

ECBA Initiative 2017/2018

“Agenda 2020: A new Roadmap on minimum standards of certain procedural safeguards”

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A. Executive Summary

The European Criminal Bar Association (ECBA) is an association of independent specialist defence lawyers. The association was founded in 1997 and has become the pre-eminent independent organisation of specialist defence practitioners in all Council of Europe countries.

The ECBA recognises the need for new and strong commitments to the EU in these anxious times. We need to strengthen the EU as a guarantor of peace, our common values, fundamental human rights, and the rule of law in our common area of freedom, security and justice. Brexit and other anti-EU sentiments should be met with reasonable arguments. We should stress the advantages of the EU and the costs of non-Europe as debated in the European Parliament (EP). In the field of criminal law the mission to achieve and to rely on mutual trust is far from complete. For example, the establishment of the European Public Prosecutor’s Office (EPPO) by Regulation 2017/1939 is in general a step in the right direction towards improving the protection of the financial interests of the EU, however, without a guarantee of a greater number of minimum standards in criminal proceedings the citizens of the EU may have reason to fear a prosecutorial behemoth that will act unilaterally against certain Member States and/or individuals. In many respects the differences between legal systems and the lack of protection provided by national laws lead to mistrust and general scepticism in relation to Europe. The ECBA offers constructive collaboration with all EU institutions and national ministries of justice and (other) NGOs to work towards a Europe in which mutual trust is not misplaced.

Since the Tampere Council in 1999 and the Framework Decision on the EAW 2002/584/JHA in 2002 (EAW-FD), and since the Stockholm Programme and the Roadmap on procedural rights of 2009, it is generally recognised in all EU Member States that mutual recognition as a legal principle in the field of criminal matters requires mutual trust. The Roadmap of 2009 has almost been completed (the exception is Measure E on vulnerable adult suspects). Nevertheless, the implementation process of the respective EU Directives at national level must be observed and monitored carefully given that not all Member States have properly transposed the Directives. Legislative action should continue to be taken at EU level in order to achieve common minimum standards of the rights of suspected or accused persons at all stages of criminal proceedings because many aspects of criminal proceedings have not yet been considered in this context. We know for instance through the findings relating to Measure F (2009) on Pre-Trial Detention and the current jurisprudence of the CJEU (e.g. C-404/15 and C-659/15) and of national courts (e.g. regarding proportionality) in many EAW cases that new EU legislation and normative clarification is absolutely necessary in this field, in order to secure the legal principle of mutual recognition. In addition, future EPPO proceedings generally require a better, more fairly balanced system of minimum standards after the Regulation 2017/1939 failed to set certain standards for procedural safeguards (cf. Art. 37, 41, 42, 45, 113) contrary to the recommendations from lawyers (e.g. ECBA Cornerstones on EPPO February 2013) and from the EP in several resolutions (e.g. 2016/2750). This ECBA Initiative for an “Agenda 2020: A new Roadmap on minimum standards of certain procedural safeguards” is designed to lead to the strengthening of the legal principle of mutual recognition and its underlying component: mutual trust. A Roadmap adopted by the EU Member States in 2020 is a politically realistic goal to achieve the real objective, legislation by means of Directives or Regulations (cf. Art 82 TFEU) on the following (cf. Guest Editorial eucrim 2017/1) for the future legislative period(s):

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

B. The European Criminal Bar Association

Today the ECBA represents over 40 different European countries including all EU Member States. The membership is composed of individual defence practitioners and national defence associations. The ECBA's aim is to promote the fundamental rights of individuals under investigation, suspects, accused and convicted defendants, not only in theory, but also in the daily practice in criminal proceedings throughout Europe. In 2016 a sub-association, the European Fraud and Compliance Lawyers (www.efcl.eu), was founded; the EFCL holds an annual conference in June.

Through its conferences, committees, working-groups, website and newsletters the ECBA provides a suitable forum to access up-to-date information on legal developments. Through the work of its board, the (new) Human Rights Committee, the (new) Committee on EU Legislation and all members the association actively seeks to shape future legislation with a view to ensuring that the rights of European citizens in criminal proceedings are enhanced in practice. Through the networking opportunities available with individual and collective membership, members establish one to one contact with other practitioners and national defence associations in other Member States both with a view to the exchange of information and to practical cooperation in specific cases. This experience from comparative jurisdictions shapes and informs the submissions which are made by the ECBA to the lawmakers, and ensures that those submissions are given due weight.

