The European Arrest Warrant
- an expression of the mutual trust principle -

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Introduction

In the last decades, the European Union started to resemble more to a "laboratory" in which several new and interesting ideas have developed and some “experiments” have been carried out in the field of international cooperation in criminal matters. The new “European” approach to extradition is based on two ideas: building an area of freedom, security and justice within the European Union (EU) and striving to achieve mutual recognition of judicial decisions rendered by the criminal justice organs of the Member States (MS). The final outcome might be *“the long-term possibility of the creation of a single European area for extradition”* as specified in the Strategy of the European Union for the next millennium regarding prevention and control of organized crime[1].

Although the concept of mutual recognition is not unknown in the criminal justice, it received a new meaning in the EU context, mainly by extending it to all decisions which are made during the criminal proceedings, not just those imposing criminal sanctions. The European Council (EC) therefore endorsed the principle of mutual recognition which, in its view, should become *"the cornerstone of judicial cooperation"* in both civil and criminal matters within the EU[2].

The European arrest warrant (EAW) is the first instrument applying the principle of mutual recognition. It can be regarded as a success, in terms of increasing the efficiency of judicial cooperation, and has overcome most of the difficulties initially encountered. Nevertheless, some problems remain - the divergent implementation of the FD (FD) and the difficulties with respect to double criminality in some fields by MS suggest that a certain degree of harmonization in the field of criminal matters would be beneficial to assist mutual recognition in respect of some substantive criminal matters.

The following situation was composed in order to highlight the valances of mutual recognition.

During March 2008 and March 2009, an organized criminal group with strong trans border connections was established on the territory of Portugal. The group was formed by a large number of citizens of EU MS who perpetrated crimes in the territory of Romania, Hungary, France Spain and Portugal. During this period of time, they began their criminal

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1 Official Journal C 124 of 3.5.2000, p. 28.

2 Presidency Conclusions within the Tampere European Council (15 and 16 October 1999), http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/00200-r1.en9.htm.

activity, which comprised several complex transnational crimes like money laundering, drug smuggling, putting into circulation of counterfeit products and fraud[3].

All members of the group jointly acted in order to commit the crimes. They presented false documents at the customs control, false origin and transportation documents and false quality certificates of the products, causing therefore an important prejudice.

During the referred period of time, evidence of the crimes was collected through interception of telephone conversations, analysis of video surveillance and controlled deliveries. This evidence was corroborated in an international cooperation framework. Romanian authorities together with French and Portuguese homologues collaborated in order to successfully establish the identity of the members of the group.

The present paperwork will only refer to the situation of two of the members, namely: Mihai Popescu and Andrei Ionescu, both Romanian citizens, aged 15.

Mihai Popescu, after finding out he is being prosecuted by Romanian authorities for the above mentioned crimes he flew with his parents in Portugal, his parents working there as farmers. In respect of Mihai Popescu a EAW was issued by the Bucharest Tribunal; the Portuguese authorities refused to execute the EAW on the grounds of Art. 3 para. 3 of the FD[4] on the EAW and on the grounds of Art. 19 of the *Portuguese Penal Code* which establishes that minors under 16 years old shall not be criminally responsible.

Andrei Ionescu, also trying to escape the prosecution, ran to France, being helped by his "friends in crime" to cross the border illegally. In respect of Andrei Ionescu, the EAW was also issued by the Bucharest Tribunal. Consequently, France, as executing State, surrendered Andrei Ionescu. The decision was taken considering the provisions of 88-2 of the French Constitution[5], Art. 122-8 of the French Penal Code, Art. which establishes that minors older than 13 can be criminally responsible, as well as under the provisions of the constitutional law number 267/25.03.2003 regarding the EAW. Andrei Ionescu stands trial in Romania in order to establish his responsibility with regard to the crimes he had allegedly committed from 2008-2009.

The issue raised by this situation is more than one related to discrimination, it emphasizes the importance of the mutual trust principle. The EAW is an instrument which

[3] Crimes provided by the Law no. 143/2000 on preventing and combating drug trafficking and illegal drug consumption, with the subsequent changes and completions and crimes provided by the Law no. 656/2002 on preventing and punishing money laundering.

[4] Council Framework Decision on the European arrest warrant and the surrender procedures between MS, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2002:190:0001:0018:EN:PDF

[5] „*Statutes shall determine the rules relating to the European arrest warrant pursuant to acts adopted by the institutions on the European Union."*

enables MS to proceed in criminal cases. Mutual trust is of essence in such situations, since executing a EAW asks for trust and recognition of another MS's acts. However, there are aspects which hinder the execution of a EAW. It is because of lack of national legislation harmonization that these situations occur. In our case, the age established for criminal liability is the reason for not executing the EAW, therefore not carring into effect the principle of mutual trust. The differences that exist within the national criminal laws and the shortage of harmonization bring not only discrimination challenges to handle, but also aspects regarding the confines of the actual application of mutual recognition.

The thesis will first aproach the directing principles - double criminality, non-discrimination and mutual recognition, aspects which will further be analysed in practical situations concerning the procedural safeguards and states' responsibility before the European Court of Human Rights (ECtHR) for acts issued by MS in the EAW procedure.

Double criminality and Non-discrimination principle

The argument intends to underline how the disparities of the national settlements could nourish discrimination on the basis of age, which is prohibited by Art. 19 of the Treaty of Functioning of the European Union (TFEU)[6]. The principle of non-discrimination requires that comparable situations must not be treated differently. In our situation, the shared competence between the MS and the EU creates a situation in which two minors found in similar situations suffer different treatment due to different national legislation. At the time of the EAW issuing, the criminal policy of Portugal and France settled different ages for criminal liability. The question is if such differential treatment is "objectively justified".

