55 Articles 5(1)(c) and 5(3) ECHR and applicable ECtHR case law, e.g. ECtHR, 5 July 2016, *Buzadji v Republic of Moldova (GC)*, Appl. no. 23755/07. Rules on regular review by the deciding judge of decisions to order PTD could be considered with provisions for a possibility to have a review very soon after the initial decision to order PTD is taken, acknowledging that this often happens against a background of inadequate information.
56 ECtHR, 11 July 2017, *Oravec v Croatia*, Appl. no. 51249/11. The right of access to the case file is already established under Article 7(1) of Directive 2012/13.
57 ECtHR, 18 December 1996, *Scott v Spain*, Appl. no. 21335/93.
58 See further European Prison Rules, Part II (Conditions of Imprisonment).
59 European Prison Rules, para. 18.8.a.
60 See also 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, *O.J.* L 132, 21.5.2016, Articles 10–12. Of particular note, and as a useful precedent regarding legislation on PTD, is Art. 10, para. 2, stipulating that "deprivation of liberty, in particular detention, shall be imposed on children *only as a measure of last resort.*"
61 See, e.g., ECtHR, 5 January 2016, *Süveges v Hungary*, Appl. no. 50255/12.
62 Art. 11.
63 Art. 10 Directive 2016/800.
64 Art. 5(3) ECHR.
65 E.g. CJEU, 28 April 2011, case C-61/11 PPU, *El Dridi*.
66 In this regard, see CJEU, 28 July 2016, Case C-294/16, *JZ*.

# Improving Defence Rights

## Including Available Remedies in and (or as a Consequence of) Cross-Border Criminal Proceedings

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**The rights of individuals in criminal procedures have been prominent on the agenda since the entry into force of the Lisbon Treaty. In this article, the authors take stock of the state of the art, evaluating the content and implementation of the 2009 "Stockholm Roadmap Directives" (ABC Directives). Furthermore, they identify the main challenges for the years ahead. The work is organised around three, closely connected issues, i.e. the need for additional minimum rules in the area of cross-border cooperation proceedings, the need for additional minimum rules on defence rights and procedural safeguards beyond the first generation of the Roadmap Directives and the need for minimum rules on remedies, in cases where rights have been violated. The authors suggest topics and strategies for legislative intervention, backed up by soft law measures.**

### I. Introduction – our Approach

This document reflects the results of our discussions over the last months. In our approach, we have focussed on collecting, to the largest extent possible, ideas which have been suggested in doctrine, policy, etc. It is for the expert group as a whole to take further positions. In this document, a number of questions came up that have structured this article. These questions are as follows:

- Should the EU focus on obligatory legislative interventions or (strive for) voluntary convergence by its Member States with the EU framework?
- In the wake of the ECJ's decisions on the *Akerberg Fransson*[1] and *Melloni*[2] cases, a number of institutional conflicts have arisen between the EU and national courts. The ECJ has this far taken an intermediate stance: a wide claim of jurisdiction over anything that comes within the scope of EU law, yet also a willingness to mitigate the principle of effectiveness (*Taricco II*[3]) or fundamental rights (*Menci*[4]) where no specific secondary EU law is applicable. This is an important contextual finding for any future legislative agenda, both in the EU and in the national setting. At the EU level, the degree of preciseness of secondary law has become an important factor in the EU institutions' role as arbiters and facilitators of a level playing field. At the national level, the challenge is not only to ward off the influence of EU law on criminal justice as much as possible, but also to think through criminal justice in light of European integration.
- Another relevant factor we have identified is that the European Court of Human Rights in Strasbourg extensively applies the margin of the appreciation doctrine in criminal matters.[5] That is not a welcome development for the EU *per se*, given the need for a transnational level playing field to fight crime and to ensure fair trials. It could require increasing interventions at the EU level.
- Should a new agenda focus on the harmonization of transnational cooperation procedures or (also) tackle the criminal justice systems of the Member States as such? In the former case, should the focus be on the laws of the executing state or also on those of the issuing state?

■ We did not take a final stance on this issue. Some of the below proposals go one way, others take an opposite direction. In light of the above arguments – the need to increase mutual trust and to expand the possibilities for EU institutions to take up their role as arbiters, *as well as* because of the apparent reticence of the Strasbourg Court in the area of criminal justice –, there is a strong case to keep focusing on the approximation of the Member States' criminal justice systems as a whole via minimum rules (including a new ABC set of Directives). This also has strong positive effects on legal certainty all over the EU. The disadvantages of this approach are centred on subsidiarity, competence creep and legitimacy concerns. Where do the minimum rules stop? With those on the right to appeal? With the legal professional privilege? Arguably, the area of cross-border procedures (as has been done with *in absentia* procedures in a number of framework decisions on mutual recognition)[6] raises less issues with respect to legitimacy while reducing chances of national institutions focusing on warding off EU law, rather than on the development of the EU dimension of their tasks (which may lead to voluntary convergence).
■ Should the EU focus on minimum rules for defence rights or for all types of safeguards, with a view to ensuring mutual trust?
■ Almost all legislative efforts have so far focused on fair trial rights. That limitation does not necessarily follow from Art. 82 TFEU ("the rights of individuals in criminal procedure"). The rights of individuals may also cover the right to privacy, liberty, property, etc. – and thus touch upon such issues as procedural safeguards for investigatory powers or even judicial independence. This is where the notion of defence rights starts to overlap with related concepts like human rights, fundamental rights, procedural safeguards, etc.
■ Should the EU focus on minimum rules for the content of rights/safeguards or also intervene through legislation in cases of violations of those rights/safeguards?
■ As rapporteurs, we feel that there is little point in minimum rules for rights if there is no common understanding on how violations of those rights should be redressed or remedied. It is vital for enhancing mutual trust. There is very little material, however, on how this should be achieved, as much for cross-border/transnational cooperation cases as in purely national cases.

In the following, we will first clarify a number of key concepts (II) and then deal in substance with the areas of possible EU intervention (III). The latter will include the issues of cross-border cooperation procedures (III.1), the extension of the ABC Directives (III.2),[7] and the issue of (minimum rules for) remedies (III.3). A certain overlap of these issues could not be avoided. As a sort of structuring principle (though not applied very strictly), we have included those issues that not only affect cooperation procedures but also purely national, intrastate criminal procedures under the section on the extension of defence rights. Matters that particularly refer to issues of cross-border cooperation (interstate coordination, etc.) have been listed under cross-border cooperation procedures. This article does neither deal with victim's rights nor with the concept of criminal charge and administrative sanctions. It focuses on criminal law *sensu stricto*. We also have excluded the relationships with third states (the external dimension of the AFSJ).

## II. Definition of Key Concepts

### 1. Cross-border criminal proceedings

There is no unanimous definition of "cross-border criminal proceedings".[8] The corresponding concept adopted for this paper is hence a broad one: any proceeding with any link whatsoever to another jurisdiction[9] within the EU. We will restrict this geographically to links to other EU Member States. Within this broad concept, different definitions may be identified: i) cross-border cooperation proceedings; ii) cross-border[10] criminal proceedings (domestic or European).

*i. Cross-border cooperation proceedings* are those stages of criminal proceedings in which the authorities from different countries directly cooperate with a view of undertaking specific procedural actions. This includes, *inter alia*, European Arrest Warrant proceedings, European Investigation Order (EIO) proceedings, proceedings for the enforcement of criminal sanctions or confiscation decisions, proceedings for the enforcement of pre-trial supervision orders alternative to detention, proceedings for the transfer of criminal proceedings, and joint investigations. These proceedings are by nature intertwined with the main criminal proceedings in the issuing states. Thus, for the purposes of this study, they form an integral part of criminal proceedings. This definition also includes cooperation proceedings between the national authorities of Member States using Eurojust, or cooperation proceedings with the European Public Prosecutor's Office (EPPO). Hard-law measures adopted in these areas could have Arts. 82(1) subpara. 2, 85(1) or 86(1) and (3) TFEU as a legal basis and hence be adopted by means of Directives or Regulations.

*ii. Criminal proceedings with a cross-border dimension* may be understood as those with any cross-border link, including the ones referring to (a) cross-border criminality[11] – which will normally but not necessarily entail police or judicial cooperation or the involvement of persons from Member States different to the state of the trial – but also (b) criminal proceedings referring to intra-state criminality – in which a person from another Member State is involved or where there is a need

for undertaking acts in cooperation with other Members States (which could be clear from the outset or supervening – for example, the suspect or accused, or the victim, being moved to another Member State). Within this definition, *European Criminal Proceedings* could be distinguished. These include proceedings led under the authority of entities that by nature may act across borders, such as the EPPO.

Hard-law measures adopted in these areas could have Art. 82(2) TFEU as a legal basis and hence be adopted by means of Directives, or, in respect of the EPPO, Art. 86(1) TFEU and hence be adopted by means of a Regulation.

*iii.* Since our topic also includes defence rights and remedies available *"as a consequence of cross-border criminal proceedings"*, this could ultimately lead to the inclusion of all criminal proceedings in the EU, since in any of these a decision may be issued that may have to be recognized and enforced in another Member State; hence any regulation with a view to improving defence rights and available remedies may impact on the recognition and enforcement of such decisions in another Member State. This is especially relevant since it is impossible to know from the beginning whether or not a criminal case will be of a cross-border nature. This shows the difficulty *(or impossibility?)* of separating "cross-border" cases from others for the purposes of EU legislation.

On the other hand, as mentioned above, minimum rules for rights also affecting purely domestic proceedings might require a particular justification in light of subsidiarity concerns. However, it should be noted that if problems arising in a cross-border situation or shortcomings in the operation of mutual recognition or cooperation in the field of criminal law generally justify the adoption of measures with respect to defence rights, they will normally have to be extended to purely domestic situations, in order to avoid reverse discrimination and legal fragmentation within the domestic systems. This approach has been adopted as a basis for the procedural rights Directives (EU) 2010/64, 2012/13, 2013/48, 2016/343, 2016/800 and 2016/1919.

Hard-law measures adopted in these areas will normally have their legal basis in Art. 82(2) TFEU and hence be adopted by means of Directives.

### 2. Rights of individuals: defendants, defence rights, safeguards and remedies in criminal procedure

Art. 82(2) lit. b) and c) TFEU refer to the "rights of individuals" and "victims". However, for the purposes of this article, the notion "defence rights" refers only to the rights of the suspect or accused during different stages of the criminal process (pre-trial investigation, trial and appeal), bearing in mind that some aspects of particular rights may be engaged in more than one of those stages.

Defence rights have been interpreted broadly in this article. That is because Art. 82(2) lit. b) TFEU refers to the "rights of individuals". Those rights also include the right to privacy, liberty, property as well as the right to an effective remedy. Hence, Art. 82 TFEU is broader than the rights set in Arts. 47 and 48 of the EU Charter of Fundamental Rights.[12] The concept of procedural safeguards is indeed a topic which has already been noted as a potential candidate for future "hard-law" minimum rules *ex* Art. 82(2) TFEU.[13] The rights of individuals also include the right to an effective remedy, a quintessential aspect for improving the quality of criminal proceedings, which is also noted as a candidate for future legislation.[14]

The necessity to ensure effective defence rights arises both from provisions of EU law setting out explicit requirements (including requirements with respect to the operation of cross-border criminal proceedings), the EU Charter,[15] and the ABC Directives, as well as from provisions that give rise to a range of implicit requirements for the same.[16] The aim of this article is therefore to examine, on the one hand, if the explicit provisions are both sufficient and sufficiently clear in order to provide adequate safeguards and, on the other hand, whether it is necessary to codify some of the implicit requirements. The list is not exhaustive, since authors have chosen what they consider to be the most pressing needs. In the following section, we present three possible areas that merit attention in our view.