The ECBA was a member of the EU Justice Forum and participates in several EU-projects (e.g. training events for defence lawyers jointly with ERA and EIPA; networking/legal aid; letter of rights; pre-trial emergency defence; European Arrest Warrant; translation and interpretation; SUPRALAT; rights of children). We have been regularly invited to many EU experts' meetings and we are regularly consulted by EU institutions concerning criminal law issues. We have established and constructive relations to the Council of Bars and Law Societies of Europe (www.ccbe.eu) and other European organisations. Further information on the ECBA can be found at our website: www.ecba.org.

C. Mutual Recognition and Mutual Trust in Criminal Matters

I. History of EU Legislation on Procedural Rights

Since the Maastricht Treaty 1992/1993, the Amsterdam Treaty 1997/1999 and the Tampere Council in 1999, the legal principle of mutual recognition of judicial decisions has been continually established and ultimately laid down in the Lisbon Treaty 2007/2009 in Art. 67, 82 TFEU. Mutual recognition as a generally recognised legal principle in the field of criminal matters requires mutual trust. This was clearly expressed in 2009 by the Stockholm Programme and the "first" Roadmap on procedural safeguards. Nobody in Europe can disavow or ignore the political success story in this field since the adoption of the "first" Roadmap in 2009. The ECBA is proud to have constructively contributed to the formation of the "first" Roadmap from 2002 to 2009, which was a thorny path, and to the subsequent EU legislation on the various measures in the field of procedural safeguards after 2009 (in particular translation/interpretation, right to information, access to a lawyer and legal aid, rights of children, presumption of innocence and right to silence, right to be present at trial). We are still missing an appropriate Measure on EU wide minimum standards for the specific protection of vulnerable adult suspects (cf. Measure E of the 2009 Roadmap), for example those people with disabilities, and we urge the responsible politicians insofar to complete the "first" Roadmap of 2009. We are also yet to take the next step following the Green Paper on Pre-Trial Detention (Measure F of the 2009 Roadmap) and the "Lisbonising" process of the EAW-FD despite certain jurisprudence of the CJEU and many national courts that provide obstacles for surrender and describe reasons not to trust and not to recognise mutually judicial decisions EAW from other EU Member States (cf. Commission Notice of 28 09 2017: Handbook on EAW C 2017/6389; Cost of Non-Europe Report EPRS December 2017).

II. Present

The CJEU aims to establish mutual trust even as a legal principle in the EU (cf C-404/15 and 659/15) in order to guarantee fundamental rights effectively. The mission of achieving mutual trust normatively and factually has not been completed because partial distrust as an empirical phenomenon still clearly exists between EU Member States and from the EU citizens' point of view. Therefore, we must carefully observe the implementation process of all the Directives that were adopted in conjunction with the Roadmap after 2009 and the additional Directive (EU) 2016/343 on presumption of innocence and the right to be present at the trial. We would like to express our expectation that the defence lawyers working at the European level represented by the ECBA and the CCBE will be part of the compliance process directed by the Commission in order to improve the quality of process and outcome of this necessary compliance regarding the implementation of EU legislation at the national level.

The Commission and the 20 (22) participating Member States expect to launch the EPPO in autumn 2019. Luxembourg will be the host city for EPPO. There will be an interim administration arrangement in place until November 2020 when it is expected that EPPO will be in a position to manage its own offices. A draft of potential rules of procedure are to be submitted by November 2019. This will deal with the daily operating bases of EPPO. It is not considered that compliance or non-compliance with internal rules will be a matter that could be reviewed by the CJEU (cf Regulation 2017/1939 Art 42). However, we would like to express our expectation that the defence lawyers working at the European level represented by the ECBA and the CCBE will be part of the process of drafting those rules of procedure (EPPO).

Further procedural safeguards in criminal proceedings and more common minimum standards (cf. Art 82 TFEU) are not yet on the political EU agenda.

