the nature of the executing authority, however its competence is restricted by a certain degree of judicial control.

Evolution of the types of authorities involved

	1959 Convention	1990 CISA	2000 EU MLA Convention	2003 FD Freezing Orders	2014 EIO Directive	2018 E-Evidence Proposal
Requesting / issuing	Judicial authorities	Judicial authorities + Administrative authorities where the decision can give rise to criminal proceedings	Judicial authorities + Administrative authorities where the decision can give rise to criminal proceedings	Judicial authorities + Non-judicial authorities competent upon validation by judicial authorities	Judicial authorities + Non-judicial authorities competent upon validation by judicial authorities	A court or a judge (production order) A court, a judge or a prosecutor (preservation order)

¹⁰⁶ The fight against criminality now includes administrative, law enforcement, and judicial authorities, for example. G. Vermeulen et al, *Rethinking International Cooperation in Criminal Matters*, 2012, op. cit., p. 94

¹⁰⁷ See typology of mutual recognition instruments developed by G. Vermeulen et al, *Rethinking International Cooperation in Criminal Matters*, 2012, op. cit., p. 67; as well as the detailed breakdown of the nature of competent authorities appointed to deal with each MR instrument, on pp. 70-71

¹⁰⁸ Art 1(1) Council of Europe Convention on Mutual Assistance in Criminal Matters, Strasbourg, 20 April 1959

¹⁰⁹ Art 49 Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, OJ L 239, 22 September, 2000 and Art 3(1) 2000 EU MLA Convention respectively.

¹¹⁰ Art 1(3) EIO Directive

¹¹¹ Art 2(a) FD 2003/577/JHA

¹¹² Art 2(c)(ii) Directive 2014/41/EU

¹¹³ Art 2(b) FD 2003/577/JHA

					+ The defence may request an EIO if national law allows	
Requested / executing	-	-	-	-	Competent authority in the executing State. Execution procedures may require a court authorisation.	"Addressees", i.e. service providers

It is worth mentioning that a similarly flexible approach was applied to other EU instruments outside the investigation domain.¹¹⁴ These include the mutual recognition of financial penalties,¹¹⁵ probation orders and alternatives to detention,¹¹⁶ and supervision orders.¹¹⁷ Other cross-border cooperation instruments retained similar flexibility, such as in the realm of criminal records¹¹⁸ and conflicts of jurisdiction.¹¹⁹

Other instruments do not retain such flexibility, as evidenced by the Framework Decision on the European Arrest Warrant which limits the relevant cooperation mechanisms to "judicial authorities" only. Under Art 1(1) FD EAW, the European Arrest Warrant constitutes a "judicial decision",¹²⁰ that only "judicial authorities"¹²¹ are competent to issue.¹²² The specificities of surrender procedures account for this particular status. Surrender involves the "deprivation, temporary or otherwise, of liberty," as well as "the analysis of proportionality before the EAW is granted."¹²³ Thus, the execution of an EAW must be subject to sufficient controls at various stages of the surrender procedure,¹²⁴ and the authorities competent to issue EAWs cannot be other than judicial.¹²⁵ The shift of *modus operandi* from "inter-ministerial" cooperation in the early days of extradition treaties from judge-to-judge cooperation under FD EAW, was more far-reaching, compared with the realm of transnational investigations, where cooperation between judicial authorities already occurred, notably through the role of the judge in authorising the use of coercive investigative measures.

¹¹⁴ See Annex 1 for a summary of the findings.

¹¹⁵ Art 1(a) Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties. The remainder of the text only refers to "authorities" without specifying further.¹¹⁵ For example, authorities other than judicial ones can communicate extracts and information relating to judicial records. See Art 13(1) 1959 CoE Convention.

¹¹⁶ Art 3(2) Council Framework Decision 2008/947/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions

¹¹⁷ The rule is that judicial authorities are competent to issue and execute ESOs. However, Member States, as an exception, may also designate non-judicial authorities as competent to take decisions. If a decision is taken by a judicial authority which is not a court on either the modification of obligations contained in the probation measure, or the suspension/revocation of the measure, such decision may be reviewed by a court or by another independent court-like body. See Art 6 FD ESO.

¹¹⁸ Art 3(1) Council Framework Decision 2009/315/JHA of 26 February 2009 on the organisation and content of the exchange of information extracted from the criminal record between Member States

¹¹⁹ Recital 6, Art 4(1) FD Conflicts of Jurisdiction read that Member States should have the discretion to designate "competent authorities."

¹²⁰ Art 1(1) FD EAW.

¹²¹ Art 6(1) FD EAW. See also C-452/16, *Poltorak*, 10 November 2016, para 28.

¹²² See *infra*.

¹²³ Opinion of Advocate General Campos Sánchez-Bordona delivered on 19 October 2016 on C-452/16, *Poltorak*, para 38.

¹²⁴ Recital 8 FD EAW.

¹²⁵ See C-452/16, *Poltorak*, 2016, op. cit. para 40 and 44: "Action by a judicial authority is required at other stages of the surrender procedure, such as hearing the requested person, deciding to keep him in detention, or deciding on his temporary transfer ... Therefore, the principle of mutual recognition, enshrined in Article 1(2) of the Framework Decision, pursuant to which the executing judicial authority is required to execute the arrest warrant issued by the issuing judicial authority, is founded on the premise that a judicial authority has intervened prior to the execution of the European arrest warrant, for the purposes of exercising its review." Whereas the *Poltorak* ruling does not explicitly put into comparative perspective the fields of surrender and cross-border investigation, the explanation put forward by the Court and its AG can be seen as an indirect justification for the different levels of flexibility retained in MR instruments.

Three other FDs limit the scope of cooperation to a decision issued by a court. They comprise those dealing with the mutual recognition of confiscation orders,¹²⁶ convictions,¹²⁷ and transfers of prisoners.¹²⁸

It is interesting to note that the inclusion of administrative components into criminal investigations is not a one-way street. The reverse trend can also be observed. The scope of Mutual Administrative Assistance (MAA) conventions¹²⁹ relating, for example, to cooperation on tax and customs matters, has been broadened to include the early stages of criminal investigations, and references to the purposes of preventing, investigating and even prosecuting fraud in the EU can be discerned in administrative instruments dealing with the protection of EU financial interests.¹³⁰

ii) ... but extending judicial control...

The broadening of the number and types of actors involved in transnational investigations does not mean that the actions of administrative authorities are not subject to a certain degree of control. The widening of cooperation in recent instruments was accompanied by stronger emphasis placed on the degree of scrutiny exercised by the judiciary on non-judicial authorities.

Another, and arguably more relevant, case in point is the absence of definition of an executing authority in MR instruments. In comparison, the EIO Directive heralds a positive shift towards the introduction of a degree of judicial control.¹³¹

Interestingly, the Commission's E-Evidence Regulation Proposal also goes in the direction of enhanced judicial control with regard to issuing authorities. The latter provides that a judicial authority must always be involved in decision-making process underpinning assistance requests, either as an issuing, or a validating authority.¹³² Moreover, the proposed regulation re-establishes the distinction between the level of control guaranteed by a court or a judge and the level of control guaranteed by a prosecutor. For example, the issuing of a Production Order for the transfer of "transactional and content data", which generally requires higher standards,¹³³ cannot be consented to by a judicial authority other than a judge or a court. As regards less sensitive data, such as subscriber or access data, production orders can be

¹²⁶ Art 2(a) Council Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders

¹²⁷ Art 2 Council Framework Decision 2008/675/JHA on taking account of convictions in the Member States of the European Union in the course of new criminal proceedings

¹²⁸ Art 2 Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union

¹²⁹ See for example Regulation 904/2010 of 7 October 2010 on administrative cooperation and combating fraud in the field of value added tax, 12 October 2010, p. 1. See M. Luchtman, "Inter-state cooperation at the interface between administrative and criminal law", in A. Weyembergh, F. Galli (eds), *Do labels still matters? Blurring boundaries between the administrative and criminal law: the role of the EU*, 2014, op. cit., p. 198

¹³⁰ M. Luchtman, "Inter-state cooperation at the interface between administrative and criminal law", in A. Weyembergh, F. Galli (eds), *Do labels still matters? Blurring boundaries between the administrative and criminal law: the role of the EU*, 2014, op. cit., p. 199. Mutual assistance in administrative matters has evolved in parallel to its criminal law counterpart, i.e. the MLA system. For an analysis of the evolution of MAA, see K. Ligeti, M. Simonello, Multidisciplinary investigations into offences, in Galli & Weyembergh 2014, op. cit., p. 189. For an example of such "reverse trend", see Art 1 of the Convention drawn up on the basis of Article K.3 of the Treaty on European Union, on mutual assistance and cooperation between customs administrations OJ C 024 , 23 January 1998

¹³¹ Interestingly, a reverse phenomenon can be observed in FD EAW. The latter limits cross-border cooperation between judicial authorities, however it does not contain any provision on judicial control. By contrast, the number of actors involved in cross-border investigations is much wider, but requirements on judicial control have been included. This is despite the fact that many debates were held on judicial control in the run-up to the adoption of FD EAW. A. Weyembergh, Transverse report on judicial control in cooperation in criminal matters: The evolution from traditional judicial cooperation to mutual recognition, in Ligeti (ed) 2013, op. cit., p. 968

¹³² Art 4, European Commission, Proposal for a Regulation on European Production and Preservation Orders for electronic evidence in criminal matters, COM(2018) 225 final, 17 April 2018

¹³³ Art 4(2) E-Evidence Regulation Proposal. Such as proving probable cause, i.e. the connection between the criminal activity and the account, and data minimisation procedures, i.e. the review of what is relevant to the offence and can be forwarded to the requesting country). European Commission, Impact Assessment accompanying the Proposal for a Regulation on European Production and Preservation Orders for electronic evidence in criminal matters and Proposal for a Directive laying down harmonised rules on the appointment of legal representatives for the purpose of gathering evidence in criminal proceedings, SWD(2018) 118 final, 17 April 2018, p. 26

issued by a prosecutor.¹³⁴ The reason for this distinction is that the level of judicial control exerted by a prosecutor is certainly not the same as the one exerted by a court or a judge. The latter are considered as a judicial authority in the strict sense of the term,¹³⁵ and offer the best guarantees of independence, impartiality and proper procedure.¹³⁶ These questions lied at the heart of the *Assange* case on extradition/surrender, where the execution of the EAW issued by Sweden was contested on the grounds that it had been issued by a prosecuting authority. According to Assange's lawyers, a 'prosecutor' did not fall under the 'judicial authority' category within the meaning of Article 3 FD EAW.¹³⁷ In spite of this, the British High Court embraced in its final judgment the broad meaning conferred to the notion of "judicial authority" by FD EAW.¹³⁸ The Irish High Court addressed similar issues with regard to an EAW issued by the Dutch prosecuting authority, and upheld the approach taken by its British counterpart.¹³⁹

Supranational instruments deliberately sought to play down the importance of this question, by equating judges and public prosecutors.¹⁴⁰ This approach was endorsed by the Court of Justice in a line of case law on surrender procedures. In *Poltorak*,¹⁴¹ the CJEU affirmed that the term 'judicial authority' is not limited to judges or courts but may extend to the authorities required to participate in administering justice in the legal system concerned,¹⁴² such as the national public prosecutor.¹⁴³ This approach was maintained and further refined in subsequent case law.¹⁴⁴

iii) ... yet in an inconsistent way: the E-Evidence Proposal

The EIO establishes a degree of judicial control over the execution of assistance requests, if national law so requires. By contrast, the E-Evidence Proposal, which acts as a complementary tool to the EIO Directive, seems to go a step backwards. The proposed regulation reads that the responsibility to ensure that assistance requests do not encroach upon fundamental rights is deferred to service providers, i.e. "the addressee."¹⁴⁵ Addressees are responsible for determining whether one of the several grounds for refusal to the execution of a Production and Preservation Orders applies. On the one hand, the weakening of the degree of judicial control at the executing stage is dictated by practical and effectiveness considerations.¹⁴⁶ On the other hand, concerns were expressed that the Proposal would be "putting companies at the same level as a court or a state", whereas companies do not have legal obligations similar to those of States to respect and defend

¹³⁴ Art 4(1) E-Evidence Regulation Proposal.

¹³⁵ G. Vermeulen et al, *Rethinking International Cooperation in Criminal Matters*, 2012, op. cit.

¹³⁶ ECtHR, *Klass a.o.*, Application no. 5029/71, Judgement of 6 September 1978, paras 55 and 56.

¹³⁷ They further noted that "in the context of 'a judicial authority' the more appropriate meanings are: 'having the function of judgment; invested with authority to judge causes'; a public prosecutor would not happily fall within this meaning." *Assange v The Swedish Prosecution Authority* [2012] UKSC 22, para 17.

¹³⁸ *Ibid*, para 79. It noted that, in most EU states, a court is involved in the process leading to the issuing of an EAW. Thus, a narrow interpretation of the terms "issuing judicial authority" would result in "a large proportion of EAWs being held ineffective (in the UK), notwithstanding their foundation on an antecedent judicial process."

¹³⁹ *Minister for Justice Equality and Law Reform v. McArdle & Brunell* [2015] IESC 56, 25th June 2015. It was noted that variations exist in the structure and composition of judicial systems in the MSs, and in many countries the public prosecutor is an integral part of the judicial structure or judicial corps. Moreover, the 1957 CoE Convention on extradition indicated that a public prosecutor could fall within the concept of judicial authority. National report No 1 on Ireland, Section on Presumption of Confidence in the Authorities of other Member States (point 5.2.)

¹⁴⁰ F. Gascon Inchausti, Report on Spain, in S. Ruggeri (ed), *Transnational Inquiries and the Protection of Fundamental Rights in Criminal Proceedings*, Heidelberg: Springer, 2014, p. 493

¹⁴¹ C-452/16, *Poltorak*, 10 November 2016, para 32

¹⁴² *Ibid*, para 33.

¹⁴³ C-486/14, *Kossowski*, 29 June 2016, para 39

¹⁴⁴ The Court however excluded ministries of justice and other government organs and police authorities from the definition of judicial authorities. It ruled that administrative and police authorities pertained to the province of the executive and, pursuant to the principle of the separation of powers that characterises the operation of the rule of law, they cannot be covered by the term judiciary. See C-477/16 PPU, *Kovalkovas*, 10 November 2016, and C-452/16, *Poltorak*, 10 November 2016, para 35. It limited their role to providing practical and administrative assistance to the competent judicial authorities, under para 42. See also C-453/16 PPU, *Özçelik*, 10 November 2016

¹⁴⁵ Art 14(4) E-Evidence Proposal.

¹⁴⁶ In many cases, the defence will have little access to the service provider, for example if the investigation is carried out without his/her knowledge, or the service provider is located outside the EU.

people's fundamental rights.¹⁴⁷ It seems that the aforementioned strengthening of judicial control at the issuing stage was meant to compensate for the absence of control at the executing stage. However, the current proposal only provides a possibility for the suspect or accused person to challenge the decision to issue a Production or a Preservation Order in the issuing State.¹⁴⁸ This means that the recognition and execution of the request by the service provider cannot be challenged by the person whose data is at stake.

These concerns are heightened by the absence of clear-cut criteria on which service providers should rely on to perform their assessment. As regards fundamental rights in particular, a service provider may oppose an order if it "manifestly violates" the provisions of the Charter, or if it is "manifestly abusive."¹⁴⁹ It is not entirely clear what a "manifest" violation of the Charter or a "manifest" abuse entail.¹⁵⁰ This approach seems to contradict the obligation of clarity and precision in EU legislation required by the CJEU's jurisprudence,¹⁵¹ an obligation that is yet essential to allow the individuals concerned to enjoy sufficient guarantees that their data will be effectively protected against risks of abuse and unlawful access and use.¹⁵²

Considerations of a more practical nature raise further concerns over the due process of requests and legal foreseeability.¹⁵³ The extent to which possible "manifest" fundamental rights concerns will be taken into account in the processing of Production and Preservation Orders may vary from a service provider to another; the broad scope of the Proposal, covering *any* criminal offence, carries the risk of swamping service providers with requests, despite the fact that many of them do not have their own legal departments to conduct these assessments.¹⁵⁴ Processing requests from law enforcement authorities will moreover entail significant costs, especially for small and medium enterprises, however provisions on financial help fail to properly address these legitimate concerns.¹⁵⁵ Besides, the six-hour deadline envisaged for processing emergency requests from law enforcement authorities sheds further doubts on the ability of service providers to conduct a review that ensures adequate protection of individuals' rights.¹⁵⁶

Another two problems arise.

Emphasis placed by the E-Evidence Regulation Proposal on judicial control at the issuing phase, alongside the boundary drawn between prosecutors on the one hand, and judicial authorities *stricto sensu* (i.e. judges and courts) on the other hand, are both welcome developments. Nonetheless, the criterion used to justify this distinction, i.e. between "sensitive" transactional and content data and "less sensitive" subscriber and access data, is not without raising concerns. The Court made clear that metadata was just as sensitive as

¹⁴⁷ European Digital Rights, EU "e-evidence » proposals turn service providers into judicial authorities, 16 April 2018. Retrieved at: <https://edri.org/eu-e-evidence-proposals-turn-service-providers-into-judicial-authorities/>

¹⁴⁸ Art 17(1) E-Evidence Proposal.

¹⁴⁹ Art 14(4)(f) E-Evidence Proposal.

¹⁵⁰ Similar criticism has been formulated as regards the broad wording of the fundamental rights ground for refusal in the EIO Directive. According to the Fundamental Rights Agency, the introduction of a fundamental rights-based ground of refusal "should ideally be complemented by explicit parameters. Such parameters could limit the refusal ground to circumstances where an EU Member State has a well-founded fear that the execution of an EIO would lead to a violation of fundamental rights of the individual concerned. In this way a fundamental rights-based refusal ground could serve as a safety-valve, facilitating EU Member State's compliance with fundamental rights obligations owing from EU primary law without Member States having to deviate from EU secondary law." Fundamental Rights Agency, Opinion on the draft Directive regarding the European Investigation Order, 14 February 2011, p. 11

¹⁵¹ In *Digital Rights Ireland Ltd and Tele2*, the Court said that EU legislation on data retention must be subject to "clear and precise rules."

¹⁵² C-362/14, *Schrems*, 6 October 2015, para 91

¹⁵³ EuroISPA, E-Evidence Proposal: EuroISPA Criticises the Privatisation of Law Enforcement, Press release, Brussels, 17 April 2018. Retrieved at: <http://www.euroispa.org/e-evidence-proposal-euroispa-criticises-privatisation-law-enforcement/>

¹⁵⁴ See analysis by E. Kyriakides, Digital Free for All, Part Deux: European Commission Proposal on E-Evidence, 17 May 2018. Retrieved at: <https://www.justsecurity.org/56408/digital-free-part-deux-european-commission-proposal-e-evidence/>

¹⁵⁵ Reimbursement of costs may be claimed before the competent authorities of the issuing State, provided that such possibility is foreseen under national law. See Art 12 E-Evidence Proposal.

¹⁵⁶ Art 9(2) E-Evidence Proposal. See also E. Kyriakides, Digital Free for All, Part Deux: European Commission Proposal on E-Evidence, 17 May 2018. Retrieved at: <https://www.justsecurity.org/56408/digital-free-part-deux-european-commission-proposal-e-evidence/>

communications contents, because it may allow “very precise conclusions to be drawn concerning the private lives of the persons.”¹⁵⁷ Besides, in many Member States, a court order is required to gather metadata.¹⁵⁸

Resorting to authorities other than judicial in MR instruments dealing with cross-border investigations sometimes create legality issues, due to compatibility concerns with the focus on judicial cooperation of the legal basis of Art 82(1) TFEU. The same criticism has been addressed to the European Commission in the inception impact assessment preceding the E-Evidence Proposal. Doubts were expressed as regards the adequacy of the legal basis chosen, i.e. Art 82(1) TFEU, while the Proposal envisages cooperation with service providers, to whom Production and Preservation Orders are addressed.¹⁵⁹ Although the issues at stake differ to some extent and the reasoning of the Court in one cannot be fully transposed to the other, some have drawn a parallel with the compatibility issues that arose in Case 1/15 on the EU-Canada PNR agreement.¹⁶⁰ There, the Court ruled that the involvement of non-judicial authorities questioned the legality of Art 82(1) as the appropriate legal basis for concluding such an agreement, and the envisaged text did not really seem to contribute to facilitating cooperation between judicial authorities.¹⁶¹

B. (Over)reliance on national law: the case of EIO and EPPO

The EU legislator circumvented national diversity by referring extensively to national law. Reliance on national law could especially be identified in the initial proposals on the EIO and EPPO and was significantly strengthened in the course of the four-year long negotiations.¹⁶²

First, national differences on the role devoted to judicial authorities in investigations could not be reconciled during the EPPO negotiations. Somehow, this accounts for the clear preference of some MSs for a collegial structure, which does not require any changes in the organisation of powers between judicial authorities at the national level. The clear preference of France and Germany for the “collegiate model” is well known, and the Franco-German position was made public even before the release of the Commission’s proposal.¹⁶³ But the creation of single prosecution office was eyed critically in other countries as well. For example, the leading role of the prosecutor in the conduct of investigations was seen as highly contentious during the negotiations by Finland, where the police takes centre stage in investigative activities.¹⁶⁴ The Finnish Legal Affairs committee insisted that the regulation should be compatible with their national system without requiring Finland to change its legislation.¹⁶⁵ Even more relevant is the clear opposition of Hungary to the EC proposal of 2013. Together with other members of the Visegrad Group, it issued the Sopot Declaration of Prosecutors General on 15 May 2015, thus promoting the so-called “Network Model”, that relied more heavily on national institutions and legal systems.¹⁶⁶ Hungary has still not opted in the EPPO Regulation.¹⁶⁷

Absence of consensus dealt a blow to the original ambitions of a “single investigation office” put forward in the 2013 proposal.¹⁶⁸ Instead, a highly decentralised system with a collegiate structure and ‘double hatted’ European Delegated prosecutors endowed with both national

¹⁵⁷ Joined Cases C-293/12 and C-594/12, *Digital Rights Ireland Ltd*, paras 26-27; Joined Cases C-203/15 and C-698/15, *Tele2 Sverige AB*, 21 December 2016, paras 98-99

¹⁵⁸ Eurojust, Report of the Strategic Meeting on Cybercrime, 19-20 November 2014, p. 6

¹⁵⁹ Statement of the Article 29 Working Party, Data protection and privacy aspects of cross-border access to electronic evidence, Brussels, 19 November 2017, p. 1

¹⁶⁰ *Ibid.*

¹⁶¹ Opinion 1/15 of the Court on the EU-Canada PNR agreement, delivered on 26 July 2017.

¹⁶² From 2010 to 2014 with regard to the EIO (and twelve trilogues), and from 2013 to 2017 for the EPPO.

¹⁶³ Common Position of the Ministers of Justice of France and Germany on the European Public Prosecutor Office (current as of 4th of March 2013).

¹⁶⁴ National report No 2 on Finland, Section Other areas of concern (point 31).

¹⁶⁵ *Ibid.*

¹⁶⁶ National report No 2 on Hungary, Section on Other areas of concern (point 31).

¹⁶⁷ *Ibid.*

¹⁶⁸ K. Ligeti, A. Marletta, The European Public Prosecutor’s Office: what role for OLAF in the future? In Z. Durdevic, E. Ivcevic Karas, *European Criminal Procedure Law in Service of Protection of European Union Financial Interests: State of play and Challenges*, Croatian Association of European Criminal Law, 2016, p. 61.

and European functions was created.¹⁶⁹ The competence of the EPPO to investigate PIF offences is moreover shared with the Member States, and the EPPO will have to rely on national law in the conduct of the investigation. It was believed that shifting from a centralized to a decentralized office would accommodate the different legal systems which “still vary to a considerable degree, and it is clear that only a prosecutor with his or her background in a given legal system will be able to know exactly what actions are most appropriate and efficient in that given state.”¹⁷⁰

Second, difficulties were encountered during EPPO and EIO negotiations to agree on a common set of measures that should be available in all Member States during cross-border investigations.

As regards the EIO Directive, Art 10(2) stipulates that a list of five investigative measures must be available in the Member States. This stands in contrast with the list of ten measures contained in the Council's original approach of 2011.¹⁷¹ Given the limited list of investigative techniques that must be available at the national level, cooperation could easily be hampered if a MS wishes to rely on another technique than those provided under the EIO Directive. The non-availability of a requested investigative measure in a similar domestic case in the executing State could indeed trigger recourse to a different investigative measure¹⁷² or even ground a refusal.¹⁷³ The case occurred in France, where the execution of an EIO issued to Belgium requesting geo-tracking more than a year after the facts was refused because the Belgian procedural criminal law does not provide for such possibility.¹⁷⁴ In a similar fashion, the list of 21 investigative measures put forward by the Commission in its 2013 proposal on the EPPO was shortened to six. Whereas some Member States were in favour of the inclusion of a list of investigation measures in the Regulation, others disagreed, and preferred that national law applied in this regard. A third group advocated for the inclusion of several lists covering more or less intrusive measures.¹⁷⁵ As a result, the list of evidence-gathering acts available in the EC proposal of 2013 was significantly altered and only the six most intrusive measures, to be ordered to investigate criminal offences punishable with a four-year imprisonment term at a minimum,¹⁷⁶ were kept. Besides, the use of some investigative measures may be subject to further restrictions. The use of interceptions of electronic communications and track and trace may be limited to “specific serious offences.”¹⁷⁷ Reference to national law was inserted to conform to the provisions of German law according to which, as seen above, the use of the aforementioned investigative measures is restricted to an exhaustive catalogue of offences. Similar concerns were formulated by the Finnish

¹⁶⁹ Under Article 13(3) Regulation 2017/1939, European Delegated Prosecutors “may also exercise functions as national prosecutors, to the extent that this does not prevent them from fulfilling their obligations under this Regulation.” The implementation of the ‘double-hat’ system is nonetheless seen problematic in Member States. The juxtaposition of a supranational prosecutorial function carries a risk of encroachment with the principle of independence, thus creating difficulties for prosecutors, when performing their national functions, to meet their obligations vis-à-vis their respective hierarchy. Some member States have therefore considered the possibility to create a special status for prosecutors endowed with supranational investigating powers.

¹⁷⁰ Intervention of Ivan Korčok, President-in-Office of the Council during the debate of the European Parliament of 4 October 2016.

Retrieved at: <http://www.europarl.europa.eu/sides/getDoc.do?type=CRE&reference=20161004&secondRef=TOC&language=en>

¹⁷¹ Art 10(2) Directive 2014/41/EU. See Council of the EU, text agreed as general approach to the initiative for a Directive of the European Parliament and of the Council regarding the European Investigation Order, 2010/0817, 21 December 2011.

¹⁷² Art 10(1)(b) Directive 2014/41/EU

¹⁷³ Art 11(1)(h) Directive 2014/41/EU

¹⁷⁴ National report No 2 on France, Section on evidence-gathering and admissibility (point C).

¹⁷⁵ Council of the EU, Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office – Discussion paper, 10859/14, Brussels, 11 June 2014

¹⁷⁶ The European Commission decided to drop the measures that were least intrusive and available in most of the Member States. See Article 30(1) Regulation 2017/1939. European Delegated Prosecutors are nonetheless entitled to request or order any other measures in their Member State that are available to prosecutors under national law in similar cases.

¹⁷⁷ Art 30(3) Regulation 1939/2017.

authorities during the negotiations, for whom the original EPPO proposal would have required broadening the scope of certain coercive measures.¹⁷⁸

Third, differences in the legal conditions governing investigative measures led the EU legislator to condition their deployment to a number of national requirements. In the absence of a “Community judge of freedoms”,¹⁷⁹ the use of a particular investigative measure is made conditional upon obtaining judicial authorisation from national courts. In the EPPO, authorisation will be compulsory in two types of circumstances: if it is a requirement under the law of the State where the investigation is being carried out, or if the law of the European Delegated Prosecutor in charge of initiating the investigation so requires.¹⁸⁰ A similar result has been achieved in the EIO, where the execution of an investigation order is subject to the procedures applicable in a similar domestic case, which may require a court authorisation as provided under national law.¹⁸¹

Judicial control is certainly necessary when it comes to the preservation of individuals’ rights. For the EPPO, the requirement of national judicial authorisation can nonetheless be problematic from the perspective of effectiveness. Bearing in mind the wide variations between delays for authorisation, differences in the authority in charge of granting authorisations, as well as the absence of time-limits imposed on the national authorities to give their consent, the start of investigations may be seriously deferred. A related concern is the absence of mutual recognition of *ex ante* authorisations, for example in the form of a requirement on national judicial authorities to *mutually* recognise the authorisation already obtained in another Member State.¹⁸² This means that authorisations from every single national authority where the EPPO wants to trigger coercive measures will be needed.¹⁸³ The authorisation procedure is reminiscent of the mutual legal assistance system.¹⁸⁴ It is doubtful that it will allow the EPPO to meet the efficiency and speediness requirements associated to an ongoing criminal investigation.¹⁸⁵

1.2.2. Obstacles in practice: the difficult interoperability of investigation systems

A. Coping with a multiplicity of authorities: administrative v criminal justice actors

Despite the two-level flexibility retained in EU instruments, the challenge of reconciling multiple authorities proved difficult to overcome at the practical level of cooperation.

The coexistence of administrative and criminal law actors in criminal investigations has raised compatibility concerns.

Issues have occurred when an investigation dealt with under the administrative channel in one Member State is conducted by criminal law authorities in other Member States. Examples of this could be identified regarding cross-border investigations of minor offences between Spain and Germany. The German legal order introduced the category of *Ordnungswidrigkeiten* to designate violations of a minor nature which do not qualify as criminal and are punishable with a financial penalty (*Buße*) imposed by an administrative authority. Despite the administrative nature of the proceedings, the accused person

¹⁷⁸ National report No 2 on Finland, Section on Other areas of concern (point 31).

¹⁷⁹ As noted by the Commission in 2001, this solution would effectively generate an obligation to enact a full body of common European legislation governing investigations, applying to searches, seizures, interceptions of communications, subpoenas, arrest, judicial review, preventive custody, and so on. See European Commission, Green Paper on criminal-law protection of the financial interests of the Community and the establishment of a European Prosecutor, COM (2001) 715 final, 2001, p. 60

¹⁸⁰ Art 31(2) and (3) Regulation 2017/1939. See also L. Kuhl, “Cooperation between Administrative Authorities in Transnational Multi-Agency Investigations in the EU: Still a Long Road Ahead to Mutual Recognition”, in K. Ligeti and V. Franssen (eds.), *Challenges in the Field of Economic and Financial Crime in Europe and the US*, 2017, p. 139

¹⁸¹ Art 2(d) Directive 2014/41/EU

¹⁸² It is somehow logical in the absence of harmonisation of evidentiary rules.

¹⁸³ M. Luchtman, J. Vervaele, European Agencies for Criminal Justice and Shared Enforcement (Eurojust and the European Public Prosecutor’s Office), *Utrecht Law Review*, Vol 10, Issue 5, 2014, p. 140

¹⁸⁴ L. Kuhl, 2017, op. cit., p. 139

¹⁸⁵ A. Venegoni, The New Frontier of PFI Investigations, the EPPO and Its Relationship with OLAF, *eucri*, Issue 4, 2017, pp. 193-196

nonetheless has a right of appeal to the ordinary courts.¹⁸⁶ The German solution is illustrative of the “depenalisation process” of minor offences undertaken in many other EU countries, because those violations are not relevant enough to be addressed by criminal law.¹⁸⁷ This classification is yet not mirrored in Spain, and MLA requests have to be executed by the judicial authorities of the Spanish investigation system, thus resulting in the allocation of substantial resources to yet trivial offences.¹⁸⁸

Other, more specific concerns arise from the involvement of intelligence services, alongside law enforcement bodies, in criminal investigations. As noted earlier, the degree of involvement of intelligence authorities in criminal investigations among the Member States examined is by no means uniform. Thus, the degree of acceptance of intelligence involvement differs, thereby generating tensions when the two are co-involved in multidisciplinary cross-border investigations. Frictions are exacerbated by the fact that, unlike law enforcement, where the competence of the Member States is shared with that of the EU, intelligence services are regulated at the sole national level. Pursuant to Art 4(2) TEU, national security remains a competence of the Member States. This means that national laws governing information-sharing with other countries, or the use of intelligence evidence in criminal proceedings, continue to apply, even when investigative activities are carried out within EU cooperation frameworks. As a result, incompatibilities between national regimes exist at various levels of cooperation and have permeated the functioning of several EU assistance mechanisms.

Under the MLA system of evidence gathering, German authorities eyed critically requests coming from the police forces of other countries, as they would perceive MLA as a procedure involving exclusively judicial bodies.¹⁸⁹ Requests did not necessarily turn out unsuccessful, however German authorities would make further inquiries to the requesting State, for example by requesting the involvement of a prosecution service or another judicial authority in the formal issuing of a MLA request.¹⁹⁰ Still now, the increasingly porous boundary between police and intelligence services¹⁹¹ in other EU States may become an issue under German law, if intelligence services were to be involved in criminal proceedings, as it is often the case in the UK and Austria.¹⁹²

The hybrid nature of the authorities involved, together with the different types of data that may be gathered, also affect the functioning of loosely institutionalised EU frameworks designed to facilitate the conduct of multidisciplinary investigations. The Financial Intelligence Units (FIUs), established at the level of MSs to fight against terrorist financing and money laundering, are a case in point. In order for FIUs to fulfil their objective, the Council Decision on FIUs establishes a requirement of “multidisciplinarity” of information and resources.¹⁹³ The units should have the capacity to have access to the “financial”, “administrative” and “law enforcement” information that they require “to fulfil their tasks properly,”¹⁹⁴ without a third party authorisation. However, due to the cross-nature of information, different types of access to data is provided, and formalities and procedures to exchange information differ from a type of data to another. Law enforcement FIUs, for example, will have easier access

¹⁸⁶ See definition provided by the European Committee on Crime Problems (CDPC). CDPC, Legal assistance in criminal, administrative and civil proceedings related to the liability of legal persons and non-conviction based confiscation, PC-OC Mod (2014) 08, Strasbourg, 7 October 2014, p. 3.

¹⁸⁷ In Italy and the Netherlands for example. See O. Jansen, *Administrative sanctions in the European Union*, Antwerpen: Intersentia, 2013.

¹⁸⁸ National report No 2 on Spain, Section on evidence gathering and admissibility (point 16).

¹⁸⁹ National report No 2 on Germany, Section on Other areas of concern (point C(4)(c)).

¹⁹⁰ *Ibid.*

¹⁹¹ *Supra*, Section 1.1. On this issue, see also the sobering preliminary conclusions of the United Nations Special Rapporteur of the impact of the new French terrorism law on the rapprochement between intelligence and criminal investigations. J.-P. Jacquin, Antiterrorisme: l'ONU s'inquiète de l'accumulation des lois françaises, *Le Monde*, 24 May 2018. See also the UN press release, OHCHR, France: UN expert says new terrorism laws may undermine fundamental rights and freedoms, 23 May 2018.

Retrieved at: <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23130&LangID=E>

¹⁹² *Ibid.* German law knows a strict separation between police and intelligence services.

¹⁹³ Art 4 Council Decision 2000/642/JHA

¹⁹⁴ Art 32 Council Decision 2000/642/JHA

to police databases, while administrative FIUs will have to file an access request.¹⁹⁵ Then, depending on the type of data that may be gathered, including, among others, criminal judicial decisions, criminal investigations or prosecutions and criminal intelligence, FIUs may be bound by a requirement to obtain a clearance from a third party to share information with another FIU for intelligence purposes,¹⁹⁶ or to have evidence used in legal proceedings in another Member State.¹⁹⁷ These requirements, however, depend not only on the type of data at hand, but also on the applicable national rules.

Proposals to further enhance information-sharing and tie more closely together law enforcement and intelligence activities were similarly made after the multiplication of terrorist attacks on the European soil. At the institutional level, the immediate aftermath of the Brussels terrorist attacks of 22 March 2016 triggered intense debates in the Council on the possibility, for the EU's structures in charge of gathering law enforcement and intelligence data, i.e. Europol and EU Intelligence Centre (INTCEN) respectively, to draw up joint threat assessments, so as to boost the visibility of INTCEN's inputs in internal security bodies.¹⁹⁸ Though the proposal was generally welcomed by national delegations, fundamental issues regarding the methodology, the type of data that should be included in these assessments, as well as the existence of an appropriate legal basis were pointed out.¹⁹⁹ It was also pointed out during these meetings that such enhanced cooperation between law enforcement and intelligence should take place at both the European and national level, thereby suggesting that synergies between the two field have not always been sought in an explicit manner by all MSs.²⁰⁰

B. The challenge of mutual knowledge and understanding

The challenge of coping with this kaleidoscopic landscape of authorities in the realm of cross-border investigations is heightened by the lack of mutual knowledge and mutual understanding between the different legal systems.

Difficulties to pinpoint the competent executing authorities have arisen at the issuing and execution stages.

With regard to the EIO, filling the request form is no easy task for the issuing authority when multiple competent authorities are involved in the executing Member States.²⁰¹ This is particularly so, since the EIO introduced 'new' competent authorities, compared with the MLA framework.²⁰² Conversely, verification procedures to assess whether the issuing authority is the competent authority sometimes also take place in the executing State.²⁰³ This challenge, in fact, pre-exists the EIO, in particular for those countries where the investigation system is built in a radically different way than that of the majority of EU States. For example, the Finnish authorities, for whom the policy officer is the competent authority to conduct investigations under the national rules, sometimes faced difficulties to determine which authority is competent in other MSs, where the involvement of a prosecutor or an investigating judge is generally necessary.²⁰⁴

¹⁹⁵ There is, moreover, great variation between the Member States on the conditions and procedures to obtain such access, which may take between one week and about 30-60 days depending on the country. See Mapping Exercise and Gap analysis on FIUs powers and obstacles for obtaining and exchanging information, report by an expert group for the European Commission, 2016.

Retrieved at:
<http://ec.europa.eu/transparency/regexpert/index.cfm?do=groupDetail.groupDetailDoc&id=33583&no=2>

¹⁹⁶ European Commission, Commission Staff Working Document on improving cooperation between EU Financial Intelligence Units, SWD(2017) 275 final, Brussels, 2017

¹⁹⁷ Ibid.

¹⁹⁸ At the Council's Standing Committee for Internal Security in particular (COSI).

¹⁹⁹ Council of the EU, Summary of discussions at the COSI, 8588/16, Brussels, 10 May 2016, p. 2

²⁰⁰ Ibid.

²⁰¹ Council of the EU, Extracts from Conclusions of Plenary meetings of the EJM concerning the practical application of the EIO, 15210/17, Brussels, 8 December 2017, p. 3

²⁰² Ibid, pp. 10-12

²⁰³ Ibid.

²⁰⁴ A. Suominen, "The Finnish approach to mutual recognition in criminal matters and its implementation", in G. Vernimmen-Van Tiggelen, L. Surano, A. Weyembergh, *The future of mutual recognition in criminal matters in the European Union*, Bruxelles: PUB, 2009, p. 232

Identification issues arise even more prominently when the investigation system of the Member State is heavily decentralised at the national level. Under the MLA mechanism, the fragmentary Spanish criminal procedural system, alongside the lack of coordination on the national territory across the multilevel spectrum of authorities involved, render transnational cooperation difficult.²⁰⁵ The difficulty to manage MLA requests along the wide spectrum of authorities involved on the Spanish territory often propel foreign authorities to issue additional requests. As noted by a Spanish prosecutor, the multiplication of requests makes it “very difficult to locate the initial request. For this reason, it can happen that a request is managed in one court and the complementary request is in another one. Obviously, that slows down the proceedings.”²⁰⁶ In 2014, Eurojust recommended Spain to “reflect on the respective role, powers and obligations of all mutual legal assistance actors in Spain (...) and their relation to each other, and to provide clarity to other Member States on this in order to simplify judicial cooperation with Spain and reduce gaps and overlaps (...)”²⁰⁷

Alongside this, lack of knowledge on how investigative techniques are deployed among the Member States, along with the difficulty to understand the intricacies of national legal and procedural frameworks, may considerably slow down or hamper cross-border investigations.

Sometimes there is not enough information on or comprehension of the different investigative measures prior to their execution.²⁰⁸ This may cause significant delays to the launch of operations, while referring to Eurojust is not systematic in some countries, such as Ireland.²⁰⁹ These difficulties are compounded by the possibility introduced for Member States, in some aspects of cooperation, to apply the specificities enshrined in their national law. In the EIO Directive for example, the practical arrangements regarding the execution of controlled deliveries will have to be agreed in each case by the authorities concerned through consultation procedures,²¹⁰ however detrimental this may be for the imperative of effectiveness – and legal foreseeability and certainty.²¹¹

Differences among procedural frameworks were also seen as an obstacle to establishing JITs. The “multi-party” composition of JITs somewhat complexifies their use.²¹² In the Joint Investigation Teams, the nature of participating bodies is indeed left to the discretion of Member States.²¹³ However, difficulties occurred in identifying competent authorities, and police authorities are not always accepted as parties to the team.²¹⁴ Other issues include the rules for secrecy of proceedings and access to case file documents (disclosure issues) in particular.²¹⁵ Authorities seeking information may not be familiar with the procedures and formalities in the other participating country,²¹⁶ and information sharing and analysis do not

²⁰⁵ The Spanish desk for Eurojust is responsible for the coordination with the competent authorities of other Member States. Eurojust, Evaluation report on the sixth round of mutual evaluations: Report on Spain, 23 September 2014, 11004/2/14, p. 47

²⁰⁶ National report No 2 on Spain, quoting Ms. Rosana Morán Martínez, Senior Public Prosecutor at the Prosecutor General's Office, Head of the Area of International Cooperation, Section on Other areas of concern (point 32).

²⁰⁷ Eurojust, Evaluation report on the sixth round of mutual evaluations: Report on Spain, 23 September 2014, 11004/2/14, p. 75.

²⁰⁸ A. Suominen, “The Finnish approach to mutual recognition in criminal matters and its implementation”, in Vernimmen-Van Tiggelen *et al* 2009, op. cit.

²⁰⁹ Ireland for example, barely relies on the assistance of Eurojust in coordinating cross-border investigations and prosecutions. The use of Eurojust is limited to extradition requests for MLA and EAWs. Eurojust, Sixth round of Mutual Evaluations, Report on Ireland, 10 November 2014, p. 52. Perhaps for these reasons, Ireland took part to its first JIT in 2014, only ten years after it transposed the Framework Decision into national law. *Ibid*, on p. 49.

²¹⁰ Art 28(1)(b)/Recital 24.

²¹¹ The diversity of existing requirements may be difficult to reconcile with the ECHR obligation to develop foreseeable procedures in relation to human rights sensitive investigative measures. See, for example, the case law of Art 8(2) ECHR, e.g. ECtHR, *Malone v United Kingdom*, App no 8691/19, paras 67-68.

²¹² Eurojust, Conclusions of the fourth meeting of National Experts on Joint Investigation Teams (15/15 December 2008, The Hague), 17512/08, Brussels, 19 December 2008, p. 6

²¹³ Art 1(1) FD JITs.

²¹⁴ Eurojust, Conclusions of the third meeting of National Experts on Joint Investigation Teams (29/30 November 2007, The Hague), 5526/08, Brussels, 22 January 2008, p. 9

²¹⁵ Eurojust Annual Report 2012, p. 34. Disclosure rules refer to the obligations of the prosecution to disclose all information relevant to the case to the defence prior to the trial.

²¹⁶ C. Rijken, “Joint Investigation Teams: Principles, practice, and problems. Lessons learnt from the first efforts to establish a JIT”, *Utrecht Law Review*, Vol 2, Issue 2, 2006, pp. 99-118

always flow smoothly,²¹⁷ despite the fact that the *modus operandi* of JITs relies on direct information exchange.²¹⁸ Alongside this, annual reports pointed out the length of procedures to obtain an authorisation on the establishment of a JIT, since such an agreement must be signed by the competent authorities of each participating State.²¹⁹ Sometimes different authorities within one Member State are competent to make an agreement, thus complicating procedures further.²²⁰ Particularly problematic areas include the deployment of undercover agents and the use of interception of telecommunications.²²¹ In order to avoid these issues, a Eurojust report underlines that great care must be taken in the drafting of JITs agreements to ensure that the provisions of the codes of criminal procedure applicable in the various participating States are taken into account.²²² This also had an impact on the admissibility of the evidence collected for use before the trial court.²²³

1.2.3. The position of individuals and the protection of human rights

A. Risks of forum-shopping and legal certainty concerns

The diversity underpinning national frameworks also raises a real risk of ‘forum-shopping’.

The concern of “forum shopping” was most prominently raised by critics in respect to the place of investigation in the EPPO. It was stressed that cross-border investigations to combat crimes would not necessarily take place in those countries where they are most needed, and that the EPPO could be “tempted to investigate or execute investigative measures in the MS granting more flexibility to the investigator, or to prosecute where the definition of the offence was broadest or punished more severely.”²²⁴ The European Parliament itself underlined in a 2014 Resolution that “the investigative tools and investigation measures available to the EPPO should be uniform, precisely identified and compatible with the legal systems of the Member States where they are implemented ... the criteria for the use of investigative measures should be spelled out in more detail in order to ensure that ‘forum-shopping’ is excluded.”²²⁵ In the meantime, the final text mitigated those concerns and laid down more specific criteria that must be taken into consideration by the EPPO when choosing the place of investigation. Thus, consideration must be given to “where the focus of the criminal activity is or, if several connected offences within the competences of the EPPO have been committed, the Member State where the bulk of the offences has been committed.”²²⁶ However, even formulated in these terms, those criteria remain broad and difficult to interpret. One may wonder how the ‘focus’ or ‘bulk’ should be determined, particularly at the early stages of the investigation.²²⁷ For example, should the number of offences or the legal interests involved, the nature and degree of the offences or the penalties be taken into consideration?²²⁸ Departure from these criteria is defined in very strict terms, and must take into consideration the place of the suspect’s or accused person’s habitual residence; the

²¹⁷ Eurojust, Sixth round of mutual evaluations, “Report on The Netherlands”, The practical implementation and operation of Council Decision 2002/187/JHA of 28 February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime and of Council Decision 2008/976/JHA on the European Judicial Network in criminal matters, Brussels, 8 January 2014, 13681/2/13, p. 59

²¹⁸ Thus bypassing Interpol or Europol channels, or rogatory letters under MLA mechanisms. See Framework Decision on simplifying the exchange of information and intelligence between law enforcement authorities of the Member States of the European Union

²¹⁹ This is despite the flexible, informal framework of the JIITs.

²²⁰ Eurojust, Sixth round of Mutual Evaluations, Report on Ireland, 10 November 2014, p. 48

²²¹ Council of the EU, Conclusions of the 9th Annual meeting of the National Experts on Joint Investigation Teams, 7259/14, 27 - 28 June 2013, the Hague, p. 7

²²² Eurojust, Sixth round of mutual evaluations, Report on Germany, Brussels, 27 May 2014, p. 77

²²³ Ibid. The report also noted linguistic obstacles.

²²⁴ A. Weyembergh, C. Brière, “Towards a European Public Prosecutor’s Office, Study for the LIBE Committee”, PE 571.399, European Parliament: Brussels, 2016, p. 29

²²⁵ European Parliament resolution of 12 March 2014 on the proposal for a Council regulation on the establishment of the European Public Prosecutor’s Office, para 5(v).

²²⁶ Art 26(4) Regulation 2017/1939.

²²⁷ M. Luchtman, “Forum Choice and Judicial Review under the EPPO’s Legislative Framework”, in W. Geelhoed, L. H. Erkelens, A. W. H. Meij (eds), *Shifting Perspectives on the European Public Prosecutor’s Office*, The Hague: TMC Asser Press, 2017, p. 157

²²⁸ Ibid.

nationality of the suspect or accused person; and the place where the main financial damage has occurred.²²⁹

It remains to be seen whether these mechanisms will prove sufficient to limit the risk of forum shopping. Careful monitoring on the application of forum choice criteria will be needed in this respect.

Besides, in practice, the risk of forum-shopping is not limited to the EPPO. The persistence of variations in criminal procedures establishes a *de facto* system of forum-shopping in the investigation of cross-border crimes. For example, the recurrence of procedural obstacles to cooperation in a given Member State, such as lengthy judicial authorisation procedures, could propel the authorities of other countries to avoid collaboration with that particular State. Attempts were made at addressing this risk in the EIO, where Art 6(1)b provides that an investigation order may only be issued if the investigative measure(s) indicated in the EIO could have been ordered in a similar domestic case. However, forum-shopping risks occurring in the context of JITs, where those correction mechanisms do not exist. The legal framework of the JITs has indeed remained out of the scope of the EIO directive and MSs retain much flexibility and autonomy regarding both their setting up and functioning.²³⁰

(Over)reliance on national law and the likelihood of forum shopping raise uncertainties for the individual. The variety of criminal procedures applicable from a MS to another amount to legal certainty issues, not least because individuals may encounter difficulties in knowing the applicable procedural framework.

B. Blurring boundaries between administrative and criminal law and related fundamental rights concerns

Dual recourse to administrative and judicial authorities in cross-border investigation instruments reflects the increasingly “blurring picture” between the administrative and criminal fields.²³¹ However, the porosity of boundaries between the two ambits is not without raising human rights concerns.

Criminal law has an intrinsic punitive character. It operates with a view to punishing individuals responsible for causing “harm to others” and, through the threat or actual imposition of a punishment, it expresses values for indicating the wrongfulness of certain behaviour.²³² Recourse to criminal law instruments is therefore limited by a number of procedural guarantees and regulating principles,²³³ for criminal law to be invoked fairly, in order to protect the individuals from abusive action by the State.²³⁴ As noted elsewhere, such considerations are alien to administrative law, whose function is to protect public interest, and not the rights of the individual.²³⁵ This is why the administrative law framework is perceived as more efficient, and authorities sometimes use it as a “detour” to bypass some of the “burdens” associated to procedural guarantees applying in criminal law.²³⁶ The result

²²⁹ Art 26(4)(a), (b) and (c) Regulation 2017/1939.

²³⁰ See Consejo General del Poder Judicial, Informe sobre el anteproyecto de ley por la que se modifica la ley 23/2014, de 20 de Noviembre, de reconocimiento mutuo de resoluciones penales en la Union Europea, para regular la orden europea de investigacion, 28 September 2017, p. 19

²³¹ A. Weyembergh, F. Galli (eds), *Do labels still matters? Blurring boundaries between the administrative and criminal law: the role of the EU*, Brussels: Presses Universitaires de Bruxelles, 2014

²³² E. Herlin-Karnell, Is administrative law still relevant? How the battle of sanctions has shaped EU criminal law, in M. Bergstrom, V. Mitsilegas, and T. Konstadinides (eds), *Research Handbook on EU Criminal Law*, Cheltenham: Edward Elgar, 2015, p. 233

²³³ Such as the principle of ultima ratio, meaning ‘to the exceptional case the ultimate means’, the principle of legality, and the principle of proportionality, to name only a few. See M. Kaiafa-Gbandi, “Approximation of substantive criminal law provisions in the EU and fundamental principles of criminal law”, in F. Galli and A. Weyembergh (eds), *Approximation of substantive criminal law in the EU, The way forward*, Bruxelles: Editions de l’Université de Bruxelles, 2013

²³⁴ E. Herlin-Karnell, The Challenges of EU Enforcement and Elements of Criminal Law Theory: On Sanctions and Value in Contemporary ‘Freedom, Security and Justice’ Law, *Yearbook of European Law*, 2016, p. 15

²³⁵ G. Vermeulen et al, *Rethinking International Cooperation in Criminal Matters*, 2012, op. cit.

²³⁶ Ibid, p. 95

has been a tendency to overextend the administrative law into the criminal law domain, leading to a hybrid domain dubbed “criministrative law” by some authors.²³⁷

At the heart of this picture lies the challenge of respecting the fundamental principle of separation of powers. The downside from the perspective of cross-border cooperation is the asymmetries in the level of protection and the protective procedural safeguards made available to individuals.²³⁸ A suspect subject to an investigative measure adopted through the criminal law channel, will benefit from the guarantees stemming from the right to a fair trial and have more chances to challenge the measure before a court. The level of protection offered to persons subject to administrative inquiries differ considerably from the procedural safeguards afforded to suspects in criminal proceedings. Investigations into cases of fraud show that “procedural guarantees are not always specified and administrative authorities enjoy a certain flexibility in preserving them.”²³⁹ Determining the applicable procedural framework appears an even thornier task in the realm of multidisciplinary investigations. Investigations carried out in the fields of terrorist financing,²⁴⁰ or the protection of financial interests,²⁴¹ increasingly require an “integrated” approach,²⁴² supported by the involvement of an admixture of administrative and judicial organs that yet apply divergent standards of protection. In such multi-level constellations, procedural standards developed at the national level often fail to function adequately in cross-border situations.²⁴³

Unfortunately, these concerns are unlikely to be alleviated by the adoption of EU directives on procedural guarantees.

The EU has been juggling between administrative and criminal fields, adopting a certain degree of flexibility in evidence-gathering instruments, leaving “carte blanche” to the Member States with regard to the kind of authorities competent to issue and execute, for example, investigation orders.²⁴⁴ On the contrary, the Council and the Commission expressly ruled out the application of EU legislation on procedural rights to administrative proceedings.

During the negotiations on the Presumption of Innocence Directive, the possibility of broadening the scope of application to “similar proceedings” instead of the sole criminal proceedings was evoked by the European Parliament in a number of amendments, as a result of an orientation vote.²⁴⁵ It also made a reference to the *Engel* criteria on punitive

²³⁷ A. Bailleux, The fiftieth shade of grey. Competition law, “criministrative law” and “fairly fair trials”, in A. Weyembergh, F. Galli (eds), *Do labels still matter? Blurring boundaries between administrative and criminal law. The influence of the EU*, 2014, op. cit., pp. 137-155

²³⁸ In *Engel*, the ECtHR noted that: “If the Contracting States were able at their discretion to classify an offence as disciplinary instead of criminal, or to prosecute the author of a ‘mixed’ offence on the disciplinary rather than on the criminal plane, the operation of the fundamental clauses of Arts 6 and 7 would be subordinated to their sovereign will. A latitude extending thus far might lead to results incompatible with the purpose and object of the Convention. The Court therefore has jurisdiction, under Art 6 and even without reference to Arts 17 and 18, to satisfy itself that the disciplinary does not improperly encroach upon the criminal.” ECHR, *Engel e.a.*, 8 June 1976, para 81.

²³⁹ K. Ligeti, M. Simonato, Multidisciplinary investigations into offences against the financial interests of the EU: a quest for an integrated enforcement concept, in A. Weyembergh, F. Galli (eds), *Do labels still matter? Blurring boundaries between administrative and criminal law. The influence of the EU*, 2014, op. cit., p. 93

²⁴⁰ The Financial Intelligence Units are a case in point. A requirement of ‘multidisciplinarity’ is imposed onto them during investigations carried out in money laundering and terrorist financing, blending financial, administrative and intelligence information.

²⁴¹ K. Ligeti, M. Simonato, “Multidisciplinary investigations into offences against the financial interests of the EU: a quest for an integrated enforcement concept”, in A. Weyembergh, F. Galli (eds), *Do labels still matter? Blurring boundaries between administrative and criminal law. The influence of the EU*, 2014, op. cit.

²⁴² See, for example, European Commission, Communication on the protection of the financial interests of the European Union by criminal law and administrative investigations: an integrated policy to safeguard taxpayers’ money, COM (2011) 293 final.

²⁴³ As the case of the fight against financial crime shows. See K. Ligeti, V. Franssen (eds), *Challenges in the Field of Economic and Financial Crime in Europe and the US*, Oxford: Hart Publishing, 2016.

²⁴⁴ G. Vermeulen, “Free Gathering and Movement of Evidence in Criminal Matters in the EU: Thinking Beyond Borders, striving for balance, in search of coherence”, Inaugural Lecture Held in accepting the position of Extraordinary Professor of ‘Evidence Law’, Maastricht University, 2011, p. 20.
Retrieved at: <https://cris.maastrichtuniversity.nl/portal/files/1088490/guid-8ef5f903-17f2-4312-8e54-05bcadf2ef3c-ASSET1.0>

²⁴⁵ S. and A. Erbeznik, “The Directive on the Presumption of Innocence and the Right to Be Present at Trial”, *eucri*, The European Criminal Law Associations’ Forum, Issue 1, 2016.

administrative sanctions as to the definition of “criminal charge.”²⁴⁶ The Commission and the Council objected this approach, this would be inconsistent with the remainder of procedural rights directives, where administrative proceedings have been explicitly excluded from their scope. Administrative law was indeed left aside from the scope of the remainder of EU directives,²⁴⁷ despite the fact that the harmonisation of safeguards with a view to transnational cooperation is nearly inexistent in administrative law,²⁴⁸ and that individuals often benefit from much lower protection when they are subject to administrative investigations/sanctions.²⁴⁹ Besides, the current framework is incoherent with the flexible and more protective approach taken by the ECtHR with regard to the scope of application of fair trials guarantees.²⁵⁰

This being said, one may refer to minor offences as an effort to bring administrative proceedings under the procedural safeguards enshrined in EU legislation.²⁵¹ As discussed earlier,²⁵² under the national law of most EU states, administrative offences embrace certain violations that have a criminal connotation but are too trivial to be governed by criminal law and procedure, such as traffic offences.²⁵³ The wording of this exception is similar in all directives. It provides that procedural safeguards can apply to administrative offences such as minor offences on condition that there is an appeal possibility before courts which are also competent in criminal matters.²⁵⁴ This notwithstanding, given the nature of offences targeted by EU cross-border cooperation tools such as the EIO, the EPPO, and the E-Evidence Proposal, alongside the focus on coercive investigative measures of these instruments, these provisions will have a limited impact on the field of transnational investigations.

The increasing blur between administrative and criminal law, alongside the involvement of both administrative and judicial authorities in transnational investigations, also heightens the risk of parallel investigations initiated for the same case. The co-existence of criminal and administrative authorities with coinciding objectives can result in the same case being dealt with by different authorities, thus producing overlaps of criminal and administrative liability for the same act.²⁵⁵ Concurrent investigations and/or concurrent sanctions could result in breaches of the *ne bis in idem* principle enshrined in Article 50 of the Charter,²⁵⁶ by imposing

²⁴⁶ See Council of the EU, Proposal for a Directive of the European Parliament and of the Council on the strengthening of certain aspects of the presumption of innocence and of the right to be present at trial in criminal proceedings - Examination of revised text, 11112/15, Brussels, 29 July 2015, footnote 2. The Presidency and the Commission opposed this view for reasons of consistency with the remainder of directives on procedural rights.

²⁴⁷ Take for example punitive measures applied to children. Previous research shows that boundaries between criminal and non-criminal proceedings are quite porous with regard to juvenile delinquency. Some countries have indeed taken the approach of *educative* proceedings against juveniles, instead of formally *criminal* proceedings, in order to avoid the stigma relating to the formal criminal label or to ensure that juveniles receive a milder treatment. This does not mean, however, that a substantial punitive nature of the proceedings has been removed. However, Recital 17 of the Safeguards for Children Directive explicitly limits its scope to criminal proceedings only. See D. De Vocht *et al*, “Procedural Safeguards for Juvenile Suspects in Interrogations: A Look at the Commission’s Proposal in Light of an EU Comparative Study”, *New Journal of European Criminal Law*, Vol 5, Issue 4, 2014, p. 485.

²⁴⁸ See O. Jansen, P. Langbroek, *Defence rights during administrative investigations*, Antwerp: Intersentia, 2007.

²⁴⁹ *Ibid.*

²⁵⁰ This is despite the fact that the ECtHR’s approach was endorsed by the Court of Justice in its nascent case law on administrative and criminal sanctions. C-617/10, *Åkerberg Fransson*, 2013, op. cit. para 35; C-489/10, *Bonda*, 5 June 2012, para 37.

²⁵¹ The directives generally take the example of traffic offences.

²⁵² See the example of Germany and Spain.

²⁵³ G. Vermeulen, W. De Bondt, C. Ryckman, *Rethinking International Cooperation in Criminal Matters in the EU*, Antwerp: Maklu, 2012, p. 101.

²⁵⁴ See Recital 16 Directive 2010/64/EU, Art 2(2) Directive 2012/13/EU, Recital 16 Directive 2013/48/EU, Recital 15 Directive 2016/800/EU, Recital 11 Directive 2016/1919, Art 7(6) Directive 2016/343. The wording of EU procedural rights directives mirrors that of some cross-border cooperation and mutual recognition instruments (e.g. 2000 EU MLA Convention, 2003 FD Freezing Orders). See *Supra*, Section 1.2.1.

²⁵⁵ See contributions by Ligeti & Simonello and Luchtman, in A. Weyembergh, F. Galli (eds), *Do labels still matter? Blurring boundaries between administrative and criminal law. The influence of the EU*, 2014, op. cit. on market abuse more specifically, see also E. Herlin-Karnell, “The challenges of EU enforcement and elements of criminal law theory: On sanctions and value in contemporary ‘Freedom, Security and Justice’ Law”, 2016, op. cit.

²⁵⁶ Article 50 of the Charter states that “No one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been acquitted or convicted within the Union in accordance with the law.” It should however be noted that the *ne bis in idem* principle does not necessarily apply when administrative investigations/sanctions are taking place. In Italy for example, several administrative investigations may take place

stricter punishments of infringements. In the *Åkerberg Fransson* case,²⁵⁷ the Court ruled that Article 50 of the Charter did not preclude a combination of administrative and criminal penalties, provided that the administrative penalty is not criminal in nature.²⁵⁸ The examination of the criminal nature of the penalty must be assessed according to the *Engel* criteria developed by the ECtHR to define the notion of “criminal charge”,²⁵⁹ namely the legal classification of the offence under national law, the very nature of the offence and the nature and degree of severity of the penalty risks incurring.²⁶⁰ Whereas *Åkerberg Fransson* referred to a national situation, questions regarding the transnational application of the *ne bis in idem* principle will sooner or later arise before the Court of Justice if Member States are unable to coordinate their approach and exchange information.²⁶¹

1.3. Recommendations

The various issues discerned above carry the potential to create major obstacles to cross-border cooperation.

(i) Legislative solutions

(i)a. Harmonising a minimum set of investigative measures in the longer run

Against the background of the multiplication of cross-border cooperation instruments on evidence-gathering, harmonising a minimum set of investigative measures, that should be available in all MSs, is of clear relevance.

However, the negotiations on the EIO and the EPPO both show that Member States are by no means in favour of such complex harmonisation endeavours.

This is a clear missed opportunity, that may affect negatively the functioning of recently adopted cross-border cooperation instruments. National attitudes suggest a clear preference for a reactive approach, whereby Member States “wait and see” which concrete obstacles hamper the operation of the EIO and the EPPO in their first years of operation, before bringing new approximation proposals onto the policy agenda. At the same time, if the debate on the approximation of investigative measures is launched again in the future, it will eventually gain more support and legitimacy. The transposition deadline of the EIO Directive expired last year, and the EPPO Regulation was agreed on less than a year ago.²⁶² The practice of

for the same fact. See O. Jansen, *Defence Rights during Administrative Investigations*, Antwerpen/Oxford: Intersentia, 2007, p. 129.

²⁵⁷ C-617/10, *Åkerberg Fransson*, 26 February 2013. The proceedings involved the compatibility with the *ne bis in idem* principle of the Swedish national sanctions system, that involved two separate sets of proceedings, i.e. administrative and criminal, to penalise the same wrongdoing. Examples of conflicts between the principle of *ne bis in idem* and a dual regime of sanctions were found in multiple countries, such as Romania, France, and Italy. As regards Romania, see: M. Gorunescu, Considerations about overlapping criminal and administrative liability for the same offense, *Challenges of the Knowledge Society*, Vol 1, 2011, pp. 169-175; As regards France, see Decision by the Conseil Constitutionnel no. 2014-453/454 QPC and 2015-462 QPC of 18 March 2015; As regards Italy, see Decision by the Court of Cassation n. 102/8.3.2016.

²⁵⁸ *Ibid*, para 34.

²⁵⁹ *Ibid*, para 35.

²⁶⁰ Pursuant to this approach, certain administrative offences and professional disciplinary proceedings may indeed fall within the ambit of the criminal head of Article 6 ECHR. See ECHR, *Engel and others v. the Netherlands*, 8 June 1976: “If the Contracting States were able at their discretion to classify an offence as disciplinary instead of criminal, or to prosecute the author of a “mixed” offence on the disciplinary rather than on the criminal plane, the operation of the fundamental clauses of Articles 6 and 7 (art. 6, art. 7) would be subordinated to their sovereign will.”

²⁶¹ As noted by Eurojust, information exchanges do not always run smoothly among the Member States on whether parallel investigations or prosecutions are taking place, and sometimes national authorities do not have knowledge of parallel proceedings that are being conducted in another EU country. See Eurojust, Eurojust News, Issue 14, 2017 and Eurojust, Report on a Strategic Seminar on Conflicts of Jurisdiction, Transfers of Proceedings, *Ne Bis In Idem: Successes, shortcomings and solutions*, The Hague, 14 June 2015. See also K. Ligeti, M. Simonato, “Multidisciplinary investigations into offences against the financial interests of the EU: a quest for an integrated enforcement concept”, in A. Weyembergh, F. Galli (eds), *Do labels still matter? Blurring boundaries between administrative and criminal law. The influence of the EU*, 2014, op. cit., p. 105. These concerns have not come to an end with the flexibility retained in the type of actors involved in investigations carried out under MR, because the determination of authorities remains a matter for national law.

²⁶² It should become operational in 2020.

these instruments may indeed propel EU legislators to put forward complementary mechanisms to facilitate cross-border cooperation at the investigation stage, thus mirroring the process that led to the adoption of FD *in absentia* in surrender procedures.²⁶³

From a legal basis standpoint, it should be borne in mind that investigative measures are not listed as such in Art 82(2) TFEU among the domains where the EU has an explicit competence to initiate approximation. Reliance on Art 82(2)d may be envisaged. This would nonetheless imply resorting to a special legislative procedure, namely the adoption by the Council of a unanimous decision, with the EP's consent.

Variations in investigating regimes at the national level – relating to differing types of authorities, the content of investigative measures and conditions to use them, along with the changing security environment in which they evolve, render the task of pushing the boundaries of harmonisation further nearly impossible. Many other investigative techniques than those listed under the EIO Directive and the EPPO Regulation are useful to fight serious crimes. A 2015 study reveals that differences in legal and procedural frameworks, together with the financial and technical constraints linked to the deployment of investigations, compromise the harmonisation of some investigative measures used by the Member States, such as informants, surveillance, and hot pursuit, or more costly techniques, such as DNA analyses.²⁶⁴

This sobering assessment is without prejudice to what we recommend as regards minimum standards of admissibility of evidence in the next section. Indeed, as hinted in Section 2, admissibility issues are the other side of the coin, meaning that establishing certain exclusionary rules offers an alternative way to establish minimum requirements at the collection phase.

(i)b. Enhancing judicial control and procedural guarantees in future EU instruments involving non-judicial actors

Whenever the administrative channel is used with a criminal justice finality, a requirement of judicial control, together with higher procedural standards, need to be introduced to ensure that a fair balance is struck between the prosecution and the defence.²⁶⁵ The presumption that “criminal justice is designed to fight crime” and “administrative justice is intended to handle administrative affairs”, seems to be less and less true in reality.²⁶⁶ Emphasis on judicial oversight is moreover in line with ECtHR's *Engel* jurisprudence, where “the extension of the guarantees of the Convention regarding criminal law was meant as a way of controlling manipulations of criminal law by the States.”²⁶⁷ Similarly, the CJEU also stressed the need to maintain some of the guarantees applicable to criminal law to cross-border cooperation instruments involving administrative authorities. As regards FD Financial Penalties, the Court defined a ‘court having jurisdiction in particular in criminal matters’²⁶⁸ as “a jurisdiction that provides for an appeal in relation to administrative offences, which has suspensory effect, unlimited jurisdiction and applies a criminal procedure which is subject to compliance with the procedural safeguards appropriate to criminal matters, the principles of *nulla poena sine lege* and proportionality in particular.”²⁶⁹ It is the recognition that, even though sanctions may be imposed by administrative authorities,²⁷⁰ some of the cornerstone principles of

²⁶³ As noted in the second national report on France, Section on Conclusion and recommendations (point D).

²⁶⁴ Rand Europe, Study on paving the way for future policy initiatives in the field of fight against organised crime: the effectiveness of specific criminal law measures targeting organised crime, Study for the European Commission, 2015.

Retrieved at: https://ec.europa.eu/home-affairs/sites/homeaffairs/files/e-library/docs/20150312_1_amoc_report_020315_0_220_part_2_en.pdf

²⁶⁵ This view is supported by, inter alia, Ligeti & Simonato, 2014, op. cit., G. Vermeulen *et al*, 2012, op. cit.

²⁶⁶ K. Sugman Stubbs, M. Jager, The organization of administrative and criminal law in national legal systems: exclusion, organized or non-organized co-existence, in A. Weyembergh, F. Galli (eds), *Do labels still matter? Blurring boundaries between administrative and criminal law. The influence of the EU*, 2014, op. cit., p. 161

²⁶⁷ P. Caeiro, “The influence of the EU on the blurring”, in A. Weyembergh, F. Galli (eds), *Do labels still matter? Blurring boundaries between administrative and criminal law. The influence of the EU*, 2014, op. cit., p. 187

²⁶⁸ See C-60/12, *Balaz*, 14 November 2013

²⁶⁹ See C-60/12, *Balaz*, 2013, op. cit., paras 39-40.

²⁷⁰ The notion of “criminal justice finality” is well captured in Vermeulen *et al*, *Rethinking International Cooperation in Criminal Matters*, 2012, op. cit.

criminal law continue to apply. As regards future instruments, lessons could also be learned from the last OLAF Regulation, where a uniform body of procedural safeguards for administrative investigations in PIF offences that goes beyond the level of safeguards applied in national administrative proceedings was included under its provisions.²⁷¹ Art 9 of the Regulation in fact provides a catalogue of rights that, in many respects, seem to mirror the guarantees enshrined under Art 6 ECHR.²⁷²

With the release of the E-Evidence Proposal, another important dichotomy has crumbled in the complex landscape of multilevel cooperation in criminal matters: that between public and private actors. Entrusting private actors with the responsibility to carry out fundamental rights risk assessments prior to the execution of data transfers requests should however be backed by stronger safeguards for individuals. How?

First, the level of accuracy or precision of the E-Evidence Regulation regarding the kind of control to be performed at the execution stage by the service providers should be raised, and the scope of the “manifest” breach of fundamental rights ground for refusal should be complemented by more explicit criteria outlining the degree of control to be performed. The rules that service providers must comply with should be spelled out in further detail, and better guidance should be provided.

Second, the right to challenge before a court the legality, proportionality and necessity of *both* the issuing and *execution* of a Production or a Preservation Order should be ensured and strengthened. In its current form, Art 17 of the E-Evidence Proposal only foresees judicial control on the issuing of the measure in the issuing State. The defendant should also be granted the possibility to challenge in the issuing State the execution of the assistance requests, as it seems difficult to leave such a margin of discretion to a private entity without opening the decision taken by the service provider to judicial review.

Dialogue should be encouraged between the issuing authorities and service providers; the creation of a “feedback mechanism” could be envisaged whenever a measure has been challenged in the issuing State. The criticism addressed in the issuing State could thus be transferred to the service provider, so that they can draw on these “lessons” and better refine their application of the grounds for refusal listed under Art 14(4) and (5). Inspiration could be drawn from the EIO Directive, which imposes a duty of information-exchange between the issuing and executing authorities whenever a legal remedy is sought in the issuing State.²⁷³

Strengthening the right to judicial review would contribute to preserving the *acquis* of the EIO Directive on judicial control. One of the underpinning reasons for establishing the E-Evidence Proposal was the absence of specific provisions on electronic evidence in the EIO.²⁷⁴ As a complementary tool,²⁷⁵ there is no obvious reason why the forthcoming E-Evidence Regulation should water down the high standard of judicial oversight achieved in the EIO.

(ii) Non-legislative options

From a non-legislative perspective, a few recommendations can be made.

(ii)a Promoting dialogue and coordination between national authorities

Dialogue and coordination between national authorities will be of crucial importance for investigations to be conducted effectively, in light of the plurality of authorities and legal frameworks involved. Member States should make use of the clauses of the EIO Directive

²⁷¹ K. Ligeti, M. Simonato, “Multidisciplinary investigations into offences against the financial interests of the EU: a quest for an integrated enforcement concept”, in A. Weyembergh, F. Galli (eds), *Do labels still matter? Blurring boundaries between administrative and criminal law. The influence of the EU*, 2014, op. cit., p. 94

²⁷² See Regulation 883/2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF) and repealing Regulation (EC) No 1073/1999 of the European Parliament and of the Council and Council Regulation (Euratom) No 1074/1999. See also analysis by Ligeti & Simonato, 2014, op. cit.

²⁷³ Art 14(5) Directive 2014/41/EU reads: The issuing authority and the executing authority shall inform each other about the legal remedies sought against the issuing, the recognition or the execution of an EIO.

²⁷⁴ E-Evidence Proposal, p. 3.

²⁷⁵ The scope of the EIO Directive was considered as too broad to cover electronic evidence as well, and the specificities of electronic evidence could hardly be taken into consideration.

that significantly reinforce the consultation mechanisms between the issuing and the executing authorities.²⁷⁶

Competent authorities should exploit as much as possible the existing instruments to get better acquainted with one another's national legal frameworks, especially whenever deficiencies in understanding the legal and regulatory landscape of one or several Member States arise. Increasing recourse to EJN should be encouraged,²⁷⁷ together with the tools available on its website, particularly the '*fiches belges*' and the data contained on the newly created EIO webpage. Similar tools should be developed to cover PIF-related offences ahead of the establishment of the EPPO.

(ii)b Promoting training of judicial authorities, defence lawyers and service providers

Training should be encouraged. As seen above, effective cross-border cooperation depends to a large extent on the degree of mutual understanding of national legal systems. The intricacies of certain national legal frameworks are complex to grasp, and training should foster mutual knowledge and understanding. EJTN's activities should be further developed so as to cover the newly adopted instruments and target those countries where training shortages exist. In Spain, for example, training is perceived as a challenge given the high number of practitioners – including at the local level, involved in cross-border cooperation instruments and the huge territory to be covered.²⁷⁸

Particular attention should be dedicated to non-traditional actors of cross-border cooperation. This category includes defence lawyers, who have been left aside from EU training efforts in the field, along with "newer" players such as service providers. As regards the latter category, the current provisions of the E-Evidence Proposal suggest that training efforts should be oriented towards enhancing capacity building among service providers. Service providers will have to cope with several assistance requests made by countries with very different rules on electronic evidence. Not all service providers are prepared to face this heavy legal burden, in terms of both expertise and financial means, nor are they equipped to assess potential fundamental rights breaches.

(ii)c Developing tools to provide financial and technical help

Financial and technical help could be envisaged for the deployment of expensive investigative tools in transnational procedures. In the current EIO Directive, costs incur exclusively to the executing State, although in exceptional circumstances, these may be shared between the issuing and the executing States.²⁷⁹ An interviewee suggested to establish a funding mechanism similar to that of the Joint Investigation Teams, in order to mitigate the financial burden associated with the use of costly investigative measures.²⁸⁰ This investigation fund could be of an inclusive nature and encompass investigations carried out within the framework of the EIO. EU funding would be beneficial in two respects:

- To ensure the effective conduct of investigations over long periods of time and level the playing field among the Member States in technological terms, against the backdrop of ever more complex investigative techniques and newer types of evidence (e.g. metadata from telephone communications, bank transactions, etc.); and

²⁷⁶ Arts 6(3), 9(6), 11(4), 12(6), 13(4), 21(2), 20(6)(b), 32(5) Directive 2014/41/EU.

²⁷⁷ Recital 13 EIO Directive acknowledges the role played by EJN in transmitting investigation requests.

²⁷⁸ Eurojust, Evaluation report on the sixth round of mutual evaluations: Report on Spain, 23 September 2014, 11004/2/14, p. 47

²⁷⁹ Art 21 EIO Directive. The Confiscation Orders FD already foresees such splitting mechanism, under Art 16. This provision introduced the splitting of revenues from the execution of confiscation orders surpassing the amount of EUR 10,000 on a 50/50 basis between the issuing and the executing States. Only if the revenues are not significant (i.e. below EUR 10,000), they will accrue to the executing State. See analysis by Vermeulen *et al*, 2010, *op. cit.*, p. 94

²⁸⁰ The financial and technical help provided to JITs has generally been assessed positively. It facilitates the participation of countries with limited budgets, thus making possible the digitisation and translation of documents, and secure channels for information exchange and mediation between investigating agencies from different countries. Eurojust, "Report on Spain", Evaluation report on the sixth round of mutual evaluations, 23 September 2014, 11004/2/14, p. 68.

- To diminish the risk of forum-shopping and avoid situations where investigations are carried out solely within those Member States where investigation means are available, thus offering a solution for countries with a small budget for large-scale investigations²⁸¹

(ii)d Narrow monitoring of reliance on national law and potential adverse impact, especially of possible cases of forum shopping

Narrow monitoring of reliance on national law and potential adverse impact should be ensured. In particular, close monitoring of possible cases of forum shopping should be conducted. This implies to check the efficiency of the inserted correction mechanisms in the EIO Directive and in the EPPO Regulation. Monitoring of forum shopping should be extended to investigative activities carried out in the framework of JITs, for which little data is available.

²⁸¹ This is perceived as a clear added value of the JITs by the Netherlands. Eurojust, "Report on The Netherlands", Sixth round of mutual evaluations, The practical implementation and operation of Council Decision 2002/187/JHA of 28 February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime and of Council Decision 2008/976/JHA on the European Judicial Network in criminal matters, Brussels, 8 January 2014, 13681/2/13, p. 58

2. ADMISSIBILITY OF EVIDENCE

KEY FINDINGS

- Admissibility rules are widely divergent across the selection of MSs examined. At the domestic level, some MSs have not adopted an exclusionary principle of illegally/improperly obtained evidence, whereas others have. Exclusionary rules are more or less stringent. As for cross-border investigations, some MSs have maintained exclusionary rules similar to those existing in domestic investigations. Others have designed more specific rules for foreign evidence.
- When a foreign country is requested to gather evidence on behalf of another country, two rules may apply: depending on the instrument of cooperation chosen, it is either the law of the State where the investigation takes place that applies (*locus regit actum*), and/or that of the State of trial (*forum regit actum*). Issues of compliance have nonetheless occurred in both cases, because procedures and formalities widely diverge from a MS to another, thus preventing the use of evidence in the proceedings. Perhaps as a result from these challenges, the exclusionary rules developed in the original proposal on the EPPO Regulation were removed from the final text. In a similar fashion, some MSs rely on the rule of non-inquiry, whereby the judicial authorities do not, or very lightly, review how evidence was gathered by the foreign State, however detrimental this may be for individuals' rights and mutual trust.
- Negotiations on the procedural rights legislation illustrate well the sovereignty-sensitive dimension of the field. Exclusionary rules developed in the Access to a Lawyer and Presumption of Innocence Directives were scrapped in the final text, thus undermining their added-value to the current framework of evidence law.
- A first set of exclusionary rules codifying ECtHR case law should be adopted by the EU. These would prohibit, inter alia, evidence obtained through torture, police incitement, as well as self-incriminating statements or breaches of the right to remain silent. Yet, codification will not be effective without a stark departure from the rule of non-inquiry. The means deployed by the authorities to collect evidence must be disclosed to enable the defence to challenge inculpatory information. Codification should therefore be complemented by the adoption of a minimum rule excluding evidence for which no information is provided by the foreign State on how it was gathered.

2.1. Nature of differences

The question of admissibility of evidence deserves particular attention for two reasons. First, the adoption of a number of cooperation instruments in the realm of evidence-gathering prompts a broader reflexion on admissibility issues, as it makes little sense for evidence to be transferred if it is then excluded from the proceedings and cannot serve the purpose of facilitating the prosecution in the requesting/issuing State. As noted earlier, evidence-gathering and admissibility rules are the two sides of the same coin: establishing certain exclusionary rules offers an alternative way to establish minimum requirements at the collection phase. Second, the Lisbon Treaty conferred an express competence to the EU to adopt minimum rules in admissibility of evidence under Article 82(2)(a). Thus far, however, the multiplication of instruments regulating cross-border investigations has not been accompanied by the adoption of minimum standards on evidence admissibility, despite the attention it has received in EU policy documents.²⁸²

²⁸² The Tampere Council of 1999 first introduced the concept of mutual admissibility of evidence in the EU, namely that "evidence lawfully gathered by one Member State's authorities should be admissible before the courts of other

The ECtHR has only established few, clear exclusionary rules: evidence obtained by means of torture²⁸³ and as a result of police incitement.²⁸⁴ However, evidence obtained in violation of other Convention rights may also give rise to an Art 6 violation, including evidence obtained through incitement, incriminating statements obtained in violation of the privilege against self-incrimination or the right to silence or confessions obtained during police interrogations without the suspect being assisted by a lawyer.²⁸⁵ However, as regards other circumstances, the Strasbourg Court has been extremely cautious when a claim is made before it that evidence obtained in violation of the Convention was used by the trial court in reaching a conviction. Arguing that the Convention contains no rules on admissibility of evidence, the Court has examined such claims under the angle of the right to a fair trial.²⁸⁶ It has repeatedly stated that it is not its role to determine whether particular types of evidence may be admissible, its concern being whether the proceedings as a whole, including the way in which the evidence was obtained, were fair. This test significantly limits the chances of the Court declaring a certain type of evidence inadmissible as a matter of principle: the violation committed during the gathering of the evidence needs to be so serious or its negative effect on the right to a fair trial so irrevocable that nothing can be done at a later stage of the proceedings to compensate for it.

“The law of admissibility regulates whether a particular piece of evidence should be received – or ‘admitted’ into the trial.”²⁸⁷ The above ECtHR case law suggests that there was no real approximation efforts undertaken at the European level. Thus, Member States have kept their own rules dictating that certain types of evidence must be excluded, meaning they cannot be taken into consideration in reaching a decision as to the guilt or innocence of the accused. Indeed, exclusionary rules are often rooted in a particular legal tradition,²⁸⁸ and thus differ considerably across jurisdictions.

Exclusionary rules can however be broadly classified into two categories:²⁸⁹ in a first category are those exclusionary rules designed to improve factfinding accuracy, that aim to determine, for example, whether evidence is reliable. These are typical, though not exclusive, of common law.²⁹⁰ In a second category are those exclusionary rules governed by other considerations: within the latter there are rules such as the English law excluding evidence obtained through interception of communications, which aims at protecting the secrecy of those investigative measures. The most important subcategory is however composed of those exclusionary rules

Member States.” Tampere Conclusions 1999, para 36; see also European Commission, Green Paper on criminal-law protection of the financial interests of the Community and the establishment of a European Prosecutor, COM(2001) 715. The GP took note that “the diversity of national rules on evidence means that evidence gathered in one Member State cannot be used in courts in another,” and argued that the “establishment of a common investigation and prosecution area guided by the principle of mutual admissibility of evidence would help to overcome this barrier.” It excluded, however, the adoption of supranational rules governing admissibility of evidence, the logical consequence of it would be the “general codification of criminal law in Europe” and out of proportion to the objective of ensuring effectiveness in proceedings. See p. 58; European Commission, Green Paper on obtaining evidence in criminal matters from one Member State to another and securing its admissibility, COM(2009) 624 final, Brussels, 11 November 2009

²⁸³ The ECtHR interpreted this exclusionary rule narrowly. The whole Art 3 ECHR does not apply, and only evidence obtained by means of torture is subject to an exclusionary rule. “See ECtHR, *Gäfgen v Germany*, App no 22978/05, 1 June 2010.

²⁸⁴ ECtHR, *Teixeira de Castro v Portugal*, App no 25829/94, 9 June 1998

²⁸⁵ The admission of other types of unlawful evidence has however been tolerated by the ECtHR. For example, Article 6(3)(d) ECHR grants the accused the right to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him. But the breach of this right does not always amount to a violation of Article 6 ECHR. See S. Allegrezza, Critical Remarks on the Green Paper on Obtaining Evidence in Criminal Matters from one Member State to another and Securing its Admissibility, *Zeitschrift für Internationale Strafrechtsdogmatik*, 2010, p. 576. Retrieved at: http://www.zis-online.com/dat/artikel/2010_9_489.pdf

²⁸⁶ Art. 6 ECHR

²⁸⁷ P. Roberts and A. Zuckerman, *Criminal evidence*, Oxford: Oxford University Press, 2nd Ed., 2010, p. 97.

²⁸⁸ See Kai Ambos, citing Orrie: “the rules of evidence are closely linked to the procedural system in which they function”; K. Ambos, “The structure of international criminal procedure: ‘adversarial’, ‘inquisitorial’ or ‘mixed?’”, in Michael Bohlander (ed), *International criminal justice: A critical analysis of institutions and procedures*, Cameron May, 2007, p. 500.