## III. Areas for Possible EU Intervention

### 1. Cross-border cooperation proceedings

Cross-border cooperation procedures are the most obvious link to the legislative competences of the EU for the AFSJ. Within the framework of such procedures, defence rights are known to fall into the gap between the legal systems involved. But diverging rights also hamper the law enforcement community. So far, the procedures in the executing state have received most attention. This may be the time to remove a number of remaining flaws, particularly when it comes to the legal systems of the issuing and those of the trial state (as this may be yet a different state). We have recently seen – under the EAW regime – that the ECJ has increased the requirements of what constitutes a judicial authority. Through its case law, the Court has introduced (and at the same time tried to remove) a number of flaws. For instance, it has introduced a proportionality check in the regime.[17]

Minimum rules for defence rights in the area of cross-border procedures have at the least three important positive effects:

- It is arguably the least intrusive of all legislative options (subsidiarity), as it does not necessarily cover purely national procedures, and it is also the option with the strongest link to the AFSJ.
- It tackles a number of flaws which the ABC Directives do not address properly (see below).
- It provides the EU institutions – particularly the ECJ and the Commission – with a solid statutory basis to further develop the AFSJ. As said, recent case law suggests that the ECJ requires the existence of a specific legislation for the further development of its case law and the AFSJ, as well as to steer away from conflicts with national (constitutional) courts. As such, that is detrimental to the development of a level playing field for transnational crime control and due process.

The ABC Directives aim at enhancing mutual trust but have quite a wide scope. They explicitly cover rights in national criminal procedures. By contrast, other defence rights have been harmonized only for cross-border procedures (e.g. EAW & *in absentia* procedures). It is somewhat surprising that the ABC Directives do not take away two of the oldest, well-documented problems in interstate cooperation: those of the systemic flaw and of the fragmentation of legal protection as a direct consequence of the rule/principle of mutual trust. The ABC Directives are based on the assumption that – where all legal orders involved have equivalent standards – fundamental rights can no longer block cooperation.[18] That assumption, however, is not entirely justified. As the Directives contain minimum rights, they will not do away with interstate differences.

The systemic flaw refers to the situation that EU states are not prevented from designing their procedures in different ways, although all of them have Charter-proof legal systems – at the least on paper (because they must offer effective remedies, which is also a Charter requirement). Some jurisdictions, for instance, require *ex ante* judicial authorization for on-site inspections or searches, while others offer redress after the act. In itself, the latter is not in violation of the right to privacy.[19] Yet obviously, situations occur under this heading where judicial protection is offered twice, or not at all.

Fragmented legal protection occurs where – because of the rule of mutual trust/non-inquiry – courts refrain from assessing the proportionality and legality of actions by actors from other jurisdictions. Many courts focus only on what has happened on their territory and not on what has happened in other Member States. Surrender courts, for instance, will not enter into an assessment of the proportionality of the issued EAW, but the FD EAW does not guarantee a full proportionality review either. That means that – compared to a purely national situation – the legal position of the person concerned is flawed (the right to liberty and the right to privacy [coercive/covert measures]).[20] Irregularities can only be challenged in the state where the acts took place. The question is to which extent such remedies can be considered to be "effective", as they will not (be likely to) have consequences in, for instance, the trial state. The Netherlands Supreme Court, as one example, refuses to hear any argument on the basis of Art. 8 ECHR if such irregularities took place under the auspices of foreign authorities (at the least not when concerning an EU state).[21]

To some extent, the foregoing problems have been recognized. The EIO, for instance, obliges authorities to take account of their own legal requirements before issuing an order. The EPPO regulation also has some requirements, controlling the element of pre-trial authorizations. These measures, however, apply to individual instruments which – certainly when applied in multilateral investigations (networks, joint investigation teams, etc.) – have become mutual alternatives. The EIO requirements can easily be bypassed when, for instance, one party collects the evidence partly for its own purposes in the framework of common or parallel independent investigations and then transfers it as information that has already been available to another party. Not only can requirements be bypassed – the question is moreover why we would require an application of the legal regimes of two states for investigative measures. This seems to be both an impediment to law enforcement and detrimental to the position of the accused.

We propose a legislative agenda that aims at aligning the legal position of those who are confronted with cooperation procedures as much as possible with those in purely national procedures. Cooperation and criminal procedures are "inextricably linked" in substance and time. Furthermore, the ECtHR case law suggests, though cautiously, that it is time to start treating cooperation procedures as part of the main procedures.[22]

On the basis of a quick scan of literature, we have come up with the following ideas for discussion. Particularly for the most intrusive coercive or covert measures of investigation, additional efforts could include as follows:

### a) The legal order of the issuing state

- A statutory framework guaranteeing a full legality and proportionality review before issuing the request.[23] For intrusive (i.e. coercive and covert) measures,[24] rules on *ex ante* court authorization (where the measure is not ordered by a court itself) prevent later problems with respect to the use of materials obtained. Other measures guaranteeing a proportionality review include a test of the degree of suspicion on the basis of

the case file or, possibly, a purpose limitation of the collected information.[25] Where the secrecy of investigations does not hamper this, it may be an *intra partes* procedure.

- Depending on the substance of harmonization, conditions in the executing state arguably need no longer be applied (full recognition of the harmonized laws of the issuing state). Such a far-reaching proposal may, however, be connected to rules on the choice of jurisdiction.
- In EAW cases: a right to be brought promptly before a judge of the issuing state (one with jurisdiction to evaluate the sufficiency of the evidence and the existence of the risks that might justify pre-trial detention) and to have bail in the issuing state decided within the context of EAW for investigation/prosecution (e.g. by organising interrogation by video link with access to a lawyer as well as the file in order to challenge detention in the issuing state).
- Remedies in the issuing state to guarantee a full (*ex post*) review on the substance/merits of the outgoing order, for measures that do not require *ex ante* authorization.
- Establishing minimum rules on the right of the defence to request investigative measures, including the availability of remedies should their request be turned down.

#### b) The legal order of the executing state

- Access to the file and sufficient time for preparation, even within the strict timeframes of mutual recognition procedures. Legal practice has shown that this is possible, also with the help of digital means (e.g., once a person is arrested and brought before the courts in the executing state, there is a time limit to lodging a defence to the EAW, which is often extended in order to allow for coordination with the lawyer in the issuing state while respecting the time limits of the FD). The scope comprises access to the case file in the issuing state via cooperation with the issuing state lawyer, which could entail i) that the issuing state recognizes the right to fully access the case file at the latest from the moment of detention (in application of Art. 7 of Directive 2012/13; this could even entail an extension of that Directive in order to specifically include a provision on EAW cases); ii) that the executing state awards enough time to the person subject of the EAW for locating and contacting the issuing state lawyer and for him to access and analyse the case files (see also the example from French case law mentioned below).
- Remedies to check the lawfulness of the execution of investigative measures and the lawful transfer of materials, including the possibility of arranging for bail via dual defence mechanisms (EAW cases).
- Mechanisms to notify the authorities of the trial state – responsible for the procedures as a whole – in the case irregularities were established, during the execution of the measures or during the transfer of the obtained materials to the trial state.

#### c) The legal order of the trial state

On the basis of the assumption that violations of the right to privacy may as well violate the right to a fair trial,[26] trial courts must be in the position to obtain a – legally binding – stance on the legality of gathering and transferring the materials by the competent authorities of the jurisdiction where these materials were obtained. Points to be discussed in that regard are not only the question of who – i.e. which authority – assesses the legality of the measures, but also of which legal order determines the legal consequences should the unlawfulness (or unfairness) of investigative action in the executing state indeed be established. Some authors have proposed some sort of a horizontal preliminary reference procedure.[27] In such a system, a court of the executing state may, for instance, be called upon by the authorities of the trial state – if necessary via an expedited procedure – to assess the legality of the investigative action that took place on its soil and to issue a binding decision. Other options could be the creation of remedies in the issuing state in cross-border proceedings, as mentioned above. Subsequently, the question arises as to what would be the consequences of any finding of unlawfulness or unfairness, and which legal order defines this. Where irregularities have been established, the procedural consequences of such a finding could be determined by the laws of the trial state,[28] taking account of the principles of effectiveness, proportionality and equivalence/non-discrimination. Others may argue, however, that, in line with the principle of mutual recognition of judicial decisions, the legal consequences attached to a court decision in the executing state also merit recognition by the courts of the trial state. No need to say that this tremendously complicated area of law would require further study. At the same time, the topic is important enough to undertake such an effort.

### 2. The extension of defence rights and procedural safeguards beyond the ABC Directives

#### a) The need for strengthening the legal framework

The mission of achieving mutual trust has not been completed because partial distrust as an empirical phenomenon still clearly exists among EU Member States and judicial authorities. From the EU citizens' perspective, the absence of judicial oversight due to mutual trust is often not counteracted by corresponding strong procedural safeguards and remedies in all Members States – or else when operating in a cross-border setting, even where such safeguards and remedies are in place, they are detached from the background legal framework upon which their effectiveness is built (the systemic flaw, as mentioned above).

Brexit, legal actions in relation to Hungary[29] and Poland,[30] the CJEU cases in relation to the concept of "judicial authority",[31] and cases asking the CJEU whether national law is obliged to foresee a remedy against an EIO[32] demonstrate this reality. But the impact of mutual distrust as well as of lack of procedural safeguards in practice is much deeper and is felt by practitioners and citizens in their daily practice and life. Soon, the EPPO will enter into operation, and its regime does not establish further procedural safeguards or remedies.

This scenario is due to, among others, the lack of common procedural rules and the ensuing legal fragmentation between the legal systems of the Member States, which becomes most apparent whenever there is a cross-jurisdictional interaction or link.

As outlined above, one way of addressing the existing imbalance is to focus on improving defence rights in the scope of cross-border cooperation proceedings. However, this solution does not tackle all other situations in which the cross-border or cross-jurisdictional link is not discovered until certain procedural acts have already been conducted (for example, if it is discovered during investigative acts that a witness interview or search is needed in another Member State). In addition to this, focussing on cross-border cases only in order to reduce legal fragmentation between Member States could have the undesired effect of creating legal fragmentation within Member States, too (for example, if a witness was heard in the scope of an EIO, or if the rights of the defence to intervene were different in EPPO proceedings than their rights in a "domestic" interview).

The only way to efficiently tackle this fragmentation are common rules that will establish a strong procedural framework. This procedural framework must allow Member State authorities and citizens to trust that fundamental rules are respected wherever in the EU procedural acts are conducted. Currently, each Member State has different regulations on procedural rights. While some fall below the desired *standards*, others – which are satisfactory in a domestic setting due to checks and balances within the system – will not be satisfactory when applied in a cross-border setting. Hence, mutual trust and mutual recognition may only be achieved if defence rights and legal remedies are strengthened, even outside the framework of cross-border cooperation proceedings. This will contribute to improving the effectiveness in criminal prosecution in the Members States (including cooperation via EU agencies such as Eurojust or the EPPO) on the one hand, and the respect for the fair trial and the rights of the defence established in Arts. 47 and 48 CFR on the other hand. This is an important aspect to justify why a legislative intervention by the EU in this area would respect the principle of subsidiarity.

