Inaudito reo Proceedings, Defence Rights, and Harmonisation Goals in the EU

Responses of the European Courts and new Perspectives of EU Law

Stefano Ruggeri

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AUTHOR

Stefano Ruggeri

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I. An Unprecedented Problem in EU Law: *Inaudito reo* Criminal Proceedings

The right to personal participation in criminal proceedings and the problem of *in absentia* procedures have lain at the core of the EU legislative agenda over the last several years. Before the entry into force of the Lisbon Treaty, Framework Decision 2009/299/JHA amended, *inter alia*, the EAW Framework Decision, tightening the conditions under which defendants can be surrendered to other Member States in proceedings instituted in the accused's absence.[1] Although this legislative intervention also contributed to the process of indirect harmonisation of criminal procedure law, initiated under the former Third Pillar,[2] it was unrealistic to think that the new rules could work properly at the transnational level without previous harmonisation of the rules governing domestic proceedings held *in absentia*. In 2013, under the new legislative framework set forth by the Lisbon Treaty, the Commission proposed a Directive aimed at strengthening certain aspects of the presumption of innocence and at laying down minimum standards governing the right to personal participation in domestic criminal proceedings.[3] After a rather long path, the Directive was approved on 9 March 2016 (Directive 2016/343/EU – hereafter: DPIPT).[4]

A close examination of these developments, moreover, reveals that, until now, EU law has handled *in absentia* procedures with almost exclusive regard to default or contumacy proceedings, a procedure that allows a criminal law action being instituted in the accused's absence. Furthermore, there is another type of criminal proceeding held *in absentia*, namely a criminal process designed to achieve a guilty verdict in writing and without any trial hearing. In most cases, these proceedings can lead to a conviction without the defendants having the opportunity of being heard and often even without knowing that a formal accusation has been brought against them. Following the civil law doctrine of proceedings *inaudita altera parte*, these proceedings – which are characteristic of several continental European countries in the Roman-German tradition – are usually known in the field of criminal justice as *inaudito reo* procedures. Unlike default proceedings that still constitute an exception from the rule whereby the accused should be put in a position to take part in the criminal trial, *inaudito reo* procedures rule out any participation on the part of the defendant prior to the decision-making, while giving the accused the right to challenge the conviction by means of a special remedy having the form of an opposition. There is little doubt that these proceedings are scarcely compatible with the fair trial requirements of European countries, which are increasingly oriented towards a participatory model of criminal justice.[5]

Also at the EU level, *inaudito reo* procedures had not raised specific concerns until recently. The problem has drawn general attention, moreover, due to the recent *Covaci* case,[6] which gave the European Court of Justice the first opportunity to examine two of the main legislative instruments launched under the 2009 Roadmap on procedural rights, i.e., the Directive on the right to interpretation and translation (hereafter: DIT),[7] and the Directive on the right to information in criminal proceedings (hereafter: DICP).[8] Alongside this case-law, the recent Directive 2016/343/EU provides some important indications on the possibility of procedural phases other than the trial or even specific types of criminal proceedings being conducted in the defendant's absence – albeit mainly focusing on the right to be present at trial. Of course, it is still early to foresee which direction EU law will follow in the future. However, these developments allow us to draw some provisional conclusions on a highly delicate subject matter.

II. The Responses of the EU Court of Justice. The *Covaci* Judgment

1. The case and the questions raised

As noted above, the question of whether *inaudito reo* proceedings are compatible with EU law made little sense until recently. The recent *Covaci* case presented the first opportunity for the European Court of Justice to give general indications on the developments in EU legislation in relation to information and linguistic rights and can thus be considered a good resistance test for the ongoing harmonisation process of defence rights in criminal justice.

In this judgment, the Luxemburg judges examined the case of a Romanian citizen who, it was discovered during a police check in Germany, had been driving a vehicle for which no valid mandatory motor vehicle civil liability insurance had been taken out, the proof of insurance being a forgery. At the police office, Mr. Covaci was thus questioned with the assistance of an interpreter but, since he had no fixed domicile or residence in Germany, he was required to issue an irrevocable written authorisation for three officials of the local court (*Amtsgericht*) in *Laufen* to accept service of court documents addressed to him. The competent public prosecutor requested a penal order through a simplified procedure that under German law excludes any hearing of the accused persons who can in turn challenge the conviction by means of an objection. In this case, the accused is tried in open court; otherwise the penal order becomes final upon expiry of a period of two weeks from its service. In the present case, however, the competent prosecutor requested that the penal order be served on Mr. Covaci through the persons authorised to accept service and, above all, that any written observations made by the person concerned, including any objection lodged against that order, should be in German.

Against this background, the competent German court raised the two following questions to the Luxembourg Court: *a*) whether Arts. 1(2) and 2(1)&(8) DIT preclude a court order from requiring, under its own law, the accused to lodge an appeal only in the language of the proceedings and *b*) whether Art. 2, 3(1)(c) and 6(1)&(3) DICP precludes the accused from being required to appoint a person authorised to accept service, where the period for bringing an appeal begins to run upon service on that person.

2. The right to effectively challenge a conviction rendered inaudito reo

a) Out-out: linguistic or legal assistance?