Regarding the differences between MS criminal legal systems, in *Advocaten voor de Wereld*[7], the European Union Court of Justice (EUCJ) supported the view that harmonisation of national criminal law is not yet a precondition for the application of the EAW and for mutual recognition. In view of the Court, the harmonisation approach fails to acknowledge the national choice and penal cultures in the different EU MS. The Europeanization of criminal law creates the potential for diminishing the traditional limits of sovereignty between MS.

[6] *"Without prejudice to the other provisions of the Treaties and within the limits of the powers conferred by them upon the Union, the Council, acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation*"

[7] Case C-303/05 Advocaten voor de Wereld VZW v Leden van de Ministerraad, judgment of 3 May 2007.

A similar situation arises with regard to the 32 crimes for which, the FD on EAW removed the requirement for double criminality[8]. As a consequence, the MS have discretionary rather than compulsory grounds for a refusal to surrender for offences not falling within those categories. Double criminality is one of the requirements for extradition procedures. It means that the acts forming the object of the extradition request need to be classified as criminal in the domestic legislation of both the requesting and the requested States. This requirement raises serious concerns, especially from the point of view of its compliance with the principle *nullum crimen sine lege.*

States' sovereignty finds it hard to tolerate the lack of precise definition which also carries the potential of inconsistent implementation of the FD within the legal orders of the 27 MS. The relaxation of the principle of double criminality will mean that each MS is effectively accepting the criminal laws of all other MS of the EU without a clear picture of what those laws might be.

Notwithstanding, the EUCJ made it obvious in *Advocaten voor de Wereld* that the absence of common definitions does not imply an inconsistency with the principles of equality and legality in criminal proceedings. The Court also emphasized that the validity of the FD stems from the fact that the definition of the listed offences constitutes a matter reserved to the MS.

Therefore, the distinct approach regarding the age starting with which a person can be held responsible from a criminal point of view brings forth different consequences for persons having similar criminal profiles, since a mandatory ground for refusal to surrender a person is that the requested person is below the age of criminal responsibility in the executing state.

The processing of the surrender request is an easy example of how the mutual recognition principle is incorporated into the practical process. The issuing state is required to submit a warrant (a form appended to the FD) with basic details of the offences and the offender along with contact details for the issuing authority.

Another consequence implies that the MS' sovereign powers in criminal matters are in effect partially given up. The categories of offences listed in the FD reflect the common will of MS in the Council to overcome these sovereignty concerns in the context of the intensification of European action against all types of criminality ranging from terrorism and organised crime to computer-related crimes.

[8] Article 2 (2) of the Council Framework Decision 2002/584/JHA, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2002:190:0001:0018:EN:PDF

Mutual recognition

The principle of mutual recognition is based on the assumption that MS meet the standards of human rights protection set out in the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), therefore those human rights abuses are unlikely to occur in MS. This assumption, however, is open to question as, while it is true that all MS have signed up to the ECHR, all have had and continue to have judgments against them in the European Court of Human Rights (ECtHR).

The fact that signature of the ECHR is a pre-requisite of EU membership is often cited[9] as a justification for mutual trust. Respect for human rights, however, is not simply a matter of declaratory intent. The protections must be real, not simply apparent on paper.

In contrast to the legislative mutual recognition programme, which so far dealt mainly with measures aimed at facilitating the prosecution of suspects and the enforcement of judgments across the EU, the case law of the EUCJ clearly brings another aspect of the mutual recognition principle into the picture. In the *Gözütok and Brügge*[10] judgment and in subsequent *ne bis in idem* decisions, the EUCJ showed how the principle of mutual recognition can play an alternative role in stopping prosecutions and thus fulfilling a protective role for the individual.

The EUCJ deduces that the MS have mutual trust in each other's criminal justice systems and that each of them recognises the criminal law in force in the other MS even when the application of the various criminal justice systems produces divergent effects in the EU MS. This reasoning is fundamental; according to it, the Court confirms the legally binding nature of the mutual recognition principle for the EU's area of criminal justice, based upon the mutual trust which is deemed to exist between MS.

In subsequent cases, the EUCJ expresses the same view: disparities between the criminal law systems of the MS regarding definition of drugs crimes (*Van Esbroeck*[11], *Van Straaten*[12]*)* or regarding prescription periods (*Gasparini*[13]*)* cannot preclude the principle of mutual recognition from playing its role. The Court recalls in its case law that the EU set itself the objective of maintaining and developing the Union as an Area of Freedom, Security and Justice in which the free movement of persons is assured (Art. 2 Treaty on European

[9] Susie Alegre, Marisa Leaf, *Mutual recognition in European Judicial Cooperation: a step too far too soon? Case study - the European Arrest Warrant*, European Law Journal, vol.10, no. 2, March 2004, p.216.
[10]Joined Cases C-187/01 and C-385/01 of Hüseyin Gözütok and Klaus Brügge, judgement of 11 February 2003.
[11]Case C-436/04 of Leopold Henri Van Esbroeck, judgement of 9 March 2006.
[12]Case C-150/05 of Jean Leon Van Straaten v Staat der Nederlanden, Republiek Italië, judgement of 28 September 2006.
[13]Case C-467/04 of Gasparini and others, judgement of 28 September 2006.

Union). This right to freedom of movement can only be effectively guaranteed if the perpetrator of an act knows that, once he has been found guilty and served his sentence, or, where applicable, been acquitted by a final judgement in a MS, he may travel within the EU territory without fear of prosecution in another MS. The free movement of persons, which has always been one of the pillars of the internal market, is thus crucial to the Area of Freedom, Security and Justice too. In *Van Esbroeck* the Court also relied on the free movement argument to sustain its argument that a factual interpretation of '*idem'* (if the facts are identical) should be preferred to a juridical interpretation (if the legal provisions are identical).

