

Criminal Proceedings in the EU – the need for more procedural rights?

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European Law Forum: Prevention • Investigation • Prosecution

Report

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This webinar presented an insight into the state of play regarding procedural rights in criminal proceedings in the EU and discussed the possible need for further procedural rights. It was attended by around 50 participants, including defence lawyers, prosecutors and judges as well as government officials and members of NGOs from different EU Member States as well as third countries. The webinar took place in the form of a lunch-break debate via Zoom and aimed at contributing to the Conference on the Future of Europe.

Main subjects discussed during the workshops

Cornelia Riehle, ERA, kicked off the debate by introducing participants to the [2009 Roadmap for strengthening procedural rights](#) of the Council of the European Union, the [Agenda 2020](#) on minimum standards of certain procedural safeguards, designed by the European Criminal Bar Association (ECBA) in 2017/2018 and supported by the Council of Bars and Law Societies of Europe (CCBE), as well as to the legal basis for harmonising the EU Member States criminal procedure law, i.e. [Art. 82 TFEU](#).

Ideas regarding the future development and assessment of procedural rights in criminal proceedings were discussed as deeply as possible under the guidance of *Prof. Holger Matt* and *Vânia Costa Ramos*, both defence lawyers and active in the ECBA. For the ECBA, representing practitioners from all EU Member States, there still is a need to control the implementation of the procedural guarantees already in place regarding criminal proceedings, but there is as well a need to develop new tools and guarantees for accused and defendants to ensure a fair environment during criminal proceedings. The ECBA identified seven areas altogether, in which changes are still needed:

- Pre-Trial-Detention and the European Arrest Warrant (EAW);
- Procedural Rights in trials;
- Witnesses' rights, legal privileges and confiscatory bans;
- Admissibility and exclusion of evidence;
- Conflicts of jurisdictions and ne bis in idem;
- Remedies and appeals
- Compensation in criminal proceedings.

According to these measures, *Prof. Matt* and *Costa Ramos* led the participants through the “new” roadmap agenda and triggered many different but still fruitful discussions forming around the different measures.

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Main ideas suggested by participants

Regarding **pre-trial detention and the EAW**, the EAW was highlighted as a big accomplishment by *Costa Ramos*, but it was pointed out that there are still problems to solve around the complexity of the instrument. From a practitioner's perspective, there are significant differences in terms of proportionality assessment when issuing an EAW in different Member States, in particular compared to domestic cases, *Costa Ramos* told the audience and gave a personal example deriving from her daily work with defendants in Portugal. Regarding legal shortcomings in relation to the EAW, *Prof. Matt* also added the problem of different rules regarding the minimum legal requirements of an arrest warrant and an EAW, the length and the recognition of time spent in pre-trial detention before surrender during the execution of an EAW in different EU Member States as well as different prison conditions and problems arising out of these conditions when executing an EAW. There definitely should be an additional ground for refusal resulting out of serious infringements of human rights when executing an EAW, *Costa Ramos* added. Triggering a discussion, the audience was asked whether they evaluate the existing measures and their execution as enough or which ideas there are among the audience regarding possible future legislation in this area. *Thomas Wahl*, Senior Researcher at the Max-Planck Institute for the Study of Crime, Security and Law added that there are measures flanking the EAW but they are not used. The existing rules should be made more precise. Other than that, *Wahl* said he sees the danger of opening a "Pandora's Box" when amending the EAW and getting no added value out of this. Other participants added that they trust in the measures that are already at hand, but there is a need to rebuild and rethink based on the already existing fundament, building upon projects already started on these issues. A Europe "united in diversity" was proposed, maybe resulting in a common "European Code of Criminal Justice Mutual Recognition Measures" as the measures are already at hand but are scattered in different legal documents and established differently in different EU Member States. Examples were given how they are executed in different EU Member States and the newly created European Public Prosecutor's Office (EPPO) was mentioned as a possible influence since it will highlight the need for more streamlined solutions in this matter.