Advocate General *Bot* has suggested an interesting approach to the first issue.[9] The reasoning of Mr. Bot's opinion lay with the main question of

"whether the costs incurred in respect of translation or interpretation in this context should be borne by the defence, obliging the defence to lodge an appeal in German, or by the prosecution, allowing the defence to submit an appeal in a language other than the language of the proceedings."[10]

Starting with this premise, the Advocate General proposed an original redefinition of the legal classification of the issue raised,[11] whereby the relevant EU rules applicable to the case should not be those of Article 2 DIT (relating to the right to translation of documents produced by the competent authority and addressed to the accused) but those of Article 3 DIT (concerning the defendants' right to be assisted by an interpreter with a view to filing procedural acts addressed to the competent authorities).[12] Moreover, Article 2 DIT ensures that the accused persons are afforded linguistic assistance with respect to filing an appeal against a

judgment. According to Mr. Bot's opinion, however, this guarantee should not be restricted only to oral activities:

"Where the accused person is unable to communicate in the language of the proceedings, he is therefore entitled to interpretation services so that statements made in a language of which he has a command, whether orally, in writing, or possibly in sign language, if he is hearing impaired or speech impaired, are translated into the language of the proceedings."[13]

However, the Court did not follow this interpretation. Opting for a more traditional approach, the Luxemburg judges made a clear distinction between the guarantees of interpretation and translation,[14] on the assumption that the former provides defendants with linguistic assistance to give oral statements, whereas the latter allows the accused persons to understand written documents that are essential for the exercise of their defence rights. According to the Court, therefore, defendants must be given free-of-charge assistance of an interpreter if they decide to lodge an oral objection against the penal order. By contrast, EU law does not require the State to provide translation of an objection lodged in writing, nor can this obligation derive from Article 2 DIT, which cannot be interpreted as charging Member States with the responsibility for the translation of any appeal brought by the persons concerned against a judicial decision issued against them.[15]

Notwithstanding these premises, the Court somehow softened its approach by stressing that EU law only aims to establish minimum standards without precluding Member States from ensuring the translation of further documents that are essential to guaranteeing the fairness of the criminal process.[16] By these means, therefore, the Luxemburg judges offloaded onto national authorities the decision to establish, taking into account the characteristics of the case at stake, whether the objection lodged in writing against a penalty order should be considered an essential document for the purposes of its translation.[17]

Certainly, this conclusion has brought about an innovative interpretation of the 2010 Directive, extending the obligation of translation of "essential documents" to documents produced by the defence, such as written statements and the appeal against a conviction.[18] Notwithstanding its merits, the approach followed by the Court gives rise to serious human rights concerns. In particular, this Solomon-like interpretation – relating to the national implementation of EU law and especially its application by the individual national courts – jeopardises the need for legal certainty by not enabling the individuals concerned to know in advance whether their appeal will be deemed an essential document in the case at stake and whether they can also count on linguistic assistance.

A further detrimental implication of the Court's approach is that the rigid distinction between interpretation and translation offloads onto the accused persons the difficult decision as to whether to obtain the assistance of an interpreter with a view to lodging an oral objection or, if they choose to lodge a written objection, to obtain the assistance of a legal counsel "who will take responsibility for the drafting of the appropriate document, in the language of the proceedings."[19] It is questionable whether legal and linguistic assistance can be considered as alternative guarantees. Moreover, each one – taken in isolation – may not be sufficient to achieve the proclaimed dual goal of enabling the full exercise of defence rights and ensuring the overall fairness of criminal proceedings. On one hand, the sole assistance of an interpreter provides the accused with the help of a person who, although equipped with linguistic knowledge, may have no competence in legal matters. This risk is particularly high in those countries that do not foresee mandatory legal assistance in penal order procedures.[20] On the other hand, the sole assistance of a lawyer may be insufficient to reflect the will of defendants who may be unable to properly express themselves in language of the court. Furthermore, offloading onto the lawyer the responsibility of a written objection can deprive the accused persons, who might be equipped with legal knowledge, of the possibility of contributing their own input to the appeal initiative.

Most significantly, the Court's conclusions offer little focus on the specific problems of penal order procedures. It has been observed that the objection constitutes the first opportunity for defendants to react against a conviction issued against them without a trial hearing and is often the only tool available for them to make their voice heard in criminal proceedings. In relation to the first question raised, however, the Court does not seem to give much weight to the particularly vulnerable condition of defendants who were convicted in a foreign country, without being heard and often without even knowing of a criminal process instituted against them.

b) Information rights and the guarantee of adequate timeframe

Compared to the reasoning on the first issue, the arguments produced for the second one soon reveal the Court's awareness of the particularities of *inaudito reo* decisions. The Luxemburg judges began considering that service of a penal order "represents the first opportunity for the accused person to be informed of the accusation against him" and that the defendant's initiative does not aim at a new judgment by a higher court but enables him to obtain a trial hearing at which he can take part.[21] These arguments led to the Court concluding that under EU law the notification of a penal order can be deemed a form of communication of the accusation and must thus satisfy the requirements set out in Article 6 DICP.[22] In this regard, the Court shares the Advocate General's opinion that Member States still have a certain margin of discretion in choosing the procedure by which information on the charge must be provided.[23] Whatever the procedure adopted, it cannot jeopardise the aims pursued by EU legislation, which enables the accused persons to prepare their defence and to safeguard the fairness of the proceedings.[24] From this it follows that the 2012 Directive should be interpreted as not precluding a Member State from requiring defendants not residing in that country to appoint a person authorised to accept service of a penalty order concerning them, provided they are given the entire prescribed period for lodging an objection against the conviction, starting the moment they were personally served.

At first glance, this conclusion strengthens the binding force of EU law, which requires countries allowing *inaudito reo* judgments to provide the defendants with personal information on the conviction, while granting them the entire period to oppose the decision. This approach reveals the Court's disfavour towards those domestic solutions that allow penal orders to become final as a result of the objective lack of any opposition, while enabling defence lawyers to file an objection on their own initiative.[25] It must be acknowledged, however, that personal information is of little help to those defendants who, despite being afforded the entire objection period, must face alone the delicate decision of whether to lodge an objection against their conviction, since national law does not grant them any legal assistance.