The analysis of policy statements, legislative instruments and case law shows us that mutual recognition is clearly intended as an important means of creating the Area of Freedom, Security and Justice. The demand for harmonisation of criminal laws to assist mutual recognition will not go away, but it seems equally difficult to overcome some of the objections to harmonisation. Mutual recognition should be seen as an alternative to harmonisation of the substantive law.

Mutual recognition appears to be a dynamic concept. Its continuous development is determined not only by the case law of the EUCJ, but also by the everyday work of legal practitioners. As we have seen, they face various types of problems, which concern legal definitions as well as the concrete functioning of the mechanisms elaborated at European level. The latter depends very much on each legal system to which mutual recognition applies. In this respect, mutual recognition is not merely an abstract entity. It is rather a living creature, which needs oxygen (i.e. mutual trust) and organs (the judicial authorities of the respective MS).

The flexible nature of the principle was also confirmed by the comparison made with the internal market context and the functioning of the principle in cooperation in civil matters. Some lessons could be drawn from the internal market project, where mutual recognition was never granted *carte blanche*, and where some control clearly remained in the hands of the MS and, desirably in the hands of national judges.

In the area of protections of human one crucial commonality is the acknowledgement that individuals must be protected from certain depredations against their person, and that international laws are needed to protect people from policies which ultimately affect the global community. Criminal procedural rights are one of the aspects regulated by the ECHR. Art. 5 and 6 of the ECHR are regulating the basic procedural rights as human rights in criminal matters.

Procedural Safeguards - from case law to act

To emphasise the importance of cooperation between MS we will return to the situation of Andrei Ionescu, a romanian citizen aged 15 whose EAW will be executed by France, as state of execution. Asked by the French authorities whether he speaks French, Andrei Ionescu answers yes. His French level of proficiency is low so he cannot always grasp the meaning of a sentence but the French authorities consider that he can speak French, so they refuse him the possibility of being assisted by an interpreter. His objection is rejected. Is there any problem? Does the state of execution have to translate the documents concerning the execution of the EAW since the ECHR speaks only about interpretation not about translation? If the State has to translate documents of proceedings to Andrei Ionescu (assuming that it provided the assistance with interpretation), will he be required in case of conviction for paying the interpretation costs? Furthermore, is there any difference between the ECHR, its case law and the European legislation regarding the right to a fair trial?

The idea of European Criminal Procedure is rather new. But, with the 2003 Green Paper[14], the MS examined whether it was appropriate and necessary to introduce in the EU common minimum standards for procedural safeguards for persons suspected or accused of, and prosecuted or sentenced for criminal offences. In its Green Paper the Commission came to the conclusion that, at this stage, priority should be given to the following fundamental rights: the right to legal assistance and representation; the right to an interpreter and translator; the right of vulnerable groups proper to protection; the right of nationals of other MS and of third countries to consular assistance; and finally, the right to information about rights. European Commission (EC) made a proposal for a FD[15] on certain procedural rights having a starting point the ECHR. Due to reasons that shall not be the topic of this paper, only in 2009 the EU justice ministers agreed on a roadmap[16] to foster protection of suspected and accused persons in criminal proceedings. The roadmap outlines six measures following the step by step approach. A. Right to interpretation and translation; B. Information of rights and information on charges; C. Legal advice and legal aid; D. Communication with relatives, employers and consular advice; E. Special safeguards for vulnerable suspects and accused

[14] Green Paper from the Commission "Procedural Safeguards for Suspects and Defendants in Criminal Proceedings throughout the European Union", http://eur-lex.europa.eu/LexUriServ/site/en/com/2003/com2003_0075en01.pdf

[15] Proposal for a council framework Decision on certain procedural rights in criminal proceedings throughout the European Union {SEC(2004) 491} /* COM/2004/0328 final - CNS 2004/0113 */, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2004:0328:FIN:EN:PDF

[16] Roadmap with a view to fostering protection of suspected and accused persons in criminal proceedings presented on 1 July 2009, http://www.ejtn.net/Documents/About%20EJTN/Linguistics%20Project/2009%20Roadmap.pdf

persons; F. Green Paper on Pre-trial Detention to be introduced one after the other in the years to come.

The Directive[17] adopted in 2010 is the first concrete measure of the "Roadmap". It aims at achieving a more consistent implementation of the rights and guarantees set out in Art. 6 of the ECHR, and to provide a further development within the EU of the minimum standards set out in the ECHR and in the EU Charter[18].

The Directive states that it respects Art. 6 of the ECHR, Art. 47 of the EU Charter enshrine the right to a fair trial. Art. 48(2) of the Charter guarantees respect of the right of defence and that it should be implemented accordingly.

According to Art. 6 para. 3 (e) of the ECHR everyone charged with a criminal offence has the following minimum rights […] (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court."

In the *case of Luedicke, Belkacem y Koc*[19] the applicants were required to pay the interpretation after being convicted. The Court notes that, "for the purpose of ensuring a fair trial, para. 3 of Art. 6 (Art. 6-3) enumerates certain rights accorded to the accused (a person "charged with a criminal offence"). Nonetheless, it does not thereby follow, as far as sub-para. (e) is concerned, that the accused person may be required to pay the interpretation costs once he has been convicted. To read Art. 6 para. 3 (e) as allowing the domestic courts to make a convicted person bear these costs would amount to limiting in time the benefit of the Art. and in practice to denying that benefit to any accused person who is eventually convicted. Such an interpretation would deprive Art. 6 para. 3 (e) of much of its effect, for it would leave in existence the disadvantages that an accused who does not understand or speak the language used in court suffers as compared with an accused who is familiar with that language - these being the disadvantages that Art. 6 para. 3 (e) is specifically designed to attenuate". The Directive states that MS shall meet the costs of interpretation and translation resulting from the application of Art. 2 and 3, irrespective of the outcome of the proceedings.