²⁸⁹ Mirjan Damaska, “Evidentiary barriers to conviction and two models of criminal procedure: a comparative study”, *University of Pennsylvania Law Review*, Vol 121, No 3, Jan 1973, pp. 514-525.

²⁹⁰ Such as the bad character evidence rule or the best evidence rule.

that deal with illegally obtained evidence, which aim at ensuring the legitimacy of the criminal justice system, to control the coercive action of criminal justice actors and redress police misconduct, or more generally, to protect the rule of law.

Exclusionary rules dealing with illegally obtained evidence are of particular interest from an EU perspective. The focus of this study on this type of exclusionary rules is justified on two important grounds. Firstly, EU instruments for evidence gathering abroad determine the law applicable to investigative measures, and often result in these being governed by an admixture of the laws of the issuing and executing States. Indeed, a direct consequence of the lack of harmonisation of the rules on investigative measures is that EU instruments for cross-border evidence-gathering have had to determine the law that will govern their deployment. Traditionally, the law of the State where evidence is gathered was applicable (*locus regit actum*). The 2000 MLA Convention operated a major change, generally requiring that investigative measures be taken in accordance with the law of the State that requests it (*forum regit actum*), a rule that was later incorporated into the EIO Directive. Today, the two rules - *locus regit actum* and *forum regit actum* - coexist.²⁹¹ As a consequence, the task of determining whether a particular piece of evidence is 'legal' or not becomes rather difficult. Indeed, as has been noted elsewhere, "by its very nature, the concept of exclusion of illegally obtained evidence is a (criminal) procedural entity".²⁹² The finding of illegality is thus linked to the criminal procedure of a particular State; when evidence is gathered abroad on the basis of EU instruments of judicial cooperation, foreign criminal procedural rules apply, ineludibly affecting the examination of the legality of the evidence. Secondly, the EU has an interest in addressing the issue of illegal evidence, in particular when the illegality amounts to a human rights violation, since the EU and its Member States are bound by the Charter and the ECHR.

The following compares national rules as regards admissibility standards in domestic proceedings (2.1.1.) and in cross-border proceedings (2.2.2.).

2.1.1. Admissibility of evidence in domestic systems

In the absence of EU-wide rules, admissibility of unlawfully gathered evidence has "different connotations" in the jurisdictions examined,²⁹³ and is governed by differing rules and conditions.

Among the Member States examined, a first distinction must be made between those who have adopted the exclusionary principle of evidence illegally obtained and those who have not.²⁹⁴ The exclusionary principle is enshrined in the law of most EU States examined (e.g. Ireland, Germany, Italy, Spain, Hungary, France, Finland, Romania). This principle, however, does not feature in the law of the Netherlands. Many exceptions nonetheless exist in each of the systems pertaining to one, or the other category, thus narrowing differences.²⁹⁵ A second difference lies in the types of existing criteria resulting in the exclusion of evidence. Third, the consequences of the exclusion of illegally obtained evidence differ from one system to another. Fourth, differences exist regarding the degree of discretion left to the judge in assessing whether evidence should be admitted (or excluded). The margin for manoeuvre left to the judge differs widely, including among the Member States that belong to the first category, i.e. those that have adopted the principle of exclusion of evidence obtained illegally.

Until recently, Ireland had one of the most restrictive rules in relation to unlawfully gathered evidence. Evidence obtained in breach of constitutional rights were automatically excluded in almost all circumstances.²⁹⁶ In some cases more time was spent arguing on the admissibility

²⁹¹ *Infra*, Section 2.

²⁹² F. Pinar Ölçer, *Illegally Obtained Evidence in European Treaty of Human Rights (ETHR)*, *Annales de la Faculté de Droit d'Istanbul*, nr. 57, 2008 p. 84.

²⁹³ A. Ryan, *Towards a System of European Criminal Justice*, 2014, op. cit., p. 20

²⁹⁴ For further information on this distinction, see L. Kennes, "La recherche d'un système équilibré de sanctions, dans la procédure pénale, des irrégularités – Etude de droit comparé", PhD thesis, 2018, op. cit.

²⁹⁵ M. Marty, *La légalité de la preuve dans l'espace pénal européen*, Bruxelles: Larcier, 2016, 716 p.

²⁹⁶ National reports on Ireland. The Supreme Court differentiated between evidence obtained "improperly or illegally" and evidence obtained in breach of constitutional rights. The former includes, for example, evidence obtained through stealing, and may be admitted before the court. The exclusionary rule nonetheless applies as regards

of evidence than establishing the guilt of the suspect.²⁹⁷ A recent decision by the Irish Supreme Court however softened this approach. The Irish Supreme Court case of *DPP v. JC*²⁹⁸ now provides for very limited grounds for the exclusion of evidence obtained as a result of a breach of a person's constitutional rights.²⁹⁹

In Germany, the most prominent exclusionary rules include evidence obtained using certain methods of interrogation interfering with the autonomy of the person, including physical or psychological maltreatment, hypnosis deceit and illicit threats and promises;³⁰⁰ and evidence obtained in violation of the constitutional protection of 'core' privacy, e.g. information protection by the testimonial privilege of a lawyer, physician or member of the clergy.³⁰¹

In Spain, the national law excludes evidence obtained directly or indirectly in breach of one, or several fundamental rights.³⁰²

In Italy, the judge excludes evidence obtained in breach of fundamental rights,³⁰³ as well as the possibility of using hearsay evidence.³⁰⁴ The Italian Constitution, following a constitutional reform enacted in 1999, consecrates the basic evidentiary rule for the defence: the principle of adversary gathering of evidence.³⁰⁵ In concrete terms, this means that evidence should in principle be produced in the presence of the defence so as to allow cross-examination. Consequently, the judge shall not use evidence other than lawfully obtained evidence during the trial stage and exclude, at least in principle, "hearsay evidence", namely previous statements collected at the investigation stage. A list of exhaustive exceptions to this exclusionary rule has been included in the Italian CCP;³⁰⁶ however these exceptions have been subject to strict interpretation.³⁰⁷

In Hungary, evidence cannot be admitted before the courts if it was obtained by committing a criminal action³⁰⁸ or by other illicit methods,³⁰⁹ or by the substantial restriction of the

evidence gathered in conscious and deliberate breach of constitutional rights. Exceptions to this rule, dubbed "extraordinary excusing circumstances", however exist. They include: the need to rescue a victim in peril, the saving of vital evidence from imminent destruction, evidence obtained incidental to and contemporaneous with a lawful arrest, although made without a valid search warrant. *People (AG) v O'Brien* (1965) IR 142 (IESC) 170. See A. Ryan, Report on Ireland, in K. Ligeti (ed), *Toward a prosecutor for the European Union*, 2013, op. cit.

²⁹⁷ M. Kusak, *Mutual admissibility of evidence in criminal matters in the EU*, 2016, op. cit., p. 211

²⁹⁸ Evidence will now be admissible if obtained unconstitutionally where the breach of constitutional rights was inadvertent.

²⁹⁹ Already in 2002, a group of experts appointed by the Irish Ministry of Justice suggested to the Court that the exclusionary rule should be softened to some extent. It stated that there was no need for such a stringent rule to fulfil the overarching objective of upholding constitutional rights and freedoms. See L. Kennes, *La recherche d'un système équilibré de sanctions, dans la procédure pénale, des irrégularités – Etude de droit comparé*, PhD thesis, 2018, op. cit., p. 339.

³⁰⁰ T. Weigend, "Report on Germany", in K. Ligeti (ed), *Toward a prosecutor for the European Union*, 2013, op. cit., p. 296

³⁰¹ *Ibid*, see also national reports on Germany.

³⁰² Article 11 of Organic Law of Judicial Power provides: "Evidence obtained, directly or indirectly, in violation of fundamental rights or freedoms shall have no effect in court". Some other factors however must be taken into consideration, such as the relevance of the fundamental right infringed; whether the information has been obtained alongside other elements, apart from the unlawful elements, due to which it is reasonable to think that the indirect evidence would have been discovered anyway; if the fundamental right violated requires a specific protective standard, because of its vulnerability; and the attitude of those who caused the infringement of the constitutional rule, for example whether the violation was committed intentionally. See L. Bachmaier Winter, Report on Spain, in K. Ligeti (ed), *Toward a prosecutor for the European Union*, 2013, op. cit.

³⁰³ Art 191 Italian CCP. This exclusion may be determined at every stage of the proceedings. See also National report No 2 on Italy, Section on evidence-gathering and admissibility (point 19).

³⁰⁴ National report No 1 on Italy, Section on probable cause and evidence-gathering (point 3).

³⁰⁵ *Ibid*, see also Art 111 Italian Constitution.

³⁰⁶ The rule can be derogated by consent of the suspect or accused, in cases of ascertained objective impossibility or proven illicit conduct. Special proceedings – based on the consent of the suspect or accused – are based on the elements of proof contained in the investigation file.

³⁰⁷ National report No 1 on Italy, Section on probable cause and evidence-gathering (point 3).

³⁰⁸ Such as unauthorised gathering of covered information. This is considered a relative exclusion.

³⁰⁹ Such as the impairment of the person's procedural rights, or as a result of a forced interrogation (e.g. mental or physical exhaustion, prohibition of sleeping, etc.). This is considered an absolute exclusion.

procedural rights of the participants.³¹⁰

In Finland, the national law precludes the use of evidence obtained through torture, in breach of a person's right not to self-incriminate or in violation of the right to a fair trial.³¹¹ Some restrictive rules regarding the admissibility of oral testimonies were also developed.³¹² It is interesting to note that prior to 2016, standards of evidence admissibility were not regulated at all by law.³¹³

In Romania, an absolute nullity of evidence can be triggered provided that one of two procedural rights are breached:³¹⁴ either denying the defendant his/her participation at stages of criminal proceedings where it is mandatory; or denying the defendant his/her right to the presence of a counsel at stages of the criminal proceedings where it is mandatory.³¹⁵ Although in practice, these rights are rarely violated, the breach of all the other legal rules can be sanctioned by a relative nullity, provided that harm was caused to others as a result from the failure to comply with those rules,³¹⁶ thereby seemingly promoting the protection of individuals' rights.³¹⁷ Another condition for absolute nullity was recently identified by the Romanian Constitutional Court in 2017. According to this new rule, evidence gathered as a result of an investigative order issued by a prosecutor who does not have jurisdiction on a case cannot enter the trial.³¹⁸

The French system is based on a system of "free proof",³¹⁹ according to which the truth may be established by all means of proof, which is evaluated by the court to reach a verdict based on their intimate conviction.³²⁰ Besides, admissibility of evidence is poorly regulated by the CCP and the bulk of rules governing evidence collection and admissibility are provided by the national jurisprudence.³²¹ Evidence collection activities have to meet certain French standards, such as respect for fundamental rights³²² and the principle of loyalty developed by the Court of Cassation.³²³ However, in practice, the control applied by the French authorities is relatively lax.³²⁴ Similarly, the existence of different types of nullities³²⁵

³¹⁰ Other exceptions apply. See the full list in national report No 2 on Hungary, Section on evidence-gathering and admissibility (point 19); see also L. Karsai, Z. Szomora, *Criminal Law in Hungary*, Kluwer Law International, 2010, p. 172

³¹¹ See National report No 2 on Finland, Section on evidence gathering and admissibility (point 19). See also Chapter 17, Section 25(2) of the Code of Judicial Procedure (*Oikeudenkäymiskaari 4/1734*). Most Scandinavian countries have not implemented admissibility standards.

³¹² For example, limitations apply on what is allowed to enter the trial as an oral testimony, e.g. such as records of deliberations between judges, or information stemming from client-lawyer communications, etc. National report No 2 on Finland, Section on evidence gathering and admissibility (point 19).

³¹³ Before 2016, the question of admissibility was determined on a case by case basis by the Finnish Supreme Court. The inclusion of the aforementioned prohibitions in the code of judicial procedure resulted from jurisprudential developments. National report No 2 on Finland, Section on evidence gathering and admissibility (point 19).

³¹⁴ In France, the act declared null is then excluded from the file. In Romania, it is not.

³¹⁵ National report No 2 on Romania, Section on evidence-gathering and admissibility (point 19).

³¹⁶ See Arts 281-282 of the Romanian CCP, on the rules of absolute and relative nullity respectively.

³¹⁷ National report No 2 on Romania, Section on evidence-gathering and admissibility (point 19).

³¹⁸ In 2017. *Ibid.*

³¹⁹ In French "*liberté de la preuve*."

³²⁰ A. Ryan, *Towards a System of European Criminal Justice*, 2014, op. cit., p. 134

³²¹ J. Tricot, "Report on France", in K. Ligeti (ed), *Toward a prosecutor for the European Union*, 2013, op. cit., p. 254

³²² Including human dignity, privacy and defence rights. See J. Lelieur, "La reconnaissance mutuelle appliquée à l'obtention transnationale de preuves pénales dans l'Union européenne : une chance pour un droit probatoire français en crise ?", *RSC*, 2011, n°1

³²³ According to which evidence must be gathered and examined in accordance with the law and in respect of the rights of the individual and the integrity of justice. A. Ryan, *Towards a System of European Criminal Justice*, 2014, op. cit., p. 155

³²⁴ Some defence rights have been, for example, very scarcely referred to by the Court of Cassation. This is notably the case for the right to not self-incriminate oneself, and the right to silence. See J. Lelieur, "La reconnaissance mutuelle appliquée à l'obtention transnationale de preuves pénales dans l'Union européenne : une chance pour un droit probatoire français en crise ?", *RSC*, 2011, n°1, as well as National report No 2 on France, Section on evidence-gathering and admissibility (point C).

³²⁵ Nullities may comprise textual nullities and substantial nullities. Textual nullity means that it is specifically stated in the CCP that a breach of a particular provision gives rise to nullity. However, no definition of a substantial nullity is provided. This means that substantial nullity has to be examined on the basis of an individual assessment. A. Ryan, *Towards a System of European Criminal Justice*, 2014, op. cit., p. 158

sometimes result in case-by-case basis assessments and legal uncertainty.³²⁶ In rare instances, an exclusionary approach was taken by the authorities to certain types of evidence, for example where statements of suspects were collected without the presence of a lawyer.³²⁷

In the Netherlands, illegally obtained evidence is subject to an assessment by the court, that decides on the exclusion of evidence according to a variety of criteria.³²⁸ These include the interest that the breached rule serves, the gravity of the breach, and the harm caused by the breach. In general, evidence gathered illegally may be excluded when a rule or a legal principle of criminal procedure has been seriously breached in the illegal collection process.³²⁹ The Dutch system is complex and admissibility seems to be decided on a case-by-case basis, depending on the set of criteria mentioned under the CCP, as well as the investigative measure deployed. As noted by an author, a breach of a rule of criminal procedure means “failure to observe written and unwritten rules that apply to gathering evidence. No distinction is made between the different types of rules.”³³⁰ According to the case law of the Supreme Court, a direct connection must be established between the breach and the gathering activity, meaning that the breach must exclusively be the result of unlawful actions.³³¹

Indicative summary table³³²

	Principle of exclusion of illegally obtained evidence	Large margin of discretion left to the judge	Exclusionary criteria
FI	X		Evidence obtained through torture, in breach of a person's right not to self-incriminate or in violation of the right to a fair trial
FR	X	X	Breach of fundamental rights, including human dignity, privacy and defence rights Breach of the principle of loyalty
ES	X		Evidence obtained directly or indirectly in breach of one, or several fundamental rights
DE	X		Evidence obtained using certain methods of interrogation interfering with the autonomy of the person, including physical or psychological maltreatment, hypnosis deceit and illicit threats and promises; Evidence obtained in violation of the constitutional protection of 'core' privacy, e.g. information protection by the testimonial privilege of a lawyer, physician or member of the clergy.

³²⁶ J. Lelieur, “La reconnaissance mutuelle appliquée à l'obtention transnationale de preuves pénales dans l'Union européenne: une chance pour un droit probatoire français en crise ?”, 2011, op. cit.

³²⁷ A. Ryan, *Towards a system of criminal justice*, 2014, op. cit., p. 241

³²⁸ Enshrined under Art 359a CCP.

³²⁹ M. J. Borgers & L. Stevens, The use of illegally gathered evidence in the Dutch criminal trial, *Electronic Journal of Comparative Law*, Vol 14, Issue 3, 2010, p. 3

³³⁰ Ibid. They can be rules on respecting fundamental rights, such as the right to remain silent. But they can also be rules that pertain 'only' to the contents of certain documents that have to be shown to the suspect when means of coercion are used. Section 359a CCP is intended to be a provision that applies to all these rules. No distinction is made either between violations of constitutional and non-constitutional rights.

³³¹ For an overview of the Dutch Supreme Court's case law on admissibility of evidence, see M. J. Borgers & L. Stevens, The use of illegally gathered evidence in the Dutch criminal trial, 2010, op. cit. See also National report No 2 on the Netherlands, Section on evidence (point 3). The 'causal link' or 'direct connection' test also exists under the French law. See L. Kennes, « La recherche d'un système équilibré de sanctions, dans la procédure pénale, des irrégularités – Étude de droit comparé », 2018, op. cit.

³³² This list of differences is by no means of a non-exhaustive nature.

IT	X		Evidence obtained in breach of fundamental rights; Hearsay evidence although a few, narrowly interpreted exceptions exist
HU	X		Evidence obtained by committing an offence or by other prohibited methods, or by the substantial restriction of the procedural rights of the participants
IE	X		Evidence obtained in breach of constitutional rights
NL		X	No specific exclusionary rules exist and the inclusion/exclusion of evidence takes place on a seemingly incremental basis depending on three criteria: the interest that the breached rule serves, the gravity of the breach, and the harm caused by the breach.
RO	X		The defendant was denied participation at stages of criminal proceedings where it is mandatory; The defendant was denied his/her right to the presence of the counsel at stages of the criminal proceedings where it is mandatory Evidence gathered as a result of an investigative order issued by a prosecutor that yet does not have jurisdiction on a case thus cannot enter the trial.

2.1.2. Admissibility of evidence gathered in another Member State

Among the countries examined, there is no exclusionary rule as regards the admissibility of evidence gathered in another EU State. While some Member States apply their national rules of evidence to evidence obtained in a foreign jurisdiction, others have established specific rules for foreign evidence.³³³

With the entry into force of the 2000 EU MLA Convention and more recently of the EIO Directive, evidence must be gathered by the requested/executed State according to the formalities and rules indicated by the requesting/issuing State. Italy, until 2016, had not implemented the 2000 EU MLA Convention,³³⁴ and instead relied on the 1959 CoE Convention, whereby evidence must be gathered according to the law of the requested/executing State.

Despite significant variations in admissibility criteria at the domestic level, often exclusionary rules are less strictly applied in cross-border proceedings, than when national authorities conduct a domestic investigation (e.g. Germany, Italy, The Netherlands).³³⁵

In Germany, breaches of the national *ordre public* and the fair trial principle of Art. 6 ECHR are considered as the main limitations for declaring evidence admissible in German criminal proceedings.³³⁶ In Italy, exclusionary rules intervene when evidence gathered has been obtained in breach of public order or public decency and constitutionally protected fundamental rights, and when there is no proof that the requested State followed the modalities specifically indicated by the requesting State for the collection of the evidence requested via MLA.³³⁷ In the Netherlands, the judicial review examines whether evidence has been gathered in accordance with the right to a fair trial.³³⁸

³³³ It should in this regard be noted that in respect of illegally obtained evidence, foreign evidence is intrinsically different to national evidence, in that in the examination of the legality of the evidence foreign rules might apply.

³³⁴ L. n. 149/2016 adopted on 21 July 2016.

³³⁵ Or involving the conduct of evidentiary activities by the national authorities in a foreign State.

³³⁶ National report No 1 on Germany, Section on Transfer of Evidence (point VI).

³³⁷ National report No 2 on Italy, Section on evidence-gathering and admissibility respectively (point 19).

³³⁸ Ibid.

In other countries, inadmissibility rules applied at the domestic level continue to apply in cross-border situations (e.g. France, Romania, Spain, Finland).³³⁹ This means that, in principle, foreign authorities in charge of the investigations will have to comply with some of the specificities of national criminal justice systems,³⁴⁰ and that evidence may be excluded from the trial according to the rules of the requesting/issuing State.

It is interesting to note that in Hungary, there is no explicit rule governing the admissibility of evidence gathered in another country. The national code of criminal procedure nonetheless states that evidence may be gathered by a foreign country upon Hungarian request according to the rules of the CCP.³⁴¹ It can be inferred from this provision that the exclusionary rules mentioned above governing domestic procedures also apply to cross-border evidence collection.³⁴²

Standards for admissibility sometimes depend on the kind of evidence that is collected, and national procedural rules may continue to apply in some countries for specific types of evidence. Evidence testimonies are a case in point in Spain and Italy, for which national procedural rules continue to apply.³⁴³ In Italy, documents and records of unrepeatable activities can always enter the trial, and evidence gathered by means of interceptions of communication can usually be used in the proceedings, provided that a rogatory letter was issued.³⁴⁴ However, the admissibility of records of witness examinations is subject to restrictions, and one of the following three conditions must be fulfilled: the presence of a counsel during the testimony, consent of the accused, or the impossibility to cross-examine the witness.³⁴⁵ These conditions are, however, of a non-cumulative nature.

2.2. Impact on cross-border cooperation

In the absence of common minimum rules, national standards on admissibility of unlawfully gathered evidence have amounted to a “patchwork of rules, principles and practice” that “does not only increase the complexity of transnational justice, but undoubtedly has a negative impact on the protection of fundamental rights and the efficiency of international judicial cooperation.”³⁴⁶

Obstacles to have evidence gathered in accordance with the law of the requested/executing State admitted in the proceedings of the issuing State (*locus regit actum*) resulted in a shift in *modus operandi*. Thus, it is the law of the requesting/issuing State (*forum regit actum*) that now governs cooperation in most EU instruments (2.2.1.). The coexistence of two rules (i.e. *locus regit actum* and *forum regit actum*) gives rise to complex problems that manifest in the terrain of evidence admissibility: issues of compliance have pervaded in respect to both the law of the requesting/issuing State (2.2.2.) and the law of the requested/executing State. Compliance issues may arise with JITs and be heightened in the EPPO within the framework of investigations carried out in multiple countries (2.2.3.). Against this background, many countries adopted the “principle of non-inquiry”, whereby

³³⁹ See National reports no 2 on France, Romania, Finland, Spain, Sections on evidence-gathering and admissibility.

³⁴⁰ For example, under Romanian law a warrant for home search may be granted by the judge for rights and liberties only if the criminal investigation has officially started, at least regarding the crime (*in rem*) – see Article 158 et seq from the 2014 Code of Criminal Procedure. In cases of international mutual assistance, the special provisions of Law no 302 of 2004 provide that when Romania is a requested state, the beginning of the criminal investigation is no longer needed (Article 176 para. 6 from Law no 302 of 2004). See National report No 2 on Romania, Section on evidence-gathering and admissibility (point 19).

³⁴¹ M. Hollan, “Report on Hungary”, in K. Ligeti (ed), *Toward a prosecutor for the European Union*, 2013, op. cit., p. 331

³⁴² Ibid, see also National report No 2 on Hungary, Section on evidence-gathering and admissibility (point 17).

³⁴³ L. Bachmaier Winter, “Transnational Criminal Proceedings, Witness Evidence and Confrontation, Lessons from ECtHR’s Case Law”, *Utrecht Law Review*, Vol 9, Issue 4, 2013; F. Caprioli, Report on Italy, in S. Ruggeri, *Transnational Inquiries and the Protection of Fundamental Rights in Criminal Proceedings*, 2015 op. cit. p. 442

³⁴⁴ F. Caprioli, “Report on Italy”, in S. Ruggeri, *Transnational Inquiries and the Protection of Fundamental Rights in Criminal Proceedings*, 2015 op. cit. p. 442

³⁴⁵ Ibid.

³⁴⁶ L. Bachmaier Winter, “Transnational Criminal Proceedings, Witness Evidence and Confrontation, Lessons from ECtHR’s Case Law”, op. cit., 2013, p. 128

requesting/issuing States do not check how evidence was gathered as a rule, so as to not paralyse the system of transnational investigations (2.2.4). However, this may be problematic from the perspective of individuals' rights (2.2.5.).

2.2.1. Difficulties encountered under the *locus regit actum* rule and insertion of the *forum regit actum* rule

Prior to the entry into force of the 2000 EU Convention on MLA in Criminal Matters, Member States relied on the *locus regit actum* rule in transnational investigations, inherited from the "mother Treaty" of the 1959 Council of Europe Convention on Criminal Matters (hereinafter 1959 CoE Convention).³⁴⁷ In its Article 3(1), the 1959 Convention notes that the requested State must execute an MLA request according to and in compliance with its own rules.³⁴⁸ This is also known as the *lex loci* principle. The application of this principle led however to admissibility problems. Differences among national procedures often resulted in the impossibility to use information gathered in a Member State in the proceedings of another Member State. For example, evidence was collected in the requested State with sometimes little consideration for the guarantees enshrined in the laws of the trial State.³⁴⁹ Absence of compliance with such procedural requirements and formalities, perceived as crucial in the trial State for evidence to be admitted, led to the exclusion of the evidence obtained, rendering the cooperation granted futile.³⁵⁰

Concerned with the situation and in order to facilitate the admissibility of evidence across the Union and attain the goal of free movement of evidence, the EU adopted the aforementioned Convention on Mutual Assistance in 2000³⁵¹ that introduced the *forum regit actum* principle which was later included under Art 9(2) of the EIO Directive, and the new E-Evidence Proposal.³⁵² Pursuant to this principle, Member States receiving a request for assistance shall comply with the formalities and procedures indicated by the requesting State unless otherwise provided in the Convention and provided that such formalities and procedures are not contrary to the fundamental principles of law of the requested Member State.³⁵³ The idea behind this rule is to subject the collection of foreign evidence to the legislation of the trial state, 'nationalising' it with the aim of ensuring its admission – and thus, enhancing the efficiency of prosecutions.

Whereas most EU States now rely on the *forum regit actum* rule for cross-border cooperation in evidentiary matters, the *locus regit actum* principle remains applicable in at least three contexts. Already existing evidence will naturally be collected in accordance with the *locus regit actum* rule, and so irrespective of the legal instrument used to transfer it. The *locus regit actum* rule also remains the underpinning rule for investigative activities carried out within the framework of Joint Investigation Teams³⁵⁴, even if the flexibility of this instrument allows participating States from having their own national procedural requirements taken into consideration. Finally, the *locus regit actum* rule is also applicable to EPPO investigations.

³⁴⁷ Council of Europe, European Convention on Mutual Assistance in Criminal Matters, ETS No.030, Strasbourg, 20 April 1959. The expression is of G. Vermeulen, "Gathering foreign evidence: Introducing the European Investigation Order", 2011, op. cit., p. 41.

³⁴⁸ The full provision reads: The requested Party shall execute in the manner provided for by its law any letters rogatory relating to a criminal matter and addressed to it by the judicial authorities of the requesting Party for the purpose of procuring evidence or transmitting articles to be produced in evidence, records or documents.

³⁴⁹ I. Armada, "The European Investigation Order and the lack of European standards for gathering evidence. Is a fundamental rights-based refusal the solution?" *New Journal of European Criminal Law*, Vol 6, Issue 1, 2015

³⁵⁰ G. Vermeulen, "Gathering foreign evidence: Introducing the European Investigation Order", 2011, op. cit., p. 42

³⁵¹ See S. Peers, *EU Justice and Home Affairs Law*, 2016, op. cit., p. 103. The Convention is in force in the majority of EU States.

³⁵² Arts 5(f) and 6(f) E-Evidence Proposal

³⁵³ Art 4(1) of the 2000 Convention. Additionally, Art 4(2) provided that: "The requested Member State shall execute the request for assistance as soon as possible, taking as full account as possible of the procedural deadlines and other deadlines indicated by the requesting Member State. The requesting Member State shall explain the reasons for the deadline."

³⁵⁴ Under the EU Convention on Mutual Legal Assistance of 2000, the team "shall carry out its operations in accordance with the law of the Member State in which it operates." See Article 13(3)(b) EU Convention on Mutual Legal Assistance in Criminal Matters between the Member States of the European Union, 29 May 2000

2.2.2. Compliance and compatibility issues under the *forum regit actum* rule: the cases of the 2000 MLA Convention and of the EIO

The introduction of the *forum regit actum* rule in 2000 failed to erase completely admissibility issues arising following transnational investigations.

Firstly, it must be stressed that the *forum regit actum* rule is somewhat voluntary; the requesting/issuing State may -but may not- indicate the formalities and procedures it wishes the requested/executing State to follow. Spain, for example, does not always provide indications on the procedure to be followed by the requested/executing State.³⁵⁵ If nothing is said, the law of the requested/executing State will apply. Moreover, even when the requesting/issuing State does indicate such formalities and procedures, such indications may turn out difficult to understand for the requested/executing State, and so in spite of the assistance provided by EJN and Eurojust.³⁵⁶ This may result in partial compliance on the part of the executing State with the law of the issuing State, in particular when no claim is filed by the defence.³⁵⁷

Secondly, the requested Member State is allowed to disregard the indicated formalities and procedures if they are contrary to its fundamental principles of law, without the latter being defined. Neither the MLA Convention nor the EIO Directive offer guidance on how and to what extent the rules of the issuing State should be followed.³⁵⁸ To a certain extent, the requested/executing Member State thus remains free to establish its own rules or practice as to the degree of compliance that should be met with the procedures of the other national systems.³⁵⁹ This is compounded by the fact that it is difficult for the requesting/issuing State to carry out checks on whether and to what extent the requested/executing State has fulfilled the conditions necessary for the piece of evidence to be admitted.³⁶⁰ Sometimes, the difficulty to check how information was gathered resulted in the evidence being excluded by the issuing State. As stated earlier, failure by the requested Member State to prove that it followed the modalities specifically indicated by the requesting State for the collection of the evidence requested via MLA constitutes a ground for excluding the evidence in Italy. In a specific case, the Romanian authorities were supposed to alert the Italian judicial authorities of the place and date of the activity, but the report merely stated that they followed the procedures required by Italy; evidence was excluded on that basis.³⁶¹

From a longer term perspective, it cannot be excluded that admissibility issues arise in the operation of the E-Evidence Proposal which, as noted above, adopted the *forum regit actum* principle as a functioning rule. Writing in 2016, the Commission noted that direct requests from law enforcement authorities to service providers are not expressly foreseen under most national laws of criminal procedure.³⁶² It also expressed doubts as to the admissibility of evidence gathered through direct cooperation in a later criminal trial.³⁶³ Despite these concerns, the E-Evidence Proposal does not contain any provision on admissibility, and merely acknowledges instead the widely divergent admissibility rules between the Member States.³⁶⁴

³⁵⁵ National report No 2 on Spain, Section on evidence gathering and admissibility (point 17)

³⁵⁶ National report No 2 on Romania, Section on evidence-gathering and admissibility (point 20)

³⁵⁷ Ibid.

³⁵⁸ I. Armada, "The European Investigation Order and the lack of European standards for gathering evidence. Is a fundamental rights-based refusal the solution?", 2015, op. cit., p. 20

³⁵⁹ Denmark does not take part in the EIO Directive, and Ireland has not opted-in the EIO.

³⁶⁰ *Supra*, Section 1 on investigative measures.

³⁶¹ Cass., Sez. IV, 26.05.10, B et al., Rv. 247822. See also National report No 1 on Italy, Section on the impact of different criminal procedures on cross-border cooperation (point 1.3.)

³⁶² European Commission, Non-paper: Progress Report following the Conclusions of the Council of the European Union on Improving Criminal Justice in Cyberspace, 15072/1/16, Brussels, 7 December 2016, p. 10

³⁶³ Ibid.

³⁶⁴ See Art 18 E-Evidence Proposal, as regards the extent to which immunities and privileges that protect the data sought in a Member State must be taken into account by the trial State.

2.2.3. Compliance and compatibility issues under the *locus regit actum* rule: the JITs and EPPO cases

Under the *locus regit actum* rule, the authorities of the requesting country cannot control the manner in which foreign courts and authorities apply their own laws. Under the 1959 Convention regime, this resulted in situations in which the judicial authorities of the requesting country failed to examine the way evidence was gathered by foreign authorities and nonetheless admitted the evidence.³⁶⁵ Inevitably, this had negative consequences on the position of the defence. The Spanish Supreme Court attempted to circumvent this issue by shifting the burden of proof onto the party affected by the evidence, and held in some instances that evidence could not be excluded since illegality could not be proven.³⁶⁶

Recurrent obstacles to evidence admissibility exist as a result of disregard of the national procedures of the State of prosecution, as JITs investigations illustrate.³⁶⁷ In JITs, as stated earlier, it is normally the law of the State where the investigation is carried out that applies according to the *locus regit actum* principle, irrespective of the number of participants to the team, and evidence is shared among all the participating countries. In some cases, indeed, the lawfulness of the evidence obtained by the team has been challenged due to the existence of special requirements under the law of the trial court, in particular with regard to the use of special investigative techniques.³⁶⁸ Although the Irish involvement within the JITs has remained (very) parsimonious to date, one of the fears expressed by Irish officials was that evidence obtained through joint investigations may not easily enter the trial, due to possible constitutional obstacles with regard to Irish rules on admissibility.³⁶⁹

This being said, admissibility issues have been more or less solved by the extensive dialogue that is taking place between national competent authorities prior to the beginning of fact-finding operations. Although the FD JITs follows the *lex loci* principle, the FD remains silent on whether evidence should be admitted in the State of trial, if the rules of the State of investigation have been following. In practice therefore, participating States generally underlines the formalities and procedures that must be taken into consideration when investigations are being carried out, in order to facilitate the admission of evidence in the proceedings when the trial is taking place. Dialogue and mutual knowledge are consequently crucial to the effective operation of JITs, thus underlining the difficulty to apply the *locus regit actum* principle when investigations are conducted by multiple countries with different standards.³⁷⁰

From the perspective of evidence-collection, the system established by the EPPO Regulation does not follow the *forum regit actum* rule either.

Contrary to the EIO, which involves bilateral cooperation between two Member States, EPPO investigations may indeed take place in a plurality of EU States. In such a context, the *forum regit actum* rule would be difficult to implement, since the State/s of trial remain unknown and the European Delegated Prosecutor cannot know what applicable rules, formalities and procedures to abide to during the conduct of investigations for the evidence to be admitted.³⁷¹

The general rule is that investigations will be carried out in a Member State by one of the national European Delegated Prosecutors in charge of the case,³⁷² according to his/her own national law. In theory the Delegated Prosecutor in charge should originate from the State

³⁶⁵ F. Gascon Inchausti, "Report on Spain", in S. Ruggeri, *Transnational Inquiries and the Protection of Fundamental Rights in Criminal Proceedings*, Heidelberg: Springer, 2014, p. 485

³⁶⁶ Ibid.

³⁶⁷ Council of the EU, Conclusions of the 9th Annual meeting of the National Experts on Joint Investigation Teams, 7259/14, 27 - 28 June 2013, the Hague, See also Eurojust Annual Report of 2012, p. 39

³⁶⁸ Ibid.

³⁶⁹ Eurojust, "Report on Ireland", Sixth round of Mutual Evaluations, 10 November 2014, 6997/14, p. 48

³⁷⁰ The aforementioned meeting suggested that enhancing participation of Seconded National Experts in JITs investigations could allow participating States to become more knowledgeable about one another's legal systems. Thus, it would diminish the risk of incompatibilities.

³⁷¹ This is compounded by the fact that the Regulation provides that for reasons of workload, investigations and prosecutions may be assigned to a prosecutor other than in his/her Member State of origin. Recital 28 Regulation 2017/1939

³⁷² Or the competent authorities instructed to carry out the investigation. See Art 28(1) Regulation 2017/1939

where the investigation is being conducted.³⁷³ A consequence of this is that there are as many European Delegated Prosecutors as MSs where investigations are needed. This was precisely to avoid situations where the handling Delegated Prosecutor encounters difficulties in understanding the language and legal system of the MS concerned.³⁷⁴ Thus, the applicable law is that of the country where the investigation is being carried out, which happens to be also the law of the European Delegated Prosecutor in charge of the investigation.

The risk of exclusion of evidence inherent to the application of the *locus regit actum* rule has been addressed in the EPPO Regulation by means of a provision dealing with admissibility of evidence. Art 37(1) thus requires that “evidence presented by the prosecutors of the EPPO or the defendant to a court shall not be denied admission on the mere ground that the evidence was gathered in another Member State or in accordance with the law of another Member State”. This provision aims at enhancing the possibilities of admission of the evidence collected by the EPPO; it is not an exclusionary but an ‘inclusionary’ rule. The final wording of the provision is quite different to that included in the EPPO proposal presented by the Commission in 2013. Under the former Art 30(1), evidence collected and presented by the EPPO should be admitted before national courts without any validation or similar legal process even if the national law of the Member State where the court is located provides for different rules on the collection or presentation of such evidence, on the condition that its admission would not adversely affect the fairness of the procedure or the rights of the defence enshrined under Articles 47 and 49 of the Charter of Fundamental Rights.³⁷⁵ Explicit reference to the fairness of the procedure and the rights of the defence were therefore removed from the provision’s final wording, and can now only be found in Recital 80. The added value of the current rule may be questioned: as it flows from the previous analysis of differences, MSs do not exclude evidence obtained abroad and the current provision is in this respect somewhat redundant. Additionally, the EU legislator opted for including a provision that seeks to improve the chances of the evidence being admitted for the sake of the prosecution case, but failed to incorporate an exclusionary rule of evidence obtained in violation of the right to a fair trial.

2.2.4. A pragmatic approach: the rule of non-inquiry, and impact on mutual trust

Problems of compliance with the national law of the trial State during cross-border investigations, alongside the difficulty to check how evidence was collected by the requested/executing State, propelled Member States to rely on a more flexible approach to the way evidence was gathered by a foreign authority. This relatively lax position of judicial authorities *vis-à-vis* evidentiary activities carried out by another State has been termed the ‘rule’ or ‘principle of non-inquiry’. In concrete terms, this means that the requesting State applies a less - stringent check on the manner evidence was obtained in the requested State as they would do in an investigation carried out by the domestic authorities.³⁷⁶ For example, the judicial review of how evidence was collected by the foreign authorities is sometimes quite poor, as was pointed out in France.³⁷⁷ A similar attitude could be discerned when cross-border cooperation was regulated by the *locus regit actum* rules developed by 1959 MLA Convention. Thus, the Italian Court of Cassation often resorted to the argument that “a foreign legal system cannot be expected to adjust to the constitutional principles of another State.”³⁷⁸

³⁷³ Recital 29, Regulation 2017/1939

³⁷⁴ Ibid.

³⁷⁵ Article 30(1) COM (2013) 534 final. As noted elsewhere, this provision purported to ensure free movement of evidence across the EU and was quite ambitious in scope, given the existence of different national rules on the collection or presentation of evidence; see A. Weyembergh, K. Ligeti, “The European Public Prosecutor’s Office: Certain Constitutional Issues”, in L. H. Erkelens, A.WH. Meij, M. Pawlik (eds), *The European Public Prosecutor’s Office: An Extended Arm or a Two-headed Dragon?*, The Hague: TMC Asser Press Institute, 2014.

³⁷⁶ L. Bachmaier Winter, “Transnational Criminal Proceedings, Witness Evidence and Confrontation, Lessons from ECtHR’s Case Law”, *Utrecht Law Review*, Vol 9, Issue 4, 2013, p. 139.

³⁷⁷ As regards, for example, whether the principle of loyalty was upheld during the investigation. See National report No 2 on France, Section on evidence-gathering and admissibility.

³⁷⁸ Cass. 28 November 2002, Acri, in CED Cass. 223202. Quoted in F. Caprioli, Report on Italy, in S. Ruggeri, *Transnational Inquiries and the Protection of Fundamental Rights in Criminal Proceedings*, 2015 op. cit., p. 447

Some countries even relied on mutual trust to justify their own reluctance to conduct a thorough review on how evidence was gathered by the foreign State. In Spain, the Supreme Court invoked the principles of respect of the sovereignty of EU State and mutual trust to defend its approach. It declared in a ruling of 2003 that the Spanish courts shall not become supervisors of the legality of acts executed in another EU State and that “in a common European area of freedom, security and justice, ... it is not acceptable to control the judicial acts and measures carried out in the different Member States in execution of letters rogatory issued in conformity with Article 3 of the 1959 Convention.”³⁷⁹ In practice, unlawfully gathered evidence was sometimes admitted in criminal proceedings.³⁸⁰ Similarly, the Dutch practice of cross-border evidence-gathering, and MR at large, hinges on a rigid application of the principle of mutual trust, as an overarching principle pursuant to which violations of fundamental rights cannot occur since all EU States are party to the ECHR and apply a common, minimum set of fundamental rights.³⁸¹

It is interesting to draw a comparison with surrender procedures. Member States have generally tended to shy away from examining how evidence that led to the issuing of an EAW was gathered. Rather, they attempted to accommodate differences in evidentiary law. The cases of Italy and Ireland discussed below provide exemplifying illustrations. A word of caution should nonetheless be raised. In evidentiary matters, the requested/executing state is actively contributing to the criminal procedure deployed in the requesting/issuing state, thereby suggesting that stringent test should be applied by the latter, compared with surrender procedures. However insightful the two examples below are, the approach taken by MSs in surrender procedures cannot be fully transposed to cross-border admissibility of evidence.

The Italian law implementing the EAW imposes an obligation, when Italy acts as an executing State, to verify the ‘probable cause’, understood as ‘serious indications of guilt’, as a condition to execute an EAW for the purpose of prosecution.³⁸² The same law also provides that the Italian executing authorities must take into consideration whether the evidentiary principles enshrined in the Italian Constitution, i.e. consecrating the basic rule of adversary gathering of evidence, have been observed during the evidence collection process leading to the issuing of an EAW. This would have probably led to systematic refusals of surrender and a clash with the principle of mutual recognition. However, in a line of case law, the Court of Cassation ruled that by no means the Italian authorities had the power to review the modalities under which evidence resulting in the issuing of an EAW had been gathered.³⁸³ It is therefore not necessary for the issuing MS to adopt a configuration of procedural safeguards similar to the Italian one.³⁸⁴

Interestingly, the Irish standards of evidence admissibility were also put to the test in a recent EAW case.³⁸⁵ Non-conformity with national rules of admissibility were recently invoked as a ground of appeal in a surrender procedure, involving Ireland as an executing State, and the UK as an issuing State. The appellant argued that the potential right of the prosecution in the United Kingdom to introduce evidence of an alleged co-conspirator’s conviction in a trial for conspiracy would be incompatible with the Irish Constitution in that it would be a denial of the respondent’s right to hear evidence presented in the context of a trial and to contest such evidence by cross-examination. The Irish High Court quashed the appeal, on the grounds that there was a need for “significantly more,” namely a real and substantive,

³⁷⁹ STS 1521/2002, 25 September 2002. in L. Bachmaier Winter, Transnational Criminal Proceedings, Witness Evidence and Confrontation, Lessons from ECtHR’s Case Law, *Utrecht Law Review*, Vol 9, Issue 4, 2013, p. 139. The principle of non-inquiry, however, does not apply to witness evidence.

³⁸⁰ It did so in particular when an individual in his private capacity had brought evidence to court obtained through theft of business data. The Supreme Court held that “the rule of exclusion becomes meaningful only as an element of prevention against excesses by the State in the investigation of a crime.” SC 228/2017.

³⁸¹ National report No 2 on the Netherlands, Section on evidence (point 3).

³⁸² National report No 2 on Italy, Section on evidence-gathering and admissibility (point 20).

³⁸³ C. Cass. Sez. VI, 24.11.2009, n. 46223, Pinteà (Rv 245450); more recently, see also Cass. Sez. VI, 26.1.2016, n. 3949, Picardi (Rv. 267185).

³⁸⁴ C. Cass., Sez. VI, 27.1.2012, n. 4528, Baldi (Rv. 251959).

³⁸⁵ The Minister for Justice & Equality v. Buckley. [2015] IESC 87, 26th November 2015. National report No 1 on Ireland, Section on Presumption of confidence in the authorities of other Member States (point 5).

i.e. “egregious”, defect in the system of justice, where fundamental rights were likely to be placed at risk, or actually denied, to deny surrender in such a case.³⁸⁶ It further noted that “rules of evidence ‘may differ’ between states, and that alone does not at all lead to the necessary conclusion that there is a breach of fundamental rights in the requesting state.”³⁸⁷ This case of particular relevance, because it put to the test the scope of application of the Irish Constitution on evidence rules. The attitude of the Irish authorities cannot, as such, be termed as relying on a principle of non-inquiry. However, by setting a high threshold for the non-execution of an EAW through the “egregious defect standard”, a certain flexibility, or “presumption of confidence”,³⁸⁸ can nonetheless be observed.

2.2.5. Fundamental rights concerns arising from current approaches

The pragmatic approach pursued by the national authorities is certainly conducive to the smoother, and more effective, circulation of evidence across the Union. However, following the rule of non-inquiry is not without raising challenges from the perspective of fundamental rights, due to the absence of review by a judicial authority (A). These shortcomings notwithstanding, the adoption of the Presumption of Innocence Directive and the Access to a Lawyer failed to redress the balance by establishing a rule of exclusion that could have forced MSs to review how evidence was gathered (B).

A. Fundamental rights concerns: absence of control and lack of legal certainty

MS’s reliance on the principle of non-inquiry is problematic. Critics pointed out that the requesting/issuing State has the full responsibility to carry out a check *ex officio* on possible irregularities occurring during the collection of evidence by the executing State.³⁸⁹ However, if the requesting/issuing State applies the rule of non-inquiry, as is the case in most of the countries examined, then no one takes the responsibility to check the way evidence was gathered.³⁹⁰

The case of Mr Hilali illustrates well this problem.³⁹¹ In 2004, an EAW was issued by Spain to the UK seeking the surrender of Mr Hilali. The British judicial authorities put Mr Hilali in jail, before they consented to his surrender. In the meantime, the evidence on which the proceedings were opened in Spain was found inadmissible by the Spanish courts. Surrender could not take place, as the basis on which the EAW had been issued was no longer valid. In view of this change of circumstances, Mr Hilali applied for judicial review before the British High Court, but his demands were rejected on the grounds that, if the decision of whether the alleged crime constitutes an extradition offence is a matter of the courts of the executing State, the evidence on which the extradition order is based and its admissibility *are entirely matters for the court of the issuing State*. Mr Hilali spent four years in prison in the UK, before a new extradition offence of alleged murder was found, and he was surrendered to the Spanish authorities to be jailed for another year. The case never came to trial, and the charges were dropped in 2012.

In the absence of common standards on evidence-gathering operations, and without a review of the way investigations were carried out in the executing country by the issuing State, encroachments may occur on the legal protection of persons subject to investigative acts.³⁹² Quite straightforwardly, reliance on mutual trust as a justification for refusing to check how evidence was gathered is incompatible with the rights of the defence, along with the imperative of a quality judicial assessment of the facts. Mutual trust is a claim that exists

³⁸⁶ Ibid, paras. 24-25.

³⁸⁷ Ibid.

³⁸⁸ National report No 1 on Ireland, Section on Presumption of confidence in the authorities of other Member States (point 5).

³⁸⁹ A. van Hoek, M. Luchtman, “Transnational cooperation in criminal matters and the safeguarding of human rights”, *Utrecht Law Review*, Vol 1, Issue 2, 2005, p. 21

³⁹⁰ Ibid.

³⁹¹ Regina (Hilali) v Governor of Whitewall Prison and Another: UKHL 3, 2008. See also analysis by See T. Konstadinides, The Europeanisation of extradition: how many light years away to mutual confidence? in C. Eckes, T. Konstadinides (eds), *Crime within the Area of Freedom, Security and Justice: A European Public Order*, Cambridge: Cambridge University Press, 2011, pp. 192-224

³⁹² Ibid.

between judicial authorities or state institutions.³⁹³ It does not, however, exist on the side of the defence. Thus, "the function of the defence is not to trust, but to check compliance with the law and to ensure that the rights of the defendant are safeguarded."³⁹⁴ By consequence, if mutual trust stands as an obstacle to the right of the defence, then "the principle of non-inquiry should be rethought."³⁹⁵ These issues lied at the heart of the *Stojkovic v. France and Belgium* case.³⁹⁶ The ECtHR condemned France, on the grounds that it had not reviewed that the interview of a witness pursuant to a letter rogatory issued to Belgium had been carried out in conformity with Art 6 ECHR.

The use of the rule of non-inquiry gave rise to controversies in some MSs. Resorting to the rule of non-inquiry does not mean that the current *modus operandi* of national authorities has not triggered intense debates at the national level.³⁹⁷ Reports on France, Italy and Germany suggest that tensions occur between the need to preserve the probative value of the evidence gathered in order to prevent impunity on the one hand, and the imperative of preserving the rights of individuals on the other hand.

In Italy, critics pointed out that resorting to the rule of non-inquiry implied a "progressive reduction of the content of the adversary principle until it becomes unrecognisable."³⁹⁸ Similar criticism was formulated in Germany. A defence lawyer interviewed in the German report pointed out that the approach taken by the Federal Constitutional Court, whereby foreign evidence may be admitted even though it does not comply with the German standards, means that German courts can justify "all or nothing."³⁹⁹ The Federal Constitutional Court set guidelines in this respect in an important judgment of 2012 on the interpretation of the *forum regit actum* rule.⁴⁰⁰ The case concerned a German request issued to the Czech authorities to carry out telecommunications interceptions. As regards the admissibility of the evidence then gathered, the German Federal Constitutional Court emphasised that, since evidence was gathered according to the German rules, the use of the evidence obtained abroad in German criminal proceedings was independent from the lawfulness of the measure in the requested EU state.⁴⁰¹ Compliance with the law of the requested State is, under the *forum regit actum* rule, not a matter for German Federal Constitutional Court.⁴⁰²

A second main concern stems from the challenges the current cooperation frameworks entail from the perspective of legal certainty.

On the one hand, the co-existence of a variety of rules and cooperation logics, i.e. *forum regit actum* and *locus regit actum*, may complicate the task of the defence of challenging the way evidence was gathered, due to difficulties in knowing the applicable law.

On the other hand, the reluctance of the EU legislator to adopt an exclusionary rule in the EPPO implies that the high degree of differentiation between exclusionary rules is maintained. This also means that the extent to which fundamental rights are being taken into consideration when judicial authorities check whether evidence should be admitted or excluded varies to a great extent.⁴⁰³ The regulation extended the free circulation of evidence

³⁹³ L. Bachmaier Winter, *Transnational Criminal Proceedings, Witness Evidence and Confrontation: Lessons from the ECtHR's Case Law*, *Utrecht Law Review*, Vol 9, Issue 4, 2013, p. 140

³⁹⁴ *Ibid.*

³⁹⁵ *Ibid.*

³⁹⁶ ECtHR, *Stojkovic v France and Belgium*, App no 25303/08, 27 October 2011

³⁹⁷ National reports No 2 on Italy, France, and Germany (see various sections on evidence gathering and admissibility). See paragraph below.

³⁹⁸ F. Caprioli, Report on Italy, in S. Ruggeri, *Transnational Inquiries and the Protection of Fundamental Rights in Criminal Proceedings*, 2015 op. cit., p. 447

³⁹⁹ National report No 2 on Germany, Section on evidence gathering and admissibility (point C(2))

⁴⁰⁰ BGH 1 StR 310/12 - Beschluss vom 21. November 2012 (LG Hamburg) = BGHSt 58, 32 = HRRS 2013, Nr. 314.

⁴⁰¹ National report No 2 on Germany, Section on evidence gathering and admissibility (point C(2))

⁴⁰² *Ibid.*

⁴⁰³ See E. De Busser, "Procedural issues under the EPPO's legislative framework, Conference on the Establishment of the European Public Prosecutor's Office (EPPO): 'state of play and perspectives'", The Hague: TMC Asser Institute, 7-8 July 2016; A. Weyembergh, C. Brière, "Towards a European Public Prosecutor's Office", 2016, op. cit., p. 33.

to the point of “an (almost) automatic ‘presumption of admissibility of evidence’”⁴⁰⁴ by removing the provisions on fundamental rights from the main text of the regulation and shifting the burden of admissibility tests to national authorities.⁴⁰⁵ The hands-off approach pursued by EU legislators does little to give a concrete meaning to the concept of mutual admissibility.⁴⁰⁶ By nearly abolishing the fundamental rights guarantees that Member States should have taken into account when scrutinising the admissibility of evidence, EU legislators opened the way to the persistence of differing standards that will continue to co-exist in parallel, including in terms of fundamental rights guarantees attached to them.⁴⁰⁷

B. The Presumption of Innocence and the Access to a Lawyer Directives: a solution?

The beneficial impact of procedural rights directives is likely to be limited in several respects.

First, no instrument of EU legislation has established exclusionary rules regarding evidence illegally/improperly obtained.

The Presumption of Innocence Directive, like previously the ECtHR, connects the presumption of innocence with the right against self-incrimination and the right to remain silent. Art 10(2) reads that “Member States shall ensure that, in the assessment of statements made by suspects or accused persons or of evidence obtained in breach of the right to remain silent or the right not to incriminate oneself, the rights of the defence and the fairness of the proceedings are respected.” However, Member States may do so “*without prejudice to national rules and systems on the admissibility of evidence.*” The inclusion of a reference to national law suggests that this provision is not an exclusionary rule and does not amount to a departure from the rule of non-inquiry; it does not clearly impose on Member States the obligation to exclude evidence obtained in violation of the right to remain silent or the right not to incriminate oneself. It was noted during the negotiations that MSs with a system of free assessment of evidence should be able to continue to use it.⁴⁰⁸ Back then, the Commission’s proposal did include an exclusionary rule, which read: “Any evidence obtained in breach of this Article shall not be admissible, unless the use of such evidence would not prejudice the overall fairness of the proceedings.”⁴⁰⁹

The Access to a Lawyer Directive should also be mentioned in this context. As briefly recalled earlier and acknowledged in the Directive itself⁴¹⁰, the ECtHR’s case-law has established more or less clearly that incriminating statements made during police interrogations without access to a lawyer must be excluded. Consequently, the Commission’s proposal contained an exclusionary rule in this regard⁴¹¹, which was watered down during the negotiations to result in a provision that is very similar to that in Art 10(2) of the Presumption of Innocence Directive: “Without prejudice to national rules and systems on the admissibility of evidence, Member States shall ensure that, in criminal proceedings, in the assessment of statements made by suspects or accused persons or of evidence obtained in breach of their right to a lawyer or in cases where a derogation to this right was authorised in accordance with Article 3(6), the rights of the defence and the fairness of the proceedings are respected”⁴¹². Again,

⁴⁰⁴ V. Mitsilegas, F. Giuffrida, “The European Public Prosecutor’s Office and Human Rights”, in W. Geelhoed et al (eds), 2017, op. cit. p. 77

⁴⁰⁵ *Supra*, Section 2.2.3.

⁴⁰⁶ *Ibid.* In the 2013 EC proposal, reliance on vaguely defined and all-encompassing concepts such as “fairness of the procedure” and “rights of the defence” was considered detrimental to legal certainty, given the large interpretative discretion that was left to the Member States.

⁴⁰⁷ In 2014 already, the European Parliament warned against the lack of clarity and uniformity of admissibility rules. European Parliament, interim report on the proposal for a Council regulation on the establishment of the European Public Prosecutor’s Office (COM(2013)0534 – 2013/0255(APP)), 24 February 2014, para vi

⁴⁰⁸ S. Cras, A. Erbeznik, “The Directive on the Presumption of Innocence and the Right to Be Present at Trial, Genesis and description of the new EU-Measure”, *eu crim 1/2016*, p. 64

⁴⁰⁹ See Arts 6 (4) and 7 (4) of the proposal.

⁴¹⁰ See Recital 50.

⁴¹¹ Art 13 (3) of the proposal reads: “Member States shall ensure that statements made by the suspect or accused person or evidence obtained in breach of his right to a lawyer or in cases where a derogation to this right was authorised in accordance with Article 8, may not be used at any stage of the procedure as evidence against him, unless the use of such evidence would not prejudice the rights of the defence”.

⁴¹² Art 12 (2) of the Lawyer’s Directive.

the EU legislator fails to establish an exclusionary rule that would shield the accused from abusive methods of investigation, and so in spite of the backup of the ECtHR's case law.

At first glance, the Presumption of Innocence Directive seems to provide a higher degree of protection than ECHR case law. Thus, "the exercise by suspects and accused persons of the right to remain silent or of the right not to incriminate oneself shall not be used against them and shall not be considered to be evidence that they have committed the criminal offence concerned."⁴¹³ This goes further than the ECtHR's controversial *Murray* case, whereby "adverse inferences" may be drawn from the silence of the accused in the light of all the circumstances of the case.⁴¹⁴

This notwithstanding, the *effet utile* of the directive is undermined by two further concerns. A first issue focuses on the lack of clarity as to the scope of the right to a legal remedy afforded to individuals under Art 10. In case of infringement or derogation to the right to be presumed innocent, the assessment of these breaches by the competent authorities should respect the rights of the defence and the fairness of the proceedings. However, this assessment should be "without prejudice to national rules and systems on the admissibility of evidence."⁴¹⁵ Another point of concern lies in the existing variable geometry in the EU's criminal justice area, as a result from the various opt-outs of the UK, Ireland and Denmark. Thus far, neither of these three countries have opted in the Presumption of Innocence Directive. Asymmetries in standards of protection recently caused some difficulties to the operation of the EAW between the UK and Germany (see box).

Variable geometry and inconsistencies among levels of protection in the right to remain silent as an obstacle to the EAW⁴¹⁶

An EAW case was recently referred to the Federal Constitutional Court of Germany, whereby the defendant contested his surrender to the UK, on the grounds that the British law, in accordance with the *Murray* judgment, allowed the court and the jury to draw inferences from his silence to his guilt. This conflicted with the status of the accused's right to remain silent in the German legal order. The Federal Constitutional Court stated that surrender is only impermissible if the *core content* of the right not to incriminate oneself as an inherent part of human dignity is affected. The core content is seen infringed, for instance, where an accused is induced by means of coercion to incriminate himself. In contrast, the core content is not affected when the silence can be used as evidence under certain circumstances and be used to the defendant's detriment. In the case at hand, the core content of the right was not infringed. The German Federal Constitutional Court ruled that denying surrender in this case would be too far-reaching.

2.3. Recommendations

The developments above identified several obstacles to the fulfilment of the objectives pursued by the EIO and the EPPO, i.e. the free circulation of evidence among EU MS.

The passage in some instruments from *locus regit actum* to *forum regit actum* has not solved all problems relating to admissibility of evidence: the admission of foreign evidence in criminal proceedings is not guaranteed, and the protection of fundamental rights is still not ensured.

⁴¹³ Art 7 (5) of Directive 2016/343.

⁴¹⁴ ECHR, *Murray*, 8 February 1996. It noted in this case that "whether the drawing of adverse inferences from an accused's silence infringes Article 6 is a matter to be determined in the light of all the circumstances of the case, having regard to the situations where inferences may be drawn, the weight attached to them by the national courts in their assessment of the evidence and the degree of compulsion inherent in the situation" (para. 47). The Strasbourg Court adopted a similar stance in *Condron v. United Kingdom*, 2 May 2000, where it stated that "it would be incompatible with the right to silence to base a conviction solely or mainly on the accused's silence or on a refusal to answer questions or to give evidence himself. Nevertheless, the Court found that it is obvious that the right cannot and should not prevent that the accused's silence, in situations which clearly call for an explanation from him, be taken into account in assessing the persuasiveness of the evidence adduced by the prosecution." (para. 56). Originally, the Commission had adopted ECHR stance in its Green Paper of 2006, a preliminary position that was heavily criticised and consequently scrapped in its proposal. S. Cras and A. Erbeznic 2016, op. cit.

⁴¹⁵ Art 10(2) Directive 2016/343/EU.

⁴¹⁶ BVerfG, Beschl. v. 6.9.2016 – 2 BvR 890/16 = StV 2017, 241. A press release in English is available at: <https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2016/bvg16-065.html>. For a short summary of the decision in English see T. Wahl, *eu crim* 3/2016, pp. 132-133.

(i) Legislative options: adopting minimum standards

The Lisbon Treaty conferred an express competence to the EU to adopt minimum rules in admissibility of evidence under Art 82(2)(a).

Academic literature on admissibility of evidence is rather scant. The few recommendations that we could find advocate in favour of minimum standards.⁴¹⁷ This view was supported by some of the national experts that contributed to the elaboration of this study (e.g. Finland, The Netherlands, Germany, Romania, France, Italy).

The need for a more solid framework is confirmed by the practical problems of compliance resulting from the application of the *forum regit actum* and *locus regit actum* rules. The adoption of the EIO Directive and the EPPO Regulation, along with the formulation of new legislative proposals in the realm of e-evidence⁴¹⁸ and confiscation orders,⁴¹⁹ moreover beg for the enactment of common standards on evidence admissibility. Clearly, the ‘pro-cooperation approach’ taken in the EPPO Regulation will not be sufficient to enable admissibility of evidence across the Union. As already noted by the Commission in 2001, “a simple reference to national law is by definition incapable of settling the question of the admissibility of evidence in a European investigation and prosecution area.”⁴²⁰

Because, as stated earlier, the way evidence is collected is inextricably linked to its admissibility, the adoption of different positive standards for each investigative measure could be theoretically advisable. It would be useful to refer to the standards developed by the ECtHR, for example as regards house search, interception of telecommunications, and the testimony of anonymous witnesses.⁴²¹ Evidence gathered in compliance with such rules in one country would then be admissible in another country.⁴²² However, as seen in the previous section, this approach is overly ambitious and extremely complex.

An alternative consists in developing a rule of exclusion for irregularly/unlawfully gathered evidence. Evidence gathered in violation of certain fundamental rights would be excluded, for example evidence obtained in breach of torture, as a result of police incitement, the infringement of the privilege of self-incrimination, the right to silence or the right to legal assistance. Although this would constitute a codification of ECHR principles, the added-value of adopting such minimum rules at EU level lies not only in enhancing the visibility of a complex body of ECtHR case law, but in that these standards could be broadly interpreted by the EU legislator, thus mirroring the strengthening of the *Salduz* jurisprudence in the Access to a Lawyer Directive. The adoption of a directive would moreover confer the possibility to individuals to rely on their direct effect, and give the right to the Commission to initiate infringement proceedings against ill- or non-implementation by the Member States. Such alternative approach seems more feasible than the first mentioned since some common grounds already exist in the field. However, a gulf of difference remains between jurisdictions, and materialises in Member States’ reluctance to legislate in this field. Member States were presented with an opportunity to legislate on the adoption of minimum rules on admissibility during the negotiations on the Presumption of Innocence and the Access to a Lawyer Directives, however they clearly refrained from doing so. As noted in the Italian national report, “identifying common standards in this context is not impossible but surely requires a higher degree of common commitment to the establishment of the Area of Freedom Security

⁴¹⁷ G. Vermeulen et al, *Rethinking International Cooperation in Criminal Matters*, 2012; M. Kusak, *Mutual admissibility of evidence in criminal matters in the EU*, 2016, op. cit.

⁴¹⁸ This is particularly true in the realm of electronic data, which may easily be subject to manipulation and questions of authorship are often disputed.

⁴¹⁹ Proposal for a regulation of the European Parliament and of the Council on the mutual recognition of freezing and confiscation orders, COM(2016) 819 final

⁴²⁰ See European Commission, Green Paper on criminal-law protection of the financial interests of the Community and the establishment of a European Prosecutor, COM (2001) 715 final, 2001, p. 58

⁴²¹ See, respectively, ECtHR, *Van Rossem v Belgium*, App no 41872/84, 9 December 2004; ECtHR, *Huvig v France*, App no 11105/84, 24 April 1990; and ECtHR, *Doorson v The Netherlands*, App no 20524/92, 26 March 1996. Quoted in G. Vermeulen et al, *Rethinking International Cooperation in Criminal Matters*, 2012; M. Kusak, *Mutual admissibility of evidence in criminal matters in the EU*, 2016, op. cit., p. 449.

⁴²² *Ibid*, p. 448. See also M. Kusak, *Mutual admissibility of evidence in criminal matters in the EU*, 2016, op. cit.

and Justice than other fields of approximation."⁴²³

A related problem with the potential establishment of EU exclusionary rules is the rule of non-inquiry. As seen above, national exclusionary rules regarding illegally/improperly obtained evidence is not as effective in transnational proceedings as in domestic matters, since the principle of non-inquiry seems to prevail. The maintaining of the rule of non-inquiry would similarly affect the effectiveness of EU exclusionary rules. These should therefore be complemented with an EU rule excluding evidence where it is impossible to check how it was gathered⁴²⁴. This is in line with the approach taken by the ECtHR to illegal evidence. When examining claims that illegal evidence was relied on to reach a verdict, the ECtHR's test⁴²⁵ begins with an assessment of the substantive right allegedly violated at the pre-trial phase. Only once it has been established that a fundamental right has been breached at the collection phase does the Strasbourg Court examine whether the defence was presented with an adequate opportunity to invoke defence rights in challenging both the collection and the use of evidence; or as the Court has put it, to "challenge the authenticity of evidence and opposing its use."⁴²⁶ It is settled ECtHR case law that national courts are endowed with a duty to examine how evidence was collected.⁴²⁷ If the non- or partial disclosure of the collection of evidence at the pre-trial stage is such that the judge cannot evaluate whether there has been a violation of the defendant's fundamental rights, then the right to a fair trial has been violated.⁴²⁸

Adopting this exclusionary rule would force Member States to check how evidence was collected by the foreign authorities before it enters the trial, and to depart from the controversial rule of non-inquiry.⁴²⁹ It would ensure that fundamental rights are taken into consideration in any assessment of evidence, defence rights in particular. This rule would moreover enhance transparency in the investigation process, thus providing the defence with a fair opportunity to challenge evidence because it would have knowledge of the means deployed to collect such evidence.

The adoption of this rule is supported by two main arguments. First, the EU has a responsibility to impose an obligation on national courts to check how evidence was gathered. The current admixture of *locus regit actum* and *forum regit actum* rules renders the task of the defence to know the applicable law a delicate endeavour. Imposing a duty to review the evidence-collection process onto national courts would mitigate risks of legal uncertainty and help redress current imbalances between the prosecution and the defence. Second, the ECtHR ruled that national courts must ensure that a review of how evidence was gathered must take place, so as not to compromise the guarantees of fair trial, in both domestic and

⁴²³ National report No 2 on Italy, Section on evidence-gathering and admissibility (point 16).

⁴²⁴ The Italian exclusionary rule regarding evidence obtained through MLA where there is no proof it has been collected in accordance with the procedures indicated by the requesting State is in line with this reasoning.

⁴²⁵ The so-called two-tiered approach is dissected in F. Pinar Ölçer, "The European Court of Human Rights: The fair trial analysis under Article 6 of the European Convention of Human Rights", in Stephen C. Thaman (Ed.), *Exclusionary rules in comparative law*, Springer, 2013, pp. 371-399.

⁴²⁶ See for example ECtHR, *PG and JH v United Kingdom*, App no 44787/98, 25 September 2001, paras 77 and 79; ECtHR, *Allan v UK*, App no 48539/99, 5 November 2002, para 43.

⁴²⁷ See F. Pinar Ölçer, *Illegally Obtained Evidence in European Treaty of Human Rights (ETHR)*, *Annales de la Faculté de Droit d'Istanbul*, nr. 57, 2008 pp. 91-92, citing ECtHR, *Dowsett v. The United Kingdom*, 24 June 2003; ECtHR, *Edwards and Lewis v. The United Kingdom*, 22 July 2003.

⁴²⁸ *Ibid.* The "balance test" developed by the ECtHR is, in fact, three-fold. Alongside the examination of the breach and the analysis of whether the defence was presented with an opportunity to invoke defence rights, the ECtHR evaluates whether the conviction was solely based on irregular evidence or accompanied by other elements of proof. This last criterion, however, is not suitable to the modus operandi of national courts. Whereas the ECtHR conducts an *ex post* examination of all the factual and legal aspects of the case, the review of evidence at the national level takes place *ex ante*, i.e. before the end of the trial. It is impossible for the judicial authority in charge of reviewing whether evidence should be admitted or not in the trial to take into consideration other elements of proof, since these elements may not be disclosed at the time of the review.

⁴²⁹ One of the main justifications put forward by national authorities is the difficulty to check how evidence was gathered. It is fair to say that, in practice, it would be much easier to carry out a compliance review if Member States shared a common set of minimum standards on admissibility. This notwithstanding, harmonisation gaps can hardly justify the absence of legality check. L. Bachmaier Winter, "Transnational Criminal Proceedings, Witness Evidence and Confrontation: Lessons from the ECtHR's Case Law", *Utrecht Law Review*, Vol 9, Issue 4, 2013

transnational proceedings.⁴³⁰

Both types of exclusionary rules complement and reinforce one another. However, if the adoption of a rule of exclusion for evidence gathered in violation of fundamental rights reveals itself too sensitive for the Member States, then the last one, based on the rejection of the principle of non-inquiry, could be used as a standalone solution. However difficult this solution will be to implement, it would at least compensate for the inexistence of EU minimum rules. In the absence of minimum standards for evidence collection, alongside the lack of EU exclusionary rules for evidence illegally/improperly obtained, as well as MSs preference for non-inquiry, the current framework for evidence admissibility clearly amounts to blind trust, a situation which threatens the rights of the defence, and undermines the functioning of the EU's area of criminal justice.

(ii) Non-legislative options: monitoring the implementation of cross-border investigations instruments

The question arises as to when such approximation effort should best be launched in order to convince MSs. Any initiative by the Commission in this sensitive domain should be evidence-based and backed by a thorough monitoring of the functioning of the EIO and the EPPO, in order to identify where approximation gaps hamper effective cross-border cooperation in evidentiary matters. This could facilitate the negotiation on approximation of evidence-gathering rules with the MSs, bearing in mind their attachment to their own specificities and margin for manoeuvre.⁴³¹

Enhancing consultations between judicial authorities in relation to the way in which evidence is collected when gathered under the umbrella of EU judicial cooperation instruments should be pursued. The EIO Directive has strengthened such consultations at several steps of the cooperation; it is desirable that similar communications between judicial authorities are encouraged also once the EIO has been executed in order to facilitate the task of examining the legality of foreign evidence and putting an end to the rule of non-inquiry.

⁴³⁰ As regards domestic proceedings, see the aforementioned cases of *Dowsett v United Kingdom* and *Edwards and Lewis v United Kingdom*. As for transnational proceedings, see *Stojkovic v France and Belgium*, op. cit., at para 55 in particular. That the French authorities did not check how the suspect's interrogation by the Belgian authorities amounted to a breach of Art 6(3) ECHR.

⁴³¹ Whereas most member states favoured the adoption of an all-encompassing instrument in the area of evidence-gathering, these common rules "should not interfere with the discretion of the relevant national authorities to assess the admissibility or probative value of the evidence in the criminal proceedings for which it has been obtained." National reluctance became evident when the national parliaments triggered the subsidiarity mechanism of the yellow card in 2013 against the principle enacted in the Commission EPPO proposal. According to the latter, evidence should be collected and presented by the EPPO, and such evidence should be admissible before national courts. This principle yet seemed unacceptable to Member States, as it would entail unnecessary intrusions in the legal systems of EU states and would introduce autonomous rules in respect of the admissibility of evidence which would amount to excessive additional difficulties in the operation of national criminal law systems. See J. Öberg, *Limits to EU powers*, Oxford/Portland: Hart Publishing, 2017, p. 172; see also Summary of the replies to the green paper on obtaining evidence in criminal matters from one member state to another and securing its admissibility, 2009, p. 4. Retrieved at: http://ec.europa.eu/justice/news/consulting_public/0004/summary_of_replies_en.pdf.

3. TRANSNATIONAL PROCEDURES AND EQUALITY OF ARMS: A LOOK AT CROSS-BORDER INVESTIGATIONS

KEY FINDINGS

- Understandings of the principle of equality of arms and the procedural safeguards applicable to transnational investigations differ widely from a Member State to another. Two examples were selected in this respect. First, the right for the defence to conduct its own, parallel investigations inherited from the adversarial tradition, is not guaranteed in all countries. Second, cross-examination of witnesses, although provided under Art 6(3)(d) ECHR, has not been implemented in a consistent and uniform manner.
- In the absence of consensus on the application of the principle of equality of arms, current instruments (e.g. EIO, EPPO) heavily rely on national law regarding the safeguards and legal remedies afforded to individuals. In spite of the financial and linguistic challenges encountered by the defence to gather exculpatory information in cross-border proceedings, the mechanisms developed by the EU, such as videoconference hearings, remain unsatisfying. This is compounded by the exclusion of the defence from transnational investigations frameworks, where cooperation takes place between national authorities and EU agencies or bodies *only*.
- The procedural rights directives have not been designed to address the challenges faced by the defence in transnational investigations. In spite of references included in recent cooperation instruments to procedural rights directives, their potential to redress current imbalances between the prosecution and the defence remains unclear, in the absence of dedicated provisions on transnational investigations.
- With the multiplication of cooperation mechanisms on transnational investigations, the procedural framework afforded to defendants should be strengthened. Adopting a separate instrument developing robust procedural safeguards for defendants in transnational investigations and instilling more clarity and coherence in the level and conditions of access to a remedy, are necessary steps to redress imbalances between the defence and the prosecution.

3.1. Key aspects of the principle of equality of arms

The principle of equality of arms requires that “each party must be afforded a reasonable opportunity to present his case – including his evidence – under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent.”⁴³² Thus, the principle of equality of arms applies to evidence matters. It has not been explicitly laid down in the text of the ECHR, but it should be read as one of the “fairness requirements” of Article 6(1) ECHR.⁴³³ Nor has it been explicitly stated under EU law. This being said, the CJEU ruled that the

⁴³² ECtHR, *Dombo Beheer BV v Netherlands*, 27 October 1993, para 33. This is also the approach taken by the CJEU, see C-199/11, *EU v Otis a.o.*, 6 November 2012, para 71

⁴³³ M. Van Wijk, *Cross-border evidence gathering: Equality of arms within the EU?*, The Hague: Eleven Publishing, 2017, p. 24. Meanwhile, the Strasbourg Court substantially fleshed out this principle in its case law. See, inter alia, the aforementioned case of *Dombo Beheer*, but also ECtHR, *Natunen v Finland*, 31 March 2009, para 42: “The accused must have the opportunity to organise his defence in an appropriate way and without restriction as to the possibility to put all relevant defence arguments before the trial court and thus to influence the outcome of the proceedings.”

principle of equality of arms was a “corollary” of the right to a fair trial,⁴³⁴ and that it was a component of the principle of effective judicial protection laid down in Art 47 of the Charter.⁴³⁵

The interpretation and implementation of the principle of equality of arms differ across the EU. The following addresses these differences through two representative case studies,⁴³⁶ namely the possibility for the defence to conduct investigations alongside the prosecution, as well as the extent to which the defence is able to cross-examine witnesses (3.2.). The difficulty to reconcile divergent approaches taken to the principle of equality of arms is illustrated by the wording of the EIO Directive and the EPPO Regulation: instead of approximation efforts, the EU legislator rather opted to circumvent differences (3.3.). From a more general perspective, the strengthening of transnational cooperation, in particular at the level of investigations, has not been counterbalanced by the development of adequate protection frameworks for defendants. The existence of these gaps puts in jeopardy the application of the principle of equality of arms (3.4.).

3.2. Different national understandings of the principle of equality of arms

The means and margin of manoeuvre available to the defence to gather evidence against the prosecution differ in several respects across the Union. Comparing the extent to which Member States have implemented the right for the defence to conduct its own investigations and the right to cross-examine witnesses is of particular interest to this study. The respective status of these rights differs in the current procedural framework developed for the defence. Whereas both of these rights are characteristics of the adversarial tradition, only the right to cross-examination has been codified under Art 6(3)(d) ECHR,⁴³⁷ and imposed as an obligation onto civil law systems. It is not legally binding, under ECtHR law, for the MSs to implement a right for the defence to conduct its own investigations, in order to fulfil the requirements of the principle of equality of arms. In some countries, however, this right is linked to equality of arms, as the analysis below shows.

Indeed, some countries have conferred a right, to the defence, to adopt a proactive approach and present a case against the prosecution.⁴³⁸ This can be done by allowing the defence, i.e. either the defendant or his/her lawyer, to be given the opportunity to conduct investigations. This right, however, is not guaranteed in all EU States.

At the higher end of the spectrum, Italy and Ireland are the sole countries that provide an express right to the defence to undertake investigations on its own and present the evidence gathered at the trial, alongside the prosecution. Under the Italian CCP, defence investigations are considered crucial and the investigative powers of the lawyer are relatively broad,⁴³⁹ as a result from the adversarial shift of the Italian criminal justice system in the 1980s.⁴⁴⁰ Thus, it is possible for the defence lawyer to carry out investigative activities on behalf of his/her client if the latter has knowledge that a criminal procedure will be brought against him/her, before the prosecutor has initiated the investigation.⁴⁴¹ Investigative activities may take

⁴³⁴ Joined cases C-514/07P, C-528/07P and C-532/07P, *Sweden and others v API and Commission*, 21 September 2010, para 88

⁴³⁵ C-199/11, *EU v Otis a.o.*, 6 November 2012, para 48. As noted by Advocate-General Cruz-Villalón in this case, the Court’s approach to the principle of equality of arms builds on the definition laid down by the ECtHR.

⁴³⁶ Other aspects of equality of arms could have been included, such as the duty of disclosure by the prosecution of all evidence in its possession before the trial. See National report No 2 on Ireland, Section on the status of defence rights (point 2)

⁴³⁷ Art. 6(3)(d) ECHR reads: Everyone charged with a criminal offence has the minimum following rights: ... “(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.”

⁴³⁸ For an extensive analysis of the principle of equality of arms and the active/reactive role the defence may take during the proceedings, see M. Igorevna Fedorova, *The Principle of Equality of Arms in International Criminal Proceedings*, PhD thesis, The Netherlands: University of Utrecht, defended on 7 September 2012

⁴³⁹ M. Van Wijk, *Cross-border evidence gathering: Equality of arms in the EU?*, 2017, op. cit., p. 189

⁴⁴⁰ National report No 2 on Italy, Section on general questions on the Italian national criminal procedure system (point 1.2.).

⁴⁴¹ *Ibid.*

place at every stage of the procedure, and include subpoenaing and obtaining statements of witnesses, requesting documents from public bodies, conducting scientific tests, and accessing premises with the purpose of viewing a site or an object.⁴⁴² The defence may also request the prosecutor to carry out special investigation acts. These concern investigative measures that cannot be initiated by authorities other than the public ones, such as search and seizure and wiretapping.⁴⁴³ In Ireland too, the defence is free to carry out its own investigations.⁴⁴⁴ However, that right is limited to the possibility, for the defence lawyer, to carry out interviews of witnesses before a trial.⁴⁴⁵

In other countries, the defence is not prevented from conducting investigations on its own, although it is not explicitly granted as a right under national law (e.g. Romania). In Romania,⁴⁴⁶ the defence can collect evidence by, for example, gathering documents and identifying witnesses. However, the defence must obtain the approval of the prosecutor (at the investigation stage) or the court (at the trial stage) for these documents to be considered as evidence. The defence is allowed to contact witnesses, unless a specific preventive measure was ordered to prevent the suspect or accused person from so doing.

In the remainder of countries, the general rule is that the defence cannot conduct investigations on its own. The approach of the defence is then more “reactive” as it is reliant on the prosecution, or the judge, to whom it must request authorisation to have further investigative acts carried out (e.g. Germany, The Netherlands, Ireland, Hungary, France, Spain).

In Germany, the defence has an obligation or, one may say, a duty, to actively participate in the conduct of the investigation.⁴⁴⁷ The request can be filed to either the investigative judge or the prosecutor.⁴⁴⁸ The margin for discretion enjoyed by the authorities is yet relatively broad; the competent prosecutor or judge will comply with a request, only to the extent the suggested evidence is deemed relevant to the investigation.⁴⁴⁹ In the Netherlands, the defence does not enjoy similar powers as the prosecutor. For example, the prosecutor can demand that the judge undertakes investigative acts, whereas the defence has only the possibility to file request for this purpose.⁴⁵⁰ Then, the prosecutor can request an expert on its own motion, whereas the defence must request experts to the prosecutor.⁴⁵¹ Similarly, the public prosecutor can always attend the questioning of a witness before an investigative judge, but the access of the defence can be restricted in the interest of the investigation.⁴⁵² In Hungary, the defence may request the assignment of an expert during the investigation phase, the granting of which being nonetheless entirely subject to the discretion of the prosecutor.⁴⁵³ In Spain, the lawyer has no investigative powers of its own, and must request the judge or any other competent authorities to have further evidentiary activities carried out if necessary.⁴⁵⁴ In France, it is for the prosecutor or the investigating judge to investigate

⁴⁴² Ibid. See also A. Ryan, *Towards a system of European criminal justice?* 2014, op. cit., p. 198

⁴⁴³ F. Ruggeri, S. Marcolini, Report on Italy, in K. Ligeti (ed), *Toward a prosecutor for the European Union*, 2013, op. cit., p. 402.

⁴⁴⁴ A. Ryan, Report on Ireland, in K. Ligeti (ed), *Toward a prosecutor for the European Union*, 2013, op. cit., p. 354

⁴⁴⁵ If the defence wishes to call on its own expert witnesses at the trial, it must however request permission from the court of trial beforehand. National report No 2 on Ireland, Section on status of defence rights (point 2).

⁴⁴⁶ National report No 2 on Romania, Section on evidence-gathering and admissibility (point 18).

⁴⁴⁷ National report No 2 on Germany, Section on general features of the German criminal procedure system (point A(2))

⁴⁴⁸ T. Weigend, F. Salditt, Criminal defence during the pre-trial stage in Germany, in E. Cape, J. Hodgson, T. Prakken, T. Spronken (eds), *Suspects in Europe: Procedural rights at the investigative stage of the criminal process in the European Union*, Antwerpen: Intersentia, 2008, p. 91

⁴⁴⁹ Ibid, see also National report No 2 on Germany, Section on general features of the German criminal procedure system (point A(2))

⁴⁵⁰ National report No 2 on the Netherlands, Section on Evidence (point 2). Requests filed to the investigating judge by the defence takes place through a procedure called the *mini instructie*, replaced by the “judicial inquiry” in 2011. M. Van Wijk, *Cross-border evidence gathering: Equality of arms in the EU?*, 2017, op. cit., p. 110

⁴⁵¹ National report No 2 on the Netherlands, Section on Evidence (point 2).

⁴⁵² Ibid.

⁴⁵³ M. Hokkian, Report on Hungary, in K. Ligeti (ed), *Toward a prosecutor for the European Union*, 2013, op. cit., p. 307

⁴⁵⁴ Such as having premises searched, or witnesses interrogated. See Chapter 4, Art 520(6)(b) Ley de Enjuiciamiento Criminal. See also National report No 2 on Spain, Section on evidence-gathering and admissibility (point 18), as well

the case in an impartial manner.⁴⁵⁵ Under the CCP, interrogating a witness at the investigation stage might constitute an offence of subornation of witness for the defence.⁴⁵⁶ The lawyer may however file an application to the investigating judge in order to carry out and/or have evidentiary activities carried out.⁴⁵⁷

Summary table

Express right or possibility for the defence to conduct its own, parallel investigations	Request for the taking of evidence must be filed to the authorities
IT, IE	DE, NL, FR, ES, HU

Another, interesting point of comparison between national criminal procedures are the applicable rules to the cross-examination of witnesses. The right, for the defence, to examine witnesses is inherited from the adversarial tradition; all Member States, even those predominantly belonging to the inquisitorial tradition, are under the obligation of implementing a right to cross-examination, pursuant to Art 6(3)(d) ECHR. It requires, as a rule, the presence of witnesses at the trial, so as to accord the defence an effective opportunity to challenge the evidence against the accused and to check the reliability of the witness evidence.⁴⁵⁸ Although the ECtHR formulated a general rule on witness evidence, the understanding and application of this right differs from a Member State to another.

At the trial stage, cross-examination of witnesses is used to gather evidence in several countries, due to the major adversarial features of their criminal justice system (e.g. Ireland, Italy), or the incorporation of adversarial elements in others (Hungary,⁴⁵⁹ Germany,⁴⁶⁰ Romania⁴⁶¹). In purely adversarial proceedings, the underpinning rule is that evidence given orally by the witness at trial is the only evidence that may be relied upon to reach a verdict.⁴⁶² Italy and Ireland apply this rule, albeit in a more or less strict manner. In Ireland, witnesses must be tested on their testimonies through cross-examination by the defence.⁴⁶³ Cross-examination by the defence is a constitutional right. If not granted, witness evidence is considered as hearsay.⁴⁶⁴ Some (limited) exceptions have however been accepted to the common law rule for hearsay evidence.⁴⁶⁵ In Italy,⁴⁶⁶ rules are slightly laxer, due to the conservation under the national CCP of elements of the inquisitorial tradition. For example, when it is not possible to gather oral testimony in trial, the previous statements collected

as Fair Trials, Fact sheet on criminal proceedings and defence rights in Spain, last updated in 2013. Retrieved at: <https://www.fairtrials.org/wp-content/uploads/Spain-advice-note.pdf>

⁴⁵⁵ By seeking elements in favour and against the suspect (i.e. *à charge* and *à décharge*), in order to determine whether the charges against the suspect are sufficient to send him forward for trial. See A. Ryan, *Towards a system of European criminal justice*, 2014, op. cit., p.151

⁴⁵⁶ J. Tricot, Report on France, in K. Ligeti (ed), *Toward a prosecutor for the European Union*, 2013, op. cit., p. 256

⁴⁵⁷ Such as to hear a witness, to have an element of the investigation disclosed, and so on. The powers of the lawyer to request investigations are broader when the investigating judge is the responsible authority to conduct them. He/she must examine the request within a month. See Arts 434 and 156 CCP.