It is worth observing that the Court was well aware that the period of two weeks can give rise to discrimination between defendants residing within the jurisdiction concerned and accused persons whose residence does not fall within that jurisdiction. Notwithstanding the merit of granting the accused persons the entire period prescribed from the moment they were personally served with the decision, the adopted solution constitutes a weak means of compensation for the obligation of appointing a person authorised to accept service of judicial decisions if foreign defendants can count neither on legal nor linguistic assistance when deciding whether to lodge an opposition. On close examination, the main discrimination exists between the accused persons residing in the country in which criminal proceedings are instituted, who are possibly familiar with that law, and non-resident defendants, who may fully ignore the law of the competent jurisdiction and the general legal culture of that country. Despite the Court's arrangements, the former do not need to appoint a person authorised to accept service of judicial decisions and, once notified of the penal order, often have the tools to prepare their own defence and assess the convenience of lodging an objection. By contrast, the latter are burdened with that obligation and, even though the period for lodging an objection

begins with their being informed of the conviction, they may not have the necessary knowledge and often face enormous difficulties in deciding whether to oppose the penal order.

For these defendants, therefore, the solution adopted by the Court is a poor guarantee and the fact that the period for lodging an objection begins to run can even end up being a dangerous boomerang for the accused. Any hasty decision can jeopardise them. Failure to lodge any objection leads to the "provisional" conviction becoming final at the end of the two weeks, whereas lodging an opposition can lead to a *reformatio in peius* in the trial hearing. In any event, it is worrying that the Court has shown no concern about the result of the expiry of the prescribed period and, more specifically, about the fact that, in a fair model of criminal justice, a conviction can become final regardless of whether or not the accused truly understood the information received and knowingly chose not to oppose the penal order.

III. Right to be Present at Trial and the Lawfulness under EU Statutory Law of Special Types of Criminal Proceedings Held in absentia

Notwithstanding the great importance of this judgment, the responses of the Luxemburg case-law on these proceedings cannot be deemed definitive. As anticipated, the recent Directive on the presumption of innocence and the right to personal participation in criminal proceedings lead us to analyse whether and under what conditions EU law allows *inaudito reo* procedures and which safeguards defendants must be ensured. In particular, it is worth observing that this legislation, while establishing strict limits for the institution of trial hearings in the accused's presence, has left Member States free to provide for "proceedings or certain stages thereof to be conducted in writing, provided that this complies with the right to a fair trial."[26] At first glance, this solution may seem to be primarily aimed at leaving to EU countries a certain leeway in deciding whether to ensure defendants' participation in phases that, although dealing with the merits of the case, do not aim at a decision on their guilt (e.g., intermediate proceedings), as well as in interlocutory proceedings that can lead to decisions seriously impinging on fundamental rights (e.g., a decision on discontinuance of the proceedings or remand proceedings). On close examination, these exceptions cannot concern interlocutory proceedings or intermediate phases, since both situations fall in any case outside the scope of application of the new rules that, as noted, are designed to ensure the right to take part at a "trial which can result in a decision on the guilt or innocence of a suspect or accused person can be held in his or her absence".[27] Therefore, the meaning of the exceptions should be defined within the scope of the main provision. In other words, Member States could decide not to ensure the accused's personal participation not only at interim decisions or phases of the proceedings not aimed at the decision on guilt but also in special types of criminal proceedings designed to achieve a guilty verdict prior to the trial phase – however, within which limits?

Whereas no indications emerge from the rules of the new Directive, Recital No. 41 contains a highly worrying statement:

> The right to be present at the trial can be exercised only if one or more hearings are held. This means that the right to be present at the trial cannot apply if the relevant national rules of procedure do not provide for a hearing. Such national rules should comply with the Charter and with the ECHR, as interpreted by the Court of Justice and by the European Court of Human Rights, in particular with regard to the right to a fair trial. This is the case, for example, if the proceedings are conducted in a simplified manner following, solely or in part, a written procedure or a procedure in which no hearing is provided for.

It is debatable whether this approach is in line with the EU Charter of Fundamental Rights that, acknowledging the right to a "fair and public hearing,"[28] not only prevents interpretations aimed at lowering the standards of protection of the European Convention on Human Rights (ECHR)[29] but also requires the scope of this guarantee to be defined in the same terms acknowledged by the European Convention and especially the Strasbourg case-law.[30] Of course, this does not mean that the right to a fair and public hearing is an absolute guarantee. However, the EU Charter of Fundamental Rights, like the European Convention, may not appear to allow for individuals to be convicted by means of a written criminal procedure on the basis of a prosecutorial decision. It gives rise to serious concerns that the new EU provisions may simply remain inapplicable if national law does not provide for a hearing before the decision-making, and it is hardly understandable how in such a case national law should anyway satisfy the fair trial requirements set by the case-law of both the Luxemburg and the Strasbourg Courts. Thus, Strasbourg case-law has on several occasions acknowledged the lawfulness of criminal proceedings held without a public hearing, provided that the accused persons were in a position to unequivocally waive this guarantee and that this does not run counter to any important public interest.[31] These findings should make the adoption of simplified written procedures conditional on the fact that the defendants either were given the possibility to waive their right to a court hearing or could have access to an effective subsequent remedy.

Assuming that EU law does not preclude a change in the *status quo* in those countries in which *inaudito reo* proceedings are still allowed, it must be further analysed which guarantees must be afforded to individuals convicted *in absentia*. According to the Luxemburg conclusions in the *Covaci* case, the examination of EU legislation paints a rather disappointing picture in relation to the two legislative instruments. Furthermore, no specific solutions emerge from the Directive on access to a lawyer (hereafter: DAL)[32] that, despite requiring Member States to protect defendants in such time and in such a manner so as to allow them to "exercise their rights of defence practically and effectively,"[33] does not take into account the particular case of a conviction *inaudito reo*. It is true that the 2013 legislation has a very broad scope of application, which includes, "where applicable, sentencing and the resolution of any appeal."[34] However, we have seen that the Luxemburg Court has explicitly stressed that penal order procedures enable the convicted person

"to bring not an appeal against that order before another court, but an objection making him eligible, before the same court, for the ordinary *inter partes* procedure, in which he can fully exercise his rights of defence, before that court rules again on the merits of the accusation against him."