Although the guarantees provided by Art. 6 of the ECHR have to take place in front of an independent and impartial tribunal established by law when charged with a criminal accusation in the *case of Kamasinsky*[20] the ECtHR ruled that the right, stated in art. 6-3(e), to

[17] Directive 2010/64/EU of the European Parliament and of the Ccouncil of 20 October 2010 on the right to interpretation and translation in criminal proceedings, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:280:0001:0007:EN:PDF

[18] Charter of Fundamental Rights of the European Union (2010/C 83/02), http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:0389:0403:en:PDF

[19] ECtHR, *Luedicke, Belkacem y Koc v. Germany,* judgement of 28 November 1978.

[20] ECtHR, *Kamiansky v. Austria*, judgement of 19 December 1989.

the free assistance of an interpreter applies not only to oral statements made at the trial hearing but also to documentary material and the pre-trial proceedings.

ECtHR reaches the same conclusion in the *case of Hermi*[21] when explains that para. 3 (e) of Art. 6 states that every defendant has the right to the free assistance of an interpreter. That right applies not only to oral statements made at the trial hearing but also to documentary material and the pre-trial proceedings. This means that an accused who cannot understand or speak the language used in court has the right to the free assistance of an interpreter for the translation or interpretation of all those documents or statements in the proceedings instituted against him which it is necessary for him to understand or to have rendered into the court's language in order to have the benefit of a fair trial.

The ECtHR admits that Art. 6 para. 3 (e) does not go so far as to require a written translation of all items of written evidence or official documents in the procedure. In that connection, it should be noted that the text of the relevant provisions refers to an "interpreter", not a "translator". This suggests that oral linguistic assistance may satisfy the requirements of the ECHR. Nonetheless, the interpretation assistance provided should be such as to enable the defendant to have knowledge of the case against him and to defend himself, notably by being able to put before the court his version of the events. In view of the need for that right to be practical and effective, the obligation of the competent authorities is not limited to the appointment of an interpreter but, if they are put on notice in the particular circumstances, may also extend to a degree of subsequent control over the adequacy of the interpretation provided.

The Directive on the right to interpretation and translation goes one step further. If the right of translation is admitted by Art. 6 par 3 (e) only in subsidiary, the Directive acknowledges that there are two separate rights: one to interpretation and one to translation.

Article 2 of the Directive regulates that MS shall ensure that suspected or accused persons who do not speak or understand the language of the criminal proceedings concerned are provided, without delay, with interpretation during criminal proceedings before investigative and judicial authorities, including during police questioning, all court hearings and any necessary interim hearings. It can be easily observed that this Article is being in accordance with the reasoning from the c*ase of Kamasinski* where it is mentioned that the right of interpretation has to be granted in the pre-trial proceedings as well.

[21] ECtHR, *Hermi v. Italy*, judgement of 18 October 2006.

What brings new the Directive is the fact that grants the right to interpretation for the persons under criminal proceedings before investigative and judicial authorities with hearing or speech impediments. The ECtHR did not rule regarding this issue but from the judgements made on matter of interpretation and translation could be understood this right as well.

Article 2 para. 2 of the Directive states that the right of interpretation is available between the accused person and the counsellor. It is an application on the judgement on *case of Lagerblom v. Sweden*[22] when the court stated that there had been no breach of Art. 6 par 3 of the ECHR because the guarantee for an accused who cannot understand or speak the language of the court to have the assistance of an interpreter extends to all those documents or statements in the criminal proceedings which it is necessary for the accused to understand or to have rendered into the court's language in order to have the benefit of a fair trial.

The Directive provides the possibility of suspected or accused persons to challenge a decision finding that there is no need for interpretation and, when interpretation has been provided, the possibility to complain that the quality of the interpretation is not sufficient to safeguard the fairness of the proceedings.

The other important right provided by the Directive is the one to translation of essential documents. Within a reasonable period of time the persons who do not understand the language of criminal proceedings concerned are provided with a written translation of all documents which are essential to ensure that they are able to exercise their right of defence. The rules on how much material is translated vary according to the MS and also in accordance with the case's nature. According to the EC, this variation is acceptable as long as the proceedings remain fair. The onus should be on the defence lawyer to ask for translations of any documents he considers necessary over and above what is provided by the prosecution.

Nevertheless, even if the states did permit some variation on how many documents shall be translated, shall be considered essential documents any decision depriving a person of his liberty, any charge or indictment, and any judgment.

The standard of interpretation and translation must be of sufficient standard to enable the suspect to understand the nature and cause of the accusation. The interpretation should enable the defendant's "effective participation" in the proceedings. MS shall ensure that when a suspected or accused person has been subject to questioning or hearings by an investigative or judicial authority with the assistance of an interpreter or when

[22] *Lagerblom v. Sweden* (Application no. 26891/95) 14 January 2003.

a person has waived the right to translation it will be noted that these events have occurred, using the recording procedure in accordance with the law of the MS concerned.