⁴⁵⁸ L. Bachmaier Winter, Report on Spain, in K. Ligeti (ed), *Toward a prosecutor for the European Union*, 2013, op. cit., p. 131

⁴⁵⁹ Art 295 CCP. See Karsai & Szomora, 2010, op. cit., p. 193

⁴⁶⁰ National report No 2 on Germany, Section on general questions on the German criminal procedure system (point A(2))

⁴⁶¹ Art 381 CCP.

⁴⁶² A. Ryan, *Towards a System of European Criminal Justice*, 2014, op. cit., p. 109

⁴⁶³ Ibid.

⁴⁶⁴ A. Ryan, Report on Ireland, in K. Ligeti (ed), *Toward a prosecutor for the European Union*, 2013, op. cit.

⁴⁶⁵ Such as dying declarations, spontaneous statements considered to be part of the evidence admitted. See A. Ryan, *Towards a System of European Criminal Justice*, 2014, op. cit., p. 109

⁴⁶⁶ Interestingly, the Italian system also provides for the *incidente probatorio* procedure, i.e. an anticipatory hearing taking place at the pre-trial stage, in order to gather evidence, for example through the examination of a witness, if there are reasons to believe he or she will not be available for examination at trial because of illness or other serious impediment. See National report No 2 on Italy, Section on the rights of victims (point 3). See also A. Ryan, *Towards a system of European criminal justice*, 2014, op. cit., p. 199

during the preliminary stage can be used as evidence.⁴⁶⁷ Interestingly, the Romanian procedural framework underwent a noteworthy shift in recent years. Prior to 2017, no adversary hearing nor presentation of evidence were deemed necessary, even if the alleged offences could not be proved otherwise than by presenting evidence at the trial, for example by cross-examination. The Romanian Constitutional Court declared the aforementioned provision unconstitutional in 2017 as regards the principles enshrined under Art 6 ECHR. Amendments were made, and a system similar to that of Italy and Germany has been established.⁴⁶⁸

In criminal justice systems predominantly rooted in the inquisitorial tradition, the value of cross-examination of witnesses at the trial stage is less relevant and may be subject to exceptions.

For example in Spain, witnesses must appear before the trial judge and give testimony. However, witnesses may be interrogated at the pre-trial stage on an exceptional basis, and the written records of statements may be used in courts.⁴⁶⁹ Interestingly, if it is known beforehand that the witness will not be able to testify at trial, testimonies can be taken through the “anticipated practice of evidence”, that gives the possibility to interrogate a witness at the pre-trial stage in the same conditions as it would take place during the trial, i.e. by granting the defence an opportunity of cross-examination.⁴⁷⁰ In the Netherlands, the pre-trial investigation stage remains the most important phase of the proceedings.⁴⁷¹ The Dutch legislator has not opted for a system of “cross-examination” during the trial itself, and the law establishes that, in principle, the presiding judge first asks questions to witnesses, followed by other judges, the public prosecutor, and the suspect.⁴⁷² This also means that witnesses may not necessarily give oral evidence at the trial if they have already made an oral or written testimony during the criminal investigation; the testimony is laid down in a report that is used at a later stage by the trial judge.⁴⁷³

3.3. Accommodating and circumventing differences through an overreliance on national law

In an attempt to overcome the widely divergent approaches of the Member States to the principle of equality of arms, the Union legislator opted for a two-pronged approach. On the one hand, national differences were “accommodated”. Just as in the field of investigative measures, a certain degree of flexibility was retained in the EIO and the EPPO as regards the participation of the defence in transnational investigations. In other words, the defence may, or may not, take an active role in transnational investigations, depending on the availability of this possibility under national law (A). Then, differences were “circumvented” in a number of (yet crucial) aspects of defence rights in transnational investigations, by deferring the questions of procedural safeguards and legal remedies to national law (B).

A. An active role for the defence in transnational investigations under the EIO and the EPPO: conferring new rights or merely referring to national law?

Both the EIO Directive and the EPPO Regulation acknowledged and took into consideration the right of the defence to conduct investigations in a few countries. However, in the absence

⁴⁶⁷ Art 512 CPP. Similarly, documentary evidence and written reports are generally accepted. National report No 2 on Italy, Section on evidence gathering and admissibility (point 17). This stands in contrast to Ireland, where stricter rules apply. Some exceptions were made to the strict admissibility regime for written documents, such as reports obtained through surveillance activities. See Criminal Justice Act of 2009.

⁴⁶⁸ In fact, the special commission of experts who drafted the initial version of the Code of Criminal Procedure had the support of German experts from IRZ (The German Foundation for International Legal Cooperation) and made explicit reference to the German and Italian model. See National report No 2 on Romania, Section on general questions on the Romanian criminal procedure system (point 1).

⁴⁶⁹ Provided that the confrontation rule was respected and the testimony was taken before a judge. L. Bachmaier Winter, Report on Spain, in K. Ligeti (ed), *Toward a prosecutor for the European Union*, 2013, op. cit., p. 725

⁴⁷⁰ Ibid. This practice seems to mirror the Italian “*incidente probatorio*” procedure.

⁴⁷¹ M. Van Wijk, *Cross-border evidence gathering: Equality of arms in the EU?*, 2017, op. cit., p. 110

⁴⁷² National report No 2 on the Netherlands, Section on Evidence (point 2).

⁴⁷³ Ibid.

of a uniform enforcement across the Union, the scope of this right remains conditional upon its existence under the national law.

The EIO Directive refers to the right of the suspected or accused person, or his lawyer on his behalf, to request the issuing of an EIO to obtain evidence.⁴⁷⁴ Whereas this is a welcome addition compared with the original draft, where no such provision existed,⁴⁷⁵ this possibility is made conditional upon availability under national law and is only foreseen “within the framework of applicable defence rights in conformity with national criminal procedure.”⁴⁷⁶ During the negotiations, MSs made clear that this would not entitle defendants to a new right to conduct parallel investigations,⁴⁷⁷ as the latter does not exist under the national law of some countries.⁴⁷⁸

Consideration to the rights of the defence was also given in the EPPO Regulation.⁴⁷⁹ Art 41(3) imposes an obligation onto the Member States to provide suspects and accused with “the possibility to present evidence, to request the appointment of experts or expert examination and hearing of witnesses, and to request the EPPO to obtain such measures on behalf of the defence.” However, this right is made conditional upon its existence under national law. This means that, similarly to the EIO, the adoption of the EPPO Regulation does not involve the creation of new rights for defendants, who remain bound by the same national constraints as before. This is a clear step backwards compared with the original Commission Proposal, where a *right*, and not a mere possibility that is conditional upon existence under national law, was conferred to suspects and accused persons, to present evidence to the consideration of the EPPO and to request the latter to gather any evidence relevant to the investigation, including appointing experts and hearing witnesses.⁴⁸⁰

B. Reliance on national law with regard to the applicable procedural safeguards and legal remedies

i) Procedural safeguards

From a more general perspective, the approach pursued by the EIO Directive and the EPPO Regulation mirrors that taken regarding investigative measures. Put differently, many concessions were made to national law.

A broad margin of appreciation was left to the Member States in the realm of procedural safeguards.

The EIO Directive emphasises that the procedural safeguards available to the defence are subject to national law. Art 14(7) contains a general clause ascertaining the imperative of respecting the rights of the defence and the fairness of the proceedings in the issuing State when assessing evidence obtained through the EIO, “*without prejudice to national procedural rules.*” The insertion of various references to national law in the main provisions of the EIO Directive is an acknowledgment that evidence is gathered *differently* from a MS to another, and that differing procedural safeguards apply.

A similar line of reasoning was adopted in the EPPO Regulation. Art 41(3) stipulates that suspects or accused persons involved in EPPO proceedings shall have all the procedural rights available to them under the applicable national law. These safeguards, however, strongly vary across the Union.⁴⁸¹ In the absence of efforts on the part of EU legislators to attenuate these differences, the defence is confronted to a multiplicity of procedural frameworks.

⁴⁷⁴ Art 1(3) Directive 2014/41/EU.

⁴⁷⁵ The main problems would concern language and costs. See S. Allegrezza, Critical Remarks on the Green Paper on Obtaining Evidence in Criminal Matters from one Member State to another and Securing its Admissibility, *Zeitschrift für Internationale Strafrechtsdogmatik*, Vol 9, 2010, pp. 569-579, at p. 577

⁴⁷⁶ Ibid.

⁴⁷⁷ Interview at the European Parliament.

⁴⁷⁸ *Supra*, Section 3.1.1.

⁴⁷⁹ Questions relating to the applicable procedural safeguards for nationals involved in cross-border cases were raised internally by the Dutch Parliament in the course of the EPPO negotiations. National report No 2 on The Netherlands, Section on evidence-gathering and admissibility.

⁴⁸⁰ Art 35 Commission Proposal on the EPPO, 2013

⁴⁸¹ Art 1(3).

Variable geometry in the protection afforded to individuals gave rise to heavy criticism in the literature.⁴⁸²

In a similar fashion, the release of the E-Evidence Proposal has not been accompanied by the adoption of specific safeguards either. The current text simply provides that the procedures of the issuing State applies when transfer of data is requested from a service provider located in another State. There remains, however, a lot of unclarity as to the conditions underpinning the issuing of a transfer request.⁴⁸³ It was indeed noted that there is too much deference in the current Proposal to the national law of the issuing State.⁴⁸⁴ The conditions for the issuing of Production and Preservation Orders are few, and formulated in broad terms.⁴⁸⁵ Both Preservation Orders and Production Orders – albeit to a lesser extent,⁴⁸⁶ can be issued for *all* kinds of criminal offence.⁴⁸⁷ Alongside this seeming absence of limits, the Proposal fails to lay down criteria for the subsequent use of data by the issuing States beyond the mere obligation of observing the proportionality and necessity requirements⁴⁸⁸.

The EIO Directive, the EPPO Regulation and the E-Evidence Proposal all provide that EU procedural rights directives apply to transnational investigations carried out under their respective frameworks. The impact of these directives will nonetheless be limited in the realm of investigations. This is particularly so for the Access to a Lawyer Directive. Under Art 3(3), suspects and accused persons shall have, as a minimum, the right for their lawyer to attend the following investigative and evidence-gathering acts: identity parades, confrontations, and reconstructions of the scene of a crime. This could facilitate the participation of the defence in cross-border investigative acts, but its potential must be relativised by the minimalist approach pursued by the EU legislator.⁴⁸⁹ The list of investigative and evidence-gathering acts is rather limited. It could have included, for example, the examination of witnesses; the question of witnesses is particularly relevant since possibility is made in the EPPO Regulation for the defence to present evidence, to request especially hearing of witnesses, and to request the EPPO to obtain such measures on behalf of the defence.⁴⁹⁰

Interestingly, the Commission proposal on the right of access to a lawyer, in its original draft, included a right of access to a lawyer in any case and any procedural or evidence-gathering act.⁴⁹¹ In 2011, a group of Member States yet objected the Commission proposal. The criticism came from both sides of the “common law – civil law divide”;⁴⁹² Ireland, the UK, Belgium and France contended that the EC proposal would result in “substantial difficulties

⁴⁸² For criticisms of the resulting variable geometry, see for instance A. Weyembergh, C. Brière, “Towards a European Public Prosecutor’s Office”, 2016, op. cit.

⁴⁸³ E. Kyriakides, “Digital Free for All, Part Deux: European Commission Proposal on E-Evidence”, 17 May 2018, op. cit.

⁴⁸⁴ Ibid.

⁴⁸⁵ Production Orders imply that a transfer request is filed to the service providers, and Preservation Orders are issued to prevent the removal, deletion or alteration of data that is located in another Member State. For Preservation Orders, the data may be transferred to the issuing State at a later stage by means of an EIO, or an MLA request.

⁴⁸⁶ On condition that the transfer requests only concern the less sensitive “subscriber and access data”, i.e. less sensitive data. For “transactional and content data”, deemed more sensitive, a transfer request may only be issued for a list of serious crimes. This is despite the fact that the distinction between the two different levels of sensitivity is debatable. See Art 5(3) and (4) E-Evidence Proposal.

⁴⁸⁷ Production Orders relating to “metadata”, as opposed to the more sensitive “content data”, can be issued for all types of offences. As regards the latter, Production Orders can only be issued for a specific list of serious crimes. See Arts 5(3) and 6(2) E-Evidence Proposal.

⁴⁸⁸ It is worth drawing a comparison with the CJEU’s rulings in *Digital Rights Ireland* and *Tele2*, although the scope and the stakes of surveillance, alongside the breadth of infringements to the right to privacy and data protection differ. In these two judgments, the Court said that data retention must be subject to “minimum safeguards so that the persons whose data have been retained have sufficient guarantees to effectively protect their personal data against the risk of abuse and against any unlawful access and use of that data.” (CJEU, *Digital Rights Ireland Ltd*, op. cit., 2016, para 54). These safeguards were also developed in the ECtHR’s jurisprudence at great length. Inter alia, these include: “the procedure to be followed for examining, using and storing the data obtained; the precautions to be taken when communicating the data to other parties; and the circumstances in which recordings may or must be erased or destroyed.” See ECtHR, *Zakharov v Russia*, App no 47143/06, 4 December 2015, para 215.

⁴⁸⁹ M. Van Wijk, *Cross-border evidence-gathering: Equality of arms in the EU?* 2017, op. cit., p. 90

⁴⁹⁰ Art 41(3) Regulation 2017/1939.

⁴⁹¹ Art 3(1)(a)(b) European Commission, Proposal on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest COM/2011/0326 final - COD 2011/0154

⁴⁹² As accurately pointed out by A. Ryan, *Towards a system of criminal justice?*, 2014, op. cit., p. 43

for the effective conduct of criminal proceedings by their investigating, prosecuting and judicial authorities.”⁴⁹³ In particular, they argued that mandating the presence of a lawyer for every investigative measure where the suspect’s presence is required or permitted, would cause significant delay in the early investigations, and alter the balance that must be struck between procedural rights and the effectiveness of the criminal justice system.⁴⁹⁴

Somewhat unsurprisingly, the French authorities opted for a *de minima* transposition of Art 3(3).⁴⁹⁵ Critics pointed out the nearly literal implementation of Directive Access to a Lawyer and the clear choice of the national legislator not to extend the rights of the defence beyond European standards.⁴⁹⁶

Other issues arose in the exercise of this right. In Spain for example, the Supreme Court opted for different levels of protection, depending on the investigative measure at hand. In a recent domestic case,⁴⁹⁷ the Spanish Supreme Court denied the allegations brought by the defendant that his right to privacy had been violated, because the house search he was subject to had not been carried out in the presence of a lawyer. The Supreme Court stated that domestic legislation does not provide for such right, nor does the Access to a Lawyer Directive. In another judgment, however, the Supreme Court ruled that the presence of a lawyer was required for the collection of DNA samples, arguing that the minimum standards approach taken by the EU legislator allowed Member States to go beyond the provisions of the Directive.⁴⁹⁸

ii) Legal remedies

Deference to national law could also be discerned in respect to another safeguard that is closely related to the principle of equality of arms: the right of individuals to effective judicial protection. This right is encapsulated under Art 13 ECHR and Art 47 of the Charter. It means that any individual whose fundamental rights are violated must be able to assert this violation before a national authority, generally in the form of a court.⁴⁹⁹ It encapsulates great significance in evidentiary law, because it allows the defence to obtain a review of how evidence was gathered.

Despite the relevance of the right to judicial protection in such a human rights-sensitive field as transnational investigations, little guidance is provided in current cross-border cooperation instruments, along with procedural rights directives, on how to exercise this right, beyond a mere obligation imposed on Member States to insert it under national law. This means that the conditions of access to an effective remedy, alongside how individuals may exercise this right, are left to the discretion of the Member States,⁵⁰⁰ and much of the effectiveness of these remedies will depend on existing arrangements under national law.⁵⁰¹

⁴⁹³ Proposal for a Directive of the European Parliament and of the Council on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest - Note by Belgium / France / Ireland / the Netherlands / the United Kingdom, Interinstitutional File 2011/0154 (COD), No 14495/11, p. 2

⁴⁹⁴ *Ibid.*, p. 3.

⁴⁹⁵ See National report No 2 on France, Section on the state of implementation of directives (point B)

⁴⁹⁶ *Ibid.* See also E. Vergès, « La procédure pénale à son point d'équilibre », *RSC*, 2016, p. 551f.

⁴⁹⁷ STC 196/2015, see National report No 2 on Spain, Section on impact of procedural rights directives (point 4.2.)

⁴⁹⁸ STC 734/2014, see National report No 2 on Spain, Section on impact of procedural rights directives (point 4.2.)

⁴⁹⁹ B. Schünemann, “Solution Models and Principles Governing the Transnational Evidence-Gathering in the EU”, in S. Ruggieri (ed), *Transnational Evidence and Multicultural Inquiries in Europe*, op. cit., 2014, p. 64

⁵⁰⁰ This issue is well illustrated in the Information Rights Directive, which provides defendants with the possibility to challenge a possible failure or refusal of authorities to disclose the materials of the case to the defence under Art 8(2). However, that right “does not entail the obligation for Member States to provide for a specific appeal procedure, a separate mechanism, or a complaint procedure in which such failure or refusal may be challenged.” In other words, the national remedies available under national law, irrespective of whether they effectively guarantee equality of arms, must remain unchanged.

⁵⁰¹ This being said, a recent study on the EAW FD shows that, even where national systems provide for a legal remedy, the conditions underpinning access to such remedies, as well as their degree of effectiveness, widely differ from a MS to another. For example, the right of appeal tends to be restricted in those countries with a centralised judicial system dealing with extradition requests (e.g. Germany), where the highest jurisdiction is in charge of such appeals (e.g. Germany, France, Italy, Finland), and in Ireland, where the appeal must be claimed before the same High Court judge who consented to the surrender of the person; In Spain and in Hungary, the appeal is brought before lower courts. See CCBE, “EAW-Rights, analysis of the implementation and operation of the European Arrest Warrant from the point of view of defence practitioners”, 2016, op. cit., p. 250

Inconsistencies moreover arise between instruments dealing with transnational investigations. For example, the EIO Directive⁵⁰² and the E-Evidence Proposal⁵⁰³ state that remedy against the decision to issue an assistance request should be sought by individuals in the issuing State. In contrast, neither the 2000 MLA Convention nor the JIT Framework Decision contain provisions on legal remedies. This means that remedies are available to individuals only to the extent they exist in comparable national investigations,⁵⁰⁴ thus heightening the risk that a legal remedy available in a purely domestic case cannot be exercised in cross-border circumstances.⁵⁰⁵ No indication is moreover provided under the current instruments on how to reconcile differences between legal remedies available in the national systems.

Besides the "effectiveness" of the legal remedy may be called into doubt. The EIO Directive and the question of the suspensive effect of the legal remedy in transnational investigations is a case in point.

As a general rule, under the EIO Directive, the legal remedy does not suspend the execution of the measure.⁵⁰⁶ It is worth noting that Member States enjoy a margin of flexibility, since the execution of the measure may be suspended if "it is provided in similar domestic cases."⁵⁰⁷ However, the transfer of evidence by the executing State may be suspended pending the outcome of a legal remedy in the issuing State, unless the immediate transfer is essential for the conduct of the investigation and to preserve fundamental rights.⁵⁰⁸ This rule is absolute when the transfer would cause serious and irreversible damage to the person concerned. If a legal remedy turns out successful once evidence has already been transferred, then the issuing State "shall take into account" a successful challenge against the recognition or execution of an EIO⁵⁰⁹. Whereas lack of clarity exists as regards the obligation of 'taking into account' the outcome of the legal remedy, the issuing State must "ensure that in criminal proceedings in the issuing State the rights of the defence and the fairness of the proceedings are respected when assessing evidence obtained through an EIO."⁵¹⁰ The latter provision seems to limit to some extent the use of evidence in the proceedings in the trial State, if a successful challenge has been brought against the recognition or execution of an EIO.

From the perspective of the accused, absence of EU-wide rules makes it difficult to identify the jurisdiction competent to address his/her claim. Determining before which jurisdiction investigative measures, or the outcome of these measures, should be challenged, may become a thorny task when measures are ordered by one State, but executed by another State, and then have effects in the ordering State, because evidence may be used in the proceedings.⁵¹¹ First, pinpointing the breach and identifying the authority responsible depend

⁵⁰² Art 14(2) Directive 2014/41/EU

⁵⁰³ Art 17(3) E-Evidence Proposal. Besides, national courts in the issuing State have been designated as "best-placed" to review the legality of European Production Orders issued to request electronic data. See Explanatory Memorandum, E-Evidence Proposal.

⁵⁰⁴ A. van Hoek, M. Luchtman, "Transnational cooperation in criminal matters and the safeguarding of human rights", *Utrecht Law Review*, Vol 1, Issue 2, 2005, p. 32

⁵⁰⁵ Both instruments recall the *Cassis de Dijon* rules on non-discrimination between domestic and transnational cases. Art 14 EIO Directive provides that legal remedies applicable to investigative measures indicated in the EIO shall be equivalent to those available in a similar domestic case. Recital 88 Regulation 2017/1939 states that "the national procedural rules governing actions for the protection of individual rights granted by Union law must be no less favourable than those governing similar domestic actions (principle of equivalence) and must not render practically impossible or excessively difficult the exercise of rights conferred by Union law (principle of effectiveness)." See Case 33/76, *Rewe-Zentralfinanz eG et Rewe-Zentral AG v Landwirtschaftskammer für das Saarland*, 16 December 1976.

⁵⁰⁶ Art 14(6) Directive 2014/41/EU

⁵⁰⁷ *Ibid.*

⁵⁰⁸ The transfer of evidence shall be suspended if it would cause serious and irreversible damage to the person concerned. Art 13(2) EIO Directive.

⁵⁰⁹ Article 14(7) Directive 2014/41/EU

⁵¹⁰ *Ibid.*

⁵¹¹ A. van Hoek, M. Luchtman, "Transnational cooperation in criminal matters and the safeguarding of human rights", *Utrecht Law Review*, Vol 1, Issue 2, 2005; R. Vogler, Transnational Inquiries and the Protection of Human Rights in the Case-Law of the European Court of Human Rights, in S. Ruggeri (ed.), *Transnational Inquiries and the Protection of Fundamental Rights in Criminal Proceedings*, Heidelberg: Springer, 2013, p. 28

on a variety of factors, including the applicable law, i.e. *forum regit actum* or *locus regit actum*, the means of evidence collection deployed, and whether the Member States allow for the interested party to become aware of the investigation before, during, or after its execution.⁵¹² For example, in the absence of provisions on legal remedies in FD JITs or the 2000 EU MLA Convention, uncertainty remains as to the competent jurisdiction the defendant may bring his/her claim before. Second, allocating the responsibility to handle the claim to the issuing State under the EIO Directive and the E-Evidence Proposal may also lead to unfairness. If defendants are citizens or resident of a country other than that where the proceedings are taking place, they will have to defend themselves in a foreign country, facing further expenses, and dealing with a procedural system that they are not familiar with.⁵¹³

The challenge to access legal remedies inherent to the weak position of the defence in transnational investigations is further heightened by broader concerns over the ability of national courts to exert control.

This question lies at the core of the controversies surrounding the EPPO Regulation. Current rules stipulate that the legality review of procedural acts intended to produce effects *vis-à-vis* third parties is to be entrusted to national courts, along with the choice of the trial State by the EPPO.⁵¹⁴ A major difficulty for national judicial bodies is that the EPPO remains an EU body, entrusted with a number of tasks that cannot be carried out by a single MS,⁵¹⁵ along with decisions that cannot always be attributed to a single legal order.⁵¹⁶ The Regulation moreover remains silent on how to exert such control: the way this control is exerted remains determined by national law.⁵¹⁷

3.4. Weak position of the defence in EU cross-border cooperation frameworks

“The transnational nature of criminal proceedings sometimes weakens the implementation of the right to equality of arms.”⁵¹⁸ Infringements to the principle of equality of arms are more difficult to discern, because they consist in the accumulation of “separate, small encroachments.”⁵¹⁹ Unfortunately, these have not yet received the attention they deserve in

⁵¹² The use of some ‘special investigative measures’ indeed requires high degrees of secrecy, such as wiretaps or interceptions of telecommunications, which may delay the right of suspects to be informed about the investigation.

⁵¹³ A. Arena, *The Rules on Legal Remedies: Legal Lacunas and Risks for Individuals Rights*, in S. Ruggeri (ed), *Transnational Evidence and Multicultural Inquiries in Europe*, 2015, op. cit., p. 113

⁵¹⁴ See extensive and critical analysis of such control by national courts by M. Luchtman, “Forum Choice and Judicial Review under the EPPO’s Legislative Framework”, in W. Geelhoed et al (eds), 2017, op. cit., p. 166; A. Weyembergh and C. Brière, op. cit., 2016, p. 37-38. The original EC proposal referred to the EPPO as a national authority for the purpose of judicial review (see Recital 37 COM (2013) 0534 final). In this respect, authors especially denounced that such system does not prevent either contradictory rulings on the legality of certain measures to be delivered in the case of investigations carried out in multiple Member States – thus leading to multiple reviews, nor does it lay down which remedies should be made available to suspects who may have an interest in prosecution in a Member State other than the one that the EPPO opted for. In *Foto-Frost*, the Court of Justice precluded national courts from delivering contradictory rulings on Union acts, and upheld the principle of coherence in the EU’s system of judicial protection. See Case 314/85, *Foto-Frost v Hauptzollamt Lübeck-Ost*, 22 October 1987, paras 16 and 17. At para 17, it ruled the Court had “exclusive jurisdiction to declare void an act of a Community institution” and “the coherence of the system requires that where the validity of a Community act is challenged before a national court the power to declare the act invalid must also be reserved to the Court of Justice.” (M. Luchtman, J. Vervaele, *European agencies for criminal justice and shared enforcement (Eurojust and the European Public Prosecutor’s Office)*, 2014, op. cit., p. 144; A. Csuri, “The Proposed European Public prosecutor’s Office – from a Trojan Horse to a White Elephant?” *Cambridge Yearbook of European Legal Studies*, Vol 18, 2016 p. 141).

⁵¹⁵ Comprising, inter alia, the development of prosecutorial policies, the decision to start investigations, or the decisions to deploy certain investigative measures in a particular state and/or to bring criminal charges in another.

⁵¹⁶ M. Luchtman, “Forum Choice and Judicial Review under the EPPO’s Legislative Framework”, in W. Geelhoed et al (eds), 2017, op. cit., p. 166

⁵¹⁷ See analysis by M. Luchtman, J. Vervaele, “European agencies for criminal justice and shared enforcement (Eurojust and the European Public Prosecutor’s Office)”, 2014, op. cit., p. 144

⁵¹⁸ S. Gless, *Transnational Cooperation in Criminal Matters and the Guarantee of a Fair Trial: Approaches to a General Principle*, *Utrecht Law Review*, Vol 9, Issue 4, 2013, p. 92

⁵¹⁹ *Ibid*, p. 108

policy debates and the literature, in a similar way than those occurring in surrender procedures.

Practical obstacles deriving from transnational procedures occur, in the form of financial and linguistic challenges (A), despite (limited) efforts undertaken by the EU to address some of these issues (B). This is compounded by the marginalisation of the defence in EU cross-border cooperation frameworks (C).

A. Practical obstacles arising from the transnational nature of proceedings

The highly differentiated application of the principle of equality of arms is complemented by a *de facto* asymmetry between the defence and the prosecution in cross-border proceedings. Indeed, the guarantees deriving from the principle of equality of arms tend to be more difficult to enforce in cross-border situations.

Practical considerations emerge as a result from the transnational character of investigations. Conducting investigations abroad may entail additional barriers of a financial, technical and linguistic nature, which prevent the defence from adopting a proactive attitude at the investigative phase.

The geographical distance between the place of the trial and the place where evidence is collected means that the cost of conducting, participating in, and challenging investigations may be particularly high. For example, if the defence wishes to conduct parallel investigations, the lawyer may have to travel to the country where the investigation was carried out to collect further evidence that cannot be obtained in the country of the prosecution, for example witness statements.⁵²⁰ Witnesses are often reluctant to travel to give evidence, however this becomes problematic if the defence is not able to travel to collect witness statements in the country where he/she is located, in particular when the trial state puts high value on oral evidence, such as Ireland.⁵²¹

Linguistic assistance too, is likely to be necessary if the defence wishes to conduct investigations abroad. Hiring an interpreter or a translator entails additional costs. In some countries, legal aid is not provided for such circumstances, simply because the possibility to conduct investigations abroad is not necessarily regulated under national law. In the Netherlands, where defence lawyers are formally not precluded from carrying out informal investigations in foreign countries, the law does not specifically regulate legal aid in relation to evidence acts conducted abroad.⁵²² Thus, the defence is not entitled to receive a payment in advance that could potentially cover the lawyer's travel expenses.⁵²³

B. Limited efforts to mitigate those practical challenges

i) Procedural rights directives

The EU sought to address existing asymmetries between the defence and the prosecution in transnational proceedings and redress some of these imbalances.

First, efforts were made in the past few years to address technical and linguistic issues inherent to the transnational nature of investigations. The Translation and Interpretation Directive places particular emphasis on providing quality of linguistic assistance at the pre-trial stage, in particular as regards the investigative work conducted by administrative or

⁵²⁰ See S. Gless, J. Vervaele, "Law should govern: Aspiring General principles for Transnational Criminal Justice", *Utrecht Law Review*, Vol 9, Issue 4, 2013. See also ECHR, *PV v Germany*, Application No. 11853/85, 13 July 1987, para 4c: where the European Commission on Human Rights did not exclude that 'witnesses residing abroad whose presence at the trial cannot be enforced by the trial court are examined on commission by a court at their place of residence.'

⁵²¹ Or in the UK for that matter. See J. McEwan, "The testimony of vulnerable victims and witnesses in criminal proceedings in the European Union", *ERA Forum*, Vol 10, 2009, pp. 369-386. See also ECtHR, *Al-Khawaja and Tahery v UK*, App 26766/05 and 22228/06, 20 January 2009. The Court held that the fact that the defendant gives evidence on his own behalf at the trial was insufficient as a means of challenging evidence, given that the statement had been made without the presence of the defence and the witness could not be cross-examined.

⁵²² M. Van Wijk, *Cross-border evidence-gathering: Equality of arms in the EU?*, 2017, op. cit., p. 127

⁵²³ *Ibid.*

judicial authorities.⁵²⁴ It requires Member States to take concrete measures and develop specific services to ensure that the defendants have knowledge of the case against them.⁵²⁵

However the minimalist approach of the legislators is illustrated by the indicative list of “essential documents” that Member States are under an obligation to translate, including “any decision depriving a person of his liberty, any charge or indictment, and any judgment.”⁵²⁶ The obligation of translating ‘essential documentary evidence’, included in the Commission proposal to facilitate its transfer from a country to another, was not retained in the final text.⁵²⁷ Prosecution evidence seemingly does not fall either within the scope of the directive.⁵²⁸ In some countries, the right to translation was unknown to law-makers, and the list of essential documents was transposed literally, i.e. with no further requirements (e.g. Spain).⁵²⁹ In others, some gaps still occur. France has been reluctant to implement the right to translation, and the latter remains narrowly interpreted.⁵³⁰ In Romania, only the indictment act is subject to compulsory translation.⁵³¹ Besides, a certain degree of confusion still exists among defence lawyers on whether documents containing evidence gathered abroad must be translated, given the non-exhaustive character of the list of essential documents provided in the directive.⁵³² Special trainings for interpreters and translators, lawyers and judicial authorities, in order for them to be aware and able to rely on the provisions of EU legislation, have not been provided in Germany⁵³³, Italy⁵³⁴.

In a similar fashion, the right to legal aid provided under Directive 1919/2016 (the “Legal Aid Directive”) supposed to cover the costs of legal assistance, is also limited in some respects. Under Art 2(1)(c), the Legal Aid Directive refers to the same list investigative and evidence-gathering acts that is enshrined under the Access to a Lawyer Directive, i.e. identity parades, confrontations, and reconstructions of the scene of a crime. It acknowledges that this list is non-exhaustive, given the minimalist character of the directive, and Member States may choose to provide legal aid beyond this list.⁵³⁵ Thus, “Member States should be able to grant legal aid in situations which are not covered by this Directive, for example when investigative or evidence-gathering acts other than those specifically referred to in this Directive are carried out.” Extending the scope of application of the right to legal aid to investigative and evidence-gathering acts is, however, only a mere possibility. In those countries where the right to legal aid is narrowly interpreted, it is unlikely that a comprehensive approach is

⁵²⁴ Art 2(2) Directive 2010/64/EU reads: “Member States shall ensure that, where necessary for the purpose of safeguarding the fairness of the proceedings, interpretation is available for communication between suspected or accused persons and their legal counsel in direct connection with any questioning or hearing during the proceedings or with the lodging of an appeal or other procedural applications.”

⁵²⁵ Inter alia, these measures include a duty to establish a register of translators (Art 5(2)), to provide trainings for judges, prosecutors and judicial staff (Art 6), an independence and confidentiality requirement on the part of interpreters and translators (Art 5(2)), a positive obligation to control the adequacy of the interpretation provided and to test the language skills of defendants (Art 2(4)), a complaint mechanism for the accused if the interpretation/translation is deemed insufficient, which may result in the interpreter/translator being replaced (Art 2(5) and Art 3(5)).

⁵²⁶ Art 3(2) Directive 2010/64/EU.

⁵²⁷ Member States feared that the financial impact of the translation of such a voluminous amount of materials would be too high. See S. Cras, L. de Matteis, “The Directive on the Right to Interpretation and Translation”, *eu crim*, Issue 4, 2010, p. 159

⁵²⁸ National report No 2 on Germany, Section on effectiveness and adequacy of EU law on criminal procedure (point (B)(3)). See also J. Brannan, Identifying written translation in criminal proceedings as a separate right: scope and supervision under European law, in: *The Journal of Specialised Translation (JoSTrans)* 27 (2017), IIb), available via: <http://www.jostrans.org/archive.php?display=27>.

⁵²⁹ National report No 2 on Spain, Section on the impact of procedural rights directives on the Spanish criminal justice system (point 4.2).

⁵³⁰ See National report No 2 on France, Section on the impact of EU legislation on national criminal procedure (point B). Art 803-5 CPP transposing that right has been interpreted narrowly by the Court of Cassation. Where documents supporting the proceedings have been read and orally translated by an interpret, the absence of a written translation does not constitute in itself a ground for invalidity as long as the exercise of the rights of the defence were not negated and that the possibility of legal remedy existed.

⁵³¹ National report No 2 on Romania, Section on transposition gaps (point 5).

⁵³² National report No 2 on Germany, Section on effectiveness and adequacy of EU law on criminal procedure (point (B)(3))

⁵³³ *Ibid* (point (B)(1)(b))

⁵³⁴ National report No 2 on Italy, Section on the impact of procedural rights directives (point 1.4.)

⁵³⁵ Recital 16 Directive 1919/2016.

retained. For example, the German criminal procedure does not grant legal aid as such to poor defendants, but provides financial public support to defendants only if there is a situation of "mandatory", or "necessary" defence.⁵³⁶ Given the broad discretion enjoyed by national authorities in the directive, the transposition of this new instrument is unlikely to trigger a far-reaching reform of the German legal aid regime.⁵³⁷

ii) Cross-examining witnesses and hearing of defendants through audio- and video-conference link

In order to alleviate the obstacles arising from the cross-border dimension of investigations, both the 2000 EU MLA Convention and the EIO Directive⁵³⁸ took advantage of technological innovations so as to enable the conduct of hearings of both defendants and witnesses through video-conference, in order to facilitate their remote participation in the proceedings.⁵³⁹

The use of the video-link entails both positive and negative consequences.

Providing the possibility to conduct hearings via videoconference may work in favour of the defendant; for example, it offers the advantage to the suspect of being heard without the need to move to the country of investigation and may constitute an appropriate alternative to the issuance of an EAW.⁵⁴⁰

However, the participation of the defendant to the main hearing via video-link was criticised for putting the suspect or accused person at disadvantage;⁵⁴¹ relying on these mechanisms does not allow the defendant to have full knowledge of the events occurring in the hearing, or effectively perceive the behaviour of the protagonists.⁵⁴² The conditions are yet crucial for the defence to ensure full understanding of the dynamics of the proceedings, and be able to deploy the most appropriate defensive strategy.⁵⁴³

Efforts were made in both the 2000 MLA Convention and the EIO Directive to address these shortcomings by including a number of safeguards to be met by national authorities. These include a duty imposed on competent authorities to enter in a dialogue regarding the practical arrangements of the hearing; in particular the executing State must "summon the suspected or accused persons to appear for the hearing ... in such a time as to allow them to exercise their rights of defence effectively."⁵⁴⁴ Additionally, defendants have been granted a right not to testify, which can be invoked under the laws of *both* the requesting/issuing State and requested/executing State.⁵⁴⁵ Most importantly, the conduct of the hearing is conditional

⁵³⁶ National report No 2 on Germany, Section on impact of procedural rights directives (point B(1)(a)).

⁵³⁷ Ibid.

⁵³⁸ See Arts 10 (video-conference) and 11 (telephone conference) 2000 MLA Convention and Arts 24 (video-conference) and 25 (telephone conference) Directive 2014/41/EU

⁵³⁹ The use of telephone conference is allowed for witnesses, however it is excluded for defendants.

⁵⁴⁰ Recital 26 Directive 2014/41/EU reads: "With a view to the proportionate use of an EAW, the issuing authority should consider whether an EIO would be an effective and proportionate means of pursuing criminal proceedings. The issuing authority should consider, in particular, whether issuing an EIO for the hearing of a suspected or accused person by videoconference could serve as an effective alternative."

⁵⁴¹ From the perspective of the judge too, the use of the video links to conduct hearings of defendants is questionable. In adversarial systems in particular, the importance of body language is crucial to assess the credibility of defendants and determine whether suspects or accused persons are lying or not. See A.

Mangiaracina, "A new and controversial scenario in the gathering of evidence at the European level: The proposal for a Directive on the European Investigation Order", *Utrecht Law Review*, Vol 10, Issue 1, 2014, p. 122

⁵⁴² See A. Grio, "The Defendant's Rights in the Hearing by Videoconference", in S. Ruggeri (ed), *Transnational Evidence and Multicultural Inquiries in Europe*, Cham: Springer International Publishing, 2014, p. 121.

⁵⁴³ Ibid.

⁵⁴⁴ Art. 24(3)(b) Directive 2014/41/EU reads: "The issuing authority and the executing authority shall agree the practical arrangements. When agreeing such arrangements, the executing authority shall undertake to: summon the suspected or accused persons to appear for the hearing in accordance with the detailed rules laid down in the law of the executing State and inform such persons about their rights under the law of the issuing State, *in such a time as to allow them to exercise their rights of defence effectively.*"

⁵⁴⁵ Art 10(5)(e) 2000 MLA reads e) the person to be heard may claim the right not to testify which would accrue to him or her under the law of either the requested or the requesting Member State; Art 24(5)(e) Directive 2014/41/EU reads: suspected or accused persons shall be informed in advance of the hearing of the procedural rights which would accrue to them, including the right not to testify, under the law of the executing State and the issuing State.

upon the consent of the defendant under both the 2000 MLA Convention and the EIO Directive.⁵⁴⁶

Despite these endeavours, the regime applicable to videoconference hearings was criticised for failing to apply other (crucial) safeguards, such as the privilege against self-incrimination, the right not to be questioned, the lack of pressure on moral freedom and expression of thought,⁵⁴⁷ and the right of the defendant to consult with his or her lawyer during videoconference proceedings.⁵⁴⁸ There is, as often in EU instruments, much deference to national law regarding the rules governing the hearing. Both the 2000 MLA Convention⁵⁴⁹ and the EIO Directive⁵⁵⁰ state that the hearing shall be conducted “directly by, or under the direction of” the requesting/issuing Member State in accordance with its own laws.⁵⁵¹ Besides, whereas the 2000 MLA Convention provided for the compulsory presence of the judicial authority during the hearing, the EIO Directive includes a simple reference to national law; the obligation of ensuring the presence of judicial authority during the hearing of the defendant seems to have been lifted.⁵⁵²

As for hearings of witnesses, shortcomings similarly exist regarding specific guarantees, such as the right to the presence of a legal counsel during the hearing. The Commission argued that “defence lawyers must have the possibility to question witnesses and experts during the hearing by videoconference if the information gathered by these means is to be introduced into the criminal trial.”⁵⁵³ This rule was recognised necessary to protect the rights of the defence, however no provision was introduced in this regard.

C. Lack of consideration for the defence in EU cross-border cooperation frameworks

The EU has sought to improve and facilitate cross-border cooperation in the EU’s criminal justice area among a variety of public actors, primarily police and judicial authorities. This contrasts with the seeming lack of interest, or consideration, paid to the defence in EU cooperation frameworks.

State cooperation under MLA and MR instruments operate under a “top-down” approach. Assistance requests are exchanged between police and judicial authorities, as well as, in more limited cases, non-judicial authorities,⁵⁵⁴ thus assigning only a marginal role to the defence. Concretely, the defence cannot, under EU instruments, directly request the competent authorities of another EU State to conduct investigations on its behalf. This means that the margin for manoeuvre of the defence is more limited in the conduct of its own investigations, and participation in other investigations, when carried out under EU cross-border cooperation frameworks.

⁵⁴⁶ Art 10 2000 MLA Convention and Art 25(2)(a) Directive 2014/41/EU respectively.

⁵⁴⁷ Ibid, p. 122. Similar criticism was formulated by the Fundamental Rights Agency in its opinion on the directive, see Opinion of the FRA on the draft Directive regarding the European Investigation Order,. Retrieved at: http://fra.europa.eu/fraWebsite/research/opinions/op-eio_en.htm, p. 12.

⁵⁴⁸ J. Blackstock, Briefing on the European Investigation Order for Council and Parliament, London: Justice, 2010, para 54.

Retrieved at: <http://static1.1.sqspcdn.com/static/f/650429/8149987/1281967185407/Briefing+on+the+European+Investigation+Order+for+council+and+parliament.pdf?token=FRnOkPmffqOqTtTImuuzfUSKLWg%3D>

⁵⁴⁹ Art 10(5)(c) 2000 MLA reads: “(c) the hearing shall be conducted directly by, or under the direction of, the judicial authority of the requesting Member State in accordance with its own laws.”

⁵⁵⁰ Art 24(5)(c) Directive 2014/41/EU reads: “the hearing shall be conducted directly by, or under the direction of, the competent authority of the issuing State in accordance with its own laws.”

⁵⁵¹ Reliance on the law of the requesting/issuing State is characteristic of the *forum regit actum* rule. The right not to testify, which can be invoked in both the requesting/issuing and requested/executing States is a noticeable exception to this *modus operandi*.

⁵⁵² Art 10(5)(c) 2000 MLA reads: “(c) the hearing shall be conducted directly by, or under the direction of, the judicial authority of the requesting Member State in accordance with its own laws.” This stands in contrast with Art 24(5)(c) Directive 2014/41/EU, which reads: “the hearing shall be conducted directly by, or under the direction of, the competent authority of the issuing State in accordance with its own laws.”

⁵⁵³ A. Mangiaracina, “A new and controversial scenario in the gathering of evidence at the European level: The proposal for a Directive on the European Investigation Order”, quoting European Commission, Comments on the Initiative regarding the European Investigation Order in criminal matters, 2010, p. 29

⁵⁵⁴ *Supra*, Section 1.

For example, where the possibility to conduct or to request the conduct of investigations is provided under national law, the defence may have to rely on the authorities of its own country in order for them to issue an assistance request to foreign authorities for further fact-finding activities to be carried out.

As a matter of example, in both the Netherlands and Italy, the defence must file an application to the national authorities of the country of prosecution for them to send a letter of request to the foreign authorities asking for further inquiries to be carried out.⁵⁵⁵ However, chances that these applications are successful are sometimes thinner. In Italy for example, the defence will have to build a much more solid case file than in domestic cases, in order to demonstrate the importance of the requested investigation, with yet no guarantees that its demands will be successful.⁵⁵⁶ Moreover, in the absence of oversight on the part of the defence on the investigative activities conducted by the executing State, there is a risk that the evidence gathered, though originally requested to exculpate the defendant, turns out to be inculpatory and is shared with the authorities of the issuing State.⁵⁵⁷

Alongside this, information on the deployment, or the outcome, of ongoing investigations may be more difficult to obtain for the defence in cross-border cases. Information-exchanges at the EU level generally circulate among national authorities, to the exclusion of third parties. Besides, the defence is not allowed to participate in information-exchange networks established at EU level, such as Europol or Eurojust.⁵⁵⁸ Defence attorneys have no direct access to these agencies, and only a few countries allow the defence to instigate requests to Europol or Eurojust through a motion for the taking of evidence.⁵⁵⁹ This heightens the difficulty for the defence to conduct its own investigation through, for example, interrogating witnesses, because the source of information may be more difficult to trace in cross-border cases.⁵⁶⁰

Lastly, the “information gap” faced by the defence is unlikely to be solved by the entry into force of the Information Rights Directive.

Art 7 of the directive attempted to equalise the balance and uphold the principle of equality of arms, by expressly granting a right to the defence,⁵⁶¹ with a view to challenging either the lawfulness of an arrest or a detention order,⁵⁶² or the merits of the accusation.⁵⁶³

Upholding the principle of equality of arms while, at the same time, ensuring the efficient conduct of criminal prosecutions, was a difficult balance to strike during the negotiations on this provision.⁵⁶⁴ Limitations to this right exist: access to the materials of the case should be granted “at the latest” upon submission of the merits of the accusation to the judgment of a court.⁵⁶⁵ Thus, the directive only refers to the latest possible moment at which access must be granted. Therefore, it seems to suggest that access to the materials of the case may be

⁵⁵⁵ M. Van Wijk, *Cross-border gathering of evidence: Equality of arms within the EU?*, 2017, op. cit.

⁵⁵⁶ Ibid.

⁵⁵⁷ Ibid.

⁵⁵⁸ S. Gless, “Transnational Cooperation in Criminal Matters and the Guarantee of a Fair Trial: Approaches to a General Principle”, *Utrecht Law Review*, Vol 9, Issue 4, 2013, p. 100

⁵⁵⁹ Ibid

⁵⁶⁰ A. van Hoek, M. Luchtman, “Transnational cooperation in criminal matters and the safeguarding of human rights”, *Utrecht Law Review*, Vol 1, Issue 2, 2005, p. 20

⁵⁶¹ This latter provision is in line with the interpretation made by the ECtHR of the principle of equality of arms, that requires evidence and other materials to be disclosed so as to not put the defence at disadvantage *vis-à-vis* the prosecution. See ECtHR, *Jasper v United Kingdom*, App no 27052/95, 16 February 2000

⁵⁶² A right of access to “documents” is conferred under Art 7(1), i.e. photographs and audio and video recordings, to facilitate the task of arrested and detained persons of challenging the lawfulness of an arrest or detention order. See also Recital 30.

⁵⁶³ Then, Art 7(2) refers to “material evidence” to which defendants should have access in order to challenge the merits of the accusation. There too, material evidence includes, but not only, photographs and audio and video recordings. Recital 31 Directive 2012/13/EU. The scope of the right of access to material evidence is wider than that of the right of access to documents, because the materials listed under Recital 31 are of a non-exhaustive nature. See S. Cras, L. De Matteis, *The Directive on the Right to Information*, 2013, op. cit., p. 30

⁵⁶⁴ S. Cras, L. De Matteis, “The Directive on the Right to Information”, 2013, op. cit., p. 24

⁵⁶⁵ Art 7(3) Directive 2012/13/EU

denied at the stage preceding the formal accusation by the court.⁵⁶⁶ This seriously limits the effectiveness of this right, as it leaves little time to the defence to prepare its own counter-strategy, especially if investigations must be carried out abroad. Some countries have indeed opted for a minimalist transposition of the directive, such as France.⁵⁶⁷

More generally, it is unclear how access to the materials can be exercised during investigations carried out under the EPPO framework.⁵⁶⁸ The handling European Delegated Prosecutor is responsible to grant access to the case file to suspects and accused persons after an investigation was initiated.⁵⁶⁹ However, information is scant on how the case file, for example, should be transmitted from the investigation to the trial State, along which timeframe, and under what conditions, in particular in situations where investigations took place in multiple countries. Overall, the applicability of this right to EPPO investigations will depend on how it is implemented under national law,⁵⁷⁰ as well as, most importantly, the extent to which the national legislator sought to facilitate the task of the defence.

3.5. Recommendations

Since the beginning, the principle of MR has been presented as facilitating the judicial protection of individual rights.⁵⁷¹ As stated by the Commission, it must be guaranteed that “the treatment of suspects and the rights of the defence would not only not suffer from the implementation of the principle, but that the safeguards would even be improved through the process.”⁵⁷² It should be recognized that the guarantees of a fair trial apply to criminal proceedings in their entirety, including the pre-trial investigation stages.⁵⁷³ Recent instruments, such as the EPPO Regulation, the EIO Directive and the E-Evidence Regulation Proposal all guarantee that the rights contained in the six directives on procedural safeguards apply. Whereas 5 directives contain dedicated provisions on the EAW, other cross-border cooperation instruments, such as those dealing with transnational investigations, are not explicitly mentioned. EU legislation on procedural rights is not specifically tailored to transnational investigations, thereby raising concerns as to whether it is fit for that purpose. As noted elsewhere, the way the procedural rights agenda was handled is a “lost opportunity to look at evidence gathering techniques from a procedural rights perspective as opposed to an effective prosecution perspective.”⁵⁷⁴

⁵⁶⁶ ECBA, ECBA Initiative 2017/2018 “Agenda 2020: A new Roadmap on minimum standards of certain procedural safeguards” (*forthcoming: New Journal of European Criminal Law*), p. 3

⁵⁶⁷ See National report No 2 on France, Section on the impact of EU legislation on national criminal procedure (point B). Under the French CCP, access to some materials during police custody may be prevented. Moreover, the French investigating judge can limit access to the materials of the case during the investigation. The Information Rights Directive was invoked more than 30 times before the Court of Cassation, but French judges refused to make a referral to the CJEU. They considered that the directive only prescribes to Member states to ensure that individuals arrested be informed about the criminal act they are suspected or accused of having committed, but does not imply giving detailed information about the accusation, particularly on the nature of the participation, which shall be communicated at the latest when the court rules on the determination of criminal charges and not necessarily at the stage of the arrest.

⁵⁶⁸ This criticism can be extended to other directives on procedural rights, as a matter of fact. It should be noted though that the Information Rights Directive does not refer either to the right of requested person to have access to the materials of the case in EAW proceedings either – or any other right besides the provision of a letter of rights. It is assumed that the requested person will enjoy the rights conferred in the directive in the issuing State upon surrender by the executing State.

⁵⁶⁹ Art 45(2) Regulation 2017/1939

⁵⁷⁰ Art 41(2) Regulation 2017/1939 reads that suspects and accused persons shall have, at a minimum “the procedural rights provided for in Union law, including directives concerning the rights of suspects and accused persons in criminal procedures, as implemented by national law.”

⁵⁷¹ In this regard, Tampere European Council, Presidency conclusions, para 33, and Programme of measures to implement MR, *op. cit.*

⁵⁷² European Commission, Communication, MR of Final Decisions in Criminal Matters, *op. cit.*, p. 16.

⁵⁷³ A. Grio, “The Defendant’s Rights in the Hearing by Videoconference”, 2014, *op. cit.*, p. 123.

⁵⁷⁴ G. Vermeulen, W. de Bondt, “The Procedural Rights Debate - A Bridge Too Far or Still not Far Enough?”, *eucri* 4/2010, p. 164

(i) Legislative options

(i)a. Adopting an instrument defining minimum standards on procedural rights of the defence in transnational investigations

Sound monitoring of the impact on defence rights of recently adopted instruments, such as the EPPO and the EIO, will be needed in the coming years. The focus should be on the possibilities offered to individuals to conduct their own investigations under the EIO, as well as to present evidence before the EPPO. Care should be paid to the obstacles the defence may encounter. These obstacles derive from the analysis above and comprise, inter alia, procedural issues, such as the unavailability of the right to request investigations to be carried out abroad under national law, alongside practical challenges of a financial and linguistic nature.

The findings above call for the development of a framework for transnational evidence-gathering and admissibility that would not infringe defence rights and the right to a fair trial in particular. The approach taken by the Commission in 2003, whereby “fairness in obtaining and handling evidence, including the prosecution’s duty of disclosure,” should feature on the same policymaking agenda as other procedural rights,⁵⁷⁵ gave rise to mitigated achievements in this respect. Efforts must be made to limit the aforementioned challenges encountered by the defence.

The EU legislator could envisage an approach similar to the one it pursued in the realm of surrender procedures.

A dedicated procedural framework should be established with regard to transnational investigations. This would further develop and instil legitimacy in the principle of mutual trust. An in-depth reflection should be initiated on defining a set of specific rules applicable to the defence in transnational investigations

The right of access to evidence and the case file encapsulated under Art 7 of the Information Rights Directive could be extended to ensure lawyers early access to the materials presented before the court upon the request for search warrants, confiscation or freezing orders, and any other coercive investigative measures.⁵⁷⁶ The analysis above indeed suggests that some Member States made use of the large margin of discretion left by the Information Rights Directive, and access to the case-file is only provided at the latest possible moment of the criminal procedure.⁵⁷⁷

The right to legal assistance should be broadened to include other circumstances. For example, the defendant’s legal counsel should be present when statements are taken from witnesses or experts, including through telephone or video-link, and should be allowed to conduct independent investigations abroad or to request evidentiary activities to be conducted to national authorities, in particular in those situations where the defendant is detained in prison, as in the *Hilali* case.⁵⁷⁸

Legal aid mechanisms should be established for the purpose of ensuring a pro-active role of the defence at the investigation stage in cross-border proceedings. The recently adopted Legal Aid Directive is not ambitious enough in this regard. Legal aid would bear travel and translation/interpretation costs when evidence needs to be collected abroad and ensure the presence of the lawyer when evidence needs to be collected abroad. As noted elsewhere, the risk is otherwise that only the wealthiest people defendants will have the possibility to collect evidence abroad by hiring counsels in several different countries.⁵⁷⁹

Three options could be envisaged.

⁵⁷⁵ European Commission, Green Paper - Procedural Safeguards for Suspects and Defendants in Criminal Proceedings throughout the European Union, COM/2003/0075 final, 2003

⁵⁷⁶ ECBA, ECBA Initiative 2017/2018 “Agenda 2020: A new Roadmap on minimum standards of certain procedural safeguards” (*forthcoming: New Journal of European Criminal Law*), p. 3. This should be without prejudice to the requirements of secrecy inherent to the use of special investigative techniques.

⁵⁷⁷ That is, under the formal accusation to a judgment of a court.

⁵⁷⁸ *Supra*, Section 2.2.5.

⁵⁷⁹ Allegrezza 2010, op. cit., p. 577

First, the negotiations on the procedural rights directives could be re-opened, in order to include provisions that are relevant to the realm of cross-border investigations. However, this is a dangerous strategy in the current state of affairs, as Member States could see it as an opportunity to renegotiate some of the guarantees they consented to during the negotiations. Instead of strengthening the current procedural framework, this could lead to just the opposite, weakening the *acquis*, and lowering the already *minimal* guarantees.

Second, another directive focusing exclusively on the rights of the defence in investigations could be adopted. The scope of this instrument would cover both domestic and transnational proceedings, thus mirroring the approach taken in the body of directives adopted on the basis of the 2009 Roadmap.

A third solution would be to adopt a separate instrument amending the relevant provisions of transnational investigations tools, thus mirroring the solution developed with regard to *in absentia* trials. The necessary amendments could be brought to existing cooperation mechanisms, without risk of jeopardizing former achievements. It would then apply only to transnational proceedings.

(i)b. Initiation of a reflection on the adoption of an instrument laying down minimum rules in the field of legal remedies

Particular attention should also be paid to the modalities of judicial control in cross-border cases. The availability of legal remedies, the conditions of access to a court, along with the effectiveness of judicial review, deserve particular focus. In particular, the way the “burden” of ensuring access to a legal remedy is allocated between the requesting/issuing State and the requested/executing State should be examined, along with the possible challenges faced by the defence to determine the competent jurisdiction. Monitoring of judicial review should be extended to the EPPO, as it is not clear who should exercise the review, what needs to be reviewed and when such a review should be engaged from the final text, despite several revisions and amendments.

Individuals must be ensured access to legal remedies in transnational investigations.

A first step could be to adopt a horizontal instrument granting the right to an effective remedy against a decision taken as a result of evidence gathered through transnational investigations. This would enhance consistency between those instruments where a right to a legal remedy is provided, such as the EIO Directive, and those that remain silent on this matter, such as the 2000 EU MLA Convention and FD JITs.

Second, rules determining the jurisdiction in charge of reviewing a decision/order could be clarified across instruments dealing with transnational investigations, alongside the allocation of responsibility to address a claim between the trial State and the State where the investigation was carried out. Recent cooperation tools in evidentiary matters designated the issuing State as the only responsible jurisdiction to address a claim against the substantive reasons leading to its issuance. As regards the recognition and the execution of the measure, there remains a lot of unclarity as to the competent jurisdiction to which the claim must be addressed. The division of labour between the issuing and the executing authorities should be spelled out in greater detail, in order to avoid coordination and cooperation issues, and to prevent the improper use of evidence in the issuing State gathered as a result of an investigation that was successfully challenged in the executing State.

In the longer run, a broader reflection should be conducted on the need to enhance consistency between the different provisions dealing with legal remedies in MR instruments.⁵⁸⁰ Some of these differences can be explained by the specificities and *modus operandi* of some MR instruments. However, a certain degree of consistency is needed between those instruments imposing an obligation to provide a legal remedy and those where such provision is absent⁵⁸¹.

⁵⁸⁰ See A. Weyembergh, I. Armada, C. Brière, “Critical Assessment of the Framework Decision on the European Arrest Warrant,” *op. cit.*, 2014., p. 15.

⁵⁸¹ *Ibid.*

The jurisprudential context begs for this debate to take place. The elevation of the right to effective judicial protection of individuals' right as a "general principle of EU law" in the recent *Associação Sindical dos Juizes Portugueses* case,⁵⁸² will perhaps propel Member States to ask the Court to clarify the extent of the application of Art 47 of the Charter to transnational investigations, through the preliminary ruling procedures.⁵⁸³ The Court, in its judgment, moreover associated the effective implementation of the right to a judicial remedy to the implementation of the principle of mutual trust.⁵⁸⁴

(ii) Non-legislative options

(ii)a. Monitoring of recently adopted instruments

As noted above impact on defence rights of recent instruments should be closely monitored. Close monitoring could indeed lead to the introduction of new legislative initiatives.

(ii)b. Training

Legislative action must be complemented by a number of practical mechanisms.

A person subject to transnational criminal proceedings, conducted in more than one jurisdiction where different national rules apply,⁵⁸⁵ needs to benefit from timely and quality legal representation. This is true for all domains of judicial cooperation, including cross border investigations. Quality legal representation is currently compromised because of insufficient training and expertise of defence lawyers in transnational cases.⁵⁸⁶ Transnational cases are more complex than purely domestic ones and require understanding the law of the various MSs concerned,⁵⁸⁷ as well as of the EU instruments organizing cross border cooperation themselves.⁵⁸⁸ Training of defence lawyers should thus be strengthened⁵⁸⁹ and focus, in particular, on the main traits of foreign criminal procedures.⁵⁹⁰

On-going training opportunities should be further promoted and possibly be funded by the EU, as it is the case with judicial/prosecution training. Incentives to ensure defence lawyers' participation in training programs are needed and must be reflected upon.⁵⁹¹ Training programmes should be complemented by a practical EU handbook especially designed for defence lawyers. The latter should be made directly and easily accessible to those lawyers who may be less familiar with EU instruments in the field of cross-border investigations tools.

Language courses should be encouraged for lawyers involved in MR and MLA procedures. Linguistic differences have been a longstanding obstacle to cross-border cooperation.⁵⁹² Boosting the number and quality of mechanisms available in this area would increase the

⁵⁸² C-64/16, *Associação Sindical dos Juizes Portugueses*, 27 February 2018, para 35.

⁵⁸³ References are made in the EIO Directive and the EPPO Regulation to Art 47 of the Charter. As regards the EIO Directive, see Art 11(f), and Recitals 18, 19 and 39. As regards the EPPO Regulation, see Arts 5(1) and 41 and Recital 30, 83 and 94.

⁵⁸⁴ It stated that "mutual trust between the Member States and, in particular, their courts and tribunals is based on the fundamental premise that Member States share a set of common values on which the European Union is founded ... Article 19 TEU, which gives concrete expression to the value of the rule of law stated in Article 2 TEU, entrusts the responsibility for ensuring judicial review in the EU legal order not only to the Court of Justice but also to national courts and tribunals." See paras 30-32.

⁵⁸⁵ In this regard see ECPI, Manifesto on European Criminal Procedural Law,

⁵⁸⁶ See A. Weyembergh, I. Armada, C. Brière, "Critical Assessment of the Framework Decision on the European Arrest Warrant", see also Vernimmen-Van Tiggelen and Surano, "Analyse transversale", in Vernimmen-Van Tiggelen, Surano and Weyembergh (eds), op. cit., p. 560.

⁵⁸⁷ See A. Weyembergh, I. Armada, C. Brière, "Critical Assessment of the Framework Decision on the European Arrest Warrant", op. cit., 2014.

⁵⁸⁸ Ibid

⁵⁸⁹ See on its importance, see especially, European Commission, Communication, Building up trust in EU-wide justice, a new dimension to European Judicial Training, COM (2011) 551, 13 Sept. 2011. For an evaluation, see European Judicial training 2012, Final report.

⁵⁹⁰ Allegrezza 2010, op. cit., p. 577

⁵⁹¹ See A. Weyembergh, I. Armada, C. Brière, "Critical Assessment of the Framework Decision on the European Arrest Warrant," op. cit., 2014.

⁵⁹² S. Ruggeri (ed), *Criminal Proceedings, Languages and the European Union*, Heidelberg: Springer, 2014. See also National report No 2 on France, Section on Conclusion and recommendations (point D)

chances that the defence is granted a fair trial.⁵⁹³ For example in Germany, special trainings to ensure a high level of competence among interpreters/translators, judicial staff (prosecutors, judges, etc.) and lawyers so as to match the requirements of directives have not been provided.⁵⁹⁴ The entry into force of the EPPO Regulation, meanwhile, suggests that different languages may be involved when investigations are carried out in multiple countries. Adequate translation and interpretation services at the national level will be paramount to ensuring the protection of the fundamental rights of individuals involved in EPPO cases.⁵⁹⁵

(ii)c. Forging ties and developing networks

The process of identifying specialised and competent lawyers in cross-border cases should be made easier for the defence. The creation of a public register of lawyers trained and experienced in cross-border cases and include information on the languages spoken was advocated by several organisations.⁵⁹⁶ Registers have been established, as evidenced by the “Find a lawyer” database available on the e-justice portal, where the contact details of lawyers are easily accessible per EU country, along with the spoken languages and their areas of expertise.⁵⁹⁷ Somehow ironically, the transnational component seems to have been omitted from this database. The register is organised according to the domains of expertise at the domestic level, but information on how to find a lawyer competent in, say, surrender procedures, is missing. A similar criticism applies to the register developed by ECBA as regards fraud and compliance lawyers in Council of Europe countries.⁵⁹⁸ These latter initiatives need to be further developed and improved so as to facilitate legal assistance in cross-border cases. A comprehensive register would, for instance, ensure a more effective operation of the right to dual representation enshrined in the Access to a Lawyer Directive, allowing defence lawyers in the executing state to identify and coordinate with experienced lawyers in the issuing state.⁵⁹⁹

Bottom-up initiatives such as the creation of networks of defence lawyers (e.g. ECBA, CCBE) should be complemented by enhanced mechanisms to forge connections between defence lawyers. In this respect, demands for an effective EU defence system to be applied to transnational cases have been expressed.⁶⁰⁰ The creation of an institutionalised network of defence lawyers⁶⁰¹ is desirable. For example, this network should be coupled with a secured system for exchanging information in cross-border cases; one may mention the – yet defunct pilot project “PenalNet – Secure E-Communications” as a possible source of inspiration.⁶⁰²

Other proposals were made in this area. An example of such initiatives is “EURO-Defensor”, whose tasks would be to establish a network of defence lawyers, to assist the coordination of the defence in cases when lawyers from different EU states are involved, providing legal

⁵⁹³ As seen in Section 3, the defence is often put at disadvantage because of the procedural, technical and linguistic differences that exist in transnational proceedings.

⁵⁹⁴ National report No 2 on Germany, Section on Directives for which the transposition deadline has already passed (B)(2)(c)

⁵⁹⁵ National report No 2 on Spain, Section on conclusion and recommendations (point 33).

⁵⁹⁶ J. Goldsmith, “TRAINAC Report on the assessment, good practices and recommendations on the right to interpretation and translation, the right to information and the right of access to a lawyer in criminal proceedings”, Brussels: CCBE, 2015; EAW rights, 2016, op. cit.; W. Van Ballengoij, The costs of non-Europe: procedural rights and detention conditions, 2017, op. cit.,

⁵⁹⁷ See e-justice portal: https://e-justice.europa.eu/content_find_a_lawyer-334-en.do

⁵⁹⁸ ECBA, Find a lawyer, available at: <http://www.ecba.org/contactlist/contacts-search-country.php>

⁵⁹⁹ J. Goldsmith, “TRAINAC Report on the assessment, good practices and recommendations on the right to interpretation and translation, the right to information and the right of access to a lawyer in criminal proceedings”, 2016, op. cit.

⁶⁰⁰ See for instance Wahl, “The perception of the principle of MR of judicial decisions in criminal matters in Germany”, in Vernimmen-Van Tigelen, Surano and Weyembergh (eds), *op. cit.*, p. 143-144.

⁶⁰¹ *Ibid.*, p. 143; Vernimmen-Van Tigelen and Surano, “Analyse transversale”, *ibidem*, p. 560; JUSTICE, p. 14 or ECPI, Manifesto on European Criminal Procedural Law, p. 435.

⁶⁰² PenalNet was an initiative developed from 2007 to 2013, supported and co-financed by the European Commission, and involving the Spanish, French, Hungarian, Italian and Romanian bar associations.

aid, and providing information to the defence.⁶⁰³ This initiative remained at embryonic stage and never gave rise to a legislative proposal.⁶⁰⁴

Finally, the expansion of the rights of the defence in cross-border investigations should be complemented by the provision of EU funding for the costs associated to legal assistance, in particular whenever the lawyer may be required to travel abroad to, for example, examine witnesses.

⁶⁰³ M. Van Wijk, *Cross-border evidence gathering: Equality of arms in the EU?*, 2017, op. cit., p. 103. Other proposals were made in this area, such as the European Criminal Law Ombudsman.

⁶⁰⁴ Ibid.

4. PRE-TRIAL DETENTION REGIMES AND ALTERNATIVES TO DETENTION

KEY FINDINGS

- Pre-trial detention regimes vary significantly. Not all MSs have established maximum length of PTD. Besides, some MSs implemented time-limits at each stage of pre-trial detention, while others rely on a system of regular judicial review. Widely divergent too are the criteria relied on to trigger a pre-trial deprivation of liberty. A last set of differences relates to the nature of alternatives to detention available among the Member States, along with the procedural framework underpinning their use.
- Obstacles to cross-border cooperation have emerged as a direct result from differences in PTD regimes: overuse and lengthy periods of remand may not be tolerated in all EU States and proved an obstacle to the (proper) execution of EAWs. Even more problematic is the adverse impact of overuse of pre-trial detention on mutual trust, due to the breaches of fundamental rights they may lead to. The mitigating impact of the procedural rights directives is likely to be remote: whereas the Presumption of Innocence could have provided a safeguard against overuse of pre-trial detention, the link between the two can be found in the Preamble of the directive, thereby compromising its added value.
- Differing approaches to alternatives to detention resulted in the ill-implementation of FD European Supervision Order and amounted to difficulties in using this instrument. Incompatibilities between supervision measures occur, alongside uncertainties as to how the executing State should adapt the issued supervision order to the measure available at the national level. Underuse of this instrument is exacerbated by the lack of communication between countries.
- Legislative action should be encouraged in two aspects of PTD: binding time-limits on the length of remand could be adopted, combined with an effective system of early and regular review by the national judicial authorities of whether pre-trial detention is still necessary. Alongside this, EU leaders should promote alternatives to PTD more clearly, by initiating infringement procedures against the ill-implementation of FD ESO, while promoting its use, encouraging dialogue and consultation between national authorities and developing training activities and support tools.

4.1. Nature of differences relating to PTD

This section comprises two overarching categories of differences. First, it looks at differences among regimes governing pre-trial detention (PTD), from the perspective of length of PTD and criteria for its use (4.1.1.). Then, it compares the use of alternatives to detention at the pre-trial stage by the Member States (4.1.2.)

4.1.1. Length, time-limits and decision-making

Pre-trial detention regimes differ significantly across the Union. Differences relate to the maximum length of PTD (A), the existence of a system of time-limits and judicial review (B), as well as the criteria relied on to trigger a deprivation of liberty (C).

A. Existence of a maximum length of PTD

A few Member States provide for a maximum length of pre-trial detention under national law (e.g. Spain, France, Romania, Italy).

Where national law provides for a time-limit, differences exist between the maximum length of pre-trial detention, as well as in the approach taken to calculate this maximum.

Time-limits may therefore vary depending mainly on the seriousness of the offence (e.g. the nature of the offence or the length of the punishable sentence). Other elements can be taken into consideration, such as the cross-border nature of the crime.

In Spain, imprisonment may not exceed two years, but this limit may be extended for another two years if the offence is punishable by a custodial sentence of more than 3 years⁶⁰⁵. In France,⁶⁰⁶ the maximum length of pre-trial detention is two years for an offence punishable by 20 years of imprisonment, and three years for an offence punishable by more than 20 years. Pre-trial detention may be extended up to three or four years if the offence was committed outside the national territory. A total of four years of PTD may also be imposed for serious crimes.⁶⁰⁷ In Romania⁶⁰⁸, PTD length is capped at five years but the CCP foresees that preventive detention cannot exceed half the length of the maximum penalty provided by law for the offence allegedly committed. In Italy, pre-trial detention cannot be ordered for more than two years for crimes that can be punished with sentences of up to six years, four years for crimes that can be punished with sentences of up to twenty years, six years for more serious offences.⁶⁰⁹

In some countries, no maximum length exists on pre-trial detention (e.g. Germany, The Netherlands, Hungary, Finland).

In Germany, a maximum length for PTD applies only in specific circumstances; it cannot exceed one year if the arrest is based on the risk that the individual will re-offend. That ground is itself limited to a series of serious offences.⁶¹⁰ For other grounds of arrest, pre-trial detention normally does not exceed six months. After six months, a thorough review takes place and the court may exceptionally decide to prolong the length of pre-trial detention.⁶¹¹ Pursuant to the German criminal code of procedure, continuation of PTD may only take place if "the particular difficulty", the "unusual extent of the investigation", or "some other important reason" do not justify continuation of remand.⁶¹² There is, by consequence, no absolute limitation on the length of PTD.⁶¹³ In The Netherlands, the maximum period of detention length preceding the trial cannot exceed 104 days. This is the only formal maximum length of pre-trial detention. In practice, the pre-trial period can last longer, for example in more complicated investigations, where the trial may be suspended.⁶¹⁴ In Hungary, the Code of Criminal Procedure was amended in 2013 to abolish the four-year time-limit on pre-trial detention for convicted persons who committed a crime punishable of at least 15 years of imprisonment.⁶¹⁵ However, time-limits exist for each stage of the PTD for less serious criminal offences.⁶¹⁶ In a similar trend, the Finnish law does not place limits on the length of pre-trial detention,⁶¹⁷ however the judge sets a deadline for the charges to be brought against the defence.⁶¹⁸ In Ireland, pre-trial detention is generally not relied on. Before being charged,

⁶⁰⁵ National report No 2 on Spain, Section on detention (point 12).

⁶⁰⁶ Art 145-2 French CCP

⁶⁰⁷ Such as drug trafficking, organised crime, terrorism. Then, the 4-year period may be extended by a 4-month period, which is renewable once.

⁶⁰⁸ National report No 2 on Romania, Section on detention (point 12).

⁶⁰⁹ G. Parisi, G. Santoro, A. Scandurra, "The practice of pre-trial detention in Italy, Research report, Fair Trials' research project, Pre-trial detention: a measure of last resort?", 2016, p. 17

⁶¹⁰ These include, for instance, sexual abuses, child abuse, stalking, aggravated theft, robbery, blackmail, fraud, or arson.

⁶¹¹ National report No 2 on Germany, Section on detention (point C(1)(a)cc)

⁶¹² Ibid. The relevant provision can be found under Sec. 121(1) GCCP

⁶¹³ This is also the conclusion reached by C. Morgenstern, H. Kromrey, 1st national report on Germany, DETOUR research project, Towards Pre-Trial Detention as Ultima Ratio, 2016, p. 13

⁶¹⁴ J. Crijns, B. Leeuw, H. Wermink, Pre-trial detention in the Netherlands: legal principles versus practical reality Fair Trials' research project, Pre-trial detention: a measure of last resort?, 2016, p. 24

⁶¹⁵ Fair Trials, Hungary's perpetual pre-trial detention, guest post, 13 March 2015. Retrieved at: <https://www.fairtrials.org/guest-post-hungarys-perpetual-pre-trial-detention/>

⁶¹⁶ National report No 2 on Hungary, Section on Detention (point 12).

⁶¹⁷ ECBA, An analysis of minimum standards in pre-trial detention and the grounds for regular review in the Member States of the EU, Report on Finland, 2007, op. cit., p. 9.

Retrieved at: <http://www.ecba.org/extdocserv/projects/JusticeForum/Finland180309.pdf>

⁶¹⁸ As noted in Section 14 of the Coercive Measures Act, the time limit may not be longer than what is necessary for the completion of the criminal investigation and the preparation of the charges. This time limit may however be

suspect shall not be detained for more than 48 hours for ordinary offences, 72 hours in case of terrorist offences,⁶¹⁹ and up to 7 days for serious offences.⁶²⁰ Formally however, there is no statutory limits on remand in custody imposed after the charges were imposed, pending the resolution of that charge before the courts.⁶²¹

Countries where a maximum length of PTD was defined

	Maximum length	Criteria
ES	4 years	Offence punishable by more than 3 years of imprisonment
FR	4 years (and 8 months)	Offence punishable by more than 20 years of imprisonment was committed outside the national territory Serious crimes (e.g. drugs trafficking, terrorism, etc.)
RO	5 years	Half of the maximum sentence prescribed by law for the particular crime for which the defendant is accused of and must not exceed 5 years
IT	6 years	Serious offences punishable by life sentence or sentence to more than 20 years prison

Countries where no maximum length of PTD was defined

DE	After six months, a thorough review takes place but continuation of the PTD can be ordered in exceptional circumstances
NL	After 104 days, the pre-trial can last longer, if more complicated investigations take place and the trial is suspended. Regular reviews of detention take place
HU	Absence of maximum limit on PTD length for crimes punishable of more than 15 years
FI	No limits (but scarce use of PTD)
IE	No limits (but scarce use of PTD)

B. Different systems of periodic review of PTD

Alongside the adoption of a maximum length, Member States have established a system of periodic review of PTD (e.g. the Netherlands, Italy, Germany, Romania, Hungary, France, Spain, Finland).⁶²²

In both the Netherlands and Italy, a review of detention orders takes place after each stage of the pre-trial detention⁶²³; the review of the detention order is stricter after each phase and the suspect must be released if time-limits have expired. The Italian pre-trial detention system is characterised by an automatic and non-discretionary nature: when the time-limits are exceeded, the judge has no alternative but to release the person in custody, irrespective of whether the original precautionary measures⁶²⁴ as part of the proceedings are still in

expanded if need be; the remanded person and his/her counsel shall be provided with an opportunity to be heard on the request (Section 14(2) Coercive Measures Act, 806/2011).

⁶¹⁹ National report No 2 on Ireland, Section on detention (point 12)

⁶²⁰ Such as murder, false imprisonment or possession of firearms with intent to endanger life, drug trafficking. See A. Ryan, Report on Ireland, *in* Ligeti 2013, *opt cit.*, p. 343

⁶²¹ J. Mulcahy, The practice of pre-trial detention in Ireland, Research report, Dublin: Irish Penal Reform Trust, 2016, p. 71

⁶²² National reports No 2 on the Netherlands, Italy, and Germany, Sections on detention.

⁶²³ Such as custody, remand in custody, detention in custody.

⁶²⁴ Under Art 274 CPP, they relate to the need to preserve of the correct gathering of evidence from a real risk of suppression or tampering by the suspect or accused, the need to prevent a real risk of flight of the suspect or

force.⁶²⁵ In Germany, PTD exceeding six months can only be maintained exceptionally and continuation must be duly justified.⁶²⁶ As a result, remand detention periods exceeding one year are rare in practice.⁶²⁷ In Romania, 'preventive' detention, i.e. taking place either during the investigation or the preliminary hearing and the trial, can be ordered for a maximum of 30 days, and extended for another period of 30 days up to a maximum of 180 days. The court must review the necessity of detention at intervals up to 60 days.⁶²⁸ In Hungary, the review of PTD takes place after six months by the court of first instance if the latter has not delivered a conclusive decision yet, and by the court of appeal if PTD has exceeded one year.⁶²⁹ In France,⁶³⁰ PTD must be reviewed after one year. Then, PTD may be renewed for six months,⁶³¹ up to the absolute and exceptional limit of four years and eight months.⁶³²

Another group of countries applies a slightly different system. In Spain, PTD is subject to the principle of proportionality, and cannot last longer than the time necessary for achieving the aims that propelled authorities to order the detention of the suspect.⁶³³ Time-limits however vary according to the charges and the grounds that led to remand.⁶³⁴ The suspect or the accused person may bring an appeal against a decision on PTD.⁶³⁵

Reviews of pre-trial detention seemingly take place on a more regular basis in Finland and Ireland. Under the Finnish system, the person remanded custody has the right to request the detention order to be reviewed by a judge at two-week intervals.⁶³⁶ In Ireland, at first appearance before the Court, detention may only be ordered for 8 days.⁶³⁷ Then, remand in custody may be ordered for a period up to 15 or 30 days, upon consent of the accused and the prosecution.⁶³⁸

C. Different criteria relied on by the competent authorities

The underpinning reasons governing the use of PTD vary to some extent. A major trend can nonetheless be discerned in the selection of countries analysed; most of the time PTD is ordered with a view to preventing absconding, re-offending, and interference with the investigation. The seriousness of the suspected offence is also considered as an important factor.⁶³⁹

accused person or his/her social dangerousness determined according to specific indicators (including his/her previous criminal records and the nature of the crime under investigation or prosecution).

⁶²⁵ National report No 2 on Italy, pp. 16-17

⁶²⁶ According to the Federal Constitutional Court, the State's intrusion into the individual's right to liberty requires a higher degree of scrutiny (more profoundness and intensity of examination) if remand detention lasts longer than six months. See National report No 2 on Germany, Section on Detention (point C)

⁶²⁷ Ibid.

⁶²⁸ National report No 2 on Romania, Section on detention (point 12).

⁶²⁹ National report No 2 on Hungary, Section on detention (point 12).

⁶³⁰ National report No 2 on France, Section on detention (point C).

⁶³¹ Following the opinion of the Public prosecutor, at the request of the Public prosecutor or the concerned person (or his/her lawyer). An order for release may be taken "at any time" by the investigating judge.

⁶³² National report No 2 on France, Section on detention (point C). See also Article 145-2 CPP. Pre-trial detention may be prolonged after the end of the judicial investigation in criminal matters until the hearing of the Assize Court (Art 179 and 181 CPP.)

⁶³³ L. Bachmaier Winter, Report on Spain, *in* Ligeti 2013, op. cit., p. 729

⁶³⁴ Ibid.

⁶³⁵ Ibid.

⁶³⁶ The request should be handled in court without delay and at the latest in four days. See ECBA, "An analysis of minimum standards in pre-trial detention and the grounds for regular review in the Member States of the EU", Report on Finland, 2007, op. cit., p. 9

⁶³⁷ D. Perry, M. Rogan, 1st National Report on Ireland, Dublin: Trinity College, DETOUR Project: "Toward Pre-Trial Detention as Ultima Ratio", 2016, p. 10

⁶³⁸ Ibid.

⁶³⁹ For example in France, although the length of pre-trial detention amounts, on average, to 25 months, it can be extended up to four years for crimes punishable of more than 20 years of imprisonment, such as terrorism and organised crime (Art 145-2 CCP). Fair Trials, Pre-trial detention in France, Communiqué issued after the meeting of the local expert group (France), 13 June 2013. (Retrieved at: https://www.fairtrials.org/wp-content/uploads/Fair_Trials_International_France_PTD_Communique_EN.pdf). See also country reports available in Fair Trials, A Measure of Last Resort? The practice of pre-trial detention decision-making in the EU, 2016, op. cit.; See also W. Hammerschick, C. Morgenstern, S. Bikelis, M. Boone, I. Durnescu, A. Jonckheere, J. Lindeman, E. Maes, M. Rogan, Towards Pre-trial Detention as Ultima Ratio: Comparative Report, DETOUR project, 2017

These criteria are generally based on a certain degree of suspicion,⁶⁴⁰ but the ‘suspicion’ threshold seems to vary from a country to another. For example in Italy, a ‘certain degree of suspicion’ implies that reasonable circumstantial evidence is needed for a restriction of freedom.⁶⁴¹ In Germany, the threshold is higher and a *strong* suspicion (as opposed to a certain degree of suspicion) is needed, which means that it is highly likely that the person will be convicted in the trial phase.⁶⁴² The threshold of suspicion required may moreover vary from a PTD phase to another within criminal justice systems. Under Dutch law, police custody must be grounded on a *reasonable* suspicion, but the threshold to order remand in custody and detention in custody is that of *grave presumptions* against the suspect are needed.⁶⁴³

By contrast, investigative detention is not so much relied on in Ireland, where it is associated to a system of preventive justice, a conception that was inherited from the UK. Under Irish constitutional law, a prisoner cannot be detained for purely preventive purpose;⁶⁴⁴ the general requirement is that a suspect must be brought before a judge and charged as soon as is practicable.⁶⁴⁵

Ireland introduced the risk of reoffending as a ground for pre-trial detention in 1997 by amending the Irish Constitution with a new article.⁶⁴⁶ The introduction of a new amendment in favour of PTD did not result in much change in practice.⁶⁴⁷ However, this might change soon with the release of a new bill that is currently going through legislative negotiations. The latter would introduce new grounds for refusing a decision on bail, including preventing evasion and/or interference with justice.⁶⁴⁸

	Review of detention	Decision-making based on the necessity to prevent absconding, re-offending, and interference with the investigation, as well as on the seriousness of the alleged offence
FI	Every 2 weeks	Yes, as well as: The identity of the suspect is unknown and the suspect refuses to reveal his name or address
FR	After one year	Yes, as well as: To protect the person under judicial examination, to guarantee that he remains at the disposal of the law, to put an end to the offence or to prevent its renewal; To put an end to an exceptional and persistent disruption of public order caused by the seriousness of the offence, the circumstances in which it was committed, or the gravity of the harm that it has caused
DE	After six months	Yes, as well as: Risk of non-appearance at the main hearing in accelerated proceedings.

⁶⁴⁰ Under Art 5(1)(c) ECHR, a decision on deprivation of liberty must be based on a reasonable degree of suspicion: 1. No one shall be deprived of his liberty save in the following cases... the lawful arrest or detention of a person ... on reasonable suspicion of having committed an offence ..."

⁶⁴¹ F. Ruggeri, Report on Italy, in K. Ligeti (ed), *Toward a prosecutor for the European Union*, 2013, op. cit., p. 387

⁶⁴² T. Weigend, Report on Germany, in K. Ligeti (ed), *Toward a prosecutor for the European Union*, 2013, op. cit., p. 274

⁶⁴³ National report No 2 on the Netherlands, Section on detention (point 3).

⁶⁴⁴ *Minister for Justice, Equality and Law Reform v. Murphy* [2010] 3 IR 77.