### b) Focus areas

One of the grounds for undermining mutual trust and for implementing a true AFSJ – impairing both the effectiveness of criminal prosecution and the citizens' rights in the criminal justice system – is the circumstance that procedural safeguards and the rights of the defence are regulated in a very different manner among Member States. Although it could be said that, at least in theory, all Member States comply with the requirements of ensuring the rights of the defence and to a fair trial, Member States may lay a different focus on them in the different stages of the criminal procedure. Some Member States, for instance, restrict the participation of the accused or of his/her lawyer in procedural acts during the pre-trial stage (by not allowing for participation in witness interviews, restricting access to the case files, etc.), but then establish trial rules that compensate for this shortcoming (e.g. full access to the case files, an impossibility of or restrictions to the use of evidence gathered without the presence of the accused or his/her lawyer, the right to call witnesses and do full cross-examination during the trial, the right to challenge the lawfulness of the evidence gathered before the trial and to have such evidence excluded, etc.).[33] Other Member States allow for an extensive use of evidence gathered pre-trial, but they also allow for the defence to participate in the evidence-gathering acts before the trial. These differences may impact criminal justice in the AFSJ in two ways:

- The evidence gathered in one Member State cannot be used in another one, thereby creating obstacles to the establishment of the facts (for example an expertise conducted during the pre-trial stage without the accused having had the opportunity to have his own expert or consultant intervene).
- The evidence gathered in one Member State will be used in another one, irrespective of the restrictions attached thereto in the legal framework of the Member State where it was gathered, which results in a negative impact on the position of the accused and his/her rights of defence, as well as on a fair trial.

In order to tackle this problem, the EU could focus on setting some standards for the rights of defence and procedural safeguards at both the pre-trial and trial stages. The intervention could focus on improving the participation rights of the accused and on the use of new technologies as a means of both facilitating the exercise of defence rights and improving the reliability of the evidence as well as the possibility for the defence to challenge evidentiary acts it did not participate in.

#### *aa) The right to legal assistance during the pre-trial stage*

The right to legal assistance involves both a reactive and a proactive intervention of the criminal defence lawyer. In this regard, his/her work during the pre-trial stage goes far beyond

that of reactively assisting his/her client during interrogations[34] or of challenging his/her detention.

In *Dayanan v. Turkey*,[35] the ECtHR stated in this respect that "[i]n accordance with the generally recognised international norms […] an accused person is entitled, as soon as he or she is taken into custody, to be assisted by a lawyer, and not only while being questioned […] the fairness of proceedings requires that an accused be able to obtain the *whole range of services* specifically associated with legal assistance. In this regard, counsel has to be able to secure without restriction the fundamental aspects of that person's defence: discussion of the case, organisation of the defence, collection of evidence favourable to the accused, preparation for questioning, support of an accused in distress and checking of the conditions of detention".[36] The ECtHR identified other services, the lack of which may have undermined the fairness of proceedings: "refusal or difficulties encountered by a lawyer in seeking access to the criminal case file, at the earliest stages of the criminal proceedings or during the pre-trial investigation";[37] and "the non-participation of a lawyer in investigative measures such as identity parades or reconstructions".[38]

Looking at Art. 3 of Directive (EU) 2013/48, it becomes clear that such a regulation does not ensure the *whole range of services* associated with legal assistance. An extension should be discussed of the provisions of the Directive to include legal assistance in acts other than those in which the accused is required to attend and establish a common definition of acts that he/she or his/her lawyer must be permitted to attend (in particular witness interviews, expert evidence, etc.). This is without prejudice of establishing limitations for exceptional cases (for example danger for the life or limb of third persons). A common definition on the safeguards that should be afforded for those cases where the presence of the accused was not permitted due to a lawful limitation could also be discussed (for example being granted access to the records of evidence-gathering acts as well as being able to call and confront the witness at a later procedural stage, and to challenge the lawfulness of the act). This would be a significant improvement, in particular in cross-border cases, where the balance established in domestic law in this respect is often broken due to the circulation of the evidence between Member States. These safeguards are also an important feature for ensuring the reliability of the evidence since the risk of an unreliability of evidence gathered in an inquisitorial fashion is much higher than if such evidence was subject to an adversarial or contradictory evidence-gathering method.

Another area of improvement is the proactive involvement of defence lawyers in the pre-trial stage. In many legal systems, such as in Portugal, defence lawyers are not allowed to actively investigate the case, and actions undertaken in this regard may even be seen as an illegitimate interference with the investigation (this also applies to the trial stage).[39] In others, such as Germany, defence lawyers are not only allowed to participate in certain evidence-gathering acts but also to request certain evidence activities from state authorities, to conduct their own investigations and even to contact as well as obtain statements from witnesses.[40] The legal basis is Art. 6 para. 3 ECHR. Regimes where pro-active defence is not permitted may fall short of the requirements of the ECHR and thus of the CFR. In addition, the variance of standards between Member States means that in cases with cross-border links the defence is impaired to exercise its right to proactive investigation whenever evidence is located in another Member State.[41] At the very minimum, effective and fair procedures should be granted for the defence to be able to have the authorities order the gathering of defence-requested evidence and to let the defence lawyer participate in the evidence-gathering act (e.g. witness interviews, searches) during the pre-trial stage.

In particular in cross-border cases (EIO, JIT, EAW) and EPPO investigations, it is apparent that the lack of certain (minimum) rules on the active involvement of defence lawyers will result in disparate protection levels for a right that should be guaranteed – at least in its minimum content – in a harmonized or equivalent manner in all Member States. It is not acceptable that in criminal proceedings of a European-wide nature, the rights of the suspect in relation to the lawyer's active involvement depend on the *forum* – especially when the *forum* may be chosen under highly flexible criteria, thereby giving prosecuting authorities discretion to choose which rights are granted to the accused in a given case. The CFR should be interpreted as granting, at the very least, the same rights as its equivalent in the ECHR, which could perhaps allow for arguing that the current situation is in contravention of the CFR in domestic cases where proactive defence is not permitted. Furthermore, the CFR allows for establishing further protections, which should be the case in areas where the legal-political nature of the EU creates a different legal framework than in the Member States – this is the case in criminal proceedings of a cross-border dimension. In relation to the type of legislative intervention by the EU in this domain, it could be discussed whether a distinction should be made at least for EPPO cases – or also for cross-border cases (especially EIO, JIT, freezing orders/confiscation) – in relation to domestic cases.

Finally, the right to dual (or multiple) legal assistance in cross-border cases (which is regulated only for the EAW) should be extended to all proceedings with cross-border links. The regulation should establish provisions to compensate for the difficulties arising in the context of dual defence, e.g. the need for more time for the defence to act; the need to have legal

assistance by specialized lawyers with sufficient linguistic knowledge (or interpreters to assist them); the need for both defence lawyers to act together in the evidence-gathering acts, if needed; provisions on legal aid compensating for the additional costs resulting from the cross-border dimension of the case. Legal assistance to the accused in cross-border cases cannot be less effective than in domestic cases. Due to the legal fragmentation and the geographical, cultural and linguistic barriers, measures should be put in place for compensating the additional difficulties faced by defence lawyers.

Many points show why this level of protection is not in line with the current legal-political structure of criminal proceedings in the EU:

- The ECHR does not explicitly look at dual defence in the cross-border context (but it does state that a violation in one state must be taken into account in another state – see *Stojkovic v. France and Belgium*[42]).
- Where the investigative (or trial) acts conducted in a criminal case affect multiple jurisdictions in the EU (or are led by an institution with European-wide powers, such as the EPPO), the rights of defence cannot be effective if there are no EU law measures to compensate the imbalance created by the cross-border or European nature of the case: this nature blurs the definition of the applicable law by multiplying the potential applicable legal frameworks and remedies, as well as by creating a fragmented criminal procedure which affects the balance between the positions of prosecution and defence.
- The rights of defence in cross-border cases can only be somehow effective if lawyers are highly specialized and speak foreign languages, as well as if their clients have adequate funding. But even in these situations, lawyers face severe difficulties in providing adequate representation to their clients due to the fragmented legal framework and the *lacunae* in domestic regulations.
- In addition to this, there is no possibility to provide effective assistance at all if i) the lawyers have no appropriate training and specialization is not required to act in cross-border cases (as is the case in most Member States); ii) the lawyers do not speak the relevant languages (thereby requiring assistance by interpreters, as is often the case); iii) the client has no funds (i.e. because even in white-collar cases, funds are often frozen and there are no common rules or no rules at all on whether moneys from frozen funds may be used to pay the lawyers' fees); iv) there is no appropriate legal aid covering cross-border cases and no freedom to choose your lawyer on legal aid.
- The majority of the current legal frameworks of Member States does not include specific rules to be applied in cross-border or EPPO cases, neither with respect to the rights available to the accused (for example the right to challenge evidence obtained abroad or to challenge evidence which was sent abroad at an earlier stage without the knowledge of the accused) nor in relation to the exercise of rights (for example, even if there is a cross-border dimension or an EPPO case, the time limits for the defence to act are the same as in merely domestic cases), nor in respect of legal aid provisions (there are no provisions requiring special qualifications for lawyers to act in such cases, or financial legal aid to support additional costs required by the cross-border nature of the case as a pre-condition for proper legal assistance).

There could be legislative intervention in this area, by means of a Regulation, under Art. 82(1) subpara. 2 lit. a) or d) TFEU (if restricted to cross-border cooperation procedures), or Art. 86(1) TFEU for the EPPO, or for a Directive under Art. 82(2) lit. b) TFEU.

#### *bb) Access to the case files as a pre-condition for effective legal assistance, effective legal remedies and rights of the defence, especially in cross-border cooperation cases (EAW, EIO, freezing orders, etc.)*

Establishing an effective right to legal assistance is only possible if defence lawyers are able to have access to the materials of the case that will allow them to properly discharge their duties arising from the provision of the *whole range of services* associated with legal assistance.

It could be discussed whether it should be guaranteed as a minimum standard that the complete file which is submitted by the prosecutor's office to a court in order to get any judicial decision (for example search order, seizure order, arrest warrant, etc.) must be disclosed to the defence lawyer upon his/her request.

In this regard, the provisions of Art. 7 of Directive (EU) 2012/13 could be extended.[43] This is especially relevant in cross-border cases. How can a lawyer in the issuing state assist a lawyer in the executing state during EAW proceedings if the former is not able to access the case file before the surrender of the person? How can a lawyer in the issuing state, prompted by the lawyer in the executing state, challenge the substantive reasons for issuing an EIO under Art. 14(2) of Directive (EU) 2014/41 (and to do so before the EIO is executed, in order to make sure that evidence will not have been unlawfully gathered) without having access to the case files? How can a lawyer in the executing state assist an accused in an interrogation requested by means of an EIO without having access to the case file in the issuing state and without knowing the evidence against his/her client so as to obtain advice of a defence lawyer in the issuing state?[44] How can a lawyer challenge an evidence-gathering act, assist his/her client in an interrogation, or exercise the rights of defence in a witness interview ordered by a European Delegated Prosecutor from his/her or another Member State without having access to the file?