In the case of *Lagerblom v. Sweden* the Court rules that interpretation assistance provided should be such as to enable the accused to have knowledge of the case against him and to defend himself. As for the recordings, in the case of *Hermi v. Italy*, using the records of public hearings the Grand Chamber of ECtHR rules that an accused person who lived for at least 10 years in the state where he was arrested and spoke that language, fact admitted by the accused person himself, can give the sufficient reason to believe that the applicant was capable of grasping the significance of the notice informing him of the date of the hearing, and that it was not necessary to provide any translation or interpretation. In the Directive it is clearly mentioned that any waiver of the right to translation of documents shall be subject to the requirements that suspected or accused persons have received prior legal advice or have otherwise obtained full knowledge of the consequences of such a waiver, and that the waiver was unequivocal and given voluntarily. This provision emphasises the fact that the right to translation is an independent one, whom may be waived, not a secondary one as it is seen in the case law of the ECtHR.

It's been said[23] that a training system for translators is essential and that it should focus on general practice of interpretation and translation and specific practice of the legal system. MS which currently do not have any training system should be required to develop one. As guaranteeing the quality of the training is of real importance, standards should be governed and accredited by an independent body. This accreditation should be renewed on a regular basis, to maintain skills and continuous professional development. Furthermore, a register should be made listing all accredited interpreters and translators, and should be easily accessible to courts and legal practitioners. In this regard, it is important to stress that interpretation and translation are two different professions which should be treated accordingly. Consequently two different registers are required[24]. The Directive now states that in order to promote the adequacy of interpretation and translation and efficient access thereto, MS shall endeavour to establish a register or registers of independent translators and interpreters who are appropriately qualified.

The Directive concerns particularly the proceedings for the execution of a EAW. The executing MS shall ensure that its competent authorities provide persons subject to such proceedings who do not speak or understand the language of the proceedings with

[23] http://arno.unimaas.nl/show.cgi?fid=3891
[24] *Idem*, p. 11

interpretation. Regarding the translation, in proceedings for the execution of a EAW, the executing MS shall ensure that its competent authorities provide any person subject to such proceedings who does not understand the language in which the EAW is drawn up, or into which it has been translated by the issuing MS, with a written translation of that document.

Why does the EU work towards achieving common minimum standards of procedural rights in criminal proceedings?

A simple answer would be that the case law of the ECtHR shows that violations of defence rights, as set out in Art. 5 and 6 of the ECHR do occur[25]. Then there is the problem of liability. A directive binds the MS to implement its provision within time-limits set by it. Accordingly to the case of *Francovich and Others*[26] *"if a MS fails to fulfil its obligation under the third paragraph of the Article 189 of the Treaty to take all measures necessary to achieve the result prescribed by a Directive, the full effectiveness of that rule of Community law*[27] *requires that there should be a right to reparation provided that three conditions are fulfilled.[…] On the basis of the rules of the national law on liability that the State must make reparation for the consequences of the loss and damage caused. In the absence of EU legislation, it is, for the internal legal order of each MS to designate the competent courts and lay down the detailed procedural rules for legal proceedings intended fully to safeguard the rights which individuals derive from Community Law […]"*. From the mentioned above, it can be understood that if a MS fails to fulfil the obligation of transposition or fulfils it wrongly, private persons are entitled to reparation of the damage caused. The detained persons will in this case introduce civil actions in front of national courts.

If the State's of execution proceedings of the EAW does not follow the procedural guarantees of Art. 6 of the ECHR, who is liable and how that state can be held responsible? In the situation of Andrei Ionescu, if the breach of the right to interpretation and translation occurs after the transposition date of the EU Directive, the victime can file a complaint before the States' of execution national courts for repairing the damages caused by non-compliance with the provision of the Directive.

Regarding State's liability, related to Andrei Ionescu's case, another question rises: since the violations of the rights stipulated by the ECHR are done during the execution of a EAW which was issued by Romania, therefore as a result of this act, which is the responsible state for any breaches of the ECHR before the ECtHR?

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[25] http://ec.europa.eu/justice/criminal/criminal-rights/index_en.htm

[26] Joined cases C-6/90 and C-9/90, Andrea *Francovich and Danila Bonifaci and others v Italian Republic,* Judgement of 19 November 1991

[27] After the Treaty of Lisbon is European Union.

State's liability before the ECtHR – a consequence of the mutual recognition principle

In the case of Andrei Ionescu, he is detained in France as a result to the EAW issued by Romanian authorities. Since no grounds for mandatory non-execution of the EAW arise, France authorities shall not refuse the execution of the warrant *de jure*. Therefore, the French authorities keep Andrei Ionescu in a prison while the procedures for executing the EAW are being done. A very interesting situation arises – that of the application of criminal procedural rights as human rights in a case where an EU FD is directly applicable. The period of Andrei Ionescu's imprisonment is of 3 months and the question of the reasonable time of detention arises. This situation creates therefore two issues – is the period of detention based on a EAW in accordance to Art. 5 of the ECHR and if not which is the responsible state: the issuing state or the executing state?

Before answering these questions, a problem of competence arises. Is the ECtHR competent to rule in a case where the application of the ECHR refers to an act issued on the grounds of an EU FD?

In *Bosphorus*[28] judgement, the ECtHR introduced a theory for justifying interference with human rights by MS when applying EU acts. ECtHR had always emphasized that it is sufficient *in abstracto* that an act has been adopted by an international organization that provides an equivalent standard of human rights protection compared to the ECHR. In the *Bosphorus* judgement, the Court applied a more concrete test to conclude to the general equivalence of human rights protection at EU level by reviewing the Union's substantive guarantees and procedural mechanisms for potential *"manifest deficiency"*. On the one hand, the ECtHR clarified its ambition to examine the specific circumstances of future cases in order to effectively review potential shortcomings in the protection of human rights at EU level. On the other hand, this also indicates that the Court will not fully review EU acts, but rather engage in a general abstract review of the EU system.