⁶⁴⁵ G. Conway, Irish Practice on Mutual Recognition in European Criminal Law, in G. Vernimmen-Van Tiggelen, L. Surano & A. Weyembergh (eds.), *The Future of Mutual Recognition in Criminal Matters in the European Union* 2009, op. cit., p. 283.

⁶⁴⁶ Thus overturning a ruling by the Irish Court of 1966, that closely associated PTD to preventive justice. See *People (Attorney General) v O'Callaghan* (1966). I.R. 501. Quoted in W. Hammerschick et al, *Towards Pre-trial Detention as Ultima Ratio: Comparative Report*, op. cit., 2017, p. 15

⁶⁴⁷ The ground of re-offending is nonetheless being applied in practice, in combination to other grounds. W. Hammerschick et al, "Towards Pre-trial Detention as Ultima Ratio: Comparative Report", op. cit., 2017, p. 15

⁶⁴⁸ Alongside the power to hear complainant evidence in bail applications, and the proof of foreign convictions. See Part 5 of General Scheme of Bail Bill, July 2015.

HU	After six months	Yes
IE	After 8 days	No. Current grounds for PTD include: preventing the suspect from committing a serious offence; the existence of evidence in application for bail, and evidence of previous criminal records.
IT	After each stage of the proceedings	Yes
NL	After each stage of PTD ⁶⁴⁹	Yes
RO	Every 60 days	Yes, as well as: The accused violated the measure of interdiction to leave the country
ES	30 days after the appeal was brought	Yes, as well as: To protect the victim and to ensure the presence of the accused at the trial

4.1.2. Alternatives to detention

Alongside widely divergent pre-trial detention systems, differences arise regarding to the list of alternatives to detention available at the national level, as well as the procedure leading national authorities to use them.

First, the list of alternatives to PTD available under national law widely differs from a MS to another.

Although it is impossible within the scope of this study to list here all the alternatives to detention available under the law of the 9 Member States analysed, it is useful to compare alternatives available in Spain and France. In quantitative terms, in Spain,⁶⁵⁰ the CCP provides for six alternatives to PTD only, against 16 in France. In qualitative terms, various alternatives provided under French law, for example a prohibition to drive a vehicle and not to engage in certain professional or social activities, or to undergo medical examination or even hospitalization, inter alia with the aim of detoxification, are not provided under the Spanish criminal code of procedure.⁶⁵¹ Conversely, the Spanish law foresees alternatives to detention that do not feature under the French CCP, such as the expulsion of aliens, and the possibility to serve preventive detention in a detoxification centre.⁶⁵²

Commonalities can nonetheless be observed between the Member States. For example, judicial control is supported by electronic monitoring in several countries (e.g. France, The Netherlands, Romania, Germany).⁶⁵³

However, electronic monitoring and house arrest, although provided under national legislation at the pre-trial stage, are barely used by Member States in practice. A look at a recent survey by the Council of Europe's Annual Penal Statistics revealed that, among the countries examined, substantial data on the number of persons benefiting from alternatives to detention at the pre-trial stage was only available with regard to France and the Netherlands.⁶⁵⁴ In the remainder of countries, the number of persons placed under supervision measures are too scant to be included in the results of the survey. In France,

⁶⁴⁹ 3 or 6 days for police custody; 14 days for remand in custody; and 90 days for detention in custody

⁶⁵⁰ National report No 2 on Spain, Section on detention conditions (point 12).

⁶⁵¹ Art 147 French CCP.

⁶⁵² National report No 2 on Spain, Section on detention (point 12).

⁶⁵³ See country reports commissioned by the Fundamental Rights Agency for the following project: Rehabilitation and mutual recognition – practice concerning EU law on transfer of persons sentenced or awaiting trial, May 2015. Retrieved at: <http://fra.europa.eu/en/country-data/2016/country-studies-project-rehabilitation-and-mutual-recognition-practice-concerning>

⁶⁵⁴ Council of Europe Annual Penal Statistics, SPACE II, Persons Serving Non-Custodial Sanctions and Measures in 2016, Survey, PC-CP 2017, 11, p. 25

only 2,1 persons out of 100,000 detainees are subject to supervision measures at the pre-trial stage, against 8,3 persons in the Netherlands.

Second, as regards the decision-making procedure underpinning the use of alternatives to pre-trial detention, the factors lying behind the reluctance of MSs to resort to these measures are sometimes difficult to identify, and differences between approaches hard to pinpoint.

In some countries, the question may be raised of the existence of a degree of arbitrariness underpinning the decision-making process on whether the person should be put in pre-trial detention, or subject to an alternative measure.⁶⁵⁵ In Spain, for example, preventive detention may be ordered without any previous risk assessment by a judge on risks of flight and/or re-offending,⁶⁵⁶ and PTD is often used as a form of coercion to force the accused's cooperation.⁶⁵⁷

Sometimes, the national law is framed in a way that is not conducive to the use of alternatives to detention. In the Netherlands, the judge must assess whether pre-trial detention is required or not.⁶⁵⁸ The existing system is yet not conducive to the use of supervision measures: it is only after the decision to order PTD that the judge assesses whether it is prudent to suspend it, either on his/her own motion, on demand of the prosecutor, or at the request of the suspect.⁶⁵⁹ It is difficult for a judge to argue convincingly that the detention should be suspended, because he will have already concluded that a person should be in pre-trial detention before he can even address the possibility of a suspension.⁶⁶⁰

It is interesting to contrast these findings with the approach taken by Ireland and Finland, countries where a very low number of pre-trial detainees exist.⁶⁶¹ In Ireland, there is indeed a strong presumption in favour of bail, often perceived as *the* alternative to pre-trial detention in Ireland.⁶⁶² In Finland however, bail is not relied on at all.⁶⁶³ Instead, the person may be subject to a travel ban or an enhanced travel ban,⁶⁶⁴ provided that the most severe penalty provided for the offence is imprisonment of at least one year,⁶⁶⁵ or confinement.⁶⁶⁶

4.2. Impact on mutual trust and mutual recognition

Differences among PTD regimes as well as regimes governing the use of alternatives to pre-trial detention seriously affect cross-border cooperation. First, obstacles to mutual recognition and mutual trust directly emerge from differing understandings of pre-trial detention regimes and overuse of PTD: lengthy periods of imprisonment carry the risk of jeopardising individuals' rights, a practice that may not be tolerated in other EU states. (4.2.1.). Besides, the alternatives to detention enshrined under the Framework Decision on Supervision Order, supposed to facilitate the cross-border use of alternatives to detention and supervision measures, are barely relied on. Whenever MSs endeavour to rely on them,

⁶⁵⁵ As noted by participants at an expert roundtable on pre-trial detention organised by Fair Trials at the European Parliament on 25 April 2018.

⁶⁵⁶ A. Nieto Martín, C. Rodríguez Yagüe, M. Muñoz de Morales Romero, Chapter on Spain, in A. Bernardi (ed), *Prison Overcrowding and alternatives to detention, European sources and national legal systems*, Naples: Jovene Editore, 2016, p. 418

⁶⁵⁷ Ibid.

⁶⁵⁸ National report No 2 on the Netherlands, Section on detention (point 3).

⁶⁵⁹ Ibid.

⁶⁶⁰ Ibid.

⁶⁶¹ See the latest CoE statistics, Council of Europe Annual Penal Statistics, SPACE I – Prison populations, PC-CP(2017)10, on p. 54

⁶⁶² J. Mulcahy, "The practice of pre-trial detention in Ireland", Research report, Dublin: Irish Penal Reform Trust, 2016, p. 151

⁶⁶³ ECBA, "An analysis of minimum standards in pre-trial detention and the grounds for regular review in the Member States of the EU", Report on Finland, 2007, op. cit.

⁶⁶⁴ An enhanced travel ban complements the original travel ban with supervision measures and may also include an obligation to stay home. National report No 2 on Finland, Section on detention (point 12)

⁶⁶⁵ Other conditions apply, such as the likelihood that a suspect will abscond or avoid criminal investigations, trial or enforcement of punishment, or continue his criminal activity. See Section 1(1)(2) Coercive Measures Act, op. cit.

⁶⁶⁶ National report No 2 on Finland, Section on detention (point 12)

incompatibilities often occur (4.2.2.). Under-use of these instruments is exacerbated by a striking lack of communication between countries (4.2.3.).

4.2.1. Different understandings between pre-trial regimes and overuse of pre-trial detention: obstacles to mutual recognition and mutual trust

No consensual approach exists to the use of pre-trial detention. Differences yielded difficulties in the operation of the EAW (A). Overuse of pre-trial detention in some countries, in transnational cases in particular, may adversely affect mutual trust (B). Meanwhile, little can be expected from the procedural rights directives, as evidenced by the broad wording of their provisions, which leaves significant margin of manoeuvre to the Member States, as well as the variably geometry resulting from the various optouts (C).

A. Differing approaches to PTD as an obstacle to the operation of FD EAW

i) Different conceptions of time-limits

A first set of obstacles arise as a result of excessive pre-trial detention length in some countries, alongside the absence of time-limits on PTD in some countries. This could easily result in tensions between those countries where PTD is subject to strict conditions, and others where greater leeway is enjoyed by the national authorities in charge of making the detention order. DG Justice Commissioner Vera Jourova acknowledged that “the lack of minimum procedural safeguards for pre-trial detention can hinder judicial cooperation.”⁶⁶⁷

The strict Italian regime governing the execution of EAWs is a case in point. In Italy, the law implementing the EAW includes an express ground for refusal when the legislation of the issuing State does not provide maximum time limits for preventive detention.⁶⁶⁸ The provision was described as a “legislative bug” and accused of paralysing the execution of EAWs, which it did in practice.⁶⁶⁹ A solution was found in the *Ramoci* case of 2007,⁶⁷⁰ where the Court of Cassation ruled that the absence of statutory maximum time limits in the issuing MS should not *per se* constitute an obstacle to the surrender, provided that an equivalent mechanism for the containment of the length of preventive detention – also in the form of periodical reviews without automatic release, can be retraced in the law or in the practice of that system. Somewhat paradoxically, despite a strict system of time-limits, in Italy suspects and accused persons usually spend long amounts of time in remand.⁶⁷¹

ii) The “non-acceptance” of investigative detention and the concept trial readiness

Another obstacle to cross-border cooperation results from the differences in approach to investigative detention.

Concrete issues occurred in the operation of the EAW.

Common law countries have tended to object EAWs issued for the purpose of investigations, that could result in lengthy pre-trial detention periods for the requested person. Thus, EAW requests should only be issued for the purposes of a trial on the charge specified in the warrant, as opposed to the continuation of a fact-finding investigation of the offence.⁶⁷²

A first, concrete manifestation of these opposite approaches to pre-trial detention can be found under Irish law. Ireland sought to limit the scope of FD EAW by prohibiting the

⁶⁶⁷ Speech by Commissioner Jourova at the European Criminal Law Academic Network, 2016 Annual Conference, 10th anniversary. Retrieved at: http://europa.eu/rapid/press-release_SPEECH-16-1582_en.htm

⁶⁶⁸ Art 18(1)(e) of the law implementing the EAW (1. 69/2005) provided (and still formally provides) for an express ground for refusal when the legislation of the issuing MS does not provide maximum time limits for preventive detention. See national report no 2 on Italy, section on Detention (12.1.).

⁶⁶⁹ Ibid.

⁶⁷⁰ C. Cass. Sez. Un, 30.1.2007, n. 4616, *Ramoci* (Rv. 235531).

⁶⁷¹ Trials take extremely long amounts of time, thus adversely impacting the length of pre-trial detention. The absence of effective limits on the length of pre-trial investigations, the large number of minor offences covered by Italian law, unclear and contradictory legal provisions, insufficient resources, including an inadequate number of judges, and strikes by judges and lawyers have all been raised as key factors in accounting for the current delays. See National report No 2 on Italy, Section on diversity of legal traditions and its impact on cross-border cooperation in criminal matters (point 1.3.).

⁶⁷² A. Weyembergh, C. Brière, I. Armada, “Critical Assessment of the European Arrest Warrant Framework Decision”, op. cit., p. 38

execution of arrest warrants issued for investigative purposes.⁶⁷³ It did so by issuing a declaration at time of the adoption of FD EAW. It is useful to provide the relevant passage of the declaration in full:

“Ireland shall in the implementation in domestic legislation of this Framework Decision provide that the European Arrest Warrant shall only be executed for the purposes of bringing that person to trial or for the purpose of executing a custodial sentence or detention order.”⁶⁷⁴

The Irish exception was inserted under the section 11 of the national law implementing the EAW.⁶⁷⁵ Pursuant to this provision, Ireland will only surrender where a decision has already been taken to charge the person.⁶⁷⁶ Put otherwise, Ireland will not surrender for the purpose of investigative detention, so as to uphold the requirements laid down under the Irish Constitution.

The blanket exclusion enshrined under Irish law has not caused major issues to date.⁶⁷⁷ In practical terms, the Irish judicial authorities have adopted a flexible approach. For example, they did not exclude the conduct of fact-finding activities subsequent to surrender.⁶⁷⁸ Much of the approach pursued by the Irish Courts is an incremental one, that consisted in examining on a case-by-case basis whether either surrender, or the Irish Constitution, should be given the priority, without drawing a precise dividing line between cases of surrender and non-surrender.⁶⁷⁹

Second, the approach taken by other common law systems, such as the UK, directly impacted on the operation of the EAW. In Germany,⁶⁸⁰ it has been observed that the British authorities are reluctant to surrender persons if they are likely to face a long period of pre-trial detention in the issuing Member State. As a result, German orders to arrest the person subject to surrender are not always followed by the British authorities and less intrusive measures are preferred, such as release upon bail.⁶⁸¹ In some cases, the suspect escaped.⁶⁸²

This notwithstanding, the restrictive stance taken by Ireland and the UK may be rendered void due to the sometimes long periods of time elapsing between charging and the time the Court is ready to try the individual in the issuing State.⁶⁸³

B. Overuse of PTD and consequences on mutual trust

Alongside hindrances to effective cooperation, excessive pre-trial detention length may amount to encroachments upon fundamental rights, that could give rise to feelings of distrust between judicial authorities.

Mutual trust hinges on the presumption that Member States comply with a high level of protection of individuals' rights. Pre-trial detention, as a measure of deprivation of liberty, may infringe Art 5 ECHR in case of abuse.⁶⁸⁴ It is particularly sensitive because no trial has

⁶⁷³ G. Conway, “Irish Practice on Mutual Recognition in European Criminal Law”, in G. Vernimmen-Van Tiggelen, L. Surano and A. Weyembergh (eds.), *The Future of Mutual Recognition in Criminal Matters in the European Union* 2009, op. cit., p. 290

⁶⁷⁴ Statement by the Minister of Justice, Equality and Law Reform on 5 December 2003. Quoted in G. Conway, 2009, op. cit., p. 290

⁶⁷⁵ Under Section 11 of the European Arrest Warrant Act of 2003.

⁶⁷⁶ National report No 2 on Ireland, Section on detention (point 12.1.).

⁶⁷⁷ Ibid. See also G. Conway, “Irish Practice on Mutual Recognition in European Criminal Law”, 2009, op. cit., p. 292.

⁶⁷⁸ National report No 1 on Ireland, Section on Irish case law (point 5).

⁶⁷⁹ *Balmer v. Minister for Justice and Equality* [2016] IESC 25, 12th May 2016. National report No 1 on Ireland, Section on Irish case law (point 5).

⁶⁸⁰ National report No 2 on Germany, Section on Differences between criminal procedures and their impact on cooperation (A)(4).

⁶⁸¹ Ibid.

⁶⁸² Ibid.

⁶⁸³ G. Conway, “Irish Practice on Mutual Recognition in European Criminal Law”, 2009, op. cit., p. 291; A. Weyembergh, C. Brière, I. Armada, “Critical Assessment of the European Arrest Warrant Framework Decision”, 2014, op. cit., p. 38. The exception contained under Irish law would then be rendered void.

⁶⁸⁴ Detention in enforcement EAWs is less problematic because a final judgement will in those cases have declared the requested person guilty of a criminal offence. Therefore, PTD is governed by stricter rules – under Article 5(1)(c) ECHR, than detention as such – governed by Article 5(1)(f) ECHR. The former reads “the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence

yet taken place and the person still enjoys the presumption of innocence. Thus, it is linked to proportionality issues, and trial readiness, *as per* the requirements of Art 5(1)(c) ECHR. Logically therefore, it should only be imposed in exceptional circumstances, in other words when “less stringent measures have been considered and found to be insufficient to safeguard the individual or the public interest.”⁶⁸⁵ In 2017, the European Parliament stressed that the systematic use of remand at the pre-trial stage, combined with poor prison conditions, entailed a violation of the fundamental rights of prisoners.⁶⁸⁶

The inherent connection between pre-trial detention and the right to be presumed innocent has also been recognised by the Council of Europe in the 2006 European Prison Rules in particular,⁶⁸⁷ as well as in some countries, such as Italy⁶⁸⁸ and France.⁶⁸⁹ In a similar fashion, the recently adopted Presumption of Innocence Directive acknowledged that the codification of this right may have a bearing on pre-trial detention. Unfortunately, this reference to pre-trial detention is only made in a recital: the right of being presumed innocent should be “*without prejudice* to preliminary decisions of a procedural nature, which are taken by judicial or other competent authorities and are based on suspicion or on elements of incriminating evidence, *such as decisions on pre-trial detention*, provided that such decisions do not refer to the suspect or accused person as being guilty.”⁶⁹⁰ The position of the EU legislator therefore suggests that the decision on pre-trial decision must be grounded on a number of criteria, so as to conform to the right to be presumed innocent. These are spelled out in further details in the remainder of the provision: competent authorities “might first have to verify that there are sufficient elements of incriminating evidence against the suspect or accused person to justify the decision concerned, and the decision could contain reference to those elements.” This notwithstanding, the location of these provisions, i.e. under a non-binding recital, alongside the use of “might” and “could”, suggest that there is no obligation for the Member States to conform to these requirements, and clearly relativise their potential to address issues of PTD overuse.

Another, and arguably more relevant, hindrance to mutual trust is the nearly systematic recourse to pre-trial detention in cases of surrender.

The risk of flight in cross-border proceedings generally persuades authorities to resort to PTD,⁶⁹¹ even though alternatives are available at the national level.⁶⁹² One of the reasons put forward is that the person may be more willing to leave the country. In Germany, the risk of flight constitutes one of the two grounds for issuing an extradition arrest order prior

of fleeing after having done so”. The latter reads: “Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: (...) f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition”.

⁶⁸⁵ ECtHR, *Ambruszkiewicz v Poland*, 4 May 2006, para 31.

⁶⁸⁶ European Parliament, Motion for a resolution on prison systems and conditions (2015/2062(INI)), 6 July 2017, point 13.

⁶⁸⁷ The 2006 EPRs notably state that remand in “custody is always exceptional and is always justified.” There is a need to ensure that persons remanded in custody are “able to prepare their defence and to maintain their family relationships” and are not “held in conditions incompatible with their legal status, which is based on the presumption of innocence.” Recommendation Rec(2006)13 of the Committee of Ministers to member states on the use of remand in custody, the conditions in which it takes place and the provision of safeguards against abuse.

Retrieved at: <https://wcd.coe.int/ViewDoc.jsp?id=1041281&Site=CM>

⁶⁸⁸ From the Italian viewpoint, preventive detention must be theoretically kept separate from punishment and should not (systematically) last until the conclusion of the proceedings.

⁶⁸⁹ Art 137 of the French CCP provides that the person “under judicial examination, *presumed innocent*, remains at liberty. However, if the investigation so requires, or as a precautionary measure, he may be subjected to one or more obligations of judicial supervision. If this does not serve its purpose, he may, *in exceptional cases*, be remanded in custody”

⁶⁹⁰ See Recital 16 Directive 2016/343/EU.

⁶⁹¹ Interestingly, in the seminal *Aranyosi and Caldaru* case of the Court of Justice (*supra*, section 5), the Public Prosecutor of Bremen, after having arrested temporarily Mr Aranyosi, had ordered his release, on the ground that “there was at that time no risk that the accused would abscond, given his social ties.” See joined cases C-404/15 and C-659/15 PPU, *Aranyosi and Caldaru*, 5 April 2016, para 65.

⁶⁹² CCBE, “EAW-rights, Analysis of the implementation and operation of the European Arrest Warrant from the point of view of defence practitioners”, EC-funded project, 2016.

to the execution of an EAW.⁶⁹³ In France, out of 180 EAWs executed in 2017, in 124 cases individuals whose surrender was sought were placed in detention, which represents approximately 70% of the cases.⁶⁹⁴ This means that persons requested for surrender, who often are neither resident nor national of the country in charge of executing the request, will be more easily sent to pre-trial detention, in comparison to a purely domestic situation. This could have a discriminatory effect if risk assessments rely on nationality as a determining factor,⁶⁹⁵ which is detrimental from the perspective of mutual trust,⁶⁹⁶ which is founded on a common set of values shared by all EU States, of which “equality” and “non-discrimination” are constitutive examples.

C. Challenging a detention order: procedural rights directives as a safeguard against lengthy pre-trial detention?

The adoption of procedural rights directives is a welcome development from the perspective of pre-trial detainees, because they provide the defence with better tools to challenge an arrest or a detention order. Therefore, chances that a suspect or accused person go through long period of pre-trial detention are thinner, including in cross-border proceedings.

Examples of relevant provisions can be found in the Interpretation and Translation Directive, as evidenced by the obligation for authorities to provide defendants with a translation of “essential documents”, namely “any decision depriving a person of liberty, any charge or indictment.”⁶⁹⁷ This could certainly help non-nationals of a country to challenge an arrest or a detention order, or an arrest warrant. In Italy for example, the right to interpretation between suspects and accused persons and a legal counsel was not provided prior to the transposition of the directive.⁶⁹⁸

Other examples are to be found in the Information Rights Directive which especially provides that a Letter of Rights “drafted in simple and accessible language” must be handed to arrested or detained persons⁶⁹⁹, including persons arrested for the purpose of executing a European Arrest Warrant.⁷⁰⁰ The aforementioned right of access to the case file should also be mentioned. Arrested persons and detainees, alongside suspects and accused persons, also have access to case materials in possession of the competent authorities, “which are *essential* to challenging effectively, in accordance with national law, the lawfulness of the arrest or detention.”⁷⁰¹

Of particular relevance too is the Access to a Lawyer Directive, pursuant to which legal assistance should be granted “without undue delay after deprivation of liberty.”⁷⁰² Pre-trial detention issues occurring in EAW proceedings were also taken into consideration. Art 10 explicitly recognises the request person a right to “dual representation” in both the executing and the issuing State. Ensuring legal representation may speed up court proceedings and reduce the length of pre-trial detention. In some countries, legal assistance was not as comprehensive as provided in the directive. For example, the right, for the lawyer, to be present and actively participate in examinations of the accused by the police was not provided in the Netherlands⁷⁰³ and in Germany⁷⁰⁴ prior to the adoption of the directive.

⁶⁹³ Alongside the strong suspicion that the accused would obstruct the finding of truth in the foreign proceedings or extradition proceedings. National report No 2 on Germany, Section on detention (point C(1)(c)).

⁶⁹⁴ National report No 2 on France, Section on detention (C).

⁶⁹⁵ Fundamental Rights Agency, “Criminal detention and alternatives: fundamental rights aspects in EU cross-border transfers”, Report, Vienna: FRA, 2016, p. 34

⁶⁹⁶ See Art 2 TEU

⁶⁹⁷ Art 3(2) Directive 2010/64/EU

⁶⁹⁸ National report No 2 on Italy, Section on impact of EU legislation on the national criminal procedure (point 4.2.)

⁶⁹⁹ Art 4(4)

⁷⁰⁰ Art 5 Directive 2012/13/EU

⁷⁰¹ Art 7(1) Directive 2012/13/EU

⁷⁰² Art 3(2) (c) Directive 2013/48/EU

⁷⁰³ Only minors and vulnerable suspects – i.e. feeble-minded individuals – could have a lawyer present during the interrogations. National report No 2 on the Netherlands, Section on Impact of EU legislation on national criminal procedure (point 2).

⁷⁰⁴ Although the accused had no right to a defence lawyer during his/her examinations by the police in the past – police forces could grant the participation of a lawyer or the access could be enforced by the accused if he claimed his right not to make any statement on the charges, unless prior consultation with his/her defence counsel.

Directive on legal aid should also be mentioned. Detainees are also granted the right to legal aid,⁷⁰⁵ including upon arrest pursuant to an EAW.⁷⁰⁶ These provisions should ensure that the right of access to a lawyer in pre-trial detention hearings is meaningful, for example by mitigating the risk of bureaucratic hurdles to obtaining legal aid.⁷⁰⁷

The entry into force of these directives is a welcome development. However, the broad wording of their provisions, the variable geometry arising from the various opt-outs and the asymmetry between law in books and law in action will restrict their added value, including regarding defence rights in pre-trial detention.

The broad language of directives leaves a large margin for manoeuvre to national authorities. One such example is provided under the Information Rights Directive, as regards the right of access to the materials of the case that are “essential” to challenge a decision on arrest or detention. Under this provision, the question of what is meant by “essential” was left to the discretion of the MSs. This provision was subject to narrow interpretation in some MSs,⁷⁰⁸ whereas in others, the national legislator went beyond the minimum standards conferred by the directive, as illustrated below.

A best practice comes from Spain, where the legislator adopted a more protective approach to this right in the transposition process. The corresponding provision does not provide access to essential case materials, as per the wording of the directive, but to “the *elements* of the proceedings that are *essential* to challenge the legality of detention or deprivation of liberty.”⁷⁰⁹ Recital 30 provides examples of such “essential” elements, namely “photographs, audio and video recordings.” This provision was interpreted broadly by the Constitutional Court. Examples were given in a recent judgment where Art 7 Information Rights Directive was relied on to quash a detention order,⁷¹⁰ that go well beyond the examples provided under Recital 30. Inter alia, these include incriminating testimonies, the content of the scientific expert reports that establish a connection link between the facts under investigation and the detainee, and documents containing the result of a search and seizure of real property. The protective Spanish approach contrasts with the Italian⁷¹¹ and French transpositions,⁷¹² that seem to have limited the scope of this right.

Second, the effectiveness of procedural rights directives is hampered by the variable geometry arising from existing opt-outs on the Access to a Lawyer Directive, such as that of Ireland. The Irish opt-out is even more striking as the right, for the lawyer, to attend police interviews is not provided under Irish law.⁷¹³

Third, a last point of concern focuses on the gaps between the “law in the books” and “law in action”.

This means that, in practice, little change is to be expected from the entry into force of procedural rights directives. In Germany for example, despite the insertion of an obligation to translate judgments, oral interpretations by an interpreter are held sufficient.⁷¹⁴ In a

Therefore, changes in practice may be limited. National report No 2 on Germany, Section on the impact of procedural rights directives (Section B(1)(a)).

⁷⁰⁵ Art 2(1)(a) Directive 2016/1919/EU

⁷⁰⁶ Until they are surrendered, or until the decision not to surrender becomes final (Art 5(1) Directive 1919/2016).

⁷⁰⁷ Fair Trials, *A Measure of Last Resort?* 2016 report, op. cit.

⁷⁰⁸ Such as France (*Supra*, 3.4.).

⁷⁰⁹ National report No 2 on Spain, Section on the State of transposition of directives (point 4.2.)

⁷¹⁰ National report No 2 on Spain, Section on the State of transposition of directives (point 4.2.)

⁷¹¹ It seems that the transposition of this right has been omitted by the Italian legislator. This right was already provided under national law prior to the entry into force of the directive, yet it is not fully guaranteed: full disclosure of the case file is only provided at the very end of the preliminary investigations. National report No 2 on Italy, Section on impact of EU legislation on the national criminal procedure (point 4.2.)

⁷¹² During police custody, access to the case file is still limited in France. *Infra*, Section 3.4.

⁷¹³ The extent of constitutional recognition of a right of access to a lawyer was addressed recently in *Director of Public Prosecutions v. Doyle*, where the Supreme Court held that the constitutional right of access to a lawyer does not extend to having a lawyer present during police interviews. *Director of Public Prosecutions v. Doyle* [2017] IESC 1, 18th January 2017. See National report No 2 on Ireland, Section on the impact of EU legislation on national criminal procedure (point 5.2.)

⁷¹⁴ National report No 2 on Germany, Section on the impact of procedural rights directives (Section B(1)(a)).

similar fashion, Italy limited the *effet utile* of the rights enshrined under the Interpretation and Translation Directive; the Supreme court excluded the right for the defendant who ignores Italian language to have a written translation in a known language of the final decision, the decision allowing the surrender in case of extradition, and the order validating the arrest that was delivered during the hearing in which the interpreter assisted the suspect.⁷¹⁵

4.2.2. Underuse of FD ESO

Framework Decision 2009/829/JHA on supervision measures as an alternative to provisional detention (hereinafter 'FD ESO') establishes a system whereby a sentenced person can have the measure imposed on him or her at the pre-trial stage in a State where that person has closer social ties, such as family, or work and study connections, than the trial State. The rationale for the adoption of FD ESO was based on the observation that discriminatory treatments between those who are resident in the trial State and those who are not; thus "a non-resident risks being remanded in custody pending trial even where, in similar circumstances, a resident would not."⁷¹⁶ A similar idea underpinned the adoption of Framework Decision 2008/947/JHA on probation measures and alternatives to detention, that focuses on the post-trial stage.⁷¹⁷

The basic principle of FD ESO is that a MS recognises a decision on a supervision measure rendered in another MS, and monitors whether the alleged offender complies with it.⁷¹⁸ In case of breach of these measures, the suspect may be surrendered to the State of prosecution.⁷¹⁹ The FD provides for six different supervision measures that must be available in the MSs, which impose on the individual concerned the duty: (i) to inform authorities about any change of residence; (ii) not to enter certain places; (iii) to remain at a specific place; (iv) to observe certain limitations on leaving the state territory; (v) to report to authorities; and (vi) to avoid contact with specific persons.⁷²⁰

Facilitating the circulation of supervision measures is of particular relevance to the aforementioned obstacles arising to both the operation of the EAW and mutual trust. The FD ESO was dubbed "a crucial flanking measure for the EAW",⁷²¹ as persons benefiting from supervision measures run less risk of having their fundamental rights violated because they are not deprived of their liberty.⁷²²

However, many commentators and interviewees emphasised that FD ESO is clearly under-used by the Member States.⁷²³ Various factors account for the reluctance of Member States

⁷¹⁵ National report No 2 on Italy, Section on impact of the procedural rights directives on Italian criminal procedure (point 4.2.). See, respectively: Cass., sez. I, 8 marzo 2014, n. 449, Cass., sez. IV, 19 marzo 2013, n. 26239, CED Cass., 255694; Cass., sez. II, 7 December 2011, n. 46897, ivi, 251453 see Gialuz, L'obbligo di interpretazione conforme alla direttiva sul diritto all'assistenza linguistica, Dir. pen. proc., 2012, 434.

⁷¹⁶ Recital 5 FD ESO

⁷¹⁷ Indeed, under the CoE Convention that FD Probation Measures aimed to replace (i.e. CoE Convention on the Supervision of Conditionally Sentenced or Conditionally Released Offenders), often judicial authorities would not consider alternatives to detention because foreigners did not have a permanent residence in the country of prosecution. As a result, offenders who would normally have qualified for suspended sentence or probation were sentenced to an imprisonment term, or kept in prison until their sentence expires. Judges and prosecutors sometimes opted to release the person, in order to have that person expelled, thus increasing the likelihood that this person would re-offend in the country of deportation. See Neveu 2013, op. cit., p. 136

⁷¹⁸ Art 1 FD ESO

⁷¹⁹ Ibid.

⁷²⁰ See Art 8(1) FD ESO

⁷²¹ D. Sayers, "The EU's common rules on detention: how serious are Member States about protecting fundamental rights?", Blog post, EU Law Analysis, 17 February 2014. Retrieved at: <http://eulawanalysis.blogspot.com/2014/02/the-eus-common-rules-on-detention-how.html>

Retrieved at: <http://eulawanalysis.blogspot.be/2014/02/the-eus-common-rules-on-detention-how.html>; See also A. Weyembergh, I. Armada, C. Brière, "Critical Assessment of the Existing European Arrest Warrant Framework Decision", European Added Value Assessment: The EU Arrest Warrant, Annex 1, Brussels: European Parliament, 2014

⁷²² Fundamental Rights Agency, "Criminal detention and alternatives: fundamental rights aspects in EU cross-border transfers", FRA Report, Vienna, 2016, p. 37

⁷²³ CCBE, EAW-rights, Analysis of the implementation and operation of the European Arrest Warrant from the point of view of defence practitioners, EC-funded project, 2016, p. 149

to rely on this instrument.

A first reason lies in the inconsistent transposition of FD ESO. Thus, all Member States have transposed this instrument, with the noticeable exception of Ireland.⁷²⁴

Another impediment to the use of FD ESO is the risk that a measure existing under one MS is unavailable in another MS. Some Member States went well beyond the list of supervision measures provided under Art 8 FD ESO, as evidenced by the aforementioned cases of Spain and France⁷²⁵.

Differences in supervision measures among national legal frameworks led the EU legislator to devise solutions in order to accommodate divergences and lessen risks of incompatibilities. FD ESO inserted an adaptation requirement under Art 13, in case the nature of the supervision measure issued is incompatible with the law of the executing State. Thus, the adapted measure should "correspond as far as possible to that imposed in the issuing State."⁷²⁶ The adaptation clause is, however, hardly workable in practice. The executing State remains confronted to the difficulty to find equivalences under its own law to the measure originally issued. The example below provides one such example of obstacle between Spanish and French measures.

A Spanish national had been convicted of a gender-based crime for a period of seven months of prison.⁷²⁷ The Spanish authorities ordered the suspension of the detention period, on condition that he undertakes a behavioural education course on gender equality.⁷²⁸ The convicted person then moved to France. However, no such course was foreseen under French law. Similarly, this course was not provided under any of EU instruments. Art 8 FD ESO was considered by the Spanish authorities, since it provides for an obligation to undergo therapeutic or treatment for addiction under Art 8(d). However, neither France or Spain have implemented this measure under national law. It was moreover perceived as difficult to see how the measure could be adapted under French law and, if it could be done so, how to gauge whether the replacement measure would be appropriate in that particular case. In the absence of an equivalent measure under French law, and in light of the irreproachable behaviour of the defendant since he had moved to France, the Spanish court decided to lift the obligation, for the defendant, to undertake such course.

Interestingly, compatibility issues do not always occur at the pre-trial phase of the proceedings, but also at the post-trial stage, once the person has already been convicted and sentenced. Just as in the case of remand, the imprisonment term may be replaced by a probation measure or an alternative to detention. However, that same person may seek to serve his or her sentence in another country to which he or she has closer ties,⁷²⁹ a possibility that is offered by Framework Decision on Probation Measures and Alternatives to Detention.⁷³⁰ The FD enables a MS which has prosecuted and convicted an offender, and imposed a probation measure or an alternative to detention on him or her, to request another MS to take care of the execution of a sentence on its territory. The challenge of adapting the measure was faced with a similar intensity as under FD ESO. The measure may be simply unknown in the executing State,⁷³¹ and lack of flexibility as to the alternatives available under the national laws renders the implementation of equivalent measures from a Member State to another difficult. Besides, Member States have different interpretations of the same

⁷²⁴ European Judicial Network, Implementation table of FD 2009/829/JHA, as of 23 May 2018. Retrieved at: https://www.ejn-crimjust.europa.eu/ejn/EJN_Library_StatusOfImpByCat.aspx?CategoryId=39

⁷²⁵ see supra, 4.1.2.

⁷²⁶ Art 13(1) FD 2009/829/JHA.

⁷²⁷ Santander Provincial Court Ruling n. 507/2015 of 26 November 2005 (National report No 1 on Spain).

⁷²⁸ '*Curso de reeducación conductual*'. The Spanish court wondered if the measure provided under Article 8(2)(d), i.e. "an obligation to undergo therapeutic treatment or treatment for addiction," could apply.

⁷²⁹ S. Neveu, "Probation measures and alternative sanctions in Europe: from the 1964 convention to the 2008 Framework Decision", Vol 4, Issues 1-2, *New Journal of European Criminal Law*, 2013, p. 144

⁷³⁰ Council Framework Decision 2008/947/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions

⁷³¹ Dutch view at the Minutes of the Meeting with EU Member States' experts on the implementation of the Framework Decisions 2008/909/JHA (Transfer of Prisoners), 2008/947/JHA (Probation and Alternative Sanctions and 2009/829/JHA (European Supervision Order), Brussels 13 November 2012, op. cit., p. 1.

measure and its transfer to another MS without altering its content has been perceived as a challenge.⁷³²

4.2.3. Lack of communication among the Member States: adverse effect on FD ESO and FD EAW

The issues encountered above as a result from national differences are exacerbated by a striking lack of communication between the authorities of the MSs concerned.

Even when MSs issue a supervision order, lack of communication between the issuing and executing authorities prevents FD ESO from being fully effective. FD ESO imposes a duty to communicate and consultation on the competent authorities of the Member States, and to exchange information on, inter alia, the particular situation of the suspect, compliance with the measures taken and possible adaptation of the measure, criminal records, and any other changes in circumstances.⁷³³ However, such exchanges barely occur in practice,⁷³⁴ thus impairing effective monitoring and follow up of the measures imposed.⁷³⁵

Communication is all the more relevant in the absence of a common regime on pre-trial detention and alternatives to pre-trial detention. There is no certainty that a person under supervision as a result from a decision taken by a judge in a Member State will receive an equivalent treatment in another Member State. Lack of trust on how conditions for the use of supervision measures would be monitored in another EU State sometimes account for the reluctance of national judges to rely on FD ESO.⁷³⁶ These instruments work best in those countries that have implemented centralised procedures, such as the Netherlands, where a network of contact points in other MSs facilitates exchanges of information. Absence of mutual knowledge on national practices is exacerbated by little awareness, among judicial authorities, of the existence of FD ESO.⁷³⁷

Failure to provide information also has an impact on the operation of the EAW. FD EAW provides under Art 26(1) that all periods of detention served in the executing State shall be deducted from the total period of detention to be served in the issuing State. This means that, whenever the person to be transferred has already served a period of pre-trial detention in the executing State, it can be deducted from the overall custodial sentence. However, issuing States do not always easily obtain information on the exact duration of the detention period already served in the executing State, as per Art 26(2) FD EAW. Executing authorities encounter difficulties in determining the exact amount of time a person had been held in custody,⁷³⁸ in respect to domestic proceedings on the one hand, and with regard to EAW proceedings on the other hand.⁷³⁹

Similarly, executing authorities do not always understand why this information is needed, and Eurojust sometimes acts as an intermediary body that ensures the communication of such information to the issuing State.⁷⁴⁰ This may become a serious issue if a person is surrendered after a long period of pre-surrender detention in the executing state, not least because the surrendered person will be subject to more pre-trial detention in the issuing

⁷³² Ibid, p. 6

⁷³³ Arts 20 and 22 FD ESO.

⁷³⁴ See FRA, *Criminal detention and alternatives: fundamental rights aspects in EU cross-border transfers*, 2016, op. cit.

⁷³⁵ Fundamental Rights Agency, “Criminal detention and alternatives: fundamental rights aspects in EU cross-border transfers”, FRA Report, Vienna, 2016, p. 32

⁷³⁶ National report No 2 on Romania, Section on detention (point 15).

⁷³⁷ Ibid.

⁷³⁸ Some MSs have encountered difficulties to gauge the amounts of pre-trial detainees incarcerated in national prisons. Spain is a case in point. National data is sometimes inaccurate, as official statistics and studies carried out by local institutions sometimes differ, and a recent report suggests that SPACE reports should be regarded with caution. See A. Nieto Martín, C. Rodríguez Yagüe, M. Muñoz de Morales Romero, Chapter on Spain, in A. Bernardi (ed), *Prison Overcrowding and alternatives to detention, European sources and national legal systems*, Naples: Jovene Editore, 2016, p. 408

⁷³⁹ Eurojust, EAW case work 2014-2016, 11 May 2017, p. 13.

⁷⁴⁰ Ibid.

state pending trial. The wording of Art 26(1) FD EAW is confusing in this respect.⁷⁴¹ Whereas most Member States have established a system of maximum periods of pre-trial detention, it is not clear from the FD if the surrendered person should be granted release if the combined periods exceed this maximum.⁷⁴²

4.3. Recommendations

(i) Legislative option: adopting rules on time-limits and judicial review

Thus far, EU lawmakers have not endeavoured to regulate the length of pre-trial detention in Member States. The sole provisions limiting the time spent in pre-trial detention can be found under FD EAW. Art 26 FD EAW, read in conjunction with the provisions on time-limits for the execution of the EAW under Art 17, suggests that, in principle, the requested person is unlikely to spend long periods of time in PTD. The scope of these provisions is limited to the operation of FD EAW, therefore they cannot be expected to have a decisive impact on PTD length. The Court moreover made clear that Art 26(1) “merely imposes a minimum level of fundamental rights protection.”⁷⁴³ Besides, in some countries the execution an EAW may be delayed for several months, and breaches of the time-limits imposed under Art 17 FD EAW occur on a frequent basis. This is notably the case of Ireland, where it takes on average 12 months for arrest warrant cases to determine.⁷⁴⁴

Rules governing pre-trial detention regimes however touch a very sensitive nerve of Member States sovereignty, as evidenced by the rejection of the establishment of a time-limit system in 2011.⁷⁴⁵

Nonetheless, more could be done in this respect. Legislation on pre-trial detention, to the extent it facilitates mutual recognition, falls within the ambit of Art 82(2) b) TFEU, since it is intimately linked to the rights of individuals in criminal procedures, and could therefore be considered.

Setting maximum time-limits could strengthen mutual trust/mutual recognition and reinforce the current framework on fundamental rights. The need for legislation on PTD regimes was subscribed to by the European Commission,⁷⁴⁶ the European Parliament,⁷⁴⁷ and practitioners.⁷⁴⁸ Legislation on pre-trial detention in the EU was also perceived as necessary for the proper functioning of the EAW in some national reports.⁷⁴⁹ This would prevent infringements to Art 5 ECHR and significantly increase mutual trust. In 2009 already, the

⁷⁴¹ A. Weyembergh, C.Brière, I. Armada, “Critical assessment of the European Arrest Warrant Framework Decision”, op. cit., 2014

⁷⁴² Similarly, it is not clear if the reference to a “detention order” includes an order for pre-trial detention. The English version “as a result of a custodial sentence or detention order being passed” and the French version “par suite de la condamnation à une peine ou mesure de sûreté privatives de liberté”.

⁷⁴³ C-294/16 PPU, *JZ v Prokuratura Rejonowa Łódź — Śródmieście*, 28 July 2016, para 55.

⁷⁴⁴ CCBE, EAW-rights, Analysis of the implementation and operation of the European Arrest Warrant from the point of view of defence practitioners, 2016, op. cit., p. 142. On the other hand, it may be argued that Ireland barely makes use of PTD. However, a quick look at the 2005 bill on bail conditions suggests that recourse to PTD may increase in the coming years.

⁷⁴⁵ See European Commission, Analysis of the replies to the Green Paper on the application of EU criminal justice legislation in the field of detention, 2012, p. 10: “adopting maximum time periods of pre-trial detention would not guarantee short detention times. On the contrary, the authorities may decide to make full use of the maximum time available, thus extending pre-trial detention periods. Moreover, the duration of provisional detention would depend on many other parameters such as the judicial system, the crime rate and the national penalties applying to the relevant criminal offences. The importance of avoiding automatic release where the absolute maximum period of detention has been exceeded was also highlighted.”

⁷⁴⁶ European Commission, Strengthening mutual trust in the European judicial area – A Green Paper on the application of EU criminal justice legislation in the field of detention, COM(2011) 327 final, Brussels, 16 June 2011

⁷⁴⁷ European Parliament, Resolution on detention conditions in the EU, 15 December 2011, (2011/2897(RSP)), para 2.

⁷⁴⁸ CCBE, “EAW-rights, Analysis of the implementation and operation of the European Arrest Warrant from the point of view of defence practitioners”, 2016, op. cit.

⁷⁴⁹ In Germany, Spain, Ireland and Hungary. National report No 2 on Germany, Section on differences between criminal procedures and their impact on cooperation (A)(4); National report No 2 on Spain, Section on recommendations (point 34); National reports No 2 on Ireland, Section on recommendations (point 34). National report No 2 on Hungary, Section on Detention (point 15).

European Commission acknowledged that “the time a person spends in pre-trial detention varies widely from one Member State to another ... Excessively long periods of pre-trial detention are detrimental for the individual, and a pattern of excessively long pre-trial detention in a particular Member State can undermine mutual trust.”⁷⁵⁰

However, the examples of Ireland and Finland suggest that the best way to prevent overuse of PTD, alongside lengthy remand periods, do not always lie in the imposition of strict time-limits. Consideration should be given to the adoption of minimum standards on judicial review of pre-conviction detention.⁷⁵¹ As a matter of fact, these two countries have achieved a very low rate of detainees, despite the absence of provisions on maximum time-limits in their criminal procedural codes.

(ii) Non-legislative solution

(ii)a. Initiating infringement procedures

The European Commission should be encouraged to initiate infringement procedures against the ill-implementation of FD ESO⁷⁵², as well as the procedural rights directives. Coherent and effective implementation of these instruments would (at least) ensure that a minimum set of supervision measures are available in all Member States. Confidence that an alternative measure to detention ordered in a Member State exists in another Member State would incite authorities to resort to supervision orders more often in cross-border cases.

(ii)b. Monitoring of PTD regimes in the Member States

Legislative options should be backed by comprehensive and accurate monitoring of pre-trial detention regimes in the Member States. Current European statistics are scant on pre-trial detention, with the noticeable exception of the work conducted for the Council of Europe through SPACE.

Collecting data on PTD issues would allow the European Commission to identify the underlying issues linked to the ill- or non-application of alternatives to detention, alongside answers that should be privileged. For example, it makes little sense to bring an infringement procedure against a MS if the main reason for ill-implementation results from financial or technical difficulties. Yet, it is currently difficult to gauge the extent to which FD ESO has been relied on by MSs, in the absence of aggregate data concerning the Union as a whole that is available for the use of this instrument, besides the last Commission report that dates back to 2014.⁷⁵³ It is therefore necessary to look into the statistics of each of the countries concerned, but even there, trends are difficult to discern.⁷⁵⁴

Other issues such as amount of persons subject to ‘inappropriate’ or excessive pre-trial detention, or whether issuing States actually deduct the time spent in pre-trial detention in executing State from the overall custodial sentence, also deserve attention. Reinforced consultation and dialogue between issuing and executing authorities should be encouraged in this respect. A good practice comes from Italy, where the Court of Cassation has

⁷⁵⁰ European Commission, Strengthening mutual trust in the European judicial area – A Green Paper on the application of EU criminal justice legislation in the field of detention, COM(2011) 327 final, Brussels, 16 June 2011, p. 9

⁷⁵¹ National report No 2 on Ireland, Section on recommendations (point 34).

⁷⁵² The European Commission has the competence to do so since December 2014.

⁷⁵³ European Commission, report on the implementation by the Member States of the Framework Decisions 2008/909/JHA, 2008/947/JHA and 2009/829/JHA on the mutual recognition of judicial decisions on custodial sentences or measures involving deprivation of liberty, on probation decisions and alternative sanctions and on supervision measures as an alternative to provisional detention, COM(2014) 57, op. cit. 5 February 2014

⁷⁵⁴ In the Netherlands for example, in 2012 there have been 62 incoming transfers and 270 outgoing transfers since the adoption of national legislation. Interestingly, most transfers operated by the Dutch authorities occur in its neighbourhood, with Belgium and Germany. The number of transfers appears to increase over time, although not regularly. Intervention of Marina Beun, Dutch Prosecutor, Dutch Central Authority for 947/2008 and 829/2009 Framework Decisions at the Cambridge Workshop “A reflection on the Right to Liberty in the AFSJ, in a post Brexit Scenario”, Cambridge, 28 September 2017

encouraged dialogue and information-exchange between the issuing and the executing States concerning the period of detention already served in another Member State.⁷⁵⁵

(ii)c. Encouraging dialogue and consultation among national authorities

Mutual understanding and knowledge is a precondition to the effective operation of EU instruments on alternatives to detention, such as FD ESO. Information on how national jurisdictions perceive supervision measures should be made available publicly and easily accessible, possibly using the EJM channel.⁷⁵⁶ Dialogue will be helpful to assist courts in deciding whether or not to surrender the person. There is a high need of better monitoring and regular information-exchanges of whether the person's behaviour conforms to his/her duties under the supervision or probation measures⁷⁵⁷, so as for the authorities to follow up on his or her social reinsertion and rehabilitation. The EU network of National Preventive Mechanisms (NPMs) was also designed to facilitate dialogue between national authorities, by organising several meetings a year.

Best practices should also be encouraged, focusing in particular on those countries where supervision measures are generally preferred to remand at the pre-trial stage, such as Ireland and the UK. "Creative" solutions developed with regard to issues of monitoring and compliance could be shared with other countries to alleviate concerns about the possible lack of effectiveness of FD ESO.⁷⁵⁸

(ii)d. Developing training and support tools

Trainings of judges, prosecutors and defence lawyers should be encouraged, in order to raise awareness of the existence of the FD ESO. The use of procedural rights directives in cross-border cases should also fall within the scope of training programmes, due to their possible "mitigating" impact on both the length and overuse of pre-trial detention.⁷⁵⁹ Handbooks – such as the updated handbook released by the European Commission in 2017 on how judicial authorities should use the EAW – are useful support tools.⁷⁶⁰ Additionally, practitioners should receive support and guidance too in order to best prepare their case in surrender procedures. These mechanisms could build on ECBA initiative to publish an online handbook on how defence lawyers should use the EAW.⁷⁶¹ Emphasis should be made on the 'low-cost' aspect of alternatives to detention, compared with the financial burden associated to imprisonment.⁷⁶²

Support tools could, moreover, address the relationship between various existing EU instruments on cooperation in criminal matters, detailing for example why the European Arrest Warrant must only be used as the *ultima ratio*,⁷⁶³ and where synergies and complementarities can be achieved between existing instruments, for example between FD ESO and the EAW.⁷⁶⁴

(ii)e. Promoting alternative measures to pre-trial and post-trial detention through soft law

⁷⁵⁵ Corte di Cassazione, 30/7/2012, n 31012; Corte di Cassazione, 26/03/2013, n 14357. Quoted from D. Cavallini, R. Amato, Italian Report, 2018, op. cit., p. 22

⁷⁵⁶ W. Hammerschick *et al.*, p. 68

⁷⁵⁷ Fundamental Rights Agency, "Criminal detention and alternatives: fundamental rights aspects in EU cross-border transfers", FRA Report, Vienna, 2016

⁷⁵⁸ W. Hammerschick *et al.*, "Towards Pre-trial Detention as Ultima Ratio: Comparative Report", op. cit., 2017, p. 68

⁷⁵⁹ See recommendations on the implementation of directives on procedural rights in the following report: W. Van Ballengooij, "The Cost of Non-Europe in the area of Procedural Rights and Detention Conditions", European Parliament Study (EPRS, European Added Value Unit), 2017.

⁷⁶⁰ Commission Handbook on how to issue and execute a European arrest warrant, OJ 2017/C 335/01

⁷⁶¹ The ECBA handbook can be retrieved at the following address: <http://www.ecba-eaw.org/extdocserv/ECBA-Handbook-on-the-EAW-Palma-Edition-2017-v1-6.pdf>

⁷⁶² Intervention by V. Costa Ramos, Committee for the Prevention of Torture (CPT), Expert Roundtable on Pre-trial Detention, organised by Fair Trials on 25 April 2018 at the European Parliament, Brussels.

⁷⁶³ National report No 2 on Germany, Section on recommendations (point D).

⁷⁶⁴ A. Weyembergh, C. Brière, I. Armada 2014, "Critical assessment of the European Arrest Warrant Framework Decision", op. cit., p. 53

Promotion of alternative measures should be further pursued,⁷⁶⁵ in order to address both the fundamental rights and effectiveness concerns that excessive use of PTD raises. Already in 2011, the Commission acknowledged that “it could be difficult to develop closer judicial cooperation between MSs unless further efforts are made to ... promote alternatives to custody.”⁷⁶⁶ That priority should be given to alternatives to detention was recently confirmed by the Court. In *JZ v Prokuratura Rejonowa Łódź — Śródmieście*, it ruled that the term ‘detention’ should not be interpreted in a strict manner and must include forms of deprivation of liberty other than the conventional ones, such as the many existing alternatives to imprisonment.⁷⁶⁷ This notwithstanding, little effort has been made so far to give greater visibility to and encourage the use of existing instruments. The Safeguards for Children Directive is the only directive that stipulates that detention is to be applied to children only as a last resort, and impose a duty on Member States to consider alternative measures.⁷⁶⁸ The terminology employed in EU instruments was also criticised for its lack of neutrality; the use of the term “alternatives” reinforces the position that detention is the norm.⁷⁶⁹ Resorting to alternatives may not necessarily solve the aforementioned tension between the presumption of innocence and remand in detention, however it may contribute to limiting and softening the material and psychological damages that often result from detention.⁷⁷⁰

More generally, a comprehensive reflection should be initiated on how to boost recourse to alternatives to detention at both the pre-trial and post-trial stages. FD Probation Measures suffers from similar implementation shortages and underuse as FD ESO.⁷⁷¹ Communication issues at the inter-state level also exist, due to lack of information exchanges between agencies within Member States themselves,⁷⁷² thus resulting in incompatibilities between probation measures imposed from a country to another.

These issues notwithstanding, the pre-trial stage of detention seems to have garnered most of the attention in recent commentaries and research reports. From a legislative perspective, post-trial detention has not been addressed by EU standards. This is well illustrated by the limited scope of the procedural rights directives to the pre-trial and trial stages, thereby precluding the application of the fair trial guarantees to probation prisoners.⁷⁷³

⁷⁶⁵ As suggested in the Hungarian report. See National report No 2 on Hungary, Section on Detention (point 15).

⁷⁶⁶ See Summary of the replies to EC Green Paper on detention conditions of 2011, op. cit., p. 4

⁷⁶⁷ *Infra*, Section 2. C-294/16 PPU, *JZ v Prokuratura Rejonowa Łódź — Śródmieście*, 28 July 2016, para 23.

⁷⁶⁸ Other guarantees apply, such as the right for children to be imprisoned in other cells than those of adult detainees. See Article 12 Directive 2016/800.

⁷⁶⁹ W. Hammerschick *et al*, “Towards Pre-trial Detention as Ultima Ratio: Comparative Report”, op. cit., 2017, p. 8

⁷⁷⁰ See examples of such damages in Section 6.

⁷⁷¹ Thus, all Member States examined offer suspended sentences, but this is not the case as regards conditional sentencing, which is provided by Germany, Finland, France, Hungary, Ireland and Romania only. Similar variations exist as regards the implementation of alternatives to detention. FRA, “Criminal detention and alternatives: fundamental rights aspects in EU cross-border transfers”, Report, Vienna, 2016, pp. 67-68

⁷⁷² S. Hilder, H. Kemshall, “The Management of Serious Violent or Sexual Offenders who are Mobile across the European Union: The Challenge of Mobile offenders”, *Irish Probation Journal*, Vol 12, 2015, p. 122

⁷⁷³ A similar assessment was made by the ECtHR, that ruled out the applicability of Art 6(1) ECHR to post-trial situations. See ECtHR, *Szabo v Sweden*, App no 28578, 27 June 2006.

5. PROCEDURES TO ASSESS DETENTION CONDITIONS AND SURRENDER FOLLOWING ARANYOSI AND CALDARARU

KEY FINDINGS

- The *Aranyosi and Caldoraru* judgment released by the Court of Justice in 2016 gave the green light to national judicial authorities to refuse surrender if there are substantial grounds to believe that the requested person will be exposed to inhuman and degrading treatment within the meaning of Art 4 of the EU's Charter. In order to perform this assessment, national authorities may request further information from the issuing State on detention conditions.
- Wide variations exist among MSs as regards the types of sources relied on when assessing whether surrender should be consented to, ranging from, inter alia, European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) reports to information provided by non-governmental organizations (NGOs). Requests for information filed to the issuing State also differ, including more or less detailed demands. Sometimes, MSs go beyond information requests and surrender has been made conditional upon the fulfilling of "assurances" or "guarantees", for example consisting in providing an individual cell to the requested person upon surrender.
- Practical and direct consequences of the *Aranyosi and Caldoraru* judgment can be observed, ranging from delays in the execution of EAWs resulting from the difficult processing of information requests by issuing States, to refusals of executing surrender requests. Risks of polarisation and "prison-shopping" moreover exist, between MSs with "good" prisons on the one hand, and those with "bad" prisons on the other hand. Meanwhile, the current system of guarantees is untenable: it not only amounts to discriminatory treatments between national and non-nationals. It is also hardly sustainable from a material and financial perspective. Sometimes the impossibility to provide the executing State with the assurances requested is solved through diplomatic dialogue among authorities, thus amounting to "re-politicising" surrender procedures, and heralding a step backwards to the MLA system. With the broadening of the *Aranyosi and Caldoraru* test to other domains of cooperation beyond detention conditions and surrender procedures, it is the very foundations of mutual trust that have been put in jeopardy.
- Minimum standards on detention conditions must imperatively be adopted in the near future. EU leaders should seize the opportunity raised by the *Aranyosi and Caldoraru* judgment to go beyond the modest agenda set out so far. Bearing in mind the connection between detention conditions, mutual recognition and individuals' rights, Art 82(2)(b) TFEU could be interpreted broadly as a legal basis to achieve minimum standards on detention conditions. Any reform of national carceral systems must be backed by EU financial support. Alongside minimum standards, it is urgent for the Court to clarify the ground for refusal it developed in *Aranyosi and Caldoraru*. Pending cases will provide the Court with the opportunity to give further clarifications. Dialogue between MSs and monitoring of detention conditions should be enhanced in parallel.

5.1. Different interpretations of the *Aranyosi and Caldăraru* judgment

The Court of Justice's judgment of *Aranyosi and Căldăraru*⁷⁷⁴ rendered in April 2016 was a watershed moment in the history of mutual recognition, and surrender procedures more specifically. It is useful to recall the key contents and stakes of this ruling before delving into the differing interpretations it raised among the Member States (5.1.1.). Then, differences regarding the types of sources relied on and the nature of the information requested to the issuing State in order, for the executing authorities, to assess whether the surrender request should be consented to, are examined (5.1.2.). Ultimately, a closer look is taken at the different interpretations of the ground for postponement/refusal the judgment raised in the various jurisdictions (5.1.3.).

5.1.1. Key aspects of the *Aranyosi and Caldăraru* judgment

In the *Aranyosi and Căldăraru* judgment, the German Court of Bremen was reluctant to surrender Mr Căldăraru and Mr Aranyosi under the EAW mechanism to respectively Romania and Hungary, given the degrading detention conditions they would face.

The Court of Justice was called upon by the German Court of Bremen to interpret Article 1(3) FD EAW. Under this article, the FD EAW "shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 (TEU)." It first recalled that Member States are bound by Art. 4 of the Charter of Fundamental Rights when implementing EU law, under Art. 51(1) of the same instrument. Then, it established a two-pronged test that the executing authority must follow whenever the requested person may suffer degrading and inhuman treatment upon surrender to the issuing State.

- First, the executing judicial authority must assess whether systemic or generalised deficiencies exist as to the detention conditions of the issuing Member State;⁷⁷⁵
- Then, it must decide, on the basis of a "specific and precise" assessment, whether there are "substantial grounds" to believe that the individual concerned will be exposed to risks such as to infringe Art 4 of the Charter if detained in the executing country.⁷⁷⁶ For this purpose, information exchanges between the issuing and executing states are essential. In the face of such circumstances, the Court did not opt for giving the right to the executing judicial authority to abandon the EAW. It ruled that the EAW must be postponed⁷⁷⁷ until the issuing judicial authority provides information discounting the risk of infringement to Art 4 of the Charter.⁷⁷⁸ If the existence of that risk cannot be discounted within a reasonable time, the executing judicial authority must decide whether the surrender procedure should be brought to an end.⁷⁷⁹

The *Aranyosi and Căldăraru* judgment was a clear attempt at reconciling the principles of mutual trust and recognition with the protection of the fundamental rights of the requested individual. It feeds into the line followed by the Court of Justice in its case law to put limits to the principle of mutual trust, through the application of Art 4 of the Charter to the two asylum cases of *N.S.* and *C.K.*⁷⁸⁰. *Aranyosi and Căldăraru* is the first concrete application to a criminal case of the exception contained in the definition of the principle of mutual trust in *Opinion 2/13*, according to which "each Member States, save in exceptional circumstances,

⁷⁷⁴ Joined cases C-404/15 and C-659/15 PPU, *Pál Aranyosi and Robert Caldăraru*, 5 April 2016.

⁷⁷⁵ *Ibid*, para 89

⁷⁷⁶ *Ibid*, para 92

⁷⁷⁷ *Ibid*, para 98

⁷⁷⁸ *Ibid*, para 103

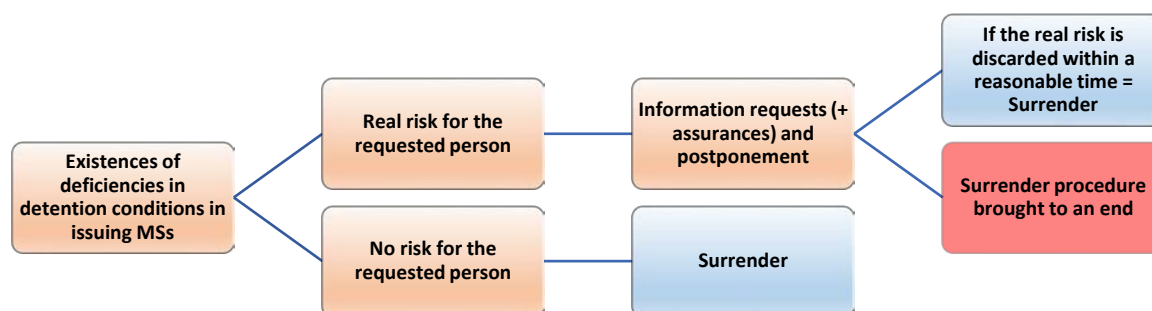
⁷⁷⁹ *Ibid*, para 104 (*in fine*).

⁷⁸⁰ C-578/16 PPU, *C. K. a.o.*, 16 February 2017. There is, yet, a major difference between the field of asylum and criminal law. In *N.S.*, if the return of the asylum seeker is impossible, the MS in which the asylum seeker finds itself will be able to process the asylum application because asylum law is almost fully harmonised across the EU. This is not the case in the realm of criminal law, where refusals to surrender may result in crimes going unpunished and augment the risks of impunity, not least because time-limits apply on the period of PTD that the requested person is normally subject to prior to his/her transfer.

(must) consider all the other Member States to be complying with EU law and particularly with the fundamental rights recognised by EU law.”⁷⁸¹

Limitations on a “blind” application of mutual trust in criminal matters had been long-awaited, and this judgment was generally welcome. It seems that, for now on, trust must be “earned” by the Member State of origin through effective compliance with EU fundamental rights standards.⁷⁸²

Key aspects of the *Aranyosi and Căldăraru* judgment, however, remain woefully unclear. The ruling did not lift the veil of uncertainty surrounding the precise contours of the “exceptional circumstances” notion formulated in *Opinion 2/13*. There remains much unclarity as regards the scope of the ground for postponement/refusal formulated by the Court. Several countries have relied on the two-step approach provided under *Aranyosi and Căldăraru* judgment in determining whether they should consent to surrender in EAW cases (e.g. Finland, Germany, the Netherlands, Italy, France).⁷⁸³ Judicial authorities found themselves in a position where they must assess detention conditions in another country before consenting to surrender a person requested by an EAW. In practice, national courts had to find out by themselves the answers to the many questions left unaddressed by the *Aranyosi and Căldăraru* judgment.



5.1.2. Types of information sources, content of information requests and introduction of a system of “guarantees”

The first part of the judgment provides that the executing judicial authority must assess whether systemic or generalised deficiencies exist as to the detention conditions of the issuing Member State. Little information was yet provided on the type of information that should be relied on for the executing State to examine whether a real risk of inhuman and degrading treatment exists. The Court allowed the MSs to rely on a broad range of evidence in order to substantiate their assessment, provided that the information used is “objective, reliable, specific and properly updated.”⁷⁸⁴ The Court gave a *non-exhaustive* list of examples of documents which can be taken into consideration by the MSs. These range from judgments of international courts, judgments of the ECtHR and judgments rendered by the national courts of the issuing Member State, to decisions, reports and other documents produced by bodies of the Council of Europe or under the aegis of the UN.⁷⁸⁵ The non-exhaustive nature of that list suggests that evidence from all types of sources may be relied on by Member States.

Given the broad margin for manoeuvre left to the Member States, differences exist as regards the type of information that may be used by executing authorities in the conduct of their assessment.

⁷⁸¹ *Opinion 2/13*, para 191, op. cit. See also the conclusions of the Luxembourg Court in the cases of *N.S. (C-411/10, N. S. v Secretary of State for the Home Department and C-493/10, M. E. and Others v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform*, 21 December 2011 and *Melloni*, op.cit.

⁷⁸² K. Lenaerts, *La vie après l’avis: Exploring the principle of mutual (yet not blind) trust*, Vol 54, *Common Market Law Review*, pp. 837-840

⁷⁸³ Spain does not seem to have relied on the *Aranyosi and Căldăraru* judgment yet. National reports.

⁷⁸⁴ Joined cases C-404/15 and C-659/15 PPU, *Pál Aranyosi and Robert Caldăraru*, 2016, para 89.

⁷⁸⁵ *Ibid.*

In Germany,⁷⁸⁶ the Netherlands,⁷⁸⁷ Ireland,⁷⁸⁸ and Italy,⁷⁸⁹ judicial authorities often refer to reports from the CoE's Committee on the Prevention of Torture to support their assessment. Reports from non-governmental organisations may be taken into consideration as well, as recent Italian⁷⁹⁰ and Dutch⁷⁹¹ jurisprudential developments show.

The second part of the test formulated by the CJEU gave rise to more striking divergences in interpretation at the national level. The Court ruled that the executing State should make a decision on surrender on the basis of a specific and precise assessment, that may be supported by additional information on the current state of detention conditions, which can be requested from the issuing State. However, the Court gave few clarifications on the content, nature and scope of information requests. The latter merely stated that the executing authority must file a request for all necessary supplementary information "as a matter of urgency".⁷⁹² This request may "relate to the existence, in the issuing Member State, of any national or international procedures and mechanisms for monitoring detention conditions, linked, for example, to visits to prisons, which make it possible to assess the current state of detention conditions in those prisons."⁷⁹³

Most Member States have combined the CJEU test with other ECHR criteria spelled out in its case law on Art 3 ECHR in order to conduct their analysis (e.g. Germany, The Netherlands, Italy, Finland, Ireland), as regards the space of cells in particular.⁷⁹⁴ This comes as little surprise, as the original reference for a preliminary ruling in the *Aranyosi and Căldăraru* judgment was supported by several judgments rendered by the Strasbourg Court on the conformity with Art 3 ECHR of Hungarian and Romanian prison conditions.⁷⁹⁵

Based on the *Aranyosi and Căldăraru* judgment, several countries, when acting as executing authorities, have already filed information requests on the state of detention conditions in the issuing State, in order to substantiate their assessment (e.g. Germany, The Netherlands, Italy, Ireland, Finland).

In the absence of guidance provided in the *Aranyosi and Căldăraru* judgment, national judicial authorities have established their own criteria to base their assessments on. As a result, the content of national requests differs.⁷⁹⁶ For example, in Finland, the Supreme Court consented to surrender to Bulgaria, on the grounds that i) work had been undertaken by the authorities to renovate detention facilities, ii) outdoor activities were organised and prison leaves were granted, and iii) efforts were made to address issues of violence between inmates.⁷⁹⁷ Different, and more detailed criteria were established by the Italian judicial authorities in

⁷⁸⁶ It should be noted that in federal countries such as Germany, differences even exist among the Higher Regional Courts of the country on how they should apply the approach taken by the CJEU in *Aranyosi and Căldăraru* in surrender cases. This is of particular relevance since it is the Higher Regional Court that holds the EAW procedure in its hand in Germany.

⁷⁸⁷ J. Graat, B. Oude Breuil, D. van Uhm, E. van Gelder, T. Hendrikse, Part IV Dutch Report, "Transfer of Prisoners in Europe" project, Utrecht University, The Netherlands, 2018, p. 29, see National report No 1 on Germany, Part V.

⁷⁸⁸ See National report on Ireland, Section on detention (point 12.2) as well as the case of Minister for Justice and Equality v. *Kinsella*, [2017] IEHC 519, 26th July 2017.

⁷⁸⁹ National report No 2 on Italy, Section on detention (point 12.2.).

⁷⁹⁰ See, in regard to an extradition case, C. Cass., Sez. VI, 15.11.2016, n. 54467, Resneli (Rv. 268932). This case related to an extradition requested by Turkey and the Court, referring *inter alia* to *Caldararu and Aranyosi*, admitted the possibility to ascertain the existence of a systematic risk on the basis of reports of NGOs (together with other sources, such as decisions adopted by courts of other Member States).

⁷⁹¹ Such as reports released by the European Prison Observatory. See J. Graat et al, Part IV Dutch Report, "Transfer of Prisoners in Europe" project, 2018, op. cit., p. 29

⁷⁹² Joined cases C-404/15 and C-659/15 PPU, *Pál Aranyosi and Robert Caldăraru*, 2016, para 95

⁷⁹³ *Ibid*, para 96

⁷⁹⁴ The ECtHR ruled that the space of cells should not go below 3 sqm. See in particular with *Muršić v. Croatia*, appl. no. 7334/13

⁷⁹⁵ Besides, Art 3 ECHR was codified under Art 4 of the Charter.

⁷⁹⁶ These questions were raised in a recent Eurojust meeting, regarding the extent to which criteria other than prison cells, used as a benchmark by the ECtHR to determine whether a detainee may face a risk of degrading and inhuman treatment, should be taken into consideration by executing authorities. These include the extent to which not only the size of prison cells, but also conditions of imprisonment, such as access to daylight possibility of natural ventilation, individual toilet and outdoor activities, should be taken into consideration in reaching a decision on the extradition of the person. Council of the EU, The EAW and Prison Conditions, Outcome Report of the College, Thematic Discussion, 9197/17, Brussels, 16 May 2017, p. 2

⁷⁹⁷ National report No 2 on Finland, Section on detention (12.2.).

recent cases. These include specific demands about the length of the penalty, the concrete treatment, the space allowed to the convicted person, the heating conditions, and the system of lunch/dinner, to name but a few.⁷⁹⁸ The content of Italian requests however varies, depending on whether the person will be subject to “continuous (i.e. closed) detention”, or “semi-detention”.⁷⁹⁹

In some cases, the national authorities of the executing state went beyond mere information requests and asked for ‘assurances’ on the part of the issuing States, in the sense of material guarantees on detention conditions (e.g. The Netherlands, Germany).⁸⁰⁰ Those guarantees may, for example, consist in providing an individual cell to an inmate requested for surrender, or the assurance that the surrendered person will not be detained in a specific prison. In a recent case involving France and The Netherlands as issuing and executing countries respectively, the Dutch authorities required assurances that the surrendered person would not be detained in specific French prisons, such as Villepintes or Fleury-Merogis.⁸⁰¹ In another case involving Germany as the executing State, the regional court made surrender to Hungary conditional upon the assurance that the space and further arrangement of the detention conditions in the correctional facility during pre-trial and post-trial detention would meet the minimum standards of Art 3 ECHR. It also requested that, should the defendant be placed in another prison, the latter must meet European minimum standards as well.⁸⁰²

5.1.3. Scope of the postponement/refusal ground

The *Aranyosi and Căldăraru* judgment gave rise to a “new” ground for postponement/non-execution.

First, the Court stated that, even though the supplementary information is not sufficient to discount a real risk of inhuman and degrading treatment, the execution of the warrant must be postponed in the first place, but it cannot be abandoned.⁸⁰³ Second, the last paragraph of the judgment reads that “if the existence of that risk cannot be discounted within a reasonable time, the executing judicial authority must decide whether the surrender procedure should be brought to an end.” The convoluted language used by the Court suggests it is not at ease with the formulation of a new ground for refusal. This last sentence was interpreted as such by the Member States, in spite of the confusing wording (e.g. Netherlands, Italy, Germany).

Unclarity nonetheless remains as to what is meant by “reasonable time”. In all likelihood, these deficiencies will not be remedied overnight.⁸⁰⁴ In the Netherlands, the period of postponement was understood as a lapse of time during which authorities are given room to provide additional information to exclude a risk of violation of Art 4 of the Charter. The Court of Amsterdam, in recent case law, referred to a period of nine months. Should this limit be exceeded and the information received cannot exclude a real risk of inhuman and degrading treatment, the EAW request will be declared “inadmissible”, and the public prosecutor will not consider the EAW.⁸⁰⁵ A similar approach was taken in Italy, where the Italian judicial

⁷⁹⁸ D. Cavallini, R. Amato, National Report on Italy, Transfer of Prisoners in Europe project, Utrecht University, The Netherlands, 2018, p. 40

⁷⁹⁹ In case of ‘continuous detention’, it shall be ensured to the detainee a cell space of at least 3 m²; in case of “semi-detention”, a smaller cell space may be accepted, provided that that other conditions are fulfilled (e.g. short duration of the detention, sufficient freedom of movement outside the cell and overall adequate detention conditions). See C. Cass., Sez. VI, 9.11.2017, n. 53031, P. (Rv. 271577). Quoted in National report No 2 on Italy, Section on detention conditions and the influence of *Aranyosi and Caldăraru* on mutual recognition (point 12.2.).

⁸⁰⁰ National reports No 2 on Germany, the Netherlands, Sections on detention conditions and the influence of *Aranyosi and Caldăraru* on mutual recognition.

⁸⁰¹ National report No 2 on France, Section on detention.

⁸⁰² National report No 1 on Germany, Part V(3); National report No 2 on the Netherlands, Section on the influence of *Aranyosi and Caldăraru* for the Netherlands (point 3).

⁸⁰³ Joined cases C-404/15 and C-659/15 PPU, *Pál Aranyosi and Robert Caldăraru*, 2016, op. cit., para 98

⁸⁰⁴ A. Willems, Improving Detention Conditions in the EU – Aranyosi’s Contribution, Paper prepared for the EUSA Biennial Conference, Miami, May 2017, p. 8.

⁸⁰⁵ National report No 2 on the Netherlands, Section on detention conditions (point 2).

authority is bound to refuse the execution *rebus sic stantibus*.⁸⁰⁶ This means that, in case the risk conditions change for the better in the issuing State, the previous refusal will not exclude a second decision consenting to the execution of the surrender.⁸⁰⁷ Germany, where decisions on surrender are placed within the hand of Higher Regional Courts, adopted a broadly similar approach, pursuant to which surrender is simply “not permissible at the moment.”⁸⁰⁸ Inconsistencies nonetheless arose between regional courts themselves in the interpretation given to the ground for postponement.⁸⁰⁹ Therefore, surrender towards some countries was permitted by some regional courts, while others took the reverse decision.⁸¹⁰

A last word should be said about the concrete impact of the postponement of a decision on surrender on the requested person. In both Germany and Italy, non-execution of the surrender requests amounted to the unconditional release of the person detained in pre-trial detention, as per the requirements of the principle of proportionality.⁸¹¹ To some extent, the Court endorsed this approach, and stated in the *Aranyosi and Căldăraru* judgment that the individual concerned cannot remain in custody without any limit in time.⁸¹² However, it referred to the solution put forward in *Lanigan*, where supervision measures can be attached to the provisional release of the person, in order to prevent him or her to abscond, so long as no final decision on the execution of the EAW has been taken.⁸¹³ This solution was perceived as difficult to put in practice, in case of a formal refusal of surrender.⁸¹⁴

5.2. Impact on mutual recognition

The significant margin for manoeuvre left to the MSs to assess whether surrender should be consented to has impaired the functioning of the EAW in several respects. Practical and direct consequences can already be observed, as evidenced by the numerous delays and suspensions of executions (5.2.1.). Other, perhaps subtler, issues are likely to arise in the coming years, if no clarification is brought to the ground for postponement/refusal formulated by the Court. Risks of polarisation and forum-shopping exist (5.2.2.). The system of guarantees, whereby cross-border inmates are better treated compared with national detainees, is difficult to justify and maintain in the long run (5.2.3.). Ultimately, the broadening of the *Aranyosi and Căldăraru* test for other purposes than detention conditions questions the very foundations of mutual trust (5.2.4.)

5.2.1. Delays and non-execution of the EAW

The possibility to make surrender conditional to the receipt of information and assurances on detention conditions on the part of issuing States crushed a blow to the operation of the EAW. It had the impact of seriously significantly delaying, or blocking, the operation of EAWs.

In many cases, requests for information deferred the surrender of the person, and the deadlines of Art 17 FD EAW could not be met.⁸¹⁵ Often, the information requested is not readily available to the issuing authorities and subsequent amounts of research are needed; data from publicly available sources, such as European Parliament reports, or press releases, was sometimes included in the information file sent to the executing authorities. In Germany, it is frequent that authorities receive inadequate replies to information requests.⁸¹⁶ In the Netherlands, the Court of Amsterdam ruled that the obligation to delay the surrender decision could be considered as an exceptional circumstance within the meaning of Article 17(7) FD

⁸⁰⁶ Or “*allo stato degli atti*”. See National report No 2 on Italy, Section on detention conditions (point 12.2.)

⁸⁰⁷ Ibid. It remains unclear, however, whether the executing procedure should restart from the beginning and which issues should be considered as covered by *res judicata*/preclusion.

⁸⁰⁸ National report No 1 on Germany, Section on other case law on detention conditions (point IV).

⁸⁰⁹ In Germany, the surrender system is highly decentralised, and Higher Regional Courts hold the decision-making power in respect to the execution of EAWs.

⁸¹⁰ National report No 1 on Germany, Section on other case law on detention conditions (point IV).

⁸¹¹ National report No 2 on Germany, Section on detention conditions (point C(1)(d)). National report No 2 on Italy, Section on detention conditions (point 12.2.).

⁸¹² Joined cases C-404/15 and C-659/15 PPU, *Pál Aranyosi and Robert Caldăraru*, 2016, paras 98 and 101.

⁸¹³ C-237/15 PPU, *Lanigan*, 16 July 2015, para 61.

⁸¹⁴ National report No 2 on Italy, Section on detention conditions (point 12.2.).

⁸¹⁵ Council of the EU, The EAW and Prison Conditions, Outcome Report of the College, 9197/17, op. cit., p. 3

⁸¹⁶ National report No 2 on Germany, Section on detention conditions (point C(1)(d))

EAW, which justified the inability of the Dutch judicial authority to take a decision within 90 days.⁸¹⁷

Then, the number of non-executions of EAWs has soared. Interestingly, attempts to invoke bad detention conditions as a fundamental right's ground for the non-execution of surrender had proven difficult and hardly successful in the past.⁸¹⁸ Since 2016, more than forty cases have been referred to the German Supreme Court relating to detention conditions, compared with only one in 2014.⁸¹⁹ In Italy, the CJEU's ruling marked a "U-turn" in the application of the fundamental rights ground for refusal inserted in the Italian law transposing the EAW.⁸²⁰ Prior to *Aranyosi and Căldăraru*, this ground had been poorly relied on, and cases were generally dismissed by the Italian Court of Cassation.⁸²¹ In the Netherlands, the execution of several EAWs was suspended on the ground that surrender would infringe the fundamental rights of the requested person. Breaches of individuals rights, which was implemented as a ground for refusal under Article 11 of the Dutch Surrender Act, had only been used twice prior to the release of the *Aranyosi and Căldăraru* judgment.⁸²²

Countries most affected by surrender refusals include eastern European countries, such as Romania, Poland, Bulgaria and Hungary.⁸²³ Alongside these, Italy, Belgium and France have recently faced similar reluctance to the execution of EAWs issued by their judicial authorities.⁸²⁴ As one of the targets of the *Aranyosi and Căldăraru* ruling, Romania has faced several refusals of execution.⁸²⁵ The multiplication of refusals however did not prevent the Romanian authorities from issuing EAWs.⁸²⁶ Interestingly, efforts had nonetheless been undertaken by the Romanian legislator in order to limit the use of the EAW instruments, and reduce Romania's overcrowding problems. Thus, under Romanian law, EAWs cannot be issued for the purpose of executing a custodial sentence if a penalty of less than 2 years of imprisonment has been imposed. Another example can be found in the law implementing FD Transfers of Prisoners, where the Explanatory Memorandum encourages the competent Romanian authorities to refrain from using the EAW and rely instead on FD Transfers of Prisoners.⁸²⁷

5.2.2. Risks of polarization and "prison shopping"?

The trend of polarization in the Union, between Member States with bad prisons on the one hand, and those with good prisons on the other hand existed long before the Court delivered the *Aranyosi and Căldăraru* judgment. National authorities were aware that imprisonment conditions were particularly dramatic in some EU states, such as Hungary, Romania and Italy. These issues had been largely documented by the CoE's instruments and the ECtHR, notably through the special technique of 'pilot judgment procedures'.⁸²⁸ Whether inadequate detention conditions could constitute a ground for refusing the execution of the EAW was already a matter lively discussed by the judicial authorities of the Member States. Some national courts had already refused EAW requests on the grounds that prison conditions were unacceptable in the issuing countries. Cases of non-execution occurred in the UK with regard

⁸¹⁷ J. Graat, et al, Part IV Dutch Report, Transfer of Prisoners in Europe project, 2018, op. cit., p. 30

⁸¹⁸ A. Weyembergh, I. Armada and C. Brière, "Critical Assessment of the Existing European Arrest Warrant Framework Decision", 2014, op. cit., pp. 54-55

⁸¹⁹ National report No 1 on Germany, Section on Other case law on detention (point IV).

⁸²⁰ D. Cavallini, R. Amato, National Report on Italy, Transfer of Prisoners in Europe project, Utrecht University, The Netherlands, 2018, p. 5

⁸²¹ Ibid.

⁸²² National report No 2 on the Netherlands, Section on Other areas of concerns (point 4).

⁸²³ As it follows from the national reports. See also some of the case law on defence rights available on the website of Fair Trials at: <https://www.fairtrials.org/campaigns/eu-defence-rights/defence-rights-in-europe-case-law/>

⁸²⁴ National report no 2 on France, Section on detention conditions.

⁸²⁵ Ibid.

⁸²⁶ National report No 2 on Romania, Section on detention (point 12).

⁸²⁷ Ibid.

⁸²⁸ The ECtHR moreover developed this technique to identify structural and systemic issues in Member States and offer a possibility of speedier redress to the individuals concerned. See ECHR factsheet on Pilot judgments, November 2017.

to EAWs issued by Italy,⁸²⁹ and Ireland in respect to Poland,⁸³⁰ where the courts based their respective judgments on a violation of Art 3 ECHR and relied on CoE reports and (pilot) judgments delivered by the Strasbourg court. A reverse approach was taken by Italy, where the Italian Court of Cassation ruled that the fundamental rights ground for refusal enshrined in the Italian law transposing FD EAW⁸³¹ excluded that the mere existence of a situation of prison overcrowding in the issuing Member State did not, in the absence of other concrete and specific elements, entail a “serious risk” of degrading and inhuman treatment for the requested person that was such as to refuse the surrender.⁸³²

European Union policymakers too, had acknowledged the existence of deficiencies in MSs’s prisons. The European Commission recognised in 2011 that the FD EAW “does not mandate surrender where an executing judicial authority is satisfied, taking into account all the circumstances of the case, that such surrender would result in a breach of a requested person’s fundamental rights arising from unacceptable detention conditions.”⁸³³ The position of the European Commission stood in contrast with earlier rigid stance towards human rights ground refusal, and gave hints that a change of strategy in favour of a more expansive interpretation of grounds for refusal was in the making.⁸³⁴ Otherwise put, concerns of polarization pre-existed the *Aranyosi and Căldăraru* judgment. What the Court of Justice seeming did, *in fine*, was only to give the green light to judicial authorities to refuse surrenders on the grounds of a breach of Art 4 of the Charter.

In all likelihood, this polarization phenomenon will be reinforced in the aftermath of *Aranyosi and Căldăraru* judgment. This concern was also voiced at a Eurojust meeting in 2017.⁸³⁵

At the same Eurojust meeting, fears were expressed that a trend of “prison shopping” could emerge. Cases already occurred where requested persons are unwilling to challenge an EAW in those executing States with poor detention conditions, in order to leave the country as soon as possible.⁸³⁶ On the contrary, in Ireland, persons held in PTD sometimes do not apply for bail and seek adjournments to their case so that the greatest time possible is spent in Irish prisons, which are considered of higher quality than elsewhere in Europe. This way, credit will be given for the entire time spent in prison upon surrender, once they begin to serve a custodial sentence in the issuing State.⁸³⁷

⁸²⁹ See *Hayle Abdi Badre v Court of Florence* (2014) EWHC 614. The British High Court noted at paras 87-88 that “the structural and systemic nature of prison overcrowding in Italy is clearly evident from the statistical data (of CoE reports) ... the breach of the applicants’ right to benefit from adequate conditions of detention is not the result of isolated incidents but arises from a systemic problem, which results in turn from a chronic malfunction particular to the Italian penitentiary system, which has affected, and is likely to affect again in the future, many people ... the situation found in the present case therefore constitutes a practice incompatible with the Convention.”