**Example:**[45] the Cour de Cassation considers that when France is executing an EAW, the suspect arrested is sufficiently informed of the charges even when provided only with the EAW decision emanating from the issuing state.[46] Following the same reasoning, in a situation where France is the issuing state and the suspect has been arrested in the executing state facing EAW proceedings, it does not consider that he/she should have access to the investigative case file before being brought to France to be presented to the French judge. This is true no matter whether access to the case files is requested by the lawyer from the executing state or the French lawyer who is instructed for the French proceedings. In practice, French lawyers are often contacted by colleagues from executing states asking them to access the case file in France in hope that it will provide grounds to oppose surrender. Since there is no requirement for the French investigative judge to do so, access will be hindered; it will be refused to communicate the case file before the person has been interrogated and indicted. France has transposed Art. 7(1) of Directive (EU) 2012/13 in the most right-restrictive version possible: right of access to the case file has been interpreted as compelling the authorities to grant access to only three documents at the investigation stage: the arrest reports, the reports made during the medical check, and the interrogation records.[47] When this law was challenged on the basis that it did not constitute a proper and complete transposition of Directive 2012/13, the Cour de Cassation ruled that the Law was compliant since

> "Article 7 § 1 of the Directive of 22 May 2012 (…) requires, at all stages of the proceedings, only access to documents relating to the case in question held by the competent authorities which are essential to effectively challenging the lawfulness of the arrest or detention; on the other hand, §§ 2 and 3 of Article 7 of the said Directive allow Member States to grant access to all the documents in the file only during the judicial phase of the criminal proceedings, which means that Article 63-4-1 of the Code of Criminal Procedure constitutes a complete transposition of Article 7 of the Directive".[48]

France was thus able to adopt this interpretation because of the wording of the Directive itself, which provides that the case material shall be provided "in due time (…) and at the latest upon submission of the merits of the accusation to the judgment of a court". This legal situation constitutes an insufficient protection against the exercise of the right of the defence, as it prevents individuals from properly challenging the grounds for their detention and surrender before a court promptly after they have been arrested (which could be an infringement of Arts. 6 CFR and 5 ECHR).

Granting access to the case files in the issuing state is possible within the strict timeframes established in the mutual recognition instruments[49].

There could be legislative intervention in this area, by means of a Regulation under Art. 86(1) for the EPPO, under Art. 82(1), subpara. 2 lit. a) (if restricted to cross-border cooperation procedures), or for a Directive under Art. 82(2) lit. b) TFEU.

#### *cc) The right to be informed (and the need to inform the accused) on important procedural acts*

The right to be informed on the most significant procedural acts (as well as on the rights, duties and remedies available as a consequence of those acts) is a quintessential component of the rights of the defence and the right to a fair trial. Service of procedural documents and summons to attend are essential *inter alia* to exercise i) the right to be informed about the nature of the charge and about judgments; ii) the rights to be present in procedural acts, both at the investigative and at the trial stage, as well as to effectively participate in those acts; iii) the right to avail oneself of the rights arising from such acts, including any legal remedies; iv) the right to be informed about duties arising from those acts.

This is recognized in EU secondary law and also in the CJEU case law,[50] for example in relation to the acts of decisions depriving a person of their liberty[51], charge or indictment[52], judgements[53], summons for attending trial[54], and freezing orders[55].

At the domestic level, problems in this area (especially in respect of summons to attend trial and trials *in absentia*) have been identified by scholars and made it to the CJEU, affecting mutual recognition.[56] However, it might be difficult to legislate in this field due to the circumstance that this issue has been an object of already two legislative initiatives (FD 2009/299/JHA and Directive (EU) 2016/343).[57]

At the cross-border level, however, problems are much more striking. Surprisingly, while in the realm of cooperation in civil matters, there is a directly applicable Regulation on the service of judicial (and extrajudicial) documents in the Member States,[58] there is no mutual recognition instrument whatsoever in the domain of cooperation in criminal matters. Art. 5 of the 2000 MLA Convention between the EU Member States[59] and Arts. 8, 9 and 12 of the CoE Convention on Mutual Assistance in Criminal Matters[60] are applicable. To the contrary of the EU Regulation in civil and commercial matters, these provisions do not establish standard rules for service – or a standard form which would make it easy not only to serve persons abroad but also to effectively inform them of their rights. The lack of such common procedures often leads to the service of documents being made incorrectly, or in a language that the respective person does not understand, thereby hampering the continuation of proceedings, because the service proved irregular or evidence is lacking that the person actually received the document. This scenario also impedes the persons receiv-

ing those documents of understanding their rights and duties in relation to the same. Furthermore, there is no deadline for the authorities of the requested state to serve the person. This often results in EAWs being disproportionately used because it was not possible to serve a defendant to appear, or because he failed to appear (although there is no evidence that he had actually received the summons), or simply because using an EAW is much faster than trying to serve the accused or defendant.[61] Moreover, it is often impossible to proceed with a case because the authorities cannot serve the accused at all, or not properly, or not timely. Ultimately, accused persons and defendants facing procedures in another Member State are often confronted with the lack of effective remedies because they are not being informed (or not in a language that they understand) of which remedies they may use in order to react to documents received. Another aggravating factor is that the persons have no extended deadlines to react, which puts them in a worse position than accused persons located in the Member State where the case is pending. Lack of knowledge of the language and rules of the forum Member State makes it even more difficult to be able to find legal assistance within the given deadlines.

**Example:** a Portuguese person born and living in another EU Member State – who cannot properly speak Portuguese – has been indicted of several sexual offences committed against a child. His summons for trial had not been translated, hence his trial was cancelled and a new service was ordered. Authorities from the executing (requested) Member State returned the request for service to attend trial multiple times due to the poor translations, lack of understanding of what was being requested, and legal requirements on the formalities of the papers (number of copies, explanations to be given to the defendant, etc.). The service of the indictment was sent by regular mail (there is no evidence on file that the accused received it), the acknowledgment of receipt has an illegible signature, and there is no identification of the person by his or her ID number. The signature is not the signature of the defendant. This means that once the defendant is served, he can allege that he had never been served on the indictment, which could imply that the case was statute-barred due to the passage of time. In any event, after multiple attempts of serving the summons for trial, the court decided to declare him "absent" and suspend the case for an undetermined time limit. An EAW was not issued because the facts go back more than ten years already and the defendant himself was very young at the time, hence the Portuguese court does not find it appropriate to order pre-trial detention and therefore cannot issue an EAW. Problems with the service of procedural papers are abundant.

There could be legislative intervention in this area, by means of a Regulation under Art. 82(1), subpara. 2 lit. a) or d) (if restricted to cross-border cooperation procedures) or Art. 86(1) for the EPPO, or for a Directive under Art. 82(2) lit. b) or d) TFEU.

#### *dd) The right to participate in criminal proceedings at trial and appeal stages*

Those who have observed or participated in trials in different Member States know how different this procedural stage is. Even where common principles are in place, their interpretation and practical implementation is not alike. This is natural, since trials are, by their very nature, procedural stages the form of which is determined not only by positive law or regulations, but above all by a series of customary practices inherited from decades or centuries of local court practice.

At the appellate level, differences are even more striking: the scope of review (facts or law); the (im)possibility to produce evidence; the right for the accused to intervene in person (or the lack thereof) or through his/her lawyer; the right to be informed in person on appellate judgements; the (im)possibility of a constitutional review of decisions; the formal requirements for appellate briefs and judgements – these aspects vary widely from one Member State to another.

As stated by the ECBA,[62] "[a]part from the right to be present at trial (Directive 2016/343/EU), the entire trial phase suffers, or may suffer, from a lack of protection (including remedies) for defendants due to national differences without any legally binding and functional concrete minimum standards. Despite the general clauses in Articles 6 and 13 ECHR, in Article 14 ICCPR and in Article 47 Charter et seq. and the corresponding case law, daily practice in certain Member States produces multiple violations of the rules applicable to the accused and/or defence counsel."[63]

In relation to the right to be present at trial, we refer to the issues of presence by video link and of service of summons to appear in trial referred to below and above, respectively. In addition to this, the following are examples of differences that might hamper mutual trust and recognition:

- In some Member States, the defendant does not have the right to sit next to his/her lawyer, which impedes from continuously exchanging views and adequately exercising their rights; in some Member States, the lawyer has to get up to speak to his/her client, which might hamper the conduct of the trial; in others, not even this is possible, and asking for a recess is needed, since the defendant literally sits in a "cage".
- The right to call witnesses and to cross-examine them widely differs between Member States, which may result in violations of the fair trial, especially where evidence obtained abroad is used.

- The possibility for the defence to request for evidence and to actively conduct one's own investigation (on this topic, the above comments in relation to the pre-trial stage also apply here).
- The (un)availability of expert evidence to the defence (and the [un]availability of financial legal aid to that end).
- The existence (or the lack thereof) of training or special qualification requirements for lawyers to act in (certain) criminal cases.
- The lack of safeguards in relation to the special needs of detained defendants in relation to their preparation for trial (access to materials of the case in prison, to a lawyer and interpreter, to a computer in order to prepare statements or to read lengthy case files, etc.).
- The availability of legal aid, its quality and the possibility to have a lawyer of one's choice while on legal aid.
- The possibility to change the indictment during trial and the procedural safeguards surrounding such changes, where admissible.

There could be legislative intervention in this area, by means of a Regulation under Art. 86(1) for the EPPO, or for a Directive under Art. 82(2) lit. b) or d) TFEU. This is a particularly sensitive area, but the need to establish an AFSJ where it is possible – on the basis of mutual trust – to "import and export" pieces of evidence, accused or convicted persons or decisions between Member States without a review of procedures conducted in another Member State requires corresponding safeguards in order to reduce the legal fragmentation and systemic gaps for the rights of defence arising from the "free movement of evidence, persons and decisions" in the criminal justice area. The sensitivity of this area might recommend an approach whereby, in a first stage, studies (including in-court empirical ones) are conducted in order to gain a better understanding of the differences and reasons for particular local regulations or customary practices, developing a Green Paper and/or soft-law measures before regulating concrete trial rights. The same applies – even more so – to appeal stages.

### c) Improving defence rights by using technologies

A different type of approach could be taken by focusing on how new technologies could be used, both as a means of facilitating the exercise of defence rights and of improving the reliability of the evidence and the possibility for the defence to challenge evidentiary acts it did not participate in.

On the one hand, the use of videoconferencing technologies could be encouraged as a means for the accused to participate in procedural acts.[64] There are many criminal cases in which an accused is situated in a different Member State than the forum Member State. In many instances, the physical presence of the accused is not necessary for the investigation or trial. However, some Member States require his/her presence for certain procedural acts (arraignment, trial). Or they make the exercise of the accused's rights dependent on such physical presence. The possibility for the accused to participate in the procedural acts, upon his/her request, by means of a videoconference would be beneficial since i) this would make it unnecessary for Member States to issue an EAW to bring a person to an arraignment or trial hearing, where his/her physical presence is not necessary but the law still requires it; ii) it would enable the accused to be present, take part in the procedures and exercise his/her rights. This is highly relevant for cases of low and medium criminality.