Surprisingly, whereas the 2013 Directive did not deal with the case of penal order procedures (which only exist in some continental countries), the EU institutions took into consideration the specific situation of Member States that enable an authority other than a court having jurisdiction in criminal matters to impose a sanction, which may, in turn, be appealed or referred to a criminal court. In this case, however, the solution of EU law is also rather reductive, since the right to access to a lawyer should not be necessarily granted before administrative authorities but instead only in proceedings before a criminal court.[35] Certainly, the case of *inaudito reo* proceedings is quite different, since a single judge having jurisdiction in criminal matters usually has the competence to issue penal orders. At any rate, applying the same rule would clearly leave foreign individuals unprotected in the timeframe for lodging the appeal against the judge who convicted them.

Remarkably, the drafters of the 2013 Directive did not ignore the problem of defendants undergoing serious interference with their fundamental rights without their being involved in the decision-making. In particular, this legislation requires national countries to make the necessary arrangements to ensure that suspects or accused persons who are deprived of liberty are in a position to exercise effectively their right of access to a lawyer, unless they have waived that right. Significantly, this requirement goes beyond the national rules on mandatory legal assistance,[36] which entails that EU law prevails over national solutions, imposing the obligation to provide the accused subjected to a restriction of liberty with legal assistance, especially for the

purpose of challenging the judicial order. There is no doubt that individuals convicted in written and without having had the opportunity to be heard are in a similarly vulnerable situation, which should require legal assistance in order to enable them to decide whether to request a criminal trial at which they can fairly participate or to waive this guarantee.

IV. *Inaudito reo* Procedures and Human Rights. The Problem of Subsequent Remedies

These observations lead us to broaden the area of the present investigation by examining whether penal order procedures are in line with human rights law in Europe. To answer this question, I shall now focus on the problem of subsequent remedies, analysing whether the opposition can truly compensate for the lack of previous involvement of the defence and ensure to the accused an "ordinary *inter partes* procedure." This is certainly a point of utmost importance, which impinges on the overall lawfulness of convictions issued without the accused persons having been involved in the criminal law action initiated against them.

Moreover, expressed in such general terms, the problem not only concerns *inaudito reo* but also *in absentia* procedures. One could even say that this is perhaps the main common feature of these procedures, given the Strasbourg case-law that, since the *Colozza* case, has traditionally allowed judgments rendered *in absentia* if the convicted persons are granted a fair opportunity for retrial or a further instance aimed at a revision of the decision.[37] It is unquestionable that this doctrine has had enormous influence on the developments in the last decades, not only in various European countries but also, as noted, in the EU law on transborder procedures and, more recently, on domestic criminal proceedings. Nevertheless, this approach can be highly problematic as a result, and doubts can be raised as to whether it is compatible with a human rights-oriented model of criminal justice. For the sake of clarity, I shall examine the problem from three perspectives, i.e., EU human rights law, constitutional law, and international human rights law.

1. The perspective of EU human rights law

From the viewpoint of EU human rights law, the possibility of a subsequent mechanism aimed at granting an "ordinary *inter partes* procedure" is apparently sufficient to ensure the lawfulness of any criminal procedure that rules out the involvement of the defence prior to the decision-making. Concerning *inaudito reo* procedures, it has been observed that, following the interpretation of the Luxemburg Court in the *Covaci* case, EU law only requires defendants to be personally informed of the conviction and they must have the entire prescribed period available to lodge an opposition, while granting them either legal or linguistic assistance if they decide to take this initiative. However, EU law does not prevent national law from leaving the accused unprotected during the period available and when deciding whether to lodge an objection.

An even worse situation is possible in *in absentia* procedures. As noted above, the 2016 Directive on the presumption of innocence and the right to be present at the trial allows a criminal law action to be carried out without the competent authorities having fulfilled their obligation of personally informing the defendants, if the latter are granted the opportunity of a subsequent remedy – no matter whether a retrial or a recourse to another instance – aimed at a full review of the conviction. To be sure, the Directive has not failed to lay down some qualitative requirements that subsequent tools must anyway fulfil. In particular, both a retrial and a remedy must ensure a fresh reassessment of the merits of the case, including the examination of new evidence as well as the reversal of the conviction.[38] However, these conditions may not be sufficient if defendants suffer from limitations to the effective exercise of their defence rights, meaning that certain defensive measures (e.g., access to alternative proceedings) are definitively lost. This demonstrates that the alternative between the accused's involvement before the decision-making and subsequent solutions cannot

be accepted in abstract terms but only as far as such legal tools can effectively compensate for the loss of defensive opportunities at the first instance. Yet, this is not always the case at the national level, nor does EU law contain clear solutions in this regard.

2. The perspective of constitutional law

Further concerns emerge from the perspective of constitutional law. To be sure, it is worth noting that recourse to the argument of a subsequent trial has traditionally eradicated any doubt over the constitutionality of penal order procedures in the countries in which this type of proceeding is allowed. In Germany, notwithstanding the Federal Constitution acknowledges the right of every person to a hearing in court in accordance with law,[39] the Federal Constitutional Court has always advocated the constitutionality of penal order procedures, provided certain safeguards are ensured.[40] Even though German constitutional case-law has increasingly focused on the need for any individuals concerned to be clearly and unequivocally informed on the objection to a penal order and the deadline provided by the law,[41] the accused cannot count on legal assistance to decide whether to lodge an opposition.