⁸³⁰ *MJELR v Rettinger* [2010] IESC 45 (23 July 2010). Interestingly, the Irish court referred to the *Saering v UK* judgment and the concept of “real risk of suffering degrading and inhuman treatment” developed therein, as well as the principles stated in *Saadi v Italy*. See the reasoning developed at paras 24-27 of the judgment.

⁸³¹ Art. 18 (1) (h) of l. 69/2005 provides an express a mandatory ground for refusal in case the surrender should entail “a serious risk for the requested person to be subject to the death penalty, torture or other inhuman or degrading treatment or punishment”. National report No 2 on Italy, Section on Detention (point 12).

⁸³² C. Cass., Sez. VI, 15.10.2014, n. 43537, Florin (Rv. 260448)

⁸³³ European Commission, Report on the implementation since 2007 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, COM(2011) 175 final (‘third evaluation report’), Brussels, 2011, p. 7

⁸³⁴ V. Mitsilegas, “The Limits of Mutual Trust in Europe’s Area of Freedom, Security and Justice: From Automatic Inter-State Cooperation to the Slow Emergence of the Individual”, Vol 31, Issue 1, *Yearbook of European Law*, 2012, pp. 319-372, at p. 326; See also A. Willems, “Improving Detention Conditions in the EU – Aranyosi’s Contribution”, Paper prepared for the EUSA Biennial Conference, Miami, May 2017, p. 4

⁸³⁵ Council of the EU, The EAW and Prison Conditions, Outcome Report of the College, 9197/17, op. cit., p. 1

⁸³⁶ For example in Lithuania, see CCBE, EAW-rights, Analysis of the implementation and operation of the European Arrest Warrant from the point of view of defence practitioners, EC-funded project, 2016, op. cit., p. 39

⁸³⁷ CCBE, “EAW-rights, Analysis of the implementation and operation of the European Arrest Warrant from the point of view of defence practitioners”, EC-funded project, 2016, p. 147. Interestingly, the same study reports that Ireland is also one of the countries where surrender requests take the longest to be processed (on average 12 months). See paragraph on ‘prison-shopping’ developed in the section on national procedures and conditions for surrender after *Aranyosi and Căldăraru*.

5.2.3. The unsustainable system of assurances

The requests for 'guarantees' or 'assurances' on the part of executing States raise four different concerns.

First, the large discretion left to executing authorities as regards the type of assurances to be requested results in treating detainees involved in a cross-border case differently from a detainee involved in a national case. From a legal perspective, differences in treatment can amount to discriminatory treatment between national and non-national inmates. However, one may nonetheless argue that non-nationals should not have to suffer from ill-detention conditions similar to nationals for the sake of non-discrimination and equal treatment. *In fine*, this would amount to a race to the bottom in standards of detention and would be detrimental to mutual trust.

Second, from a strictly practical perspective, the system of guarantees and reassurances is unworkable on a large scale. Individual cells, for example, are unlikely to be available for all the detainees awaiting surrender to the issuing State, especially in those countries where significant investments are necessary to improve detention conditions. In this case too, the surrender regime can be blocked because of the inability of issuing State to meet the demands of the executing State.

A third criticism relates to the lack of reliability of the system of guarantees itself. Once the requested person has been surrendered, the executing State has little control over the detention conditions faced by the prisoner.⁸³⁸ With regard to the monitoring of the application of Art 3 ECHR, the ECtHR stated that "assurances are not in themselves sufficient to ensure adequate protection against the risk of ill-treatment. There is an obligation to examine whether assurances provide, in their practical application, a sufficient guarantee that the applicant will be protected against the risk of ill-treatment."⁸³⁹ Thus, it may very well be that a person faces degrading and inhuman treatment at a later stage, for example if the prisoner is transferred to another prison after he or she was surrendered.⁸⁴⁰ These reservations lie at the core of referred questions to the Court by the German Court of Bremen, dubbed 'Aranyosi II' by some authors.⁸⁴¹ Those questions were nonetheless recently dismissed by the CJEU; the EAWs issued for the surrender of Mr Aranyosi had been annulled by Hungary, and there was no longer a need, for the Court, to adjudicate.⁸⁴² This notwithstanding, the questions referred remain as relevant as before, as evidenced by the filing of two new references for preliminary rulings to the Court.⁸⁴³

Fourth, attention should be paid to the risk of politicizing judicial proceedings. Where assurances cannot be satisfied by the issuing State, dialogue between authorities may help overcome a deadlock situation. This is also the view that was taken by the ECtHR, where a State may, when confronted to a situation where it has to assess the assurances given by another State in respect to the application of Art 3 ECHR, check "whether compliance with the assurances can be objectively verified through diplomatic or other monitoring mechanisms."⁸⁴⁴ The case occurred in France, where the French authorities were unable to meet the Dutch demands that the surrendered person would not be detained in Villepintes or Fleury-Merogis.⁸⁴⁵ The impasse was ultimately solved through extensive dialogue between

⁸³⁸ J. Graat, B. Oude Breuil, D. van Uhm, E. van Gelder, T. Hendrikse, Part IV Dutch Report, "Transfer of Prisoners in Europe" project, Utrecht University, The Netherlands, 2018, pp. 30-31

⁸³⁹ ECtHR, *Othman v UK*, App no 8139/09, 17 January 2012, para 87.

⁸⁴⁰ *Ibid.*

⁸⁴¹ National report No 2 on Germany Section on Detention (point C(1)(d)). See C-496/16, *Pál Aranyosi*, Order of the Court, 15 November 2017. In essence, the Court of Bremen asked whether the executing authorities, were under the obligation not only to file requests to the issuing State for guarantees with respect to the place where the requested person is to be detained, but also to take into consideration detention conditions in other prisons in their decision to surrender or not.

⁸⁴² *Ibid.*

⁸⁴³ C-220/18 PPU on detention conditions in Hungary (the audience is scheduled for 14 June 2018); C-128/18 on detention conditions in Romania.

⁸⁴⁴ ECtHR, *Othman v UK*, 2012, op. cit., para 189(viii).

⁸⁴⁵ National report No 2 on France, Section on detention (point C).

chancelleries.⁸⁴⁶ Dialogue may certainly prove helpful for the executing authority to assess whether a risk of violation of Art 4 of the Charter exists, and ultimately take a decision on surrender.⁸⁴⁷ However, reliance on diplomatic channels between national authorities suggests that the surrender of a person is somehow made conditional upon the well-being of relations between EU States. This carries the risk of “(re-)politicizing” the proceedings, which is at odds with the spirit of EAW.⁸⁴⁸ The re-introduction of politics heralds a shift backwards to the old extradition system. It will become dangerous if it continues to play a role in the determination of the proceedings, because human rights guarantees may not be taken into consideration to the extent they deserve.⁸⁴⁹ It is moreover difficult to reconcile with CJEU case law, where the Court excluded ministries of justice and other government organs⁸⁵⁰ from the definition of judicial authorities.⁸⁵¹

5.2.4. Impact on mutual trust, including beyond the EAW

Beyond practical consequences for the operation of the EAW, detention conditions may affect in a more general manner mutual trust between the Member States. This link is by no means new. Under ‘Measure F’ of the 2009 Roadmap, the European Commission released a Green Paper on detention conditions in 2011 where it acknowledged that poor treatment of detainees may undermine the principle of mutual trust that underpins judicial cooperation within the Union.⁸⁵²

The current practice of the *Aranyosi and Căldăraru* judgment suggests that the principle of mutual trust relies on rather fragile foundations. As noted by Advocate-General Bobek in a recent EAW case, mutual trust no longer implies “an irrefutable presumption.”⁸⁵³ The broad interpretation of the *Aranyosi and Căldăraru* test by the national courts resulted in a “switch from the classic paradigm of EU law of ‘judges asking judges’” to a system that relies on “judges monitoring judges.”⁸⁵⁴ Instead of fostering confidence across the EU, mutual assessments risk fuelling a feeling of mutual distrust, that jeopardises the primacy, unity and effectiveness of EU law.⁸⁵⁵

The current impact of the *Aranyosi and Căldăraru* judgment on mutual trust is three-fold.

Firstly, it highlights that a fundamental gap exists in EU law as regards the protection of individuals against inhuman and degrading treatment that may occur as a result of bad detention conditions. This gap is well-illustrated in a recent German judgment on surrender.⁸⁵⁶ In assessing whether German judicial authorities should consent to surrender or not, the Federal Constitutional Court based its reasoning primarily on the requirements of detention conditions as defined in the national jurisprudence on Art 1 of the Constitution, that guarantees the protection of human dignity. It reaffirmed, in this case, that the Federal

⁸⁴⁶ Ibid.

⁸⁴⁷ See H. Sorensen, “Mutual Trust – blind trust or general trust with exceptions? The CJEU hears key cases on the European Arrest Warrant”, blog post, EU Law Analysis, 18 February 2016. Retrieved at: <http://eulawanalysis.blogspot.com/2016/02/mutual-trust-blind-trust-or-general.html>

⁸⁴⁸ Ibid.

⁸⁴⁹ S. Gless, J. Vervaele, “Law should govern: Aspiring general principles for transnational criminal justice”, 2013, op. cit.

⁸⁵⁰ C-477/16 PPU, *Kovalkovas*, 10 November 2016

⁸⁵¹ It ruled that administrative and police authorities pertained to the province of the executive and, pursuant to the principle of the separation of powers that characterises the operation of the rule of law, they cannot be covered by the term judiciary. C-452/16, *Poltorak*, 10 November 2016, para 35. It limited their role to providing practical and administrative assistance to the competent judicial authorities, under para 42. See also C-453/16 PPU, *Özçelik*, 10 November 2016

⁸⁵² European Commission, Strengthening mutual trust in the European judicial area – A Green Paper on the application of EU criminal justice legislation in the field of detention, COM (2011) 327 final, p. 4

⁸⁵³ Opinion of Advocate General Bobek delivered on 20 December 2017, Case C-571/17 PPU, *Openbaar Ministerie v Samet Ardic*, para 80.

⁸⁵⁴ T. Konciewicz, “The Consensus Fights Back: European First Principles Against the Rule of Law Crisis”, *Verfassungsblog*, 5 April 2018

⁸⁵⁵ That is, the famous triptych of *Melloni*. See P. Bard, W. Van Ballengooij, “Judicial Independence as a Precondition for Mutual Trust”, *Verfassungsblog*, 10 April 2018

⁸⁵⁶ BVerfG, Beschl. v. 18.8.2017 – 2 BvR 424/17 = HRRS 2017 Nr. 832. The order is available in the Internet (in German) at: https://www.bverfg.de/SharedDocs/Entscheidungen/DE/2017/08/rk20170818_2bvr042417.html. See National report No 1 on Germany, Section on Follow up to the identity control order (point IV).

Constitutional Court would protect the inviolable rights stemming from the German Constitution, such as the right to human dignity, even if conflicting with Union law.⁸⁵⁷ This is not to say that the German decision differs from the position taken by the Court in the *Aranyosi and Căldăraru* judgment. The Federal Constitutional Court simply emphasised that the case law of the CJEU was incomplete, because it could not be discerned which specific minimum standards derived from Art 4 Charter on detention conditions and what determined the applicable review of detention conditions under European Union law.⁸⁵⁸ The persistence of this gap, along with the re-installment of a degree of control by the national judge to fill this identified vacuum, are detrimental to mutual trust, because differing national standards may apply and co-exist with one another, thereby jeopardising the primacy of EU law.⁸⁵⁹

Another point of concern, related to the above, arises. Whereas it is traditionally the executing State that trusts the issuing State for the purpose of the execution of an EAW, the issuing State should also trust the executing State in order for the system to work properly. Bad prison conditions can hamper the execution of EAWs, but theoretically speaking these could also impair the issuance of EAWs, whenever authorities issue a request for surrender, whereas they are aware that the person will have to go through poor prison conditions, pending surrender in the executing State. This issue constitutes the more subtle and difficult to discern “other side of the coin” of the *Aranyosi and Căldăraru* judgment, and could well become a major point of friction in the foreseeable future. Nonetheless, it has yet to receive the attention it clearly merits.

Unfortunately, the impact of the procedural rights directives is unlikely to enhance mutual trust in this regard. The right provided to the lawyer, under Art 4 of the original proposal on the Access to a Lawyer Directive, to access the place of detention to check detention conditions,⁸⁶⁰ was not even retained in the final version of the directive.

Second, it cannot be excluded that existing gaps in EU law on detention conditions could reverberate to other areas of cooperation, beyond the operation of the European arrest warrant. A case in point is provided by the Council Framework Decision 2008/909/JHA on the recognition of custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union (hereinafter ‘FD Transfer of Prisoners’).⁸⁶¹ Back in 2011, ten Member States had already emphasised in their replies to EC Green Paper on detention conditions that inadequate detention conditions may affect the proper application of the FD Transfer of Prisoners. National authorities expressly stated that they were reluctant to transfer a person where his or her basic human rights would be infringed,⁸⁶² in particular since FD Transfer of Prisoners limits the situations in which the consent of the prisoner is needed.⁸⁶³ A recent comparative study⁸⁶⁴ revealed that none of the countries examined exclude the possibility to refuse a transfer that would result in a violation of Art 3 ECHR.⁸⁶⁵ Besides, France, Germany and Hungary, have mentioned detention conditions in the State of

⁸⁵⁷ On the identity review, see *infra*, Section 7.2.

⁸⁵⁸ National report No 1 on Germany, Section on Follow up to the identity control order (point IV). See also National report No 2 on Germany, Section on Detention conditions (point C(1)(d)(2)).

⁸⁵⁹ *Infra*, Section 7.2.

⁸⁶⁰ Art 4, European Commission, Proposal for a directive on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest, COM(2011) 326 final, Brussels, 8 June 2011

⁸⁶¹ Both the FD EAW and FD Transfer of Prisoners establish a transfer mechanism.

⁸⁶² Commission, Analysis of the replies to the Green Paper on the application of EU criminal justice legislation in the field of detention, p. 7

⁸⁶³ Under Article 6 FD 2008/909/JHA, the consent of the sentenced person shall not be required when the person is transferred (a) to the Member State of nationality he/she lives; (b) to the Member State to which the sentenced person will be deported once he or she is released from the enforcement of the sentence on the basis of an expulsion or deportation order included in the judgment or in a judicial or administrative decision or any other measure consequential to the judgment; (c) to the Member State to which the sentenced person has fled or otherwise returned in view of the criminal proceedings pending against him or her in the issuing State or following the conviction in that issuing State.

⁸⁶⁴ T. Marguery (ed), *Mutual Trust Under Pressure*, 2018, op. cit., p. 427

⁸⁶⁵ *Ibid*. There has been no case to date.

execution as a relevant criterion to assess the prospects of social rehabilitation, the latter being one of the main objectives served by the FD.⁸⁶⁶

Thirdly, the need to strengthen the link between mutual recognition and human rights and to toughen the conditions for cross-border cooperation is increasingly being felt at the national level. The question can be raised whether the *Aranyosi and Căldăraru* judgment can be relied on beyond the sole realm of detention conditions and the absolute prohibition of torture and degrading and inhuman treatment. In the Netherlands, the Court of Amsterdam recently applied the two-tiered test it developed in its interpretation of *Aranyosi and Căldăraru*, to an EAW case where the requested person could be subject to inhuman and degrading treatment in Poland because she had made incriminating statements on a particularly violent gang. The defence feared that surrender to Poland would entail a breach of Arts 2 and 3 ECHR and Art 4 of the Charter, and she could face retaliation.⁸⁶⁷ The question referred to the CJEU by the Irish court with respect to the execution of an EAW issued by Poland is another, and even more controversial, case in point. In the *Minister for Justice and Equality v. L.M.* case⁸⁶⁸, the Irish court asked whether the *Aranyosi and Căldăraru* test laid down by the CJEU, which relies upon principles of mutual trust and mutual recognition, could be applied if the executing authority had found that the common value of the rule of law set out in Art 2 TEU had been breached in Poland. Then, the Irish court enquired whether, if the requested person was at real risk of flagrant denial of justice, it had to revert to the issuing authority to ask the Polish authorities for further information about the trial, where the Irish court had found that there is a systemic breach to the rule of law in Poland.⁸⁶⁹

Thus far, at the EU level, obstacles to the operation of the EAW as a result of the *Aranyosi and Căldăraru* judgment, had been confined to the question of detention conditions. In the *Minister for Justice and Equality v. L.M.* case, the CJEU has been asked to broaden its fundamental rights test towards a wide rule of law test based on the flagrant denial of a fair trial in the issuing country. The Irish reference to the CJEU sends a clear message that more needs to be done to uphold the rule of law and fundamental rights protection, in order for mutual trust and mutual recognition to remain legitimate and optimal in the AFSJ.⁸⁷⁰

Whether *Aranyosi and Căldăraru* has become “the cornerstone” of “a Union that respects the fundamental rights,”⁸⁷¹ is debatable in some respects.

Two questions deserve to be asked.

A first difficulty lies in the scope of application of the *Aranyosi and Căldăraru* test. Otherwise put, it is the question of “where to draw the line”. It is easy to forestall that an EAW could be suspended on other grounds, provided that the defence provides solid evidence substantiating the alleged fundamental rights violations.⁸⁷² The question of the necessary threshold to suspend or refuse the execution of an EAW will emerge again as a crucial one. Clarifications will need to be brought to the scope of the “exceptional circumstances” pursuant to which mutual trust can be rebutted, a question that the Court has yet to be confronted with in the realm of surrender procedures.⁸⁷³

Then, one may wonder whether the *Aranyosi and Căldăraru* judgment can be transposed to other cases, where violations of non-absolute rights may be at stake. As regards defence rights enshrined under Arts 6, 47 and 48 of the Charter, Advocate-General Sharpston ruled

⁸⁶⁶ FRA, “Criminal detention and alternatives: fundamental rights aspects in EU cross-border transfers”, Report, Vienna, 2016, p. 45

⁸⁶⁷ National report No 2 on the Netherlands, Section on conclusion and recommendations (point 5).

⁸⁶⁸ See C-216/18 PPU, pending case. The hearing took place on the 1st of June. A decision by the CJEU should be taken at the beginning of the summer. This case is also known as the *Celmer* Case.

⁸⁶⁹ *Minister for Justice and Equality and Artur Celmer*, (2018), IEHC, 12 March 2018, para 145.

⁸⁷⁰ See analysis by S. Carrera, V. Mitsilegas, “Upholding the Rule of Law by Scrutinising Judicial Independence: The Irish Court’s request for a preliminary ruling on the European Arrest Warrant”, Commentary, Brussels, CEPS, 2018.

⁸⁷¹ Opinion of Advocate General Bobek delivered on 20 December 2017, Case C-571/17 PPU, *Openbaar Ministerie v Samet Ardic*, para 80.

⁸⁷² An interviewee notably mentioned the issue of corruption.

⁸⁷³ L. Bay Larsen, Quelques remarques sur la place et les limites de la confiance mutuelle dans le cadre du mandat d’arrêt européen, *L’Observateur de Bruxelles No 112, Dossier Spécial (L’espace judiciaire européen : évolutions récentes et perspectives)*, avril 2018, p. 14

that “the infringement in question must be such as fundamentally to destroy the fairness of the process.”⁸⁷⁴ None of these rights are of an absolute nature, in contrast to Art 4 of the Charter. This suggests that the Court may have to develop a new test. At the same time, a delicate balance will have to be struck by the Court so as to not take a step backwards from the values-based approach devised in *Aranyosi and Căldăraru*.

5.3. Recommendations

It derives from the foregoing that detention conditions, mutual recognition and mutual trust are inextricably linked. Further action in the realm of detention conditions is urgently needed. Already in 2010, the Stockholm programme acknowledged that “efforts should be undertaken to strengthen mutual trust and render more efficient the principle of mutual recognition in the area of detention (...) The European Commission is invited to reflect on this issue further within the possibilities offered by the Lisbon Treaty.”⁸⁷⁵

(i) Legislative options

The aftermath of the *Aranyosi* case, the multiplication of EAW refusals and the broadening of its application to other areas of concern, show that a more solid framework of fundamental safeguards is needed. The momentum generated by the *Aranyosi and Căldăraru* has not waned, as illustrated by the aforementioned *Minister for Justice and Equality v. L.M.* case. The nine EU States examined have, moreover, implemented a fundamental rights ground for refusal, albeit with some differences in scope and conditions. Earlier research recommended the introduction of an explicit ground for refusal based on human rights in the EAW FD.⁸⁷⁶ However, it is unlikely that these demands translate into concrete achievements, as the Commission itself rejected the idea of amending the concerned FD in 2014.⁸⁷⁷

(i)a. Adopting minimum standards on detention conditions

The favoured option deriving from the findings above is to establish EU minimum standards on prison conditions, covering both the pre-trial and post-trial stages, in order to ensure the adequate treatment of individuals.⁸⁷⁸ The need to adopt minimum standards in this field was acknowledged by the academics who drafted the national reports.⁸⁷⁹ A legislative solution is moreover supported by the EP. In its last resolution on detention conditions, the EP called on the EU institutions to:

“take the necessary measures in their fields of competence to ensure respect for and protection of the fundamental rights of prisoners, and particularly of vulnerable individuals, children, mentally ill persons, disabled persons and women, including the adoption of common European standards and rules of detention in all Member States”.⁸⁸⁰

These standards already exist in a way, through the monitoring work of the Council of Europe and ECHR case law. However, the main problem of these instruments is that they lack enforcement powers, thus leaving Member States with a certain margin for discretion in implementing the recommendations issued by Strasbourg bodies.⁸⁸¹ The CoE has been a long

⁸⁷⁴ Opinion of AG Sharpston delivered in C-396/11, *Radu*, on 18 October 2012, para 97

⁸⁷⁵ European Council, The Stockholm Programme — An open and secure Europe serving and protecting citizens, 2010/C 115/01, p. 1

⁸⁷⁶ A. Weyembergh, I. Armada and C. Brière, “Critical Assessment of the Existing European Arrest Warrant Framework Decision”, 2014, op. cit.

⁸⁷⁷ European Commission, Follow-up to the European Parliament resolution with recommendations to the Commission on the review of the European arrest warrant adopted by the Commission on 28 May 2014.

⁸⁷⁸ See solution proposed by A. Weyembergh, I. Armada and C. Brière, “Critical Assessment of the Existing European Arrest Warrant Framework Decision”, 2014, op. cit., p. 56.

⁸⁷⁹ National reports on France, Finland, The Netherlands, Spain, Italy. The Dutch report even described detention conditions as seemingly the biggest threat to cross-border cooperation and the effective operation of mutual recognition at present. See National report No 2 on the Netherlands, Section on recommendations (point IV).

⁸⁸⁰ European Parliament, Resolution on prison systems and conditions, 5 October 2017, para 57.

⁸⁸¹ Intervention by J. Friestedt, Head of Transversal Support Division, Committee for the Prevention of Torture Secretariat, at the Expert roundtable on pre-trial detention, organised by Fair Trials at the European Parliament in Brussels, 25 April 2018

advocate of common standards on detention conditions, however Member States are not living up to them.⁸⁸² Besides, considerable amounts of time sometimes elapse between the moment the violation occurred, and the release of CoE reports.

Agreeing on minimum standards on detention conditions would lay the groundwork for increased compliance with the principles enacted by ECHR text and case law, through the combined enforcement powers of the European Commission and the Court of Justice. It is high time for an enhanced monitoring and scrutiny of fundamental rights in the EU's area of criminal justice, and for the CJEU to "behave as a human rights court would behave."⁸⁸³

Minimum standards would also provide clear guidance to executing authorities⁸⁸⁴ and avoid inconsistencies in information requests filed to issuing authorities.⁸⁸⁵

The EU should always keep in mind that minimum standards are not a substitute for the promotion and use of alternatives to detention.⁸⁸⁶ Emphasis should be made on how to exploit complementarities and synergies between the two.

The adoption of minimum standards in this field is, however, not without challenges.

There was disagreement among the practitioners and officials interviewed on the existence of a legal basis for the adoption of minimum standards in the field of detention conditions. Art 82(2) TFEU could provide a legal basis for such proposal, to the extent minimum standards facilitate mutual recognition. This was supported by AG Bot in his opinion in *Aranyosi and Căldăraru*, who invited EU law-makers to "ensure that the Member States meet all their obligations or, at least, take the necessary measures ... Article 82 TFEU provides them with a legal basis for doing so."⁸⁸⁷ As this study shows, ill-detention conditions clearly hamper the operation of the EAW and affect mutual trust writ large. Increase feelings of distrust could swiftly spill over to other domains of cooperation and further hinder the functioning of MR instruments. Adopting minimum standards on detention conditions so as to facilitate the operation of mutual recognition will indirectly induce legislative and practical reforms at the national level to bring their standards into compliance with CoE recommendations.⁸⁸⁸

However, the question remains whether adopting minimum standards on detention conditions falls within the scope of Art 82(2)(b). A broad interpretation of the notion of criminal procedure, as seemingly endorsed by AG Bot, would then be required. An alternative lies in the use of Art 352 TFEU, pursuant to which "if action by the Union should prove necessary, within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties, and the Treaties have not provided the necessary powers, the Council, acting *unanimously* on a proposal from the Commission and after obtaining the consent of the European Parliament, shall adopt the appropriate measures." The unanimity requirement at the Council, however, sheds doubts as to the chances that a proposal on minimum standards will be adopted in the coming years (if at all). The reluctance of Member

⁸⁸² Representative of the Netherlands, European Committee on Crime problems (CDPC), 74th Plenary Meeting, debate on overcrowding (point 6 of the agenda), Strasbourg, 6 June 2018.

⁸⁸³ Advocate-General Bot, in joined cases C-404/15 and C-659/15 PPU, *Aranyosi and Caldăraru*, delivered on 3 March 2016, para 175. The full paragraph of the opinion reads: "I am aware that the position which I suggest the Court should adopt amounts, in part, to asking it to behave as a human rights court would behave. In the sphere of criminal law, I think that that approach will need to be addressed at some point."

⁸⁸⁴ *Ibid.*

⁸⁸⁵ As noted by the National report No 2 on Italy, Section on detention conditions (point 15).

⁸⁸⁶ See section 4 on Pre-trial detention regimes and alternatives to detention at the pre-trial and post-trial stages.

⁸⁸⁷ Opinion of Advocate-General Bot in joined cases C-404/15 and C-659/15 PPU, 3 March 2016, paras 181-182

⁸⁸⁸ An analogy could be drawn with the procedural rights directives. Arguably, EU legislation on due process guarantees were adopted on the basis of Art 82(2) TFEU, with a specific view to facilitating mutual recognition. Besides this apparent limitation, it is fair to say that the reach of these directives goes far beyond the sole realm of mutual recognition and cross-border cooperation in criminal matters, and forced MSs to sometimes introduce drastic changes in the procedural framework applicable at the domestic level. One may indeed wonder whether the procedural rights directive would have been designed differently, had they been adopted on a different basis and not with the specific purpose of facilitating MR. This reasoning could be easily transposed to the realm of detention conditions. It is unlikely that, if minimum standards are adopted with the goal of enhancing MR, MSs will be forced to adapt the domestic standards applicable at the national level in order to meet the requirements of cross-border cooperation.

States to the adoption of minimum standards should not be underestimated. Detention conditions touch on the core of national sovereignty and the formulation of EU-wide rules in this field was already rejected by some Member States in 2011.⁸⁸⁹ Lack of willingness at the national level was also mentioned in interviews and reports⁸⁹⁰ as a major obstacle to any legislative initiative in this field.

Besides, adopting minimum standards in the realm of detention conditions implies for the Member States to face substantial financial costs. Improving material detention conditions, along with the skills and capacity of prison staff, will undoubtedly require financial help from the EU. Experience also shows that Member States are less inclined to negotiate new legislative proposals when these entail subsequent financial burdens.⁸⁹¹ A European support programme providing technical and financial help could be set up in order to promote the modernization of prisons (e.g. improving structures, developing rehabilitation activities, etc.) and the implementation of alternatives to detention.⁸⁹²

(i)b. Revising Article 4(6) FD EAW: a superficial solution?

Another legislative proposal was reflected upon among practitioners at a recent meeting at Eurojust, mention was made of a possible revision of Article 4(6) FD EAW.⁸⁹³ This provision allows the executing State to refuse surrender for the purpose of the execution of a custodial sentence or a detention order on the grounds that the person is staying in, or is a national or a resident of the executing MS. Article 4(6) could be amended to give the possibility to the executing State to take over the custodial sentence, in situations where it finds substantial grounds that the requested person would face inhuman or degrading treatment if surrendered to the issuing MS.⁸⁹⁴ In our view, however, this proposal not only fails to address the core of the problem, i.e. detention conditions. It also avoids tackling the question of EAWs issued for the purpose of a prosecution, that may eventually lead to arrest and incarceration.

(ii) Non-legislative solutions

(ii)a. Financial support to Member States: an EU Fund dedicated to prison conditions

As mentioned earlier, financial support will be key in order to help MSs improve detention conditions. Funding should take place irrespective of any legislative proposal on detention conditions. In 2015, 12 MSs sent a letter asking whether the EU could fund the renovation of existing prisons. As a response, the European Commission mapped out possibilities for funding through the use of structural funds. Relying on structural funds, however, may not

⁸⁸⁹ See Summary of the replies to EC Green Paper on detention conditions of 2011, op. cit. Poland, Denmark, Ireland, Germany, Latvia, Portugal and Malta opposed the adoption of common rules in the realm of detention conditions.

⁸⁹⁰ National report No 2 on Germany.

⁸⁹¹ The Legal Aid Directive is a case in point. Instead of being formally integrated within the Access to a Lawyer Directive, as originally foreseen in the 2009 Roadmap, it was decided to negotiate a separate instrument at a later stage, in view of the disagreements the financial costs the Legal Aid Directive implied generated among the Member States. As noted elsewhere, "anything in the European Union that costs money, including the right to legal aid, is always very sensitive." S. Cras, *Directive on the Right of Access to a Lawyer in Criminal Proceedings and in European Arrest Warrant Proceedings*, *eucri* 2014/1, p. 33

⁸⁹² As recommended by our national expert on Romania, and G. L. Gatta, E. Dolcini *Final proposals on possible guidelines of the EU- policy in order to implement the best practices in the fields of detention conditions and alternatives to detention*, in A. Benardi, A. Martufi (eds.), *Prison overcrowding and alternatives to detention. European sources and national legal systems*, Jovene Editore, Milano, 2016, p. 514. The national report no 2 on Germany also noted that detention conditions is widely seen as a financing problem, Section on detention, part C(1)(d)(2).

⁸⁹³ Council of the EU, 9197/17, op. cit., p. 4

⁸⁹⁴ A model agreement was drawn up for that purpose. It reads as follows: "if the European arrest warrant has been issued for the purposes of execution of a custodial sentence or detention order, where the requested person is staying in, or is a national or a resident of the executing Member State; as well as when the executing authority finds substantial grounds to believe that the requested person, if surrendered to the requested Member State, will be exposed to a real risk of inhuman or degrading treatment, within the meaning of Article 4 of the Charter of Fundamental Rights of the EU, and that executing Member State undertakes to execute the sentence or detention order in accordance with its domestic law." See Council of the EU, 9197/17, op. cit., p. 4.

result in a comprehensive answer to detention conditions issues.⁸⁹⁵ Therefore, a specific EU fund could tackle the problem of bad prison conditions in its entirety.

(ii)b. Clarifying the ground for postponement/refusal surrender under *Aranyosi and Caldăraru*

There is a clear need to clarify the ground for postponement/refusal laid down in the *Aranyosi and Căldăraru* ruling.

Reports on Italy, France, The Netherlands, Finland, Ireland and Germany suggest that more guidance is needed on the application of the ground for postponement/refusal laid down in the *Aranyosi and Căldăraru* judgment.

As things stand now, the situation is clearly dissatisfying. The question can be raised of what happens with the requested person whenever surrender is denied. In some of the countries examined, the non-execution of the EAW resulted in the release of the person, because doing otherwise would breach the principle of necessity and proportionality that MSs must observe in using pre-trial detention while the person is awaiting surrender. However, releasing the person also heightens the risk of impunity, as he or she may have to wait for considerable amounts of time before being tried in the issuing Member State or serving the custodial sentence the EAW was issued for.⁸⁹⁶

Suggestion was made that clarifications should be made as regards a situation where the existence of a risk of degrading and inhuman treatment cannot be discarded “in a reasonable time”, and what is meant by the “non-excessiveness” of detention of the person to be surrendered, in case the execution of the EAW must be postponed.⁸⁹⁷ An explicit correlation was drawn between the need for guidance and the imperative of improving legal certainty in the application of the right to liberty.⁸⁹⁸

Then, the content of information requests filed by the executing authorities should be streamlined in order to avoid situations where issuing States cannot cope with several information requests of different nature. Recent proposals on the possibility to develop uniform templates on the type and content of information requested by the executing State, on the basis of commonly agreed uniform criteria, were discussed at Eurojust.⁸⁹⁹ The option of developing a multilingual template laying down the type of information requested by the executing authority was also evoked in other works.⁹⁰⁰

(ii)c. Enhancing dialogue

Dialogue channels and coordination structures should be further developed between a broad range of actors, from the judicial authorities of EU states dealing with EAW requests, government officials dealing with imprisonment conditions, and European Commission officials, to civil society actors, such as prison staff. The role of Eurojust could be enhanced in this respect.⁹⁰¹ Solution-oriented conferences, meetings, workshops, and prison visits should be organised on a more regular basis, with a specific view to following up on the *Aranyosi and Căldăraru* judgment and facilitate best practice exchanges. A good practice comes for Romania, which planned to take advantage of its position as holder of the rotating presidency next year to bring together people from probation services, detention services, the judiciary and policymakers in conference scheduled for 2019.⁹⁰² It has been

⁸⁹⁵ For example, ventilation and sanitary equipments can be improved by the use of structural funds dedicated to energy efficiency.

⁸⁹⁶ Cases where information was incomplete and deemed unsatisfying were mentioned in the national reports on Germany and the Netherlands.

⁸⁹⁷ See National report No 2 on Italy, Section on detention (point 15).

⁸⁹⁸ Ibid.

⁸⁹⁹ According to the report, this template would build on CJEU and ECHR case law and explain how the presumption of mutual trust can be rebutted. It was suggested that Eurojust could draft such templates containing the type of information that could be requested. See Council of the EU, 9197/17, op. cit., p. 3.

⁹⁰⁰ See T. Marguery (ed), *Mutual Trust Under Pressure*, 2018, op. cit., 439

⁹⁰¹ Ibid. However the research notes that practitioners from prison and probation services will not be able to participate in Eurojust meetings.

⁹⁰² National representative for Romania, 74th plenary session of the CDPC, 5-7 June 2018.

acknowledged that cross-border cooperation works best when national authorities have knowledge of one another's legal system and practice.

(ii)d. Closer and more comprehensive monitoring

Any legislative option should be complemented with better monitoring of detention conditions, along with close attention paid to the implementation of the Council of Europe's relevant instruments in this field. This was emphasised in several European Parliament resolutions.⁹⁰³ Initiatives were recently taken recently in this field, including the creation of a Commission-funded EU network of National Preventive Mechanisms monitoring detention conditions in the Member States, in close collaboration with Council of Europe's SPACE and the Fundamental Rights Agency. These initiatives should be assessed positively. Attention must be paid to avoid the fragmentation of efforts and ensure consistency between the various solutions put forward by actors involved in tackling the problem of detention conditions.⁹⁰⁴

⁹⁰³ See European Parliament Resolution of 6 July 2017 on prison systems and conditions (2015/2062(INI))

⁹⁰⁴ Broadly speaking, lack of consistency among the various responses to detention conditions was perceived as an issue. Enhanced cooperation between the EU and the Council of Europe was moreover perceived as a prerequisite to assess prison conditions on the basis of objective, common criteria by the national representative for Romania at the 74th CDPC plenary meeting, 5-7 June 2018. For example, it was recently underlined that the aforementioned conference organised by Romania on detention conditions as part of the Council presidency feeds into the efforts undertaken by the Netherlands to raise awareness of overcrowding issues within the framework of the Council of Europe. Indeed, the Netherlands is organising a conference on overcrowding in 2019.

6. COMPENSATION SCHEMES FOR UNJUSTIFIED DETENTION

KEY FINDINGS

- Unjustified detention occurs on a regular basis in EU States, for reasons of mistaken identity, or simply because the person was granted a decision on acquittal after a long period of pre-trial detention. All MSs have established a compensation scheme for unjustified detention. Differences nonetheless exist, in terms of grounds for claiming compensation, amounts awarded, time-limits, eligibility conditions, and applicability to cross-border cases.
- In the absence of rules establishing a right to fair compensation for unjustified detention in cross-border cases, national compensation systems are sometimes ineffective in transnational proceedings, surrender procedures in particular. In the absence of rules on liability between the issuing and the executing States, it is often difficult for the defendant to pinpoint the Member State responsible to address the compensation claim. Some MSs moreover tended to “misuse” mutual trust in order to shelve responsibility for unjustified detention. Fundamental rights concerns moreover emerge, as denying compensation for unjustified detention may give rise to breaches of Art 5 ECHR.
- Adopting an EU legislative instrument would force MSs to consecrate a right to compensation for unjustified detention in cross-border cases. This instrument should allow the claimant to file an application in the State where he/she resides, provide for dedicated rules organising the liability of the issuing and/or the executing States, and formulate precise grounds on which compensation may be claimed.

6.1. Nature of differences

Unjustified detentions may occur as a result of a mixture of different circumstances. These include, among other reasons, clear mistakes of the issuing or executing states (or both), or judicial errors on the person, following for instance the theft or selling of identity cards.⁹⁰⁵ In spite of these issues, the EU has not yet adopted a compensation instrument regulating unjustified detention for the purpose of the execution of an EAW. Neither does the FD EAW contain provisions on compensation for unjustified detention. The silence of the EU legislator on these issues contrasts with the realm of cross-border victims, where a directive designed to facilitate the interoperability of national compensation schemes for victims of intentional and violent crimes was adopted in 2004. In the absence of EU rules governing compensation for unjustified detention, differences arise between compensation systems available in domestic proceedings in terms of grounds for application, amounts awarded, time-limits for application and eligibility criteria (6.1.1.), as well as the extent to which national compensation schemes have been or can be transposed to transnational situations (6.1.2.).

6.1.1. Grounds for claiming compensation, amounts awarded, eligibility conditions and time-limits

All the Member States from the sample examined have established a compensation system for unjustified detention occurring within the framework of domestic proceedings. The content of existing schemes and procedures to claim compensation for unjustified detention yet vary from a Member State to another. The most striking differences occur in terms of

⁹⁰⁵ A. Weyembergh, I. Armada and C. Brière, “Critical Assessment of the Existing European Arrest Warrant Framework Decision”, 2014, op. cit., p. 41

grounds for application, amounts awarded, time-limits for application and eligibility criteria.⁹⁰⁶

Grounds for compensation claims

The grounds for granting compensation are more or less narrowly defined.

Erroneous assessment by the judicial authority seems to be the most widespread ground for granting compensation (e.g. Spain, Germany, Romania⁹⁰⁷, Italy, Finland, Ireland⁹⁰⁸).

In other countries, compensation claims must fulfil strict conditions (e.g. France, Spain, The Netherlands). In France, admissibility of requests for compensation for damages is provided on condition that the trial ended by a discharge, a decision of acquittal or to drop the charges. Under Art 149 of the Criminal Procedure Code, the claim must be filed with the court within six months of notification of the final innocence decision.⁹⁰⁹ These conditions were recently criticised for being too strict, in the recent Camara scandal, where compensation for unjustified detention was denied in the first place because the person had not been subject to a decision on final innocence. Instead, Mr Camara was simply released from prison (see box).

Unjustified detention for a mistaken identity: a French example⁹¹⁰

In 2001, Mohamed Camara was arrested by the Belgian authorities on the basis of an EAW issued by France. Mohamed Camara was accused of the rape of two minors of 15 years old. He was subsequently imprisoned for a three-month term in Belgium before he was extradited to France to spend another two months in prison. However, it turned out after a DNA analysis that the French authorities had mistaken the identity of Mr. Camara with the homonymous rapist. Mr. Camara sought compensation from the French authorities some years after. He struggled somehow to receive compensation from the State, because he had been granted neither an acquittal, a discharge, or a decision to drop the charges. Mr. Camara *in fine* obtained a compensation of EUR 45,000.

In Spain too, strict conditions to compensation for pre-trial imprisonment apply. Under the Judiciary Act, the scope of compensation is limited to those cases where there has been an error in a judicial activity, or it cannot be proved that the appellant has committed a crime, whenever there is not enough evidence proving the participation of the appellant to such crime.⁹¹¹

Other, more parsimonious, grounds for compensation claims include irregular functioning of the judicial administration (e.g. Spain), and losses of business due to extradition for unjustified detention (e.g. Germany).⁹¹²

⁹⁰⁶ It is worth noting that those differences had been underlined by the Council of Europe in the context of extradition. CoE, European Committee on Crime Problems (CDPC), Committee of experts on the operation of European Conventions on co-operation in criminal matters (PC-OC), Replies concerning compensation issues related to the European Convention on Extradition, PC-OC (2008) 03 Rev 3, 2 November 2008.

⁹⁰⁷ In Romania, compensation may be claimed as regards pre-trial detention when criminal detention was deemed unlawful by the competent judicial authorities. See National report No 2 on Romania, section on compensation for unjustified detention (point 14).

⁹⁰⁸ In Ireland, the sole ground on which unjustified detainees may rely on is that of miscarriages of justice (see CCBE, "EAW-rights" report, 2016, op. cit., p. 71. See also Irish Penal Reform Trust, The practice of pre-trial detention in Ireland, Research Report, Dublin, 2016, p. 32).

⁹⁰⁹ European Judicial Network, Regional meeting, 'Compensation after detention based on an EAW', Roundtable, Paris, 22 September 2017.

⁹¹⁰ More information on M. Leplongeon, 45 000 euros pour avoir été emprisonné par erreur. Trop peu ? Le Point, 6 January 2014. Quoted in National report No 2 on France, Section on compensation for unjustified detention (point C).

⁹¹¹ The possible limitations on the amount of individuals benefiting from compensation induced by the restricted scope of the Spanish legislation were somewhat mitigated by ECHR case law. The Spanish Constitutional Court ruled that this provision should not be such as to limit the right to the presumption of innocence.

⁹¹² National report No 2 on Germany, Section on Compensation (A(2)(a))

Compensation rates and time-limits

Compensation rates per day differ significantly, from 25 euros (Germany),⁹¹³ to 80-105 euros (e.g. The Netherlands),⁹¹⁴ 100-120 euros (e.g. Finland),⁹¹⁵ and more than 230 euros (Italy).⁹¹⁶ Factors to be taken into consideration when determining the amounts of compensation also vary. For example, they include whether the person has been detained in a police station or in a prison (e.g. Netherlands), or the person's age (e.g. France).⁹¹⁷ In Spain, the amount of compensation is calculated according to the time spent in detention and the damages incurred to the person and his/her family.⁹¹⁸

Time-limits to lodge a compensation claim range from 3 months (The Netherlands⁹¹⁹; Spain) and 6 months (France⁹²⁰; Finland⁹²¹) to 1 year (Germany, Hungary⁹²²) and two years (e.g. Italy⁹²³), after the end of the proceedings.

6.1.2. Applicability of national schemes to cross-border proceedings

The existence of a national compensation scheme notwithstanding, the majority of countries analysed do not provide a specific compensation regime to individuals concerned in respect to specific problems likely to occur under mutual recognition instruments, such as the withdrawal of a request for surrender.⁹²⁴

As regards the existence of a national system providing for compensation in transnational cases, only two Member States in the sample analysed, i.e. the Netherlands and Germany, have established a compensation system that clearly provides the possibility, for "surrender victims", to obtain compensation for unjustified EAW-detention. The two compensation systems are, however, radically opposed in terms of *modus operandi*. The German scheme applies only when Germany acts as an issuing authority, unless the authorities are responsible for the unjustified persecution. Compensation under the Dutch rules can be claimed only when the Netherlands is the executing authority: the claim may be admissible only if surrender was refused by the Dutch court – in any other circumstances, for example if the EAW was withdrawn, the executing authorities cannot be held responsible.⁹²⁵

In some countries (e.g. Finland, Italy, France), although the national authorities have not dedicated a specific compensation mechanism for *transnational* cases, the supreme courts ruled that the national compensation scheme also applied to EAW "victims".⁹²⁶

As a result from uncertainties regarding the applicability of compensation schemes to transnational situations in some countries, it is still unclear to which country should incur the costs of compensation. A recent study pointed out that there is a general agreement on designating the issuing State as responsible to deal with the compensation claim if the judicial

⁹¹³ This reimbursement mainly concerns the costs for a Germany-based lawyer.

⁹¹⁴ 105 euros per day at the police station, 80 euros per day in a pre-trial detention facility. See CCBE, "EAW-rights" report, 2016, op. cit., p. 71

⁹¹⁵ National report No 2 on Finland, Section on detention (point 14). CCBE, "EAW-rights" report, 2016, op. cit., p. 71

⁹¹⁶ CCBE, "EAW-rights" report, 2016, op. cit., pp. 71 and 279

⁹¹⁷ European Judicial Network, Comparative analysis of the replies to the questionnaire, 'Compensation after detention based on an EAW' project, 2017, p. 3

⁹¹⁸ National report No 2 on Spain, Section on detention conditions (point 14).

⁹¹⁹ Complainants must apply within three months after the surrender procedure ended, i.e. surrender was either denied by the Dutch judicial authorities (either the Court or the Prosecutor), or the EAW was withdrawn.

⁹²⁰ European Judicial Network, Regional meeting, 'Compensation after detention based on an EAW', Roundtable, Paris, 22 September 2017. See also Art 149 CCP.

⁹²¹ The indicated amount applies to short-term detention. For longer detentions compensation rates may be raised to thousands of euros. National report No 2 on Finland, Section on detention (point 14).

⁹²² National report No 2 on Hungary, Section on Detention (point 14)

⁹²³ European Judicial Network, Regional meeting, 'Compensation after detention based on an EAW', Roundtable, Paris, 22 September 2017.

⁹²⁴ A. Weyembergh, I. Armada and C. Brière, "Critical Assessment of the Existing European Arrest Warrant Framework Decision", 2014, op. cit., p. 43

⁹²⁵ A. M. van Kalmthout, "An Analysis of Minimum Standards in Pre-trial Detention and the Grounds for Regular Review in the Member States of the EU", in A. M. van Kalmthout, M. M. Knapen, C. Morgenstern (eds), *Pre-Trial Detention in the European Union*, Tilburg: Wolf Legal Publishers, 2009

⁹²⁶ See national reports No 2 on Finland, Italy and France, Section on detention (point 14).

error was made in the latter country, even if the wrongful detention took place in the executing State,⁹²⁷ as is the case in France. In Finland and Italy however, the case law of the courts suggests that compensation may be granted although they acted as executing States. In Finland more specifically, the State usually pays compensation without many formalities to be fulfilled; the State Treasury developed dedicated forms for compensation claims, and the final decision is made within a month.⁹²⁸ If payments are issued later than originally expected, interests are paid to the claimant.⁹²⁹

6.2. Impact on mutual recognition and cross-border cooperation

The existence of significant variations in compensation regimes come as little surprise. There are no EU rules establishing the duty to ensure fair compensation in EAW cases, nor are there provisions organising the allocation of liability between the issuing and the executing States. As a result, compensation schemes are rather ineffective in cross-border situations (6.2.1.), and the absence of rules on liability often makes it difficult to pinpoint the Member State responsible for addressing the compensation claim (6.2.2.). Logically therefore, fundamental rights concerns arise (6.2.3.).

6.2.1. Ineffective compensation schemes in cross-border situations ...

Despite the existence of a compensation scheme in most EU States examined, the risk of being deprived of compensation exists. The granting of compensation in cross-border cases may be thwarted by procedural costs, procedural risks, language issues and difficulties associated with the lack of understanding of the legal regime in a different EU State.

An example of this relates to the case of a Slovak citizen arrested on the basis of an EAW issued by the Netherlands.⁹³⁰ The only evidence held against him was a DNA sample found on the crime scene. Despite the fact that the person could prove that he was not in the Netherlands at the time the offence was committed, the Slovak Court consented to his surrender considering that the EAW was formally valid and that his claims should be dealt with in the issuing State. After the person's surrender, the Dutch Court realised that the evidence was insufficient and released him, leaving him with no money or assistance, and without even notifying his release to the Slovak embassy. Despite the endured sufferings (bad reputation, economic loss and psychological damage), he renounced to lodge proceedings in the Netherlands, and did not receive any compensation.

6.2.2. ... Exacerbated by the absence of rules on liability

The risk of being deprived of compensation is exacerbated by the absence of provisions organising the allocation liability between the executing and the issuing States, that logically derives from the lack of rules on compensation in EAW-cases.

In Germany, cases occurred where compensation for damage was denied by the courts when the person had to be released because prosecution was time-barred, and extradition could no longer take place, or because the German courts found that the extradition request was inadmissible.⁹³¹ A case dating from 2005 illustrates well the way the burden of responsibility may shift between the issuing and executing States. In the situation at hand, a person was provisionally arrested upon arrival in Germany on the basis of a SIS alert introduced by the Austrian authorities. Once informed of the arrest, the issuing authorities notified Germany that the SIS alert had been revoked. When the arrested person claimed compensation in

⁹²⁷ CCBE, "EAW-rights" report, 2016, op. cit., p. 71

⁹²⁸ Ibid, p. 72

⁹²⁹ Ibid.

⁹³⁰ Case quoted in A. Weyembergh, C. Brière, I. Armada, "Critical Assessment of the Existing European Arrest Warrant Framework Decision", 2014, op. cit., p. 42.

⁹³¹ National report No 2 on Germany, Section on Compensation (A(2)(a))

Germany, he was denied such a right, on the ground that, at the time of the arrest, it was not apparent that the alert had been revoked.⁹³²

In the absence of rules governing liability, it cannot be excluded from the example above that the requested person is denied compensation, on the grounds that the executing and the issuing States were unable to come to an agreement on responsibility.⁹³³ It is interesting to note that other instruments, such as Framework Decision on Freezing Orders,⁹³⁴ or the SIS II Regulation,⁹³⁵ do contain provisions allocating liability. Art 48 of the SIS II Regulation in particular reads that:

“Each Member State shall be liable in accordance with its national law for any damage caused to a person through the use of N.SIS II. This shall also apply to damage caused by the Member State which issued the alert, where the latter entered factually inaccurate data or stored data unlawfully. If the Member State against which an action is brought is not the Member State issuing the alert, the latter shall be required to reimburse, on request, the sums paid out as compensation unless the use of the data by the Member State requesting reimbursement infringes this Regulation.”

This latter instrument is of particular interest because it creates a precedent, under which both the issuing and executing States may be held liable for damages caused to a person, for technical, or legal errors committed when they used the SIS system. It is particularly relevant to unjustified detention occurring within the framework of EAWs, because Art 9(2) FD EAW allows the transmission of EAWs via an alert in SIS II. Unfortunately, the absence of review of SIS alerts often results in the maintaining of sleeping or outdated alerts in the system,⁹³⁶ that sometimes result in unjustified arrests.⁹³⁷ Although the mechanisms governing liability and the procedures for claiming compensation should be further spelled out, the provisions of the SIS II Regulation lays the basis from which inspiration may be drawn for the adoption of a future instrument.

A certain degree of inconsistency can be observed in EU instruments governing the responsibility for compensation. In FD Freezing Orders, it is the issuing State that can be held liable. In the SIS II Regulation, both the issuing and the executing States have a responsibility for damage. Then, the EPPO Regulation introduces a new rule on liability, this time conferring the Court of Justice jurisdiction over compensation for damages.⁹³⁸ However, most of these provisions remain broad and incomplete. They are, moreover, detrimental to the coherence and credibility of the EU's area of criminal justice.⁹³⁹

6.2.3. Fundamental rights concerns and misuse of mutual trust

Interestingly, mutual trust is sometimes invoked as a justification for refusing a claim for compensation. In the *Praczijsk* case,⁹⁴⁰ an Italian judicial authority issued an EAW against a Belgian national called Praczijsk. On that basis, Praczijsk was arrested by the Belgian

⁹³² Case quoted in A. Weyembergh, C. Brière, I. Armada, “Critical Assessment of the Existing European Arrest Warrant Framework Decision”, op. cit., p. 42.

⁹³³ Ibid.

⁹³⁴ Although it does so in a limited way. See Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence. Article 12 reads that: 1. Without prejudice to Article 11(2), where the executing State under its law is responsible for injury caused to one of the parties mentioned in Article 11 by the execution of a freezing order transmitted to it pursuant to Article 4, the issuing State shall reimburse to the executing State any sums paid in damages by virtue of that responsibility to the said party except if, and to the extent that, the injury or any part of it is exclusively due to the conduct of the executing State. 2. Paragraph 1 is without prejudice to the national law of the Member States on claims by natural or legal persons for compensation of damage.

⁹³⁵ Regulation No 1987/2006 of the European Parliament and of the Council of 20 December 2006 on the establishment, operation and use of the second generation Schengen Information System (SIS II).

⁹³⁶ A. Weyembergh, C. Brière, I. Armada, “Critical Assessment of the Existing European Arrest Warrant Framework Decision”, 2014, op. cit., p. 16

⁹³⁷ See the *Praczijsk* case below.

⁹³⁸ Art 113 Regulation 2017/1939.

⁹³⁹ A. Weyembergh, C. Brière, I. Armada, “Critical Assessment of the Existing European Arrest Warrant Framework Decision”, 2014, op. cit., p. 42.

⁹⁴⁰ See Weyembergh and Santamaria, “La reconnaissance mutuelle en matière pénale en Belgique”, in G. Vernimmen, L. Surano and A. Weyembergh (eds), *The future of MR in criminal matters in the European Union*, 2012, op. cit., p. 67.

authorities and placed in detention. In spite of doubts concerning his identity, no additional information was requested to Italy. The person was then surrendered, where the competent authorities soon realized that he was not the suspect and released him. When questioned by a member of the Belgian Parliament on the compensation to be paid to Mr Praczyk, the Belgian Minister of Justice at the time, L. Onkelynx, declared that the Belgian authorities did not have to pay any compensation since they had not made any mistake but merely satisfied their duty of mutual trust. This is an excellent illustration of a bad implementation of mutual trust, i.e. blind trust, which undermines its legitimacy.

Compensation of persons that suffered from unjustified detention in transnational situations is intrinsically linked to fundamental rights. By the same token, it has an impact on mutual trust. Promoting mutual recognition and mutual trust is conditional upon the protection of individuals' rights.⁹⁴¹ In 2008 already, the Council of Europe emphasized that "compensation of persons is a very important question, in particular as it affects human rights, which would deserve further consideration by the PC-OC at a later stage."⁹⁴² As noted elsewhere, the EU has a responsibility to ensure that the individual who suffer from unjustified detention receives a fair compensation, as provided under Art 6 of the Charter read in conjunction with Art 52(2).⁹⁴³ It is moreover in line with Art 5(5) ECHR. This provision provides a general entitlement of victims of detention to a direct and enforceable right to compensation before national courts.⁹⁴⁴ Absence of provisions on unjustified detention may impact other MR instruments dealing with the movement of prisoners, such as FD Transfer of Prisoners. Further research is however needed to identify whether compensation issues arose in the application of this instrument.

6.3. Recommendations

(i) Legislative option: a new legislative instrument on compensation for unjustified detention in cross-border cases

The adoption of a legislative instrument is recommended in the field of compensation for unjustified detention in cross-border cases. This solution is in line with the rights conferred by the ECHR and has been endorsed by the European Parliament⁹⁴⁵ and practitioners.⁹⁴⁶

The four following items should be covered.

A first element is to impose a general obligation on all Member States to consecrate a right to compensation for unjustified detention in transnational situations.⁹⁴⁷

⁹⁴¹ Between 2012 and 2017, approximately 104 EAW compensation cases have been filed to France. 54 cases occurred in the Netherlands for the 2012-2016 period. European Judicial Network, Comparative analysis of the replies to the questionnaire, 'Compensation after detention based on an EAW' project, 2017,

⁹⁴² PC-OC, List of decisions taken at the 6th meeting of the restricted Group of experts on international co-operation (PC-OC Mod) enlarged to all PC-OC members, 30 Sept. – 2 Oct. 2008, point 1, b), compensation of persons, p. 1.

⁹⁴³ A. Weyembergh, C. Brière, I. Armada, "Critical Assessment of the Existing European Arrest Warrant Framework Decision", 2014, op. cit., p. 43

⁹⁴⁴ Article 5(5) ECHR provides that "Everyone who has been the victim of arrest or detention in contravention of the provisions of this Art. shall have an enforceable right to compensation", and several judgments have already dealt with this issue. See the fact sheet of the ECtHR, available at: https://www.echr.coe.int/Documents/Guide_Art_5_ENG.pdf

⁹⁴⁵ European Parliament resolution of 27 February 2014 with recommendations to the Commission on the review of the European Arrest Warrant (2013/2109(INL)). Para 11 reads: While stressing the primary importance of correct procedures including appeal rights, calls for Member States, as either an issuing or executing Member State, to provide for legal mechanisms to compensate damage arising from miscarriages of justice relating to the operation of mutual recognition instruments, in accordance with the standards laid down in the ECHR and in the well-established case-law of the CJEU;

⁹⁴⁶ Respondents of a recent CCBE study on the EAW highlighted that consideration should be given to an EU-wide harmonisation of compensation. CCBE, "EAW-rights" report, 2016, op. cit., pp. 289-290

⁹⁴⁷ Many instruments, other than the EAW, may indirectly impact to decision to put a person in jail. For example, many suspects are placed in pre-trial detention to prevent a risk of interference with investigative activities. The recent entry into force of the EIO, for example, may contribute, albeit in an indirect manner, to increasing the number of persons detained in PTD.

Second, the prejudiced person must be able to file a compensation claim in the country where he or she resides to designated authorities.⁹⁴⁸ The claim would then be transferred by the authorities of the country of residence to the relevant authorities of the country in charge of processing the compensation application. This possibility would lessen the likelihood that the person finds himself/herself in the position where he/she has to bear the translation and legal assistance costs that may arise in a transnational case, simply because language and procedural frameworks are different from a country to another. The establishment of such a system would mirror the one existing under the Compensation Directive for victims of crime.⁹⁴⁹ However that system should be adapted to take into consideration the specificities of FD EAW.⁹⁵⁰ The adoption of a standard form for transmitting a claim from the issuing MS to the executing MS could be envisaged.⁹⁵¹

Third, provisions in FD EAW organising the allocation of liability between the executing and the issuing States should be included. Detainees subject to unjustified detention must be granted the right to claim compensation from executing authorities,⁹⁵² which is not possible at the moment in all EU States, as the description of differences reveals. The ECtHR moreover stated that “in the context of an extradition procedure, the requested state should be able to presume the validity of the legal documents issued by the requesting state and on the basis of which a deprivation of liberty is required,”⁹⁵³ and that it seems clear that detention and arrest “having been instigated by a requesting country on the basis of its own domestic law, and followed-up by the requested country in response to its treaty obligations, can be attributed to the requesting country notwithstanding that the act was executed by the requested country.”⁹⁵⁴ The possibility to hold both the issuing and the executing States liable would avoid potential disputes among EU countries over the responsibility of processing the compensation claim, and enhance consistency with other MR instruments that already provides rules governing allocation of liability, such as FD Freezing Orders. As suggested elsewhere, the creation of a dispute settlement to regulate the allocation of responsibility, in particular in complex cases where joint liability may be held, could be envisaged.⁹⁵⁵ Given the delays that may be associated with possible conflicts of liability, an EU fund would allow victims of unjustified detention to receive compensation without waiting for the resolution of the dispute.⁹⁵⁶

Fourth, the grounds for compensation should be spelled out in further detail, alongside the content of such compensation. Cases where the issued EAW is unlawful, unverified data about the person transmitted, mistaken identity and, when following surrender, the person was released on acquittal could be included as grounds for compensation claims. This approach is in line with EU legislation and in particular Art 48 SIS II Regulation, which already provides a right to compensation whenever inaccurate or unlawful data was entered or stored in the SIS II.

The forthcoming review of the Compensation for victims Directive of 2004⁹⁵⁷ would constitute a timely opportunity to open the debate for the adoption of a new parallel instrument on compensation for unjustified detention in transnational cases, as well as a broader reflection on access to compensation in cross-border proceedings writ large. Indeed, a reflection should be conducted on the adoption of an instrument providing compensation and organising the

⁹⁴⁸ A. Weyembergh, C. Brière, I. Armada, “Critical Assessment of the Existing European Arrest Warrant Framework Decision”, 2014, op. cit.

⁹⁴⁹ See section on compensation for victims.

⁹⁵⁰ A. Weyembergh, C. Brière, I. Armada, “Critical Assessment of the Existing European Arrest Warrant Framework Decision”, 2014, op. cit.; CCBE, EAW-rights report, 2016, op. cit.

⁹⁵¹ European Judicial Network, Comparative analysis of the replies to the questionnaire, ‘Compensation after detention based on an EAW’ project, 2017, p. 16

⁹⁵² A. Weyembergh, C. Brière, I. Armada, “Critical Assessment of the Existing European Arrest Warrant Framework Decision”, 2014, op. cit., p. 44

⁹⁵³ ECHR, *Stephens v. Malta* (no. 1), *supra note 365*, para 52.

⁹⁵⁴ ECHR, *Toniolo v. San Marino and Italy*, 26 June 2012, Appl. No. 44853/10, para 56.

⁹⁵⁵ A. Weyembergh, C. Brière, I. Armada, “Critical Assessment of the Existing European Arrest Warrant Framework Decision”, 2014, op. cit., p. 45

⁹⁵⁶ *Ibid.*

⁹⁵⁷ *Infra*, Section 8.

liability of national authorities competent in cross-border cases. This would act as a complementary and indispensable tool, one that enables a balanced operation of mutual recognition instruments, that fully takes into consideration the interests of all parties.

(ii) Non-legislative options

(ii)a. Mapping and monitoring existing compensation frameworks

Besides, any legislative proposal in this area should be supported by extensive mapping of existing compensation systems and the extent to which they may apply to transnational cases. Little data exists on the topic besides publications by Henning Sørensen,⁹⁵⁸ a study on the EAW initiated by the European Parliament in 2014,⁹⁵⁹ a report carried out by CCBE on the EAW,⁹⁶⁰ and a comparative study on compensation for unjustified detention in EAW cases and conducted by the Netherlands supported by the EJM.⁹⁶¹ In this latter study, it was noted that only a few countries were able to produce reliable figures on the amounts of existing cases on compensation claims filed in transnational situations.⁹⁶² The few studies that addressed this topic should be shared more widely, in order to raise awareness of compensation issues among national and EU lawmakers, alongside judicial authorities.

A monitoring instrument should be set up by the European Commission to fill the current information gap in respect to unjustified detention occurring as a result from transnational cooperation in transnational cases. For example, data collection could focus on whether and how many detainees suffered from unjustified detention in cross-border cases, under which the conditions detainees may claim compensation, how many detainees benefited from a compensation scheme in the past, as well as the financial and immaterial compensation national schemes entail. Comparative law may prove useful in determining the extent to which a new legislative instrument is needed and, if so, delineating its exact contours.⁹⁶³ Inspiration may be drawn from these countries where a scheme specifically designed to address compensation claims in transnational situations exists, such as Germany and the Netherlands.

(ii)b. Considering EU financial support

One of the main challenges to the adoption of a legislative instrument will be to overcome national reluctance to unlock the necessary funding to address compensation claims. EU funding could be considered in order to level the playing field and raise the rates of compensation in those countries where amounts are very low.⁹⁶⁴ Besides, the wrongful arrest for surrender under the EAW takes place in the framework of EU law and, partly, in the EU's interest, inasmuch as furthering judicial cooperation is a goal of the EU. Pursuant to the principle of equality, criteria should be uniform for all the "victims", and the EU should bear part of the financial responsibility.

⁹⁵⁸ H. Sørensen, "Den europæiske arrestordre og retten til erstatning for frihedsberøvelse" ("The European Arrest Warrant and the right to compensation for the deprivation of freedom"), Karnov Group, 2015. 328 p; "Erstatning for strafferetlig forfølgning i udleveringssager" ("Compensation for criminal investigation in extradition cases") / Sørensen, Henning Bang Fuglsang Madsen. In: Tidsskrift for Kriminalret, Vol. 2015, No. 99-1, TfK2015.1, 2015; "Mutual recognition and the right to damages for criminal investigations" / Bang Fuglsang Madsen Sørensen, Henning. In: European Criminal Law Review, Vol. 5, 01.12.2015, p. 194-208.

⁹⁵⁹ A. Weyembergh, C. Brière, I. Armada, "Critical Assessment of the Existing European Arrest Warrant Framework Decision", 2014, op. cit.

⁹⁶⁰ CCBE, "EAW-rights", 2016, op. cit.

⁹⁶¹ European Judicial Network, Comparative analysis of the replies to the questionnaire, "Compensation after detention based on an EAW" project, 2017

⁹⁶² Ibid, p. 15

⁹⁶³ Ibid, p. 16.

⁹⁶⁴ CCBE, EAW-rights report, 2016, op. cit.

7. THE RIGHT TO BE PRESENT AT A TRIAL AND CONDITIONS OF EAW SURRENDERS

KEY FINDINGS

- National understandings and applications of the right to be present at a trial differ. In some countries, the right to be present at a trial encapsulates greater significance than in others and has the status of a constitutional right. Besides, a few MSs sometimes went beyond the letter of FD 2009/299 governing conditions allowing surrender for the purpose of executing a sentence rendered *in absentia*, thus limiting the “pro-cooperation approach” pursued by the EU legislator in the FD.
- Dissatisfaction with the low protection and safeguards afforded to individuals tried *in absentia* in some countries propelled some MSs to re-install a degree of control over the operation of the EAW, thus threatening the primacy of EU law. Further to this, the co-existence of different approaches to *in absentia* trials has had several implications for the practical operation of the EAW. Surrender procedures have been delayed, or blocked, because MSs do not always conform to the conditions formulated in the FD.
- The entry into force of the Presumption of Innocence Directive was perceived as a “non-solution”. On the positive side, the codification of the FD will force MSs to implement provisions on *in absentia* at the domestic level. However, the codification process in some respects amounted to the simplification of the requirements of the FD. Instead of clarifying the conditions allowing *in absentia* trials, the directive seemingly increased the margin of discretion left to MSs, thus opening the door to the multiplication of national differences at the operational stage.
- Bearing in mind the existence of two pieces of legislation on *in absentia* trials, it is hard to advocate in favour of a new legislative solution. Developing soft law mechanisms, in the form of guidelines on the conditions that must be fulfilled to authorise *in absentia* trials, is more realistic. Guidelines should take into consideration the recent case law of the Court of Justice of the EU, where clarifications were brought to the provisions of the FD.

7.1. Nature of differences

The right to be present at the trial is regulated by Framework Decision 2009/299/JHA (hereinafter ‘FD *in absentia*’). It lays down “the circumstances in which the person concerned must be deemed to have waived, voluntarily and unambiguously, his right to be present at his trial.”⁹⁶⁵ In other words, a decision rendered *in absentia* may not constitute a ground for refusing the execution of an EAW, provided that one of the four conditions listed under Article 2 is met.⁹⁶⁶ Just as the ECtHR in its case law,⁹⁶⁷ the Court of Justice took the view in its seminal *Melloni* judgment that, although the right of the accused person to appear in person at his/her trial is “an essential component of the right to a fair trial”, however “that right is

⁹⁶⁵ CJEU, C-399/11, *Melloni*, 26 February 2013, para 52

⁹⁶⁶ (i) The person was summoned in due time in person and informed of the scheduled date and place of the trial and informed in due time that a decision may be handed down if or she does not appear at the trial; (ii) The person was made aware in due time of the scheduled trial and gave a mandate to a legal counsellor to defend him or her at the trial; (iii) after being served with the decision and being expressly informed about her right to a retrial, or an appeal, the person expressly stated that he or she does not contest the decision or did not request a retrial or appeal within the applicable time frame; and (iv) the person was not personally served with the decision but will be personally served with it without delay after the surrender and will be expressly informed of his or her right to a retrial, or an appeal, will be informed of the time frame within which he or she has to request such a retrial or appeal, as mentioned in the relevant European arrest warrant.

⁹⁶⁷ See, for example, judgment of the ECtHR of 1 March 2006 in *Sejdovic v. Italy*, paras 82, 86 to 88 and 99.

not absolute.”⁹⁶⁸ Mr Melloni was subject to a European Arrest Warrant issued by Italy, after he had been sentenced to 10 years of imprisonment. The conviction took place *in absentia*, since Mr Melloni had fled to Spain to escape the Italian justice. In order to challenge the EAW request, Mr Melloni invoked the strict constitutional regime governing surrender for the purpose of the execution of a sentence rendered *in absentia* trials in Spain and provide for a higher degree of protection of individuals compared with the FD. In its preliminary reference to the CJEU, the Spanish Court raised the question of the possibility to interpret Art 53 of the Charter⁹⁶⁹ as opening the possibility for MSs to grant more extensive fundamental rights to the accused than the ones afforded by EU law. The ECJ answered by the negative, arguing that such an interpretation, in an area where the fundamental rights had been harmonised in an exhaustive way, would undermine the effectiveness and the primacy of EU law. As hinted in the above outlined *Melloni* case, the right to be present at the trial encapsulates a greater significance in some countries compared with others (7.1.1.). Regarding specific aspects of *in absentia* trials, the national legislator sometimes went beyond the letter of the Framework Decision (7.1.2.).

7.1.1. Various understandings of the right to be present at the trial

Various understandings of the right to be present at a trial can be observed among the Member States.

A first category of Member States considers that the right to be present during trial is fundamental to due process and *in absentia* trials are usually not permitted in domestic proceedings (e.g. Ireland, Germany, Spain, Finland).

Sometimes, the exclusion of *in absentia* trials is the result from the legal tradition these countries belong to. In Ireland, the adversarial nature of trials prohibits judgments *in absentia* in domestic cases.⁹⁷⁰ In common law cultures, it is generally assumed that *in absentia* trials simply do not take place, and the exercise of jurisdiction requires having the person in custody of the court.⁹⁷¹ Until recently, Irish law would make surrender for the purpose of executing a custodial sentence rendered *in absentia* subject to the requirement that the requested person had “fled” the issuing State.⁹⁷² The unusual (and strict) condition provided under Irish law amounted to tensions between Ireland and Hungary.⁹⁷³

In Germany and Spain, the right to be present at a trial is a constitutional right. In Spain, the right for the defendant to be present at his own trial constitutes an absolute right which is intrinsically linked to the principle of human dignity. The Constitutional Court established in 2000 that the right to be physically present at the hearing in criminal proceedings relating to serious offences constituted one of the essential components of the absolute content of the right to a fair trial enshrined in Art. 24(2) of the Constitution.⁹⁷⁴ Prior to the *Melloni*

⁹⁶⁸ C-399/11, *Melloni*, 2013, op. cit. para 49.

⁹⁶⁹ Art 53 of the Charter reads: Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union, the Community or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States’ constitutions.

⁹⁷⁰ European Committee on Crime Problems, Committee of Experts on the Operation of European Conventions on Co-operation in Criminal Matters (PC-OC), Questionnaire concerning judgments in absentia and the possibility of a retrial – Summary and Compilation of Replies, PC-OC(2013) 01 Rev.3 Bil., Strasbourg, 28 April 2004, p. 29

⁹⁷¹ IBA International Criminal Court and International Criminal Law Programme, Report on the Experts’ Roundtable on trials in absentia in international criminal justice, September 2016. In the UK for example, in absentia trials were prohibited until 2001. Since then, they have taken place on a parsimonious basis, and under strict conditions. See Briefing note: EU strengthens trials in absentia - Framework Decision could lead to miscarriages of justice, Briefing note, London: Open Europe.

Retrieved at: <http://archive.openeurope.org.uk/Content/documents/Pdfs/tia.pdf>

⁹⁷² See the *Tobin I* case, National report No 1 on Hungary (case 1).

⁹⁷³ *Ibid.* In 2002, Mr Tobin had been sentenced *in absentia* to a three-year imprisonment term by the Hungarian court for the crime of murder, while he was residing in Ireland. Mr Tobin did not return to Hungary to service his sentence. The surrender request issued by Hungary was refused by the Irish court, on the grounds that Mr Tobin had not fled Hungary, a yet important requirement under Irish law. The Irish law was subsequently amended after this case.

⁹⁷⁴ M. Garcia, STC 26/2014: The Spanish constitutional court modifies its case law in response to the CJEU’s *Melloni* judgment, blog post, European Law blog, 17 March 2014. Retrieved at

judgment, the Spanish courts even went a step further, and held that an EAW could be refused on account of an *indirect* violation of an absolute right, such as the right to be present at the trial.⁹⁷⁵ The ‘indirect violation of the absolute content of a fundamental right’ approach led Spain to make surrender conditional upon the guarantee of a retrial whenever the person was sentenced *in absentia* for a serious offence,⁹⁷⁶ thus leading Spanish courts to refuse the execution of several EAWs.⁹⁷⁷ In a similar fashion, in Germany, the right of the accused person to be present at his/her trial is viewed as an essential requirement of the right to a hearing in accordance with the law, and is intrinsically linked to the principle of human dignity.⁹⁷⁸ *In absentia* trials are not permitted under the domestic code of criminal procedure when the accused is charged with serious crimes.⁹⁷⁹

The right to be present at one’s trial is not a constitutional right in Finland. However, trials held *in absentia* are usually not permitted either in domestic proceedings, although narrow exceptions exist.⁹⁸⁰

A second category of countries applies less stringent standards as regards what is meant by the ‘presence’ of the appellant to the trial, meaning that *in absentia* trials are allowed under national law (e.g. The Netherlands, France⁹⁸¹, Romania, Italy). For example, both France and The Netherlands apply the “default of appearance” procedure, meaning that the court will try the case as usual if the person fails to appear.⁹⁸²

As a consequence of the different understandings of the right to be present at the trial, the conditions of a retrial once the person has been tried *in absentia* are different as well, in the sense that they depend on more or less narrow conditions. For instance, retrial procedures do not always allow full reconsideration of all material evidence.⁹⁸³

7.1.2. Implementation beyond the letter of FD *in absentia*

The stringent approach taken by some Member States to *in absentia* trials propelled them to go beyond the provisions contained under FD *in absentia* in their national laws implementing the EAW.

First, some of them transformed the *optional* ground for refusal of Article 4a into a *mandatory* one (e.g. Germany, Spain, Ireland, Italy, The Netherlands). Even if this is still a controversial point, it seems to revert the logic of the Framework Decision, as it transforms a “possibility of non-execution (...)” into a requirement of non-execution.”⁹⁸⁴

<http://europeanlawblog.eu/2014/03/17/stc-262014-the-spanish-constitutional-court-modifies-its-case-law-in-response-to-the-cjeus-melloni-judgment/>

⁹⁷⁵ Sentencia 91/2000, 30 March.

⁹⁷⁶ If a person has been convicted in his absence, a surrender for the execution of that conviction must be made conditional on the right to challenge the conviction in order to safeguard that person’s rights of defence, even if he had given power of attorney to a lawyer who effectively represented him at the trial. See *Melloni*, op. cit., paras 20 and 22.

⁹⁷⁷ Sentencias n. 177/2006 of 5 June; 199/2009 of 28 September.

⁹⁷⁸ PC-OC (2013) 01 Rev.3 Bil., p. 17

⁹⁷⁹ German Code of Criminal Procedure, §§ 230(1), 232. The constitutional identity control was applied for the very first time in EAW proceedings, but it cannot be excluded that it may be transposed to other mutual recognition instruments that carry the risk of infringing the constitutional guarantees formulated in the German Basic Law.

⁹⁸⁰ The defendant i) has been invited and informed that the trial may go on without him/her; ii) consented to the trial being held in absentia and his/her presence is not necessary; the person is evading the proceedings. See National report No 2 on Finland, Section on in absentia (point 35).

⁹⁸¹ The French CCP was amended in 2004 to abolish the *jugement par contumace*, whereby the accused person could be sentenced without receiving legal assistance, nor having the right to an appeal (see ex Arts 627-632 CCP). See ECtHR, *Krombach v France*, App no 29731/96, 13 February 2001. The Court ruled that contumace sentences were in breach of Art 6(3) ECHR.

⁹⁸² National report No 2 on the Netherlands, Section on in absentia (point 4). The French CCP provides for three different types of “judgment by default”: i) by default; ii) by repeated default; or iii) by adversarial hearing subject to notification. The conditions of in absentia trials differ from a category to another. See PC-OC (2013) 01 Rev.3 Bil., p. 16

⁹⁸³ B. de Sousa Santos (ed), *The European arrest warrant in law and in practice: a comparative study for the consolidation of the European law-enforcement area*, Coimbra: Permanent Observatory of Justice, University of Coimbra, 2010.

⁹⁸⁴ Opinion of Advocate General Bobek in Case C-270/17 PPU, *Openbaar Ministerie v Tadas Tupikas*, 26 July 2017, para 75.

Some countries even extended the scope of Article 4a FD EAW.

This was especially the case of Dutch law that included appeal proceedings within its ambit; the Dutch authorities referred a question to the Court of Justice on the scope of the concept of “trial resulting in the decision” of FD EAW in the *Tupikas* case.⁹⁸⁵ The Court endorsed the Dutch approach, which is more protective: it applies the guarantees formulated under Article 4a to both the first decision and the decision taken in appeal. The Court’s reasoning relied on the broad scope of Article 6 ECHR, which applied not only to the finding of a guilt, but also to the determination of the sentence. The Court asserted that, because the appeal proceedings are decisive to determine the sentence of the person, the defendant must be able to exercise his/her rights of defence to influence the final decision that is taken in this respect. The Court reiterated its judgment in the subsequent *Zdziaszek* case whereby the Dutch authorities asked whether proceedings resulting in a cumulative sentence constituted a trial resulting in a decision within the meaning of FD EAW.⁹⁸⁶

In Ireland, the transposition law refers to non-appearance “at the proceedings”, whereas FD *in absentia* only refers to non-appearance “at the trial.” This minor difference in transposition was brought to light in 2017, in a case concerning an *in absentia* judgment on sentencing. The Polish authorities had imposed a sentence on the appellant. Once part-served, the sentence was suspended, and then re-instated without notification to the appellant, who was sought for surrender in Ireland. The question boiled down to whether the case actually fell under the provisions preventing surrender. The Irish court concluded to the absence of clarity on the applicability of Article 4a FD and held it necessary to make a reference to the Court of Justice of the European Union on the scope of “trial” within Article 4a of the Framework Decision on European Arrest Warrant.⁹⁸⁷ On the basis of the judgments delivered in the *Tupikas* and *Zdziaszek* cases, the Irish Court withdrew its reference⁹⁸⁸.

7.2. Impact on mutual recognition

The coexistence of different approaches to *in absentia* trials lies at the core of the longstanding debate on the conundrum faced by EU law since *Melloni* on the adoption of common *minimum* standards. Whereas minimum rules are beneficial for some Member States, other national orders are prevented from going beyond EU guarantees. In some cases, in order to ensure the effectiveness of the EAW mechanism, those MSs may be forced to lower their national standard of protection, as has happened in Spain after the Court rendered the *Melloni* judgment. *Melloni* was heavily criticised in the literature, and reasoning of the Court was condemned for “(endorsing) the Union’s objective speedy surrender, renouncing the highest level of protection of fundamental rights provided by the law of the executing State.”⁹⁸⁹

Dissatisfaction with the low protection afforded to individuals confronted to *in absentia* trials in some countries, propelled some MSs to re-install a degree of control over the application of EU law, thus threatening the primacy of EU law (7.2.1). The coexistence of different approaches to *in absentia* trials has had also several implications for the practical operation of the EAW. Surrender procedures have been delayed, or blocked, because EU States do not always conform to FD *in absentia* provisions (7.2.2.)

⁹⁸⁵ C-270/17 PPU, *Openbaar Ministerie v Tadas Tupikas*, 10 August 2017. In the proceedings at hand, it could not be ascertained whether *Tupikas*, during appeal proceedings taking place in Lithuania, had been informed of the time and place of the hearing, or had authorised his lawyer to represent him.

⁹⁸⁶ See C-271/17 PPU, *Zdziaszek*, 10 August 2017.

⁹⁸⁷ Minister for Justice v Lipinski, [2017] IESC 26

⁹⁸⁸ CJEU, Order 23 February 2018 (Removal from the Register), Case C-376/17.

⁹⁸⁹ M. Daniele, Evidence gathering in the realm of the European Investigation Order, From National Rules to Global Principles, *New Journal of European Criminal Law*, Vol 6, Issue 2, 2015, p. 188. At the same time, if the CJEU attempted to prevent Member States from invoking their national standards in the operation of FD EAW. Granting such margin for manoeuvre to Member States would have been detrimental to the effectiveness of the principle of mutual recognition, mutual trust and would have called into question the primacy of EU law.

7.2.1. Dissatisfaction with the minimum standards approach and re-installment of a degree of national control

The existence of widely divergent standards across the Union means that some countries consider that the level of protection they confer to EU citizens is higher than in other EU States. Actual or perceived asymmetries propelled some MSs to re-install a certain degree of national control over surrender procedures (A). The Court of Justice, in the *Taricco* saga, moreover seemed to adopt a relatively flexible approach to the existence of national rules, alongside EU standards, heralding a departure from the rigid stance it took in *Melloni* (B).

A. Re-installment of a degree of national control over surrender procedures

Countries with a high standard of protection may find themselves dissatisfied with the standards applicable in other legal orders. Fears that executing countries may have to lower their fundamental rights standards in transnational cooperation situations could give rise to “episodes of mistrust” towards certain legislative systems deemed unable to provide “adequate guarantees.”⁹⁹⁰

Although Spain revised its Constitution in order to conform to the CJEU ruling in *Melloni*, the Spanish Constitutional Court, in its judgment implementing the CJEU’s ruling in *Melloni*, emitted a reserve as regards the primacy of EU law.⁹⁹¹ It emphasised that the sovereignty of the Spanish people should be preserved, and affirmed the supremacy of the Spanish Constitution. It moreover warned that the Constitutional court remained competent if Union law were to become irreconcilable with the Spanish Constitution.⁹⁹²

The German Federal Constitutional Court expressed an even clearer warning to the EU. By order of 15 December 2015, the Federal Constitutional Court applied the “identity review” to an *in absentia* case.⁹⁹³ The concept of identity review directly stems of the *Solange* jurisprudence,⁹⁹⁴ and implies that all the elements constitutive of Germany’s constitutional identity, may act as a limit to the application of EU (or international) laws that entail a breach of this identity.⁹⁹⁵ In the case at hand, it was questionable whether the complainant would have the opportunity of a new evidentiary hearing against the judgment *in absentia* at the appeal stage in Italy. The Federal Constitutional Court quashed the decision taken by a lower court to execute an EAW request issued by Italian judicial authorities, as it violated the right to a fair trial as a constitutive element of the right to human dignity enshrined under Art 1 of the German Constitution. It emphasised that:

“The fact that the principle of mutual trust does not apply without limits even according to Union law also signifies that the national judicial authorities, upon relevant indications, are authorised, and under an obligation, to review whether the requirements under the rule of law have been complied with, even if the European arrest warrant formally meets the requirements of the Framework Decision. Also under a Union law perspective, an effective judicial review presupposes that the court that decides about the extradition is able to conduct the relevant investigations as long as the extradition system established by the Framework Decision remains effective in practice. As a consequence, the requirements under

⁹⁹⁰ B. Galgani, Extradition, Political Offence and the Discrimination Clause, in S. Ruggeri (ed), *Transnational Inquiries and the Protection of Fundamental Rights in Criminal Proceedings*, 2013, op. cit., p. 173

⁹⁹¹ Sentencia 26/2014, 13 February 2014

⁹⁹² Ibid, para 3.

⁹⁹³ Federal Constitutional Court of Germany, Protection of fundamental rights in individual cases is ensured as part of identity review, Press Release No. 4/2016 of 26 January 2016. Retrieved at:

http://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2016/bvg16-004.html?jsessionid=A1235A9967C58FC4EC86960E0E430AD2_2_cid392

⁹⁹⁴ In the *Solange I* order of 1974, the Federal Constitutional Court established an identity review mechanism according to which EU law would not be applied in Germany if it conflicted with those rights that lie at the core of the constitutional identity of Germany. This ruling was reviewed by the *Solange II* order, after the EU framework for fundamental rights underwent several improvements. The order of 2015 has been dubbed ‘*Solange III*’ by some commentators. See M. Hong, Human Dignity and Constitutional Identity: The *Solange-III*-Decision of the German Constitutional Court, blog post, *VerfBlog*, 2016. Retrieved at: <https://verfassungsblog.de/human-dignity-and-constitutional-identity-the-solange-iii-decision-of-the-german-constitutional-court>. As regards *Solange I* and *Solange II*, see: Internationale Handelsgesellschaft von Einfuhr-und Vorratsstelle für Getreide und Futtermittel [1974] Decision of 29 May 1974, BVerfGE 37, 271 CMLR 540 (*Solange I*); Order of the Second Senate of the German Constitutional Court of 22 October 1986 - 2 BvR 197/83 (*Solange II*).