**Example**: in Portugal, many courts understand that the accused must be physically present in court. If he/she does so, he/she is able to make a confession. That will enable him/her to pay less court costs and to have a lower (sometimes special or mitigated) sentence. Many EU citizens from other Member States are subject to criminal proceedings for low or medium criminality (for example driving under the influence of substances and driving without a license, resisting the authorities, simple bodily harm, defamation/slander, illegal graffiti, etc.). If they are primary offenders, they are very likely to be sentenced to a fine of less than € 1,000 (depending on the circumstances of the case). Typically, they will make a confession. However, they cannot make it in writing or by video link. Hence, if they wanted to benefit from the confession, they would be obliged to travel to Portugal – which may require several days – and bear the direct costs of their travel (several days absence at work, travel, and accommodation) just in order to be present at a court hearing that may only take one hour. If the accused does not want to be physically present and asks to participate by video link, he/she should be entitled to this, since otherwise his/her position in relation to an accused living in Portugal is much worse.

In addition to this, if being able to participate by video link, upon his/her request, the accused would be at least able to hear the evidence and to follow the proceedings against him/her, instead of being tried *in absentia* due to the impossibility or significant difficulty of attending in person. Initiatives in this field should also address the particularities of legal assistance in this special constellation.

Another area where the use of modern communication technologies may be considered is the facilitation of dual defence and defence in cross-border cases. If there is an ongoing investigation in Member State A and the accused is to be interviewed in Member State B (and if he/she has sufficient financial means), he/she will be assisted in Member State B by a local lawyer as well as a lawyer from the issuing state.

However, if the person does not have enough financial means to instruct a lawyer in both states and to fund the issuing state lawyer's travel costs to the executing state, only the local lawyer will assist him/her. This type of legal assistance is often not effective, in particular if it comes to more complex cases where dual representation is important. It is the lawyer of the issuing state who is in a better position to assess the strength of the evidence there – so as to make sure that the procedures applicable there are respected (especially if their application was requested by the issuing state) – and to advise on the applicable laws and practices in the issuing state. Even when lawyers are able to cooperate closely, the linguistic barrier often makes it impossible to ensure adequate legal assistance (the case files are normally not translated into the executing state's and the accused's language). Clearly – at least when the authorities of the issuing state are also physically present in the executing state –, there should be legal aid to cover the travel/time costs of the issuing state's lawyer to be able to attend the act in the executing state, as a matter of equality of arms. This is clearly not the case in the overwhelming majority of Member States. In any event, the presence of the authorities of the issuing state in the territory of the executing state usually only happens in a small number of cases. In the remainder of cases, which are the overwhelming majority, a middle-ground solution could be discussed, e.g. the participation of the issuing state's lawyer by means of videoconferencing (which is already the case where the issuing state asks for this means, which is conducted by the issuing state's authorities). This could also apply to other evidence-gathering acts, such as witness or expert interviews. Initiatives in this field should also address the particularities of legal assistance in this special constellation.

**Example:** a Greek citizen is charged in Portugal with "intentional bodily harm", aggravated by risk for the life of the victim and permanent consequences, due to a traffic accident[65] while she was spending her holidays there. An EIO is sent to Greece in order to interrogate the defendant. This interrogation could have major implications: what she says will mean that the case is either closed due to lack of evidence of violation of the duty of care while driving; or that she is indicted. It could also make the difference between being indicted for an intentional crime, carrying a sentence of over 10 years (for which an EAW could be issued and she could be remanded in pre-trial detention), or a negligent homicide that would carry either a maximum sentence of three or five years and does not allow for an EAW to be issued in Portugal or for her to be remanded in pre-trial detention. This difference in legal qualification also implicates that it might be possible – or not – to make a "plea bargain" and avoid trial. In order to prepare for her interrogation, she needs to find a lawyer in the issuing state who will be able to advise her on the legal framework, to analyse the evidence in the case file (all in Portuguese), and to advise her on whether to make a statement or not, whether she should rather come to make her statement in person in Portugal, etc. If she does make a statement, it is important that her Portuguese lawyer is able to assist her in its course, in order to ask for certain clarifications that might be relevant for the consequences indicated above. While the presence of the Greek lawyer (provided that he/she and the Portuguese lawyer are even able to communicate in a common language) is necessary to analyse the implications from the Greek standpoint as well as to oversee the respect for Greek rules, it is not equivalent to an intervention by the Portuguese lawyer. The dual intervention of the lawyers will also improve the quality of the gathered evidence and the conduct of proceedings (for example, it will prevent the lawyers from raising violations of procedure in relation to this interrogation at a later stage).

From a different perspective, new technologies could be used to improve the reliability of the evidence, to avoid wrongful convictions, and to improve the ability of the defence to challenge evidentiary acts in which it could not have participated. Audio-visual recording of police interrogations could have several advantages[66]:

- It helps prevent undue compulsion, torture and other ill-treatment during questioning, and it provides protection to police officials against false allegations.[67]
- It permits to record how information on rights has been administered.
- It permits to record interpretation and to perform after-the-fact controls of its quality.
- It permits to capture reactions and nuances a later written statement cannot reproduce (facial expressions, remorse, tension).
- It allows officers to focus on questioning rather than note-taking.
- It allows other officers to observe questioning from outside the room and to make suggestions.
- It reduces the number of motions to suppress evidence.
- It improves public trust in the police or judicial authorities.
- It allows experts, the defence, and prosecution to re-analyse the questioning.
- It allows the trial court to better assess evidence than by merely consulting written minutes.
- It allows the defence to verify how evidence has been gathered, whether the record was complete and accurate, and how statements should be interpreted in cases in which the defence could not participate.
- It improves trust in the evidence obtained in other jurisdictions, thereby strengthening the AFSJ.

Finally, audio-visual recording during the trial and the appellate stages could also strengthen the rights of the defence, since it provides an accurate track record of the procedure and

the evidence, which is essential not only for lodging appeals in general, but in particular for exercising the right of the accused to know what happened in his/her trial and to request a new trial or an appeal where it has been conducted in his/her absence. The audio-visual recording of both the hearings (especially in relation to the interview of the suspect/accused) and the trial/appeal is the law and practice in some Member States.

Another use of new technologies which should be encouraged is the provision of electronic access to the case files, making it easier for the defence lawyer and the accused to have full and swift access and thereby having sufficient means and time to prepare for the defence in the different procedural stages. This is already in place in some Member States. For example in Portugal, lawyers have access to the electronic case files after the indictment; although case files are not yet fully digital, digitization is being progressively implemented; in some cases, the public prosecutor's office also provides digital copies of the investigative file once an indictment has been pronounced. In Germany, lawyers do not need to go to the prosecutor's office regularly to look into the case file or to receive copies of them, they can make an application, and either a digital copy will be provided, or the original file or complete copies will be sent to the lawyer's office in paper ("*Duplo*"), with the request to return those files to the prosecutor's office in order to give the defence lawyer the chance to produce complete copies and/or an electronic file by using the technical facilities in the lawyer's office. There could be legislative intervention in this area, by means of a Regulation, under Art. 82(1), subpara. 2 lit. a) or d) (if restricted to cross-border cooperation procedures), under Art. 86(1) for the EPPO or for a Directive under Art. 82(2) lit. a) or b) TFEU.

#### d) Instruments and strategies

Strengthening the rights or safeguards in these areas could be achieved through the following strategies:

- By regulating the rights within the framework of EPPO cases, which could start with internal regulations and guidelines, then followed by a hard-law measure (Regulation).
- By regulating the rights in general, with specific provisions adapted to cross-border cases by means of Directives (or eventually Regulations if restricted to cross-border cases).
- By supplementing those hard-law measures with soft-law or other measures.

At the level of soft-law measures, the following could be developed:

- Guidelines on the requirements of legal assistance in cases involving foreign elements or cross-jurisdictional links or supranational entities, such as EUROJUST or the EPPO (specialization of lawyers; training requirements; language requirements; special legal aid provisions).
- Developing (and/or improving) practical handbooks for authorities on good practices in respect of defence rights (how to apply provisions on the rights of the defence and procedural safeguards in cases involving foreign elements or cross-jurisdictional links or supranational entities, such as EUROJUST or the EPPO; information about remedies, deadlines, identification of the lawyer or how to get a lawyer, etc.) and specific indications on the coordination between EU instruments in the AFSJ; developing handbooks on the role of lawyers, including in proceedings involving JITs, Eurojust and the EPPO (both for prosecutors and judges and for lawyers); developing and improving existing practical handbooks for the defence (e.g. ECBA EAW Handbook)[68].
- Guidelines and template forms for summons in cross-border and EPPO cases.
- Guidelines on the access to case files.
- Guidelines on the coordinated application of EU instruments in the AFSJ (a kind of "systematic" presentation of the existing AFSJ instruments and their appropriate use, as if they made up a "code").
- Developing funding mechanisms for legal aid in cases with cross-border or cross-jurisdictional links.
- Strengthening training – in this regard, funding initiatives is not enough; soft-law and likely hard-law measures or minimum training requirements for authorities and defence lawyers to act in cases with cross-border or cross-jurisdictional links might be necessary (for example, defence lawyers in Portugal are not obliged to have any specialty for working in criminal law, the least in cross-border matters, and they are not obliged to do any training at all).
- Supporting networks of lawyers.

### 3. Remedies

Effective judicial protection is a general principle of EU law, stemming from the constitutional traditions common to the Member States, which is enshrined in Arts. 6 and 13 ECHR and reaffirmed by Art. 47 CFR.[69] In accordance with the subsidiarity principle, it is primarily for the national authorities to redress the alleged violations of the ECHR or EU law.

The right to an effective remedy, enshrined in Art. 13, in terms of the ECHR requires that a "remedy" be such as to allow the competent domestic authorities both to deal with the substance of the relevant complaint and to grant appropriate relief. A remedy is only effective if it is available and sufficient. It must be sufficiently certain not only in theory but also in practice, and must be effective in practice as well as in law, having regard to the individual circumstances of the case. Art. 13 ECHR does

not require any particular form of remedy, with states having a margin of discretion in how to comply with their obligation, but the nature of the right at stake has implications for the type of remedy the state is required to provide. Even if a single remedy by itself does not entirely satisfy the requirements of Art. 13 ECHR, the aggregate of remedies provided for under domestic law may do so. In assessing effectiveness, account must be taken not only of the formal remedies available but also of the general legal and political context in which they operate, as well as the personal circumstances of the applicant.