The Italian Constitutional Court, since its very first ruling on this issue,[42] has also consistently rejected any doubt on the incompatibility of penal order procedures with the Italian constitution. The main argument used was purely theoretical, based on the idea – originally elaborated in the field of civil proceedings[43] – of the subsequent, albeit only potential, involvement of the defence (*contraddittorio eventuale e differito*). According to this approach, even though the conviction was issued without the accused persons even knowing about the institution of a criminal process against them, they can be involved after the decision-making if they decide to request, by means of the opposition, an "ordinary *inter partes* procedure." Surprisingly, this doctrine remained untouched even after the 1999 fair trial reform,[44] which enacted into the Constitution a model of fair criminal justice based on the parties' involvement in the administration of justice and, not less significantly, on the principle of equality of arms.[45] Criminal law scholars have certainly contributed to this result, supporting the lawfulness of penal order procedures under the new constitutional framework on the double assumption that the right to a fair hearing can still be satisfied as long as the decision has not become final and, more specifically, that the Italian constitution enables the accused to consent to evidence being taken without an adversarial hearing.[46]

Whereas the latter argument relates to a particular feature of the Italian model of a fair trial,[47] the former goes beyond the peculiarities of Italian law, posing a question of a broader nature that certainly concerns penal order procedures also in other European countries that acknowledge the right to a fair hearing at the constitutional level. Can the *audi alteram partem* rule, especially if viewed in terms of the individual right to *contradictoire*, be fulfilled regardless of whether the defence was involved before or after the decision-making? In my view, the response is radically negative, especially because a subsequent trial is not always able to erase the negative consequences of a previous conviction rendered against the accused. Until recently, as noted, Italian law imposed on absent defendants allowed to challenge the conviction considerable hurdles regarding the right to evidence at the second instance. Moreover, it is worth noting that, even though both the Italian criminal law scholars and the Constitutional Court still advocate the lawfulness of penal order procedures, some important developments have recently occurred in constitutional case-law. In a 2007 ruling, the constitutional judges departed from the traditional concept of a "provisional conviction,"[48] a view also shared by the Luxembourg Court in the *Covaci* case, while acknowledging that an opposition can entail the loss of important defensive opportunities.[49] This new jurisprudence was further enhanced in a more recent judgment in which the Italian Constitutional Court declared the regulation on penal order procedures unconstitutional in that it enabled the complainant to lodge a preventative opposition to a penal order in case of criminal proceedings for offences that can only be prosecuted after a lawsuit by the victim.[50] This judgment reveals a significant development in Italian constitutional case-law, which has, for the first

time, shifted from the traditional understanding of penal order procedures, characterised by subsequent involvement of the defence, towards a new constitutional justification rooted in the need for an expeditious criminal justice.

These observations lead us to doubt that penal order proceedings – as still construed in countries such as Germany and Italy – can be deemed compatible with the requirements of the constitutional model of a fair trial. These requirements also do not remain without consequences for the relationship with EU law, especially if a strong approach is adopted, such as that recently advocated by the German Federal Constitutional Court.[51] Following this doctrine, whenever a competent authority is of the opinion that national law foresees higher standards of human rights protection,[52] it should disapply EU law in favour of the domestic regulation.

3. The perspective of international human rights law

Finally, it is highly questionable whether criminal procedures ruling out the accused's involvement before the decision-making, on the assumption that a subsequent trial will provide a proper compensation, are compatible with international human rights law. Even though the Strasbourg Court constantly invokes the lawfulness of subsequent remedies in relation to judgments *in absentia*, this doctrine entails serious human rights risks. Clearly, the Court's arrangements reflect the clear attempt to strike a compromise between the adversarial culture of trial hearings and the continental tradition of countries allowing criminal proceedings held *in absentia*. This point also reveals the weakness of the Court's reasoning, however. The main problem probably lies in the justification of criminal proceedings held without giving the accused the opportunity for a previous hearing. Thus, the fact that national authorities have applied all the available means to make defendants aware of the institution of criminal proceedings does not in itself make a criminal law action absolutely necessary in any case. Certainly, especially when serious crimes are at stake, a prompt criminal law action can at best satisfy the needs concerned with a criminal policy aimed at a social defence and avoid further shortcomings, such as the danger that relevant evidence may get lost or that evidence subject to a high risk of deterioration be altered. However, these undisputable advantages are largely outweighed by the risks that can arise from a criminal process, especially if the grounds for the accused's absence have remained unclear. In the *Colozza* case, the Strasbourg Court was already aware that "the impossibility of holding a trial by default may paralyse the conduct of criminal proceedings, in that it may lead, for example, to dispersal of the evidence, expiry of the time-limit for prosecution or a miscarriage of justice."[53]

Notwithstanding, the Court has always been aware that the institution of criminal proceedings in the defendant's absence must satisfy a public interest; this requirement is constantly blurred if defendants are given the chance for a retrial. A clear example of this approach was the saga of judgments that led to the conviction of Italy for its old contumacy proceedings. It is thus no surprise that – even after the 2005 Italian reform on the right to be relieved of the effects of the expiration of the time to challenge contumacy judgments[54] – the European judges confirmed the lawfulness of default convictions on the assumption that absent defendants could have easier access to a second instance,[55] without any consideration of the serious restrictions on the right to evidence at the second instance.[56] Yet, there are damages that certainly cannot be erased by means of a remedy or a retrial, even where a "fresh determination of the merits of the charge" is ensured – not to mention the adverse effects that the initiation of criminal proceedings can produce for the images of both the defendants and their families in today's information society. In the future, all these considerations should lead the Strasbourg case-law to a better approach towards the human rights implications that default proceedings entail for the accused's participatory rights.