With the *Bosphorus* judgment, the ECtHR confirmed therefore its former case law that it has no competence to review EU acts as such. But the Court also recognizes that it has a competence to review these acts indirectly, by examining specific implementation measures at national level. The *Bosphorus* judgement establishes that both primary and secondary EU law are now subject to review by the ECtHR and EU MS can be held responsible for nearly all acts (excepting EU acts which do not require any implementation by the MS), as they originally participated in the legislation process as the authors of these acts and are

[28] *ECtHR, Bosphorus Hava Yollari TurİZm ve Tİcaret AnonİM şİrketİ v. Ireland* , judgement of 30 June 2005

considered the original legislators of EU acts, thus being held responsible for any shortcomings in this context.

As it can easily be observed, in Andrei Ionescu's case of deprivation of liberty was made in respect of a EAW, act which is issued based on a FD. The issue therefore is whether the ECtHR is competent to rule in a case where violations of the ECHR have been made as a result of a MS's act which was issued in accordance to a EU FD. In *Pupino*[29], the EUCJ issues for the first time a ruling on FD. They are no longer a judicially dormant *materia*. As was the case in the EU's first pillar with the famous rulings in *Van Gend en Loos*[30] and *Costa/ ENEL*[31], the EUCJ laid down forceful parameters for the interpretation and application of this new legal instrument. And it was made clear that the EUCJ itself is likely to play a decisive role in the FD's development and future shaping.

At the centre of the decision lies paragraph 37: *„The EUCJ's jurisdiction would be deprived of most of its useful effect if individuals were not entitled to invoke FDs in order to obtain a conforming interpretation of national law before the courts of MS".* By granting FDs the capacity of influencing the interpretation of national law, the EUCJ rejected the arguments raised by the majority of MS. True, on the surface there was nothing explicitly referred to direct applicability. But by saying national courts (and all other official bodies) are under the obligation to interpret all national law in conformity with an FD, the EUCJ in principal conferred the system of supra-nationality upon the EU's third pillar.

Paragraph 47 of the *Pupino* comes to impose a limit to the obligation to interpret national law in the light of a FD. The EUCJ stipulates that *„The obligation on the national court to refer to the content of a FD when interpreting the relevant rules of its national law ceases when the latter cannot receive an application which would lead to a result compatible with that envisaged by that FD. In other words, the principle of conforming interpretation cannot serve as the basis for an interpretation of national law contra legem. That principle does, however, require that, where necessary, the national court consider the whole of national law in order to assess how far it can be applied in such a way as not to produce a result contrary to that envisaged by the FD."* In criminal matters, on the other hand, the benchmark for interpretation is slightly different. A FD alone (independent of an implementing law) cannot have the effect to determine or aggravate the status of criminal liability: *„It should be noted, however, that the obligation on the national court to refer to the*

[29] C-105/03, case of *Maria Pupino*, judgement of 16 June 2005
[30] C-26/62 - Van Gend en Loos v Administratie der Belastingen, judgement of 5 February 1963
[31] C-6/64 - Costa v E.N.E.L., judgement of 15 July 1964

content of a FD when interpreting the relevant rules of its national law is limited by general principles of law, particularly those of legal certainty and non-retroactivity. In particular, those principles prevent that obligation from leading to the criminal liability of persons who contravene the provisions of a FD from being determined or aggravated on the basis of such a decision alone, independently of an implementing law".[32]

When it comes to the interpretation of a FD as such, the leading guide for interpretation are fundamental rights, as guaranteed by the ECHR, and as they result from the constitutional traditions common to the MS, as general principles of law: „The FD must thus be interpreted in such a way that fundamental rights, including in particular the right to a fair trial as set out in Art. 6 of the ECHR and interpreted by the ECtHR, are respected". Case *Pupino* raises therefore not only the aspect of FDs' statute in the EU and the MS, but also the necessity to do the interpretation of FDs in accordance with the ECHR.

Corroborating case *Boshorus* of the ECtHR and *Pupino* of the EUCJ it seems that the ECtHR has the competence to rule in a case such as this one. Andrei Ionescu's deprivation of liberty is done in France due to a EAW issued by Romanian authorities. In *Bosphorus* the ECtHR ruled that it has the competence to review these kind of acts indirectly through examining specific implementation measures at national level and in *Pupino* the EUCJ ruled that MS have the obligation to interpret national law in the light of a FD and the FDs must thus be interpreted in such a way that fundamental rights, including in particular the right to a fair trial as set out in Art. 6 of the ECHR and interpreted by the ECtHR, are respected.

In the case of *Pietro Pianese*[33], even though the ECtHR considered the request on Art. 5 para. 1(c) inadmissible because the 6 months delay was not obeyed, the Court observes that „the applicant's complaint was not a declaration that his detention from August 3 to 13 2007 was contrary to Art. 5 of the ECHR, or the second EAW was illegal, and asked for compensation in these areas, but only establish whether a crime had been committed by the institutional head of Rome-and Rebibbia prison by an agent and whether sanctions should be imposed on these people". The Court, therefore, takes into account the possibility for the applicant to challenge the legality of an EAW. This decision answers more precise to the question if the ECtHR has the competence to decide on an act issued by an EU MS as a result of its compliance to the EU law.

Seeing that the question of competence has been answered, the issues of the responsible state and the reasonable period of detention still need to be solved. Concerning

[32] http://www.aeud.org/file/European_Arrest_Warrant.pdf
[33]ECtHR, Case of Pietro Pianese v. Italy and the Netherlands, judgement of 27 septembre 2011

the aspect of the responsible state, the ECtHR does not have yet an express case law on states' responsibility in the execution of EAW.