The EU instruments seem to offer the same flexibility for states to choose how they address the right to an effective remedy. Although this legislator's choice might be justifiable from the perspective of subsidiarity, it leads to a series of problems that may affect the very core of the right: i) there is a lack of a common understanding on the applicability of remedies (access, speediness, procedure, costs, suspensive effect, exclusionary rule, etc.); ii) Member States will understandably choose a minimal implementation of the corresponding rights in the Directives (as for example, the minimal implementation of the procedural rights Directives); iii) it leaves too much room for intervention by the ECJ to define the concept of "effectiveness". One of the most striking examples in this respect is the right to counsel in Art. 12 of the Directive 2013/48/EU,[70] which provides that states should ensure an effective remedy without specifying the criterion of effectiveness. Not only the formulation in the Directive is very vague, leaving states with a large choice of procedural means to give content to this right; but not even references to ECtHR case law seem to help any longer, as the Court has not only lowered its previous standards[71] but has also opened the door for states to apply an extremely restrictive approach.[72]

In this context, elaborating a theoretical framework of effectiveness of remedies in a European context seems necessary. This may raise strong opposition from the Member States, therefore a first step towards opening the discussions could be the elaboration of a guide to good practice with respect to domestic remedies[73] across EU Member States and instruments. The aim is to identify the fundamental legal principles that apply to effective remedies across EU instruments, the characteristics required for remedies in specific situations for them to be effective, as well as to identify good practices which can provide a source of inspiration for other Member States.

Discussions on a more binding instrument could also be opened; however, although desirable from the point of view of the defendant, it is a very difficult endeavour, given the major differences between legal systems across the EU and subsidiarity requirements. But since *there is no right without a remedy*[74] – a principle that is well-established in EU Law –, we believe that the Commission should be bold enough to start tackling this matter. How can it be approached?

A Green Paper on remedies would probably be the best way. As regards **procedural remedies**[75] – i.e. minimum requirements for obtaining effective judicial oversight in respect of alleged violations of EU rights (the need to establish a remedy; the judicial nature of the competent authority; the requirement that such authority has jurisdiction to grant relief if an EU right was violated; an extension of national deadlines if there is a cross-border link, etc.[76]) – the challenge is to create *standards* that are sufficient yet flexible enough to be introduced into the domestic systems without affecting their balance.[77]

As regards **substantive remedies** – i.e. the appropriate relief that has to be made available[78] – the problems are even bigger. In order to be effective, remedies will have to ensure *restitutio in integrum*. According to the ECtHR's case law, a decision or measure favourable to the applicant is only sufficient if the national authorities have acknowledged, either expressly or in substance, a violation of the Convention, and then afforded redress for it. The principle of subsidiarity does not mean renouncing all supervision of the result obtained from using domestic remedies, otherwise the rights guaranteed by the Convention would be devoid of any substance. Therefore, as far as appropriate remedies are concerned, two types of relief are generally required: (1) bringing the violation to an end and (2) affording compensation for any damage sustained as a result of the violation. The compensatory element of the remedy is particularly important in view of the subsidiarity principle, so that aggrieved persons are not forced to refer to international courts complaints. Both the fact-finding and the fixing of monetary compensation should, as a matter of principle and effective practice, be the domain of domestic courts.[79] In other words, preventive and compensatory remedies have to be complementary to be considered effective.[80] Translated into EU criminal matters, this principle could be understood to imply that the person needs to have the possibility to ask for redress of his/her situation *within the criminal case*; an extra-procedural remedy, such as compensation, would not be sufficient to consider the remedy effective.

This initiative follows from the Charter of Fundamental Rights (Art. 47) – in combination with the principle of effectiveness of EU law (the ABC Directives and their objective, i.e. to ensure an AFSJ)[81] and the uniform application of EU law –, as the application of EU defence rights also depends on the remedies that are available to protect them.[82] As indicated, such a position also seems necessary as the ECHR system – based on the margin of appreciation and "living instrument" doctrines – may not be sufficient for achieving a common European justice area.

Given the above, EU law should and/or could establish the features remedies must have in order to be considered effective. However, this principle of effectiveness should not be understood as an automatic requirement to annul the procedures (only appropriate for structural or fundamental errors), since in certain cases the violation might have had no impact on the exercise of the rights of defence or on the outcome of the case.[83] In addition to this, the implementation of effective judicial protection may be achieved through a wide array of remedies, depending on the rights that have been violated.[84]

Hence, a rather feasible approach for the proposed Green Paper would be to choose a set of rights instead of addressing remedies in a general manner – for example the right to information on rights, the right against self-incrimination, and the right to access to a lawyer, or the right to privacy in criminal investigations. In principle, the mentioned rights are those for which remedies are well-established in both ECtHR case law and domestic legal systems.[85] The right to privacy is a more complex field, since here the ECtHR does not offer strong guiding caselaw for the use of evidence obtained in violation of the right to privacy.[86] But it is a field in which the ECJ has developed a body of case law defining the substance of the right of privacy, e.g. in connection with data retention for the purposes of criminal investigations.[87] The right of privacy includes a right to the deletion of data if they were obtained in violation of such a right. The EIO also knows the legal consequences of data deletion in cases of telecommunication interceptions: if a Member State has obtained data without authorization (and technical assistance) of the Member State on whose territory the person is situated, that Member State may order the deletion (after having been notified of the interception).[88] Hence, there could be enough ground to start a discussion. Data retention is quite likely also one of the areas where there is more need to establish a common legal framework, since the lack thereof could hamper both the effectiveness of cross-border investigations and EU citizens' rights. Within these rights, a distinction could then be made between types of violations and appropriate remedies.[89] Using a Green Paper would enable assessing the impact of the remedies that could possibly be established. Subsequently, a legislative proposal for a Directive or Regulation (depending on the field – for EPPO: a Regulation) could be drafted.

In the field of remedies, scholars have advanced the following proposals:[90]

At the national level:

- Monitoring the implementation of the ABC Directives in order to identify deficiencies undermining the effectiveness of EU defence rights, with a special focus on the following: (1) national legislation that does not provide the appropriate standards for the defence rights enshrined in the Directives; (2) national judicial remedies, which do not enable the accused to seek effective judicial control against breaches of defence rights; (3) ineffective procedural sanctions against ascertained defence rights that ultimately undermine the right to a fair trial.
- Dissemination of relevant information and training of practitioners, in particular judges with regards to their role as EU law courts in a functional sense, as well as exchanges of good practices.

At the EU level:

- Minimum rules for judicial review to the extent necessary to grant the *effet utile* to the provisions of EU law that grants defence rights by strengthening the remedial obligations in the ABC Directives with regard to particularly serious breaches of defence rights, for example the obligation for prompt judicial review.
- Adopting minimum rules harmonizing procedural sanctions against breaches of those rights, thereby enhancing mutual trust and recognition by means of a "roadmap" on procedural sanctions; this should be preceded by comparative studies, which aim at identifying adequate minimum sanctions against the different breaches of the different rights.[91]
- Development of CJEU case-law to interpret the legal framework, including the creative application, where necessary, in particular in the most sensitive areas, of the principles elaborated by the European Court of Human Rights in the relevant fields.
- A more stable and reliable legal environment as concerns remedies would greatly contribute to improving fairness and effectiveness of proceedings across EU countries, which is essential to increase trust in the justice system and democratic values.

## IV. Conclusion

EU Law has travelled a long way since the first debates on procedural rights of the suspect and accused persons in the 2000's, which initially failed to produce any legislative instrument. The adoption of the Stockholm Roadmap in 2009 and of the corresponding Directives were significant steps.

However, these steps have failed to address the issues of legal fragmentation and systemic flaw in the cross-border context, even when new institutions such as the European Public Prosecutor were created.

Domestic criminal procedures remain disparate and the disparity is such that it undermines mutual trust and consequently the operation of the mutual recognition principle. The development of an area where persons, evidence and decisions may

circulate freely and without duplication of controls by the authorities of Member States may not be further deepened without additional reflection and intervention at EU level in the field of defence rights and procedural safeguards. In this paper we tried to set out a few areas that should merit attention in the years ahead, touching upon three, closely connected issues: i) the need for additional minimum rules in the area of cross-border cooperation proceedings; ii) the need for additional minimum rules on defence rights and procedural safeguards beyond the first generation of the 2009 Stockholm Roadmap Directives (ABC Directives); iii) and the need for minimum rules on remedies, in cases where rights have been violated. The road ahead for the EU is still long. Hopefully our contribution will bring an additional spark to the ongoing discussion.

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1 ECJ, 26 February 2013, case C617/10, Åkerberg *Fransson*.

2 ECJ, 26 February 2013, case C-399/11, *Melloni.*

3 ECJ, 5 December 2017, case C-42/17, *M.A.S., M.B.*

4 ECJ, 20 March 2018, case C-524/15, *Menci*.

5 See, for example, ECtHR, 15 November 2016, Appl. nos. 24130/11 and 29758/11, *A and B. v. Norway*; ECtHR (GC), 28 June 2018, Appl. nos. 1828/06 and 2 others, *G.I.E.M. S.R.L. and Others v. Italy (merits).*

6 Council Framework Decision 2009/299/JHA amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA, and 2008/947/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial, *O.J.* L 81, 26/02/2009, 24. This instrument was later complemented by the intrastate approach of Directive 2016/343 on the presumption of innocence.

7 The ABC Directives refer to the legislative agenda for strengthening the procedural rights of suspected or accused persons in criminal proceedings, adopted in the respective Roadmap by the Council in 2009 (*O.J.* C 295, 4.12.2009, 1).

8 Cf. J. Arnold, Grenzüberschreitende Strafverteidigung in Europa, 2015, p. 49, who explains that the concept varies for practising defence lawyers according to their practical experience; it ranges from a limited concept of international cooperation proceedings (conventional or pursuant to the mutual recognition principle) to a broad one including any criminal proceedings with connections to other European countries (the majority preferred the latter concept). For the academic view, see Arnold, ibid., pp. 167–169, and L. Bachmaier, "Transnational Criminal Proceedings, Witness Evidence and Confrontation: Lessons from the ECtHR's Case Law", (2013) 4 *Utrecht Law Review* 127, pp. 128–129.

9 This corresponds to the semantic meaning of the word "cross-border": "between different countries or involving people from different countries"; available at: <https://dictionary.cambridge.org/dictionary/english/cross-border>, accessed 31/10/2020>.

10 As defined below, this category could be named "criminal proceedings with a cross-border link" or "criminal proceedings with a cross-jurisdictional link".

11 See definition in the Palermo Convention.

12 Right to an effective remedy and to a fair trial; presumption of innocence and right of defence.

13 E. Sellier and A. Weyembergh, 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, 2018, available at: <https://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL_STU%282018%29604977>, accessed 03/11/2020.

14 E. Sellier and A. Weyembergh, *op. cit.* (n. 13).

15 Relevant explicit requirements are set in the Charter of Fundamental Rights mainly in Arts. 6–8, 19, 47–50. As set in Art. 52(3) CFR, the Charter rights are to be interpreted in light of the corresponding rights deriving from the ECHR, which concretely means the right to liberty and security in Art. 5 and the right to a fair hearing in the determination of a criminal charge in Art. 6 ECHR, but also the right of appeal in criminal matters, the right to compensation for wrongful conviction, and the right not to be tried or punished twice pursuant to Arts. 2, 3 and 4 of Protocol No. 7 respectively.

16 Implicit requirements stem particularly from the right to life and the prohibition of torture (which are of significance for matters such as the use of force in law-enforcement action, the investigation of alleged offences and the conduct of interrogation); the right to respect for private and family life, home and correspondence (which not only sets important limitations to the way in which offences can be investigated and evidence gathered, but is also relevant for the restrictions to which persons arrested and remanded in custody can be subjected to and the publicity that can be given to certain aspects of criminal proceedings); the right to property (which must be respected in the course of law-enforcement action and may also be relevant for measures taken to secure either evidence of the commission of an offence or the proceeds derived from this).