The Strasbourg Court has not traditionally had many opportunities to examine the issue of subsequent remedies in relation to penal order procedures. The recent case *Gray v. Germany*, however, gives us a rather clear picture of the Court's approach to this procedure, while highlighting some new problematic aspects.[57]

In the case at hand, the applicants complained under Art. 2, read in conjunction with Art. 1 ECHR, that shortcomings in the British health system in connection with the recruitment of *locum* doctors and supervision of out-of-hours *locum* services had led to their father's death as a consequence of medical malpractice by a German *locum* doctor.[58] Although the case did not directly concern the right to a fair hearing, the complaint focused on two important aspects of penal order proceedings. In particular, the applicants stressed that the summary criminal proceedings instituted in Germany had not "involved a proper investigation or scrutiny of the facts of the case or the related evidence" and, more specifically, that "the German authorities had failed to inform them of the proceedings and had thus deprived the deceased's next of kin of any possibility to get involved and participate in the latter."[59] These complaints highlighted the highly problematic nature of penal order proceedings from a rather different perspective, which concerns their evidentiary justification and the possibility of injured parties being involved in a criminal law action. Of course, the latter problem did not relate to the stage prior to the decision-making but to the trial phase in which, pursuant to German law, the applicants could have joined the prosecution as plaintiffs. This result did not materialise, however, since the penal order was not challenged and the applicants learned of the procedure after the conviction had already become final.

This focus therefore shifted the problem of participation in criminal proceedings to individuals other than the accused. The Strasbourg judges, while rejecting the complaint relating to Article 2 ECHR, incidentally provided some worrisome indications on penal order proceedings. As to the lack of involvement of the applicants, the Court, relying quite uncritically on the Government's arguments, simply recognises that German law neither requires the aggrieved parties to be informed of a penal order procedure nor enables them to challenge the conviction with a view to joining the prosecution as plaintiffs.[60] The Court further excludes that the obligation to involve them can derive from Article 2 ECHR, as conversely acknowledged in relation to situations in which the responsibility of State agents in connection with a victim's death had been at stake.[61] The reasoning used to support this conclusion is rather unconvincing. On close examination, the Strasbourg judges did not also rule out that, as regards medical negligence, "the next of kin of the victim must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests,"[62] provided, however, that the "circumstances surrounding the death were suspicious or unclear."[63] Also in this regard, the Court limited itself to concurring with the government's argument "the circumstances of the case had been sufficiently established in the course of the investigative proceedings," such that "a participation of the applicants in a potential main hearing, even if it might have a cathartic effect for the victim's next of kin, could not have further contributed to the trial court's assessment of the case."[64] This argument is rather difficult to understand without an overall consideration of the Court's reasoning, which comes to the conclusion that "the applicants have not specified which aspect" of the applicant's "responsibility for medical negligence causing the applicants' father's death has not been sufficiently clarified."[65]

This functional approach is rather paradoxical. Pursuant to Strasbourg case-law, the European Convention protects the right of the aggrieved parties to be involved in a criminal inquiry only as long as they can demonstrate the usefulness of their potential contribution in a public hearing. This argument is as surprising as maintaining that, under the European Convention, defendants must be granted the right to be informed about the accusation only if it is proven that insufficient information would jeopardise the effective exercise of the defence in a concrete case.[66] It is not easy to understand how the injured party must be granted the right to participation in criminal proceedings but cannot claim this guarantee. It cannot be accepted that the right to be involved in a criminal inquiry is granted only *secondum eventum* or, even worse, that the individual concerned can be burdened with the task of proving in advance what contribution they could provide in a trial hearing. By stating that "in the sphere of medical negligence the procedural obligation imposed by Article 2 does not necessarily require the provision of a criminal-law remedy,"[67] the Court makes it clear that the European Convention cannot grant the injured party a subsequent remedy if not provided for by national law. Yet, the main question raised by the aggrieved parties – namely, whether "in an unusual and sensitive case

like the present one the prosecution authorities' decision to apply for a conviction"[68] through a summary proceeding that radically excludes their involvement was justified, notwithstanding sufficient evidence gathered against the accused – remained unanswered.

V. Concluding remarks

The rapid developments that have occurred in EU law over the last few years in relation to defence rights in criminal proceedings has recently brought an unprecedented question to the surface, namely whether and to what extent a criminal law action can be instituted with a view to a summary conviction that excludes the involvement of the accused and any other interested party prior to the decision-making. In the *Covaci* case, the Luxembourg Court, ruling for the first time on the EU legislation on the right to linguistic assistance and information in criminal proceedings, renders a rather minimalist interpretation of EU law, which not only provides foreign defendants with scant guarantees but also leaves them alone with the delicate decision of whether to lodge an opposition to a penal order. The picture emerging from this judgment is that penal orders are only provisional decisions and, provided that the accused is given the abstract opportunity of a subsequent trial hearing, a procedure held *inaudito reo* is acceptable under EU law.

This scenario suggests broadening the area of the analysis, requiring in-depth reflection on the subsequent remedies aimed at saving the lawfulness of criminal proceedings held against absent defendants, both when this result is ordinarily foreseen (*inaudito reo* procedures) and when it is an exception from the rule of the direct involvement of the defence (*in absentia* procedures). The discussion takes on further relevance in light of the recent Directive on the presumption of innocence and the right to be present at trial, legislation that, while allowing EU countries to maintain special procedures held in writing and without a trial hearing, confirms the legitimacy of default proceedings, provided the accused persons are granted either a retrial or a remedy aimed at a full review of their conviction. A close examination of the constitutional law requirements of countries allowing *inaudito reo* procedures and a reflection on the Strasbourg case-law, both on *in absentia* and *inaudito reo* procedures, however, raise doubts as to whether this is the appropriate direction to be followed in a European area aimed at ensuring high standards of human rights protection.