In *Soering*[34], the ECtHR rendered a decision in an issue having an extra-territoriality aspect. The applicant was detained in UK and the USA issued an extradition request, in the USA the applicat probably going to face the death penalty. The applicant claims that being faced with such a penalty violates Art. 3 of the ECHR. The Court was thus faced with the issue whether or not it has the competence to decide on an issue which, even though refers to an act of one of the Contracting States (executing the extradition request), concerns the effects of that act, which will only occur as a result of a non-Contracting State's action. The ECtHR held that „the decision by a Contracting State to extradite a fugitive may give rise to an issue under Art. 3, and hence engage the responsibility of that State under the Convention". Furthermore, the ECtHR rules that "it is liability incurred by the extraditing Contracting State by reason of its having taken action which has as a direct consequence the exposure of an individual to proscribed ill-treatment." The Court considers therefore that it is under its competence to judge a case where a Contracting State's action has consequences on a person's rights as stipulated in Art. 3 ECHR, even though the possible violation of Art. 3 will belong to a non-Contracting State.

In the case of Andrei Ionescu the question is if either Romania or France will be held responsible for Andrei Ionescu's rights violation. If a comparison were to be made, at a first glance it would seem that France, as the executing state (similar to UK in *Soering*), would be held responsible in case of an illegal detention based on the EAW was made. However, in its case law the ECtHR stated differently.

In the case *Stephens v. Malta*[35] the applicant was a UK national living in Spain, who was suspected by Maltese authorities of having conspired with other persons in Spain to transport drugs to Malta. A warrant for his arrest was issued by a Maltese court and he was detained in Spain following a request for his extradition. While still awaiting extradition in Spain, the applicant challenged the lawfulness of the national arrest warrant before Maltese courts, the warrant being found procedurally defective. After a new request for extradition was filed, the applicant was rearrested, extradited to Malta, and ultimately convicted on the criminal charges against him. Before the ECtHR, he challenged the lawfulness of his detention pending extradition in Spain – but he did so by claiming that Malta, not Spain, had violated Art. 5(1) ECHR.

[34]ECtHR, Case of Soering v The UK, judgment of 7 July 1989
[35]ECtHR, Case of Stephens v. Malta, judgement of 21 April 2009

The Court actually found that Stephens was within Malta's jurisdiction because „the applicant's deprivation of liberty had its sole origin in the measures taken exclusively by the Maltese authorities pursuant to the arrangements agreed on by both Malta and Spain under the European Convention on Extradition".

The Court establishes that „In the context of an extradition procedure, a requested State should be able to presume the validity of the legal documents issued by the requesting State and on the basis of which a deprivation of liberty is requested." In *Stephens*, the arrest warrant had been issued by a court which did not have the authority to do so, a technical irregularity which the Spanish court could not have been expected to notice when examining the request for the applicant's arrest and detention. Accordingly, the Court rules that „the act complained of by Mr. Stephens, having been instigated by Malta on the basis of its own domestic law and followed-up by Spain in response to its treaty obligations must be attributed to Malta notwithstanding that the act was executed in Spain." Even though in *Stephens* the detention is due to an extradition request, the solution proposed by the ECtHR might be the same for the detention following a EAW.

In the case of Andrei Ionescu he is being held by the French authorities due to a EAW issued by Romanian authorities. It is a similar situation to Stephens' case. The EAW was issued for conducting a criminal prosecution against Andrei Ionescu for the crime of drug smuggling, as the national arrest warrant was issued for Mr. Stephens. Admitting that a national arrest warrant is enough for finding Malta responsible for the detention of Mr. Stephens, the ECtHR seems to consider that the issuing state (issuing a arrest warrant, not a EAW!) is responsible for the non-respect of Mr. Stephens' rights stipulated by Art.5 of the ECHR. Taking the Court's reasoning one step further, considering that Andrei Ionescu is being held in France because of a EAW issued by Romanian authorities, it appears that Romania will be held responsible for any breaches of Andrei Ionescu's rights arising from the EAW.

Seeing that if Andrei Ionescu's right stipulated by Art. 5 of the ECHR was violated during the detention in France, Romania will be held responsible, it is now the case to see if that period of 3 month during which Andrei Ionescu was imprisoned was in accordance with the ECHR. If the period of detention due to the EAW was not in accordance to Art. 5 of the ECHR, Romania will be held responsible before the ECtHR.

When it comes to the aspect of the detention duration, Art. 17 of the FD stipulates that "1. A EAW shall be dealt with and executed as a matter of urgency. 2. In cases where the requested person consents to his surrender, the final decision on the execution of the EAW

should be taken within a period of 10 days after consent has been given. 3. In other cases, the final decision on the execution of the EAW should be taken within a period of 60 days after the arrest of the requested person." It seems therefore that the FD requires a limit of 60 days for the decision on the execution of the warrant, period during which the defendant might be in detention. This means that a maximum period of 60 days of detention is stipulated by the FD. Paragraph 4 of the same Art. stipulates that „Where in specific cases the EAW cannot be executed within the time limits laid down in para. 2 or 3, the executing judicial authority shall immediately inform the issuing judicial authority thereof, giving the reasons for the delay. In such case, the time limits may be extended by a further 30 days." It is therefore only in exceptional cases that the detention period may be prolonged.