III. Need for action due to obvious shortcomings

1. (Pre-Trial) Detention and European Arrest Warrant

We should attempt to improve, to modernize and to "lisbonise" the existing mutual recognition instrument, the European Arrest Warrant, that covers pre-trial detention and final judgements (cf *ECBA Handbook on the EAW*: <http://handbook.ecba-eaw.org/>). Certain rights of prisoners should be guaranteed at a minimum level. Effective legislative measures at the EU level are lacking in the entire area of pre-trial detention (cf. Measure F of the 2009 Roadmap) where the EU competence according Art 82 TFEU is not in doubt: The very different standards in prison conditions infringe partly the legal principle of human dignity and have become obstacles to EAW proceedings (cf Commission Notice of 28 09 2017: Handbook on EAW C 2017/6389; Cost of Non-Europe Report EPRS December 2017). Art 33 of the Regulation 2017/1939 on EPPO refers to national law (only). The European Supervision Order is actually not used in practise and the Framework Decision (2009/829/JHA) is still not (or not properly) implemented in many Member States (cf FRA report 2016 p. 30 ff). There are no minimum standards for the legal and factual requirements for both a national arrest warrant and an EAW. This leads to fundamental problems, for instance in cases which clearly lack proportionality (contrary to the EIO, cf Art 6 Directive 2014/14/EU). There are no EU standards for time limits for pre-trial detention or less intrusive measures or specific remedies and/or regular judicial control by the responsible authorities. An arrest warrant should always be a measure of last resort in Europe. Practical issues arise repeatedly regarding access to the file and intentional non-disclosure of (exculpatory) information by the state authorities throughout Europe; the Regulation 2017/1939 on EPPO refers in Art 45 par 2 to national law (only).

2. Certain Procedural Rights in Trials

Apart from the right to be present in trials (Directive 2016/343/EU) the entire trial phase suffers 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 Art 6, 13 ECHR, in Art 14 ICCPR and in Art 47 ff CFEU and

the corresponding jurisprudence the daily practises in certain Member States provides multiple violations of these rules which are applicable for the accused and/or the defence lawyer. The areas in which these rules are violated include: admission and limitation function of bill of indictments, impartiality and independence of judges and prosecutors (right to recuse), continuous and confidential access to the lawyer (seating order), access to the complete files (information), right to defence statement, right to confrontation with witnesses, right to directly ask questions to witnesses (cross examination), right to request for evidence, recording of trials and right to access to recordings and minutes. Regarding future EPPO proceedings we have to be aware of the weak framework regarding forum choice in Art 26 par 4 and 36 par 3 Regulation 2017/1939 and the weaknesses of judicial control (cf. Art 42).

3. Witnesses' Rights and Confiscatory Bans

There should be minimum standards for witnesses' rights, legal privileges and corresponding confiscatory bans. Transnational investigations and future EPPO proceedings should have common minimum standards in order to protect all citizens equally who are concerned of any criminal investigation or trial in the EU. It should be a matter of course that a witness is allowed to consult a lawyer before any questioning, therefore witnesses should have the right to continuing and confidential access to a lawyer; that must apply to all concerned civil parties (e.g. companies). Witnesses need a legally secured right to silence when the possibility of self-incriminating statements exists (cf. Directive 2013/48/EU Art 2 par 3 and recital 21). The traditional legal privileges must be recognised and respected in all criminal proceedings throughout Europe. Dangers of forum shopping can be reduced. Existing rules for the protection of victims have to be considered (cf. Directive 2012/29/EU).

4. Admissibility and Exclusion of Evidence and other Evidentiary Issues

Other evidentiary issues (the admissibility or exclusion of evidence, the right of the defence to gather or to request for evidence, recording of police interviews) need certain minimum rules alike. After the implementation of the European Investigation Order (Directive 2014/41/EU), the potential adoption of a Regulation on a Protection and Preservation Order (COM 2018-225) and other evidence related measures, and in future EPPO proceedings it is necessary that an adequate participation of the defence (right to confrontation) and/or subsequently control by the defence (access to the file) is safeguarded during the investigative stage of the proceeding, i.e. before formal accusation at court. All these issues are essential in order to establish the required mutual trust in the EU (cf. Art 82 par 2 TFEU). The Regulation 2017/1939 on EPPO avoids any solution in Art 37, 45 and demonstrates the political difficulties and failure to achieve constructive concepts at EU level. The issues remain.