17 ECJ, 27 May 2019, case C-509/18, PF (as well as joined cases C-508/18 and C-82/19 PPU, OG and PI).
18 See also ECJ, 18 December 2014, Opinion 2/13.
19 See, for example, EfCJ, 18 June 2015, case C-583/13 P, *Deutsche Bahn and Others v. Commission.*
20 Other examples: the case for "being brought promptly before a judge" who will decide on the lawfulness of detention – the executing authority in an EAW will say there is no violation since the person is brought promptly before a judge there (even if this judge cannot rule on the sufficiency of the evidence, flight risk, etc. in the criminal case), and the issuing authorities will also consider that the requisite is met, since the person will be brought promptly to a judge as soon as he/she enters their Member State after surrender. Similar examples can be found with respect to access to the case file.
21 See Hoge Raad, 5 October 2010, case 08/03813.
22 See, for example, ECtHR, 27 January 2012, *Stojkovic v. France and Belgium,* Appl. no. 25303/08.
23 E. Sellier and A. Weyembergh, *op. cit.* (n. 13).
24 The case law of the ECtHR contains some guidance on this. Some measures may be ordered only by a court, after all.
25 Cf. M. Luchtman, European cooperation between financial supervisory authorities, tax authorities and judicial authorities, 2008.
26 In *Khan v. UK*, the ECHR found no violation of the right to a fair trial (see case no. 35394/97, 12 May 2000 and subsequent cases). It is not entirely clear whether the ECJ will follow this -ECtHR case law in Khan. In light of the specifics of the AFSJ, it may well be that the ECJ finds that the use of evidence obtained in violation of the right to privacy also violates the fair trial principle; cf. ECJ, 17 December 2015, case C-419/14, Web Mind Licenses. This is (incidentally) also the state of the art in many EU jurisdictions.
27 M. Böse, "Die Europäische Ermittlungsanordnung – Beweistransfer nach neuen Regeln?", (2014) *ZIS*, pp. 152, 160.
28 Suggestions have been made by A. Klip, "Violations of Defence Rights' Directives", (2018) 26(4) *European Journal of Crime, Criminal Law and Criminal Justice*, pp. 271–281.
29 The European Parliament has adopted a Resolution asking the Council to determine whether Hungary is in breach of Article 7 TEU – see European Parliament Resolution of 12 September 2018, P8_TA(2018)0340, available at <http://www.europarl.europa.eu/doceo/document/TA-8-2018-0340_EN.html?redirect>, accessed 2 November 2020>. Hungary has filed to annul the Resolution – see case C-650/18, Hungary v. Parliament. The Commission has launched infringement proceedings in relation to laws criminalising activities in support of asylum seekers and has also launched new proceedings in relation to the non-provision of food in transit zones – see <https://ec.europa.eu/commission/presscorner/detail/en/ip_19_4260>, accessed 2 November 2020. For an overview of the recent developments on the threats to the rule of law in Hungary, see T. Wahl, "Rule-of-Law Developments in Hungary", eucrim, <https://eucrim.eu/news/rule-law-developments-hungary/>, accessed 2 November 2020.
30 ECJ, 24 June 2019, case C-619/18, Commission v. Poland (ruling that the Polish reform lowering the retirement age of the Supreme Court judges is contrary to EU law) – for a short note on the case see T. Wahl, "CJEU: Polish Supreme Court Reform Infringes EU Law", eucrim <https://eucrim.eu/news/cjeu-polish-supreme-court-reform-infringes-eu-law/>, accessed 2 November 2020; ECJ, 8 April 2020, case C-791/19 (granting interim measures against the powers of the Disciplinary Chamber of the Supreme Court with regards to disciplinary cases concerning judges). Article 7 TEU proceedings were launched by the Commission in 2017 – see <https://europa.eu/rapid/press-release_IP-17-5367_en.htm>, accessed 2 November 2020; and again in 2020 – see <https://ec.europa.eu/commission/presscorner/detail/en/IP_20_772>, accessed 2 November 2020. For an overview of the recent developments on the threats to the rule of law in Poland, see T. Wahl, "Threat of Rule of Law in Poland – Recent Developments", eucrim <https://eucrim.eu/news/threat-of-rule-of-law-in-poland-recent-developments/>, accessed 2 November 2020.
31 ECJ, 27 May 2019, case C-509/18, PF, and joined cases C-508/18 and C-82/19 PPU, OG and PI.
32 ECJ, 24 October 2019, case C-324/17, Criminal Proceedings against Ivan Gavanozov. See also AG Bot's Opinion of 11/04/2019. See further the summaries by T. Wahl in eucrim <https://eucrim.eu/news/first-cjeu-judgment-european-investigation-order/>, regretting the restrictive approach followed by the ECJ, and <https://eucrim.eu/news/ag-bulgaria-must-bring-its-law-line-eio-directive/>, accessed 2 November 2020.
33 See, for example, the Portuguese legal system described in V. Costa Ramos and B. Churro, "Report on Portugal", in: S. Quattrocolo and S. Ruggeri (eds.), *Personal Participation in Criminal Proceedings. A Comparative Study of Participatory Safeguards and in absentia Trials in Europe*, 2019, pp. 305, 319–323.
34 After the ECtHR's judgment in Salduz (Appl. no. 36391/02), some states had alleged that the judgement did not imply that the lawyer had to be present during questioning, as regards the right to access to a lawyer attached from the moment when the person was held in pre-trial or police custody and was subject to police interrogation. The ECtHR established otherwise in *Karabil v. Turkey* (Second Section judgement of 16/06/2009, Appl. no. 5256/02) that the suspect must benefit from legal assistance during his/her questioning, which was underlined in *Navone and others v. Monaco* (First Section judgement of 24/10/2013, Appl. nos. 62880/11, 62892/11, 62899/11), paras. 79–80. For a comprehensive comparative study on the role of defence lawyer at the investigative stage, see A. Pivaty, Criminal Defence at Police Stations: A Comparative and Empirical Study, 2019.
35 ECtHR, 13 October 2009, Appl. no. 7377/03, *Dayanan v. Turkey*, para. 32 (citations omitted, highlighted by the authors).
36 See also ECtHR, 9 November 2018, Appl. no. 71409/10, *Beuze v. Belgium,* para. 136.
37 ECtHR, Beuze v. Belgium, *op. cit.* (n. 36), para. 135 (citations omitted).
38 ECtHR, ibid.
39 See V. Costa Ramos, B. Churro, *op. cit.* (n. 33), p. 319 with further references. This is a tendency also observed in other European countries, e.g. Bulgaria: "[t]he use of private detectives for the collection of evidence is practically unknown and, apart from the questioning of witnesses, there is little other new evidence that could be presented by the defence at trial" – Y. Grozev , "Bulgaria", in: E. Cape and Z. Namoradze (eds.), *Effective criminal defence in Eastern Europe*, 2012, p. 100. In white-collar and complex criminality, such investigations nonetheless tend to become the rule and to receive acceptance or, at least, tend not to be seen as illegitimate interference with the investigation. E. Cape, Z. Namoradze, R. Smith and T. Spronken, "The European Convention on Human Rights and the right to effective defence", in: E. Cape et al. (eds.), *Effective Criminal Defence in Europe*, 2010, pp. 44–45, state that "[existing research shows that inquisitorially-based criminal justice systems often prohibit active defence at the pre-trial phase and merely allow reactive defence: only when the results of the official (pre-trial) investigation are made known to the accused is he in a position to propose further investigations such as the questioning of (additional) witnesses or counter-investigation by an expert [...] In some jurisdiction investigation by the accused or his lawyer is even regarded as obstructing the course of the official investigations."
40 T. Wahl, Fair Trial and Defence Rights in: Sicurella et al. (eds.), *General Principles for a Common Criminal Law Framework in the EU*, 2017, p. 140.
41 In this regard, it is important to notice that defence lawyers acting in other MS will normally have to obey the local professional rules of conduct – see Article 2.4 of the CCBE Code of Conduct ("when practising cross-border, a lawyer from another Member State may be bound to comply with the professional rules of the host Member State. Lawyers have a duty to inform themselves as to the rules which will affect them in the performance of any particular activity" – and, as an example, Article 207(1) of the Statute of the Portuguese Bar Association – Law 145/2015, of 9 September 2015, obliging foreign lawyers to comply with the local rules.
42 ECtHR, 27 January 2012, Appl. no. 25303/08, *Stojkovic v. France and Belgium.*
43 See also the ECBA Agenda 2020 – V. Asselineau, "Agenda 2020: A new Roadmap on minimum standards of certain procedural safeguards", (2018) 9 *NJECL*, pp. 184, 188–189, also available on <http://www.ecba.org/extdocserv/20180424_ECBA_Agenda2020_NewRoadMap.pdf>, accessed 2 November 2020 (see III.4.6), stressing that such an access is a precondition for effective legal remedies.