⁹⁹⁵ On the identity review and the internal struggle within the German legal academy to accept the primacy of EU law, see B. Davies, “Resistance to European Law and Constitutional Identity in Germany: Herbert Kraus and *Solange* in its Intellectual Context”, *European Law Journal*, Vol 21, No 4, 2015, pp. 434-459.

Union law with regard to the execution of a European arrest warrant are not beneath those that are required by (the Basic Law) as minimum guarantees of the rights of the accused.”

The identity review triggered in the aforementioned German order, dubbed “Solange III decision”,⁹⁹⁶ occurred twice since then, as regards the right to remain silent,⁹⁹⁷ and detention conditions.⁹⁹⁸

The propensity of some MSs to challenge the primacy of EU law should not be neglected. Fears that this trend finds echoes in other countries should not be overlooked. The right to be present at the trial is a fundamental right which is sometimes guaranteed by national constitutions. Even though the national laws do not always provide that executions of EAWs should be systematically turned down if the conditions for the right to be present are not met, all MS examined have introduced – in a more or less explicit manner, a fundamental rights ground for refusal in their national laws transposing the EAW. Even where Member States have not transposed FD *in absentia* as a mandatory ground for refusal, it cannot be excluded that the execution of an EAW could be refused on the ground that the fundamental rights of the defendant will not be safeguarded in the issuing country. According to the findings of a recent study, *in absentia* trials is where the fundamental rights ground for refusal enshrined under national laws implementing the EAW is most likely to be triggered.⁹⁹⁹

B. Minimum standards: a more flexible approach after the *Taricco* saga?

Recent case law shows that the debate on whether national protection standards should prevail over EU law is far from over and is not confined to *in absentia* trials.

The question of national differences was analysed further in the so-called *Taricco* saga, where the Court, in its final judgment, accommodated a certain degree of differentiation so as to protect the fundamental principles enshrined at the national level.

The issue at hand was the compatibility of time limitations introduced in the Italian criminal code in tax fraud with the Member States' general obligation to fight against PIF offences under Art 325 TFEU.¹⁰⁰⁰ In *Taricco I*, the Court of Justice overturned the time-limitation system enshrined in Italian law to give full effect to Art 325 TFEU.¹⁰⁰¹ Those findings were contested by the Italian Court of Cassation in the *Taricco II* case¹⁰⁰² on several grounds. Inter alia,¹⁰⁰³ it was argued that the Italian time-limitation is covered by the legality principle as enshrined in the Constitution,¹⁰⁰⁴ and the Italian Constitution guarantees a higher level of protection of fundamental rights than that recognised in EU law. References were made to Art 53 of the Charter,¹⁰⁰⁵ and to Art 4(2) TEU, to support the argument that national courts cannot conform to *Taricco I* without calling into question the Italian constitutional identity.¹⁰⁰⁶

The Court, in its judgment, somehow shelved the issue of confronting the case at hand to the principles of *Melloni*,¹⁰⁰⁷ which however had been discussed extensively in its AG's opinion.¹⁰⁰⁸ Instead, it reaffirmed the crucial aspects of *Taricco I*, such as the direct effect of

⁹⁹⁶ M. Hong, “Human Dignity and Constitutional Identity: The Solange-III-Decision of the German Constitutional Court”, *Verfassungsblog*, 18 February 2016. Retrieved at: <https://verfassungsblog.de/human-dignity-and-constitutional-identity-the-solange-iii-decision-of-the-german-constitutional-court/>

⁹⁹⁷ *Supra*, Section 2.

⁹⁹⁸ *Supra*, Section 5.

⁹⁹⁹ T. Marguery (ed.), *Mutual Trust Under Pressure*, 2018, op. cit., p. 421

¹⁰⁰⁰ C-105/14, *Taricco I* and others, ‘*Taricco I*’, 8 September 2015

¹⁰⁰¹ C-105/14, *Taricco I*, 2015, op. cit., para 58. See also para 51: “The provisions of EU primary law impose on Member States a precise obligation as to the result to be achieved that is not subject to any condition regarding the application of the rule ... which they lay down.”

¹⁰⁰² C-42/17, *M.A.S. and M.B.*, ‘*Taricco II*’, 5 December 2017

¹⁰⁰³ The Court of Cassation also argued that the criteria laid down in *Taricco I* for the disapplication of the provisions of Italian law, were vague and generic, and raised issues from the perspective of legal certainty.

¹⁰⁰⁴ See the Order of the Court delivered on 28 February 2017 in C-42/17, available in French and Italian only.

¹⁰⁰⁵ Opinion of Advocate General Bot delivered on 18 July 2017 in C-42/17, para 8.

¹⁰⁰⁶ *Ibid*, paras 120-121.

¹⁰⁰⁷ It reiterated the principles of *Melloni*, namely that national courts are free to apply national standards provided that the primacy, unity and effectiveness of EU law are not compromised, however it did so by quoting *Akerberg Fransson*, and not *Melloni*. C-42/17, ‘*Taricco II*’, 2017, op. cit., para 47.

¹⁰⁰⁸ AG Bot in his opinion showed no signs of compromise. Instead it upheld the principles formulated in *Melloni* and, for the same reasons as in this latter judgment, overturned the interpretation made by the Italian Court of Cassation

Art 325 TFEU, and the obligation to comply with that provision, but allowed the Italian courts to disapply the findings of *Taricco I* whenever the requirements of certainty, precision, and foreseeability inherent to the principle of legality would be violated.¹⁰⁰⁹

Otherwise put, the Court allowed the Italian criminal courts to apply their own national standards of protection. It is difficult to say whether the *Taricco II* case constitutes “a risk or an opportunity”¹⁰¹⁰ for *in absentia* trials, and cross-border cooperation at large. Some have argued *Taricco II* is the recognition that the specificities of the domestic criminal law enshrined in the national constitution deserve to be taken into account and considered in balance with the effectiveness of EU law.¹⁰¹¹ The implications of the *Taricco II* judgment are yet difficult to discern and raise interpretation questions. One of them is the extent to which the Court will maintain its flexible approach in future rulings or stick to the strict application of the principle of effectiveness formulated in *Melloni*, thus “accepting the risk of new rebellions.”¹⁰¹²

The attitude of the Court is illustrative of the longstanding difficulty to strike a balance between safeguarding the human rights of the person on the one hand, and ensuring the effective application of cross-border instruments on the other.

The standards developed by the Framework Decision on *in absentia* trials were criticised in some respects for taking a pro-recognition approach. Since it is only a mutual recognition instrument, it only deals with how to ascertain whether a retrial will take place after a person is tried in absentia, and not what this retrial entails.¹⁰¹³ The need to ensure that a fair trial is taking place, by granting the opportunity to examine witnesses for example, must be taken into consideration at the retrial stage in order to satisfy Art 6 ECHR.¹⁰¹⁴

Against this background, it is perhaps no surprise that some MSs opted to transform these originally optional grounds for refusal into mandatory ones. For example, it was underlined that the optional nature of the grounds for non-execution means that the FD does not define a minimum standard, but rather a *maximum* standard on the conditions for surrender.¹⁰¹⁵ Put otherwise, the FD allows the executing State to apply a lower threshold on *in absentia* trials.¹⁰¹⁶ The frustration that may result from this race to the bottom will certainly not amount to creating more ‘trust’ across the Union, as evidenced by the “conditional acceptance of EU law primacy”¹⁰¹⁷ by national constitutional courts in *Taricco II*.

7.2.2. Obstacles to the practical operation of EAWs

The presence of variations in the standards applicable to *in absentia* trials hinders the operation of the EAW in several respects.

The description of differences revealed that some MSs have gone further than the EAW FD and have transformed the optional ground for refusal into a mandatory one. This amounted to less flexibility in the execution of EAWs (A). Delays and non-executions of EAWs have also occurred as a result from the “clash” of understandings of the conditions laid down under FD *in absentia* (B). Despite the Court’s recent attempt in the *Dworzecki* case at clarifying the

of Art 53 of the Charter by virtue of the principle of primacy of EU law. Opinion of Advocate General Bot delivered on 18 July 2017 in C-42/17, paras 155-6.

¹⁰⁰⁹ C-42/17, *Taricco II*, 2017, op. cit., para 60-62.

¹⁰¹⁰ S. Manacorda, “The Taricco saga: A risk or an opportunity for European Criminal Law”, *New Journal of European Criminal Law*, Vol 9, Issue 1, 2018, pp. 4-11

¹⁰¹¹ Ibid. It is also the view taken by F. Viganò, Melloni overruled? Considerations on the ‘Taricco II’ judgment of the Court of Justice, *New Journal of European Criminal Law*, Vol 9, Issue 1, 2018, pp. 18-23

¹⁰¹² F. Viganò, “Melloni overruled? Considerations on the ‘Taricco II’ judgment of the Court of Justice”, 2018, op. cit., p. 22. On the implications of Taricco II on the three pending judgments of Scialdone, Kolev and Menci, see G. Giuffrida, *New Journal of European Criminal Law*, Vol 9, Issue 1, 2018, pp. 31-37

¹⁰¹³ JUSTICE, European Arrest Warrants, Ensuring an effective defence, Report, 2012, op. cit., p. 23

¹⁰¹⁴ Ibid.

¹⁰¹⁵ Ibid.

¹⁰¹⁶ Ibid. Emphasis added.

¹⁰¹⁷ M. Krajewski, “‘Conditional’ primacy of EU law and its deliberative value : an imperfect illustration from Taricco II”, Blog post, European Law Blog, 18 December 2017.

Retrieved at: <https://europeanlawblog.eu/2017/12/18/conditional-primacy-of-eu-law-and-its-deliberative-value-an-imperfect-illustration-from-taricco-ii/>

provisions of the FD by imposing an obligation of information-exchanges between authorities, the judgment may remain difficult to implement in practice (C). Finally, the Presumption of Innocence Directive significantly lacks “teeth” and, by simplifying the provisions of the FD, seems to open the door to multiple (and widely divergent) interpretations at the national level (D).

A. Transformation by some MSs of the optional ground for refusal into a mandatory one

The initiative taken by some countries to transpose the optional ground for refusal contained under FD in *absentia* into a mandatory ground for refusal is problematic in several respects.

As regards Art 4(6) FD EAW, the *Popławski* judgement suggests at least that transforming an optional refusal into a mandatory one generates tensions.¹⁰¹⁸ In this judgment, the executing State had transformed Art 4(6) FD EAW into a mandatory ground for non-execution and refused the surrender of a person requested for the purpose of serving a custodial sentence, without yet undertaking that sentence itself. The Court held that:

“Legislation of a Member State which implements Art 4(6) of Framework Decision 2002/584 by providing that its judicial authorities are, in any event, obliged to refuse to execute an EAW in the event that the requested person resides in that Member State, without those authorities having any margin of discretion, and without that Member State actually undertaking to execute the custodial sentence pronounced against that requested person, thereby creating a risk of impunity of that requested person, *cannot be regarded as compatible* with that framework decision”.

Whereas the Court was confronted, in this case, to a clear risk of impunity, this judgment suggests that it is not at ease with the transposition by the MSs of an optional ground for refusal into a mandatory one. As noted by Advocate General Bot in *Popławski*, “the option which, according to the Court, the Member States have as to whether or not to transpose the grounds for optional non-execution into their national law does not mean for that matter that ... they are at liberty to interpret the words ‘may refuse’ as establishing an obligation incumbent on their judicial authorities to refuse to execute a European arrest warrant.”¹⁰¹⁹ The choice of some MSs to opt for mandatory refusals instead of optional refusals in the field of *in absentia* trials, illustrates well the underlying tension between the risk of impunity deriving from an all too strict approach to *in absentia* trials, and the due process imperative of giving the defence the opportunity to present its case.

Moreover, setting higher standards may pose significant obstacles to the fluidity of mutual recognition of national decisions. It does not necessarily imply that EAWs are systematically refused by the executing State. However, the mere fact that the person to be surrendered appeals to the judicial authorities of the executing State suffices to cause significant delays to the execution of the EAW, thus affecting the operation of mutual recognition. In the *Tupikas* case, AG Bobek held that the Dutch transposition of Article 4a was considered “too rigid” and amounted to difficulties in the execution of EAW.¹⁰²⁰

B. Delays and non-executions of EAWs

The “clash” between countries where the right to be present at a trial is of constitutional importance and others has sometimes resulted in the non-execution of EAW requests. For example, in an EAW case involving the German surrender to Romania of a detained person tried *in absentia*, the Romanian authorities considered that connecting the defendant via videoconferencing link to the main hearing was sufficient to ensure that the right to be

¹⁰¹⁸ In the case at hand, the Netherlands had implemented the optional ground for refusal of Article 4(6) FD EAW as a mandatory one. See C-579/15, *Popławski*, 29 June 2017, para 23: “legislation of a Member State which implements Article 4(6) of Framework Decision 2002/584 by providing that its judicial authorities are, in any event, obliged to refuse to execute an EAW in the event that the requested person resides in that Member State, without those authorities having any margin of discretion, and without that Member State actually undertaking to execute the custodial sentence pronounced against that requested person, thereby creating a risk of impunity of that requested person, *cannot be regarded as compatible* with that framework decision.”

¹⁰¹⁹ Opinion of Advocate General Bot delivered on 15 February 2017 in Case C-579/15, *Popławski*, para 28

¹⁰²⁰ Opinion of Advocate General Bobek in Case C-270/17 PPU, *Openbaar Ministerie v Tadas Tupikas*, 26 July 2017, paras 79-80

present at the trial had been enforced.¹⁰²¹ However, this was deemed unacceptable by the German authorities.

The existence of different understandings of the right to be present at one's trial propelled Member States to request further information on the conditions surrounding *in absentia* trials in the issuing State.

However, obtaining information on whether the trial has taken place *in absentia* in accordance with the conditions set in both the FD and CJEU jurisprudence is sometimes a difficult process.¹⁰²² Although information contained in the warrant should be sufficient to enable the executing authority to arrive at a decision on the application for surrender, additional requests are sometimes necessary. In a 2008 case,¹⁰²³ the Irish court explained that even with a carefully designed and properly filled form of warrant, in particular cases ambiguities might arise, or some lacunae on points of detail in the information may exist, particularly when the standard form of arrest warrant falls to be issued by a judicial authority in one legal system and executed by a judicial authority in another legal system, for example due to the use of different languages. Yet, the difficulty to obtain guarantees from the issuing State is an issue that has been raised in several reports.¹⁰²⁴ For example, French judges reported that the information given by issuing authorities on whether and how the person was notified of the date and place of the trial lacks precision and is not well-translated.¹⁰²⁵ Answers to requests for additional information are sometimes limited to the mere reaffirmation that the notification was duly made.¹⁰²⁶

In the absence of satisfying guarantees, EAWs requests are often turned down in France,¹⁰²⁷ while Ireland¹⁰²⁸ and Germany¹⁰²⁹ faced similar issues. Countries where EAWs are most often subject to information requests and refusals include Romania and Poland.¹⁰³⁰

Second, contradictory trends could be discerned as regards the guarantees needed from the issuing State in order to make a decision on surrender. In some cases, the executing State may be satisfied with a mere diplomatic assurance from the issuing State. Consents to surrender are sometimes grounded on the presumption that ECHR standards are met, pursuant to the principle of mutual trust.¹⁰³¹ In others, higher guarantees must be received from the issuing State. It is interesting to contrast the approaches taken by Germany and the UK in the cases below.

In Germany, by order of 5 February 2015,¹⁰³² a regional court denied the execution of an EAW from Romania since the then rules of the Romanian criminal procedure law on providing the defendant with a retrial are not considered in line with the requirements of the German law implementing the EAW. It added that a diplomatic assurance from the Romanian

¹⁰²¹ See OLG Karlsruhe, Beschl. v. 27.4.2017, Ausl 301 AR 35/17. The German authorities refused the execution of the EAW.

¹⁰²² A. Suominen, The Finnish approach to mutual recognition in criminal matters and its implementation, in G. Vernimmen-Van Tiggelen, L. Surano, A. Weyembergh, *The future of mutual recognition in criminal matters*, Bruxelles: PUB, 2009

¹⁰²³ [2008] IESC 73, 19th December 2008. See National report No 1 on Ireland, Section on the s. 21A of the 2003 EAW Implementing Act (point 5.3.)

¹⁰²⁴ JUSTICE, European Arrest Warrants, Ensuring an effective defence, Report, 2012, op. cit., National reports on France, Ireland and Germany (see below).

¹⁰²⁵ National report No 2 on France, *ibid*.

¹⁰²⁶ *Ibid*.

¹⁰²⁷ The non-fulfilling of *in absentia* conditions by issuing States is the most frequently used ground for refusal in France. National report No 2 on France, Section on adequacy in light of the case law and practice on judicial cooperation.

¹⁰²⁸ National report No 1 on Ireland, Section on the s. 21A of the 2003 EAW Implementing Act (point 5.3.)

¹⁰²⁹ National report No 1 on Germany, Section on other case law on *in absentia* (II).

¹⁰³⁰ As noted in the German, Dutch, Irish and French reports.

¹⁰³¹ See case law on *in absentia* of National report No 1 on the Netherlands. The case law that references to mutual trust and compliance with the Charter and the ECHR's rules form the main justification of the court in determining whether the EAW should be executed. The Dutch law implementing the EAW also stipulates that the conditions surrounding *in absentia* trials are governed by the procedural rules of the issuing State. In other words, the obligation to refuse surrender depends on the degree of compliance of the *in absentia* trial procedure at hand with the rules of the issuing State, rather than those of the Dutch law.

¹⁰³² OLG Stuttgart, Beschluss vom 05. Februar 2015 – 1 Ausl 6/15

authorities that the retrial will be guaranteed and the rights of the person concerned will be maintained, cannot replace the legislation in place. This approach taken by Germany stands in sharp contrast with the position adopted by the UK in the *Da An Chen* case.¹⁰³³ *Da An Chen* was tried *in absentia* in Romania without his knowledge. He was arrested in the UK upon request of the Romanian authorities and sentenced to a twenty years of prison for allegedly committing murder. One year later, the British authorities ordered his extradition for the purpose of executing the twenty-year prison sentence on the basis of the decision taken by the Romanian authorities. Interestingly, the British authorities assumed that Mr Chen would be granted a retrial upon his arrival, based on Romania's membership of the ECHR, as well as reports and assurances given by the Romanian authorities.¹⁰³⁴ A hearing was organised in order to determine whether a new trial should take place. However, Mr Chen's sentence was upheld, and no retrial was granted.

C. The *Dworzecki* judgment: an attempt at clarifying the conditions of *in absentia* trials?

The Court made a step forward in addressing those concerns in the *Dworzecki* judgment.¹⁰³⁵ It clarified the content of information that must be exchanged between the issuing and executing authorities, in order to facilitate the task of the executing State of establishing whether the guarantees of a fair trial are upheld. It held that issuing authorities must include in the EAW evidence on the basis of which it found that the person concerned received official information on the place and date of the trial.¹⁰³⁶ Moreover, that authority must, at the request of the executing authority, provide additional information.¹⁰³⁷ Meanwhile, executing authorities must examine if there was a possible lack of diligence in the conduct of the concerned person, e.g. if he or she tried to escape the summons directed to him; and specific provisions of national law of the issuing State, such as the right to ask for a new trial under certain conditions.¹⁰³⁸ If none of the conditions prove satisfying enough to surrender the person, the authorities may "(request) supplementary information, as a matter of urgency, if (the issuing authority) finds that the information communicated by the issuing Member State is insufficient to allow it to decide on surrender."¹⁰³⁹

Ultimately, the Court clarified the meaning of "summoned in person ... or by other means" and "informed in such a manner that it was unequivocally established that (the person in question) was aware of the scheduled trial" under Article 4a(1) FD *in absentia*. The Court ruled that "other means" should be understood as "a method of service" that "ensures that the person concerned has himself received the summons and ... has been informed of the date and place of his trial,"¹⁰⁴⁰ and "(achieves) the same high level of protection of the person summoned."¹⁰⁴¹ It did not rule out that handling information on the date and place of the trial to a third party was *per se* contradictory to Article 4a, however it must be "unequivocally established" that the information was passed on to the person concerned, and such information should be included in the EAW by the issuing State.¹⁰⁴² The specific guarantees contained under this provision are summarised in AG Bobek's opinion; they relate to "the methods whereby the information is received (the information must be official and not merely circumstantial or informal), its terms (it must include the date and place of the trial) and its result (the person concerned must be *actually* informed, in such a manner that the fact that

¹⁰³³ Fair Trials, The *Da An Chen* case, available at: <https://www.fairtrials.org/da-an-chen/>

¹⁰³⁴ House of Lords, Joint Committee on Human Rights, *The Human Rights Implications of UK Extradition Policy, Fifteenth Report of Session 2010-12*, London: The Stationery Office Limited, 2011, p. 21

¹⁰³⁵ C-108/16 PPU, *Dworzecki*, 24 May 2016

¹⁰³⁶ *Ibid*, para 49

¹⁰³⁷ *Ibid*, para 53. Requests for additional information were already filed before the Court of Justice rendered its decision in *Dworzecki*. See for example the following case from the French Cassation Court: Cour de cassation, Chambre criminelle, 25 mars 2014, n° 14-81.430, inédit.

¹⁰³⁸ *Ibid*, paras 51-52

¹⁰³⁹ *Ibid*, para 53

¹⁰⁴⁰ CJEU, C-108/16 PPU, *Pawel Dworzecki*, 24 May 2016, para 45

¹⁰⁴¹ *Ibid*, para 46

¹⁰⁴² *Ibid*, paras 48-49.

he was made *aware* of the scheduled trial was established *unequivocally*.”¹⁰⁴³ These conditions are, moreover, cumulative.¹⁰⁴⁴

On the one hand, the clarifications brought by the Court in recent case law are welcome and could facilitate the implementation of the conditions contained under Art 4a FD EAW.¹⁰⁴⁵ Issuing MSs now find themselves bound by an obligation to provide information upon requests to the executing State. Thus, the Court transformed what used to be an *ad hoc* practice implemented by executing authorities into a formal procedure. Furthermore, the summoning conditions have been clarified, thus providing indications to the executing State as regards the type and content of information they may request from the issuing country in future EAW procedures. The *Dworzecki* judgment is also eponymous with a more values-based approach taken by the Court, through the imposition of a duty onto the executing State to conduct a thorough assessment of the conditions in which the *in absentia* trial took/would take place in the issuing State.

On the other hand, the procedures for *in absentia* surrender remain constrained by the same time-limits enshrined under FD EAW as before. This means that the executing State will have to check whether the defence rights of the person are respected within 60 days after the EAW was transmitted by the issuing country. It remains to be seen whether the indications provided by the Court of Justice in *Dworzecki* will prove sufficient to allow executing States to receive all the guarantees *at a sufficiently early stage of the procedure* to enable them to assess whether the right to a fair trial will be upheld.

D. The Presumption of Innocence Directive: a non-solution

The Presumption of Innocence Directive builds on the provisions enshrined in FD *in absentia*. Unfortunately, the directive seems to be limited to a mere codification of the existing *acquis*, thus limiting its potential to raise the level of protection afforded to individuals.

Furthermore, some of the provisions it contains even *simplified* the conditions laid down under FD *in absentia*.¹⁰⁴⁶ Thus, pursuant to Art 8 of the Presumption of Innocence Directive, a decision taken *in absentia* can be enforced, provided that the person, upon apprehension, is informed of the possibility to challenge the decision, and of the right to a new trial or to *another legal remedy*.¹⁰⁴⁷ The use of ‘another legal remedy’ under the latter provision is problematic as it seems to open the door to an indefinite number of alternatives to the right to a retrial in comparison to the provisions of the FD. The qualitative requirements introduced under Art 9, that both the retrial and the remedy must ensure a fresh reassessment of the merits of the case, including a fresh examination of evidence, may not be sufficient; take for example a situation where the sole ‘other legal remedy’ available is an appeal before an appeal court, if the person loses this appeal, then no other alternatives will be available to that person.¹⁰⁴⁸ A certain degree of unequal treatment may arise between those entitled to a new trial in some Member States, while in other jurisdictions the defendants will solely benefit from a possibility to appeal. Could, for example, the execution of an EAW for the purpose of serving a sentence rendered *in absentia* be refused by the executing authorities on the grounds that the defendant will not be provided a new trial in the issuing country but a mere appeal possibility? This may very well occur in those countries where the constitutional courts have taken a strict stance with regard to *in absentia* trials. Risks of

¹⁰⁴³ Opinion of Advocate-General Bobek delivered on 11 May 2016, Case C-108/16 PPU, para 62.

¹⁰⁴⁴ *Ibid*, para 63.

¹⁰⁴⁵ This is also the view of our Spanish expert. See National report No 2 on Spain, Section on effectiveness of EU law on national criminal procedure (point 11).

¹⁰⁴⁶ Thus, Art 8 provides that decisions on the guilt or innocence can only be taken *in absentia* if (i) the suspect/accused person has been informed “in due time” of the trial and the consequences of non-appearance; or (ii) has mandated a lawyer to represent him/her. If these conditions are not met, the decision can be challenged by the suspect/accused person and a new trial may take place. See Arts 8(2)a and 9 Directive 2016/343/EU.

¹⁰⁴⁷ *Ibid*.

¹⁰⁴⁸ See S. Cras, A. Erbezniak, The Directive on the Presumption of Innocence and the Right to Be Present at Trial, Genesis and description of the new EU-Measure, *eu crim 1/2016*; S. Ruggeri, *Inaudito reo* Proceedings, Defence Rights, and Harmonisation Goals in the EU, *eu crim 1/2016*

paralysing the operation of EAWs, therefore, cannot be fully prevented by the entry into force of the Presumption of Innocence Directive.

7.3. Recommendations

(i) Legislative option

FD *in absentia* sought to improve the principle of mutual recognition by narrowing down the margin for discretion enjoyed by the executing Member State when deciding whether to surrender a person convicted *in absentia*.¹⁰⁴⁹ The fact that there is already two pieces of legislation on this matter, i.e. not only the FD but also the more recent Presumption of Innocence Directive, makes it difficult to advocate in favour of a new instrument. However, the several implementation gaps encountered in the national laws of EU States, in particular with respect to the way the person is summoned, or the conditions in which the retrial takes place, show that a more detailed and comprehensive EU framework/guidance is needed.

(ii) Non legislative options

(ii)a. Adopting guidelines on conditions allowing *in absentia* trials

Instead of a revision of existing instruments, a guidance document or a practical handbook on *in absentia* trials could be developed,¹⁰⁵⁰ so as to bring about a more uniform approach across the EU.¹⁰⁵¹ The most recent case law of the Court of Justice could be taken into consideration in framing those guidelines. Reference could be made to the *Dworzecki* judgment, as well as the *Tupikas* case, where the Court shed some light on the broad meaning given to the “at the trial” formula, namely that the decisive stage to which the person must appear is the one whereby the ultimate sentence is determined.

Thus far, these efforts have remained at embryonic stage. The updated handbook released by the European Commission in 2017 only included a very brief paragraph of the findings of the Court in *Dworzecki*.

(ii)b. Initiating infringement procedures

The Commission should be encouraged to launch infringement procedures against those Member States which do not conform to the conditions for *in absentia* trials laid down in EU legislation and case law. As noted in the French national report,¹⁰⁵² the judges interviewed took the view that obstacles to mutual recognition do not necessarily stem from a deficit in the level of protection provided under FD *in absentia*, but rather originate from implementation gaps. Particular attention should be dedicated to the correct implementation of the Presumption of Innocence Directive, so as not to limit the uniform application of the conditions imposed on *in absentia* trials to the circumstance of EAW surrenders, and extend the same level of protection to proceedings taking place at the domestic level. This would certainly reassure those Member States where the right to be present at a trial is of constitutional significance, and overall enhance mutual trust.

(ii)c. Enhancing exchanges of information

Ultimately, fulfilling the conditions laid down in CJEU's *Dworzecki* judgment undoubtedly imposes an information-exchange requirement on the Member States. The French rapporteur noted that obstacles to the operation of the EAW occurred mainly as a result of lack of rigor regarding how information on the way the person was summoned is conveyed to the executing State.¹⁰⁵³ In order to avoid significant delays in the transmission of the relevant

¹⁰⁴⁹ K. Lenaerts, The principle of mutual recognition in the Area of Freedom, Security and Justice, Fourth annual Sir Jeremy Lever lecture, All Souls College, University of Oxford, 30 January 2015, p. 26. Retrieved at: https://www.law.ox.ac.uk/sites/files/oxlaw/the_principle_of_mutual_recognition_in_the_area_of_freedom_judge_lenaerts.pdf

JUSTICE, European Arrest Warrants, Ensuring an effective defence, Report, 2012, op. cit., p. 12

¹⁰⁵¹ ECBA, Response to the UK's Home Office Extradition Review, 2011. Retrieved at: http://www.ecba.org/extdocserv/projects/EAW/20110331_ECBA_RespExtradHomeOffice.pdf

¹⁰⁵² National report No 2 on France, Section on adequacy in light of the case law and practice on judicial cooperation.

¹⁰⁵³ Ibid.

information and meet the automaticity and expediency requirements imposed by FD EAW, more systematic recourse should be made to EJM as an information hub about the national laws of the different EU Member States. A cartography of the different implementing rules at the national level of FD *in absentia* and the Presumption of Innocence Directive could be made publicly available on the website of the EJM.

8. COMPENSATION SCHEMES FOR VICTIMS

KEY FINDINGS

- Compensation systems for victims of crime widely vary across the Member States, depending on whether compensation is sought from the State, or from the offender. Within the former, significant variations exist among the MSs in the scope, procedures, time-limits and amounts awarded. Compensation from the offender exists in all MSs, however it can take various forms. For example, not all MSs provide that restitution of the confiscated property is a form of compensation.
- Cross-border compensation from the State is regulated by Directive 2004/80/EC. However, in the absence of approximation of compensation schemes, cross-border cooperation hardly works in practice. Incompatibilities between national systems may arise and give rise to situations where victims are put at disadvantage when seeking compensation in cross-border cases, compared with purely domestic proceedings. Similarly, the *effet utile* of the possibility conferred to victims to obtain compensation through restitution of the confiscated property in cross-border proceedings in the proposal for a regulation on confiscation and freezing orders, will be significantly weakened in the absence of consensus at the national level.
- Directive 2012/29/EU dealing with victims' rights is unlikely to alleviate current obstacles. Compensation from the State does not fall within its scope. Meanwhile, the content, scope and eligibility conditions of the rights to both compensation from the offender and restitution of the confiscated property it confers are left to the discretion of the national legislator.
- A revision of Directive 2004/80/EC on compensation from the State is necessary in the coming years. In this respect, a thorough and comprehensive mapping of existing compensation schemes is needed. The revision process should be seen as an opportunity to explore complementarities and synergies between compensation from the State and compensation from the offender. EU funding should be made available to support a legislative initiative.

8.1. Nature of differences

Compensation for victims is essential in the EU's AFSJ. It bolsters "civic trust" from society, in the capacity of public policies and public authorities to protect citizens.¹⁰⁵⁴

Before delving into the comparative study of compensation schemes, it is useful to note that variations are intrinsically linked to the status of the victim in the criminal law of EU states, along with the nature and degree of their participation in criminal procedures.

A trend common to all EU States is the increasing recognition of victims' rights over the past decade, the latter being either constitutionally protected or granted the status of fundamental rights.¹⁰⁵⁵ An exception to this rule can be found in Ireland, where victims' rights are not directly protected under Irish constitutional law, but are inherent in other rights, such as the (un-enumerated) right to bodily integrity and to property.¹⁰⁵⁶ In some countries, the enhanced protection granted to victims resulted from the incremental development of national case law (e.g. France, Spain)¹⁰⁵⁷ and the pressure of EU legislation (e.g.

¹⁰⁵⁴ Interview at the European Commission. See also D. Maiers 2014, Offender and state compensation for victims of crime, Two decades of development and change", *International Review of Victimology*, Vol 20, Issue 1, 2014, p. 156

¹⁰⁵⁵ National reports No 2, Section on the status of the rights of victims under national law.

¹⁰⁵⁶ National report No 2, Section on the status of the rights of victims under national law (point 3).

¹⁰⁵⁷ National report No 2 on France, Section on the status of the rights of victims (point A); National report No 2 on Spain, Section on the status of the rights of victims (point 3).

Netherlands, Ireland, Italy).¹⁰⁵⁸

The status of victims in criminal proceedings is subject to important variations. In some countries, the victim is not always seen as a party to the proceedings but rather as a witness (e.g. Ireland)¹⁰⁵⁹ and the focus is therefore on protecting victims, rather than enabling them to take part in proceedings.¹⁰⁶⁰ In the Netherlands, the victim is not considered as a party to the proceedings either, but rather as a participant.¹⁰⁶¹

The situation is more nuanced in Italy, where victims harmed by a crime have the right to take a proactive role at the pre-trial stage, even though his/her powers are significantly limited at the trial stage.¹⁰⁶² The Italian system applies a particular regime for victims economically damaged by a crime, a category that embraces both the person who suffered an economic loss and a moral damage as a direct consequence of a crime; only this last category is entitled to intervene in the trial as a civil party.¹⁰⁶³ In other countries, the victim is considered as a civil party to the criminal proceedings (e.g. France, Romania, Spain).¹⁰⁶⁴ Blending the civil and criminal channels avoid separate proceedings and sometimes provide a cheaper and simpler manner to obtain compensation.¹⁰⁶⁵

The German CCP recognises victims as an independent party to the proceedings and provides for their active participation during the criminal procedure, by granting them, *inter alia*, a right to legal assistance, access to the file, and to be present during the trial.¹⁰⁶⁶ This is despite the fact that the term ‘victim’ is not legally defined under German law.¹⁰⁶⁷

The following addresses national differences existing in respect to compensation schemes from the State (8.1.1.) and rules on compensation from the offender (8.1.2.).

8.1.1. State compensation systems

Compensation is regulated at EU level by Directive 2004/80/EC (hereinafter ‘Compensation Directive’) of April 2004. A degree of harmonisation had already been established by a 1983 CoE Convention on compensation of victims of violent crimes, which has been ratified by most countries.¹⁰⁶⁸ The Compensation Directive applies to ‘victims of intentional violent crime’. However, it does not aim at harmonising compensation systems, due to lack of Commission competence to do so.¹⁰⁶⁹ Instead, it establishes a mechanism whereby victims of intentional violent crimes in one MS, may claim compensation in another MS. The rationale for the adoption of the Compensation Directive was to set up a system of cooperation that facilitates access to “fair and appropriate” compensation to victims of violent intentional crimes in cross-border situations.¹⁰⁷⁰ It builds on the principle of equal access to rights and protection formulated in the *Cowan* judgment of 1989, where the Court ruled that the

¹⁰⁵⁸ National report No 2 on the Netherlands, Section on the rights of the defence and the victims (point 1), National report No 2 on Ireland, Section on the status of the rights of victims under national law (point 3), National report No 2 on Italy, Section on Victims (point 23).

¹⁰⁵⁹ National report No 2 on Ireland, Section on victims (point 23).

¹⁰⁶⁰ Under the common law, a victim of a crime also has the right to act as a private prosecutor, but this rarely happens in practice. National report No 2 on Ireland, Section on Victims (point 23). See also Fundamental Rights Agency, Victims of crime in the EU: the extent and nature of support for victims, Report, Vienna: FRA, 2015, p. 29

¹⁰⁶¹ National report No 2 on the Netherlands, Section on the rights of the defence and the victims (point 1)

¹⁰⁶² For example, the victim has a right to search privately for evidence during investigations, to ask the prosecutor to collect evidence through the *incidente probatorio* procedure (i.e. to collect evidence that is at risk of vanishing), to ask for a judicial review of the decision taken by the prosecutor to dismiss the case, etc. At the trial stage however, the witness status of the victim significantly hamper their margin for manoeuvre. National report No 2 on Italy, Section on Victims (point 3)

¹⁰⁶³ National report No 2 on Italy, Section on victims (point 3)

¹⁰⁶⁴ National report No 2 on France, Section on the status of the rights of victims (point A); National report No 2 on Romania, Section on victims (point 3); National report No 2 on Spain (point 24)

¹⁰⁶⁵ Fundamental Rights Agency, “Victims of crime in the EU: the extent and nature of support for victims”, Report, Vienna: FRA, 2015

¹⁰⁶⁶ National reports on Germany, Section on Victims (points B and C).

¹⁰⁶⁷ Ibid.

¹⁰⁶⁸ With the exception of Hungary, Ireland and Italy, among the Member States examined. CoE, Chart of signatures and ratifications of Treaty 116, European Convention on the Compensation of Victims of Violent Crimes, Status as of May 2018.

¹⁰⁶⁹ S. Peers, “EU Justice and Home Affairs Law”, 2016, op. cit., p. 159.

¹⁰⁷⁰ Recital 6 and Art 12(2) Directive 2004/80/EC.

protection of natural persons should be guaranteed whenever they exercise their right of free movement.¹⁰⁷¹ Thus, the State, "in enacting legislation for the compensation of victims of crime, ... takes a position analogous to that of a guarantor with regard to compensation for harm which could not otherwise be redressed, harm arising from the infringement of rights which it was the State's duty to protect but which it was not able to guarantee."¹⁰⁷²

Since then, all Member States examined have set up a national system providing compensation from the State for violent intentional crimes, alongside existing schemes allowing compensation from the offender. However, State compensation has not been subject to approximation measures, despite the adoption of the Compensation Directive in 2004. The directive requires the national compensation scheme of Member States to cover *any* violent intentional crime committed on their territory,¹⁰⁷³ however the organisation and functioning of national compensation schemes remains entirely governed by national authorities. The latter enjoy a large margin of manoeuvre in terms of, inter alia, definitions of victims and crimes, alongside "specific eligibility, conditions and financial ceilings."¹⁰⁷⁴ The following puts the scope, procedures, time-limits and amounts awarded of compensation schemes into comparative perspective.

Scope of compensation schemes

In terms of material scope, the Compensation Directive does not provide a definition of 'violent intentional crime', and significant variations exist at the national level as regards the crimes covered by compensation schemes. As noted by the Court, Member States remain "competent to define the scope of (the violent intentional crime) concept in their domestic law".¹⁰⁷⁵ As a result, what is meant by "intentional violent crimes" differs from a MS to another. For example, the crimes of murder, human trafficking and sexual abuse explicitly feature as grounds for compensation in some countries (e.g. France, Italy, Romania, The Netherlands).¹⁰⁷⁶ Sometimes the compensation scheme also covers less serious attacks, such as theft, fraud, or blackmail, or victims for whom a serious material or psychological condition has arisen (e.g. France).¹⁰⁷⁷ The Spanish compensation system applies to "violent crimes", and more specific references to crimes against sexual freedom and terrorism exist.¹⁰⁷⁸ In Ireland and Germany, the material scope of application of compensation systems is laid down in even broader terms. In Ireland in particular, the Scheme of Compensation for Personal Injuries Criminally Inflicted provides for compensation in case of "crime of violence," but little details are coming within its scope, besides arson, poisoning, and 'injury', including death.¹⁰⁷⁹ The German Compensation Act too covers the administration of poison, alongside the "at least negligent creation of a danger to the life and limb of another person by commission of a crime by means causing a common danger".¹⁰⁸⁰

¹⁰⁷¹ It draws on the approach taken by the Court in its seminal judgment *Cowan* of 1989, where it ruled that the award of a compensation for a crime committed on the territory of a Member State conditional upon the existence of an agreement between that Member State and the victim's Member State of origin impinged on the freedom of movement. See Case 186/87, *Cowan v. Trésor public*, 1989, para 20. Reference to *Cowan* is made under Recital 2 Directive 2004/80/EC.

¹⁰⁷² Opinion of Advocate General Carl Otto Lenz, Case 186/87, *Cowan v. Trésor public*, 2 February 1989.

¹⁰⁷³ C-601/14, *Commission and Council v Italy*, 11 October 2016, para 49. See also para 46: the determination of the intentional and violent nature of a crime, as the Advocate General has stated in points 69 and 83 of his Opinion, although the Member States have, in principle, the competence to define the scope of that concept in their domestic law, that competence does not, however, permit them to limit the scope of the compensation scheme for victims to only certain violent intentional crimes, lest it render redundant Article 12(2) of Directive 2004/80

¹⁰⁷⁴ As acknowledged by Commissioner Vera Jourova. See Answer given by Ms Jourova on behalf of the Commission to an MEP Question on 20 February 2018.

Retrieved at: <http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2017-006875&language=EN>

¹⁰⁷⁵ C-601/14, *European Commission v Italy*, 11 October 2016, para 42

¹⁰⁷⁶ See national reports and various links to national compensation schemes quoted throughout the text.

¹⁰⁷⁷ Ministry of Justice, Fact sheet on compensation in France. Retrieved at: http://www.justice.gouv.fr/art_pix/indemnisation_victime_an.pdf

¹⁰⁷⁸ National report No 2 on Spain, Section on victims (point 24)

¹⁰⁷⁹ Scheme of Compensation for Personal Injuries Criminally Inflicted.

Retrieved at: <http://www.justice.ie/en/JELR/Scheme%2011.pdf/Files/Scheme%2011.pdf>

¹⁰⁸⁰ Section 1(2)(2) Crime Victims Compensation Act, last amended on 20 July 2017. Retrieved at: http://www.bmas.de/SharedDocs/Downloads/EN/crime-victims-compensation-act-2016.pdf?__blob=publicationFile&v=4

Compensation may be claimed by nationals, EU citizens and foreigners living legally on the territory of the Member State of application (e.g. Spain, France, Finland, Hungary, Romania, Italy, The Netherlands, Germany).¹⁰⁸¹ The Irish scheme contains no residence or nationality criteria.

Summary table

MS	National definitions of intentional violent crime
NL	'Intentional violent crime or involuntary manslaughter': robbery, mugging, threat with a weapon, assault, sex crime, domestic violence, stalking and incest.
HU	Criminal acts: in particular bodily or emotional harm, mental shock or economic loss
RO	Crimes committed with intention which resulted in the grievous bodily harm of the victim, of offences of rape, sexual aggression, sexual intercourse with a minor and sexual corruption; ill treatment applied to minors; victims of the crimes and attempts of traffic and exploitation of vulnerable persons.
FI	Personal injury, suffering (e.g. through unlawful deprivation of liberty, unlawful threat), property damage and financial loss, death
ES	Violent crimes, including crimes against sexual freedom and terrorism ¹⁰⁸²
FR	Voluntary or involuntary crimes such as terrorism, rape, sexual assault, murder or involuntary homicide, voluntary or involuntary violence that causes a total absence from work of more than a month and less serious offences, such as theft, fraud, breach of confidence, extortion of funds, destruction, or defacement
DE	Poison, the negligent creation of a danger to the life and limb of another person by commission of a crime by means causing a common danger
IT	Violent intentional crimes, e.g. labour exploitation, sexual violence, homicide and, except for the offences of battery and simple injuries, when the claim for compensation against the perpetrator or other civilly liable parties was brought unsuccessfully.
IE	Arson, poisoning, and 'injury', including death

Procedures, time-limits and amounts awarded

The procedures to claim compensation also differ to some extent. In some EU States, a claim can be passed on to the authority of the victim's State of origin, even though the crime was committed abroad (e.g. Italy, France, Hungary, Germany),¹⁰⁸³ whereas this possibility is not provided in other countries (e.g. Netherlands, Ireland, Finland, Romania, Spain).¹⁰⁸⁴ In the majority of countries (e.g. Hungary, France, Italy, Spain, Ireland, Romania), a compensation claim cannot be submitted if the criminal investigation bodies have not been notified.

¹⁰⁸¹ Stricter conditions may apply for non-EU citizens in some countries, such as Germany. See, for example, Section 1(4), (5) and (6) of the German Crime Victims Compensation Act, op. cit.

¹⁰⁸² Two bodies were implemented under Spanish law to deal with compensation, i.e. one authority dealing with violent and sexual crime and one for victims of terrorism.

¹⁰⁸³ Since 2009 and an amendment to the Crime Victims' Compensation Act it is possible for victims to apply for compensation and assistance if the violent act was committed abroad. See website of the German Ministry of Labour and Social Affairs: <http://www.bmas.de/EN/Our-Topics/Social-Security/compensation-and-assistance-for-victims-of-violent-crime.html>

¹⁰⁸⁴ See national reports and various links to national compensation schemes quoted throughout the text.

In terms of time-limits to submit an application, some national systems regulate from the time of the conviction of the offender (e.g. Romania, Hungary, The Netherlands¹⁰⁸⁵), and others from the time the crime was committed (e.g. Ireland, Spain, Germany). Finland and France apply both criteria with different timeframes. As regards the first group, the period for application varies from one year (e.g. France, Romania), to three years (e.g. Finland) after the final judgment was rendered. As regards the second group, differences between time-periods are much wider: from three months (e.g. Hungary, Ireland) to one year (e.g. Spain, Romania¹⁰⁸⁶), three years (e.g. France) and ten years (e.g. The Netherlands) if the case has not been tried to court (e.g. Finland)¹⁰⁸⁷. In Germany, there is no time-limit to file an application.¹⁰⁸⁸

Finally, differences also exist as regards the type and amount of compensation. Generally speaking, compensation is calculated on a case-by-case basis, in accordance with the damage suffered by the victim. For example, maximum compensation amounts vary significantly,¹⁰⁸⁹ spanning EUR 8,200 (e.g. Italy)¹⁰⁹⁰, EUR 15,000 (e.g. France)¹⁰⁹¹, EUR 28,500 (e.g. Germany)¹⁰⁹², EUR 35 000 (e.g. The Netherlands)¹⁰⁹³, EUR 61,000 (e.g. Finland),¹⁰⁹⁴ EUR 500,000 (e.g. Spain).¹⁰⁹⁵ In Romania, the maximum compensation amounts cannot exceed the equivalent of ten national minimum basic gross salaries calculated on a yearly basis.¹⁰⁹⁶ In Spain, where the system of compensation is fragmented across different laws, the maximum thresholds vary according to both the type of crime committed and the damage incurred. For example, if a victim died following a terrorist attack, a financial compensation of max. EUR 500,000 can be awarded to the spouse or the family.¹⁰⁹⁷ In Hungary, there is no maximum threshold.¹⁰⁹⁸

It is noteworthy that all Member States have created a dedicated webpage spelling out information on their national compensation scheme in English language. However, the content of information varies from a country to another. The Hungarian factsheet, for example, provides details about the crimes covered and the procedure to be followed to claim compensation, as well as a list of contact points in different countries.¹⁰⁹⁹ Germany went a

¹⁰⁸⁵ Or once the police investigations have been completed. See website of the Criminal Injuries Compensation Fund (*Schadefonds Geweldsmisdrijven*) <https://schadefonds.nl/english>

¹⁰⁸⁶ Or three years if the perpetrator is unknown. Art. 25 Law on certain measures to ensure the protection of victims of crime OJ. No 505, 4 June 2004 (official translation)

¹⁰⁸⁷ Finnish State Treasury, Fact Sheet on compensation claims. Retrieved at: http://www.statetresury.fi/en-US/Citizens_and_Communities/Compensation_and_benefits/Crime_damages/Claiming_compensation

¹⁰⁸⁸ See website of the German Ministry of Labour and Social Affairs: <http://www.bmas.de/EN/Our-Topics/Social-Security/compensation-and-assistance-for-victims-of-violent-crime.html>

¹⁰⁸⁹ Compensation amounts are not always publicly available.

¹⁰⁹⁰ The amount set for the crime of homicide is EUR 7,200; in case of homicide committed by the spouse, also separated or divorced, or by a person who is or was involved in an emotional relationship with the injured person, the amount is EUR 8,200 exclusively in favor of the victim's children; for the offence of sexual violence, except for the case where the mitigating circumstance of minor gravity occurs, the amount is EUR 4,800; for offences other than those of homicide and sexual violence, the maximum amount for the reimbursement of medical and care costs is EUR 3,000. See official website of the Italian Ministry of Justice https://www.giustizia.it/giustizia/it/mg_2_10_6.page. See also Question raised by MEP Stefano Maullu to the Commission on 10 November 2017.

Retrieved at: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+WQ+E-2017-006979+0+DOC+XML+V0//EN&language=en>

¹⁰⁹¹ See European Parliament, EPRS implementation assessment of Directive 2012/29/EU, 2017, p. 58

¹⁰⁹² It only applies in the case of loss of several limbs. For any other damage, the maximum compensation amount is set at EUR 16, 500. Section 3a(2) Crime Victims Compensation Act, last amended on 20 July 2017, op. cit.

¹⁰⁹³ See website of the Dutch Criminal Injuries Compensation Fund, op. cit.

¹⁰⁹⁴ Finnish State Treasury, Fact Sheet on compensation claims, op. cit.

¹⁰⁹⁵ National report No 2 on Spain, Section on victims (point 24). The amounts of compensation yet vary depending on the crime. For example, compensation for death amounts to EUR 250,000, compensation for injuries that left the victim disabled for life ranges between EUR 75,000 and EUR 500,000.

¹⁰⁹⁶ Art. 27(2) Law on certain measures to ensure the protection of victims of crime OJ. No 505, 4 June 2004 (official translation)

¹⁰⁹⁷ Art 20(4) and 17 Act 29/2011, of 22 September, on the recognition and comprehensive protection of the victims of terrorism [Ley 29/2011, de 22 de septiembre, de reconocimiento y protección integral a las víctimas del terrorismo]. Available at: www.boe.es/buscar/pdf/2011/BOE-A-2011-15039-consolidado.pdf

¹⁰⁹⁸ Section 7 Act CXXXV of 2005 on Crime Victim Support and State Compensation.

¹⁰⁹⁹ See official English transnational of Act CXXXV of 2005 on Crime Victim Support and State Compensation, op. cit.

step further and translated the law implementing the Compensation Directive.¹¹⁰⁰ By contrast, the dedicated webpage of the Italian Ministry of Justice merely provides information on the amount of compensation per crime covered, and reads that victims should refer to the assisting authority of his/her MS of origin for further information on the Italian scheme.¹¹⁰¹ These differences of approach do not constitute, *per se*, differences of criminal procedures, however they may complicate the task of individuals to access compensation in another EU State.

It should be noted that instruments combating terrorism and human trafficking similarly refrained from imposing specific conditions on Member States regarding compensation schemes, which remain governed by national rules.¹¹⁰²

Summary table¹¹⁰³

MS	A compensation claim can be filed ...			Time-limits	Max. amounts awarded
	In the State of origin if the crime was committed abroad	From the time of the commission of the crime	From the time of the decision on conviction		
NL	No		X	10y	€35,000
HU	Yes		X	3m	N/A
RO	No		X	1y	N/A
FI	No	X	X	3y or 10y	€61,000
ES	No	X		1y	N/A
FR	Yes	X	X	1y or 3y	€15,000
DE	Yes	X		N/A	€28,500
IT	No	N/A	N/A	N/A	€8,200
IE	No	X		3m	N/A

8.1.2. Compensation from the offender

Compensation from the offender is not regulated at the EU level. It is understood in the sense of any offender financial payment in respect of a victim's loss or injury, or the offender's direct or indirect restoration of stolen or damaged property.¹¹⁰⁴ This means that compensation is resourced privately, in contrast to State schemes, for which compensation is extracted from public funds. Compensation from the offender may take various forms. In some cases, the property stolen by the offender may have been confiscated by the State,

¹¹⁰⁰ See German Scheme of Compensation for Personal Injuries Criminally Inflicted, *op. cit.*

¹¹⁰¹ See official website of the Italian Ministry of Justice https://www.giustizia.it/giustizia/it/mg_2_10_6.page

¹¹⁰² Recital 28 Directive 2017/541 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA; Article 17 Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA

¹¹⁰³ Data on the Italian scheme of compensation is scant, and information could not be retrieved as regards all the conditions underpinning the compensation claim. As regards the amounts of compensation awarded, some countries do not provide for maximum amounts and have implemented a different calculation system, as reflected in the main text.

¹¹⁰⁴ See definition provided by D. Maiers, "Offender and state compensation for victims of crime, Two decades of development and change", *International Review of Victimology*, Vol 20, Issue 1, 2014, p. 146

and this can be used as a form of compensation from the offender. This form of compensation is of particular relevance in the current legislative context, given the ongoing negotiations on a future EU Regulation on Confiscation and Freezing Orders, and the inclusion of references to this right under the current Proposal.¹¹⁰⁵

All countries examined have arrangements in their criminal justice that guarantee a right to compensation from the offender. Victims may bring a civil claim for compensation during the criminal proceedings, with the noticeable exception of Ireland, where discretion is left to the Court to make a compensation order.¹¹⁰⁶

Restitution of the confiscated property as a form of compensation of the victim is, however, not provided under the national law of all EU States.

In Germany, restitution of the confiscated property is seen as a form of compensation of the victim.¹¹⁰⁷ A slightly different system exist in Italy, where restitution of confiscated property can be seen as indirect means of compensation. Victims of crime can access to compensation funds, the funding of which comes in part from the confiscation of properties of the convicted acquired in the course of the unlawful activity.¹¹⁰⁸¹¹⁰⁹

In other countries however, confiscated assets go to the State and are generally not used to compensate victims. However, the property may be returned to the victim through a civil procedure (e.g. Spain,¹¹¹⁰ The Netherlands,¹¹¹¹ Romania¹¹¹², Ireland¹¹¹³, France¹¹¹⁴).

In some national systems, a right is granted to the victim to ask national authorities to undertake action for the seizure of confiscated assets (e.g. Germany,¹¹¹⁵ Finland and France). In France and Finland in particular, the national authorities are competent to, or must take action for the purpose of restitution or compensation of victims.¹¹¹⁶ This may include the duty to freeze and confiscate property on behalf of the victim or granting the victim priority on the confiscated property.¹¹¹⁷

The possibility to claim compensation and/or restitution during criminal proceedings, however, is accompanied by significant differences in legal aid regimes. Most countries examined provide for free legal assistance and legal representation during criminal proceedings. Eligibility conditions however differ. For example, eligibility for free legal aid and representation is not always systematic, and may depend on resources of the victim and status, but such conditions are generally waived for most serious crimes (e.g. France, Italy,

¹¹⁰⁵ *Infra*, Section 8.2.

¹¹⁰⁶ National reports No 2 commissioned for the purpose of this study, Section on victims compensation. See also FRA, Country studies for the project "Victim Support Services in the EU: An overview and assessment of victims' rights in practice", 2016. Retrieved at: <http://fra.europa.eu/en/country-data/2016/country-studies-project-victim-support-services-eu-overview-and-assessment-victims>

¹¹⁰⁷ National report No 2 on Germany, Section on compensation rights (point C(III)(6))

¹¹⁰⁸ M. Barbera, A. Baracchi, V. Protopapa, F. Rizzi, "Victim Support Service in the EU: An overview and assessment of victims' rights in practice", National report on Italy for the Fundamental Rights Agency, 2014, p. 41

¹¹⁰⁹ Provided that confiscation was ordered by a final decision. See National report No 2 on France Section on Victims (point C).

¹¹¹⁰ National report No 2 on Spain, Section on Victims (point 24)

¹¹¹¹ M. Wijers, "Compensation of victims of trafficking under international and Dutch law", 28 April 2014, p. 6.

Retrieved at: http://lastradainternational.org/lsidocs/3062-Policy%20paper%20compensation_Netherlands_28%20April%202014.pdf

¹¹¹² National report No 2 on Romania, Section on Victims (point 24)

¹¹¹³ The proceeds are passed to the exchequer after costs have been met. National report No 2 on Ireland, Section on Victims (point 24).

¹¹¹⁴ In France, the restitution of confiscated property is traditionally not considered as a form of compensation under national law, however the victim can request for damages to be paid on the assets confiscated to the perpetrator. National report No 2 on France, Section on Victims (point C).

¹¹¹⁵ National report No 2 on Germany, Section on compensation rights (point C(III)(6))

¹¹¹⁶ European Commission, Impact assessment on the Proposal for a regulation of the European Parliament and of the Council on the mutual recognition of freezing and confiscation orders, SWD(2016) 468 final, Brussels, 2016, p. 23

¹¹¹⁷ See also FRA, Country studies for the project "Victim Support Services in the EU: An overview and assessment of victims' rights in practice", 2016.

Spain).¹¹¹⁸ In some countries, a means-test apply (e.g. Finland, Germany).¹¹¹⁹ Others grant free legal aid and free legal representation for victims of serious crimes without means-testing (e.g. Romania, Ireland).¹¹²⁰ In the Netherlands, all victims are entitled to free legal advice, and all victims of a serious crime are entitled to free legal representation (a means test apply for victims of other crimes).¹¹²¹ In Hungary, victims with low financial means get only partial assistance from the State.¹¹²²

It should also be noted that not all EU countries provide the possibility, for victims, to benefit from advance payments from the State in case the offender does not have the means to pay for compensation. Advance payments are provided in some countries (e.g. Finland),¹¹²³ for some particular forms of serious crimes (e.g. The Netherlands,¹¹²⁴ Italy)¹¹²⁵ and under specific conditions (e.g. Romania, France).¹¹²⁶ In Germany and Spain, if the perpetrator of particularly serious criminal offences is not in a position to make up for the damage caused or cannot be traced in the first place, the victim is entitled to state compensation under the corresponding national scheme.¹¹²⁷ In Spain, the offender must have been declared insolvent.¹¹²⁸

Summary table

Eligibility conditions for legal aid		Restitution of the confiscated property as a compensation means and/or as a civil procedure	Advance payments for the State if the offender cannot provide compensation
Serious crimes	Means test		
FR, IT, ES, RO, IE	FI, DE, IT, ES	DE	FI, NL, IT, RO, FR, DE ES

8.2. Impact on cross-border cooperation

The significant variations in compensation schemes risk affecting cross-border cooperation in two respects. First, incompatibilities between State compensation schemes may arise and give rise to situations whereby the victim suffers from uneven treatment from a MS to another

¹¹¹⁸ Ibid.

¹¹¹⁹ Ibid. In Finland, the lawyer's fees are covered by the government, irrespective of the victim's financial situation. See National report No 2 on Finland, Section on victims (point 24).

¹¹²⁰ Ibid.

¹¹²¹ J. Nieuwboer, G. Walz, Victim Support Services in the EU: An overview and assessment of victims' rights in practice, Report on the Netherlands for the FRA, 2014

¹¹²² National report No 2 on Hungary, Section on Victims (point 23).

¹¹²³ M. Aaltonen, A. Sams, A-M. Sorjanen, Victim Support Services in the EU: An overview and assessment of victims' rights in practice, national report on Finland for the FRA, 2014

¹¹²⁴ In the Netherlands, the full amount of compensation can be paid by the State in advance if the person making the claim is a victim of a violent crime or a sex crime, including trafficking in human beings. The offender must have been convicted and ordered to pay damages to the victim as part of the criminal proceedings and failed to pay damages within the eight months after the sentence has become final. In other cases, the victim can receive an advance payment of maximum EUR 5,000. See M. Wijers, "Compensation of victims of trafficking under international and Dutch law", 2014, op. cit.; See also Ministry of Security and Justice, Fact Sheet on the Rights of victims of criminal offences (Retrieved at:

https://www.rijksoverheid.nl/binaries/rijksoverheid/documenten/brochures/2017/04/03/verklaring-van-rechten-voor-slachtoffers-van-strafbare-feiten/WEB_100159_Infoblad+Verklaring+Rechten+ENG.pdf)

¹¹²⁵ In Italy, the State compensation mechanism described in Section 8.1.1. applies when a claim to obtain compensation from the offender was brought unsuccessfully. See official website of the Italian Ministry of Justice https://www.giustizia.it/giustizia/it/mg_2_10_6.page

¹¹²⁶ For example advance payments are provided in Romania if the victim has applied for compensation within a year from the date the offender's liability was established, the victim has participated in the proceedings as a civil party; the offender cannot pay or has disappeared; the victim has not received compensation from an insurance company. See G. Georgiana Fusu-Plăiașu, Victim Support Services in the EU: An overview and assessment of victims' rights in practice, national report on Romania for the FRA, 2014, p. 29

¹¹²⁷ National report No 2 on Germany, Section on compensation of victims (point C); National report No 2 on Spain, Section on compensation of victims (point 24).

¹¹²⁸ National report No 2 on Spain, Section on compensation of victims (point 24)

(8.2.1.). Then an assessment is made on the prospective impact of differences on the functioning of the forthcoming Confiscation and Freezing Orders Regulation, which includes crucial provisions on compensation from the offender (8.2.2.).

8.2.1. Risks of unequal treatment in cross-border situations and limited scope of the Compensation Directive

The high degree of differentiation between State compensation schemes suggests that a victim may not always receive quality compensation in all MSs.

Concerns of different treatment in cross-border situations therefore arise. This may incite victims to refrain from making use of State compensation instruments. These concerns are compounded by the limited scope of the Compensation Directive, i.e. to violent intentional crimes only.

Differences in scope between national compensation schemes mean that, when exercising their right to free movement, victims may face more restrictive rules, or less advantageous compensation schemes in the country where they moved to, than in the country of origin.

The very nature of the directive as an instrument of legislation indeed leaves Member States free to determine the means deployed to achieve the objective pursued by the directive. This means that MSs may choose to go beyond the list of measures it contains. As seen above, extending the material scope of the directive beyond the mere category of "intentional violent" crimes provide one example of this. However, those areas where the national legislator went beyond the provisions of EU law may constitute obstacles from the perspective of cross-border cooperation, not least because a measure foreseen in one country does not find equivalence in another country.¹¹²⁹ For example, a victim of theft may be entitled to compensation in France, however that same victim cannot claim compensation in Romania. This is compounded by the fact that some countries do not allow their own nationals to claim compensation if the crime was committed abroad. In other words, if gaps and flaws exist in the compensation system of the country where the crime was committed,¹¹³⁰ the victim cannot rely on the compensation scheme of his/her country of origin to obtain full compensation. Thus, victims may enjoy less protection in cross-border situations than they would in purely domestic proceedings.

Taking the problem the other way around, another consequence of the narrow scope of the directive can be foreseen. Given that the directive only applies to cross-border situations, namely "only where a violent intentional crime has been committed in a Member State other than that in which the victim is habitually resident,"¹¹³¹ its provisions cannot be relied on by individuals in situations other than transnational proceedings, for example at the domestic level. This means that the amounts of compensation received may be more generous and advantageous in transnational situations, compared with purely domestic proceedings, thus giving rise to what has been termed "reverse discrimination."¹¹³² The case below provides an example of such kind.

Limited scope of application of the Compensation Directive: the *Paola C.* case¹¹³³

Ms C claimed compensation for a sexual assault committed in Italy by an Italian national. The national court ordered the offender to pay for compensation, however the defendant did not have the financial means to do so. As a result, Ms C sought to receive compensation from the Italian State and relied for that purpose on the Compensation Directive; however, the national compensation scheme only covered terrorism and organised crime. The Tribunal of Florence referred a question to the Court of Justice,

¹¹²⁹ It is obvious that this issue is a recurrent one and applies to all directives adopted by the EU in the field of cross-border cooperation. However, it is worth mentioning this shortcoming as regards the Compensation Directive in particular; the absence of precision on the scope, content and eligibility conditions of compensation schemes indeed exacerbates the equivalence issue.

¹¹³⁰ As was the case in Italy until recently, where the compensation system only applied to certain types of crime.

¹¹³¹ C-467/05, *Dell'Orto*, 2007, op.cit., para 59; C-79/11, *Giovanardi and Others*, 12 July 2012, para 37

¹¹³² S. Peers, Reverse discrimination against rape victims: a disappointing ruling of the CJEU, blog post, EU Law Analysis, 24 March 2014. Retrieved at: <http://eulawanalysis.blogspot.be/2014/03/compensation-for-crime-victims.html>. This is also the view of our Spanish expert. See National report No 2 on Spain, Section on victims (point 30).

¹¹³³ C-122/13, *Paola C.*, 30 January 2014

asking whether the Compensation Directive imposed an obligation on Member States to adopt a compensation scheme for victims of all violent or intentional crime. The Court of Justice declared itself incompetent to answer the question, as it referred to a purely domestic situation.¹¹³⁴

Following this judgment, the European Commission introduced an action for failure against Italy. In 2016, the Court gave a broader interpretation of the provisions of the directive and overturned the decision it took in 2014. The Court ruled that it “does not permit them to limit the scope of the compensation scheme for victims to only certain violent intentional crimes,”¹¹³⁵ including in purely domestic proceedings. Conscious of the limited margin of manoeuvre conferred by the Directive as regards national compensation schemes, the Court instead relied on the principle of non-discrimination on the grounds of nationality lying at the heart of the right of free movement of persons and services to sanction the Italian Republic.¹¹³⁶ AG Bot further added that, to enable Union citizens to circulate freely across the EU, a “game of mirrors”, i.e. equivalent compensation schemes from a Member State to another, must be in place.¹¹³⁷

The clarifications brought by the Court on the scope of the broad notion of “intentional violent crime” is to be welcome. It heralds a step further in the protection of victims and diminishes the risk of falling into a “reverse discrimination” scheme.

The current picture nonetheless remains a mixed one. The Court excluded the possibility of MSs to impose *quantitative* limitations on the list of intentional violent crimes covered, but it left the *qualitative* aspects of this notion to be defined by national authorities¹¹³⁸. In practical terms, double standards will continue to exist, alongside uneven treatment from a Member State to another.

Besides, the applicability of the directive to “violent intentional crimes” only was seen as too restrictive. This means that not all victims fall within the scope of application of national compensation schemes.¹¹³⁹ This raises the broader question of whether the State should, in fact, privilege the crime victim’s injuries above those of other victims, such as accident at work or of congenital, or contracted disease of illness.¹¹⁴⁰ As seen in the comparison of differences, the focus of national compensation schemes has remained, in most parts, on serious violence.

Another interesting issue raised in the German report is that, even when victims are entitled to claim compensation,¹¹⁴¹ they tend not to do so. No concrete explanation accounting for the underuse of this instrument could be found; “*action civile*” tools, such as mediation mechanisms offering out-of-court settlements, exist in parallel and seem to be preferred¹¹⁴². In practice cross-border compensation was rarely sought. At the national level, an empirical study on the use of compensation funds in the Netherlands revealed that awareness of the existence of a State compensation scheme among victims is low.¹¹⁴³ Besides, sometimes less than full compensation is paid by the Dutch fund.¹¹⁴⁴ In Finland, the national compensation scheme was relied only seven times since the implementation of the directive.¹¹⁴⁵

Little can be expected from the Victims’ Rights Directive in terms of compensation. Firstly, there seems to be a disconnection between the Victims’ Rights Directive and the Compensation Directive. The Victims’ Rights Directive indeed provides a right to compensation from the offender, whereas the Compensation Directive entitles to compensation from the State. From this observation, it seems that the two instruments,

¹¹³⁴ C-122/13, *Paola C.*, 2014, op. cit., para 12.

¹¹³⁵ C-601/14, *European Commission v Italy*, 11 October 2016, para 46

¹¹³⁶ C-601/14, *European Commission v Italy*, 2016, op. cit., para 50

¹¹³⁷ Opinion of Advocate-General Bot delivered on 12 April 2016, Case C-601/14, para 79

¹¹³⁸ C-601/14, *European Commission v Italy*, 11 October 2016, para 46

¹¹³⁹ As observed in Germany. National report No 2 on German, Section on victims (point II(H)).

¹¹⁴⁰ Miers, “Compensation of victims of trafficking under international and Dutch law,” 2014, op. cit., p. 155

¹¹⁴¹ Ibid.

¹¹⁴² Ibid.

¹¹⁴³ M. R. Hebly, J. D. M. van Dongen, S. D. Lindenbergh, Crime Victims’ Experiences with Seeking Compensation: A Qualitative Exploration, *Utrecht Law Review*, Vol 10, Issue 3, 2014

¹¹⁴⁴ Ibid.

¹¹⁴⁵ National report No 2 on Finland, Section on victims (point 19).

adopted at different times and following different logics, co-exist without building on the strengths of one another. The criminal focus of the scope of the Victims' Rights Directive, secondly, gave rise to criticism, despite the civil nature of many of the claims brought by victims. The victim's right to legal aid is a case in point. The directive provides for this right only when the victim has the status of civil party to criminal proceedings. Whereas many cases are not dealt with under the criminal justice channel, the right to legal aid is excluded in situations where a separate civil claim is introduced. Yet, these restrictions "may be particularly onerous for victims of gender-based violence who do not make complaints and whose cases will never be dealt with as part of the criminal justice system."¹¹⁴⁶

8.2.2. Restitution as a compensation mechanism and the Regulation on Confiscation and Freezing Orders: back to national law

Bolstered by the imperative of addressing security threats stemming from terrorist financing and organised crime, the European Commission released in 2016 a proposal for a regulation on confiscation and freezing orders. The Commission noted in the explanatory memorandum of the Proposal that "the confiscation of assets aims at preventing and combating crime, including organised crime, *compensating victims*, and provides additional funds to invest back into law enforcement activities or other crime prevention initiatives and *to compensate victims*."¹¹⁴⁷ The proposal therefore sought to facilitate access to restitution and compensation, noting that often, "the victim's only possibility to get back the losses suffered is to obtain restitution or compensation directly from the confiscated property."¹¹⁴⁸

The subsequent provisions provide that, whenever a property is confiscated by the executing State, the corresponding sum should be restituted to the victim if the issuing State has taken a decision to do so, "for the purposes of compensation or restitution."¹¹⁴⁹ The EP insisted during the negotiations to *limit* the transfer of the confiscated property to the issuing State for the *sole* purpose of compensation or restitution of the victim.¹¹⁵⁰, which is a rather positive addition from the perspective of victims' rights. One may indeed welcome the efforts made to include the protection of victims in mutual recognition. Few attempts have been made, thus far, to address the needs of victims in cross-border cooperation instruments. The Commission rightly pointed out in its impact assessment accompanying the proposed regulation on confiscation and freezing orders that the current cross-border cooperation framework in these two domains does not at all refer to victims.¹¹⁵¹

However, the proposed regulation does not establish any common rule on restitution of confiscated property as a means of compensation of victims. It shies away from "(introducing) any new right for victims where such right does not exist under national law."¹¹⁵² The existence of a high degree of differentiation suggests that the cross-border compensation mechanism of property returns may only be relied on where the possibility, for victims, to obtain compensation through the restitution of confiscated property, has been provided at the national level.¹¹⁵³

¹¹⁴⁶ European Parliament, Draft Report on the implementation of Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime (2016/2328(INI)), LIBE Committee, 2016/2328(INI), 26 February 2018, p. 8.

¹¹⁴⁷ European Commission, Explanatory Memorandum, Proposal on the mutual recognition of freezing and confiscation orders, COM(2016) 819 final, Brussels, 2016, p. 1

¹¹⁴⁸ European Commission, Impact assessment on the Proposal for a regulation of the European Parliament and of the Council on the mutual recognition of freezing and confiscation orders, SWD(2016), p. 22

¹¹⁴⁹ Recital 32, Art 31 Confiscation and Freezing Orders Proposal

¹¹⁵⁰ Amendment No 126, European Parliament, Report on the proposal for a regulation of the European Parliament and of the Council on the mutual recognition of freezing and confiscation orders (COM(2016)0819 – C8-0002/2017 – 2016/0412(COD))

¹¹⁵¹ Framework Decision 2003/577/JHA on Freezing Orders and Framework Decision 2006/783/JHA on Confiscation Orders. See Commission Impact assessment on the Proposal for a regulation of the European Parliament and of the Council on the mutual recognition of freezing and confiscation orders, SWD(2016), op. cit., p. 22

¹¹⁵² Ibid, p. 16

¹¹⁵³ On the existence of such schemes and national legislations on confiscation, see Transparency International, "Legislation meets practice: National and European perspectives in confiscation and forfeiture of assets, Comparative Report", Sofia, 2015. Retrieved at: <http://www.confiscation.eu/research/test>

Additionally, the complementarity of compensation from the State and compensation from the offender is not in place in all countries. This may result in situations where the right of the victim to obtain compensation becomes void, due to lack of financial means on the part of the offender to reconstitute the financial damage to the victim. Further reflection should be conducted on the subsidiary role of the State if the offender is not in a position of providing compensation.¹¹⁵⁴

The latter shortcomings have been left unaddressed by the Victims' Rights Directive.

The Directive does grant victims a right to compensation from the offender and to restitution of confiscated property. This being said, the obligations weighing on the Member States in respect to compensation are particularly weak: Member States must ensure that victims are entitled to *obtain a decision* on compensation by the offender within a reasonable time.¹¹⁵⁵ This means that, whenever a victim files a claim for compensation to the court in the course of the criminal proceedings, the relevant national authorities must ensure that the victim is made aware of the decision of the court on its claim. Thus, the directive confers a right to information to victims on the outcome of their compensation claim, rather than a right to compensation *per se*. This is further illustrated by the absence of precision on the type of compensation to be granted, and under which conditions,¹¹⁵⁶ besides a mere requirement of "(promoting) measures to encourage offenders to provide adequate compensation to victims."¹¹⁵⁷ A similar assessment can be made on the restitution of the confiscated property; the organisation of the practicalities are, again, to be "determined by national law."¹¹⁵⁸

Another factor to bear in mind is that, in all countries, compensation from the offender can be obtained by filing a claim directly in the criminal proceedings.¹¹⁵⁹ Yet, preparing and sustaining a compensation claim may entail significant costs. Unfortunately, the "conditions or procedural rules under which victims have access to legal aid shall be determined by national law,"¹¹⁶⁰ as well as their reimbursement for participating in criminal proceedings.¹¹⁶¹

In the impact assessment conducted prior to the adoption of the Victims' Rights Directive, the Commission discarded the policy options of regulating legal aid and compensation. It acknowledged that "further research is still needed to precisely identify problems and possible solutions. Such research is even more important since action in these areas could have very high cost implications for the Member States. As such, legal aid and compensation are not included in the options below but will be the subject of further studies to determine appropriate EU action."¹¹⁶²

The Victims' Rights Directive clearly shies away from laying down rules governing compensation systems and legal aid. It is fair to say that the same, non-constraining approach as the Compensation Directive, was followed. Against this background, the *effet utile* of these rights risks being undermined by the persistence of inconsistencies and high variations between national schemes.

8.3. Recommendations

The current framework for the compensation of victims is unsatisfying. The Victims' Rights Directive dealing with compensation from the offender, despite the comprehensive and far-

¹¹⁵⁴ European Commission, Guidance document on the transposition and implementation of Directive 2012/29/EU, op. cit., p. 37.

¹¹⁵⁵ Art 16(1) Directive 2012/29/EU

¹¹⁵⁶ The option of regulating compensation was discarded in the Impact Assessment of 2011, for the lack of information of national compensation systems. See European Commission, Impact Assessment accompanying the Proposal for a Directive on the Rights of Victims, SEC(2011) 580 final, p. 23

¹¹⁵⁷ Art 12(2) Directive 2012/29/EU

¹¹⁵⁸ Art 15 Directive 2012/29/EU

¹¹⁵⁹ Or by introducing a separate civil claim, i.e. civil court action.

¹¹⁶⁰ Art 13 Directive 2012/29/EU

¹¹⁶¹ Art 14 Directive 2012/29/EU

¹¹⁶² European Commission, Impact Assessment accompanying the Proposal for a Directive on the Rights of Victim, SEC(2011) 580 final, p. 23

fetches provisions it contains, seems almost fully disconnected from the Compensation Directive, focused on compensation from the State. Besides, the absence of approximation efforts on national compensation schemes clearly undermines the functioning of both EU texts. Consequently, current ambitions of a cross-border compensation mechanism of restitution of confiscated property to victims seem unrealistic in the absence of approximation of national laws.

(i) Legislative solutions

(i)a. Monitoring the implementation of the Compensation Directive and existing compensation schemes across the Union

The 2011 Roadmap on strengthening the rights of victim,¹¹⁶³ laid down as a priority objective the review of the Compensation Directive. Under 'Measure D', the Roadmap invited the European Commission to revise and simplify procedures for victims to request compensation, and to submit legislative or non-legislative proposals in this area. Seven years after, the Commission has appointed a special rapporteur to conduct this review.¹¹⁶⁴

The findings outlined in this section suggest that a revision of the Compensation Directive, that extends its scope and restricts the margin for manoeuvre of Member States, is the most appropriate way forward.

A complete assessment of the difficulties encountered by the Member States in the implementation of both the Compensation Directive and the Victims' Rights Directive should be made, prior to the formulation of any new legislation on compensation. The number of infringement proceedings brought against Member States for failure of transposition following the adoption of the Compensation Directive suggests that formulating new proposals in this area will be no easy task.¹¹⁶⁵ Similarly, a recent implementation assessment released by the European Parliament reveals that many difficulties occurred in both the transposition and implementation processes of the Victims' Rights Directive.¹¹⁶⁶ The European Commission should continue to monitor where gaps and issues have persisted before reflecting on new proposals on compensation.

Then, a thorough and comprehensive mapping of existing legislations on compensation schemes should be made by the European Commission, in order to identify the main differences, gaps, and solutions that could be incorporated in the Compensation Directive.¹¹⁶⁷ There remains unclarity as to the root causes of the seeming under-use of compensation instruments by victims, in other words what is preventing them from accessing justice.

The revised instrument should tackle the following aspects.

- A binding obligation on national authorities to open compensation for nationals residing or staying abroad should be inserted in order to avoid discriminatory situations, whereby victims involved in cross-border settings are worse off, compared with purely domestic proceedings.
- Then, the scope of the Directive should be broadened. The types of crimes and victims covered should be spelled out in a clear manner and perhaps be extended to include not only victims of violent intentional crimes, but also others. Extending the scope of the Directive further should be supported by a thorough assessment of the current scope of national schemes on compensation, so as to identify whether a common ground can be found on the types of crime covered. It could, for example, mirror the large scope of the

¹¹⁶³ Council of the EU, Resolution of 10 June 2011 on a Roadmap for strengthening the rights and protection of victims, in particular in criminal proceedings, OJ C 187, 28 June 2011.

¹¹⁶⁴ European Commission, Statement by Commissioner Jourová on European Day for Victims of Crime, Brussels, 22 February 2018.

¹¹⁶⁵ C-26/07, *Commission v Greece*, 18 July 2007; C-112/07, *Commission v Italy*, 29 November 2007; C-407/09, *Commission v Greece*, 31 March 2011

¹¹⁶⁶ A. Scherrer, I. K. Kristo, *The Victims' Rights Directive 2012/29/EU*, European Implementation Assessment, European Parliament Study, EPRS, Ex-Post Evaluation Unit, 2017. See also National report No 2 on Spain, Section on victims (point 29).

¹¹⁶⁷ As recommended by the National report on Germany No 2, Section on victims (point H).

Victims' Rights Directive. This would imply including specific crimes, such as child abuse,¹¹⁶⁸ human trafficking,¹¹⁶⁹ and terrorism,¹¹⁷⁰ alongside particular types of victims, such as vulnerable victims,¹¹⁷¹ including child victims¹¹⁷².

- Minimum and maximum amounts of compensation could be established. These amounts could be calculated on the basis of uniform criteria taking into consideration both the seriousness of the offence and the damage caused to the victim, as well as the financial situation of the offender and the vulnerability of the victim.
- Lastly, the question can be raised of the inclusion of legal persons with the Compensation Directive's scope in the longer run. Indeed, in light of the free movement of persons guaranteed by EU internal market, and the development of an enhanced framework for cooperation between service providers with the E-Evidence Regulation, this would not be illogical to ensure that rights of legal persons are safeguarded to some extent,¹¹⁷³ at least in respect to particular crimes (e.g. cybercrime). The Victims' Rights Directive could be amended accordingly.

Attention should be paid to the consistency of the legal framework on victims. The Stockholm programme suggested that the possibility to subsume the Compensation Directive and the (now repealed) FD 2001/220/JHA on the standing of victims in criminal proceedings into a comprehensive instrument. However, it seems difficult to envisage re-opening the negotiations on the Victims' Rights Directive. Changing the legal framework at this early stage in relation to victims could be counter-productive.¹¹⁷⁴ Consistency could be nonetheless enhanced by the insertion, in the revised compensation mechanism, of cross-references to existing legislation, such as the Victims' Rights Directive, the EPO Directive and the European Protection Measures Regulation.¹¹⁷⁵ Clarifications on how they relate to and complement one another should be brought.

(i)b. Reflecting on the adoption of rules on compensation from the offender

The review of the Compensation Directive could be taken as an opportunity to initiate a parallel reflection on the development of rules governing cross-border compensation when the latter is provided by the offender. The articulation between both compensation mechanisms needs refining and could be spelled out in further detail, so as to enable complementarities and synergies. In particular, indications should be provided to victims on circumstances where it is more advisable to rely on one, or the other, mechanism. This has two advantages. First, compensation is a sensitive field of negotiations, due to the financial burdens associated to the adoption of binding financial mechanism.¹¹⁷⁶ Achieving synergies between the two instruments could alleviate financial costs. Cue may be taken from those Member States that combine both systems. In the Nordic States for example, half of the funds for compensation come from the offenders, or a certain percentage of inmates' salaries.¹¹⁷⁷ Another best practice comes from France, where the national authorities imposed a levy on property insurance policies to bolster the compensation fund dedicated to victims of terrorism.¹¹⁷⁸ The second advantage of this solution is to make the compensation

¹¹⁶⁸ Art 24 Directive 2012/29/EU

¹¹⁶⁹ Art 22(3) Directive 2012/29/EU

¹¹⁷⁰ Art 22(3) Directive 2012/29/EU

¹¹⁷¹ Art 23 Directive 2012/29/EU. See also T. Rafaraci, *New Perspectives for the Protection of the Victims in the EU*, in S. Ruggeri (ed) *Transnational inquiries and the protection of fundamental rights in criminal proceedings. A study in memory of Vittorio Grevi and Giovanni Tranchina*. Heidelberg: Springer, 2013. The distinction between the protection of victims of crime (already committed) and preventive protection is however not as clear-cut in the Directive.

¹¹⁷² Art 24 Directive 2012/29/EU.

¹¹⁷³ S. Peers, *EU Justice and Home Affairs Law: Vol II, EU Criminal Law, Policing and Civil Law*, Oxford: Oxford University Press, 2016, p. 159

¹¹⁷⁴ National report No 2 on Ireland, Section on Victims (point 30).

¹¹⁷⁵ See *Infra*, section 9.

¹¹⁷⁶ Interview at the European Commission. *Supra*, Section 6 on compensation for unjustified detention.

¹¹⁷⁷ Interview at the European Commission.

¹¹⁷⁸ Reuters, "France ups insurance levy to boost attack victims compensation fund", 19 October 2016.

mechanism foreseen in the forthcoming Regulation on Confiscation and Freezing Orders workable. Reflecting on how the State could advance payment in case of default by the offender would avoid situations where the compensation claim of the victim in cross-border cooperation is left unaddressed. More comparative research is needed in this regard.

(ii) Non-legislative solution: Developing financial mechanisms

Although a budget line has been devoted to the funding of several projects designed, *inter alia*, to ensure victims of terrorism access to support services, as well as the development of trainings for practitioners, to our knowledge there is no overarching fund dedicated to the compensation of victims of crime. Further reflection should be conducted on the relevance and feasibility of this fund, as well as how to articulate financial support with funds existing at the national level. The question can be raised of the beneficiaries of this fund. Efforts should be undertaken to avoid the multiplication and fragmentation of EU funds designed for specific types of crime and victims.¹¹⁷⁹

Financial help would moreover prevent Member States from being discouraged after the costly implementation process of the Victims' Rights Directive. The implementation of the latter instrument was indeed slowed down by the important financial burdens it generated in most countries,¹¹⁸⁰ regarding more specifically legal aid, the establishment of mediation systems, victim assistant offices and the training and availability of translators and interpreters.¹¹⁸¹

Retrieved at: <http://www.businessinsurance.com/article/20161019/NEWS06/912310065/France-boosts-insurance-levy-terrorism-attack-victims-compensation-fund-Paris-cr>

¹¹⁷⁹ The EP proposed in an amendment to the draft Confiscation and Freezing Proposal the creation of a fund designed to guarantee compensation for the families of police officers and public servants either killed or disabled in the line of duty.¹¹⁷⁹

¹¹⁸⁰ All Member States had to amend their national laws, including those that "pioneered" the rights of victims. European Parliament, The Victims' Rights Directive 2012/29/EU, European Implementation Assessment, EPRS Study, PE 611.022, 2017, p. 44

¹¹⁸¹ In Spain, it was made clear by the authorities that, although the creation of an EU-wide catalogue of procedural rights for victims in criminal proceedings was a welcome development from a criminal law perspective, its effective implementation at the national level would certainly be slowed down by the lack of financial and human resources.