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1. Framework Decision 2009/299/JHA.↩
2. See, in this sense, M. Böse, 'Harmonizing Procedural Rights Indirectly: the Framework Decision on Trials in Absentia', in *North Carolina Journal of International Law* (2011), pp. 489 ff.; F. Siracusano, 'Nuove prospettive in materie di processo *in absentia* e procedure di consegna', in T. Rafaraci (ed.), *La cooperazione di polizia e giudiziaria in materia penale nell'Unione europea dopo il Trattato di Lisbona*, Giuffrè, 2011, p. 91 f.↩
3. COM(2013) 821 final. This initiative was not aimed at implementing the 2009 Roadmap for strengthening the procedural rights of suspected or accused persons in criminal proceedings. However, the European Council, incorporating the Roadmap into the Stockholm Programme, stressed its non-exhaustive character, thus calling for further initiatives on procedural issues, e.g., the presumption of innocence.↩
4. OJ L 65, 11.3.2016, p. 1. See also the news-section "Procedural Criminal Law – Procedural Safeguards" in this issue.↩
5. For reservations on the compatibility of Italian penal order procedures with constitutional law, see S. Ruggeri, 'Il procedimento per decreto penale', in G. Di Chiara (ed.), *Eccezioni al contraddittorio e giusto processo. Un itinerario attraverso la giurisprudenza*, Giappichelli, 2009, pp. 133 ff.↩
6. ECJ, judgment of 15 October 2015, *Covaci*, C-216/14. See M. Gialuz, 'Dalla Corte di Giustizia importanti indicazioni esegetiche in relazione alle prime due direttive sui diritti dell'imputato', www.penalecontemporaneo.it.↩
7. Directive 2010/64/EU.↩
8. Directive 2012/13/EU.↩
9. Opinion of Advocate General Bot, delivered on 7 May 2015. ↩
10. *Ibid.*, § 44. ↩
11. M. Gialuz, *op. cit.*, pp. 3 f.↩
12. Opinion of Advocate General Bot, § 55 et seqq.↩
13. *Ibid.*, § 61. ↩
14. ECJ, *Covaci*, § 28 et seqq.↩
15. *Ibid.*, § 38.↩
16. *Ibid.*, § 49.↩
17. *Ibid.*, § 50.↩
18. For a positive consideration of this approach, see M. Gialuz, *op. cit.*, p. 6 f.↩

19. ECJ, *Covaci*, § 42.↩
20. This is the case for Germany, as seen in the case under examination. For Italy see § 407 et seqq. CCP-Italy. In Italy, penal order procedures did not traditionally provide for mandatory legal assistance either prior to the decision-making or with a view to the lodging of an opposition. This situation changed after Law 60/2001, which amended Art. 460 CCP-Italy by requiring penal orders to be provided not only to the convicted persons but also to a court-appointed lawyer, if they have not appointed a counsel of their confidence. Before this reform, however, the Italian Constitutional Court had already acknowledged that a court-appointed lawyer should in any case be ensured for defendants without residence in Italy who have not appointed a counsel of their confidence (see Constitutional Court, judgment 225/1993).↩
21. ECJ, *Covaci*, § 60.↩
22. *Ibid*., § 61.↩
23. *Ibid*., § 62.↩
24. *Ibid*., § 63.↩
25. In Italy, the 1988 code of criminal procedure, departing from the approach of the 1930 codification that required a special power being given to the counsel, enabled lawyers to lodge an opposition on their own initiative. This raised the question of whether a court-appointed lawyer could also autonomously oppose a penal order. Over the last several years, the Supreme Court has increasingly acknowledged this power. See Corte di Cassazione, 4 March 2005, *P.m. in proc. Singh*, in *Archivio della nuova procedura penale*, 2006, p. 330. For some criticism on the risks of this solution, see S. Ruggeri, *Il procedimento per decreto penale. Dalla logica dell'accertamento sommario alla dinamica del giudizio*, Giappichelli, 2008, pp. 98 ff.↩
26. Art. 8(6) DPIPT.↩
27. To be sure, also this formulation is rather unclear as significant differences emerge from a comparative analysis of linguistic versions. Some of them relate to the sole trial phase: see in this sense, alongside the English version (*trial*), the German one that, while mentioning the concept of *Verhandlung*, may seem to concern the *Hauptverhandlung*, that is, the trial hearing. Other linguistic versions broaden the scope of the new rules by relating to any "process" or "proceeding" aimed at a decision on guilt: in this sense cf. the Greek version (*δίκη*) as well as almost all the versions in Roman languages, such as those in Italian (*processo*), French (*procès*), Portuguese (*julgamento*), Romanian (*proces*) and Spanish (*juicio*). This issue is of utmost importance since various EU countries allow special types of criminal judgments on the merits of the case to be issued prior to the trial phase. It is probable that the question will need the intervention of the European Court of Justice in the near future, also because the definition of the scope of the new rules impinges on that of the right to a retrial.↩
28. Art. 47(2) CFR↩
29. Art. 53 CFR. Concerning the relationship of the EU Charter with national law, the Luxembourg Court has instead opted for an interpretation of Art. 53 based on the primacy of EU law, even over constitutional law. See ECJ, Grand Chamber, 26 February 2013, *Melloni v. Ministerio Fiscal*, Case C-399/11, §§ 55 et seqq. More recently, the German Federal Constitutional Court expressed the opposite opinion in that national courts should reject a surrender request in line with EU law if it entails a violation of the constitution. See BVerfG, Decision of 15 December 2015, Az. 2 BvR 2735/14 (see also news section "European Arrest Warrant" in this issue).↩
30. Art. 52(3) CFR. This provision has led to various reactions and very different suggestions for intrepretation. For a strong interpretation of this clause, whereby the EU Charter incorporated the ECHR set-up of human rights protection, see M. Borowsky, 'Artikel 52', in: J. Meyer, (ed.), *Charta der Grundrechte der Europäischen Union*, 3rd ed.,Baden-Baden, 2011, p. 687.↩
31. See, *inter alia*, ECtHR, *Håkansson and Sturesson v. Sweden*, judgment of 21 February 1990, Appl. No. 11855/85, § 66.↩
32. Directive 2013/48/EU. See, *inter alia*, S. Cras, in *eucrim* 1/2014, pp. 32 ff.; C. Amalfitano, 'La terza tappa della tabella di marcia per il rafforzamento dei diritti processuali di indagati o imputati in procedimenti penali: la direttiva 2013/48/UE sul diritto di accesso al difensore', *La Legislazione penale* (2014) pp. 21 ff.; L. Bachmaier Winter, 'The EU Directive on the Right to Access to a Lawyer: A Critical Assessment', in S. Ruggeri (ed.), *Human Rights in European Criminal Law. New Developments in European Legislation and Case-Law after the Lisbon Treaty*, Heidelberg, 2015, pp. 111 ff.↩
33. Art. 3(1) DAL.↩
34. Art. 2(1) DAL.↩
35. Art. 2(4) DAL.↩
36. Art. 3(4) DAL.↩
37. ECtHR, *Colozza v. Italy*, judgment of 12 February 1985, Appl. No. 9024/80, § 29.↩
38. Art. 9 DPIPT.↩
39. Art. 103(1) German Const.↩
40. BVerfGE, 3, 248 (253).↩
41. BVerfG, 2 BvR 2211/97.↩
42. Italian Constitutional Court, judgment 46/1957, in www.cortecostituzionale.it↩
43. In Italy, the justification invoked by the Constitutional Court mixes the doctrine elaborated by two outstanding scholars of civil procedure during last century, i.e., *Calamandrei*, who advocated the idea of subsequent involvement of the other parties, and *Carnelutti*, who focused on the eventual nature of their participation. See, respectively, P. Calamandrei, *Il procedimento monitorio nella legislazione italiana*, Unitas, 1926, and F. Carnelutti, 'Nota intorno alla natura del processo monitorio', in *Rivista di diritto processuale civile* (1924) pp. 270 ff. Carnelutti's doctrine was first imported to penal order procedures by *Bellavista*. Cf. G. Bellavvista, *Il procedimento penale monitorio*, 2nd ed., Milano, 1952, p. 47.↩
44. Constitution Amendment Law 2/1999. On this reform, see, *inter alia*, E. Marzaduri, 'Commento all'art. 1 legge costituzionale 2/1999', in *La Legislazione penale,* 2000, pp. 762 ff.↩
45. Italian Constitutional Court, Decisions 8/2003, 32/2003, 131/2003, 257/2003, in www.cortecostituzionale.it↩
46. V. Grevi, 'Processo penale, "giusto processo" e revisione costituzionale', in *Cassazione penale,* 1999, p. 3320; E. Marzaduri, *op. cit.*, pp. 767 f.↩
47. According to Art. 111(5) Italian Const., a Law may "govern the cases in which evidence is not to be taken in the presence of both parties with the consent of the defendant or when it is objectively proven to be impossible, or as a result of proven unlawful conduct."↩
48. In Italian law, the objection does not aim at a review of the penal order, which must be revoked anyway. See Art. 464(3) CCP-Italy.↩