44 See below the example on an EIO between Portugal and Greece.
45 This example was given to us by two ECBA Members from France.
46 See Cour de cassation, Chambre criminelle, 18 February 2014, case 14-80.484.
47 See Art. 63-4-1 of the Code of Criminal Procedure.
48 Cour de cassation, Chambre criminelle, 4 October 2016, case 16-82.309; see also Cour de cassation, 31 January 2017, case 84613.
49 See above on page 234, section b), indicating how legal practice has shown that this is feasible.
50 In the context of UN sanctions and in relation to the right to be informed, see ECJ,. 18 July 2013, joined cases C-584/10 P, C-593/10 P and C-595/10 P, *Kadi II*, as well as joined cases C-508/18 and C-82/19 PPU, OG and PI, paras. 97, 98, 100 ("the Courts of the European Union must, in accordance with the powers conferred on them by the Treaties, ensure the review, in principle the full review, of the lawfulness of all Union acts in the light of the fundamental rights forming an integral part of the European Union legal order [...] That obligation is expressly laid down by the second paragraph of Article 275 TFEU. Those fundamental rights include, inter alia, respect for the rights of the defence and the right to effective judicial protection [...] [T]he second of those fundamental rights, which is affirmed in Article 47 of the Charter, requires that the person concerned must be able to ascertain the reasons upon which the decision taken in relation to him is based, either by reading the decision itself or by requesting and obtaining disclosure of those reasons, without prejudice to the power of the court having jurisdiction to require the authority concerned to disclose that information, so as to make it possible for him to defend his rights in the best possible conditions and to decide, with full knowledge of the relevant facts, whether there is any point in his applying to the court having jurisdiction, and in order to put the latter fully in a position to review the lawfulness of the decision in question" (citations omitted).
51 Art. 3(2) Directive (EU) 2010/64; Arts. 4 and 5 Directive (EU) 2012/13.
52 Art. 3(2) Directive (EU) 2010/64; Art. 6 Directive (EU) 2012/13.
53 Art. 3(2) Directive (EU) 2010/64; Art. 8(4) Directive (EU) 2016/343.
54 Arts. 8(2) and (4) and 9 Directive (EU) 2016/343.
55 Art. 8(2), (4), (6) and (8) Directive (EU) 2014/42; Arts. 32 and 33 Regulation (EU) 2018/1805.
56 E. Sellier, A. Weyembergh, *op. cit.* (n. 13).
57 E. Sellier, A. Weyembergh, *op. cit.* (n. 13).
58 Regulation (EC) No. 1393/2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents), and repealing Council Regulation (EC) No. 1348/2000, *O.J.* L 324, 10/12/2007, 79.
59 Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union, *O.J.* C 197, 12/07/2000, 3.
60 European Convention on Mutual Assistance in Criminal Matters of 20 April 1959 (ETS No. 030).
61 For example, since it is often difficult or uncertain to determine whether a person has been served leads to an overuse of the EAW at the investigative stages of proceedings, as a means to serve a person to appear for the arraignment in order to be notified of the charges pending against him/her, being able to make a statement and to receive a decision on bail. This often happens and the consequence is that after the person is surrendered, he/she will not remain in custody, rendering the detention manifestly disproportionate in many cases.
62 The ECBA Agenda 2020 – V. Asselineau, (2018) 9(2) *NJECL*, *op. cit.* (n. 43), see III.2.
63 Some of the areas identified are: admission and limitation function of bills of indictment; impartiality and independence of judges and prosecutors (right to refuse); continuous and confidential access to the lawyer; access to the complete case file; right to make a defence statement; right to ask questions to witnesses directly (cross-examination); right to request for evidence; recording of trials and right to access recordings and minutes.
64 On the topic of the use of videoconferencing in criminal cases, see European Criminal Bar Association, "Statement of Principles on the use of Video-Conferencing in Criminal Cases in a Post-Covid-19 World", <http://www.ecba.org/extdocserv/20200906_ECBAStatement_videolink.pdf>, accessed 2 November 2020.
65 Although a traffic accident usually does not cause *intentional bodily harm, this was stated in the charges.*
66 See the ProCam Study by the Hungarian Helsinki Committee, <https://fairtrials.org/sites/default/files/ProCam_Comparative_Report.pdf>, accessed 2 November 2020, and the Fair Trials Desk Report, <https://fairtrials.org/sites/default/files/ProCam_international_desk_report.pdf>, accessed 2 November 2020, pp. 19–20 with further references. These advantages are referred to in the context of interviews of accused persons. We believe they apply mutatis mutandis to witness interviews and other procedural acts, such as searches, reconstructions of the crime-scene, lineups, etc.
67 See European Committee for the Prevention of Torture (CPT) Standards [CPT/Inf/E (2002) 1 – Rev. 2011], § 36; Fair Trials Desk Report, *op. cit.* (n. 66), p. 4.
68 European Criminal Bar Association, "How to defend a European Arrest Warrant Case. ECBA Handbook on the EAW for Defence Lawyers", <http://handbook.ecba-eaw.org>, accessed 2 November 2020.
69 See ECJ, 18 March 2010, joined cases C-317/08 to C-320/08, *Rosalba Alassini v. Telecom Italia SpA et al.*
70 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.
71 In the ECtHR Salduz judgement (27 November 2008, Appl. no. 36391/02), the ECtHR recognised that the right of everyone charged with a criminal offence to be effectively defended by a lawyer is one of the fundamental features of a fair trial (para. 51). This right becomes applicable as soon as there is a "criminal charge" within the meaning given to that concept by the ECtHR's case law and, in particular, from the time of the suspect's arrest, whether or not that person is interviewed or participates in any other investigative measure during the relevant period. Being confronted with a certain divergence in the approach to be followed in cases dealing with the right of access to a lawyer, the Court recently had occasion to further examine the matter in the Beuze judgement (*op. cit.,* n. 36), in which it departed from the principle set out before. In Beuze, the Grand Chamber gave prominence to the examination of the overall fairness approach and confirmed the applicability of a two-stage test, namely whether there are compelling reasons to justify the restriction as well as the examination of the overall fairness.
72 For example, in light of a restrictive understanding of Salduz, the Constitutional Court of Malta attaches weight to the defendant's vulnerability in those cases where it finds a violation of his/her right to legal assistance. In their joint dissenting opinion in *Farrugia v. Malta* (4 June 2019, Appl. no. 63041/13), ECtHR judges Serghides and Pinto de Albuquerque considered this approach as being much more restrictive than that of the Grand Chamber in Beuze; they also believe that such an abusive and restrictive interpretation of that right contradicts its essence.
73 On the basis of the model of the Council of Europe Guide to good practices in respect of domestic remedies, <https://edoc.coe.int/en/european-convention-on-human-rights/6608-guide-to-good-practice-in-respect-of-domestic-remedies.html>, accessed 4 November 2020.
74 See in this respect A. Soo, "Potential Remedies for Violation of the Right to Counsel in Criminal Proceedings: Article 12 of the Directive 2013/48/EU (22 October 2013) and its Output in National Legislation", (2016) 3 *EuCLR* 284, 292: "This principle could be summarised as Ubi ius ibi remedium – if there is a right, there also is a remedy. On the other hand, the right exists only to the extent its violation is remedied: if the breach of a right is not followed by proper remedy, the right is not applicable in the proceedings in question. This principle could be described as Ubi remedium ibi ius – there is a right only if there is a corresponding remedy. In that sense, the fact that the legislation provides for the right does not automatically lead to a conclusion that this right is exercised in practice in a state. The right acquires true meaning only if there is an adequate remedy provided in case of its violation"; S. Allegrezza and C. Covolo, "Conclusions", in: S. Allegrezza and C. Covolo, *Effective Defence Rights in Criminal Proceedings*, 2018, pp. 499, 507–508, state that the full effectiveness of rights granted by the ABC Directives must

be ensured by a three-fold shield of protection: "the formal protection of defence rights under national law, the effective judicial control over alleged breaches and an effective sanction against the ascertained violation".

75 A. Klip, (2018) 26(4) *European Journal of Crime, Criminal Law and Criminal Justice*, *op. cit.* (n. 28), 279, calls them "legal remedies".

76 For a definition on the requirements for effective judicial review, see S. Allegrezza and C. Covolo, *op. cit.* (n. 74), pp. 499, 502–507.

77 In this field, access to the CJEU could be discussed, too, at least in a long-term perspective: availability of remedies to challenge a decision to refuse to refer a matter to the CJEU; availability of a full remedy/appeal to the CJEU. The challenge here is that – except maybe for the field of the EPPO – such changes might entail a need to amend the Treaties, making them more difficult.

78 A. Klip (2018), 26(4) *European Journal of Crime, Criminal Law and Criminal Justice*, *op. cit.* (n. 28), 279, calls them "procedural sanctions".

79 See, for example, ECtHR, 2 May 2016, Appl. no. 40828/12, *Mironovas and Others v. Lithuania, for the necessity of both preventive and compensatory remedies in the context of prison conditions.*

80 See ECtHR, 17 December 2009, Appl. no. 20075/03, *Shilbergs v. Russia*, para. 67.

81 Cf. M. Caianello, "To Sanction (or not to Sanction) Procedural Flaws at EU Level?", (2018) 22(4) European Journal of Crime, Criminal Law and Criminal Justice, 317, explaining that the speciality of criminal procedure rules lies in sanctions attached thereto. Without them, the nature of the rule changes from that of an order to that of a guideline.

82 Cf. A. Klip, (2018) 26(4) *European Journal of Crime, Criminal Law and Criminal Justice*, *op. cit.* (n. 28), 277.

83 In some jurisdictions, for the less serious irregularities, reduction of a sentence or even the mere establishment of a violation is also considered to be an appropriate response to irregularities.

84 A. Klip, (2018) 26 (4) *European Journal of Crime, Criminal Law and Criminal Justice, op. cit.* (n. 28), 278, says: "[a]s a general rule, one can presume that the violation of a procedural rule has consequences for the issue to which it relates." For example: if the accused was not granted enough time to study the case against him/her, the remedy would normally be to grant him/her such time; if the accused was not informed on a change made to the facts or offences stated in an indictment and was convicted for different facts or offences, the remedy could be either an annulment of procedures whereby he/she would receive such information and be able to defend him-/herself before a new judgement is pronounced; or it could be to reverse the judgement and acquit him/her in relation to those new facts; if a piece of evidence is obtained in violation of a right, the remedy could be the exclusion of the evidence or, in certain cases, also of derivate evidence and causally linked procedural acts. Another example is the case that the violation of the right to be made aware of the contents of the indictment must be redressed by putting the person in the situation by which he/she would benefit from the objection deadline (cf. ECJ, 22 March 2017, joined cases C-124/16, C-188/16 and C-213/16, Criminal proceedings against Tranca, Reiter and Opria, para. 46).

85 For example, there might be discussions on the substantive scope of the right against self-incrimination – i.e. whether it can be restricted in certain circumstances –, but where it applies, the remedy for its violation is by its very nature the exclusion of the evidence (subject to possible exceptions for derivative evidence). The same applies to violations of the right to access to a lawyer, but the ECtHR case law seems to be fragile in this respect and the standards might be further lowered in the future.

86 Which is a subject of criticism by dissenting judges, see, for example, ECtHR, 10 March 2009, Appl. no. 4378/02, *Bykov v. Russia.*

87 See, for example, ECJ, 21 December 2016, case C-203/15, TELE2 Sverige.

88 Art. 31(3) lit. b) Directive (EU) 2014/41.

89 See the suggestion made by A. Klip, (2018) 26(4) European Journal of Crime, Criminal Law and Criminal Justice, *op. cit.* (n. 28), 279–280: violations that can be repaired; violations that affect a single piece of evidence; violations that affect the proceedings against the accused as a whole.

90 S. Allegrezza and C. Covolo, *op. cit.* (n. 74), pp. 499, 508–512.

91 A. Soo, (2016) 3 EuCLR, *op. cit.* (n. 74), 284, 307, suggests that "the remedy for violation of the right to counsel is 'effective' in the meaning of Article 12 § 1 of the Directive [2013/48] only if it aims at restoring the person's position back to that which it would have been had the violation not occurred. The requirement that a person's pre-violation situation should be reinstated reduces the list of remedies significantly as there are only a few that have such potential." Hence she proposes that "main remedies worth considering are the exclusionary rule, the doctrine of the 'fruit of poisonous tree', and re-trial. At the same time, the application of a principle that a person's pre-violation situation should be restored raises a number of questions as it is often difficult to determine what the pre-violation position actually is. In addition, due to a number of practical reasons, it is almost impossible to reinstate such a position to the full extent." Since "[i]t is impossible to turn back the clock", "a viable solution might focus on determining preventative 'remedies' much more than has been done so far." The author also acknowledges the need for more studies.

# Strengthening the Fight against Economic and Financial Crime within the EU

Luigi Foffani, Valsamis Mitsilegas, and Pedro Caeiro

**EU legislation in the field of financial and organised crime is affected by different issues. The anti-money laundering (and counter-terrorist financing) legislation is dense, but it still lacks effectiveness. Although the approximation between the Member States still presents some concerns, what seems to be desirable is not further legislative intervention from the EU but to foster monitoring activities (on criminal law usage, suspicious transaction reports, and FIU functioning, etc.). In this context, a specialised agency could be of remarkable value, but the corresponding draft needs accurate analysis. With regard to organised crime, FD 2008/841/JHA features too narrow a scope, on the one hand, when it requires the aim of obtaining "financial or other**