9. PROTECTION MEASURES FOR VICTIMS

KEY FINDINGS

- Measures to protect victims vary significantly from a Member State to another. Civil protection measures are generally provided in most MSs, alongside criminal measures. In some countries however, only civil or criminal measures exist, the latter being often considered as an alternative to detention. The procedures to claim a protection order also differ, alongside the scope of measures, which often depends on the way the offence resulting in a protection order was defined in the first place.
- The EU legislator attempted to accommodate legal diversity by adopting two different instruments dealing respectively with criminal and civil measures: the EPO Directive and the EPM Regulation. Flexibility was retained in the type of authorities involved, as well as the nature of the measure involved. In practical terms, obstacles have persisted. Though the adoption of two instruments was designed to facilitate cooperation, paradoxically relying on a dual track of mechanisms created confusion among national authorities. The current system is not conducive to the effective enforcement of protection orders. Fears that a monitoring technique applied in the issuing State is not available in the executing State refrain MSs from relying on existing instruments. Applying for a new measure in the country where the victim moved is often perceived as a quicker, and easier process. Incompatibilities are compounded by a general lack of awareness on the existence of these instruments, on the part of judicial authorities, practitioners, civil society, and victims themselves.
- The Victims' Rights Directive confers victims with a general right to protection. Over time, this might enhance the visibility of the EPO Directive and the EPM Regulation. In the absence of references to these instruments, however, the directive seems disconnected from mutual recognition tools, thereby relativising its impact on their functioning.
- The current diversity of national protection measures renders approximation difficult. A reflection on how to improve these instruments should be supported by close monitoring of the implementation of the EPO Directive and the EPM Regulation. Other domains of legislative action could be explored, for example victims of cybercrime and gender-based violence. Attention should be paid not to disperse and fragment legislative efforts in a myriad of instruments. Meanwhile, awareness of existing instruments on victims' rights should be raised.

9.1. Nature of differences

Victims should be protected against future assaults, through intimidation on the part of the offender, or retaliation.¹¹⁸² Protection measures have been designed to protect the person from repeat offences, against "a criminal act that may endanger his or her life, physical or psychological integrity, dignity, personal liberty or sexual integrity."¹¹⁸³ These measures are most widespread in the context of domestic violence, harassment, and sexual assault,¹¹⁸⁴ and most of the time involve the avoidance of contacts between the offender and the victim

¹¹⁸² S. van der Aa, J. Ouwerkerk, "The European Protection Order: No Time to Waste or a Waste of Time?" *European Journal of Crime, Criminal Law and Criminal Justice*, Vol 18, 2011, pp. 267-287

¹¹⁸³ E. Cerrato, T. Freixes, M. Lutfi, V. Merino, N. Oliveras, L. Román, B. Steible and N. Torres, "European Protection Order, European Implementation Assessment", EPRS Study, 2017, p. 7

¹¹⁸⁴ Council of Europe, Emergency barring orders in situations of domestic violence: Article 52 of the Istanbul Convention: A collection of papers on the Council of Europe Convention on preventing and combating violence against women and domestic violence, 2017. Retrieved at: <https://rm.coe.int/convention-istanbul-article-52/168073e0e7>

through provisional, or final measures.¹¹⁸⁵ Differences could be identified as regards the legal nature of protection orders (9.1.1.), as well as the procedures leading to the issuing of a protection order, alongside the scope of these measures, and definitions of offences resulting in the application of a protection measure (9.1.2.).

9.1.1. Legal nature of protection orders

Striking differences exist among the Member States as regards the legal nature of protection measures.

The sample of Member States examined can be divided into three groups.

A first category brings together the Member States whose national laws provide for both civil and criminal protection measures, depending on the nature of these protection measures, on the type of proceedings and on the moment they are adopted (e.g. Hungary, Ireland, Italy, The Netherlands).¹¹⁸⁶ The procedure to claim such protection depends on the nature of the measure. In the Netherlands for example, civil protection measures can only be obtained via preliminary relief proceedings. In contrast, no less than fourteen different procedures exist in criminal law to apply for a protection measure.

A second group of countries applies exclusively one or the other type of protection measure. In some countries, protection orders can only be issued by a civil authority (e.g. Germany) while, in other countries, protection orders mainly, or exclusively pertain to the criminal field (e.g. Spain, Romania).¹¹⁸⁷ In Romania, the civil court is only competent to issue restraining orders in domestic violence cases.¹¹⁸⁸ In Spain, protection measures are exclusively adopted by judicial organs in criminal matters.¹¹⁸⁹

A third group is constituted by those countries where some of the national protection measures do not fall squarely in one or the other category. The authorities of Finland, for example, issue "quasi-criminal protection orders,"¹¹⁹⁰ which are not necessarily connected to a criminal prosecution, however the violation of which constitutes a criminal offence.¹¹⁹¹ Moreover, not only the victim, but also the police and the prosecutor can apply for an order.¹¹⁹² As a result, the protection orders are neither of a purely civil, nor a purely criminal nature.¹¹⁹³

Civil and criminal protection measures	Civil protection measures	Criminal protection measures	Quasi-criminal protection measures
NL, IT, HU, FR, RO, IE, FI	DE	ES	FI

¹¹⁸⁵ S. van der Aa, J. Niemi, L. Sosa, A. Ferreira & A. Baldry, *Mapping the legislation and assessing the impact of Protection Orders in the European Member States*, Oisterwijk: Wolf Legal Publishers 2015

¹¹⁸⁶ Cerrato et al, "European Protection Order, European Implementation Assessment", 2017, op. cit., p. 31

¹¹⁸⁷ S. van der Aa et al, *Mapping the legislation and assessing the impact of Protection Orders in the European Member States*, op. cit., 2015

¹¹⁸⁸ National report on Romania, Section on Victims (point 27)

¹¹⁸⁹ National report No 2 on Spain, Section on Victims (point 30).

¹¹⁹⁰ "The Act on Restraining Orders." See S. van der Aa, J. Niemi, L. Sosa, A. Ferreira & A. Baldry, *Mapping the legislation and assessing the impact of Protection Orders in the European Member States*, Oisterwijk: Wolf Legal Publishers 2015, available at <http://poems-project.com>, p. 221.

¹¹⁹¹ Ibid.

¹¹⁹² Ibid. For a typology of existing protection orders, see: S. Van Der Aa, *Protection Orders in the European Member States: Where Do We Stand and Where Do We Go from Here?*, *European Journal of Criminal Policy Research*, Vol 18, 2012, p. 190

¹¹⁹³ Ibid.

9.1.2. Procedures, scope of protections orders and definitions of offences

Alongside differences in terms of legal nature, the procedure to apply for protection also differs from a MS to another. The margin for manoeuvre enjoyed by the victim when requesting the issuing of a protection measure is a case in point. In a first group of countries, the victim itself, along with its family, the prosecutor, the police and any relevant authority can request a protection order (e.g. Spain, Romania, Hungary¹¹⁹⁴, Finland).¹¹⁹⁵ In others, only the prosecutor has the competence to do so (e.g. Italy),¹¹⁹⁶ the Family court, (“*juge aux affaires familiales*”) (e.g. France),¹¹⁹⁷ or the court and/or the prosecutor (e.g. The Netherlands).¹¹⁹⁸

Then, protection orders serve various purposes.

Civil measures are generally of a precautionary nature and take the form of a restraining order (e.g. France, Romania, Ireland, The Netherlands, Germany, Finland). They may also be used to stop a wrongful act (e.g. Italy, France, The Netherlands, Spain), such as domestic violence.

As part of the criminal proceedings, a protection order can be issued as a complementary tool, or a condition for the suspension of the prison sentence. At the pre-trial stage, a protection order can be imposed so as to prevent any contact between the offender and the victim as an alternative to pre-trial detention (e.g. France, The Netherlands, Italy, Spain, Romania).¹¹⁹⁹ For example under Dutch law the judge can order the suspension of PTD under the condition that the suspect does not contact the victim.¹²⁰⁰ As part of the sentence, the competent judicial authorities can impose a measure restricting the person’s freedom (e.g. Ireland, The Netherlands, Romania, France). At the post-trial stage, a protection order may be imposed as a pre-condition to order conditional release (e.g. France, The Netherlands, Romania, Hungary, Spain). This means that the latter may be associated to specific requirements, for example that the convicted person does not contact or communicate with the victim, their relatives, or any other persons as determined by the judge.¹²⁰¹

The existence of emergency protection measures is also uneven across the selection of MSs examined. Emergency barring orders (EBO) are crucial to guarantee victims protection in case of immediate danger, in case of domestic violence against women in particular.¹²⁰² Only five Member States have included in their legal systems short-term protection measures applying from the moment a risk has been identified (e.g. The Netherlands, Italy, Hungary, Germany, Finland). However in other countries EBOs do not exist.¹²⁰³ In Ireland, a new bill currently going through the legislative process now will soon provide the courts with the possibility to issue EBOs.¹²⁰⁴ Art 52 of the Council of Europe’s Istanbul Convention¹²⁰⁵ provides that MSs must adopt EBOs to prevent perpetrators of domestic violence from

¹¹⁹⁴ J. Wirth, National report on Hungary for the POEMS project, 2015.

Retrieved at: <http://poems-project.com/wp-content/uploads/2015/02/Hungary.pdf>

¹¹⁹⁵ See: S. Van Der Aa, Protection Orders in the European Member States: Where Do We Stand and Where Do We Go from Here?, *European Journal of Criminal Policy Research*, Vol 18, 2012, p. 190; National report No 2 on Romania, Section on Victims (point 23)

¹¹⁹⁶ A. Baldry, L. De Geus, National Report on Italy for the POEMS project, 2015.

Retrieved at: <http://poems-project.com/wp-content/uploads/2015/02/Italy.pdf>

¹¹⁹⁷ National report No 2 on France, Section on the protection of victims (point C).

¹¹⁹⁸ National report No 2 on the Netherlands, Section on the protection of victims (point 2).

¹¹⁹⁹ National report No 2, Section on Victims (point 23). As regards Italy, complementary information could be found in Baldry and De Geus 2015, National Report on Italy for the POEMS project, 2015, op. cit.

¹²⁰⁰ National report No 2 on the Netherlands, Section on victims (point 2).

¹²⁰¹ National report No 2 on Spain, Section on victims (point 28).

¹²⁰² WAVE Network, SNaP: Special Needs and Protection Orders – project funded by the DAPHNE Programme of the EU, International report, 2016.

¹²⁰³ Cerrato *et al*, “European Protection Order, European Implementation Assessment”, 2017, op. cit.

¹²⁰⁴ National report No 2 on Ireland, Section on victims (point 23). In the meantime, only Interim Barring Orders (IBOs) can be issued. IBOs can be requested in cases of immediate risk of harm for a maximum of eight days, however these can only be applied for at a civil court (WAVE Network, SNaP: Special Needs and Protection Orders – project funded by the DAPHNE Programme of the EU, International report, 2016).

¹²⁰⁵ Council of Europe Convention on preventing and combating violence against women and domestic violence, Istanbul, 11.V.2011

entering the residence or contacting the victim.¹²⁰⁶ However, only a few Member States have ratified the Istanbul Convention (e.g. Finland, France, Germany, Italy, The Netherlands, Romania, Spain),¹²⁰⁷ in spite of its signing by the EU in June 2017.¹²⁰⁸

Variations in protection regimes also depend on the way offences have been defined and addressed at the national level. Gender-based violence deserves closer attention. This example is particularly relevant, as the EPO Directive essentially arose from the willingness of some countries to address the lack of protection of gender-based victims across the Union. The national legal definitions of gender-based violence in general, and specific forms of violence, such as rape, sexual assault, stalking and intimate partner violence, to name only a few examples, differ significantly from a MS to another.¹²⁰⁹ For example, the German CCP defines sexual assault as: “Whosoever coerces another person, by force, by threat of imminent danger to life or limb, or by exploiting a situation in which the victim is unprotected and at the mercy of the offender, to suffer sexual acts by the offender or a third person on their own person or to engage actively in sexual activity with the offender or a third person.” In contrast, the definition provided by the Irish CCP is much more succinct and evasive: “Sexual assault means an indecent assault on a male or a female.” Logically, national answers to gender-based offences are different too, as a comparative study shows.¹²¹⁰

9.2. Impact on mutual recognition and cross-border cooperation

Under the Spanish presidency in 2010, twelve MSs launched an initiative for a directive on the European Protection Order. The rationale for the EPO was to increase the protection for victims in cross-border situation to ensure that protection orders applied over the whole EU territory. Perpetrators and victims too, must be able to exercise their freedom of movement, and protection should not be limited to the State where the protection measure was originally adopted.¹²¹¹ Put differently, it was believed that the protection should “follow” victims to the Member State they chose to go to.

In order for cross-border protection to happen, the mutual recognition route was chosen. On the basis of ‘Measure C’ of the 2011 Roadmap on victims’ rights, the EU developed the European Protection Order Directive (hereinafter ‘EPO Directive’) and Regulation 606/2013 on the mutual recognition of protection measures in civil matters (hereinafter ‘EPM Regulation’). These two instruments allow national authorities to issue protection orders to protect victims of one Member State when they are located in another Member State.

Major obstacles to the operation of these instruments exist. The widely divergent national approaches to protection measures resulted in a significant flexibility retained by EU legislators, both during the negotiations and regarding the content of MR instruments (9.2.1.). Flexibility, along with the existence of a dual framework, generated some confusion among the MSs as to which instrument should be relied on. The overriding impression is that incompatibilities between national protection measures exist in practice (9.2.2.). This is

¹²⁰⁶ The full provision reads: Parties shall take the necessary legislative or other measures to ensure that the competent authorities are granted the power to order, in situations of immediate danger, a perpetrator of domestic violence to vacate the residence of the victim or person at risk for a sufficient period of time and to prohibit the perpetrator from entering the residence of or contacting the victim or person at risk. Measures taken pursuant to this article shall give priority to the safety of victims or persons at risk.

¹²⁰⁷ Council of Europe, Chart of signatures and ratifications of Treaty 210, Council of Europe Convention on preventing and combating violence against women and domestic violence, Status as of 3 April 2018

¹²⁰⁸ LIBE Committee, Interim Report on the proposal for a Council decision on the conclusion, by the European Union, of the Council of Europe Convention on preventing and combating violence against women and domestic violence (COM(2016)0109 – 2016/0062(NLE)), 19 July 2017

¹²⁰⁹ See, on this matter, the comparative index of national definition drawn up by the European Institute for Gender Equality. Available at: <http://eige.europa.eu/gender-based-violence/regulatory-and-legal-framework/legal-definitions-in-the-eu>.

¹²¹⁰ T. Freixes, L. Román (eds.), “Protection of the Gender-Based Violence Victims in the European Union, Preliminary study of the Directive 2011/99/EU on the European protection order”, EPOgender project, 2014

¹²¹¹ Van der Aa and Ouwkerk, “The European Protection Order: No Time to Waste or a Waste of Time?” 2011, op. cit., p. 268

exacerbated by the ill-implementation of these instruments, as well as a striking lack of knowledge of their existence (9.2.3.).

9.2.1. Flexibility in MR instruments

The complex and kaleidoscopic landscape of national protection measures rendered the negotiations on a cross-border protection instrument difficult.

Attempts at accommodating the diversity of legal traditions are three-fold.

First, the co-existence of civil and criminal protection measures at the national level forced EU lawmakers to consider the adoption of two separate instruments governing the ambits of both civil and criminal law. A compromise was reached between the Commission on the one hand, and the Council and the Parliament on the other hand. At times of negotiation of the EPO, the Commission wanted to restrict the scope of the directive to criminal matters. Bearing in mind the diversity of protection measures issued by civil jurisdictions at the national level, this raised concerns within the legislative bodies, and it was agreed to prepare a separate instrument for civil matters.¹²¹²

Then, the existence of different kinds of authorities in the Member States calls for a “high degree of flexibility in the cooperation mechanism.”¹²¹³ Flexibility was introduced as regards the nature of authorities competent to adopt and enforce protection measures.¹²¹⁴

The EPO Directive provides that not only “judicial” but also “equivalent authority or authorities” are competent under national law to issue an EPO and to recognise such an order.¹²¹⁵ Flexibility is further illustrated in the Preamble of the directive, where Recital 10 explicitly states that the civil, administrative or judicial nature of the authority adopting a protection measure is irrelevant. The “civil counterpart” of the EPO Directive, namely the EPM Regulation, retained similar flexibility as regards the nature of authorities. Thus, the civil, administrative or criminal nature of the authority ordering a protection measure is not determinative;¹²¹⁶ decisions can be taken by either judicial or administrative authorities. Police authorities, on the other hand, do not have the competence to issue civil protection orders.¹²¹⁷

Third, flexibility was introduced regarding the nature (criminal or civil) of protection measures to be implemented.

In the EPO Directive, the competent executing authorities remain free to determine the kind of measures of protection that should follow the issuing of a protection measure. Recital 20 states that the “competent authority in the executing State is not required in all cases to take the same protection measure as those which were adopted in the issuing state, and has a degree of discretion to adopt any measure which it deems adequate and appropriate under its national law” to provide continued protection to the person. It is interesting to note that a stricter approach was taken in the EPM Regulation. Cross-border cooperation under this instrument is strictly confined to the realm of civil cooperation. Thus, the type and the civil nature of the protection measure cannot be affected.¹²¹⁸

A last word should be said regarding the number and types of protection measures governed by the EPO Directive and the EPM Regulation.

No endeavours at approximating the protection regimes were made beyond a mere list of three measures that must be available in the Member States provided under the EPO Directive and the EPM Regulation: a geographical prohibition on certain places; a prohibition

¹²¹² Cerrato *et al*, “European Protection Order, European Implementation Assessment”, *op. cit.*, 2017, p. 12. See also European Commission, Statement by Vice-President Viviane Reding, EU Justice Commissioner, on the European Protection Order, Strasbourg, 13 December 2011, MEMO/11/906

¹²¹³ Recital 8 Directive 2011/99/EU

¹²¹⁴ Recital 20 Directive 2011/99/EU. Also reiterated under Art 1, whereby rules allow a judicial or *equivalent* authority to adopt a protection order.

¹²¹⁵ Art 3(1) Directive 2011/99/EU

¹²¹⁶ Recital 10 Regulation 606/2013

¹²¹⁷ Art 3(4) and Recital 11 Regulation 606/2013

¹²¹⁸ Recital 20 Regulation 606/2013

or regulation of contact; and a prohibition or regulation on approaching a person beyond a limited distance.¹²¹⁹ The all-encompassing wording and broad scope of these three protection measures suggests that these instruments sought to circumvent the absence of uniform protection measures for victims at the national level, and to favour effective cross-border cooperation.

Furthermore, the EPO Directive acknowledges that the approximation of the national legislation of the Member States is not required;¹²²⁰ on the contrary, the Directive specifically states that it “does not create obligations to modify national systems for adopting protection measures nor does it create obligations to introduce or amend a criminal law system for executing a European protection order.” This is mirrored in the EPM Regulation, which states that the regulation “takes account of the different legal traditions of the Member States and does not interfere with the national systems for ordering protection measures.”¹²²¹ As a result, Member States are not obliged to “modify their national systems so as to enable protection measures to be order in civil matters, or to introduce protection measures in civil matters for the application of this Regulation.”

9.2.2. Confusion arising from the existence of a dual framework and risks of incompatibilities in practice

The co-existence of the EPO Directive and the EPM Regulation in the field of protection orders complicates their use,¹²²² and creates confusion as to which instrument should be given the priority, depending on the circumstances of a case.¹²²³ This raises an interesting paradox: whereas national differences forced EU law-makers to accommodate the variety of civil and criminal protection measures by adopting two separate instruments, it is precisely this endeavour at accommodation that is being criticised for raising confusion at the implementation stage.

Yet, the choice of one or the other instrument has important implications for the victim since the degree of effectiveness and efficacy is not the same in the directive and the regulation.

These differing levels of effectiveness echo existing differences in mutual recognition in criminal matters and mutual recognition in civil matters and are somehow logical. For example, in the EPM Regulation, the standard transmission form applicable in mutual recognition instruments was replaced by a certificate containing more detailed information about the issuing authority, the protected person, the person causing the risk, and the type of protection measure applied and its duration.¹²²⁴ Meanwhile, in the EPM Regulation the grounds for refusal were shortened to two instead of nine in the EPO Directive.¹²²⁵ Then, the dual criminality requirement of the EPO Directive¹²²⁶ is not mirrored in the EPM Regulation, where direct and automatic circulation of the protection measure is encouraged.¹²²⁷

Other differences between the two instruments are less obvious to discern, and more difficult to understand. The involvement of administrative authorities is a case in point. Whereas flexibility regarding the nature of authorities was retained in both instruments, only the EPM Regulation makes the competence of administrative authorities conditional upon the existence of “guarantees with regard, in particular to their impartiality and the right of the parties to judicial review.”¹²²⁸

In practical terms, frictions may arise from the co-existence of proceedings partly governed by criminal law and partly governed by civil law. There seems to be a widespread feeling

¹²¹⁹ Art 5 Directive 2011/99/EU

¹²²⁰ Recitals 8 and 9 Directive 2011/99/EU

¹²²¹ Recital 12 Regulation 606/2013

¹²²² National report No 2 on Germany, Section on Victims (point E(I)); National report No 2 on France, Section on Victims (point C).

¹²²³ D. Porcheron, *Le principe de reconnaissance mutuelle au service des victimes de violences*, *Rev. crit. DIP*, 2016, p. 232

¹²²⁴ Art 7 Regulation 606/2013

¹²²⁵ Art 13 Regulation 606/2013

¹²²⁶ Art 10(c) Directive 2011/99/EU.

¹²²⁷ National report No 2 on France, Section on Victims (point C).

¹²²⁸ Art 3(4) and Recital 20 Regulation 606/2013

among national authorities that these instruments, if relied on, would be unworkable in practice. Indeed, compatibility issues could arise when the executing State has to recognise an EPO imposing protection measures that originally were adopted by non-criminal authorities or even non-judicial agents or bodies of the issuing State.¹²²⁹ Germany, for example, will never be able to issue protection orders under the EPO, whereas Spain will never make use of the civil Certificates provided under the EPM Regulation.

Obstacles at the enforcement stage may arise from the existence of a dual regime of protection measures. The question of compliance can be raised, in particular when a Member State only has civil instruments at its disposal to enforce a criminal protection order issued by another jurisdiction.¹²³⁰ In the Netherlands for example, the supervision of compliance with civil protection orders is less regulated than it is for criminal protection orders.¹²³¹

From a more technical perspective, it may simply be that some of the instruments deployed by the issuing State to monitor whether the protection order is being complied with are not available in the executing State. The extent to which MSs have established specialised services and other protection measures for victims varies to some extent. Thus, the “preliminary layers” of protection, that are a pre-requisite to cooperation at the inter-state level, are not always available. Otherwise put, it may very well be that the victim does not enjoy an equivalent protection in the State where he or she moves to, compared with the State of origin. Fears of such kind were expressed by Spain, which has at its disposal a variety of monitoring techniques, including electronic bracelets and geolocation devices connected to police servers.¹²³²

Interviewees and national reports suggested that it is easier to make use of domestic procedures instead of relying on cross-border channels of protection. For example in Germany, the formalities to initiate a protection measure are few, and thus constitute an easier and faster way than going through the inter-European procedure, where authorities must first enter in contact with one another.¹²³³ Moreover, the domestic system of protection against violence, that pre-existed the EPO Directive and the EPM Regulation, is also open to EU citizens of other Member States who reside in Germany.¹²³⁴ This is compounded by the clear deficit in coordination and communication that was recently identified between competent national authorities.¹²³⁵

9.2.3. Implementation issues, lack of knowledge and legality concerns

The two instruments were described in the national reports as difficult to transpose by the respondents and hardly workable in practice. Significant transposition delays occurred with regard to the EPO Directive. The transposition deadline for the latter instrument was set on 11 January 2015, however the transposition process was only achieved last year, the last MS being Belgium in May 2017.¹²³⁶ Only seven EPOs were issued since the entry into force of the EPO Directive,¹²³⁷ despite thousands of protection orders issued at the domestic level.¹²³⁸ For example in Finland, 1500 restraining orders were issued in 2017.¹²³⁹ No information could be

¹²²⁹ See national reports on Germany (point E(I)) and Spain (point 30).

¹²³⁰ *Ibid.*

¹²³¹ The claimant is solely responsible for the supervision, and electronic means of monitoring compliance cannot be imposed. See S. Van der Aa https://www.wodc.nl/binaries/2183-summary-part-i_tcm28-72404.pdf. Former studies also pointed out to the lack of enforcement measures and sanctions in case of breaches of POs in Germany. WAVE Network, ‘SNaP: Special Needs and Protection Orders’ – project funded by the DAPHNE Programme of the EU, International report, 2016, *op. cit.*, p. 22

¹²³² National report No 2 on Spain, Section on Victims (point 30). It is interesting to note that similar issues arose as regards the use of probation measures and alternatives to detention. *Supra*, Section 4.2.

¹²³³ National report No 2 on Germany, Section on victims (point E(I)).

¹²³⁴ *Ibid* (point C(II)).

¹²³⁵ Cerrato et al 2017, *op. cit.*, p. 53

¹²³⁶ Loi relative à la décision de protection européenne. Moniteur Belge; Publication of 18/05/2017; pp. 57542-57557.

¹²³⁷ Four EPOs were issued by Spain, two in the UK and one in Italy. See European Parliament, Implementation assessment of the EPO, 2017, *op. cit.*

¹²³⁸ This finding is corroborated by those of the implementation assessment conducted by the European Parliament on the EPO, *ibid.*

¹²³⁹ National report No 2 on Finland, Section on Victims (point 28).

found in the national records of the Member States examined on the issuing of civil protection orders under the EPM Regulation.

The way those instruments were implemented is not conducive to their smooth operation. For example, the requirement of dual criminality was implemented in some countries as a mandatory ground for refusal (e.g. France and Spain). This could also constitute one of the reasons preventing the use of the EPO, due to existing divergences between the definitions and concepts of offences, such as gender-based violence.¹²⁴⁰

One may also mention that the EPO Directive does not provide time-limits for Member States to issue protection orders. As a result, most legislations did not include specific provisions in their transposing law.¹²⁴¹ Other issues include the way the EPO Directive was converted into national law, sometimes resulting in a mere translation of the directive, without further adaptation to the particularities of national systems.¹²⁴² The Irish optouts on both the EPO Directive and the EPM Regulation, add another impediment to high ambitions of free circulation of protection.

Besides, there seems to be a general lack of knowledge on these two instruments on the part of both victims and professionals in charge of protecting them. A recent EP study reveals that victims still lack awareness of their rights, and information on how they could exercise them is scarcely available.¹²⁴³ Despite the fact that the EPO Directive provides for the conduct of courses and trainings for judicial authorities on EPO procedures,¹²⁴⁴ in Germany, many judges and lawyers are simply not aware that the EPO exists.¹²⁴⁵ Most lawyers in Germany dealing with criminal law are primarily criminal defence lawyers, and it can be hard to find specialised victim lawyers.¹²⁴⁶ Another issue identified in Germany is the lack of willingness of lawyers themselves to undergo training, since the EPO mechanism has never been relied on in Germany.¹²⁴⁷ A similar criticism applies to France, where judges dealing with protection measures applied to victims are few, and human and financial resources devoted to the enforcement of these measures are scant.¹²⁴⁸ An obstacle to the training of judges identified in Germany lies in the requirement of independence of judges, that cannot be forced to participate in trainings.¹²⁴⁹

A last concern relates to the compatibility of the flexibility retained under the EPO Directive with the legal basis of Art 82(1) TFEU on judicial cooperation chosen by the legislators.¹²⁵⁰ A joint legal basis of Art 82 and Art 81 TFEU would have perhaps reflected more accurately the content and the cooperation mechanism laid down in the directive.¹²⁵¹

¹²⁴⁰ *Supra*, paragraph on the nature of differences. See also National report No 2 on Spain, Section on Victims (point 30). For example, gender-based violence may encapsulate a different meaning depending on the degree of acceptance of same-sex couples or relationships in the national law of a given MS.

¹²⁴¹ As noted by our Romanian expert. See National report No 2 on Romania, Section on Victims (point 27).

¹²⁴² National report No 2 on Romania, Section on Victims (point 27).

¹²⁴³ European Parliament, *The Victims' Rights Directive 2012/29/EU, Implementation Assessment, 2017*, op. cit., p. 106

¹²⁴⁴ Recital 31 Directive 2011/99/EU reads that: "Member States should consider requesting those responsible for the training of judges, prosecutors, police and judicial staff involved in the procedures aimed at issuing and recognising a European protection order to provide appropriate training with respect to the objectives of this Directive."

¹²⁴⁵ National report No 2 on Germany, Section on victims (point E(I)).

¹²⁴⁶ This is despite the fact that victim protection is taken into account in the education of judges and prosecutors. See National report No 2 on victims (point II).

¹²⁴⁷ *Ibid.*

¹²⁴⁸ C. Blaya, *Mapping the legislation and assessing the impact of protection orders in the European Member States (POEMS)*, National report on France, 2015.

Available at: <http://poems-project.com/wp-content/uploads/2015/02/France.pdf>

¹²⁴⁹ National report No 2 on Germany, Section on victims (point E(II)).

¹²⁵⁰ Similar concerns were formulated as regards the E-Evidence Directive (*Supra*, Section 1). It seems that the widening of cross-border cooperation actors is not always compatible with the rather strict boundaries – between administrative, criminal and civil actors – operated in the Treaties.

¹²⁵¹ V. Mitsilegas, *EU Criminal Law after Lisbon, Rights, Trust and the Transformation of Justice in Europe*, 2016, op. cit., p. 196

9.3. The Victims' Rights Directive: raising awareness?

The comprehensive scope of the Victims' Rights Directive carries the potential to raise awareness on the imperative of protecting victims throughout the EU. This could, over time, enhance the visibility of the EPO Directive and the EPM Regulation (A), given the conferring of a general right to protection of victims in the directive (i), as well as a strong focus on victims of gender-based violence (ii). As such therefore, the provisions of the Victims' Rights Directive seem to feed in the underlying objective of the EPO Directive and the EPM Regulation to ensure that victims of gender-based violence are adequately protected throughout the EU. However, the added-value of the Victims' Rights Directive is undermined by its seeming disconnection from instruments of mutual recognition (B).

A. Raising awareness on the protection of victims and domestic violence

i) A general right to protection

Under Chapter 4, the Victims' Rights Directive includes a general right to protection for victims.

'Protection' is declined in several aspects. Under Art 18, the victim has a right to be protected from "secondary and repeat victimisation, from intimidation and from retaliation, including against the risk of emotional or psychological harm, and to protect the dignity of victims during questioning and when testifying. When necessary, such measures shall also include procedures established under national law for the physical protection of victims and their family members."¹²⁵² The scope of this provision is much broader than that of protection orders. Whereas the EPO Directive and the EPM Regulation regulate interactions between the offender and the victim, the Victims' Rights Directive covers the interplay between the victim and both the offender and professionals dealing with the offence, such as investigative and judicial authorities. Thus, it provides a complementary protection to the protection orders instruments. The inclusion of list of dangerous situations that the victim may face, i.e. secondary and repeat victimisation, intimidation and retaliation, including against the risk of emotional or psychological harm, can be used as guidance by the national authorities as to the circumstances in which a protection order should be issued. However, the procedures and instruments to enable such protection remain a matter for the national law, and Art 18 does not seek to expand the list of protection measures provided under the EPO Directive and the EPM Regulation further.¹²⁵³ The Court of Justice was recently called on by the Italian judicial authorities to further clarify the exact scope of this provision through the preliminary ruling procedure.¹²⁵⁴

Art 19 provides that, where necessary, contact should be avoided between the offender and the victims and its family members, for example by providing separate court rooms during the proceedings. The latter provision is reminiscent of the prohibition/regulation of contact and distance enshrined under the EPO Directive and the EPM Regulation and ensures a degree of consistency between the three instruments.

Two observations can be made.

First, the inclusion of a chapter on the protection of victims may contribute to raise awareness on the need to protect victims further. Indirectly, it could also incite Member States to resort to the EPO Directive and the EPM Regulation more often.

Then, the difficulty to regulate in favour of minimum standards on protection measures is illustrated by the absence of approximation efforts in the directive. Rather, the guidance document on the implementation of the Victims' Rights Directive explicitly states that Art 18

¹²⁵² Art 18 Directive 2012/29/EU

¹²⁵³ As stated in the Commission's guidance paper on the implementation of Directive 2012/29/EU, p. 40.

¹²⁵⁴ C-38/18, Request for a preliminary ruling from the Tribunale di Bari (Italy) lodged on 19 January 2018 — Criminal proceedings against Massimo Gambino and Shpetim Hyka. The Court asked, in essence, if Articles 16, 18 and 20(b) of Directive 2012/29/EU must be interpreted as precluding the victim of a crime from having to present evidence orally for a second hearing, even though the victim has already been heard at the first hearing, simply because one of the parties in the proceedings refused that the judge reads the written record of the victim's statement.

does not harmonise the types of national protection orders. Besides, the Victims' Rights Directive applies to criminal matters only, and does not regulate civil measures.¹²⁵⁵ Therefore, those provisions will be of little help to address the crux of the problem: incompatibilities between civil, criminal and quasi-criminal protection orders.

Despite these apparent limitations, the introduction of a general standard of protection for victims under national law was assessed positively in some countries, especially where it did not exist prior to the entry into force of the directive (e.g. Italy, Germany).¹²⁵⁶

ii) Victims of gender-based violence

The Victims' Rights Directive dedicates specific attention to victims of gender-based violence, in particular women. The Guidance Document issued by the Commission on the implementation of the directive mentions that the provisions it contains are particularly relevant to the protection of victims of gender-based violence. It includes a non-exhaustive list of situations which qualify as gender-based violence, comprising physical violence, sexual exploitation and abuse, female genital mutilation, forced marriages and so-called 'honour crimes'.¹²⁵⁷ Perhaps a streamlining of the national definitions of gender-based offences could lead, over time, to more consensus on the protection afforded by victims of such offences. This is compounded by the inclusion of a few provisions on the kind of protection and support that must be available for vulnerable persons. Thus, the directive recognises that "women victims of gender-based violence and their children often require special support and protection because of the high risk of secondary and repeat victimisation, of intimidation and of retaliation connected with such violence."¹²⁵⁸ Victims of gender-based violence have a right to targeted and integrated support¹²⁵⁹ and an individual assessment,¹²⁶⁰ and trainings of authorities in direct contact with victims should be gender-sensitive.¹²⁶¹

A word of caution should nonetheless be raised. The exclusion of administrative and civil proceedings from the scope of the Victims' Rights Directive means that some offences may not fall within its scope. It is the case, for example, of victims of sexual offences within public administration in Spain,¹²⁶² where these offences are dealt with under the administrative channel, where the victim is not entitled to the status of party to the proceedings. The Spanish Constitutional Court addressed this gap to some extent, ruling that some of the rights enjoyed by the victims in criminal proceedings shall be guaranteed in disciplinary proceedings.¹²⁶³

B. The relative disconnection between approximation and mutual recognition

In spite of the strong awareness-raising potential of the Victims' Rights Directive, the relations between the latter's provisions and mutual recognition are difficult to appreciate. The Preamble of the directive includes a simple and brief reference to mutual recognition and to the EPO Directive,¹²⁶⁴ without elaborating further on how it is supposed to contribute to its functioning. Besides, none of the provisions of the Victims' Rights Directive refer to the EPO Directive. The justification for adopting the Victims' Rights, along with references to mutual trust and mutual recognition, that featured in the explanatory memorandum of the

¹²⁵⁵ Similar restriction applied to Framework Decision 2001/220/JHA. See C-467/05, *Dell'Orto*, op. cit., as well as the opinion of Advocate General Kokott delivered on 8 March 2007.

¹²⁵⁶ National reports No 2 on Germany and Italy, Section on Victims (points C(I)(1) and 23 respectively). In Italy, this led to a strengthening of the rights of victims with specific protection needs (Article 90-quarter CCP).

¹²⁵⁷ European Commission, Guidance Document related to the transposition and implementation of Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, p. 8

¹²⁵⁸ Recital 17 Directive 2012/29/EU

¹²⁵⁹ Art 9(3)(b) Directive 2012/29/EU

¹²⁶⁰ Art 22(3) Directive 2012/29/EU

¹²⁶¹ Recital 61 Directive 2012/29/EU. For example, victims of gender-based violence to have interviews carried out by a person of the same sex as the victim (Art 23(2)(d) Directive 2012/29/EU).

¹²⁶² National report No 2 on Spain, Section on Victims (point 29).

¹²⁶³ Ibid.

¹²⁶⁴ Recital 7.

original proposal of the Commission, were scrapped in the final version of the text.¹²⁶⁵ The original text read:

“Mutual recognition can only operate in a spirit of confidence, whereby not only judicial authorities but all those involved in the criminal justice process and others who have a legitimate interest in it can trust in the adequacy of the rules of each Member State and trust that those rules are correctly applied. Where victims of crime are not subject to the same minimum standards throughout the EU, such trust can be reduced due to concerns over the treatment of victims or due to differences in procedural rules. Common minimum rules should thus lead to increased confidence in the criminal justice system of all Member States, which in turn should lead to more efficient judicial cooperation in a climate of mutual trust as well as to the promotion of a fundamental rights culture in the European Union. They should also contribute to reducing obstacles to the free movement of citizens since such common minimum rules should apply to all victims of crime.”

The seeming disconnection between approximation and mutual recognition in the field of victims stands in contrast to EU legislation on the rights of defendants, which was perceived as a pre-requisite for mutual recognition to operate effectively, because of the potentially detrimental effect of some instruments on the exercise of human rights, the FD EAW in particular.¹²⁶⁶

Chronological considerations provide a partial account for this relative disconnection between approximation and mutual recognition instruments in the realm of victims' right. Whereas considerable amounts of time elapsed between the adoption of FD EAW and the adoption of the procedural rights directives on defendants, mutual recognition instruments in the realm of the protection of victims were adopted almost simultaneously as the Victims' Rights Directive. However, this raises the question of the adequacy of the legal basis, since measures adopted on the basis of Art 82(2) TFEU must demonstrate that they will facilitate mutual recognition. One may wonder whether the Victims' rights Directive, in its current form, facilitates “mutual recognition of judgments and judicial decision and police and judicial cooperation in criminal matters having a cross-border dimension.”

These concerns reinforce the aforementioned criticism drawn as regards the Compensation Directive, from which the Victims' Rights Directive seems also completely disconnected.

9.4. Recommendations

The three measures included under the EPO Directive and the EPM Regulation establish minimum standards of protection for victims, however they do not modify the internal legislation of MSs. As a result, neither convergence, or approximation, have occurred. Interviewees came to the consensus that it is easier for the protected person to apply for another protection measure in the new state of residence than to maintain the protection enjoyed in the state of origin. As noted in the Dutch report, the EPO illustrates well the fact that sometimes “instruments have been created with wonderful intentions, but seem to have little added value in practice.”¹²⁶⁷

The following recommendations, designed to boost the use of these instruments, can be made.

(i) Legislative option

The protection of victims has received increasing attention in the past years. The near absence of use of existing MR instruments renders any legislative initiatives relating to the cross-border protection of victims premature. Approximation of protection measures could be envisaged, inasmuch as it would facilitate cross-border cooperation and materialise the

¹²⁶⁵ European Commission, Proposal for a directive establishing minimum standards on the rights, support and protection of victims of crime (COM/2011/0275) final – (COD) 2011/0129, pp. 2-3

¹²⁶⁶ See analysis by V. Mitsilegas, *EU Criminal Law after Lisbon, Rights, Trust and the Transformation of Justice in Europe*, 2016, op. cit., p. 198

¹²⁶⁷ National report No 2 on the Netherlands, Section on Impact of Union legislation on Dutch criminal procedural law (point 2)

objective of ensuring that protection afforded in one MS should follow the victim in another MS. Prospects of approximation should nonetheless be relativized by the huge diversity of protection measures available at the national level, as well as the widely divergent regimes governing their use.

The question can be raised of the best approach to follow in order to ensure that victims are protected in a comprehensive manner. The broad scope of the Victims' Rights Directive is a particularly welcome development. However, other areas will deserve increasing attention in the coming years. It is notably the case for the protection of victims of cybercrime, where both natural persons and small enterprises generally suffer important damages.¹²⁶⁸ The release of the Commission proposal on E-Evidence, alongside the growing relevance of private actors in the cooperation instrumentarium, could provide the needed momentum for the formulation of concrete policy options in this area. In the realm of victims of gender-based violence, the Parliament advocated in favour of the adoption of dedicated legislation on women in several resolutions.¹²⁶⁹ More research is however needed on the current legal, legislative and procedural frameworks governing gender-based victims at the national level, and how approximation in this field could positively impact the functioning of the EPO Directive and the EPM Regulation.¹²⁷⁰

Despite the many areas left unaddressed in EU legislation on victims' rights, attention should be paid not to adopt a variety of instruments dealing with specific aspects of victims' protection. A comprehensive instrument may be preferred to a sectorial approach, where the fragmentation of the current framework and duplication of efforts are more likely to occur.

(ii) Non-legislative options

(ii)a. Closer monitoring of the degree of implementation of MR instruments

There is little data available on the nature of protection measures available in the Member States, as well as the effectiveness of victim protection laws in practice.¹²⁷¹ A comprehensive mapping of existing measures is necessary prior to any legislative endeavours. Monitoring should go beyond the state of implementation of MR instruments on protection orders and the existence of a national framework for the protection of victims at the national level and examine how existing measures work in practice. In some countries there is sometimes a discrepancy between 'the law in books' and the 'law in action'.¹²⁷² Member States should be invited to submit information about their own experience with the EPO and the EPM instruments, regarding their implementation in practice.¹²⁷³ Data on the extent to which victims of one Member State were successful in requesting a protection measure in another Member State without yet going through the directive or the regulation's channel would be relevant in this respect. As noted elsewhere, Member States would be well advised to establish a central national authority that coordinates and manages the issuing and execution of all orders, and create a national register listing the types of protection measures available that would be accessible to other MS.¹²⁷⁴ The submission of the implementation report by

¹²⁶⁸ See European Commission, Combating Cybercrime: EU-wide rules against cyber-attacks come into force, Press Release, 4 September 2015. Available at: https://ec.europa.eu/home-affairs/what-is-new/news/news/2015/20150904_1_en

¹²⁶⁹ European Parliament resolution of 26 November 2009 on the elimination of violence against women, P7_TA(2009)0098; European Parliament resolution of 10 February 2010 on equality between women and men in the European Union, P7_TA(2010)0021

¹²⁷⁰ Little research was conducted in this respect. As acknowledged in a recent EP Study, EU agencies active in the field of victims' rights, such as the Fundamental Rights Agency and the European Institute for Gender Equality, have not looked extensively into the EPO. Cerrato et al 2017, op. cit., p. 18. Moreover, statistics provided by the Member States on domestic violence are not always accurate. See FRA, Violence against women: an EU-wide survey, main results, Vienna: FRA, 2015, p. 14. It is however worth mentioning the following report: T. Freixes, L. Román (eds.), Protection of the Gender-Based Violence Victims in the European Union, Preliminary study of the Directive 2011/99/EU on the European protection order, EPOgender project, 2014

¹²⁷¹ Besides the comprehensive works of S. van der Aa. National reports also confirm this.

¹²⁷² In Italy for example, the legal framework seems to protect victims in a sufficient way but statistics show that gender-based violence increases every year. National report No 2 on Italy, Section on victims (point 30).

¹²⁷³ Van Der Aa et al 2015, op. cit., p. 247

¹²⁷⁴ T. Freixes, L. Román (eds.), Protection of the Gender-Based Violence Victims in the European Union, Preliminary study of the Directive 2011/99/EU on the European protection order, EPOgender project, 2014

the European Commission to the European Parliament and the Council, which was postponed from 11 January 2016 to 2018 as a result of transposition delays, will contribute to shedding light on existing legal and legislative frameworks at the national level.

(ii)b. Reflecting on the future of MR instruments in the field of protection measures

There is a clear need to reflect on how to improve cross-border protection of victims. A debate could be initiated on the approximation of protection measures available for victims, with the final objective of pushing national laws towards higher degrees of homogeneity.¹²⁷⁵ This would clarify and fortify the link between approximation and mutual recognition instruments.

Mounting obstacles nonetheless remain, given the widely divergent national frameworks existing in this area.

Any further reflection on the future of the EPO Directive and the EPM Regulation should be replaced within the broader EU legal context. Attention should be paid to complementarities between protection measures and alternatives to detention available under FD ESO and FD Probation Measures. Reflecting on how to improve cross-border protection should take place in conjunction with initiatives designed to incite MSs to use FD ESO and FD Probation Measures.¹²⁷⁶ Suggestion was made during the negotiations on the EPO Directive to amend the two FDs by inserting provisions on victims' protection, instead of adopting a dedicated piece of legislation in this area.¹²⁷⁷ *In fine*, this option was not retained. In an ironic twist, it is noteworthy that, out of two EPOs issued in 2015, the first one was replaced by an alternative to PTD.¹²⁷⁸ Initiatives taken in these areas could form part of a broader debate on how to strike the right balance between victims' protection and defence rights.¹²⁷⁹

This approach is supported by the European Parliament. The latter recently underlined the possible synergies and added value that may come out of a comprehensive approach and stressed that "the judicial and practical flaws in the implementation of (the EPO) directive can be counteracted by the proper interplay and coordination between the various EU victim-protection instruments, such as the Framework Decision on supervision measures as an alternative to provisional detention and the Framework Decision on probation measures, Regulation 606/2013 on mutual recognition of protection measures in civil matters and Directive 2012/29/EU ... establishing minimum standards on the rights, support and protection of victims of crime."¹²⁸⁰

(ii)c. Raising awareness of instruments on victims

Greater visibility should be given to mutual recognition instruments dealing with the protection of measures. The Victims' Rights Directive may contribute to raising awareness of the existence of these tools. However, none of its provisions refer to cross-border protection, and its impact is expected to be remote.

Training focusing on the use of MR instruments on protection orders, alongside the protection of victims' rights in general, should be encouraged and further developed. EJTN thus far has not been involved in providing courses and seminars on victim protection. Expanding the network's scope of activities could be considered.¹²⁸¹ Targets should include not only judicial authorities – prosecutors and judges, but also lawyers and the police, due to their direct contacts with victims and the prominent responsibilities they have in upholding victims' rights.

¹²⁷⁵ National report No 2 on Romania, Section on Victims (point 27).

¹²⁷⁶ *Supra*, Section 4.

¹²⁷⁷ Cerrato et al 2017, op. cit., p. 11

¹²⁷⁸ National report No 2 on Spain, Section on victims (point 25).

¹²⁷⁹ C. Harding, EU Criminal Law under the Area of Freedom, Security and Justice, in A. Arnulf, D. Chalmers, The Oxford Handbook of European Law, Oxford: Oxford University Press, 2015, p. 852

¹²⁸⁰ European Parliament, Motion for a Resolution on the implementation of Directive 2011/99/EU on the European Protection Order (2016/2329(INI)), 14 March 2018, para 48.

¹²⁸¹ Arguably, the rights of victims could feed into seminars dealing with fundamental rights. See EJTN, Calendar of training activities, 2018.

Available at: <http://www.ejtn.eu/PageFiles/9777/2017-115-EJTN-Calendar%20of%20activities%202018-ONLINE-EN-v13.pdf>

Awareness-raising activities of legal professionals should be complemented by a bottom-up approach focusing on civil society. NGOs and associations working directly with victims should become the targets of information campaigns, courses and training activities to incite them to file an application for a protection measure.¹²⁸² The creation of public directories or registers of accredited support organisations and lawyers could be envisaged, and signposting and other material summarising victims' rights should be made available.¹²⁸³ Other segments of the civil society should also be targeted by awareness campaigns, such as universities and schools, social media, posters, public transport and mobile applications.¹²⁸⁴ The current loopholes in victim protection and support services are best captured by the multiplication of accusations of sexual harassment in the aftermath of the Harvey Weinstein scandal, whereby countless demands for help, alongside the need for women to be able to speak out without fearing retaliation and secondary victimization, were brought to light.

¹²⁸² Cerrato et al 2017, op. cit., p. 56

¹²⁸³ European Parliament, The Victims' Rights Directive 2012/29/EU, Implementation Assessment, 2017, op. cit., p. 106

¹²⁸⁴ Ibid.

ASSESSMENT AND SUMMARY OF THE RECOMMENDATIONS

1. General assessment

This research paper identified nine areas of friction among national procedural criminal laws. It focused on investigative measures,¹²⁸⁵ standards of admissibility of evidence,¹²⁸⁶ equality of arms in transnational investigations,¹²⁸⁷ pre-trial detention regimes and alternatives to detention,¹²⁸⁸ procedures to assess detention conditions after the *Aranyosi and Căldăraru* judgment,¹²⁸⁹ compensation schemes for unjustified detention in transnational proceedings,¹²⁹⁰ the right to be present at a trial and conditions surrounding *in absentia* surrenders,¹²⁹¹ compensation schemes for victims,¹²⁹² and protection measures for victims.¹²⁹³

Bearing in mind the breadth of the study at hand, the sort of “negative catalogue”¹²⁹⁴ of obstacles to cross-border cooperation exposed above is by no means exhaustive and could be developed and deepened further.¹²⁹⁵

The research team faced several limitations and challenges in the preparation of this study. Some of the mutual recognition and cross-border cooperation instruments addressed have just been implemented (e.g. EIO Directive) or are still in the process of being implemented (e.g. EPPO Regulation), not to mention those which are still going through negotiations (e.g. E-Evidence Proposal). Thus, it was impossible to take the distance needed to appreciate and assess in a comprehensive and accurate manner the obstacles impairing the functioning of these two mechanisms. Besides, it should not be overlooked that this study draws on a limited sample of nine Member States. Other issues may have been encountered elsewhere, but they might not have been dealt with comprehensively.

Interviews, reports and research papers by academics, EU and national officials, and civil society representatives highlighted that other areas deserve close examination as well. Inter alia, these comprise the absence of an EU instrument organising transfers of proceedings,¹²⁹⁶ obstacles stemming from conflicts of jurisdiction, as well as differences in understandings and approaches to the principle of *ne bis in idem*. Although the latter may seriously impair cross-border cooperation,¹²⁹⁷ obstacles encountered in these areas were deliberately left aside from the scope of this research, since the link between these and differences in criminal procedures is more tenuous.¹²⁹⁸

Another area of inquiry will deserve closer attention in the coming years. It relates to the crumbling dichotomies underpinning the EU’s area of criminal justice. The demarcation line between administrative and criminal law has become extremely porous, helped by the significant flexibility retained in EU instruments, in order to accommodate the different degrees of ‘blur’ between the two ambits at the national level. The question of where to draw the line between the administrative and criminal fields permeates many fields of cooperation, including the realm of victims, where the EU had to cope with the variety of administrative

¹²⁸⁵ *Supra*, Section 1.

¹²⁸⁶ *Supra*, Section 2.

¹²⁸⁷ *Supra*, Section 3.

¹²⁸⁸ *Supra*, Section 4.

¹²⁸⁹ *Supra*, Section 5.

¹²⁹⁰ *Supra*, Section 6.

¹²⁹¹ *Supra*, Section 7.

¹²⁹² *Supra*, Section 8.

¹²⁹³ *Supra*, Section 9.

¹²⁹⁴ National report No 2 on Germany, Section on conclusion and recommendations (point D).

¹²⁹⁵ As noted in the introduction.

¹²⁹⁶ National report No 2 on Spain, Section on Conflicts of jurisdiction (point 22).

¹²⁹⁷ See the project led by the European Law Institute on Prevention and Settlement of Conflicts of Exercise of Jurisdiction in Criminal Law, University of Luxembourg, 2014-2017.

See the Draft Legislative Proposals for the prevention and resolution of conflicts of jurisdiction in criminal matters in the European Union available at:

https://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/Conflict_of_Jurisdiction_in_Criminal_Law_FINAL.pdf

¹²⁹⁸ With the noticeable exceptions of *ne bis in idem* issues.

and criminal protection measures existing at the national level. Then, another boundary has begun to wane with the strengthening and expansion of cross-border cooperation in criminal matters: the one underpinning the respective roles of public and private actors. Inherent in this change is the role dedicated to private actors in the E-Evidence Proposal. Private parties are not only expected to actively cooperate with judicial authorities and their role is no longer confined to that of “gatekeepers” and “long-arm collectors of enforcement information”.¹²⁹⁹ They also take an active part in the assessment of the investigative measure, in particular when examining whether the assistance request conforms to fundamental rights. Faced with these “tectonic shifts” in the division of labour and competences in the EU’s area of criminal justice, the legal landscape of actors has become extremely complex, interweaving not only EU and national actors and laws, but also embracing administrative and penal rules and procedures, alongside public and private actors. If the trend of multiplying and complexifying the number and kinds of actors involved in cross-border cooperation is to persist, care must be taken that the requirement of effectiveness of cooperation broadening of options for transnational cooperation does not raise legality concerns. With the adoption of the EPO Directive and the release of the E-Evidence Proposal, it seems that the legal basis for judicial cooperation of Art 82(2) TFEU was stretched well beyond its scope, so as to accommodate the development of new forms of cooperation. Pushing the boundaries of Treaty provisions further and broadening options for transnational cooperation by involving new types of actors should not result in lowering the standards and rights of individuals.

Other areas were identified during the research and drafting process of this study. These include, inter alia, the application of some of the general principles of EU law to cross-border cooperation mechanisms, such as the principle of proportionality,¹³⁰⁰ the procedural rights of vulnerable persons and, in particular, those of witnesses,¹³⁰¹ the position of legal persons in criminal justice systems.

I. Impact of differences in criminal procedures on mutual recognition and cross-border cooperation: a practical assessment

This research identified several types of “hindrances” to cross-border cooperation in criminal matters. The very notion of *hindrance* to mutual recognition or cross-border cooperation was understood in broad terms. Several forms of impairment were identified, ranging from lengthy and complex negotiations,¹³⁰² mere delays¹³⁰³ and ill-execution of measures,¹³⁰⁴ to the non-execution of requests,¹³⁰⁵ alongside the near absence of use of cooperation instruments.¹³⁰⁶

a. Lengthy and complex negotiations

The complex and lengthy negotiations leading to the adoption of new instruments of cooperation serve as a first illustration of the difficulties encountered in reconciling differences among criminal procedures. This challenge, combined with the sometimes asymmetrical levels of ambition and lack of political willingness to move forward with new

¹²⁹⁹ J. Vervaele, “Special procedural measures and respect of human rights”, *Revue internationale de droit pénal*, Vol 80, Issue 1, 2009, p. 88

¹³⁰⁰ National report No 2 on Germany, Section on conclusion and recommendations (point D).

¹³⁰¹ See J. McEwan, The testimony of vulnerable victims and witnesses in criminal proceedings in the European Union, *ERA Forum*, Vol 10, 2009, pp. 369-386. Looking into witnesses’ duties in criminal proceedings from a MS to another was also suggested as a possible area of research and improvement by the second national report on Germany (Section on Conclusion and policy recommendations (point D)).

¹³⁰² Negotiations on the EIO Directive and the EPPO Regulation are cases in point. *Supra*, Section 1.

¹³⁰³ EAW issued for the purpose of executing a custodial sentence, authorisation procedures for setting up a JIT, judicial authorisation for the use of coercive investigative measures, identification of the competent authorities under the EIO. *Supra*, Sections 1 and 5.

¹³⁰⁴ EAW issued for the purpose of conducting a prosecution, if the person is to serve a long period of pre-trial detention, investigation requests for minor offences that would normally be dealt with under the administrative channel in the requesting/issuing State but are dealt with under the judicial channel of the requested/executing State. *Supra*, Sections 1 and 4.2.

¹³⁰⁵ EAW issued for the purpose of executing a custodial sentence, EAW issued for the purpose of conducting a prosecution *in absentia*. *Supra*, Sections 5 and 7.

¹³⁰⁶ Cross-border compensation for unjustified detention, cross-border compensation for victims of serious and intentional crimes, protection measures for victims. *Supra*, Sections 6, 5 and 8.

instruments, translated into lengthy negotiations and the watering down of initially relatively high ambitions. Strategies relied on by MSs sitting in Council formations often reverberated in the provisions of the final texts. This is evidenced by the rocky road that led to the adoption of the EIO Directive and the EPPO Regulation.¹³⁰⁷ The drastic cuts in the list of investigative measures to be made available in all MSs during transnational investigations, along with the shift from the idea of an EU central office to prosecute PIF offences to a highly decentralised structure in the EPPO, offer prime examples of this. Meanwhile, crucial provisions, such as the exclusionary rules on admissibility of evidence in the original drafts of the EPPO Regulation, the Access to a Lawyer Directive, and the Presumption of Innocence Directive, were either removed from the main text and inserted in the Preamble of these instruments, or simply deleted.

b. Delays, ill-execution and non-recognition or under-use of assistance requests

The functioning of existing measures has been impaired to a varying extent, depending on a range of factors. The most visible obstacles to cooperation are those relating specifically to the European Arrest Warrant. Indeed, the *Aranyosi and Caldaru* judgment seriously affected the functioning of the EAW, despite its widespread and longstanding use across the Union since its adoption, more than a decade ago. Whereas FD EAW has received most public attention over the past two years, other instruments deserve close consideration as well. Worthy cooperation mechanisms, such as the EPO Directive and the EPM Regulation, have barely been relied on by the Member States, despite their significant potential to increase the standing of victims across the Union. Meanwhile, delays and ill-execution of requests occurred as a result of incompatibilities between legal and procedural rules, absence of mutual knowledge, as well as the lack of effective and speedy communication and information-exchanges between competent authorities.

The findings of this study are summed up in the table below.

Obstacles encountered in practice

<i>Lengthy and complex negotiations, during which crucial provisions were either deleted, or watered down</i>	The list of investigative measures that must be available in the Member States in the EIO Directive and the EPPO Regulation; the rules on admissibility of evidence in the Access to a Lawyer Directive, the Presumption of Innocence Directive and the EPPO Regulation; The right to the presence of a legal counsel in all evidence-gathering acts in the Access to a Lawyer Directive; The right to have evidence translated in the Interpretation and Translation Directive
<i>Delays in the execution of requests and/or ill-execution of requests</i>	Execution of EAWs when detention conditions are problematic in the issuing State; Execution of EAWs issued for the purpose of conducting a prosecution, if the person is to serve a long period of pre-trial detention; Execution of EAWs issued for the purpose of conducting a prosecution <i>in absentia</i> ; Authorisation procedures for setting up a JIT; Identification of the competent authorities under the EIO; Tensions resulting from the possible use of intelligence data in cross-border investigations; Execution of investigation requests for minor offences that would normally be dealt with under the administrative channel in the requesting/issuing State but are dealt with under the judicial channel of the requested/executing State
<i>Non-execution of requests</i>	Execution of EAWs when detention conditions are problematic in the issuing State; Execution of EAWs issued for the purpose of conducting a prosecution <i>in absentia</i>
<i>Underuse or absence of use of cooperation instruments</i>	Cross-border compensation for victims of serious and intentional crimes; Protection measures for victims (EPO Directive and EPM

¹³⁰⁷ *Supra*, sections 1 and 2.

Regulations); Supervision measures at the pre-trial stage;
 Probation measures and alternatives to detention at the post-trial
 stage

II. How to cope with differences: a typology of existing trends among Member States

Against this background, solutions were found in order to accommodate and overcome those differences. Among the Member States analysed, two types of approaches could be observed: a “blind trust” approach and a “half-hearted” or more “reluctant” approach.

Member States following the “blind trust” paradigm sought to accommodate differences to the maximum extent possible. National courts, when assessing whether a request for assistance, a warrant, or an order should be executed, base their analysis on the trust that governs the relation between the Member States. Under this line of reasoning, it is generally taken for granted that fundamental rights violations cannot occur in those countries which are parties to the ECHR and have implemented the *acquis* of the Charter. One may wonder whether this approach truly hinges on the honest assumption that the values enshrined under Art 2 TEU are being upheld across the Union. Pursuant to this approach, cooperation would still rely on the principle of mutual trust, even though it implies falling into a naïve reality of mutual ignorance. But form often trumps substance. In many circumstances, mutual trust was invoked as a justification to hide the underlying preference of national authorities for more efficient judicial cooperation, irrespective of the varying degrees of compliance with fundamental rights across the Union and the adverse impact it may entail on individuals. Why, for example, have the fundamental rights grounds for refusal rarely been invoked in surrender procedures prior to the release of the *Aranyosi and Caldaru* judgment, whereas executing authorities knew that the requested person would risk undergoing degrading and inhuman treatment, as a result from the deficiencies of the carceral system of the issuing State? Whereas resorting to the mutual trust argument has become less and less of a tenable position since *Aranyosi and Caldaru*, the “blind trust” paradigm continues to prevail in other fields of cooperation. This approach is prevalent in the field of evidence admissibility, where some national authorities explicitly refrain from reviewing how evidence was gathered by the authorities of a foreign MS.

The “half-hearted” attitude differs from the above. Member States endorsing this approach have accepted differences between criminal procedures, on condition that these differences are not such as to encroach upon the core content of a fundamental right enshrined under national law. There, the general idea is that the mere existence of differences in criminal procedures is not enough to justify the non-execution of a request for assistance. This is the stance taken by the German Federal Constitutional Court when it implemented its identity review. The extent of the review is limited to the protection of the “core rights” enshrined in the Constitution, such as the principle of human dignity. The Federal Constitutional Court invoked the “identity review” three times, as regards *in absentia* trials,¹³⁰⁸ the right to remain silent,¹³⁰⁹ and detention conditions.¹³¹⁰ This position mirrors the jurisprudential developments in Ireland, where the Irish courts laid down the “egregious defect standard”, when confronted to differences in criminal procedures in surrender proceedings.¹³¹¹ The threshold set by the Irish courts is that differences must be critical, so as to justify a refusal to surrender. Thus, “egregious circumstances” may take the form of “a clearly established and fundamental

¹³⁰⁸ *Supra*, Section 7.

¹³⁰⁹ *Supra*, Section 2. This relatively flexible approach is illustrated by a 2016 ruling, when Germany was confronted to the different implementation of the right to remain silent in the UK, where inferences may be drawn from the suspect’s silence. In its judgment, the Federal Constitutional Court emphasised that the defendant’s right to remain silent would only be infringed if its *core content* would be affected.

¹³¹⁰ *Supra*, Section 5.

¹³¹¹ *Supra*, Section 2. National report No 1 on Ireland, Section on the scope of the grounds for non-execution of the EAW (point 5.2.)

defect in the system of justice of a requesting state”¹³¹² that is such as to be incompatible with the national Constitution.

Variations and nuances could nonetheless be identified in the degree of “half-heartedness” developed by the Member States. Clashes sometimes occur between countries with high levels of protection, and those perceived as located at a lower end of the spectrum. Mismatches in the use of investigative detention, alongside the suspensions of many EAWs issued by, among other countries, Romania, serve as illustrations of this trend. This approach suggests that mutual trust is not based on the mere presumption that Member States share the same level of commitment to a common set of values, but shows that trust must be “earned” by the Member States through effective compliance with fundamental rights standards.

Though it is possible to discern recurring trends in the attitudes of MSs, it is interesting to note that none of the countries examined fall squarely into one, or the other category. In practice, the position adopted by national authorities varies from a field of cooperation to another, depending on the classification of the right infringed under national law. For example, Germany has adopted a flexible approach to standards of evidence admissibility, but the German position is much stricter on *in absentia* trials, because the right to be present at a trial is intrinsically linked to the constitutional right to human dignity. Then, the coexistence of a variety of approaches is problematic from the perspective of fundamental rights. That Member States interpret the concept of mutual trust differently is one thing, and it already complicates the task of defendants to challenge a cooperation measure effectively, because national regimes differ to a more or less greater extent. The issue of variable geometry becomes a thornier one when interpretations of mutual trust differ *within the national regime itself*, depending on both the cooperation measure at hand and the individual’s right that is being infringed.

III. How to cope with differences: the solution brought by the EU

Coping with widely divergent legal regimes was not only a difficult undertaking for the Member States. As far as the EU is concerned, the question of how to strike a balance between the diversity of legal traditions and the imperative of approximation, the latter being a pre-requisite to the effective operation of cross-border cooperation since the entry into force of the Lisbon Treaty, emerged as a crucial one. In order to mitigate the impact on cooperation and fundamental rights of the lack of harmonised rules and the seeming incompleteness of the approximation framework, the Union developed three different strategies.

a. The adoption of legislation designed to approximate individuals’ rights

A first attempt at reducing the impact of differences in criminal procedures on cross-border cooperation lies in the adoption of a body of directives on the basis of the 2009 and 2011 roadmaps, on defendants’ and victims’ rights respectively. The bulk of directives codifies and clarifies the case law of the ECtHR, as well as the principles developed therein, and expands the current procedural framework to some extent by implementing a number of new provisions.¹³¹³ The adoption of EU legislation moreover carries the potential of increasing compliance with the jurisprudential *acquis* developed by the ECtHR, through the advent of a “centralised system of enforcement of EU criminal law”:¹³¹⁴ Since 1 December 2014, the Commission has the competence to monitor the implementation process of these directives and may launch infringement procedures before the Court of Justice, if it considers that the directives have not been implemented adequately. Besides, the choice of the directive as an instrument means that some of the rights they confer have ascending vertical direct effect. Individuals may therefore invoke these rights directly before the courts of Member States if national law failed to implement them, thus complementing the Commission’s powers with a

¹³¹² *Minister for Justice, Equality & Law Reform v. Brennan* [2007] IESC 21, 4th May 2007.

¹³¹³ Through the introduction of a Letter of Rights to be handed to the arrested person (Directive 2012/13/EU).

¹³¹⁴ V. Mitsilegas, *EU Criminal Law after Lisbon, Rights, Trust, and the Transformation of Criminal Justice in Europe*, 2016, op. cit., p. 175

“decentralised enforcement avenue”.¹³¹⁵ Otherwise put, irrespective of whether these rights add much to the ECHR and the national systems already in place, “their adoption by the European legislature will obviously increase their strength and enforceability, due to the particular nature of European law.”¹³¹⁶

b. Flexibility in EU instruments as regards the authorities and the nature of cooperation

Alongside approximation endeavours, a complementary strategy was devised by the EU. This time, the approach taken was not geared to tackling differences head on, but rather to circumvent them. As a result, significant flexibility was retained in cross-border cooperation mechanisms, in order to strike a balance between ensuring the effectiveness of instruments and respecting national legal diversity. First, the scope of actors involved in cross-border cooperation was significantly widened, so as to include both judicial and non-judicial actors, such as administrative authorities. This flexibility has manifested particularly in the terrains of transnational investigations and the protection of victims. Another degree of flexibility was instilled as regards the nature of cooperation measures themselves. Concerning the protection of victims, the existence of a variety of criminal, administrative and civil measures propelled the EU legislator to achieve flexibility with regard to the measures of protection which follow the recognition of a European Protection Order.

c. Deference to national law where differences are too wide and sensitive

Differences sometimes proved too wide and sensitive to be accommodated by ensuring maximum flexibility in EU instruments. Instead, some cooperation mechanisms often simply rely on national law. Several examples of this were encountered in the course of this research. In institutional terms, the implementation of the decentralised EPPO, where ambitions of a single prosecution office faced stiff resistance from the Member States which, *in fine*, preferred a more collegiate framework, will be a real credibility test. In procedural terms, the requirements of judicial authorisation by the national judicial authority for the use of investigative measures, is another telling example. Examples abound in the field of procedural safeguards and legal remedies. Most of the time, the scope, access and eligibility conditions, as well as the overall effectiveness of these provisions, are a matter for national law. In the realm of defendants, these include the degree of applicability of the procedural rights directives to cross-border cooperation instruments, that often depends on the scope of directives under national law. As for the right to a legal remedy, whenever dedicated provisions have been included in EU instruments, the content of which is often limited to a blanket obligation to implement a right to an effective remedy, with few rules governing the access to such remedies, and their scope of application. In the realm of victims, the rights to compensation from the State and compensation from the offender, alongside the right to the restitution of the confiscated property and to legal aid, suffer from similar shortcomings.

d. Limitations and flaws of current solutions

The current solutions brought by the EU have not always been conducive to effective cross-border cooperation. Somewhat paradoxically, whereas flexibility and deference to national law were retained to facilitate and smoothen cross-border cooperation, maintaining the co-existence of the administrative and criminal channels has not always yielded more effectiveness. Incompatibilities between measures invoked as part of the administrative or criminal ambits occur and generate much confusion among practitioners. This is particularly so in the realm of victims, where difficulties to cope with the variety of administrative, criminal and civil measures were pointed out as one of the major reasons for the under-use of the EPO Directive and the EPM Regulation. Delays may occur as a result from the obligation to cope with a variety of existing laws, procedures and requirements. An example of this can be found in the realm of transnational investigations where, in the absence of a Union judge

¹³¹⁵ Ibid.

¹³¹⁶ P. Caeiro, “Introduction” (or: Every Criminal Procedure Starts with a Bill of Rights), in P. Caeiro (ed), *The EU Agenda on Procedural Safeguards for Suspects and Accused pPersons: The ‘Second Wave’ and Its Predictable Impact on Portuguese Law*, Coimbra: Universidade. De Coimbra, 2015, p. 16

of freedoms, a requirement of judicial authorisation at the national level will be necessary to initiate special investigative measures.

From the point of view of individuals' rights, the solutions retained by the EU have not proved satisfying either. Firstly, whereas national law has not always been designed to cope with transnational aspects of justice,¹³¹⁷ fair trials guarantees and the conditions to access to justice continue to be left, to a large extent, to the discretion of the Member States. By consequence, maintaining a strong degree of deference to national law means that individuals are confronted to varying rules and protection regimes, depending on the Member States participating in transnational cooperation. Variable geometry undermines the principle of legal certainty, a yet crucial requirement in transnational proceedings where several MSs are involved, and determining which jurisdiction is competent to address a claim is not always an easy task. Then, the question can be raised of the extent to which blending the administrative and criminal channels, where different procedural safeguards, as well as differing types of access to justice are provided to individuals, may encroach upon fundamental rights. These concerns emerge most prominently when multidisciplinary investigations are conducted, or a dual track of administrative and criminal sanctions is imposed for the same offence, because uncertainty remains as to which guarantees should be applied. Difficulties for individuals to cope with differing regimes of legal protection depending on the nature – administrative or criminal – of cooperation at hand are compounded by another layer of complexity stemming from the strong deference to national law observed in EU instruments.

These concerns are compounded by the minimalist approach pursued by EU legislators in the procedural rights directives, thus undermining their added value, along with their mitigating impact on possible infringements to individuals' rights. Low levels of ambition are illustrated by a variety of factors. In terms of scope, administrative and civil proceedings, along with legal persons, and the post-trial stage of proceedings, are altogether excluded from the scope of EU legislation. As regards the transnational component of EU procedural rights directives, reference is only made to surrender procedures; the link to other mutual recognition and cross-border cooperation instruments is extremely tenuous, and uncertain.¹³¹⁸ Crucial safeguards have often been included under recitals, which contrasts with the sometimes low levels of ambition of the main text, such as the tension between the presumption of innocence and pre-trial detention.¹³¹⁹ As such therefore, the current framework for the protection of individuals is not entirely satisfying, and may give rise to significant tensions between national constitutional courts and the principle of primacy of EU law.¹³²⁰ It is not entirely conducive to properly "(ensuring) full implementation and respect of Convention standards, and, where appropriate, to ensure consistent application of the applicable standards and to raise existing standards."¹³²¹

IV. Imbalances and inconsistencies between actors and instruments

The tension between the operation of cross-border cooperation instruments and fundamental rights has been widely documented in the literature. It boils down to the longstanding debate of how to reconcile effectiveness of EU cooperation without encroaching upon the protection of individuals. This research identified a number of imbalances and inconsistencies, that somehow illustrate the red lines of this debate, and to some extent suggest that the crucial questions it raises have not found a satisfying answer yet.

¹³¹⁷ Ibid.

¹³¹⁸ Such as FD Transfers of Prisoners and FD Probation Measures, that exclusively deal with post-trial situations. Lack of clarity moreover exists as to the extent of their application to the EIO and the EPPO, as well as forthcoming instruments, such as the Regulation on Confiscation and Freezing Orders and the E-Evidence Directive. Though these instruments explicitly state that the procedural rights contained in the defendants' directives continue to apply, it remains unclear how these may be relied on in order to challenge transnational evidence.

¹³¹⁹ *Supra*, Section 4. See also Intervention by V. Costa Ramos, Committee for the Prevention of Torture (CPT), Expert Roundtable on Pre-trial Detention, organised by Fair Trials on 25 April 2018 at the European Parliament, Brussels.

¹³²⁰ *Supra*, Section 7. Interview at the European Parliament.

¹³²¹ Council of the EU, Resolution on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings, 2009/C 295/01, recital 2.

a. Prosecution and defence

Despite the adoption of EU legislation on procedural safeguards in order to limit the negative affection of individuals' rights, imbalances between the prosecution and the defence have pervaded. Recurrent references in the study to situations where defendants face discriminatory treatment in cross-border situations suggest that more should be done to redress this imbalance. Much emphasis over the past years has been placed on the adoption of new cooperation instruments, as evidenced by the multiplication of transnational investigation tools recently negotiated – or currently under negotiations.

The original promise that “the treatment of suspects and the rights of the defence would not only not suffer from the implementation of the (MR) principle, but that the safeguards would even be improved through the process”,¹³²² was only partially fulfilled. Efforts were made in surrender procedures to “reduce the existing distance of protection between criminal proceedings on the one hand, and the EAW on the other.”¹³²³ Hence, dedicated provisions were inserted under each of the procedural rights directives. Yet, the picture is mixed, and the breadth of issues left unaddressed is impressive. Detention conditions has become an outstanding obstacle to surrenders, and compensation mechanisms for unjustified detention are few, and cannot be replicated automatically to transnational proceedings. Sentenced persons suffer from similar shortcomings in EU legislation, post-trial situations being excluded from the scope of EU legislation of procedural rights.

Worrying concerns have emerged over the effective application of the principle of equality of arms in transnational investigations. Responsibility for safeguarding the rights of the defence was passed to national courts on the basis of not entirely clear-cut standards.¹³²⁴ Assuming that the rights of suspects or accused persons are adequately protected due to MS membership of ECHR is not sufficient and misleading.¹³²⁵ Though recently adopted instruments (e.g. EPPO, EIO) refer to EU legislation on procedural rights, it is not entirely clear how the protection conferred by the EU directives can be transposed from surrender procedures to transnational investigations.

b. Defence and victims

Asymmetries continue to exist between the legal protection afforded to the defence and the one developed in favour of victims. This observation holds true, although the crime victim is no longer “a forgotten figure of the criminal justice system”,¹³²⁶ and more consideration was given to victims under the legislation adopted on the basis of Art 82(2)(c) TFEU. It is generally acknowledged that defendants and victims are subject to “variable vulnerabilities,”¹³²⁷ however it seems that, so far, less attention has been paid to the vulnerabilities of the latter.

A first, striking asymmetry between defendants and victims is of a quantitative nature. The six directives adopted in respect to defence rights – in a relatively short span of time, contrast with the two measures adopted in the realm of victims. Meanwhile, the revision process of the Compensation Directive, that has been on the agenda since 2011, has been postponed to 2019.

A second issue focuses on the content of the rights conferred. The provisions contained under the six directives on the defence imply a significant degree of approximation of standards if taken all together, despite the minimalist approach pursued by the legislators. Of the two directives dealing with victims, only the Victims' Rights Directive implies a significant approximation effort on the part of national authorities. This notwithstanding, the content

¹³²² European Commission, Communication on the programme of measures to implement the principle of MR of decisions in criminal matters, *OJ C 12*, 15 Jan. 2001, p. 16

¹³²³ L. Mancan, *The Right to Liberty in European Union Law and Mutual Recognition in Criminal Matters*, 2016, op. cit. p. 235

¹³²⁴ S. Gless, *Transnational Cooperation in Criminal Matters and the Guarantee of a Fair Trial: Approaches to a General Principle*, op. cit., 2013, p. 104

¹³²⁵ As evidenced by the Court's recognition that the presumption of mutual trust is rebuttable. *Supra*, Section 5.

¹³²⁶ N. Katsoris, *The European Convention on the Compensation of Victims of Violent Crimes*, *Fordham International Law Journal*, Vol 14, Issue 1, 1990, p. 188

¹³²⁷ S. Van Der Aa, *Variable Vulnerabilities? Comparing the Rights of Adult Vulnerable Suspects and Vulnerable Victims under EU Law*, *New Journal of European Criminal Law*, Vol 7, Issue 1, 2016, pp. 39-59

and scope of the rights granted by the Victims' Rights markedly contrast with the rights conferred by the procedural rights directives for defendants. As a matter of example, the rights to legal assistance and legal aid, that gave rise to the adoption of dedicated instruments for the defence, were reduced to a blanket obligation for victims imposed on the Member States to implement these rights, leaving national authorities free to determine their content, scope, and eligibility conditions.

Thirdly, the status of victims in cross-border cooperation instruments has, thus far, received little attention. The link between victims' rights approximation and mutual recognition is extremely tenuous, compared with the procedural rights directives adopted for defendants. It may be argued that the question of defendants has only emerged following the adoption of EU legislation on procedural rights, and the systematic inclusion of references to the procedural safeguards of defendants is a rather new development. Given the difficulties encountered by the Member States in the implementation process, it is perhaps logical that efforts have not yet been undertaken to flesh out the link between cooperation measures and victims' rights. However, the question of the standing of victims in the EU's criminal justice area goes back to 2001, with the adoption of the first Framework Decision in this regard. Cooperation instruments adopted in the past decade failed to explore synergies and complementarities with the FD. By referring to the possibility, for victims, to obtain compensation or restitution from the property confiscated in cross-border cases, the Confiscation and Freezing Orders Proposal heralds a positive step towards a more inclusive approach, that should be replicated to other instruments.

c. Approximation and cross-border cooperation

A last asymmetry can be discerned regarding the sometimes questionable link between approximation and cross-border cooperation. The overarching rule in the construction of the EU's area of criminal justice is that the adoption of cross-border cooperation instruments pre-empts approximation of legislation. The general approach followed by the EU is reminiscent of the proverbial "*reculer pour mieux sauter*". Although the debate on procedural rights dates back to 2004, it took no less than nine years after the entry into force of FD EAW before the first piece of legislation designed to facilitate its use by laying down minimum standards on defence rights was adopted.¹³²⁸ Minimum rules on the rights of defendants can be justified on specific human rights grounds and EU standards can be linked directly with the operation of the EAW.¹³²⁹ This degree of complementarity, however, was not achieved in respect to other instruments. Despite references to the procedural rights directives in both the EPPO and the EIO, there remains a certain degree of unclarity as to applicability of these provisions to cross-border investigations. Similar conclusions can be drawn in respect to victims' rights. The direct impact of approximation on the operation of MR instruments such as the EPO Directive and the EPM Regulation is nearly absent. It is regrettable that the provisions of Victims' Rights Directive, despite their broad scope, are nearly disconnected from these two mutual recognition instruments. Reference has not been made either to the Compensation Directive, that provides for the establishment of compensation from the State for cross-border victims of intentional and violent crimes, despite the fact that the Victims' Rights Directive contains provisions on compensation from the offender.

The "reactive" approach pursued by the EU, as opposed to an "active" or "anticipative" *modus operandi*, affects cooperation. In the absence of approximation endeavours, it is not only that mechanisms are being neglected by Member States, because they seem unworkable in practice, as evidenced by the EPO Directive and the EPM Regulation. Individuals also suffer from the non-availability of adequate safeguards to invoke whenever the practice of cross-border cooperation entails violations of their fundamental rights. The shortcomings and insufficiencies inherent to this "wait and see" attitude were painfully exposed in the *Aranyosi and Caldaru* judgment, where the point was made that cross-border cooperation cannot function properly in the absence of minimum levels of harmonisation in the detention

¹³²⁸ See introduction.

¹³²⁹ V. Mitsilegas, *EU Criminal Law after Lisbon, Rights, Trust, and the Transformation of Criminal Justice in Europe*, 2016, op. cit., p. 198

conditions field. Against this background, it is unsurprising that some national courts threatened to re-install a degree of control over certain aspects of cross-border cooperation.

Ultimately, the various optouts of the UK and Ireland make the link between approximation and mutual recognition even less obvious to discern. The current framework of “*justice à la carte*” and “pick and choose” approach pursued by the two countries undermine the complementarity resulting from the combination of instruments.¹³³⁰ As the Treaty is currently worded, the effective operation of mutual recognition and the adoption of defence rights are waved together and constitute two sides of the same coin.¹³³¹ Participating in enforcement measures while remaining outside of instruments safeguarding defence rights in order to facilitate judicial cooperation clearly challenges the coherence of the EU’s area of criminal justice.¹³³² It also leaves any observer with the impression that, irrespective of the close intertwining between approximation and mutual recognition suggested by the Treaties, in practice, in many circumstances the latter seems to operate on its own, as if it were the preferred – and less controversial – *modus operandi*.

2. Summary of the recommendations

This research paper identified various solutions to the nine issues that were discussed above. More detailed recommendations can be found in the independent sections. Two types of recommendations are provided: Practical solutions, including soft law mechanisms (I) and legislative action (II).

I. Practical recommendations and soft law tools

Practical mechanisms may be sometimes preferred to binding legislative action.¹³³³ Ancillary measures, because they support learning and adaptation, may also act as a useful complementary tool that supports the implementation and operation of legislative instruments.

a. Developing training and other awareness-raising activities

The need to foster and promote trainings was raised in many of the national reports received.¹³³⁴ Training does double duty, not only increasing knowledge of EU measures, but also fostering mutual understanding between the Member States themselves. The research indeed found that lack of knowledge is an overarching issue that yielded several impacts. Little, or complete absence of awareness of some cooperation instruments among national authorities, practitioners and civil society clearly thwart their use, or their “correct” use, as often incompatibilities occur. Alongside this, the striking lack of mutual knowledge on each other’s national legal systems cultivates feelings of distrust, which do little to incite MSs to cooperate with one another.

Several aspects of training structures and activities deserve to be expanded and further refined. In terms of scope, the type and number of beneficiaries of trainings should be broadened to include not only relevant criminal justice authorities, including judges, prosecutors and law enforcement authorities, but also legal professionals, such as defence lawyers. Private entities, service providers in particular, will also deserve close attention, in light of their growing relevance in the current cooperation framework and the release of the E-Evidence Proposal. Furthermore, the content of trainings should be focused on a more limited selection of instruments. Alongside other cooperation mechanisms, such as the EAW, trainings should target specifically these tools that have not enjoyed much publicity thus far

¹³³⁰ As noted in the study, Ireland does not participate in the EPPO Regulation and the EPO Directive and is bound by only two procedural rights directives out of six, namely the Translation and Interpretation Directive and the Information Rights Directive.

¹³³¹ V. Mitsilegas, *EU Criminal Law after Lisbon, Rights, Trust, and the Transformation of Criminal Justice in Europe*, 2016, op. cit., p. 182

¹³³² Ibid.

¹³³³ See T. Marguery (ed), *Mutual Trust Under Pressure*, 2018, op. cit., p. 439

¹³³⁴ Germany, Spain, France.

(e.g. the European Supervision Order),¹³³⁵ and those that recently entered into force, but yet prove complex to use in cross-border situations (e.g. procedural rights directives).¹³³⁶ Trainings were also suggested in the realm of victims' rights¹³³⁷, an area where few practitioners have developed their expertise.

Linguistic training should also be encouraged. Language courses must target primarily lawyers involved in cross-border procedures.¹³³⁸ Linguistic divergences have constituted an all too long barrier to effective cooperation, that lessen the likelihood that the defence is granted a fair trial. Adequate translation and interpretation services must be in place at the national level.

Current initiatives to develop EU-wide registers of lawyers, disclosing their areas of expertise as well as the languages, should be further strengthened and better tailor-made to the transnational nature of proceedings.¹³³⁹

b. Boosting exchanges of information and dialogue

In some particular fields, it was widely acknowledged in the study that "transjudicial dialogue"¹³⁴⁰ and communication facilitate cross-border cooperation.

The need to strengthen dialogue between judicial authorities is consistent with the insistence of both the EU legislator and the Court on the need to reinforce two-way information exchanges between the Member States, either in EU instruments (e.g. EIO) or jurisprudence (e.g. *Aranyosi and Caldaru* and *Dworzecki*).