5. Conflicts of Jurisdiction and ne bis in idem

Conflicts of jurisdiction (Art. 82 par. 1 b) TFEU) arise when two or more Member States claim criminal jurisdiction to investigate, prosecute and adjudicate suspicious criminal conduct; an area that certainly relates to the issue of ne bis in idem (Art 50 CFEU, Art 54 CISA) where we have a precise legal framework and certain jurisprudence but where many practical problems exist and remain. In addition, it is self-evident that double or multiple prosecution and trials should be avoided in a common area of freedom, security and justice. Parallel criminal proceedings can endanger the interests of all parties involved. Different legal regimes in connection with parallel proceedings produce uncertainties and lacks of foreseeability. When several countries exercise jurisdiction over the same facts efforts and resources are wasted and lead to potentially arbitrary and diverging results. The outcome of the Commission's efforts starting with the Green Paper in 2005 is poor: the Framework Decision on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings (2009/948/JHA), adopted on 30 November 2009 just before the Lisbon Treaty entered into force, establishes a simple concept of communication between the involved Member States. Where it is not possible to reach consensus the matter may be referred to Eurojust where very flexible guidelines were established in 2003. The analysis is: neither binding rules preventing conflicts of jurisdiction nor reliable mechanisms to resolve conflicts of jurisdiction exist at EU level. However, the legal principle of ne bis in idem demands normatively for better protection

in the phase (investigation, prosecution, trial, sentence) prior to the direct applicability of the ne bis idem principle (according to the jurisprudence of the CJEU, cf. *ECBA Handbook on the EAW* E.1 and J: <http://handbook.ecba-eaw.org/>).

6. Remedies and Appeal

In all phases of criminal proceedings it is necessary to grant effective legal remedies in order to improve the quality of criminal proceedings and judicial decisions including judgements. Procedural guarantees including the right to be heard are not sufficiently protected (i.e. practically and efficiently not only theoretically and illusory). One of the most crucial issues is the factual prevention of the defence from information (evidence, files) during the investigative stage of a criminal proceeding. Accordingly the Regulation 2017/1939 on EPPO refers to national law (Art 45 par 2) and in Art 41 par 2 b to the Directive 2012/13/EU (Art 7) which allows (“at the latest”) the exclusion from access to the file until the formal accusation to a judgment of a court. In order to be in a position to control and to consider filing a remedy, as a matter of principle, the defence should get access to the complete file which has been presented to the court or another judicial authority upon the request for search warrants, confiscation or freezing orders, telephone tapping or other bugging operations and other coercive measures (cf. Art 7 par 1 Directive 2012/13/EU for arrest warrants). Prevention from access to information avoids justice and fairness of any proceeding.

7. Compensation

The longstanding discussion on EPPO since 2013 and the many different interim drafts have further demonstrated that compensation is not seen as an issue relating to criminal proceedings at the EU level. The Regulation on EPPO establishes rules on compensation (cf. Art 113 Regulation 2017/1939), however, that is neither a general rule as a minimum standard for criminal proceedings throughout the EU nor does it cover compensation for damages after (ex post) unlawful deprivation of liberty (cf. Art 5 para 5 ECHR) or other (ex post) unjustified coercive measures, or for legal fees in cases of acquittal or termination of the investigation (independent of detention), due to lack of evidence or, in cases of proven innocence, as the result of an investigation or after miscarriage of justice (cf. Protocol no. 7 to the Convention, Art 3, and Art 14 par 6 ICCPR). The European legislator should close this gap. As a red line, any acquittal must lead to compensation including legal fees at a reasonable level. Many further questions arise and demand for minimum standards throughout Europe, such as: Is there a right to compensation for non-material loss (e.g. moral damages) resulting from unlawful detention? How is the right to compensation for non-material loss calculated (e.g. on the basis of evidence and/or a fixed rate per day, week or month)? What factors are taken into account in determining whether compensation for non-material loss should be awarded? Or is an individual who was unlawfully detained automatically entitled to such compensation? Is there a requirement for reasoning to be provided in support of any decision not to award compensation for non-material loss? Is there any cap on the amount of compensation for non-material loss which can be paid in an individual case? Is compensation for non-material loss usually awarded following a compensation claim for unlawful (pre-trial) detention? Which rules on compensation should exist for EAW's (issuing and/or executing state)?

IV. Agenda 2020

Action should continue to be taken at the EU level in order to strengthen the rights of suspected or accused persons in criminal proceedings. This initiative will ultimately lead to the strengthening of the legal principle of mutual recognition and its underlying foundation: mutual trust. Following the election in 2019 it will be appropriate to determine the future working programme of the EU Institutions. The time for political preparation is running. The difficulties and complexity of certain legal issues should not discourage action. The ECBA suggests therefore the initiative “Agenda 2020: A new Roadmap on minimum standards of certain procedural safeguards” which should include research by studies, impact assessment(s) by the EC and eventually legislation by means of Directives or Regulations (cf. Art 82 TFEU) on the following (cf. Guest Editorial eucrim 2017/1):

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