Moving forward, the issue of **minimum standards in trials** was discussed. Regarding the newly created European Public Prosecutor's Office (EPPO), on the one hand, the fundamental idea in the respective Regulation is that criminal proceedings should be conducted in a national legal framework, but on the other hand, the EPPO will be a European institution, so there could be a need to harmonise existing national rules. In reference to this, the choice of forum was mentioned as extremely important, and harmonising national rules would resolve the gravity of this issue in a significant manner. *Prof. Matt* also mentioned the different national rules regarding the right to refuse judges and their impartiality, sitting orders in trials prohibiting contact of the defendant with his lawyer, access to the complete case files, giving defence statements and the right to confront (key) witnesses during trial as well as the absence of European rules on these issues. For these issues, there should be minimum rules implemented at least to level the differing levels of protection in the different EU Member States. Also, the question of recordings of trials and the access to these recordings was mentioned. *Paola de Franceschi*, Judge at the Court of Appeal of Venice, added the problem of the right of the defendant being present at trial and the presumption of innocence in these cases: "The right to be present at the trial is enshrined in Article 8 of Directive (EU) 2016/343 of 9 March 2016 'on the strengthening of certain aspects of the presumption of innocence.' In accordance with the Italian Procedural Criminal Code, the trial can be held *in absentia* when, *inter alia*, the suspect/accused person at the beginning of the proceedings (i.e. when he/she was identified by the police or even arrested) indicated an address for service (*elezione di domicilio*) at the studio of the lawyer who was appointed *ex officio* (i.e. he/she is a foreigner and doesn't know any lawyer in Italy). In this case there is a kind of presumption that the accused person had knowledge of the charges and of the date of the trial. But if he/she could prove not having had any information about the trial, he/she has the right to appeal against the sentence issued in *absentia*. A recent decision of the United Chambers (*Sezioni Unite*) of the Court of Cassation, in order to grant an effective knowledge of

the trial, requires that – in the above-mentioned case – the judge should verify if a real professional link does exist between the lawyer appointed *ex officio* and the suspected/accused person.” *Costa Ramos* added that there are also problems regarding these issues in Portuguese criminal proceedings where the burden of proof regarding the service of documents and the knowledge of what happens in criminal proceedings is put upon the defendants.

Next up were **evidentiary issues** to be discussed, an issue often called upon as “too difficult for politics.” *Prof. Matt* pointed out that it is indeed a difficult issue to look upon, but it must be addressed as criminal proceedings not only concern guilty people, but the innocent as well. We cannot exclude legal issues just because they are difficult – witnesses' rights and the right to remain silent if incriminating oneself otherwise, for instance, pose problems where no common European Rules are set. According to *Prof. Matt*, the good news is that the European Commission has already started its work in this area but these are only first steps into a different legal future. *Costa Ramos* added that the issue of remedies regarding unlawful collection and use of evidence for defendants should be addressed, especially as there are still many different rules in the different EU Member States regarding how defendants are compensated in these cases. Consequences of violations and rules of exclusion of evidence should be harmonised in the EU to ensure a unionwide standard of safe and fair trials. One participant insisted on the Directive regarding the European Investigation Order as a good starting point on questions regarding evidentiary issues, whereas *Costa Ramos* added that this all depends on the interpretation of this legal instrument by the relevant national authorities, in particular Art. 14(7).

Prof. Matt concluded the discussion with his intervention on three points made during the debate: First, the idea of a unified Criminal Procedure Code for the EU would not be convincing to him because of different legal cultures throughout the Union. Second, the idea of Art. 82(2) TFEU was only meant to establish minimum rules on different legal issues, but not blocking EU Member States from establishing a higher standard of protection in these questions. Third, all issues in criminal proceedings will lead sooner or later to the question of remedies which should therefore be a focal point in the discussion.

General atmosphere and expected follow-up

In her closing remarks, *Cornelia Riehle* pointed out how fruitful the discussion was and summarised the main issues voiced during the debate. She highlighted the focus on questions regarding the EAW and detention issues as well as the question of proportionality in these cases. There is also a pressing need for minimum standards in relation to the question of impartiality as well as admissibility and exclusion of evidence. She pointed out the issue of *ne bis in idem* in criminal proceedings where ERA offers further training. Finally, she mentioned the possibility to gain more information on procedural rights in criminal proceedings in the EU via a special [subsite](#) provided by ERA and co-financed by the European Commission that contains further presentations, podcasts, videos, and reading material. The seminar ended with a short presentation on the cycle of the “Conference on the Future of Europe.”

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