Diversity could be used as a strength, rather than a weakness, precisely because the variety of legal traditions implies that plenty of solutions can be found in each national system. The analysis above on detention conditions, *in absentia* trials, pre-trial detention and supervision measures, investigative measures and admissibility of evidence, and protection measures, all constitute areas where EU-wide judicial conferences, networks, publications and institutional contacts may play a role in building consensus.¹³⁴¹ Best practice exchanges, and experience- and information-sharing sessions, in this regard, become even more relevant.¹³⁴² Community-building events should be organised on a more regular basis among national authorities and legal practitioners, in order to enable emulation between participants and practical solutions to common implementation problems. A best practice comes from the Netherlands where, in October 2017, an international conference was held bringing practitioners from, inter alia, Belgium, Germany, France, Norway and Switzerland. The conference was meant to gather insights from national criminal procedures, from which the Netherlands could draw from with a view to a future modernisation of the Dutch CCP.¹³⁴³ Another good practice comes from Romania, where the commission of experts in charge of drafting the new CCP of 2014 comprised German and Italian advisers.¹³⁴⁴

More systematic use of EU judicial actors, such as Eurojust and EJM should be made in order to facilitate communication,¹³⁴⁵ including the tools developed by the latter, such as the European Judicial Atlas. Other recommendations in this field include making better use of existing networks, such as defence lawyers organisations (e.g. CCBE, ECBA), and establishing

¹³³⁵ *Supra*, Section 4.4. National report on Germany. A similar suggestion was made by Fair Trials. See Fair Trials, Pre-trial detention: a measure of last resort?, 2016, op. cit.

¹³³⁶ *Supra*, Section 4.4.

¹³³⁷ *Supra*, Section 9.4. National report on Germany.

¹³³⁸ *Supra*, Section 4.4. and 3.4.

¹³³⁹ *Supra*, Section 3.4.

¹³⁴⁰ A.M. Slaughter, A Global Community of Courts, *Harvard International Law Journal*, Vol 44, 2003, p. 219

¹³⁴¹ Difficulties to access information have been exacerbated by the *Aranyosi and Caldaru* judgment, that prompted a variety of information requests to issuing States on detention conditions in surrender procedures. Lack of availability of information at the national level resulted in significant delays in the execution of EAW requests, and for them to be suspended, whenever information was either not delivered, or deemed unsatisfactory by the executing authority.

¹³⁴² *Supra*, Section 4.4. on PTD. It was noted that civil law countries should learn from common law systems, where release on bail is generally preferred to PTD.

¹³⁴³ National report No 2 on the Netherlands, Section on the Dutch criminal procedural law (point 1).

¹³⁴⁴ National report No 2 on Romania, Section on General features of the Romanian criminal justice system (point 1)

¹³⁴⁵ *Supra*, Section 1.4.

new ones, gathering lawyers competent in cross-border situations, and lawyers specialised in victims' cases.¹³⁴⁶

c. Soft law instruments

The multiplication of MR and approximation mechanisms should be accompanied by complementary support tools facilitating their implementation. Inconsistencies between the various MR instruments on the one hand, and between approximation measures and MR on the other hand, must be addressed. Guidance and support tools for practitioners on the relationship between the variety of cooperation instruments available could be developed, for instance laying down further details on why the European Arrest Warrant should only be used as the *ultima ratio*,¹³⁴⁷ and in which circumstances resorting to FD ESO may be preferred to the issuing of an EAW. Similar guidance tools could be developed to clarify the concept of trials *in absentia*, as laid down in the corresponding Framework Decision and interpreted by the Court of Justice, so as to promote the coherent interpretation and implementation of this concept.¹³⁴⁸ Given the remaining unclarity concerning the impact of procedural rights directives on the operation of MR instruments, guidance on this matter would be equally welcome. Inspiration could be taken from the guidelines developed by several MSs to facilitate the implementation of EU procedural rights legislation.¹³⁴⁹ The guidelines developed by the Commission to assist the transposition of the Victims' Rights Directive¹³⁵⁰ could serve as another suitable point of departure for this purpose.

Clarification is also needed as regards the scope of the ground for refusal formulated by the Court of Justice in *Aranyosi and Căldăraru*. Whereas it is essentially the role of the Court of Justice to narrow down the test it developed in the latter judgment, consideration could be given to the creation of a template available in several languages, that would lay down in precise terms the content and scope of information that should be requested from the issuing State.¹³⁵¹ This would contribute to streamlining information requests, so as to avoid situations where issuing authorities are swamped with several demands at the same time, and find themselves in a situation where they cannot provide the necessary information within the time-limits imposed by the FD EAW. It is hoped that the few judgments currently pending before the Court will shed more light on the scope of the new ground for refusal formulated in *Aranyosi and Căldăraru*. In this respect, vertical dialogue between the Court of Justice and national courts is needed, alongside its horizontal, "national-to-national", dimension. In some situations indeed, "judge-to-judge dialogue", although substantial, does not always prove sufficient to address all the legal complexities of a case. The EAW proceedings involving the surrender of Mr Puigdemont to Spain are a case in point. Despite extensive dialogue between national authorities, in the absence of questions referred to the Court, the decisions taken by the Belgian¹³⁵² and German¹³⁵³ executing authorities left many legal questions

¹³⁴⁶ *Supra*, Section 3.4., 9.4.

¹³⁴⁷ National report on Germany.

¹³⁴⁸ *Supra*, Section 7.4.

¹³⁴⁹ FRA, "Rights of suspected and accused persons across the EU: translation, interpretation and information", Report, Vienna: FRA, 2016, p. 33

¹³⁵⁰ *Supra*, Section 9.4.

¹³⁵¹ *Supra*, section 5.4.

¹³⁵² The first EAW was withdrawn by Spain in December 2017, after Belgium sought further clarifications on the accusations of rebellion and sedition put forward by the Spanish judicial authorities. Belgium refused to execute the second EAW issued by Spain in January 2018. The decision was grounded on the ECJ's reasoning in *Bob Dogi*, pursuant to which an EAW must be based on a national warrant. See *Nederlandstalige rechtbank van eerste aanleg Brussel, De procureur des Konings te BRUSSEL Openbaar Ministerie v Antoni Comin Oliveres*, BR16.EU.51/18, 16 May 2018 (in Dutch – not available to public)

¹³⁵³ The Higher Regional Court of Schleswig ruled that surrender for the charge of rebellion was inadmissible, resulting in the release Mr Puigdemont on bail. The HRC stated that there was not enough evidence included in the EAW issued by Spain to substantiate the alleged crime of 'High Treason Against the Federation', which is the German equivalent of the Spanish crime of 'Rebellion'. Schleswig-Holsteinisches Oberlandesgericht, Antrag des Generalstaatsanwalts auf Erlass eines Auslieferungshaftbefehls gegen Carles Puigdemont eingegangen, Press Release, 3 April 2018 (in German). Retrieved at: <https://www.schleswig-holstein.de/DE/Justiz/OLG/Presse/PI/201802Puigdemontdeutsch.html>.

On the decision to release Mr Puigdemont on bail, see: The Oberlandesgericht for the State of Schleswig-Holstein issues extradition arrest warrant against Carles Puigdemont for embezzlement and stays the extradition arrest

unaddressed and received a mixed reception.¹³⁵⁴

d. Financial support from the EU

Financial support from the EU is highly desirable. Building the basic capacity of EU States that sometimes lack sufficient material and human resources to implement EU legislation properly is a precondition to enhance compliance with EU law and enable effective cooperation. With the noticeable exception of Ireland and Finland, national reports all pointed out the financial difficulties that may be associated to the implementation of new instruments of legislation. The need for an EU funding mechanism was identified in the following sections: investigative measures, detention conditions, and compensation schemes in favour of both defendants and victims.¹³⁵⁵

Alongside enhanced compliance and more effective implementation, funding is also necessary to facilitate the negotiations and the ensuing adoption of new legislative instruments.¹³⁵⁶ Because support from the Member States cannot be taken for granted, financial help can be seen as a means to increase buy-in from the Member States for a series of legislative instruments, spanning minimum standards on detention conditions,¹³⁵⁷ obligations to compensate for unjustified detention in cross-border cases,¹³⁵⁸ a revision of the current mechanisms on the cross-border compensation of victims of intentional and violent crimes.¹³⁵⁹

II. Legislative action

a. Consolidating the current *acquis* and identifying and addressing implementation gaps

Many of the national and EU officials interviewed, alongside some of the rapporteurs involved in the preparation of this study,¹³⁶⁰ expressed a degree of reserve as regards the adoption of new legislation in the coming years. Instead, consolidating the *acquis*, as well as reflecting on how to make existing mechanisms more effective, was seen as more desirable and realistic.¹³⁶¹

Several arguments came to support the consolidation approach, particularly in respect to procedural guarantees for defendants adopted on the basis of the 2009 Roadmap.

Firstly, the impact of the procedural legislation on transnational cooperation remains to be determined. Some directives have not been fully transposed, while the transposition deadline of others has not passed yet. It is therefore too early to gauge in an accurate and comprehensive manner the impact of EU legislation on both domestic and cross-border proceedings.¹³⁶² The CJEU, secondly, will have the opportunity to clarify and extend the scope of these minimum guarantees through giving broad interpretations of their provisions,¹³⁶³ as

warrant's execution, Press Release, 5 April 2018 (in English). Retrieved at: <https://www.schleswig-holstein.de/DE/Justiz/OLG/Presse/PI/201803Puigdemontenglisch.html>

¹³⁵⁴ None of the authorities involved (Belgian and German executing authorities and Spanish authorities) referred questions to the Court, and many legal concerns remain. These include, for example, the scope of the obligatory ground for refusal inserted in the Belgian law transposing the EAW, provided that there are valid grounds for believing that its execution would infringe the fundamental rights of the person concerned enshrined under Art 6(2) TEU. As a matter of example, a question could have been raised asking whether the presumption of compliance with EU fundamental rights in Spain could be rebutted in the case at hand. See C. Rizcallah, The EU and the Spanish Constitutional Crisis, blog post, EU law analysis, 6 November 2017. Retrieved at: <http://eulawanalysis.blogspot.com/2017/11/the-eu-brought-on-stage-in-spanish.html>

¹³⁵⁵ *Supra*, Sections 1.4., 5.4., 6.4., 7.4.

¹³⁵⁶ See the example of the negotiations on Legal Aid under Section 5.

¹³⁵⁷ *Supra*, Section 5.4.

¹³⁵⁸ *Supra*, Section 6.

¹³⁵⁹ *Supra*, Section 8.

¹³⁶⁰ The German and Dutch reports.

¹³⁶¹ Spain, Germany, the Netherlands.

¹³⁶² Thus far, directives seem to have raised the applicable standards in criminal procedures at the domestic level (e.g. in Germany, Romania, Spain, Italy, The Netherlands) and some of the directives' provisions have been relied on in a few national proceedings (e.g. Spain, Romania). These only constitute, however, preliminary findings.

¹³⁶³ According to AG Bot, the concept of minimum rules creates "misunderstandings", and the "objective of more effective judicial cooperation in criminal matters ... calls for a broad interpretation of Directive 2010/64 guaranteeings

evidenced by the Court's recent rulings on the first three directives.¹³⁶⁴ Thirdly, many officials pointed to the same conclusion that re-opening the negotiations on key instruments such as the Access to a Lawyer Directive and the Presumption of Innocence Directive could backfire, and risks weakening the current *acquis*. The head-on opposition and deep reluctance of some MSs landmined the path leading to the adoption of these directives. In all likelihood, re-opening the negotiations would give them a window of opportunity to weaken some of the guarantees they contain. Fourthly, a general preference for a "wait and see" approach could be discerned among interviewees. The practice of recently adopted and transposed instruments, such as the EIO and the EPPO, will shed more light on the concrete obstacles hampering or hindering cooperation, and allow EU lawmakers to pinpoint more accurately where legislative gaps need to be filled. Approximation in this field is likely to be a rather delicate process, and any initiative on the part of the Commission should be supported by accurate monitoring and strong evidence that a legal vacuum needs to be addressed. Lastly, the implementation process of the current set of directives generated significant technical and financial costs, in the realms of both defendants and victims.¹³⁶⁵ The view was taken that Member States should not be submerged by a constant flow of new European legislation they simply cannot cope with.¹³⁶⁶

As part of the consolidation approach, implementation gaps should be identified and addressed. Flaws remain in the implementation process of the procedural rights directives.¹³⁶⁷ Other, striking implementation failures exist in respect to FD *in absentia*, FD ESO, and FD Probation Measures. A more uniform implementation of these tools is highly desirable in order to maximise their effectiveness.

Resorting to infringement proceedings against "reluctant" MSs should be considered on a more regular basis. Several procedures have been initiated against several MSs for the ill-implementation of the Compensation Directive, however reliance on this mechanism has been inconsistent to date.¹³⁶⁸ The acquisition of full enforcement powers in December 2014 was moreover invoked as an argument by the European Commission, as "guardian of the Treaties", to dismiss calls for the re-opening of the negotiations on the EAW, and justify its inclination for a "wait and see" posture.¹³⁶⁹ At first glance, however, it seems that the Commission has made little use of the scrutiny and compliance powers it has assumed after Lisbon.

A word of caution should be raised. As noted in the Dutch report, the implementation process of EU legislative instruments may be slowed down for pecuniary reasons, because financial and technical difficulties exist at the national level.¹³⁷⁰ A few Member States¹³⁷¹ have, for example, encountered financial difficulties in the implementation process of directives on the right to translation and interpretation, legal aid, and victims' rights. Against this background, infringement proceedings will be of little help and support to bring national law in conformity with the necessary level of transposition required by the EU. In this respect, the European Commission would be well advised to conduct sound and comprehensive monitoring.

the best protection of the rights of defence of the persons concerned." See Opinion of AG Bot, C-216/14, *Criminal proceedings against Gavril Covaci*, delivered on 7 May 2015, para 74.

¹³⁶⁴ See, inter alia, C-216/14, *Criminal proceedings against Gavril Covaci*, 15 October 2015; C-25/15, *Balogh*, 9 June 2016; C-278/16, *Sleutjes*, 12 October 2016; C-612/15, *Criminal proceedings against Nikolay Kolev, Stefan Kostadinov*, 4 April 2017

¹³⁶⁵ Ibid.

¹³⁶⁶ National report No 2 on the Netherlands, Section on conclusion and recommendations (point 5).

¹³⁶⁷ Such as Art 14 of the Information Rights Directive in the Netherlands, the scope application of Art 3(6) of the Interpretation and Translation Directive in Spain, which is limited to the 'judgment' in Spain and does not apply to 'any resolution of appeal'.

¹³⁶⁸ *Supra*, Sections 4.4., 7.4.

¹³⁶⁹ European Commission, Follow-up to the European Parliament resolution with recommendations to the Commission on the review of the European arrest warrant adopted by the Commission on 28 May 2014, p. 2

¹³⁷⁰ National report No 2 on the Netherlands, Section on conclusion and recommendations (point 5).

¹³⁷¹ Such as Spain, Romania, the Netherlands.

b. Boosting the legitimacy of new EU legislative action: improving monitoring and data collection

In spite of a clear inclination for the consolidation approach in the coming years, this research paper recommends the adoption of several legislative actions. In this respect, the key to success is to back innovative solutions by comprehensive monitoring and comparative data on the challenges encountered at the national level.

One of the biggest challenges faced during the preparation of this paper was the lack of reliable information. In some particular areas, implementation/evaluation assessments and comparative studies are particularly scant. Whereas alternatives to detention, pre-trial detention regimes and protection measures for victims have become the topic of several studies in recent years, research on other, essential domains of cooperation is nearly absent. These range from investigative measures, admissibility of evidence and procedural safeguards available in cross-border situations, to the fields of compensation, focusing either on victims, or defendants in case of unjustified detention. National rapporteurs too, sometimes faced difficulties to answer the questions raised in the guidance paper distributed to them.

Whereas crucial aspects of cross-border cooperation were recently addressed by recent studies, dealing with, inter alia, transfers of prisoners and probationers,¹³⁷² conflicts of jurisdiction¹³⁷³ and legal remedies,¹³⁷⁴ comprehensive monitoring and extensive mapping of existing legal, procedural and legislative frameworks in the Member States is needed in the nine areas of cooperation identified in this paper. Particular attention will have to be devoted in the coming years to the implementation and functioning of recently adopted instruments, such as the EIO and the EPPO. Risks of forum-shopping,¹³⁷⁵ alongside the occurrence of delays in the conduct of investigations,¹³⁷⁶ incompatibilities between investigative measures,¹³⁷⁷ as well as possible admissibility issues,¹³⁷⁸ will deserve close scrutiny. Awareness of these issues will perhaps help policymakers develop innovative proposals and come up with creative solutions in order to bolster and enrich the provisions of the current proposal on E-Evidence.

c. Short-term legislative solutions

Legislative action should be taken in order to address current obstacles to cross-border cooperation. The following legislative recommendations are designed to tackle both these issues that significantly limit the effectiveness of cooperation, and those that, at times, generated tensions with individuals' rights.

Minimum rules should imperatively be adopted in the crucial areas of detention conditions and admissibility of evidence.

Drawing on the momentum generated by the *Aranyosi and Caldaru* judgment, EU leaders should seize the opportunity to go beyond the modest agenda set out so far. Ill detention conditions have become the thorn in the side of mutual recognition, delaying and blocking surrender procedures, and putting at risk the principle of mutual trust in the EU. The triadic connection between detention conditions, the effectiveness of mutual recognition and the preservation of individuals' rights is almost self-evident. Art 82(2)(b) TFEU could be

¹³⁷² T. Marguery (ed), *Mutual Trust under Pressure*, 2016, op. cit.

¹³⁷³ See the project led by the European Law Institute on Prevention and Settlement of Conflicts of Exercise of Jurisdiction in Criminal Law, University of Luxembourg, 2014-2017.

See the Draft Legislative Proposals for the prevention and resolution of conflicts of jurisdiction in criminal matters in the European Union.

Retrieved at:

https://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/Conflict_of_Jurisdiction_in_Criminal_Law_FINAL.pdf

¹³⁷⁴ See the project led by S. Allegrezza on Effective defence rights in criminal proceedings: a European and comparative study on judicial remedies (JRECRIPRO), University of Luxembourg, 2015-2017

¹³⁷⁵ *Supra*, Section 1.4.

¹³⁷⁶ *Ibid.*

¹³⁷⁷ *Supra*, Section 1.4.

¹³⁷⁸ *Supra*, Section 2.4.

envisaged as a legal basis to achieve minimum standards on detention conditions. Tying minimum standards to mutual recognition will work as a key lever to eventually force MSs to adapt their incarceration systems and introduce the necessary changes to the same magnitude as if legislation at the domestic level were adopted.¹³⁷⁹ Should this legal basis be excluded, an alternative lies in Art 352 TFEU. However, relying on the latter legal basis raises significant challenge given the unanimity requirement it entails.

This study identified another priority area where minimum rules are needed. With the multiplication and diversification of instruments on evidence gathering, exclusionary rules on illegally/improperly obtained evidence have become an essential feature of the EU's instrumentarium. EU lawmakers should take advantage of the express competence conferred to the EU by the Lisbon Treaty under Art 82(2)(a) TFEU. Inadmissibility rules construed along the baseline of ECHR case law must be reflected upon, and evidence obtained in breach of, for example, torture, police incitement, the infringement of the privilege of self-incrimination, the right to silence or the right to legal assistance, must be excluded.¹³⁸⁰ This notwithstanding, adopting these standards will yield little impact on the current system of evidence circulation if Member States continue to rely on the rule of non-inquiry. This research paper advocates in favour of the development of an EU rule excluding evidence which it is impossible to know how it was gathered. It promotes the imposition of a binding obligation on national judicial authorities to examine how evidence was collected and, if the non- or partial disclosure of evidence at the pre-trial stage is such that the judge cannot evaluate whether there has been a violation of the defendant's right, then evidence must be excluded.

A comprehensive and effective answer will be necessary to address the issues at hand. This study offers to complement the adoption of minimum rules with provisions strengthening and further enhancing the existing framework for judicial review. As discussed above, exploring complementarities between minimum rules and judicial review was deemed necessary in the sovereignty-sensitive field of evidence admissibility. In a similar fashion, the legislative agenda on detention conditions cannot be fully disconnected from current issues of overuse of pre-trial detention, and the extreme length of remand in some countries. Drawing on the Finnish or Irish experiences, where low rates of pre-trial detainees exist and judicial review of PTD takes place at regular and short intervals, this study suggests reflecting on the insertion of an obligation to review the necessity for remand at early, and regular stages of the procedure. This could be implemented alongside other measures, for example a binding system of maximum time-limits on pre-trial detention.

Another two issues can be addressed through legislative means. These relate to compensation schemes for victims of crime on the one hand, and suspects and accused persons that suffered from unjustified detention in cross-border situations on the other hand.

Starting with the former, the revision of the Compensation Directive should lay down minimum rules on the scope and content of compensation schemes. Too many variations exist among national MSs for this instrument to be relied on in cross-border situations. Ahead of the negotiations on the Confiscation and Freezing Orders Regulation, a broader reflection should be conducted on the inclusion of rules for compensation from the offender, as well as the way the two systems can complement one another and build synergies.¹³⁸¹ Besides, linking the revised Compensation Directive to the forthcoming Confiscation and Freezing Orders Regulation would contribute to tying more closely legislation on victims and mutual recognition.

The revision of the Compensation Directive could be seized as an opportunity to reflect on how to tackle the absence of EU compensation rules for unjustified detention for defendants. The revision process could go hand-in-hand with the adoption of an instrument providing compensation for unjustified detention in transnational proceedings. The latter would impose an obligation on Member States to implement a compensation system in cross-border cases,

¹³⁷⁹ *Supra*, Section 5.4.

¹³⁸⁰ *Supra*, Section 2.4.

¹³⁸¹ *Supra*, Section 7.

and develop rules governing liability between the issuing and executing States. However, difficulties in garnering support from Member States can be easily foreseen, bearing in mind significant costs that will result from the establishment of compensation schemes. This could moreover prejudice the forthcoming negotiations on the revision of the Compensation Directive, because financial burdens could be invoked as an argument to block the adoption of an ambitious instrument. Against this background, it is fair to say that financial support cannot be separated from the legislative agenda on compensation.

d. Medium- and long-term perspectives: reflecting on the adoption of new instruments ...

The section above indicates where legislative action is needed from a short-term perspective.

These areas do not, however, constitute the end of the road.

In the medium-term, the development of procedural standards for the defence in transnational investigations and the adoption of an instrument guaranteeing the right to an effective remedy in cross-border investigations must be reflected upon. The further strengthening of an EU framework for judicial cooperation in criminal matters needs to be pursued. The work on procedural guarantees, though welcome, must be nurtured and intensified; the transnational application of the concept of fair trial should be refined.¹³⁸² We lack sound and effective due process principles for, in particular, cross-border investigations, as well as subsequent prosecutions and trials.¹³⁸³ Additional rules should be designed to facilitate the task of the defence to challenge transnational investigations ordered by the prosecution through, *inter alia*, facilitating access to the case-file at early stages of the criminal procedure, developing legal aid mechanisms, and strengthening existing provisions on legal remedies.¹³⁸⁴ These initiatives would feed into the ongoing reflection on the adoption of the “Roadmap 2020” for the rights of the defence advocated by ECBA.¹³⁸⁵

Attention should also be paid to the increasing difficulty to distinguish the demarcation line between judicial and non-judicial actors, which is profiling in recent EU instruments, including the E-Evidence Proposal. Judicial control must be ensured, and effective means to challenge cross-border assistance requests, along with their recognition and execution, should be easily accessible by individuals so as to meet the requirement of legal certainty, and maintain a fair balance between effective prosecution and defence rights.¹³⁸⁶

Legislative action in several domains was deemed premature and/or too complex in the current state of play. From a longer-term perspective, attention should nonetheless be dedicated to these areas, ranging from the harmonisation of a minimum set of investigative measures, to the adoption of minimum standards of admissibility for evidence gathered through special investigative measures, alongside the approximation of protection measures available to victims at the national level. At least in strictly theoretical terms, adopting these instruments would herald a move towards a smoother, and more effective system of cooperation.

* *
*

¹³⁸² S. Gless, “Transnational Cooperation in Criminal Matters and the Guarantee of a Fair Trial: Approaches to a General Principle”, 2013, *op. cit.*

¹³⁸³ S. Gless, J. Vervaele, “Law should govern: Aspiring general principles for transnational criminal justice”, 2013, *op. cit.*

¹³⁸⁴ *Supra*, Section 3

¹³⁸⁵ The ECBA launched an initiative aiming at reflecting further on the adoption of a “Roadmap 2020”. Areas covered by this roadmap include (Pre-Trial) Detention and European Arrest Warrant; Certain Procedural Rights in Trials; Witnesses’ Rights and Confiscatory Bans; Admissibility and Exclusion of Evidence and other Evidentiary Issues; Conflicts of Jurisdiction and *ne bis in idem*; Remedies and Appeal; and Compensation.

¹³⁸⁶ *Supra*, Section 1.4.

Food for thought sessions, building specifically on the nine areas of friction identified in this research paper, should be encouraged and conducted in parallel to the monitoring of the newly established cooperation frameworks.

It is up to EU leaders to reflect further on the many obstacles to cross-border cooperation identified in this study, and to take on these challenges.

ANNEXES

Annex 1 – Country reports*

The authors are indebted to the national experts that conducted research on the jurisprudence and criminal justice system of the nine Member States identified above. The views and opinions stated in the national reports are those of the national experts only. National experts feature as follows:

- Reports on Finland: Samuli Miettinen¹³⁸⁷ and Petri Freundlich¹³⁸⁸
- Reports on France: Perrine Simon¹³⁸⁹
- Reports on Germany: Thomas Wahl;¹³⁹⁰ Alexander Oppers (report on victims)¹³⁹¹
- Reports on Hungary: Petra Bard¹³⁹²
- Reports on Ireland: Gerard Conway¹³⁹³
- Reports on Italy: Silvia Allegrezza¹³⁹⁴
- Reports on the Netherlands: Aart de Vries,¹³⁹⁵ Joske Graat,¹³⁹⁶ Tony Marguery¹³⁹⁷
- Reports on Romania: Daniel Nitu¹³⁹⁸
- Reports on Spain: Marta Muñoz de Morales Romero¹³⁹⁹

* Annex 1- Country reports is published separately

¹³⁸⁷ PhD, Associate Professor of Transnational Law, Tallinn University, Estonia, University Lecturer, Helsinki University, Finland.

¹³⁸⁸ LLM, University of Leiden, Senior adviser at the Finnish Immigration Service, former research assistant of Prof. Dr. Miettinen.

¹³⁸⁹ PhD, University Paris Est/University of Luxembourg

¹³⁹⁰ Senior researcher at the Max Planck Institute for Foreign and International Criminal Law

¹³⁹¹ Ass. iur. Alexander Oppers, at the time of writing the report, trainee lawyer (Rechtsreferendar) at the Max Planck Institute for Foreign and International Criminal Law

¹³⁹² LLM, PhD, Associate Professor, ELTE School of Law, Department of Criminology; Visiting Professor, CEU.

¹³⁹³ PhD, Lecturer, University of Brunel

¹³⁹⁴ PhD, Associate Professor in Criminal Law, University of Luxembourg

¹³⁹⁵ LLM, PhD candidate, University of Utrecht

¹³⁹⁶ LLM, PhD candidate, University of Utrecht

¹³⁹⁷ PhD, Assistant Professor, University of Utrecht

¹³⁹⁸ PhD, Lecturer, Faculty of Law, Babeş-Bolyai University, Attorney, Cluj Bar

¹³⁹⁹ PhD, Profesor, Faculty of Law, Castilla-La Mancha University

Annex 2 – List of interviews

DISCLAIMER - The interviewed practitioners stressed that their responses reflect their personal opinion, and do not constitute the official position of their MS/institution.

7 February 2018

- Katarzyna Janicka, Team Leader, Procedural Criminal Law Unit, DG Just, European Commission

8 February 2018

- Isabelle Pérignon, Head of the Procedural Criminal Law Unit, DG Just, European Commission
- Ingrid Gertrude Breit, Procedural Criminal Law Unit, DG Just, European Commission
- Fabien Le Bot, Procedural Criminal Law Unit, DG Just, European Commission

22 February 2018

- Daniel Flore, Belgian Ministry of Justice
- Stéphanie Bosly, Belgian Ministry of Justice
- Nathalie Cloosen, Belgian Ministry of Justice
- Amandine Honhon, Belgian Ministry of Justice
- Nancy Colpaert, Belgian Ministry of Justice

1 March 2018

- Peter Csonka, Head of the General Criminal Law Unit, European Commission

5 March 2018

- Steven Cras, Administrator, Justice and Home Affairs, Council of the European Union

6 March 2018

- Laura Surano, Legal Officer, Eurojust

18 March 2018

- Jesca Bener, Procedural Criminal Law Unit, DG Just, European Commission

2 May 2018

- Anze Erbeznik, Administrator, Committee on Civil, Justice and Home Affairs, European Parliament

15 May 2018

- Wouter Van Ballengooij, Policy analyst, EPRS, European Parliament

25 May 2018

- Ola Lofgren, Secretary General, European Judicial Network

8 June 2018

- Vincent Jamin, Head of Joint Investigations Teams Network Secretariat, Eurojust

REFERENCES

Case law

European Court of Justice

CJEU, Case 33/76, *Rewe-Zentralfinanz eG et Rewe-Zentral AG v Landwirtschaftskammer für das Saarland*, 16 December 1976

CJEU, Case 186/87, *Cowan v. Trésor public*, 2 February 1989

CJEU, C-187/01, *Gözütok and Brügge*, 11 February 2003

CJEU, C-467/05, *Dell'Orto*, 2007,

CJEU, C-26/07, *Commission v Greece*, 18 July 2007

CJEU, C-112/07, *Commission v Italy*, 29 November 2007

CJEU, Joined cases C-514/07P, C-528/07P and C-532/07P, *Sweden and others v API and Commission*, 21 September 2010

CJEU, C-407/09, *Commission v Greece*, 31 March 2011

CJEU, Joined cases C-411/10 and C-493/10, *N. S. v Secretary of State for the Home Department and M. E. and Others v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform*, 21 December 2011

CJEU, C-396/11, *Radu*, on 18 October 2012

CJEU, C-489/10, *Bonda*, 5 June 2012

CJEU, C-79/11, *Giovanardi and Others*, 12 July 2012

CJEU, C-199/11, *EU v Otis a.o.*, 6 November 2012

CJEU, C-617/10, *Åkerberg Fransson*, 26 February 2013

CJEU, C-399/11, *Melloni*, 26 February 2013

CJEU, C-60/12, *Balaz*, 14 November 2013

CJEU, C-122/13, *Paola C.*, 30 January 2014

CJEU, Joined Cases C-293/12 and C-594/12, *Digital Rights Ireland Ltd*, 8 April 2014

CJEU, Opinion 2/13 of the Court on Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms, 18 December 2014

CJEU, C-237/15 PPU, *Lanigan*, 16 July 2015

CJEU, C-105/14, *Taricco I* and others, 'Taricco I', 8 September 2015

CJEU, C-362/14, *Schrems*, 6 October 2015

CJEU, C-486/14, *Kossowski*, 29 June 2016

CJEU, C-294/16 PPU, *JZ v Prokuratura Rejonowa Łódź — Śródmieście*, 28 July 2016

CJEU, C-601/14, *Commission and Council v Italy*, 11 October 2016

CJEU, C-601/14, *European Commission v Italy*, 11 October 2016

CJEU, C-439/16 PPU, *Emil Milev*, 27 October 2016

CJEU, C-477/16 PPU, *Kovalkovas*, 10 November 2016

CJEU, C-452/16, *Poltorak*, 10 November 2016

CJEU, C-453/16 PPU, *Özçelik*, 10 November 2016

CJEU, C-108/16 PPU, *Pawel Dworzecki*, 24 May 2016

CJEU, Joined Cases C-203/15 and C-698/15, *Tele2 Sverige AB*, 21 December 2016

CJEU, C-578/16 PPU, *C. K. a.o.*, 16 February 2017

CJEU, C-579/15, *Popławski*, 29 June 2017

CJEU, Opinion 1/15 of the Court on the EU-Canada PNR agreement, delivered on 26 July 2017.

CJEU, C-270/17 PPU, *Openbaar Ministerie v Tadas Tupikas*, 10 August 2017

CJEU, C-571/17 PPU, *Openbaar Ministerie v Samet Ardic*, 28 September 2017

CJEU, C-42/17, *M.A.S. and M.B., 'Taricco II'*, 5 December 2017

CJEU, C-64/16, *Associação Sindical dos Juizes Portugueses*, 27 February 2018

European Court of Human Rights

ECtHR, *Engel and others*, App no 5100/71, 8 June 1976

ECtHR, *Klass and others*, App no 5029/71, Judgement of 6 September 1978

ECtHR, *Malone v United Kingdom*, App no 8691/19, 2 August 1984

ECtHR, *Huvig v France*, App no 11105/84, 24 April 1990

ECtHR, *Dombo Beheer BV v Netherlands*, App no 14448/88, 27 October 1993

ECtHR, *Murray*, App no 18731/91, 8 February 1996

ECtHR, *Doorson v The Netherlands*, App no 20524/92, 26 March 1996

ECtHR, *Teixeira de Castro v Portugal*, App no 25829/94, 9 June 1998

ECtHR, *Jasper v United Kingdom*, App no 27052/95, 16 February 2000

ECtHR, *Condrón v. United Kindgom*, App no 35718/97, 2 May 2000

ECtHR, *Krombach v France*, App no 29731/96, 13 February 2001

ECtHR, *Van Rossem v Belgium*, App no 41872/84, 9 December 2004

ECtHR, *Ambruszkiewicz v Poland*, App no 35718/97, 4 May 2006

ECtHR, *Szabo v Sweden*, App no 28578, 27 June 2006

ECtHR, *Al-Khawaja and Tahery v UK*, App 26766/05 and 22228/06, 20 January 2009

ECtHR, *Natunen v Finland*, App no 21022/04, 31 March 2009

ECtHR, *Gäfgen v Germany*, App no 22978/05, 1 June 2010

ECtHR, *Stojkovic v France and Belgium*, App no 25303/08, 27 October 2011

ECtHR, *Toniolo v. San Marino and Italy*, App no 44853/10, 26 June 2012

ECtHR, *Zakharov v Russia*, App no 47143/06, 4 December 2015

Others

Assange v The Swedish Prosecution Authority (2012) UKSC 22

De procureur des Konings te BRUSSEL Openbaar Ministerie v Antoni Comin Oliveres, Nederlandstalige rechtbank van eerste aanleg Brussel, BR16.EU.51/18, 16 May 2018 (in Dutch – not available to public)

Regina (Hilali) v Governor of Whitewall Prison and Another (2008) UKHL 3

Minister for Justice and Equality and Artur Celmer, (2018), IEHC, 12 March

Official documents

Convention drawn up on the basis of Article K.3 of the Treaty on European Union, on mutual assistance and cooperation between customs administrations OJ C 024, 23 January 1998

Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, OJ L 239, 22 September, 2000

Council of Europe, European Convention on Mutual Assistance in Criminal Matters, ETS No.030, Strasbourg, 20 April 1959

Council of Europe, European Committee on Crime Problems, Committee of Experts on the Operation of European Conventions on Co-operation in Criminal Matters (PC-OC), Questionnaire concerning judgments in absentia and the possibility of a retrial – Summary and Compilation of Replies, PC-OC(2013) 01 Rev.3 Bil., Strasbourg, 28 April 2004

Council of Europe, Recommendation Rec(2006)13 of the Committee of Ministers to member states on the use of remand in custody, the conditions in which it takes place and the provision of safeguards against abuse.

Retrieved at: <https://wcd.coe.int/ViewDoc.jsp?id=1041281&Site=CM>

Council of Europe, PC-OC, List of decisions taken at the 6th meeting of the restricted Group of experts on international co-operation (PC-OC Mod) enlarged to all PC-OC members, 30 Sept. – 2 Oct. 2008, point 1, b)

Council of Europe Convention on preventing and combating violence against women and domestic violence, Istanbul, 11.V.2011

Council of Europe Annual Penal Statistics, SPACE II, Persons Serving Non-Custodial Sanctions and Measures in 2016, Survey, PC-CP 2017

Council of Europe, Chart of signatures and ratifications of Treaty 210, Council of Europe Convention on preventing and combating violence against women and domestic violence, Status as of 3 April 2018

Council of the EU, Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings, 2001/220/JHA

Council of the EU, Resolution of 10 June 2011 on a Roadmap for strengthening the rights and protection of victims, in particular in criminal proceedings, OJ C 187, 28 June 2011

Council of the EU, Statement of the Article 29 Working Party, Data protection and privacy aspects of cross-border access to electronic evidence, Brussels, 19 November 2017

Council of the EU, text agreed as general approach to the initiative for a Directive of the European Parliament and of the Council regarding the European Investigation Order, 2010/0817, 21 December 2011

Council of the EU, Summary of discussions at the COSI, 8588/16, Brussels, 10 May 2016
Council of the EU, Extracts from Conclusions of Plenary meetings of the EJM concerning the practical application of the EIO, 15210/17, Brussels, 8 December 2017

Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties

Council Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders

Council Framework Decision 2008/675/JHA on taking account of convictions in the Member States of the European Union in the course of new criminal proceedings

Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union

Council Framework Decision 2008/947/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions

Council Framework Decision 2009/315/JHA of 26 February 2009 on the organisation and content of the exchange of information extracted from the criminal record between Member States

Council Framework Decision 2009/948/JHA of 30 November 2009 on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings

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

Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA

Directive 2011/99/EU of the European Parliament and of the Council of 13 December 2011 on the European protection order

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

Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA

Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters

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

Directive 2016/343 strengthening certain aspects of the presumption of innocence

Directive (EU) 2016/800 of the European Parliament and of the Council of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings

Directive 2016/1919 of the European Parliament and of the Council of 26 October 2016 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings

Directive 2017/541 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA

Eurojust, Conclusions of the third meeting of National Experts on Joint Investigation Teams (29/30 November 2007, The Hague), 5526/08, Brussels, 22 January 2008

Eurojust, Conclusions of the fourth meeting of National Experts on Joint Investigation Teams (15/15 December 2008, The Hague), 17512/08, Brussels, 19 December 2008

Eurojust, Conclusions of the 9th Annual meeting of the National Experts on Joint Investigation Teams, 7259/14, 27 - 28 June 2013

Eurojust, Sixth round of mutual evaluations, "The practical implementation and operation of Council Decision 2002/187/JHA of 28 February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime and of Council Decision 2008/976/JHA on the European Judicial Network in criminal matters", Report on The Netherlands, Brussels, 8 January 2014, 13681/2/13

Eurojust, Evaluation report on the sixth round of mutual evaluations: The practical implementation and operation of the Council Decision 2002/187/JHA of 28 February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime and of the Council

Decision 2008/976/JHA on the European Judicial Network in criminal matters: Report on Spain, 23 September 2014, 11004/2/14

Eurojust, Sixth round of Mutual Evaluations, Evaluation report on the sixth round of mutual evaluations: The practical implementation and operation of the Council Decision 2002/187/JHA of 28 February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime and of the Council Decision 2008/976/JHA on the European Judicial Network in criminal matters: Report on Ireland, 10 November 2014, 6997/14

Eurojust, Report of the Strategic Meeting on Cybercrime, 19-20 November 2014

Eurojust, Report on a Strategic Seminar on Conflicts of Jurisdiction, Transfers of Proceedings, Ne Bis In Idem: Successes, shortcomings and solutions, The Hague, 14 June 2015

Eurojust, EAW case work 2014-2016, 11 May 2017

Eurojust, Conclusions of the Thirteenth Annual Meeting of National Experts on Joint Investigation Teams (JITs) 17 and 18 May 2017

European Commission, Green Paper on criminal-law protection of the financial interests of the Community and the establishment of a European Prosecutor, COM(2001) 715.

European Commission, Green Paper - Procedural Safeguards for Suspects and Defendants in Criminal Proceedings throughout the European Union, COM/2003/0075 final, 2003

European Commission, Green Paper on obtaining evidence in criminal matters from one Member State to another and securing its admissibility, COM(2009) 624 final, Brussels, 11 November 2009

European Commission, Impact Assessment accompanying the Proposal for a Directive on the Rights of Victims, SEC(2011) 580 final

European Commission, Proposal for a directive on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest, COM(2011) 326 final, Brussels, 8 June 2011

European Commission, Report on the implementation since 2007 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, COM(2011) 175 final ('third evaluation report'), Brussels, 2011

European Commission, Proposal for a directive establishing minimum standards on the rights, support and protection of victims of crime (COM/2011/0275) final – (COD) 2011/0129

European Commission Communication on the protection of the financial interests of the European Union by criminal law and administrative investigations: an integrated policy to safeguard taxpayers' money, COM (2011) 293 final

European Commission, Strengthening mutual trust in the European judicial area – A Green Paper on the application of EU criminal justice legislation in the field of detention, COM(2011) 327 final, Brussels, 16 June 2011

European Commission, Guidance Document related to the transposition and implementation of Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA

European Commission, Analysis of the replies to the Green Paper on the application of EU criminal justice legislation in the field of detention, 2012

European Commission, Follow up to the European Parliament resolution with recommendations to the Commission on the review of the European arrest warrant adopted by the Commission on 28 May 2014

European Commission Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office – Discussion paper, 10859/14, Brussels, 11 June 2014

European Commission Proposal for a Directive of the European Parliament and of the Council on the strengthening of certain aspects of the presumption of innocence and of the right to be present at trial in criminal proceedings - Examination of revised text, 11112/15, Brussels, 29 July 2015

European Commission, Non-paper: Progress Report following the Conclusions of the Council of the European Union on Improving Criminal Justice in Cyberspace, 15072/1/16, Brussels, 7 December 2016

European Commission, Explanatory Memorandum, Proposal on the mutual recognition of freezing and confiscation orders, COM(2016) 819 final, Brussels, 2016

European Commission, Impact assessment on the Proposal for a regulation of the European Parliament and of the Council on the mutual recognition of freezing and confiscation orders, SWD(2016)

European Commission, Commission Staff Working Document on improving cooperation between EU Financial Intelligence Units, SWD(2017) 275 final, Brussels, 2017

European Commission, Handbook on how to issue and execute a European arrest warrant, OJ 2017/C 335/01

European Commission, Proposal for a Regulation of the European Parliament and of the Council on the mutual recognition of freezing and confiscation orders, 15104/17, 2017

European Commission Proposal for a Regulation on European Production and Preservation Orders for electronic evidence in criminal matters, COM(2018) 225 final, 17 April 2018

European Committee on Crime Problems (CDPC). CDPC, Legal assistance in criminal, administrative and civil proceedings related to the liability of legal persons and non-conviction based confiscation, PC-OC Mod (2014) 08, Strasbourg, 7 October 2014

European Council, Tampere European Summit, Presidency Conclusions, 15 and 16 Oct. 1999, SN 200/99

European Council, The Stockholm Programme — An open and secure Europe serving and protecting citizens, 2010/C 115/01

European Parliament resolution of 26 November 2009 on the elimination of violence against women, P7_TA(2009)0098; European Parliament resolution of 10 February 2010 on equality between women and men in the European Union, P7_TA(2010)0021

European Parliament, Resolution on detention conditions in the EU, 15 December 2011, (2011/2897(RSP))

European Parliament, interim report on the proposal for a Council regulation on the establishment of the European Public Prosecutor's Office (COM(2013)0534 – 2013/0255(APP)), 24 February 2014

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

European Parliament Resolution of 12 March 2014 on the proposal for a Council regulation on the establishment of the European Public Prosecutor's Office

European Parliament, Report on the proposal for a regulation of the European Parliament and of the Council on the mutual recognition of freezing and confiscation orders (COM(2016)0819 – C8-0002/2017 – 2016/0412(COD))

European Parliament, Motion for a resolution on prison systems and conditions (2015/2062(INI)), 6 July 2017

European Parliament, Resolution on prison systems and conditions, 5 October 2017

European Parliament, LIBE Committee, Interim Report on the proposal for a Council decision on the conclusion, by the European Union, of the Council of Europe Convention on preventing and combating violence against women and domestic violence (COM(2016)0109 – 2016/0062(NLE)), 19 July 2017

European Parliament, Draft Report on the implementation of Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime (2016/2328(INI)), LIBE Committee, 2016/2328(INI), 26 February 2018

European Parliament, Motion for a Resolution on the implementation of Directive 2011/99/EU on the European Protection Order (2016/2329(INI)), 14 March 2018

House of Lords, Joint Committee on Human Rights, *The Human Rights Implications of UK Extradition Policy, Fifteenth Report of Session 2010-12*, London: The Stationery Office Limited, 2011

International Criminal Court and International Criminal Law Programme, Report on the Experts' Roundtable on trials in absentia in international criminal justice, September 2016.

Programme of measures to implement the principle of mutual recognition of decisions in criminal matters, 15 January 2001

Proposal for a Regulation of the European Parliament and the Council on the mutual recognition of freezing and confiscation orders COM/2016/0819 final - 2016/0412 (COD)

Proposal for a Regulation of the European Parliament and the Council on European Production and Preservation Orders for electronic evidence in criminal matters COM/2018/225 final - 2018/0108 (COD)

Regulation No 1987/2006 of the European Parliament and of the Council of 20 December 2006 on the establishment, operation and use of the second generation Schengen Information System (SIS II)

Regulation 904/2010 of 7 October 2010 on administrative cooperation and combating fraud in the field of value added tax, 12 October 2010

Regulation No 606/2013 of the European Parliament and of the Council of 12 June 2013 on mutual recognition of protection measures in civil matters

Regulation 883/2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF) and repealing Regulation (EC) No 1073/1999 of the European Parliament and of the Council and Council Regulation (Euratom) No 1074/1999

Regulation 2017/1939 of the Council of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO'), 31 October 2017

Books and book chapters

K. Ambos, "The structure of international criminal procedure: 'adversarial', 'inquisitorial' or 'mixed'?", in Michael Bohlander (ed), *International criminal justice: A critical analysis of institutions and procedures*, Cameron May, 2007

P. Asp, European criminal and national criminal law, in V. Mitsilegas, M. Bergström and T. Konstadinides, *Research handbook on EU criminal law*, Cheltenham/Northampton, Edward Elgar Publishing, 2016

L. Bachmaier Winter, Mutual Recognition and Cross-Border Interception of Communications: The way ahead for the European Investigation Order, in C. Brière, A. Weyembergh (eds), *The needed balances in EU criminal law: Past, present and future*, Portland: Hart Publishing, 2018

L. Bachmaier Winter, "Report on Spain", in K. Ligeti (ed.), *The Future of Prosecution in Europe*, Vol. 1, Oxford: Hart Publishing, 2013

A. Bailleux, "The fiftieth shade of grey. Competition law, 'criministrative law' and 'fairly fair trials'", in A. Weyembergh, F. Galli (eds), *Do labels still matters? Blurring boundaries between the administrative and criminal law: the role of the EU*, Brussels: PUB, 2014, pp. 137-155

A. Bernardi, A. Martufi (eds), *Prison overcrowding and alternatives to detention. European sources and national legal systems*, Naples: Jovene Editore, 2016

B. Schünemann, "Solution Models and Principles Governing the Transnational Evidence-Gathering in the EU", in S. Ruggieri (ed), *Transnational Inquiries and the Protection of Fundamental Rights in Criminal Proceedings*, Heidelberg: Springer, 2013

P. Caeiro, "The influence of the EU on the blurring", in A. Weyembergh, F. Galli (eds), *Do labels still matters? Blurring boundaries between the administrative and criminal law: the role of the EU*, Brussels: PUB, 2014

G. Laura Candito, "The Influence of the Directive 2012/13/EU on the Italian System of Protection of the Right to Information in Criminal Procedures", in S. Ruggieri (ed), *Human Rights in European Criminal Law*, Heidelberg: Springer, 2015, pp. 229-261

G. Conway, "Irish Practice on Mutual Recognition in European Criminal Law", in G. Vernimmen-Van Tiggelen, L. Surano and A. Weyembergh (eds.), *The future of mutual recognition in criminal matters*, Bruxelles: PUB, 2009

E. Cape, Z. Namoradze, R. Smith and T. Spronken, *Effective Criminal Defence in Europe*, Antwerpen-Oxford: Intersentia, 2010

F. Caprioli, "Report on Italy", in S. Ruggieri (ed), *Transnational Inquiries and the Protection of Fundamental Rights in Criminal Proceedings*, Heidelberg: Springer, 2013

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

F. Galli, "Terrorism", in V. Mitsilegas, M. Bergström, T. Konstadinides, *Research Handbook on EU Criminal Law*, Cheltenham: Edgar Publishing, 2016

- F. Gascon Inchausti, "Report on Spain", in S. Ruggeri (ed), *Transnational Inquiries and the Protection of Fundamental Rights in Criminal Proceedings*, Heidelberg: Springer, 2014
- A. Grió, "The Defendant's Rights in the Hearing by Videoconference", in S. Ruggeri (ed), *Transnational Evidence and Multicultural Inquiries in Europe*, Cham: Springer International Publishing, 2014
- C. Harding, "EU Criminal Law under the Area of Freedom, Security and Justice", in A. Arnulf, D. Chalmers, *The Oxford Handbook of European Law*, Oxford: Oxford University Press, 2015
- E. Herlin-Karnell, "Is administrative law still relevant? How the battle of sanctions has shaped EU criminal law", in M. Bergstrom, V. Mitsilegas, and T. Konstadinides (eds), *Research Handbook on EU Criminal Law*, Cheltenham: Edward Elgar, 2015
- M. Hollan, "Report on Hungary", in K. Ligeti (ed.), *The Future of Prosecution in Europe*, Vol. 1, Oxford: Hart Publishing, 2013
- O. Jansen, *Administrative Sanctions in the European Union*, Antwerpen: Intersentia, 2013
- O. Jansen, P. Langbroek, *Defence rights during administrative investigations*, Antwerp: Intersentia, 2007
- M. Kaiafa-Gbandi, "Approximation of substantive criminal law provisions in the EU and fundamental principles of criminal law", in F. Galli and A. Weyembergh (eds), *Approximation of substantive criminal law in the EU, The way forward*, Brussels: PUB, 2014
- L. Karsai, Z. Szomora, *Criminal Law in Hungary*, Kluwer Law International, 2010
- T. Konstadinides, The Europeanisation of extradition: how many light years away to mutual confidence? in C. Eckes, T. Konstadinides (eds), *Crime within the Area of Freedom, Security and Justice: A European Public Order*, Cambridge: Cambridge University Press, 2011, pp. 192-224
- M. Kusak, *Mutual admissibility of evidence in criminal matters in the EU, A study of telephone tapping and house search*, Antwerp: Maklu, 2016
- B. Galgani, "Extradition, Political Offence and the Discrimination Clause", in S. Ruggieri (ed.), *Transnational Evidence and Multicultural Inquiries in Europe*, Heidelberg: Springer International Publishing, 2014
- G. L. Gatta, E. Dolcini *Final proposals on possible guidelines of the EU- policy in order to implement the best practices in the fields of detention conditions and alternatives to detention*, in A. Benardi, A. Martufi (eds.), *Prison overcrowding and alternatives to detention. European sources and national legal systems*, Jovene Editore, Milano, 2016
- M. Hollan, "Report on Hungary", in K. Ligeti (ed.), *The Future of Prosecution in Europe*, Vol. 1, Oxford: Hart Publishing, 2013
- A. M. van Kalmthout, "An Analysis of Minimum Standards in Pre-trial Detention and the Grounds for Regular Review in the Member States of the EU", in A. M. van Kalmthout, M. M. Knapen, C. Morgenstern (eds), *Pre-Trial Detention in the European Union*, Tilburg: Wolf Legal Publishers, 2009
- K. Ligeti, V. Franssen (eds), *Challenges in the Field of Economic and Financial Crime in Europe and the US*, Oxford: Hart Publishing, 2016.

- K. Ligeti, A. Marletta, "The European Public Prosecutor's Office: what role for OLAF in the future?" In Z. Durdevic, E. Ivcevic Karas, *European Criminal Procedure Law in Service of Protection of European Union Financial Interests: State of play and Challenges*, Croatian Association of European Criminal Law, 2016
- K. Ligeti (ed.), *The Future of Prosecution in Europe*, Vol. 1, Oxford: Hart Publishing, 2013
- K. Ligeti, M. Simonello, "Multidisciplinary investigations into offences", in A. Weyembergh, F. Galli (eds), *Do labels still matter? Blurring boundaries between the administrative and criminal law: the role of the EU*, Brussels: PUB, 2014
- M. Luchtman, "Forum Choice and Judicial Review under the EPPO's Legislative Framework", in W. Geelhoed, L. H. Erkelens, A. W. H. Meij (eds), *Shifting Perspectives on the European Public Prosecutor's Office*, The Hague: TMC Asser Press, 2017
- M. Luchtman, "Inter-state cooperation at the interface between administrative and criminal law", in A. Weyembergh, F. Galli (eds), *Do labels still matter? Blurring boundaries between the administrative and criminal law: the role of the EU*, Brussels: PUB, 2014
- P. Maggio, "The EIO Proposal for a Directive and Mafia Trials: Striving for Balance Between Efficiency and Procedural Guarantees", in S. Ruggieri (ed.), *Transnational Evidence and Multicultural Inquiries in Europe*, Heidelberg: Springer International Publishing, 2014
- T. Marguery, *Mutual Trust under Pressure: the Transferring of Sentenced Persons in the EU*, Oisterwijk: Wolf Publishers, 2018
- V. Mitsilegas, *EU Criminal Law after Lisbon: Rights, Trust and the Transformation of Justice in Europe*, Oxford/Portland: Hart Publishing, 2016
- V. Mitsilegas, F. Giuffrida, "The European Public Prosecutor's Office and Human Rights", in W. Geelhoed, L. H. Erkelens, A. W. H. Meij (eds), *Shifting Perspectives on the European Public Prosecutor's Office*, The Hague: TMC Asser Press, 2017
- A. Nieto Martin, C. Rodriguez Yagüe, M. Muñoz de Morales Romero, Chapter on Spain, in A. Bernardi (ed), *Prison Overcrowding and alternatives to detention, European sources and national legal systems*, Naples: Jovene Editore, 2016
- J. Öberg, *Limits to EU powers*, Oxford/Portland: Hart Publishing, 2017
- S. Quattrocchio, "The Right to Information in EU Legislation", in S. Ruggieri (ed), *Human Rights in Criminal Law: New Developments in European Legislation and Case Law after the Lisbon Treaty*, New York: Springer International Publishing, 2015
- S. Peers, *EU Justice and Home Affairs Law*, Oxford: Oxford University Press, 2016
- P. Roberts and A. Zuckerman, *Criminal evidence*, Oxford: Oxford University Press, 2nd Ed., 2010
- S. Ruggieri (ed), *Criminal Proceedings, Languages and the European Union*, Heidelberg: Springer, 2014.
- S. Ruggieri (ed), *Transnational Evidence and Multicultural Inquiries in Europe*, Heidelberg: Springer, 2014
- S. Ruggieri, *Transnational Inquiries and the Protection of Fundamental Rights in Criminal Proceedings*, Heidelberg: Springer, 2013

- A. Ryan, *Towards a System of European Criminal Justice, The problem of admissibility of evidence*, New York/London: Routledge, 2014
- J. R. Spencer, "The Problems of Trans-border Evidence and European Initiatives to Resolve Them", in C. Barnard (ed), *Cambridge Yearbook of European Legal Studies, Vol 9, Volumes 2006-2007*, Oxford/Portland: Hart Publishing, 2007
- K. Sugman Stubbs, M. Jager, "The organisation of administrative and criminal law in national legal systems: exclusion, organized, or non-organized co-existence", in A. Weyembergh, F. Galli (eds), *Do labels still matters? Blurring boundaries between the administrative and criminal law: the role of the EU*, Brussels: PUB, 2014
- A. Suominen, "The Finnish approach to mutual recognition in criminal matters and its implementation", in G. Vernimmen-Van Tiggelen, L. Surano, A. Weyembergh, *The future of mutual recognition in criminal matters in the European Union*, Bruxelles: PUB, 2009
- T. Spronken, Effective Defence: The Letter of Rights and the Salduz-directive, in G. Vermeuleun et al (eds), *Defence Rights: International and European Developments*, Antwerp: Maku, 2012
- J. Tricot, "Report on France", in K. Ligeti (ed), *The Future of Prosecution in Europe*, Vol. 1, Oxford: Hart Publishing, 2013
- S. Van der Aa, J. Niemi, L. Sosa, A. Ferreira & A. Baldry, *Mapping the legislation and assessing the impact of Protection Orders in the European Member States*, Oisterwijk: Wolf Legal Publishers 2015
- M. Van Wijk, *Cross-Border Evidence Gathering: Equality of Arms Within the EU?* The Hague: Eleven Publishing, 2017
- G. Vermeulen, W. De Bondt, C. Ryckman, *Rethinking International Cooperation in Criminal Matters in the EU, Moving beyond actors, bringing logic back, footed in reality*, Antwerp: Maklu, 2012
- R. Vogler, "Lost in Translation: Language Rights for Defendants in European Criminal Proceedings", in S. Ruggeri (ed), *Human Rights in European Criminal Law*, Heidelberg: Springer, 2015, pp. 96-108
- T. Wahl, "The perception of the principle of mutual recognition of judicial decisions in criminal matters in Germany", in G. Vernimmen-Van Tiggelen, L. Surano, A. Weyembergh (eds), *The future of mutual recognition in criminal matters in the European Union*, Bruxelles: Presses Universitaires de Bruxelles, 2009, pp. 115-147
- T. Weigend, "Report on Germany", in K. Ligeti (ed.), *The Future of Prosecution in Europe*, Vol. 1, Oxford: Hart Publishing, 2013
- T. Weigend, F. Salditt, Criminal defence during the pre-trial stage in Germany, in E. Cape, J. Hodgson, T. Prakken, T. Spronken (eds), *Suspects in Europe: Procedural rights at the investigative stage of the criminal process in the European Union*, Antwerpen: Intersentia, 2008
- A. Weyembergh, K. Ligeti, "The European Public Prosecutor's Office: Certain Constitutional Issues", in L. H. Erkelens, A.WH. Meij, M. Pawlik (eds), *The European Public Prosecutor's Office: An Extended Arm or a Two-headed Dragon?*, The Hague: TMC Asser Press Institute, 2014

A. Weyembergh, "Transverse report on judicial control in cooperation in criminal matters: The evolution from traditional judicial cooperation to mutual recognition", in K. Ligeti (ed.), *The Future of Prosecution in Europe*, Vol. 1, Oxford: Hart Publishing, 2013

A. Weyembergh, *L'harmonisation des législations : condition de l'espace pénal européen et révélateur de ses tensions*, Bruxelles: Presses Universitaires de Bruxelles, 2004

G. Zarza, "Mutual recognition in criminal matters in Spain", in G. Vernimmen-Van Tiggelen, L. Surano, A. Weyembergh (eds), *The future of mutual recognition in criminal matters in the European Union*, Bruxelles: Presses Universitaires de Bruxelles, 2009, pp. 189-219

Academic journals

S. Allegrezza, "Critical Remarks on the Green Paper on Obtaining Evidence in Criminal Matters from one Member State to another and Securing its Admissibility", *Zeitschrift für Internationale Strafrechtsdogmatik*, 2010.

S. Allegrezza, V. Covolo, "The Directive 2012/13/EU on the Right to Information in Criminal Proceedings: Status Quo or Step Forward?", *Croatian Association of European Criminal law*, 2016, pp. 41-51

I. Armada, "The European Investigation Order and the lack of European standards for gathering evidence. Is a fundamental rights-based refusal the solution?" *New Journal of European Criminal Law*, Vol 6, Issue 1, 2015

L. Bachmaier Winter, "Transnational Criminal Proceedings, Witness Evidence and Confrontation, Lessons from ECtHR's Case Law", *Utrecht Law Review*, Vol 9, Issue 4, 2013

L. Bay Larsen, "Quelques remarques sur la place et les limites de la confiance mutuelle dans le cadre du mandat d'arrêt européen", *L'Observateur de Bruxelles No 112, Dossier Spécial (L'espace judiciaire européen : évolutions récentes et perspectives)*, avril 2018

M. J. Borgers & L. Stevens, "The use of illegally gathered evidence in the Dutch criminal trial", *Electronic Journal of Comparative Law*, Vol 14, Issue 3, 2010

S. Cras and A. Erbezniak, "The Directive on the Presumption of Innocence and the Right to Be Present at Trial", *eu crim*, The European Criminal Law Associations' Forum, Issue 1, 2016

A. Csurik, "The Proposed European Public prosecutor's Office – from a Trojan Horse to a White Elephant?" *Cambridge Yearbook of European Legal Studies*, Vol 18, 2016

Mirjan Damaska, "Evidentiary barriers to conviction and two models of criminal procedure: a comparative study", *University of Pennsylvania Law Review*, Vol 121, No 3, Jan 1973, pp. 514-525.

D. De Vocht *et al*, "Procedural Safeguards for Juvenile Suspects in Interrogations: A Look at the Commission's Proposal in Light of an EU Comparative Study", *New Journal of European Criminal Law*, Vol 5, Issue 4, 2014

ECBA, ECBA Initiative 2017/2018 "Agenda 2020: A new Roadmap on minimum standards of certain procedural safeguards" (*forthcoming: New Journal of European Criminal Law*)

M. Kusak, Common EU Minimum Standards for Enhancing Mutual Admissibility of Evidence Gathered in Criminal Matters, *European Journal of Criminal Policy Research*, Vol 23, 2017, pp. 337-352

- G. Giuffrida, "Taricco principles beyond Tarrico: Some thoughts about three pending judgments," *New Journal of European Criminal Law*, Vol 9, Issue 1, 2018, pp. 31-37
- S. Gless, "Transnational Cooperation in Criminal Matters and the Guarantee of a Fair Trial: Approaches to a General Principle", *Utrecht Law Review*, Vol 9, Issue 4, 2013
- S. Gless, J. Vervaele, "Law should govern: Aspiring General principles for Transnational Criminal Justice", *Utrecht Law Review*, Vol 9, Issue 4, 2013
- M. R. Hebly, J. D. M. van Dongen, S. D. Lindenbergh, "Crime Victims' Experiences with Seeking Compensation: A Qualitative Exploration", *Utrecht Law Review*, Vol 10, Issue 3, 2014
- E. Herlin-Karnell, "The Challenges of EU Enforcement and Elements of Criminal Law Theory: On Sanctions and Value in Contemporary 'Freedom, Security and Justice' Law", *Yearbook of European Law*, 2016
- E. Hertog, "Directive 2010/64/EU of the European Parliament and of the Council on the Right to Interpretation and Translation in Criminal Proceedings: Transposition Strategies with regard to Interpretation and Translation", *MonTI*, Vol 7, 2015, pp. 73-100
- S. Hilder, H. Kemshall, "The Management of Serious Violent or Sexual Offenders who are Mobile across the European Union: The Challenge of Mobile offenders", *Irish Probation Journal*, Vol 12, 2015
- J. Lelieur, "La reconnaissance mutuelle appliquée à l'obtention transnationale de preuves pénales dans l'Union européenne : une chance pour un droit probatoire français en crise ?", *RSC*, 2011, n°1
- K. Lenaerts, "La vie après l'avis: Exploring the principle of mutual (yet not blind) trust", Vol 54, *Common Market Law Review*, pp. 837-840
- D. Maiers, "Offender and state compensation for victims of crime, Two decades of development and change", *International Review of Victimology*, Vol 20, Issue 1, 2014
- S. Manacorda, "The Taricco saga: A risk or an opportunity for European Criminal Law", *New Journal of European Criminal Law*, Vol 9, Issue 1, 2018, pp. 4-11
- J. McEwan, "The testimony of vulnerable victims and witnesses in criminal proceedings in the European Union", *ERA Forum*, Vol 10, 2009, pp. 369-386
- V. Mitsilegas, "The Limits of Mutual Trust in Europe's Area of Freedom, Security and Justice: From Automatic Inter-State Cooperation to the Slow Emergence of the Individual", Vol 31, Issue 1, *Yearbook of European Law*, 2012, pp. 319-372
- V. Mols, "Bringing directives on procedural rights of the EU to police stations: Practical training for criminal defence lawyers", *New Journal of European Criminal Law*, Vol 8, No 3, 2017, pp. 300-308
- S. Neveu, "Probation measures and alternative sanctions in Europe: from the 1964 convention to the 2008 Framework Decision", Vol 4, Issues 1-2, *New Journal of European Criminal Law*, 2013
- F. Pınar Ölçer, "Illegally Obtained Evidence in European Treaty of Human Rights (ETHR)", *Annales de la Faculté de Droit d'Istanbul*, nr. 57, 2008
- S. Ruggeri, "Inaudito reo Proceedings, Defence Rights, and Harmonisation Goals in the EU", *eu crim*, 1/2016

I-M. Rusu, The right to information within the criminal proceedings in the European Union. Comparative examination. Critical opinions. *Judicial Tribune*, Vol 6, special issue, 2016, pp. 139-150

A.M. Slaughter, "A Global Community of Courts", *Harvard International Law Journal*, Vol 44, 2003

A. Soo, "How are the member states progressing on transposition of Directive 2013/48/EU on the right of access to a lawyer? An inquiry conducted among the member states with the special focus on how Article 12 is transposed", *New Journal of European Criminal Law*, Vol 8, No 1, 2017, pp. 64-76

T. Spapens, "Joint Investigation Teams in the European Union: Article 13 JITS and the Alternatives", *European Journal of Crime, Criminal Law and Criminal Justice*, Vol 19, 2011

S. Van Der Aa, "Variable Vulnerabilities? Comparing the Rights of Adult Vulnerable Suspects and Vulnerable Victims under EU Law", *New Journal of European Criminal Law*, Vol 7, Issue 1, 2016, pp. 39-59

S. Van der Aa, J. Ouwerkerk, "The European Protection Order: No Time to Waste or a Waste of Time?" *European Journal of Crime, Criminal Law and Criminal Justice*, Vol 18, 2011, pp. 267-287

E-J. Van Der Vlis, "The right to interpretation and translation", *The Journal of Specialised Translation*, Issue 14, 2010, pp. 26-40

A. Van Hoek, M. Luchtman, "Transnational cooperation in criminal matters and the safeguarding of human rights", *Utrecht Law Review*, Vol 1, Issue 2, 2005, p. 21

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

J. Vervaele, "Special procedural measures and the protection of human rights: General report", *Utrecht Law Review*, Vol 5, Issue 2, 2009

F. Viganò, "Melloni overruled? Considerations on the 'Taricco II' judgment of the Court of Justice", *New Journal of European Criminal Law*, Vol 9, Issue 1, 2018, pp. 18-23

PhD theses

M. Igorevna Fedorova, The Principle of Equality of Arms in International Criminal Proceedings, PhD thesis, The Netherlands: University of Utrecht, defended on 7 September 2012

L. Kennes, La recherche d'un système équilibré de sanctions, dans la procédure pénale, des irrégularités – Étude de droit compare, PhD thesis, Bruxelles: Université libre de Bruxelles, Faculté de Droit, defended on 22 May 2018

Reports

S. Allegrezza, *Effective defence rights in criminal proceedings: a European and comparative study on judicial remedies (JRECRIPRO)*, University of Luxembourg, 2015-2017

A. Baldry, L. De Geus, *National Report on Italy, Mapping the legislation and assessing the impact of protection orders in the European Member States (POEMS)*, 2015

Retrieved at: <http://poems-project.com/wp-content/uploads/2015/02/Italy.pdf>

M. Barbera, A. Baracchi, V. Protopapa, F. Rizzi, "National report on Italy," for the project "Victim Support Service in the EU: An overview and assessment of victims' rights in practice" (Fundamental Rights Agency), Vienna, 2014

C. Blaya, "National Report on France", *Mapping the legislation and assessing the impact of protection orders in the European Member States (POEMS)*, 2015

Available at: <http://poems-project.com/wp-content/uploads/2015/02/France.pdf>

D. Cavallini, R. Amato, *National Report on Italy, "Transfer of Prisoners in Europe" project*, Utrecht University, The Netherlands, 2018

CCBE, "EAW-rights, Analysis of the implementation and operation of the European Arrest Warrant from the point of view of defence practitioners", EC-funded project, Brussels, 2016

E. Cerrato, T. Freixes, M. Lutfi, V. Merino, N. Oliveras, L. Román, B. Steible and N. Torres, "European Protection Order, European Implementation Assessment", EPRS Study, European Parliament, Brussels, 2017

Council of Europe, "Emergency barring orders in situations of domestic violence: Article 52 of the Istanbul Convention: A collection of papers on the Council of Europe Convention on preventing and combating violence against women and domestic violence", 2017. Retrieved at: <https://rm.coe.int/convention-istanbul-article-52/168073e0e7>

J. Crijns, B. Leeuw, H. Wermink, "Pre-trial detention in the Netherlands: legal principles versus practical reality," for the project "Pre-trial detention: a measure of last resort?" (Fair Trials), 2016

European Commission, "Mapping Exercise and Gap analysis on FIUs powers and obstacles for obtaining and exchanging information", Report by an expert group for the European Commission, 2016.

Retrieved at:

<http://ec.europa.eu/transparency/regexpert/index.cfm?do=groupDetail.groupDetailDoc&id=33583&no=2>

European Law Institute, "Prevention and Settlement of Conflicts of Exercise of Jurisdiction in Criminal Law", University of Luxembourg, 2014-2017. See the Draft Legislative Proposals for the prevention and resolution of conflicts of jurisdiction in criminal matters in the European Union.

Retrieved at:

https://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/Conflict_of_Jurisdiction_in_Criminal_Law_FINAL.pdf

T. Freixes, L. Román (eds.), "Protection of the Gender-Based Violence Victims in the European Union", Preliminary study of the Directive 2011/99/EU on the European protection order, EPOgender project, 2014

Fundamental Rights Agency, "Victims of crime in the EU: the extent and nature of support for victims", Report, Vienna, 2015

Fundamental Rights Agency, "Rights of suspected and accused persons across the EU: translation, interpretation and information", Vienna: FRA, 2016

Fundamental Rights Agency, "Criminal detention and alternatives: fundamental rights aspects in EU cross-border transfers", FRA Report, Vienna, 2016

Fundamental Rights Agency, "Surveillance by intelligence services: fundamental rights safeguards and remedies in the EU Volume II: field perspectives and legal update", FRA Report, Vienna, 2017

G. Fusu-Plăiașu, "National Report on Romania", "Victim Support Services in the EU: An overview and assessment of victims' rights in practice" (Fundamental Rights Agency), 2014

J. Goldsmith, "TRAINAC Report on the assessment, good practices and recommendations on the right to interpretation and translation, the right to information and the right of access to a lawyer in criminal proceedings", CCBE, Brussels, 2015

J. Graat, B. Oude Breuil, D. van Uhm, E. van Gelder, T. Hendrikse, Part IV Dutch Report, "Transfer of Prisoners in Europe" project, Utrecht University, The Netherlands, 2018

M. Gutheil, Q. Liger, C. Möller, J. Eager, M. Henley, Y. Oviolu, "EU and member States' policies and laws on persons suspected of terrorism-related crimes", Study for the LIBE Committee, European Parliament, Brussels, 2017

W. Hammerschick, C. Morgenstern, S. Bikelis, M. Boone, I. Durnescu, A. Jonckheere, J. Lindeman, E. Maes, M. Rogan, "Towards Pre-trial Detention as Ultima Ratio: Comparative Report", DETOUR project, London: DETOUR, 2017

Hungarian Helsinki Committee, "The practice of pre-trial detention in Hungary: monitoring alternatives and judicial decision-making", for the project "Pre-trial detention: a measure of last resort?" (Fair Trials), 2016.

Retrieved at: https://www.fairtrials.org/wp-content/uploads/PTD_country_report_Hungary_HHC_2015.pdf

C. Morgenstern, H. Kromrey, 1st national report on Germany, for the project "Towards Pre-Trial Detention as Ultima Ratio" (DETOUR), 2016

J. Mulcahy, "The practice of pre-trial detention in Ireland", Research report, Dublin: Irish Penal Reform Trust, 2016

J. Nieuwboer, G. Walz, "National Report on the Netherlands", for the project "Victim Support Services in the EU: An overview and assessment of victims' rights in practice" (Fundamental Rights Agency), Vienna, 2014

G. Parisi, G. Santoro, A. Scandurra, "The practice of pre-trial detention in Italy, Research report", for the project, "Pre-trial detention: a measure of last resort?" (Fair Trials), 2016

D. Perry, M. Rogan, 1st National Report on Ireland, for the project "Toward Pre-Trial Detention as Ultima Ratio" (DETOUR), 2016

Rand Europe, "Study on paving the way for future policy initiatives in the field of fight against organised crime: the effectiveness of specific criminal law measures targeting organised crime", 2015

Retrieved at: https://ec.europa.eu/home-affairs/sites/homeaffairs/files/e-library/docs/20150312_1_amoc_report_020315_0_220_part_2_en.pdf

A. Scherrer, I. K. Kristo, "The Victims' Rights Directive 2012/29/EU, European Implementation Assessment", EPRS Study, Ex-Post Evaluation Unit, European Parliament, Brussels, 2017

T. Spronken, G. Vermeulen, D. De Vocht, L. Van Puyenbroeck, "EU Procedural Rights in Criminal Proceedings", Maastricht University/Ghent University, Maastricht, The Netherlands/Ghent, Belgium, 2009

Transparency International, "Legislation meets practice: National and European perspectives in confiscation and forfeiture of assets, Comparative Report", Sofia, 2015. Retrieved at: <http://www.confiscation.eu/research/test>

W. Van Ballengooij, Procedural rights and detention conditions, Cost of non-Europe report, EPRS, European Added Value Unit, European Parliament, Brussels, 2017

WAVE Network, SNaP: Special Needs and Protection Orders – project funded by the DAPHNE Programme of the EU, International report, Madrid, 2016

A. Weyembergh, C. Brière, "Towards a European Public Prosecutor's Office, Study for the LIBE Committee", European Parliament, Brussels, 2016

A. Weyembergh, I. Armada, C. Brière, "Critical Assessment of the Existing European Arrest Warrant Framework Decision", Research Paper for DG EPRS, European Parliament, Brussels, 2014

J. Wirth, National report on Hungary for the POEMS project, 2015.
Retrieved at: <http://poems-project.com/wp-content/uploads/2015/02/Hungary.pdf>

Compensation schemes

Compensation in Finland, Finnish State Treasury, Fact Sheet on compensation claims.
Retrieved at: http://www.statetresury.fi/en-US/Citizens_and_Communities/Compensation_and_benefits/Crime_damages/Claiming_compensation

Compensation in France, the Fonds the garantie pour les actes de terrorisme et autres crimes.
Retrieved at: http://www.justice.gouv.fr/art_pix/indemnisation_victime_an.pdf

Compensation in Germany, Crime Victims' Compensation Act, German Ministry of Labour and Social Affairs.
Retrieved at: <http://www.bmas.de/EN/Our-Topics/Social-Security/compensation-and-assistance-for-victims-of-violent-crime.html>

Compensation in Hungary, Hungarian law on compensation of victims, Act CXXXV of 2005 on Crime Victim Support and State Compensation

Compensation in Ireland, Scheme of Compensation for Personal Injuries Criminally Inflicted.
Retrieved at: <http://www.justice.ie/en/JELR/Scheme%2011.pdf/Files/Scheme%2011.pdf>

Compensation in Italy, Italian Ministry of Justice, Compensation Scheme for victims of crime,
https://www.giustizia.it/giustizia/it/mg_2_10_6.page

Compensation in the Netherlands, Ministry of Security and Justice, Fact Sheet on the Rights of victims of criminal offences. Retrieved at:
https://www.rijksoverheid.nl/binaries/rijksoverheid/documenten/brochures/2017/04/03/verklaring-van-rechten-voor-slachtoffers-van-strafbare-feiten/WEB_100159_Infoblad+Verklaring+Rechten+ENG.pdf

Other online resources

P. Bard, W. Van Ballengooij, "Judicial Independence as a Precondition for Mutual Trust", *Verfassungsblog*, 10 April 2018

J. Blackstock, Briefing on the European Investigation Order for Council and Parliament, London: Justice, 2010

J. Brannan, Identifying written translation in criminal proceedings as a separate right: scope and supervision under European law, in: *The Journal of Specialised Translation (JoSTrans)* 27 (2017), 11b), available via: <http://www.jostrans.org/archive.php?display=27>

R. Bunche, Free movement threatened if European arrest warrant abused, *EU observer*, 3 April 2018

E. De Busser, "Procedural issues under the EPPO's legislative framework, Conference on the Establishment of the European Public Prosecutor's Office (EPPO): 'state of play and perspectives'", The Hague: TMC Asser Institute, 7-8 July 2016

S. Carrera, V. Mitsilegas, "Upholding the Rule of Law by Scrutinising Judicial Independence: The Irish Court's request for a preliminary ruling on the European Arrest Warrant", *Commentary*, Brussels, CEPS, 2018.

European Commission, Statement by Vice-President Viviane Reding, EU Justice Commissioner, on the European Protection Order, Strasbourg, 13 December 2011, MEMO/11/906

European Commission, Combating Cybercrime: EU-wide rules against cyber-attacks come into force, Press Release, 4 September 2015. Available at: https://ec.europa.eu/home-affairs/what-is-new/news/news/2015/20150904_1_en

ECBA, Response to the UK's Home Office Extradition Review, 2011. Retrieved at: http://www.ecba.org/extdocserv/projects/EAW/20110331_ECBA_RespExtradHomeOffice.pdf

ECBA, paper presented by President Holger Matt at the 2017 ECBA spring conference, available at: <http://www.ecba.org/extdocserv/conferences/prague2017/ECBAAgenda2020NewRoadmap.pdf>

European Digital Rights, EU "e-evidence" proposals turn service providers into judicial authorities, 16 April 2018. Retrieved at: <https://edri.org/eu-e-evidence-proposals-turn-service-providers-into-judicial-authorities/>

EuroISPA, E-Evidence Proposal: EuroISPA Criticises the Privatisation of Law Enforcement, Press release, Brussels, 17 April 2018. Retrieved at: <http://www.euroispa.org/e-evidence-proposal-euroispa-criticises-privatisation-law-enforcement/>

European Judicial Network, Regional meeting, 'Compensation after detention based on an EAW', Roundtable, Paris, 22 September 2017.

Fair Trials, The Da An Chen case, available at: <https://www.fairtrials.org/da-an-chen/>

Fair Trials, Hungary's perpetual pre-trial detention, guest post, 13 March 2015. Retrieved at: <https://www.fairtrials.org/guest-post-hungarys-perpetual-pre-trial-detention/>

Fundamental Rights Agency, Opinion on the draft Directive regarding the European Investigation Order, 14 February 2011

Fundamental Rights Agency, "Violence against women: an EU-wide survey, main results", Vienna: FRA, 2015

E. Kyriakides, Digital Free for All, Part Deux: European Commission Proposal on E-Evidence, 17 May 2018. Retrieved at: <https://www.justsecurity.org/56408/digital-free-part-deux-european-commission-proposal-e-evidence/>

M. Garcia, STC 26/2014: The Spanish constitutional court modifies its case law in response to the CJEU's Melloni judgment, blog post, European Law blog, 17 March 2014. Retrieved at <http://europeanlawblog.eu/2014/03/17/stc-262014-the-spanish-constitutional-court-modifies-its-case-law-in-response-to-the-cjeus-melloni-judgment/>

M. Gorunescu, Considerations about overlapping criminal and administrative liability for the same offense, *Challenges of the Knowledge Society*, Vol 1, 2011, pp. 169-175

M. Hong, "Human Dignity and Constitutional Identity: The Solange-III-Decision of the German Constitutional Court", *Verfassungsblog*, 18 February 2016. Retrieved at: <https://verfassungsblog.de/human-dignity-and-constitutional-identity-the-solange-iii-decision-of-the-german-constitutional-court/>

J-P. Jacquin, Antiterrorisme: l'ONU s'inquiète de l'accumulation des lois françaises, *Le Monde*, 24 May 2018

M. Krajewski, "'Conditional' primacy of EU law and its deliberative value : an imperfect illustration from Taricco II", Blog post, European Law Blog, 18 December 2017. Retrieved at: <https://europeanlawblog.eu/2017/12/18/conditional-primacy-of-eu-law-and-its-deliberative-value-an-imperfect-illustration-from-taricco-ii/>

T. Koncewicz, "The Consensus Fights Back: European First Principles Against the Rule of Law Crisis", *Verfassungsblog*, 5 April 2018

S. Jones, D. Boffey, European arrest warrant issued for ex-Catalan leader Carles Puigdemont, *The Guardian*, 3 November 2017

K. Lenaerts, The principle of mutual recognition in the Area of Freedom, Security and Justice, Fourth annual Sir Jeremy Lever lecture, All Souls College, University of Oxford, 30 January 2015, p. 26. Retrieved at: https://www.law.ox.ac.uk/sites/files/oxlaw/the_principle_of_mutual_recognition_in_the_area_of_freedom_judge_lenaerts.pdf

M. Leplongeon, 45 000 euros pour avoir été emprisonné par erreur. Trop peu ? *Le Point*, 6 January 2014. Quoted in National report No 2 on France, Section on compensation for unjustified detention (point C).

OHCHR, France: UN expert says new terrorism laws may undermine fundamental rights and freedoms, press release, 23 May 2018.

Retrieved at: <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23130&LangID=E>

G. Neppi-Modona, Substitute member for Italy of the European Commission for Democracy through Law (Venice Commission), Presentation at the Seminar on the Independence of Justice, Tunisia, 21-22 March 2012, CDL(2012)035

The Oberlandesgericht for the State of Schleswig-Holstein issues extradition arrest warrant against Carles Puigdemont for embezzlement and stays the extradition arrest warrant's execution, Press Release, 5 April 2018 (in English). Retrieved at: <https://www.schleswig-holstein.de/DE/Justiz/OLG/Presse/PI/201803Puigdemontenglisch.html>

S. Peers, Reverse discrimination against rape victims: a disappointing ruling of the CJEU, blog post, EU Law Analysis, 24 March 2014. Retrieved at: <http://eulawanalysis.blogspot.be/2014/03/compensation-for-crime-victims.html>

R. Renard, R. Coolsaet (eds), "Returnees: who are they, why are they (not) coming back and how should we deal with them? Assessing Policies on Returning Foreign Terrorist Fighters in Belgium, Germany and the Netherlands", Egmont paper 101, Brussels: Egmont Institute for International Relations, February 2018

C. Rizcallah, The EU and the Spanish Constitutional Crisis, blog post, EU law analysis, 6 November 2017

D. Sayers, "The EU's common rules on detention: how serious are Member States about protecting fundamental rights?", Blog post, EU Law Analysis, 17 February 2014. Retrieved at: <http://eulawanalysis.blogspot.com/2014/02/the-eus-common-rules-on-detention-how.html>

Schleswig-Holsteinisches Oberlandesgericht, Antrag des Generalstaatsanwalts auf Erlass eines Auslieferungshaftbefehls gegen Carles Puigdemont eingegangen, Press Release, 3 April 2018 (in German). Retrieved at: <https://www.schleswig-holstein.de/DE/Justiz/OLG/Presse/PI/201802Puigdemontdeutsch.html>.

H. Sorensen, "Mutual Trust – blind trust or general trust with exceptions? The CJEU hears key cases on the European Arrest Warrant", blog post, EU Law Analysis, 18 February 2016

G. Vermeulen, "Free Gathering and Movement of Evidence in Criminal Matters in the EU: Thinking Beyond Borders, striving for balance, in search of coherence", Inaugural Lecture Held in accepting the position of Extraordinary Professor of 'Evidence Law', Maastricht University, 2011

Retrieved at: <https://cris.maastrichtuniversity.nl/portal/files/1088490/guid-8ef5f903-17f2-4312-8e54-05bcadf2ef3c-ASSET1.0>

M. Wade, "Developing a Criminal Justice Area in the European Union", study for the European Parliament, LIBE Committee, PE 493/043, 2014

M. Wijers, "Compensation of victims of trafficking under international and Dutch law", 28 April 2014

Retrieved at: http://lastradainternational.org/Isidocs/3062-Policy%20paper%20compensation_Netherlands_28%20April%202014.pdf

A. Willems, Improving Detention Conditions in the EU – Aranyosi's Contribution, Paper prepared for the EUSA Biennial Conference, Miami, May 2017

Conferences and other public events

European Committee on Crime problems (CDPC), Council of Europe, 74th Plenary Meeting, Strasbourg, 5-7 June 2018

Expert roundtable on pre-trial detention, organised by Fair Trials at the European Parliament, Brussels, 25 April 2018.

This study, commissioned by the European Parliament’s Policy Department for Citizens’ Rights and Constitutional Affairs at the request of the LIBE Committee, examines to what extent differences between national procedural criminal laws hinder the negotiations and the operation of cross-border cooperation instruments. It is based on a comparative analysis of a representative sample of nine Member States. It identifies several forms of “hindrances” to cross-border cooperation, ranging from mere delays to the suspension and the non-execution of assistance requests, alongside the striking underuse of some of the existing instruments. There is no simple or single answer to these challenges. Therefore, several non-legislative and legislative recommendations are put forward for the short- and long-term horizon.

PE 604.977

Print ISBN 978-92-846-3485-9 | doi: 10.2861/867894 | QA-04-18-654-EN-C
PDF ISBN 978-92-846-3486-6 | doi: 10.2861/928251 | QA-04-18-654-EN-N