49. Italian Constitutional Court, Decision 323/2007, in www.cortecostituzionale.it. In the present case, the problem was the loss of judicial control in the intermediate phase, since the objection leads directly to the trial.↩
50. Italian Constitutional Court judgment 23/2015, in www.cortecostituzionale.it↩
51. *Above*, fn. 28.↩
52. It has been noted that, unlike Germany, Italy requires the competent authority to notify not only the defendants of the penal order but also their lawyers or a court-appointed lawyer. Notwithstanding its merits, this legislative reform has not solved the problem of whether lawyers can contact their clients.↩
53. ECtHR, *Colozza v. Italy*, § 29.↩
54. This reform was implemented by Law Decree 17/2005, converted into Law 60/2005, in response to the convictions of Italy by the Strasbourg Court in the *Somogyi* and *Sejdovic* cases, dropping the exigent requirements originally laid down by the 1988 code of criminal procedure for the accused to be relieved of the effects of the expiration of the time in order to file an appeal against a judgment rendered *in absentia*.↩
55. ECtHR, *Cat Berro v. Italy*, decision of 25 November 2008, Appl. No. 34192/07.↩
56. Thus, the 2005 reform maintained the original solution of the 1988 code, which made the full exercise of the defendants' right to evidence at second instance dependent on the difficult proof that their absence in court had not been their fault. More recently, Law 67/2014, while abolishing dafault proceedings, also dropped the limits on the right to evidence that absent defendants suffered from in second instance. For an analysis of this legislative reform, see S. Quattrocolo, 'Il contumace cede la scena processuale all'assente, mentre l'irreperibile l'abbandona. Riflessioni a prima lettura sulla nuova disciplina del procedimento senza imputato', www.penalecontemporaneo.it.↩
57. ECtHR, *Gray v. Germany*, judgment of 22 May 2014, Appl. No. 49278/09.↩
58. *Ibid.*, § 3.↩
59. *Ibid.*, § 61.↩
60. *Ibid.*, § 87.↩
61. *Ibid.*↩
62. ECtHR, *Hugh Jordan v. United Kingdom*, judgment of 4 May 2001, Appl. No. 24746/94, § 109.↩
63. ECtHR, *Gray v. Germany*, § 87.↩
64. *Ibid.*, § 91.↩
65. *Ibid.*↩
66. For a critical assessment of this approach to the right to information on the charge, see S. Trechsel, '*Human rights in criminal proceedings*', Oxford University Press, 2005, p. 194 f.↩
67. ECtHR, *Gray v. Germany*, § 91.↩
68. *Ibid.*, § 91.↩

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