Taking into account that the period settled by the FD is subject to minor juggle, the issue of the detention being in accordance to Art. 5 para. 3 (c) of the ECHR rises. Art. 5 para. (3) requires that deprivation of liberty during a pending trial should never exceed a reasonable time. The ECtHR held repeatedly that continued detention may be justified in a given case only if there are clear indications of a genuine public interest which, notwithstanding the presumption of innocence, outweighs the right to liberty. In our case, the public interest is the creation of a space of freedom, security and justice. It is with this purpose that the MS apply the procedure imposed by the FD on EAW. It is therefore necessary only to see if the period of detention is, indeed, reasonable.

In determining what is "reasonable", the ECtHR has never accepted the idea that there is a maximum length of pre-trial detention which must never be exceeded since this would involve an assessment *in abstracto* and a judgement must always take into account all the special features of each case. Any period, no matter how short, will always have to be justified. The Court's case law has proved the significance of the particular circumstances of a case. While periods smaller than a year were considered excessive, periods between two and three years were found both acceptable and objectionable. A domestic law providing for a maximum period of pre-trial detention would raise no problems of compatibility with the ECHR. However, it would undoubtedly be a mistake to be guided by such a maximum since it is the particular circumstances of a case that will determine whether or not a reasonable time has been exceeded.

In the case of Andrei Ionescu, he was held for 3 month in the French prison. The French court extended the pre-trial detention for long periods of time under the argument of severity of the sentence faced with full disregard of the pertinent facts, such as: the arrested person is a minor, he has a family and a stable way of life and after the passage of time any

possible danger of collusion and absconding had receded. Taking into account the ECtHR's case law, it seems therefore that there has been a violation of Art. 5 para. 3(c) of the ECHR, since the complexity of the case does not suffice to justify the multiple extensions of the detention period. Interesting is that the extension and the procedures during the detention have been made in accordance to the French law, even though the detention itself it is a consequence of a EAW issued by Romania.

Article 12 of the FD comes to settle the issue concerning which is the legislation that regulates the maximum period of detention: „When a person is arrested on the basis of a EAW, the executing judicial authority shall take a decision on whether the requested person should remain in detention, in accordance with the law of the executing MS. The person may be released provisionally at any time in conformity with the domestic law of the executing MS, provided that the competent authority of the said MS takes all the measures it deems necessary to prevent the person absconding." The FD stipulates therefore that the procedure to be followed during the detention, when it comes to the release of the defendant, is the procedure of the executing state. This is a good example for the principle of mutual trust being applied, since, even though the legislation applicable for the period of detention or the releasing conditions is the one of the executing state, the state held responsible for any violations of the defendant's rights stipulated by the ECHR during that time is the issuing state.

In the case of Andrei Ionescu, during the detention time his rights to interpretation and translation and his rights as stipulated under Art. 5 para. 3 (c) of the ECHR have been breached during his detention in the French prison. Taking into consideration the previous aspects discussed (cases *Stephens* and *Pietro Pianese*) it is highly likely that in front of the ECtHR the state held responsible for the breach of Andrei Ionescu's right to liberty will be Romania, as issuing state of the EAW. The question still remains whether the responsible state for the violation of the right to interpretation and translation is also Romania. As discussed above, Andrei Ionescu has the possibility to hold responsible France after the time-limit of transposition in front of the EUCJ for breaching his right to interpretation and translation, in accordance to EU law and EUCJ case law (case of *Francovich*). However, when it comes to states' liability before the ECtHR, the conclusion seems to be that Romania will be held responsible for any violation of Andrei Ionescu's rights during the detention, since these violations are all consequences of the EAW, as issued by Romanian authorities.

Conclusions

Mutual trust is at the heart of the EU. Although the Union lacks a general mechanism to enforce its rules and decisions, MS usually comply with them. This remarkable fact can in part be explained by self interest: although individual rules and decisions may be found harmful and are avoided from time to time, all MS know they win by obeying the EU rules.

The EU MS that applies a rule or a decision trusts all the others to do the same most of the time. If this were not so, the system would break down.

The mutual recognition of decisions in criminal matters between MS is the cornerstone of the European judicial area. In practice, the Commission notes that the MS are still reluctant to recognise criminal decisions taken in another MS of the Union, strengthening mutual trust being an absolute necessity if the European judicial area is to be achieved. As shown in the first part of this paper, the difference between the legislation of MS rises issues concerning discrimination. However, the Treaty of Lisbon comes to provide the EU with a more extensive legal basis for adopting Directives for the approximation of criminal offences and sanctions against particular crimes, as well as rules of criminal procedure, and the process of changing the FDs on criminal law(-related) issues into Directives under the Treaty of Lisbon also insures this extension. Furthermore, the principle of mutual recognition is being advanced as the underlying principle for judicial cooperation (Art. 82(1) TFEU). These proceedings insure that in the future cases of discrimination will slowly disappear.

Next to that, there is the human rights framework brought by the Treaty of Lisbon particularly based on the ECHR. Landmark cases of the ECtHR can have important effects on domestic criminal justice systems. The Directive that obliges MS to grant suspects or accused persons, the right to interpretation and translation is a fine example of how human rights standards developed in the case law of the ECtHR are being incorporated and interpreted by the EU. These standards and the EU's interpretation thereof are then enforced by the traditional mechanisms of Union law: Directives are binding as to the results they aim for (Art. 288 TFEU), they can have direct effect and domestic criminal courts are obliged to apply the EUCJ's doctrine of consistent interpretation.

The direction of the ECtHR case law concerning state's liability for acts issued by other MS creates a deeper sense of responsibility for all MS. Seeing that one state's acts might engage another states' liability before the ECtHR, the principle of mutual trust takes shape. The issuing and the execution of an EAW is a clear example of how this principle works in practice. The EAW is therefore a real expression of the mutual trust principle.